

Testimony of

The Honorable Strom Thurmond

April 17, 2002

Mr. Chairman:

Thank you for holding this important hearing regarding the War Powers Resolution and its application to the war on terrorism. In addressing the War Powers Resolution, our discussion today will focus on the constitutional roles of the President and Congress in waging war. I hope that by having thoughtful discussions on these fundamental issues, we will promote an atmosphere in which President Bush and Congress can work together constructively. By proceeding in a spirit of cooperation, our Nation will no doubt succeed in rooting out terrorism and spreading the light of democracy and freedom to all the world.

Today's hearing will explore the powers of the President and the Congress as mandated by the Constitution, the War Powers Resolution, and the resolution authorizing the President to use force in response to the September 11 terrorist attacks. In a February 11 Washington Times piece, Chairman Feingold voiced his concern that President Bush, without consulting Congress and seeking its authorization, may target Iraq and other rogue nations during the next phase of U.S. military operations. While I agree with his assertion that the President should consult with Congress whenever possible, I believe that the President has broad constitutional powers to combat terrorism as he sees fit. As our Commander in Chief, the President has the power to commence military operations in Iraq or other countries without congressional authorization. Furthermore, Congress has already provided the President with an open-ended mandate to deter future acts of terrorism by passing the use of force resolution. This explicit authorization satisfies the requirements of the War Powers Resolution.

The first place that we should look when examining war powers is the Constitution. The Constitution divides war powers between the President and Congress. Article II, Section 2 directs that 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." Under Article II, the President is also vested with the executive power. Article I, Section 8 gives Congress the power to declare war and to raise and support the armed forces.

Although the Constitution seeks to divide war-making powers, it provides the President with substantial authority in this area by designating him as the Commander in Chief and Chief Executive. It is readily apparent that war-making is more of an executive function than a legislative one. The President is best equipped to make crucial and time-sensitive decisions about the deployment of troops based on the latest intelligence information. In addition, the President is the Nation's leader in setting foreign policy, a process that is often deeply intertwined with decisions relating to the use of military force.

Senator Feingold has challenged the proposition that the Constitution provides the President with substantial war-making powers. During the Senate floor debate on the use of force resolution, Senator Feingold stated, "Congress owns the war power. But by this resolution, Congress loans it to the President in this emergency." I disagree with the distinguished Senator's characterization of the distribution of war powers. The concept of "loaning" the war power to the President is

completely without precedent and has no basis in the Constitution. Rather, the text of the Constitution and historical practice demonstrate that war powers are shared.

It is important to note that the framers specifically rejected giving Congress the power to "make war." In fact, the Constitutional Convention voted to change the phrase from "make war" to "declare war." It was commonly understood at the time of the ratification that a declaration of war signaled a legal status under international law. As Alexander Hamilton noted in *The Federalist No. 25*, a declaration of war was by no means required to initiate hostilities. Therefore, it is clear that the framers intended the President to have war-making powers. If Congress was meant to be all powerful in this arena, the framers would have made it explicit.

When the Supreme Court has addressed war powers and foreign policy issues, it has often been deferential to the President's judgments. In the Prize Cases, the Supreme Court refused to decide whether President Lincoln was justified in the use of a blockade against the Southern states. Rather, the Court found that this decision was discretionary, falling under the President's duties as Commander in Chief. *The Prize Cases*, 67 U.S. (2 Black) 635, (1862).

Just years later, the Supreme Court heard a case in which the state of Mississippi sued to enjoin President Andrew Johnson from implementing Reconstruction statutes by directing the military to divide 10 Southern states into military districts. The Supreme Court noted that as Commander in Chief, the President must have discretion in carrying out his duties, as they are executive and political in nature. *State of Mississippi v. Johnson*, 71 U.S. 475 (1866).

In *U.S. v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), the Supreme Court was faced with the question of whether Congress could transfer powers to the President relating to international affairs. Congress had purported to delegate to the President the power to implement an arms embargo in South America when, in his discretion, such an action would contribute to peace between warring nations. Writing for the majority, Justice Sutherland wrote that presidential power is not dependant wholly on acts of Congress because of the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations... ."

As Senator Feingold has rightly noted, discussions of war powers must also include an analysis of the War Powers Resolution, which became law in 1973 and was passed over President Nixon's veto. It was largely a reaction to the conflict in Vietnam and was meant to add structure to the constitutional tug-of-war between the President and Congress regarding war powers. Section 3 of the War Powers Resolution requires the President to consult with Congress "in every possible instance" before introducing U.S. Armed Forces into hostile situations. This is a vague and general requirement that is fleshed out in other sections of the resolution. Section 2(c) states that the President may only introduce forces into hostilities when there is (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency caused by attack upon the United States or the armed forces. Section 4(a) further requires that the President inform Congress within 48 hours of introducing armed forces into hostilities, and Section 5(b) requires the president to remove troops within 60 days, unless Congress has authorized the action.

I voted against the War Powers Resolution in 1973 because I found it unnecessary to restrict the President's ability to conduct military operations that he determines are in the best interests of the United States. As time passed, the Resolution proved to be ineffective and largely irrelevant. Moreover, many scholars have taken the position that it is unconstitutional. No President, Republican or Democrat, has acknowledged the constitutionality of the War Powers Resolution, arguing that the Resolution interferes with the President's inherent authorities to conduct warfare as Commander in Chief.

Historical practice supports this position. Since the presidency of George Washington, there have been at least 125 deployments of U.S. forces abroad without prior express authorization from Congress. Perhaps the most striking example of the use of force without congressional authorization was President Truman's commitment of troops to the Korean peninsula from 1950 through 1953. He did not seek the approval of Congress before or after the fact.

In 1962, during the Cuban missile crisis, President Kennedy implemented a quarantine on the shipment of missiles from the Soviet Union. He also warned that if the Soviet Union launched missiles from Cuba against any nation in the Western Hemisphere, the U.S. would retaliate with nuclear weapons. President Kennedy never sought congressional approval for his actions.

In 1986, President Reagan ordered the attack of targets in Tripoli and Benghazi, Libya, after the bombing of a Berlin nightclub frequented by U.S. military officers. President Reagan claimed to act under his own authority as Commander in Chief.

President Clinton commenced a number of military operations, also relying on his Commander in Chief powers. In 1993, President Clinton ordered U.S. naval forces to launch missiles against the headquarters of the Iraqi Intelligence Service in Baghdad in response to an assassination attempt against former President Bush in Kuwait. No congressional approval was sought.

Also in 1993, President Clinton began preparations to deploy troops to Haiti, without congressional approval, in an effort to force General Cedras to step down so that the rightfully elected President Aristide could take power. In addition, the President sent aircraft carriers into the region. Last minute diplomacy worked, and General Cedras stepped down before American troops entered combat operations.

Most recently, President Clinton sent 30,000 soldiers as part of a NATO operation to respond to the Yugoslav government's violence against ethnic Albanians in Kosovo. The President took this action despite a failed House vote that would have authorized force. In addition, the War Powers Resolution requirement to remove troops within 60 days was ignored.

I would like to emphasize that Congress retains substantial power to check the President's ability to wage war, despite the ineffectiveness of the War Powers Resolution. The real power of Congress does not lie in the implementation of a system of notification and authorization, as the War Powers Resolution attempts to do. Rather, it is the power of the purse that enables Congress to refuse to fund presidential prerogatives. In fact, Congress has done so in the past, refusing to fund Cambodian operations in the Vietnam War. The President cannot conduct military operations without money, and Congress can decline the necessary funding.

Even if we were to assume the constitutionality and continued validity of the War Powers Resolution, Congress has met its requirements by specifically authorizing the President to use force in response to the terrorist attacks of September 11. By an overwhelming vote of 98-0, the Senate approved S.J.Res.23, which authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons" that he determines took part in the September 11 terrorist attacks. The President is empowered to use force "in order to prevent any future acts of international terrorism against the United States."

The language of this joint resolution is clear and unambiguous. Its finding section states that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." The language of the resolution itself is quite broad and places no time or geographical restraints on the President's ability to respond to the terrorist attacks. Therefore, S.J.Res.23 authorizes, in the broadest possible terms, the use of force against those responsible for the September 11 attacks. Under the resolution, there is no time limit imposed on our operations in Afghanistan. Additionally, the President may commence

military operations in other countries that contributed to the atrocities of September 11. There has been rampant speculation over the Administration's plans regarding Iraq. Numerous media reports have indicated that Iraq was involved in the terrorist plot of September 11. If true, the President may commence military actions against Iraq, and such actions would be specifically authorized under the use of force resolution. Furthermore, the text of the resolution specifies that the President is the person who makes the determination that a nation is responsible for the terrorist attacks. Congress has instructed the President to use his best judgment, and if he decides that Iraq is culpable, he may take action. In fact, as the findings section states, the President has the constitutional authority to take action.

Neither the War Powers Resolution nor the authorization of force require further Congressional authorization for future military actions aimed at those responsible for the terrorist attacks. Congress has already authorized the President to act in a broad manner, and this authorization satisfies the War Powers Resolution. If it is the will of Congress to repeal the authorization of force, it may do so.

I am not advocating that Congress abdicate its very important role in the war-making process. Congress should watch U.S. military actions with vigilance and should suspend funding for military operations if it disagrees with the President's objectives. It is also critical that the President consult with Congress whenever possible. Consultations would not only be politically advisable but would also enable the President and the Congress to present a unified front. However, the Constitution does not mandate consultations. Even if it did, this kind of determination would be highly fact-specific and impossible to implement. Rather, the Administration and Congress should seek to develop good faith communications on a regular basis. Common sense and comity should be our guideposts. I hope that our discussions today are productive, and I look forward to hearing from our distinguished witnesses.