

Testimony of
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"Exercising Congress's Constitutional Power to End a War."
United States Senate, Committee on the Judiciary
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I am pleased to address the important subject of this hearing. My views on the power of Congress to end a war or to limit the scope and duration of a war are set out in the statement I submitted with other scholars to the congressional leadership a few weeks ago. See Letter from Constitutional Law Scholars to Congressional Leaders Concerning Constitutionality of Statutory Limitations on Troop Increase in Iraq, January 17, 2007. That statement is attached to this testimony.

I would add only the following points. I believe that the president has extensive inherent powers to protect and defend the United States. In the absence of any congressional legislation on point, I would be ready to conclude that a president can act on his own authority and pursuant to his own judgment in matters of national security. Once Congress has acted, however, the issue is fundamentally different. The question then becomes whether the Act of Congress is itself unconstitutional.

What is a valid exercise of congressional control over war making? Presidential administrations have generally acknowledged that Congress may by legislation determine the objective for which military force may be used, define the geographic scope of the military conflict and determine whether to end the authorization to use military force. Consider, for example, the position taken by the late Chief Justice William Rehnquist while serving as Assistant Attorney General in 1970. Assistant Attorney General Rehnquist opined as follows:

It is too plain ... to admit of denial that the Executive, under his power as Commander-in-Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior Congressional approval. However, if the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include Executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale. Constitutional practice also indicates, however, that Congressional sanction need not be in the form of declaration of war. A declaration of war by Congress is in effect a blank check to the Executive to conduct military operations to bring about subjugation of the nation against whom war has been declared. The idea that while Congress may do this, it may not delegate a lesser amount of authority to conduct

military operations, as was done in the instances referred to above, is both utterly illogical and unsupported by precedent.

The opinion, "The President and the War Power: South Vietnam and the Cambodian Sanctuaries" may be found at http://www.stanford.edu/group/jlawreview/jcontent/jissue6jbybee_appendix.pdf.

Under the Rehnquist opinion, Congress is not limited to an all or nothing choice. Congress can authorize the use of military force, but place limits on the nature, scope and duration of the task assigned to the military. Assistant Attorney General Rehnquist expressly noted that "Congress undoubtedly has the power in certain situations to restrict the President's power as Commander-in-Chief to a narrower scope than it would have had in the absence of legislation." Specifically, Rehnquist noted, "Very recently, Congress has enacted legislation providing that United States forces shall not be dispatched to Laos or Thailand in connection with the Vietnam conflict. This proviso was accepted by the Executive."

As Assistant Attorney General in 1994, I similarly issued opinions that acknowledged the authority of Congress to limit the use of military force. See, for example, 1994 OLC42, "Deployment of United States Force Into Haiti" which is predicated upon the President's compliance with conditions placed by Congress on the use of force in Haiti.

The suggestion that Congress, if it authorizes the use of military force in a country, cannot place limits on the size of the military contingent deployed to that country is unpersuasive. Suppose a multinational military force were to be assembled to engage in hostilities in the Sudan and the United States were asked to contribute troops to the venture. Congress could surely determine that 20,000 US troops, but no more, could be deployed as part of that force. To conclude otherwise would mean that if Congress authorized any US participation at all, then the President could move the entire world wide armed forces of the United States to the Sudan and there would be nothing Congress could do other than withdraw entirely from the country.

There are of course circumstances in which a congressional limitation of the scope or duration of the use of US military force would be unconstitutional as applied. The examples are familiar. If the protection of US troops from attack urgently required the use of additional forces beyond the limits set by Congress, the President as Commander in Chief could disregard those limits -- but only to the extent necessary to provide for the protection of US forces or to deal with other exigent circumstances.

One final point. The spending power is a source of some confusion. Invocation of that power is not necessary in order for Congress to legislate limits on the use of military force. If a limitation on the use of force is within the authority of Congress, a direct limitation is binding on the executive branch. It need not take the form of a restriction on spending. (Conversely, if a spending limitation did invade the President's authority as Commander in Chief of the armed forces, as would be the case, for example, with limits on his authority to appoint commanders and direct battlefield operations, it is unconstitutional and the President would be justified in not abiding by such limits.)

In the present circumstances, Congress has the authority it needs to legislate limits on the use of force in Iraq. As the scholars' letter of January 17th set out in some detail, the Constitution

confers upon Congress numerous powers over national defense and the governance of the armed forces. Congress, acting pursuant to those ample wellsprings of constitutional authority, may set bounds on the president's discretion about the scope and duration of military action. A president, in our constitutional republic, is obligated to adhere to those limits.