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Statement by Louis Fisher
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Mr. Chairman, thank you for inviting me to offer my views on the constitutional authority of Congress to restrict, redirect, or terminate military operations. In recent years, some commentators have argued that Congress cannot, in time of war, interfere with the President's power as Commander in Chief. Others claim that if Congress decides to exercise the power of the purse it must terminate all funding rather than adopting more selective or focused approaches. These commentators read congressional power far too narrowly and misunderstand the purpose of the Constitution and its commitment to representative (republican) government.

Democratic Principles

Congress is not merely a "coequal" branch of government. The framers vested the decisive and ultimate powers of war and spending in the legislative branch. We start with that basic understanding. American democracy places the sovereign power in the people and entrusts to them the temporary delegation of their power to elected Senators and Representatives. Members of Congress take an oath of office to defend the Constitution, not the President. Their primary allegiance is to the people and the constitutional principles of checks and balances and separation of power.¹ Any interpretation of presidential power that fails to take account of those basic concepts is contrary to the democratic system established in the United States.

The legislative judgment to take the country to war carries with it a duty throughout the conflict to decide that military force remains in the national interest. As with any other statute, Congress is responsible for monitoring what it has set in motion. In the midst of war, there are no grounds for believing that the President's judgment for continuing the war is superior to the collective judgment of elected representatives. Congress has both the constitutional authority and the responsibility to retain control and recalibrate national policy whenever necessary.

The breadth of congressional power is evident simply by looking at the text of the Constitution and comparing Article I to Article II. The powers expressly stated give Congress the predominant role in matters of war. However, this purely textual reading misses what the American framers did, why they did it, and how they broke with the reigning British models of executive power.

Their study of history led them to place in Congress the sole power to take the country from a state of peace to a state of war. They left with the President in his capacity as Commander in Chief, certain defensive powers to "repel sudden attacks."

Rejecting Monarchical Power

In 1787, the existing models of government throughout Europe, particularly in England, placed the war power and foreign affairs solely in the hands of the Executive. John Locke, in his *Second Treatise on Civil Government* (1690), vested the "federative" power (what we call foreign policy) with the Executive. Sir William Blackstone, in his *Commentaries*, defined the king's prerogative broadly to include the right to declare war, send and receive ambassadors, make war or peace, make treaties, issue letters of marque and reprisal (authorizing private citizens to undertake military actions), and raise and regulate fleets and armies.

The framers carefully studied this monarchical model and repudiated it in its entirety. Not a single one of Blackstone's prerogatives was granted to the President. They are either assigned entirely to Congress (declare war, issue letters of marque and reprisal, raise and regulate fleets and armies) or shared between the Senate and the President (appointing ambassadors and making treaties). The rejection of the British and monarchical models could not have been more sweeping.

This explains what the framers did. The next question is why they did it. The framers gave Congress the power to initiate war because they concluded -- based on the history of other nations -- that Executives, in their quest for fame and personal glory, had too great an appetite for war and little care for their subjects or the long-term interests of their country.² John Jay, whose experience in the Continental Congress and the early years of the Republic was generally in foreign affairs, warned in *Federalist No. 4* that "absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people."

Joseph Story, who served on the Supreme Court from 1811 to 1845, similarly wrote about the need to vest in the representative branch the decision to go to war. The power to declare war "is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nations. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometime subversive of the great commercial, manufacturing, and agricultural interests." Story found war as "sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead."³

Through their study of history and political ambition, the framers came to fear the Executive appetite for war. Human nature has not changed over the years to justify trust in independent and unchecked presidential decisions in war. The record of two centuries in America teaches us that what Jay said in 1788 applies equally well to contemporary times.

Offensive and Defensive Wars

The debates at the Philadelphia Convention in 1787 underscore the framers' intent to keep offensive wars in the hands of Congress while reserving to the President certain actions of a defensive nature. All three branches understood that distinction for 160 years, until President Truman went to war against North Korea by going to the UN Security Council for "authority" instead of to Congress.

Review what the framers said in Philadelphia. On June 1, 1787, Charles Pinckney offered his support for "a vigorous Executive but was afraid the Executive powers of Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one." 1 Farrand 64-65. John Rutledge wanted the executive power placed in a single person, "tho' he was not for giving him the power of war and peace." James Wilson, who also preferred a single executive, "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c." Id. at 65-66.

Edmund Randolph worried about executive power, calling it "the foetus of monarchy." The delegates to the Philadelphia Convention, he said, had "no motive to be governed by the British Governmt. as our prototype." Alexander Hamilton, in a lengthy speech on June 18, strongly supported a vigorous and independent President, but plainly jettisoned the British model of executive prerogatives in foreign affairs and the war power. In discarding the Lockean and Blackstonian doctrines of executive power, he proposed giving the Senate the "sole power of declaring war." The President would be authorized to have "the direction of war when authorized or begun." Id. at 292. In Federalist No. 69, Hamilton explained the break with English precedents. The power of the king "extends to the declaring of war and to the raising and regulating of fleets and armies." The delegates decided to place those powers, he said, in Congress.

At the constitutional convention, Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, since he expected Congress to meet but once a year. James Madison and Elbridge Gerry moved to amend the draft constitution, empowering Congress to "declare war" instead of to "make war." This change in language would leave to the President "the power to repel sudden attacks." The motion carried. 2 Farrand 318-19.

Reactions to the Madison-Gerry amendment reinforce the narrow grant of authority to the President. Pierce Butler wanted to give the President the power to make war, arguing that he "will have all the requisite qualities, and will not make war but when the Nation will support it." Not a single delegate supported him. Roger Sherman objected: "The Executive shd. be able to repel and not to commence war." Id. at 318. Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war." George Mason spoke "agst giving the power of war to the Executive, because not to be trusted with it. . . . He was for clogging rather than facilitating war." 2 Farrand 319. His remarks echo what Jay said in Federalist No. 4. At the Pennsylvania ratifying convention, James Wilson expressed the prevailing sentiment that the system of checks and balances "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large." 2 Elliot 528. The

power of initiating war was vested in Congress. To the President was left certain defensive powers "to repel sudden attacks."

This distrust of presidential power in matters of war was expressed frequently after the Philadelphia convention. In 1793, Madison called war "the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace."⁴ Five years later, in a letter to Thomas Jefferson, Madison said that the Constitution "supposes, what the History of all Govts demonstrates, is that Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."⁵

Separating Purse and Sword

The need to keep the purse and the sword in separate hands was a bedrock principle for the framers. They recalled the efforts of English kings who, denied funds from Parliament, decided to rely on outside sources of revenue for their military expeditions. The result was civil war and the loss of Charles I of both his office and his head.⁶ The growth of democratic government is directly tied to legislative control over all expenditures, including those for foreign and military affairs.

The U.S. Constitution attempted to avoid the British history of civil war and bloodshed by vesting the power of the purse wholly in Congress. Under Article I, Section 9, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In Federalist No. 48, Madison explained that "the legislative department alone has access to the pockets of the people." The President gained the title of Commander in Chief but Congress retained the power to finance military operations. For Madison, it was a fundamental principle of democratic government that "[t]hose who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws."⁷ This understanding of the war power was widely understood. Jefferson praised the transfer of the war power "from the executive to the Legislative body, from those who are to spend to those who are to pay."

Commander in Chief

In recent years, advocates of presidential authority have argued that the title "Commander in Chief" empowers the President to initiate military operations against other countries and to continue unless Congress cut off all funds, presumably by mustering a two-thirds majority in each House to overcome an expected presidential veto. Such a scenario means that a President could start and continue a war so long as he had at least one-third plus one in a single chamber of Congress. Nothing in the writings of the framers, the debates at Philadelphia and the ratifying conventions, or the text of the Constitution supports that theory.

Article II reads: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Here is one constitutional check. Congress, not the President, does the calling. Article I gives to Congress the power to provide "for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Under Article I, Congress raises and supports armies and provides and maintains a navy. It makes rules for the government and regulation of the land and naval forces. It provides for organizing, arming, and disciplining the militia.

The Constitution does not empower the President as Commander in Chief to initiate and continue wars. In Federalist No. 74, Hamilton explained part of the purpose for making the President Commander in Chief: unity of command. The direction of war "most peculiarly demands those qualities which distinguish the exercise of power by a single head." The power of directing war and emphasizing the common strength "forms a usual and essential part in the definition of the executive authority." The President's authority to bring unity of purpose in military command does not deprive Congress of its constitutional responsibility to monitor war and decide whether to restrict or terminate military operations.

A third quality attaches to the Commander in Chief Clause. Giving that title to the President represents an important technique for preserving civilian supremacy over the military. The person leading the armed forces would be the civilian President, not a military officer. In 1861, Attorney General Edward Bates explained that the President is Commander in Chief not because he is "skilled in the art of war and qualified to marshal a host in the field of battle." He is Commander in Chief for a different reason. Whatever soldier leads U.S. armies to victory against an enemy, "he is subject to the orders of the civil magistrate, and he and his army are always 'subordinate to the civil power.'"⁸ Just as military officers are subject to the direction and command of the President, so is the President subject to the direction and command of Members of Congress, because they are the representative of the sovereign people. To allow a President to conduct a war free of legislative constraints, or free of constraints unless both Houses muster a two-thirds majority to override a veto, would violate fundamental principles of republican government.

The Constitution in Practice

The basic distinction between offensive and defensive military actions was understood by all three branches for the first 160 years. President Truman's decision to go to war in 1950 against North Korea marked a fundamental change. He went not to Congress for authority but to the UN Security Council. Korea represented the first of several unconstitutional presidential wars.⁹ Prior to that time it was broadly understood by Congress, Presidents, and the courts that anything of an offensive nature in military operations was reserved strictly to the nation's representatives. Presidents accepted that principle for all wars: declared or undeclared.

When President George Washington took military action against certain Indian tribes, he carefully followed statutory policy and understood that his operations against tribes were to be defensive, not offensive, measures. His Secretary of War, Henry Knox, wrote to governors: "The Congress which possess the powers of declaring War will assemble on the 5th of next Month -- Until their judgments shall be known it seems essential to confine all your operations to

defensive measures."¹⁰ To Knox, Washington had no authority to "direct offensive operations" against Indian tribes because such measures were reserved to "the decisions of Congress who solely are invested with the powers of War."¹¹

Chief Justice John Marshall, writing for the Court in 1801, spoke expansively about the powers of Congress in war: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."¹² If a presidential proclamation in time of war conflicted with statutory policy enacted by Congress, the statute prevailed over the proclamation.¹³ Similarly, the Neutrality Act of 1794 established a national policy that could not be disregarded by independent presidential judgments over military operations. Ruled a circuit court in 1806: "The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids."¹⁴ Further: "Does [the President] possess the power of making war? That power is exclusively vested in congress."¹⁵ If a nation invaded the United States, the President would have an obligation to resist with force. But there was a "manifest distinction" between going to war with a nation at peace and responding to an actual invasion: "In the former case, it is the exclusive province of congress to change a state of peace into a state of war."¹⁶

President Jefferson understood the difference between defensive and offensive wars. In 1801, he directed a squadron into the Mediterranean, telling commanders that in the event the Barbary powers declared war on the United States or took any offensive actions against U.S. ships, American commanders were to sink and destroy the attacking vessels. Having issued that order, based on congressional authority in providing for a "naval peace establishment," he recognized that Congress decided the nation's military policy: "The real alternative before us is whether to abandon the Mediterranean or to keep up a cruise in it, perhaps in rotation with other powers who would join us as soon as there is peace. But this Congress must decide."¹⁷ Although the Pasha of Tripoli insisted on a larger tribute from the United States and declared war on America on May 14, 1801, Jefferson looked solely to Congress to decide the nation's response. On December 8, he informed Congress of the situation and asked for further guidance, stating he was "unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense." It was up to Congress to authorize "measures of offense also." He gave to Congress all the documents it needed so that the legislative branch, "in the exercise of this important function confided by the Constitution to the Legislature exclusively," could act in the manner it considered most appropriate.¹⁸

It is often said during congressional debate and in studies released by the Justice Department that Jefferson took military measures against the Barbary powers without seeking the approval or authority of Congress.¹⁹ In fact, in at least ten statutes, Congress explicitly authorized military action by Presidents Jefferson and Madison against the Barbary pirates.²⁰

Those who promote unilateral and plenary power for the President in matters of war frequently cite the Supreme Court decision in *The Prize Cases* (1863), which upheld President Lincoln's blockade of rebellious states. However, the Court clearly distinguished between defensive and offensive actions. Justice Robert Grier said that although the President as Commander in Chief had no power to initiate war, in the event of foreign invasion the President was not only authorized "but bound to resist force by force. He does not initiate the war, but is bound to accept

the challenge without waiting for the special legislative authority."²¹ The President had no choice but to meet the crisis in the shape it presented itself "without waiting for Congress it with a name; and no name given to it by him or them could change that fact."²²

Yet Justice Grier proceeded to carefully limit the President's power to defensive actions, noting that he "has no power to initiate or declare a war against either a foreign nation or a domestic State."²³ The executive branch took exactly the same position. During oral argument, Richard Henry Dana Jr., who was representing the President, acknowledged that Lincoln's actions had nothing to do with "the right to initiate a war, as a voluntary act of sovereignty. That is vested only in Congress."²⁴

In a case decided by the Supreme Court in 1889, England had called upon the United States to supply naval forces for a military action against China. The Court made it clear that offensive operations had to be authorized by Congress, not the President. The Secretary of State told the English government that "the warmaking power of the United States was not vested in the President but in Congress, and that he had no authority, therefore, to order aggressive hostilities to be undertaken."²⁵ Significantly, the Court spoke not merely of the congressional power to declare war but of a broader power: war-making. The decision to spill the nation's blood and draw funds from the Treasury is reserved to Congress, not the President.

Presidents, in probably more than two hundred instances, have used military force without first receiving congressional authority. Those actions generally fall under the category of "protecting life or property," including chasing bandits over the Mexican border. None of these actions come close to anything approaching a major war.²⁶

Contemporary Statutory Restrictions

Congress has often enacted legislation to restrict and limit military operations by the President, selecting both appropriations bills and authorizing legislation to impose conditions and constraints. The Congressional Research Service recently prepared a lengthy study that lists these statutory provisions.²⁷ A major cutoff of funds occurred in 1973, when Congress passed legislation to deny funds for the war in Southeast Asia. After President Nixon vetoed the bill, the House effort to override failed on a vote of 241 to 173, or 35 votes short of the necessary two-thirds majority.²⁸ A lawsuit by Representative Elizabeth Holtzman asked the courts to determine that President Nixon could not engage in combat operations in Cambodia and elsewhere in Indochina in the absence of congressional authorization. A federal district court held that Congress had not authorized the bombing of Cambodia. Its inability to override the veto and the subsequent adoption of an August 15 deadline for the bombing could not be taken as an affirmative grant of legislative authority: "It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it had not authorized."²⁹ Appellate courts mooted the case because the August 15 compromise settled the dispute between the two branches and terminated funding for the war.

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Through its power to authorize programs and appropriate funds, Congress can define and limit presidential military actions. Some claim that the power of the purse is an ineffective and impractical method of restraining presidential wars. Senator Jacob Javits said that Congress "can hardly cut off appropriations when 500,000 American troops are fighting for their lives, as in Vietnam."³¹ The short answer is that Congress can, and has, used the power of the purse to restrict and terminate presidential wars. If Congress is concerned about the safety of American troops, those lives are not protected by voting additional funds for a war it does not support.

A proper and responsible action, when war has declining value or purpose, is to reevaluate the commitment by placing conditions on appropriations, terminating funding, moving U.S. troops to a more secure location, and taking other legislative steps. There is one central and overriding question: Is the continued use of military force in the nation's interest? If not, then U.S. soldiers need to be safely withdrawn and redeployed. Answering that difficult question is not helped by speculation about whether congressional action might "embolden the enemy."

Other examples of congressional intervention can be cited. In 1976, Congress prohibited the CIA from conducting military or paramilitary operations in Angola and denied any appropriated funds to finance directly or indirectly any type of military assistance to Angola. In 1984, Congress adopted the Boland Amendment to prohibit assistance of any kind to support the Contras in Nicaragua. No constitutional objection to this provision was ever voiced publicly by President Reagan, the White House, the Justice Department, or any other agency of the executive branch.³²

Congress has options other than a continuation of funding or a flat cutoff. In 1986, Congress restricted the President's military role in Central America by stipulating that U.S. personnel "may not provide any training or other service, or otherwise participate directly or indirectly in the provision of any assistance, to the Nicaraguan democratic resistance pursuant to this title within those land areas of Honduras and Costa Rica which are within 20 miles of the border with Nicaragua."³³ In 1991, when Congress authorized President George H. W. Bush to use military force against Iraq, the authority was explicitly linked to UN Security Council Resolution 678, which was adopted to expel Iraq from Kuwait.³⁴ Thus, the legislation did not authorize any wider action, such as using U.S. forces to invade and occupy Iraq. In 1993, Congress established a deadline for U.S. troops to leave Somalia. No funds could be used for military action after March 31, 1994, unless the President requested an extension from Congress and received prior legislative priority.³³

Conclusions

In debating whether to adopt statutory restrictions on the Iraq War, Members of Congress want to be assured that legislative limitations do not jeopardize the safety and security of U.S. forces. Understandably, every Member wants to respect and honor the performance of dedicated American soldiers. However, the overarching issue for lawmakers is always this: Is a military operation in the nation's interest? If not, placing more U.S. soldiers in harm's way is not a proper response. Members of the House and the Senate cannot avoid the question or defer to the President. Lawmakers always decide the scope of military operations, either by accepting the commitment as it is or by altering its direction and purpose. In a democratic republic, that decision legitimately and constitutionally resides in Congress.

1. The Constitution Project, *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* (2005).
2. William Michael Treanor, "Fame, The Founding, and the Power to Declare War," 82 *Corn. L. Rev.* 695 (1997).
3. 3 Joseph Story, *Commentaries on the Constitution of the United States* 60-61 (1833).
4. 6 *The Writings of James Madison* 174 (Hunt ed. 1900-10).
5. *Id.* at 312.
6. Paul Einzig, *The Control of the Purse* 57-62, 100-06 (1959). See also Charles Tiefer, "Can Appropriation Riders Speed Our Exit From Iraq?," 42 *Stan. J. Int'l L.* 291, 299 (2006); Richard D. Rosen, "Funding 'Non-Traditional' Military Operations: The Alluring Myth of a Presidential Power of the Purse," 155 *Mil. L. Rev.* 1, 29-44 (1998).
7. 6 *The Writings of James Madison* 146 (emphasis in original).
8. 10 *Ops. Att'y Gen.* 74, 79 (1861) (emphasis in original).
9. Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?," 89 *Am. J. Int'l L.* 21 (1995). For presidential reliance on the UN Security Council and NATO countries for "authority," instead of Congress, see Louis Fisher, "Sidestepping Congress: Presidents Acting Under the UN and NATO," 47 *Case W. Res. L. Rev.* 1239 (1997).
10. Louis Fisher, *Presidential War Power* 19 (2d ed. 2004).
11. *Id.*
12. *Talbot v. Seeman*, 5 *U.S.* 1, 28 (1801).
13. *Little v. Barreme*, 6 *U.S.* (2 Cr.) 169 (1804).
14. *United States v. Smith*, 27 *Fed. Cas.* 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).
15. *Id.*
16. *Id.*
17. Fisher, *Presidential War Power*, at 33-34.
18. *Id.* at 34.
19. 4A *Ops. O.L.C.* 187 (1980); 140 *Cong. Rec.* 19809 (1994) (statement by Senator McCain, third column). The opinion of the Office of Legal Counsel was placed in the *Congressional Record*: 139 *Cong. Rec.* 25702-05 (1993).

20. Fisher, *Presidential War Power*, at 35-37.
21. *The Prize Cases*, 67 U.S. 635, 668 (1863).
22. *Id.* at 669.
23. *Id.* at 668.
24. *Id.* at 660 (emphasis in original).
25. *The Chinese Exclusion Case*, 130 U.S. 581, 591 (1889).
26. Fisher, *Presidential War Power*, at 57-66.
27. Congressional Research Service, "Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches," January 16, 2007, RL33803. See also Tiefer, "Can Appropriation Riders Speed Our Exit From Iraq?," 42 *Stan. J. Int'l L.* at 303-17.
28. 119 *Cong. Rec.* 21778 (1973).
29. *Holtzman v. Schlesinger*, 361 F.Supp. 553, 565 (E.D. N.Y. 1973).
30. Fisher, *Presidential War Power*, at 143-44.
31. Jacob K. Javits, "The War Powers Resolution and the Constitution: A Special Introduction," in *The President's War Powers: From the Federalist to Reagan 3* (Demetrios Caraley, ed. 1984).
32. Fisher, *Presidential War Power*, at 275-76.
33. 100 Stat. 3341-307, sec. 216(a) (1986).
34. 105 Stat. 3 (1991).
35. 107 Stat. 1476 sec. 8151(b)(2)(B) (1993). See also my articles and books: "Unchecked Presidential Wars," 148 *U. Pa. L. Rev.* 1637 (2000); "Presidential Independence and the Power of the Purse," 3 *U.C. Davis J. Int'l Law & Pol.* 107 (1997); "Congressional Checks on Military Initiatives," 109 *Pol. Sci. Q.* 739 (1994-95); "How Tightly Can Congress Draw the Purse Strings?," 83 *Am. J. Int'l L.* 758 (1989); *Presidential Spending Power* (1975).