WAR POWERS FOR THE 21ST CENTURY: THE CONSTITUTIONAL PERSPECTIVE

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

OF THE

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WAR POWERS FOR THE 21ST CENTURY: THE CONSTITUTIONAL PERSPECTIVE

THURSDAY, APRIL 10, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS,
HUMAN RIGHTS, AND OVERSIGHT,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 3:01 p.m., in room 2172, Rayburn House Office Building, Hon. William D. Delahunt (chairman of the subcommittee) presiding.

Mr. DELAHUNT. The subcommittee will come to order.

I feel like I am in law school right now, a graduate program, and hopefully I won't be around for the final exam. This is a certainly star-studded panel of scholarship and probably some of the most respected legal scholars in terms of these issues anywhere in the country. We all have you here, and it's, I am sure, going to be informative.

In 1990, one of America's leading constitutional scholars had this to say about the War Powers Resolution. These are his words; I will try to read them with the appropriate tone:

> "No modification of the resolution will in itself ensure that the collective judgment of the Congress and the President will apply to the introduction of United States Armed Forces into hostilities. The most that a statute can do, no matter how artfully drawn, is to facilitate the efforts of individual Members of Congress to carry out their responsibilities under the Constitution. To do that requires understanding, and it also requires courage and the fortitude to stand up to those who equate criticism with lack of patriotism. For a Congress composed of such Members, no War Powers Resolution would be necessary. For a Congress without them, no War Powers Resolution will be sufficient."

That scholarly exposition mirrors the analysis presented by my friend and distinguished ranking member, Mr. Rohrabacher, in our first hearing on this topic. I believe that it poses the essential question for us as we continue in this series of hearings on the issue of war powers for the 21st century and as we focus, in particular, on the changes in the War Powers Resolution that has been proposed by our colleague, Walter Jones, in House Joint Resolution 53.

The question is, Do we need a change in the congressional culture so that more Members become convinced of their obligation to be partners with the President in the most crucial of all national

decisions, the decision to go to war, or do we need a change in the process by which we ensure that Congress meets its constitutional responsibilities? Well, as most things in life, I am coming to the conclusion that we need a little, and perhaps a lot, of both.

I wonder what the distinguished author of that 1990 treatise would say to my conclusion. Unfortunately, I am not going to be able to—I am going to be able to find out, because it is Michael Glennon, a professor at the Fletcher School at Tufts University and the former counsel to the Senate Committee on Foreign Relations, and who is one of our witnesses today.

But, first, a bit of history is in order.

The confluence of the war in Vietnam and President Nixon's unparalleled claims to Executive power provoked a response by Congress that led to the enactment, over his veto, of the War Powers Act. However, Congress since then has not only abdicated its constitutional responsibility, but also failed to insist on compliance with the war powers legislation that it had enacted by an overwhelming majority.

The truth is that the War Powers Resolution has never really worked. In fact, according to the Congressional Research Service, there have been over 120 Presidential filings consistent with—and that is a legal term of art—consistent with the War Powers Resolution, but only one that started the 60-day clock for congressional approval pursuant to it. And in at least a dozen other cases, combat took place with no notification whatsoever.

Now we find ourselves at a different moment in time, with another war, another President, and another effort to usurp congressional authority, at least from my perspective.

The administration has claimed that, upon the expiration of the United Nations mandate that expires at the end of this year, the only plausible legal basis for our presence there, American military forces can continue to engage in combat without the President returning to Congress to secure new authority. In large measure, the administration bases this position on the 2002 congressional resolution that authorized the use of force to remove the threat posed by the government of Saddam Hussein.

My comment at that time, and I will repeat it now, is that this is just patently absurd on its face. It is an interpretation of the 2002 authorization that has no basis in fact, and I consider it an affront to the constitutional role of Congress.

I recently introduced legislation with Congresswoman Rosa DeLauro that calls for the extension of the U.N. mandate and requires that any agreement authorizing U.S. forces to fight be approved by the United States Congress. Therefore, the argument about congressional and Executive war powers is not simply an academic exercise and debate but a very real one, and one that we will be facing shortly here in this institution. I would submit that now, more than ever, is the moment in our history to engage in a public discourse on this issue.

Now let me turn to my friend from California for any opening remarks he may wish to make.

Mr. Rohrabacher?

[The prepared statement of Mr. Delahunt follows:]

PREPARED STATEMENT OF THE HONORABLE BILL DELAHUNT, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS, AND CHAIRMAN, SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

The Subcommittee will come to order. In 1990, in his authoritative book *Constitutional Diplomacy*, one of America's leading constitutional scholars had this to say about the War Powers Resolution:

> No modification of the Resolution will in itself "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . .". . The most that a statute can do, no matter how artfully drawn, is to *facilitate* the efforts of individual members of Congress to carry out their responsibilities under the Constitution. To do that requires understanding, and it also requires courage . . . and the fortitude to stand up to those who equate *criticism* with lack of *patriotism*. For a Congress composed of such members, no War Powers Resolution would be necessary; for a Congress without them, no War Powers Resolution will be sufficient.

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That question is:

> Do we need a change in the congressional *culture*, so that more Members become convinced of their obligation, to be partners with the President in the most crucial of all national decisions—the decision to go to war?
>
> Or do we need a change in the process by which we ensure that Congress meets its Constitutional responsibilities?

Well, as with most things in life, I am coming to the conclusion that we need a little, and perhaps a lot, of both.

I wonder what the distinguished author of that 1990 book would say to my conclusion . . . and fortunately, I am going to be able to find out, because Michael Glennon, a professor at the Fletcher School at Tufts University and the former counsel to the Senate Committee on Foreign Relations, is one of our witnesses here today.

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The confluence of the war in Vietnam and President Richard Nixon's unparalleled claims to executive power provoked a response by Congress that led to the enactment—over his veto—of the War Powers Act.

However, Congress since then has not only abdicated its constitutional responsibility, but also failed to insist on compliance with the War Powers legislation that it had enacted by an overwhelming majority.

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My comment then—which I will repeat now—is that this patently absurd interpretation of the 2002 authorization has no basis in fact, and is an affront to the constitutional role of Congress. I recently introduced legislation with Congresswoman Rosa DeLauro that calls for the extension of the U.N. mandate—and requires that any agreement *authorizing* U.S. forces to *fight* be *approved by Congress.*

Therefore, this argument about congressional and executive war powers is not academic, but very real. And I would submit that now, more than ever, is the moment in our nation's history to engage on this issue.

Let me now turn to my friend from California for his opening remarks.

Mr. ROHRABACHER. All right. Thank you very much, Mr. Chairman.

What you are doing is basically calling the public together for a discussion on very basic constitutional issues pertaining to the War Powers Act. I think that a fundamental discussion of the way our system works and what doesn't work is a very positive thing. So I appreciate the fact that we are here and that this will create change the way change was envisioned by our Founding Fathers, and that is starting off with a very good discussion of the issue.

It is a historical fact that the Founding Fathers had a healthy dose of skepticism about relying on the collective judgment of a large group of politicians when deciding how to go about conducting war. The experience of our Founding Fathers during the American Revolution was dismaying, at best, in terms of the actions of the Continental Congress. And there were many people, people of the day, who felt that the Continental Congress almost lost the Revolutionary War for us.

As we all know, due to their experience during the Revolution, they changed the Constitution so that the role of Congress was not to make war but to declare war. Well, the fog of war before, during and after conflict is hard enough to contend with. Herding the political cats of our Congress through that fog is a recipe for disaster, especially in the type of world we live in today.

But we need not revisit the Revolutionary War to note that this body usually has a debilitating reluctance to take any responsibility of deciding whether or not to commit our Nation on issues as important as war. In 1999, when President Bill Clinton sent our military forces to battle Bosnian Serbs, who, I might add, were in the process of massacring Kosovars and other Muslims in Bosnia and also Croatia, the House of Representatives rejected authorization of that use of troops by 213–213. Then the House defeated a measure declaring a state of war between the United States and the Federal Republic of Yugoslavia. Then we defeated a measure directing the President to remove United States Armed Forces from operations against the Federal Republic of Yugoslavia. Then both houses of Congress agreed to an emergency supplemental appropriation, which financed that military operation.

We are going to rely on Congress to make these types of decisions during the war? I mean, the war is actually going, and this type of nonsense is going to permeate and prevail on our side of a conflict?

By creating new laws that allow for or require more involvement of the Congress in certain aspects of war, if we do that, we are creating, perhaps creating, a set of dangerous circumstances that will not necessarily keep our country safe. And we should have a major discussion of that.

And while I keep an open mind about what our witnesses will say today and, of course, the position of my chairman, who I deeply respect and admire, I will have to admit that my years at the White House and my years here at Congress has made me a skeptic about expanding the congressional role, such as what is being suggested today.

Let me note this: Do we need, as the chairman noted, a change of congressional culture? The answer is, I think, yes, we do need

a change of congressional culture. We need to be able, if we are going to step up in the world as it is today, yes, Congress need to step up and be able to put themselves on the record and be accountable. And I have no problem with that. So, yes, there needs to be a change of culture.

Well, does there need to be a change in the legal steps that are required in case of conflict? No, I don't think so. Those are two different issues.

And I would hope that Congress would take advantage—if, indeed, the majority Members of Congress believe we should not be in Iraq, they have had the ability to defund our military operation every single year. Just simply not appropriating the money for those military operations; it would have been over. Now, no amount of claiming we are going to change the way things are done is going to alter the fact that it is already within our ability to do these things.

I, myself, have a piece of legislation, and I am very happy that the chairman has joined me as a co-author, and I will be submitting this later today or early next week, which is a sense of the House Resolution that suggests that any status of forces agreement with Iraq should include a provision that requires the Iraqi Government to pay for all future military operations in Iraq by United States forces.

Again, hey, the power of the purse. If the Iraqis don't want us there enough to pay, then we shouldn't be there. And if Congress doesn't want us out enough to stop the flow of money, well, then we aren't exercising the authority that we already have.

So I am looking forward to this discussion. I hope I have thrown a few barbs out there that we can discuss. And I appreciate this opportunity, Mr. Chairman.

Mr. DELAHUNT. I assure you, Mr. Rohrabacher, you have thrown sufficient barbs out to this particular group.

Now I am going to go to the gentleman who really does have an open mind on this issue, a member of the subcommittee, Mr. Ron Paul.

Mr. PAUL. Thank you, Mr. Chairman. I appreciate very much you calling these hearings and bringing this distinguished panel before us. It is a very necessary discussion.

I want to welcome our colleague, Walter Jones, who has a bill dealing with this subject, H. J. Res. 53. And it is good to have him here, because that is an important piece of legislation trying desperately to correct a problem that we have.

And some may argue that we should allow the executive branch to have more authority and give up on the legislative branch. I am not quite there yet. I think our biggest problem that we have faced is the unusual willingness of the legislative branch to give up on its prerogative and its responsibilities. But it is correct to say that, yes, it is pretty amazing the Congress doesn't declare the war, yet they fund it. And it is true, they should quit funding it. That is a way to do it. And there are a few who have practiced that approach.

But I think this is one issue—and sometimes we can go back and look at a few things in the Constitution, and we would have wished the Founders would have described things a little more clearly. But

I don't think, on the war issue, they could have been more clear. It is in the hands of the Congress.

And it is not too difficult to find the difference between the definition of making war and declaring war. But if we are declaring war and a state of war—and I would say we were in a state of war with Korea and Vietnam and Iraq—but, certainly, the President has the responsibility to repel invasions and to defend this country without calling the Congress together. But as far as declaring and fighting a prolonged war, there is no doubt the Founders did not want that to be in the hands of the executive branch. That was to be in the hands of the legislative branch.

This, to me, was one of the most important issues. Although I entered politics with a very definite interest in economic policy and inflation, there is a connection between our ongoing wars and our economic problems here at home. I wish the Founders would have been much clearer about never borrowing money. And I believe Jefferson argued that case, but, of course, we were allowed to borrow. But they didn't provide for an income tax, they shouldn't have provided for the borrowing, and they certainly objected to the inflating of the currency in order to finance these wars.

And the main beef that we all should have, if we care about individual liberty, is to understand the philosophy of Randolph Warren when he said, "War is the health of the state." So if you like a big government, if you like the idea that you can tolerate big-government conservatives, then you have to be careless about the way we go to war.

If we are at this point where we want the executive branch to have more authority and more say, the Constitution needs to be amended, rather than us just carelessly standing by and permitting the executive branch to wage war.

To me, it is a vital issue. It is a typical thing, though, when Congress comes to solve a problem, like they did in 1973 in order to prevent Vietnam, you better watch out, because whether it is accidental or whether there is a loophole and they work it around or there is an ulterior motive for those solving our problems, they permit it to exist, that we actually made our problems worse. That is what I think happened on the War Powers Resolution.

And, quite frankly, as much as I endorse what Congressman Jones—and I am a cosponsor and very supportive of that—ultimately, some day, my position would be we ought to just repeal that and go back to, you know, do something really radical: Obey the Constitution.

I yield back.

Mr. DELAHUNT. I thank the gentleman.

At this point, I am going to ask unanimous consent that the Honorable Walter Jones, Jr., be permitted to participate as a member of the subcommittee today for the purposes of receiving testimony and asking questions.

Hearing no objections, it is so ordered.

Mr. Jones, it is only through your efforts that we are here today addressing this issue. You are the engine on this train, and I applaud you for investing the time and the effort you made in preparing the resolution that gives us a vehicle to have this discussion.

Would you care to make an opening statement?

Mr. JONES. Mr. Chairman, I will be very brief. I want to thank you, the ranking member, and all the members of this committee, and certainly the distinguished panel that will be speaking in just 2 or 3 minutes because I won't talk but just 2 or 3 minutes.

Mr. Chairman, this came as a pain in my heart that I did not do what was necessary to study the National Intelligence Estimate before giving the President the authority to have the option of going into Iraq if necessary. That is my fault. I don't blame anyone for that. You know and members of this committee know I have signed over 7,500 letters in 4½ years to every family and extended family that has lost a loved one in Afghanistan and Iraq. I did that as a retribution to my Lord that I did not do what was required of me as a Congressman.

My staffer, John Thomas, who is here today—I went to John and I said, "John, there is something wrong with this system." I did join Mr. Tom Campbell back in the late 1990s when President Clinton sent troops into Yugoslavia. I believe, as Mr. Paul said and you have said, Mr. Chairman, and Ranking Member as well, that, wouldn't it be nice if we didn't need to even be discussing war powers? But the problem is we have abdicated our constitutional responsibility.

To me, this effort has been nothing more or less than to have a debate and discussion of the responsibility of Congress. And I believe sincerely—and I looked at the PBS, during the Easter break, "Frontline," when I saw the first night the 2½-hour segment of how this country got itself into war in Iraq, and thinking when I saw the still shots of the President, the Vice President, the Cabinet, sitting around possibly discussing Iraq and what we were going to be doing, wouldn't it have been nice if there had been a Member of the leadership of the House and a leadership of the Senate sitting in that room, and maybe that leader of the House or the Senate could have brought to the discussion a thought or thoughts that maybe had not been discussed?

So, to me, the answer is to go back to what the constitutional says, as Mr. Paul said. But if we are going to need and have the War Powers Act, let's take 1973's action and let's make it stronger and let's put Congress back into meeting its constitutional responsibility.

With that, thank you, sir, for letting me sit with you and the distinguished committee today. I yield back.

Mr. DELAHUNT. Thank you, Mr. Jones.

We are joined by my friend and colleague from North Carolina, Mr. Miller. I understand he will not make an opening statement.

Let me begin to introduce the panel.

I am going to ask the panel if they can make an effort to keep their statements somewhat short. My ranking member indicates maybe 5 minutes, but I tend to be a little more flexible.

Professor Michael Glennon has written not just the treatise that I referred to earlier, which is called "Constitutional Diplomacy," but also four other significant texts in the field in the definitive "United States Foreign Relations and National Security Law," which was just republished in a new edition this year.

Mike is joined at the witness table, as I indicated earlier, by a remarkable collection of experts and scholars on these issues.

Bruce Fein is widely recognized as a leading conservative authority on the Constitution. I usually see him when I am on the Judiciary Committee. He has written on many of the fundamental questions of our time, authoring books on the Supreme Court, the Constitution, and international law. And he has also advised numerous countries on constitutional questions, including Russia, Spain, South Africa, Iraq, Cyprus and Mozambique.

Like the rest of our panel, Professor Jules Lobel of the University of Pittsburgh Law School is a leading legal scholar and author, including a handbook for lawyers on civil rights litigation and a collection of essays on the Constitution. But, in addition, he is perhaps the leading American litigator on the issue of war powers, serving as the attorney in such key court challenges as our former colleague Congressman Tom Campbell's suit against President Clinton's decision to wage an air war against Yugoslavia over its actions in Kosovo and Congressman Ron Dellums' suit to force President George Herbert Walker Bush to come to Congress for approval to drive Iraq out of Kuwait.

Edwin Williamson, who is currently the senior counsel at Sullivan and Cromwell, served on the distinguished panel on the war powers put together by The Constitution Project, whose co-chairs we heard from in the previous hearing. Mr. Williamson wrote the dissenting opinion to the majority report, which I remind the subcommittee served as the basis for Walter Jones's proposal. He also has been the legal advisor at the Department of State.

It would almost be blasphemy to hold a review of constitutional thought on this issue without the one person who everybody and the staff interviewed while seeking witnesses for this hearing and simply said he had to be here, Lou Fisher, from the Library of Congress. He has such a long resume, I am not going to read it.

But welcome, gentlemen, and please proceed. Why don't we begin from left to right—or from right to left?

Mr. Williamson?

STATEMENT OF EDWIN D. WILLIAMSON, ESQ., SENIOR COUNSEL, SULLIVAN AND CROMWELL, LLP

Mr. WILLIAMSON. Thank you, Mr. Chairman, ranking member, and other members of the subcommittee. Thank you for the opportunity to be here.

My written statement did not comment specifically on the two legislative proposals, and I was not aware of being asked to do so until I saw the chairman's press release yesterday.

I think, from my written comments, one can quickly deduce the following thoughts on the proposed legislation.

First, on H. J. Res. 53, the key provisions of this bill are not only of questionable constitutional validity, but they are also not sound policy.

As to the constitutional validity, as I indicated in my written statement, I believe the Constitution authorizes the President, as Chief Executive and Commander in Chief, to use all forces provided to him and maintained by Congress to defend against more than actual attacks on U.S. territory, our Armed Forces and our citizens.

As indicated in my written statement, today's equivalent of a sudden attack is quite different from what it was in 1789. Therefore, the modern version of the President's authority is to defend against any threat to the vital interests of the United States.

I believe the mandatory removal of Armed Forces from hostilities, found in section 5(c), is unconstitutional. As I indicate in my written statement, once hostilities begin, the President's Commander in Chief powers are clearly implicated, and decisions as to how and whether to terminate the hostilities are left to him, assuming the original defensive purpose is still present. As noted later, this provision may also not be workable.

As a believer that Congress's real power is its power of the purse, I have great sympathy with the idea that Congress can refuse to fund military operations with which it disagrees. I do not, however, believe that Congress can appropriate funds for a purpose that is clearly within the President's constitutional powers and then proceed to control how the President exercises those powers.

As to the wisdom of H. J. Res. 53, first, section 3 is too narrow. With respect to attacks on the United States, it only permits the "initiation of hostilities to repel an attack and to retaliate for an attack." In other words, before the President can act unilaterally, there must be an actual attack.

The definition of initiate or initiation, found in section 11, is so broad, it includes "taking of self-defense measures by the Armed Forces in response to a threatened attack." The use of force to prevent the 9/11 attacks and attempted attacks would not be permitted under section 3.

It is interesting that Mssrs. Glennon and Fisher subscribe to the following language in the war initiative report referred to in my written statement:

> "All members of the War Powers Initiative agree that a clandestine operation without statutory authorizing directing armed services of a specific imminent terrorist threat falls within the President's defensive war power."

The attempts to prohibit the U.S. of appropriated funds, sections 3(b) and 6(c), strike me as being unworkable. I think the better policy is that, once Congress appropriate for a specific purpose or about specific limitations, it is not possible to halt the subsequent use of those funds. The time to limit the use of appropriated funds is when the funds are appropriated.

I would comment that section 2 seems internally inconsistent. For all reporting obligations, the bill should recognize the President's authority to limit the distribution or delay the distribution for national security reasons.

The judicial review provision, section 8, seems inconsistent with the Supreme Court's rulings in these areas.

The rules of interpretation in section 9 appear to repeat the rules that are found in the War Powers Resolution and were clearly not followed. I believe those rules were not followed because it defies common sense, as the ranking member has pointed out, to take the position that Congress has not authorized an activity when it has clearly appropriated funds for that activity.

As to H.R. 5626, I would simply note that in addition to the difficulty of appropriating funds for vague purposes, the bill's passage would required a two-thirds approval by both houses of Congress.

In closing, I would note, in three of the last four major uses of force, the President has actually gone to Congress for their authorizations. As I indicated in my written statement, this was not constitutionally required; it was just good politics.

There was a surprising silence when President Clinton did not abide by the 60-day clock in the 1999 Kosovo campaign, or at least outside this chamber. I thought that was a pretty good sign that all agreed that the War Powers Resolution, at least the 60-day clock provision, was a dead letter.

The fact that the Justice Department's OLC opinion on the Kosovo action, which incidentally was finally delivered in December 2000, ran a large truck over the interpretation provisions of the War Powers Resolution, the fact that that also went unnoticed was a further recognition that the War Powers Resolution had, in fact, been a bad idea. My question is, Why try to reinvent it?

[The prepared statement of Mr. Williamson follows:]

PREPARED STATEMENT OF EDWIN D. WILLIAMSON, ESQ., SENIOR COUNSEL, SULLIVAN AND CROMWELL, LLP

In 2004–2005, I participated in a War Powers Initiative under the auspices of the Constitution Project.[1] The Initiative was charged "with analyzing and prescribing how the U.S. government should constitutionally and prudently make the decision to use armed force abroad." Our Committee was chaired by two former members of this body—Mickey Edwards and David Skaggs. Most of its active members had served on Congressional staffs or were academics who are strongly on record as supporting more, rather than less, Congressional participation in decisions to use force. I was the only member of the Committee who had actually advised a part of the Executive Branch in a legal capacity on the President's use of force powers.

Notwithstanding the strongly pro-Congress bent of our Committee, it reached the following conclusion with respect to the War Powers Resolution ("the "WPR"):

> The WPR, as implemented, has neither fulfilled the original intent nor facilitated the collective judgment of the political branches. Its heart is the "sixty-day clock": a provision (intended to be self-executing) requiring a President to withdraw the armed forces within sixty days (or ninety if he or she deems it militarily necessary) after deployment unless the President has obtained congressional authorization by declaration or specific use-of-force legislation. The WPR has failed for multiple reasons. It defines the President's defensive war powers too narrowly; . . . ;[2] its never-used provision for two-house veto of a use of force is probably unconstitutional after the Supreme Court's 1983 decision striking down a one-house veto; and the sixty-day clock at its heart has been misconstrued to give the President a sixty-day "free pass" to use force without congressional authorization[3] and to allow Congress to do nothing. . . . (Report at 31–32)

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[1] A copy of the Committee's Report (the "Report"), *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*," has been submitted with my testimony.

[2] The Committee also complained that the WPR's "consultation and reporting provisions leave loopholes that presidents have exploited." I do not agree with this assessment. While all Presidents (except perhaps President Carter) have reported to Congress the introduction of U.S. armed forces into hostilities "consistent with" (as opposed to "pursuant to") the WPR, I believe this language has been used in order to protect Presidential prerogatives and not in order to delay or avoid the start of the WPR 60/90-day clock.

[3] I read this as a criticism of the conclusion reached by Assistant Attorney General Walter Dellinger, in his opinion on the proposed use of force in Haiti in 1994 ([cite])("Dellinger Opinion"), that the WPR authorizes the President to commit troops to hostilities—at least for 60 days—without any Congressional action. Although Professor acknowledged the existence of a provision in the WPR that explicitly warns against any such inference, he also relied on another provision that says that the WPR does not alter the President's Constitutional authority, which leads one to the conclusion that somewhere in the Constitution the President is given authority to use our armed forces, at least for 60 days, for whatever purpose he wishes, a position which I disagree with.

The fundamental principle enunciated by our Committee was that Congress should be given the opportunity to approve the use of force (and in so doing, Congress should act deliberately and transparently). I agree with that principle. I disagreed, however, with the Committee's reasoning underlying it. In the Committee's view, this participation is a legal requirement, mandated by the Constitution. In my view, this participation is a recommendation—as a political matter, it is prudent for the President to make sure that Congress is committed politically before he/she commences a use of force. In other words, the President is not *required* to get Congress' approval before using force for the purpose of defending against threats to our vital national interests, but history has shown that it has been wise for the President to have obtained the political support of Congress for major uses of force.

Since the early days of our Republic, there has been general agreement that there are at least three bases on which the President could act unilaterally to use our armed forces: to put down an insurrection; to protect our citizens; and to defend against a direct or imminent attack on our territory. On these bases, the President has used force outside the U.S., without prior Congressional approval, over 200 times.

Obviously, these traditional justifications need to be looked at in the light of modern conditions. Take, for example, the defense against an armed invasion of U.S. territory. What would in 1789 have been a threat to the national security of the United States constituting a life-threatening emergency to a relatively geographically isolated, newly created nation may be quite different from a threat today to the national security of the United States, a mature country with vital interests worldwide. Therefore, in the Persian Gulf conflict in the early 1990's, we urged the first President Bush to use a broader term to define what the President can use armed forces to defend—he can defend vital national interests.

Our Committee did a good job of outlining the changes in the nature of the threats against the United States, from the time of the writing of the Constitution to today. Its brief outline demonstrates that what constitutes a "sudden attack" on the United States (see the discussion in the Report at 5–7) has changed. In other words, the Constitutional principle is not changing, but the facts to which it is applied are.[4]

On the President's authority to use force without Congressional action, our Committee reached a conclusion essentially similar to mine: that "congressional authorization is required before the President initiates the use of force abroad except when that force is used defensively: to defend against actual attack on the United States or its armed forces, to forestall a reasonably imminent attack, to protect or rescue Americans abroad, and, in exceptional circumstances, to defend against urgent and severe threats to the United States when time does not permit obtaining advance congressional authorization." (Report at 1–2). In my view, the Committee's conclusion too narrowly states the President's Chief Executive and Commander-in-Chief authorities and would be disputed, I believe, by the Executive branch of our government, regardless of which political party were in power. Instead, as indicated earlier, I believe that the President can use force to defend against any threat to the vital national interests of the United States. The President does not have to seek authority from Congress in the absence of an actual or imminent attack when he is acting defensively against such a threat. Furthermore, the Commander-in-Chief authority of the President goes beyond deciding about "day-to-day tactics." It includes making broad strategic decisions about whether to use force, *provided* that use is for such defensive purposes.

Let me turn to another aspect of the discussion of the use of force that I find troublesome—an attempt to define war in a quantitative sense. In his Haiti opinion, then Assistant Attorney General Dellinger argued that whether the President has authority to use force turns on whether an armed conflict constitutes a "war." In other words, whether the President has the authority to deploy forces to engage in the conflict is a quantitative question. According to Professor Dellinger:

> In deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary, the President was entitled to take into account the anticipated nature, scope and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties

[4] As our Committee put it, "[t]he modern overlapping threats of terrorism and the proliferation of weapons of mass destruction (WMD) pose a challenge to our understanding of constitutional war powers because of the nature and sources of these threats." (Report at 16). For examples of what I believe to be the modern day equivalent of a "sudden attack," I would refer the reader to President George W. Bush's National Security Strategy (September 2002), his second inaugural address and the report of the 9/11 Commission.

> as a result of the deployment. Indeed, it was the President's *hope*, since vindicated by the event, that the Haitian military leadership would agree to step down before exchanges of fire occurred. Moreover, . . . the fact that it would not involve extreme use of force, as for example preparatory bombardment, [was] . . . also relevant to the judgment that it was not a war." (Dellinger Opinion at .) [Emphasis added.]

Recognizing, I assume, the inherent risks of imposing a quantitative limit on the size of a deployment, Professor Dellinger appended a footnote to the first sentence of the quotation that contains a disclaimer to the effect that the size of the Haitian troop deployment was "not in itself dispositive on the question whether the operation was a 'war' in the constitutional sense, since the very size of the force was designed to reduce or eliminate the likelihood of armed resistance."[5]

The danger in this quantitative concept of "war" is that it will lead exactly to what got us into trouble in Vietnam—a gradual buildup of forces, with a constant concern of overstepping that line that may, to use Professor Dellinger's phrase, "rise to the level of 'war'." It simply makes no sense to limit the President's powers in this way. If the President has the authority to deploy troops in the first place, as Commander-In-Chief he clearly has the authority to determine what forces are needed to be successful.

I would also caution this Committee to avoid turning to the judicial branch to settle essentially political differences between the two political branches of our Government. I believe strongly that whether a use of force is constitutionally authorized is a political question beyond the judicial power. Those who purport to find an historical role of the courts in war powers decision-making generally mistakenly rely on the French Naval War cases.[6]

Our War Initiative Committee set forth a list of factors that affect the determination of the President's power to use force without Congressional authorization.[7] I certainly agree that the President, in making his decision, should consider those factors, but one must recognize that these factors are not always going to be crystal clear and there may be limits (national security as well as practical) on what the President can say, predict or promise. In questions of doubt, I believe that the President must be free to act.

Our Committee's criticism of my understanding of the allocation of constitutional war powers focused on two concerns: leaving the decision-making for such an important issue to one person and the lack of a standard for deciding whether the Presidential assessment of a threat is correct. As to the first concern, I would argue that the single decision-maker (who is, after all, an elected official) issue has long been ceded. The Constitutional Convention debate may be inconclusive on some points, but all agree that in changing Congress' power from "making" war to "declaring" war, the President was given the authority to initiate the use of force in at least some defensive cases (what the Committee and I disagreed about was what those cases are).

As to the concern that my understanding lacks a standard for deciding whether a Presidential assessment is correct, I would argue that that has not been a problem, at least recently. In three of the last four major uses of force (the Persian Gulf in 1991, Afghanistan in 2001 and Iraq in 2003), while the President in fact sought (and obtained) specific authority from Congress for the use of force, he made it clear in his signing statement that such authority was not necessary and laid out the basis for that position—the defense of vital U.S. interests. In the fourth (Kosovo), the President did not seek authority from Congress to conduct an extensive air campaign against the former Yugoslavia—incidentally the only use of force not authorized by Congress that has exceeded the 60-day period provided in the War Powers

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[5] Up to the insertion of the footnote, Professor Dellinger could at least have found some support in Judge Harold Green's decision in the suit brought by 54 Congressmen to enjoin the first President Bush's use of force in the Persian Gulf without Congressional approval. See *Dellums* v. *Bush*, F.Supp. 2d (1990).

[6] For an excellent discussion of these cases, see J. Gregory Sidak, *The Quasi War Cases*, 28 HARVARD JOURNAL OF LAW & PUBLIC POLICY 465 (volume 2, Spring 2005). The author concludes that these cases, which involved the interpretation of statutes passed by Congress, "established no significant interpretation of the constitutional allocation of the war powers among Congress and the President." *Id.* at 483. The author also interestingly contrasts Chief Justice Marshall's much quoted dictum in *Talbot* v. *Seaman*, quoted in the Report at footnote 30, with Marshall's "equally sweeping, yet inaccurate, statements" (Id. At 489), such as his statement in a speech in the House only a year before writing the opinion in *Talbot*, in which he described the President as "the sole organ of the nation in its external relations," which was quoted in *U.S.* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

[7] Report at 17–18.

Resolution.[8] According to the Report, "[w]hile one can disagree with President Clinton's assessment of the threat to our national security posed by the war in the Balkans, there is no standard for deciding between the President's assessment and the dissenter's contrary assessment, and therefore no basis under the dissenting view for determining when the President's unilateral use of force is authorized." (Report at 12) I do not believe the Kosovo example supports the Report's conclusion, for the simple reason that President Clinton did not claim that the United States' vital interests were in any way threatened, and no arguments were put forward in the United Nations Security Council or NATO to justify the use of force on defensive grounds.[9] President Clinton's justifications for the air campaign (see Report at 12) should be compared not only with what the Presidents Bush said about what was at stake in the two Iraq crises and the terrorism threat, but also with what those on the other side of the political aisle said (e.g., Senator Mitchell in 1987: "The United States must maintain a military presence to defend our interests in the [Persian Gulf] region. . . . [T]wo facts are indisputable: the United States has vital interests at stake in the Gulf, and our troops are already there.").[10] Had President Clinton made a defensive claim to justify the air campaign, then the Report's contention could have been tested, but he did not.

Mr. DELAHUNT. Thank you, Mr. Williamson.
Professor Lobel?

STATEMENT OF JULES LOBEL, ESQ., PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. LOBEL. Mr. Chairman and members of the committee, thank for inviting me to testify before this subcommittee on the critical issue of congressional power over the initiation of warfare.

As the chairman pointed out, my own experience with this issue has been bipartisan. As vice president of the Center for Constitutional Rights, I have represented Members on both sides of the aisle: First, Congressman Dellums and more than 50 Democratic Members of Congress in a lawsuit against President Bush to prevent him from going to war with Iraq without congressional authorization, and then Congressman Tom Campbell and more than 20 mostly Republican Members, including Mr. Jones, to challenge President Clinton's use of force against Yugoslavia.

My experience leads me to conclude that the constitutional framework prohibiting the President from initiating warfare without congressional approval is as important in the 20th century as it was in the 18th, that the War Powers Resolution has failed to serve its purpose and should be replaced by a more effective measure, and that House Joint Resolution 53 is an excellent step in this direction.

The Framers vested the power to decide on war in Congress because they believed that war was, in Madison's words, "among the greatest of national calamities," and they therefore sought to slow

[8] The fact that the traditional supporters of the War Powers Resolution did not voice any significant criticism of President Clinton's running out the WPR's "60-day clock" indicates to me that that most of them must now agree with the traditional critics of the WPR that that portion of the WPR is a dead letter.

[9] I believe that the air campaign required Congressional approval and, in the absence of Security Council approval, violated both the U.N. Charter and the NATO Treaty, unless justified on defensive grounds. In December 2000, the Justice Department's Office of Legal Counsel finally got around to committing to writing its oral legal opinion upholding the President's spring of 1999 use of force. Authorization for Continuing Hostilities in Kosovo, Memorandum for the Attorney General, U. S. Department of Justice, Office of Legal Counsel (December 19, 2000). The opinion found that Congress's emergency appropriation of funds for the air campaign constituted authorization for it. The opinion concluded that the WPR's stricture against inferring authorization of the use of force from such a Congressional activity that did not "state that it is intended to constitute specific statutory authorization with the meaning" of the WPR was not a bar to Congress' doing just that—authorizing a use of force without such a statement.

[10] 133 Cong. Rec. S13327 (1987) (Statement of Sen. Mitchell).

down or clog the process by providing careful review by independent minds. Madison's claim that in no part of the Constitution is more wisdom to be found than in the clause that confides the questions of war and peace to the legislature, not the Executive, has been affirmed by the last half-century of our history, particularly our recent experience in Iraq, which demonstrates the need for more independent review before going to war, and not for less.

While the nature and sources of the threats to our national security have dramatically changed since the 18th century, the cost of warfare in lives lost, injuries suffered and national resources expended is even greater today than it was in 1787.

In my view, the Declare War Clause is not limited to giving Congress the formal power of issuing a declaration, but was intended to give Congress the power to decide whether the United States should initiate any offensive military hostilities, whether major or minor, for whatever purposes, with the sole exception that the President can use force to respond to a sudden attack against our territory, our troops or our citizens.

Moreover, to the extent that there is any doubt about the meaning of the Declare War Clause, the clause immediately following it in the Constitution gives Congress the power to grant letters of marque and reprisal. Now, I doubt many of us know what letters of marque and reprisal are, but they referred in the 18th century to what was known as imperfect wars, or special wars, or limited wars, or reprisals, all of which constituted hostilities that were something less than full-scale war.

Moreover, I think it is important to note that the President's Commander in Chief power to repel sudden attacks is an independent but not exclusive emergency authority. The President has the independent authority to use American forces in self-defense until Congress can meet and decide what to do. But Congress can limit that authority both in time, as does House Joint Resolution 53, and in the manner of response, if it chose to do so.

Now, the War Powers Resolution was flawed in two key respects. The first was that the resolution imposed no operative substantive limitations but, rather, created a time limit on the President's use of troops in hostile situations of 60 days. But I think experience has shown and the Constitution requires that the key time for Congress to provide authorization is prior to initiating a nondefensive war and not within 60 days after the warfare is initiated.

Second, the War Powers Resolution correctly recognized, I think, that congressional silence, inaction, or even implicit authorization by funding was insufficient to authorize the President to engage in warfare, but it failed to provide an adequate enforcement mechanism. I think you could see this in Congressman Campbell's efforts, valiant efforts, in my view, in 1999 to use the priority procedures to force a vote in Congress. And, as the ranking member said, he did force a vote, and authorization lost by a tie vote. Congress did provide funding.

And we went to court, saying that the War Powers Resolution was clearly being violated, which it was. The court said that Congress has many powers to stop this war: It could stop the funding, it could explicitly provide for the withdrawal, or it could impeach

the President. "And if the Congress is going to do nothing, why should we?," said the judges.

In fact, every time I argued a case involving the congressional war powers, whether it was in Central America in the 1980s, before Judge Green in the first Iraq war in 1990, or the Kosovo cases, judges said, in effect, "Why should we enforce the constitutional provision of congressional war powers when Congress will not?"

The answer I would give, and it is the same answer I give to Mr. Rohrabacher, is that to require Congress to act affirmatively to stop a war reverses the constitutional presumption, which is that the President is required to obtain affirmative congressional authorization to go to war and not that he or she could go to war unless Congress can muster a majority to stop it, or muster, in many cases, a two-thirds majority to stop it.

Now, in fact, what had happened in Congressman Campbell's case is that I believe that a majority of the Members of the Congress did not approve of this war and, therefore, were not willing to vote to authorize it. But neither were they willing to step in, in the middle of a war, and say we are not going to fund the troops who are fighting it. And this is a problem we have had in every war since World War II, where Congress hasn't approved it, including the current one. And the only solution to this is to prevent the President from going to war in the first place. That is the only real solution, which I think this bill does.

So, turning to this bill, I think it is an excellent bill because I think that it revives the Senate bill, Senate War Powers bill, essentially, in 1973, which tries to place substantive limits on the President's power. And I think the substantive limits are basically the accurate ones of the Constitution; namely, the President's only power is to repel an attack on territory, troops or citizens.

If you look at the uses of American forces over the past several decades, I don't think you could find a one where the President did not have time to come to Congress before initiating the attack. The Libya attack in 1986, the Baghdad air strikes in 1993, 1998; Afghanistan and Sudan in 1998, Yugoslavia in 1999, the Panama invasion—in all of these cases the President had time to come to Congress.

The President might say, as the ranking member said and Mr. Williamson said, "Well, Congress is often too hard to move." But I think the genius of the Constitution, which is wise policy today, is that unless a majority of the Congress feels strongly, strongly enough to authorize the use of force, American troops should not be sent into combat.

And where the majority of Congress does feel strongly, as after the September 11 attacks, they can act quite quickly. Three days after those attacks, Congress authorized the use of force. And they probably would have authorized it sooner, but the President asked for very wide authority, which had to go through some narrowing before Congress, and it took a day to narrow it.

So I believe that when there is a strong case for war, Congress will approve it. The problem is that when there is not a strong case for war and Congress doesn't do anything, the President acts, and under the Constitution he shouldn't.

Mr. DELAHUNT. Professor, I have to ask you to terminate there, because——

Mr. LOBEL. Yes, sure. The one last point I would make on that statute is simply that, I think in addition to the congressional standing provisions, which I believe the Supreme Court will not accept—I don't think Congressmen can get standing, and I don't think that way will work—I think the statute should provide for private individuals, particularly soldiers who have to go out and fight, if they believe that it is an unconstitutional war, to be able to go to court and that the political question doctrine should not preclude a lawsuit by the people who have to fight the war.

Thank you.

[The prepared statement of Mr. Lobel follows:]

PREPARED STATEMENT OF JULES LOBEL, ESQ., PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW[0]

Mr. Chairman, and members of the Committee, thank you for inviting me to testify before this Subcommittee on the critical issue of how to ensure that decisions to go to war be made by Congress. The constitutional principle that those decisions not be made by one person is too important to our nation's well being and security to be a partisan issue.

My own experience with this issue has been bipartisan. I have not only written extensively on the question of constitutional war powers, but I am Vice President of the Center for Constitutional Rights, on whose behalf I have represented members on both sides of the aisle in lawsuits challenging Presidential usurpations of congressional authority over warfare. In 1990, I was lead counsel for Congressman Dellums and more than 50 Democratic members of Congress in a case challenging President George H. W. Bush's claim that he could go to war against Iraq without congressional authorization.[1] In 1999, I was lead counsel for Congressman Tom Campbell and more than 20, mostly Republican members of Congress who sought declaratory and injunctive relief against President Clinton's use of force against Yugoslavia after this House had refused, by tie vote, to specifically authorize hostilities.[2] My experience both as a scholar and in my representation of both Republican and Democratic members of this House leads me to conclude that the constitutional framework prohibiting the President from initiating warfare without congressional approval is as important in the 21st century as it was in the 18th, that the War Powers Resolution has failed to serve its purpose and should be replaced by a more effective measure, and that H.J.R. 53 is an excellent step in that direction.

I—CONSTITUTIONAL FRAMEWORK

The framers vested the power to decide on warfare in Congress for three main reasons. First, they believed that war was, in Madison's words, "among the greatest of national calamities,"[3] and therefore wanted to provide what Jefferson termed an "effectual check on the dogs of war."[4] They sought to slow down or "clog" the process of initiating warfare by providing careful review by independent minds, thus ensuring that the United States would not, as a key framer James Wilson put it "hurry . . . into war."[5] Second, they were suspicious of allowing the Executive to make the decision to go to war alone, for many agreed with Madison that war "in fact is the true nurse of executive aggrandizement."[6] Third, they wanted broad democratic participation in the momentous decision to initiate warfare, and therefore required the approval of a broadly representative legislative body. Therefore the Constitution provides that only Congress can initiate warfare—whether it be major

[0] *I wish to thank Law Librarian Linda Tashbook for her assistance in preparing this testimony.

[1] Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990).

[2] Campbell v. Clinton, 203 F.3d 19 (D.C. 2000).

[3] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (M. Farrand ed., 1911).

[4] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789) *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958).

[5] 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (1937).

[6] *Helvidius No. 4, in* 6 WRITINGS OF JAMES MADISON 174 (G. Hunt ed., 1906).

military conflicts, small skirmishes or little wars—with the sole exception that the President can use force to respond to a sudden attack against us.

These reasons are as valid today in the 21st century as they were in the 18th century. Madison's claim that, "in no part of the Constitution is more wisdom to be found, than in the clause which confides the questions of war or peace to the legislature and not to the executive department," [7] has been affirmed by the last half century of our history, which demonstrates the need for more independent review by Congress before going to war, not less. While the nature and source of the threats to our national security have dramatically changed since the 18th century, the cost of warfare in lives lost, injuries suffered, and national resources expended is even greater today than it was in 1787. Indeed, one lesson of the current Iraq war is that the need to put a brake on the rush to war and ensure that independent minds evaluate whether war is really necessary is still as compelling today as it was in 1787. Today the rule of law encapsulated in the Constitution and our treaty commitments requires the authorization of not only Congress but also the U.N. Security Council before the United States initiates non-defensive warfare.

Modern Presidents have distorted our constitutional framework, engaging in dozens of military actions against other nations without first seeking the constitutionally required consent of Congress. Moreover, they have articulated broad theories of Presidential power under which the President alone can use force in a broad array of circumstances. As President George H. W. Bush colloquially stated, "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait." [8]

For example, Post World War II Presidents have claimed that smaller uses of military force, such as the Clinton Administration's planned invasion of Haiti in 1995 do not rise to the level of war requiring congressional approval. The Justice Department in *Dellums* v. *Bush* took the even more extreme position that the term war had no fixed meaning whatsoever and therefore what was a war for purposes of the Declare War Clause could not be determined by a court. This position is in error and was fortunately rejected by Judge Greene in the *Dellums* case. The Article I congressional power to declare war is not limited to the formal power of issuing a declaration, nor to authorizing full-scale wars, but was intended to give Congress the power to decide whether the United States should initiate any offensive military hostilities, however big or little, or for whatever purposes.[9]

Moreover, to the extent there is any doubt as to the meaning of the Declare War Clause, the clause immediately following it gives Congress the power to "grant letters of Marque and Reprisal." In the 18th century, Letters of Marque and Reprisal had two meanings. The first, now obsolete, referred to authorization given to private merchantmen to fight the enemy. Second, and still relevant today, letters of marque and reprisal referred to imperfect wars, special wars, limited wars, reprisals—all of which constituted hostilities that were something less than full-scale war.[10] For example, both Alexander Hamilton and Secretary of War James McHenry advised President John Adams in 1798 that any use of American naval force beyond repelling attack on the nation's seacoast, armed vessels or commerce within American waters, "comes within the sphere of reprisals and . . . requires the explicit sanction of that branch of the government which is alone constitutionally authorized to grant letters of marque and reprisal." [11]

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[7] Id.

[8] Remarks before the Texas State Republican Convention, Dallas, Texas, June 20, 1992.

[9] *See, e.g., Bas* v. *Tingy*, 4 U.S. 33, 35–36 4 Dall. 37, 40 (1800) (Washington J.) ("every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war.").

[10] For example, Sir Matthew Hale, a well-known legal scholar in the seventeenth century familiar to the constitutional framers, wrote: Special kinds of wars are that which we usually call marque and reprisal." M. HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEASE OF THE CROWN 162 (S. Emlyn ed., 1736) (1st ed. London 1680). James Kent, in his authoritative *Commentaries on American Law* referred to special letters of marque and reprisal as "imperfect war[s]," (JAMES KENT, COMMENTARIES ON AMERICAN LAW 62 (O. W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989) (1826).) which are "compatible with a state of peace." *Id.* at 61. Blackstone noted that the "prerogative of granting [letters of marque and reprisal] . . . is nearly related to . . . making war; this being indeed only an incomplete state of hostilities." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 258 (Garland Publishing, photo. reprint 1978) (1765). Joseph Story, citing Blackstone, noted that the power to issue letters of marque and reprisal was "plainly derived from that of making war," being "an incomplete state of hostilities." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 64 (Boston, Hilliard, Gray 1833).

[11] Letter from James McHenry to John Adams (May 18, 1798), *reprinted in* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 155

Continued

Various Administrations and their supporters have also argued that the traditional limit of the Commander in Chief's power to repel sudden attack or resist invasion no longer controls in the modern world. The Justice Department argued that the President had the unilateral power to send troops to Vietnam because the interdependence of the 20th century world meant that all warfare anywhere in the world might "impinge directly upon the nation's security."[12] Similarly , The Bush Administration acknowledged the Iraq Resolution passed by Congress in 2002 as a "resolution of support" but claimed that the President had independent authority to use force "to deter, prevent or respond to aggression on other threats to U.S. interests."[13] Therefore, modern Presidents have articulated a constitutional power to send forces into combat whenever they detect threats to national security. This vision of Commander in Chief clause merges war and peace, offensive action and defensive conduct. If any threat to United States security around the world actives the executive's war powers, then the distinction between the executive emergency power to repel an attack and congressional power to authorize the introduction of U.S. forces into hostilities loses significance. As Judge Greene noted in *Dellums* v. *Bush*, such a reading of the Constitution would essentially write the Declare War Clause out of the Constitution.[14] Moreover, it would be incredibly dangerous to allow the President alone to decide to attack Iraq, North Korea or any other nation he or she deems a serious threat to U.S. national security.

Finally, it is important to note that the President's Commander in Chief power to repel sudden attacks is an independent but not preclusive emergency authority. The President has the independent constitutional authority to use American forces in self defense until Congress can meet and decide what to do, but that independent power is not a sole, exclusive power which Congress cannot limit or restrict. Congress can limit the President's "repel attack" authority to a certain time period. Congress also could have prohibited the President from responding with nuclear weapons to a Soviet attack on American forces in Europe, or from attacking China in response to an attack on U.S. forces in Korea. The President's Commander in Chief power to repel attacks allows him to act in self defense, independent of congressional authorization where Congress is silent, but not to act in disregard of affirmative restrictions that Congress enacts.

II—THE WAR POWERS RESOLUTION

The War Powers Resolution attempted to restore Congress's primacy over decisions to go to war. Nonetheless, virtually all observers recognize that the Resolution has failed. Every President since the enactment of the Act has considered it to be unconstitutional. Presidents have generally not filed a report starting the 60-day clock running, despite repeated executive introduction of armed forces into hostile situations in Indo-China, Iran, Lebanon, Central America, Grenada, Libya, Bosnia, Kosovo, or Somalia. Congress has usually not challenged this non-compliance. And the judiciary has persistently refused to adjudicate claims challenging executive action as violative of the Resolution, holding that members of Congress have no standing to seek relief, or that the claim presents non-justiciable political questions.

The War Powers Resolution was flawed in several key respects. The first flaw was that the Resolution imposed no operative, substantive limitations on the Executive's power to initiate warfare, but rather created a time limit on the President's use of troops in hostile situations of 60 days absent explicit congressional authorization.[15]

This approach was a mistake, as some astute members of Congress such as Senator Eagleton and Congressman Dellums recognized at the time, because as a practical matter it recognized that the President could engage in unilateral war making

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(1976). Hamilton had advised McHenry that the president's constitutional power went no further than the authority "to *repel* force by *force*. . . . Any thing beyond this must fall under the idea of reprisals and requires the sanction of that Department which is to declare or make war." Letter from Alexander Hamilton to James McHenry (May 17, 1798), *reprinted in* 21 THE PAPERS OF ALEXANDER HAMILTON 461–62 (Harold C. Syrett ed., 1974).

[12] Office of the Legal Adviser, Dept. of State, *The Legality of United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085 (1965).

[13] Statement by the President, 38 Weekly Comp. Pres. Doc. 1779 (Oct. 21, 2002) cited in David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Powers in Foreign Affairs*, 12 UCLA J. INT'L & FOR. AFFAIRS 75, 121 (2007).

[14] 752 F. Supp. 1141, 1146 (D.D.C. 1990).

[15] Section 2 of the Resolution defined a national emergency, which permits the Commander in Chief to introduce armed forces into hostilities, as arising only "by attack upon the United States, it territories or possessions, or its armed forces." 50 U.S.C. § 1544(c). However, Section 2, entitled "Purpose and Policy" is merely hortatory.

for up to 60 days.[16] But the Constitution requires that Congress provide authorization *prior to* initiating non-defensive war, not within 60 days *after* warfare is initiated. As history has demonstrated time and again, it is difficult to terminate warfare once begun; the key time therefore for Congress to weigh in is before hostilities are commenced, not within 60 days afterwards.

Second, the War Powers Resolution correctly recognized that congressional silence, inaction or even implicit authorization was insufficient to authorize the President to engage in warfare, but failed to provide an adequate mechanism to enforce that basic principle. The automatic termination provision in Section 5(c) requiring that the President terminate any use of United States forces in hostilities or imminent hostilities after 60 days unless Congress affirmatively declared war or specifically authorized warfare proved to be unenforceable. Presidents simply ignored it, Congress had an insufficient interest in enforcing it, and the courts responded by saying that if Congress did nothing, why should we.

Congressman Campbell's effort to enforce the War Powers Resolution during the Clinton Administration's air war against Yugoslavia in 1999 provides a vivid example of the Resolution's unenforceability. Through tremendous persistence, Campbell managed to invoke the priority procedures of the Resolution and force Congress to vote on whether to authorize the war. The House voted against declaring war by a lopsided margin, against requiring the President to withdraw troops, and, by a tie vote against authorizing the war. Moreover, both the House and Senate voted to appropriate funds for the war. Campbell and two dozen other members of Congress filed a complaint in Federal District Court seeking to enforce the Resolution. The President was in clear violation of the Resolution since more than 60 days had passed since United States warplanes had commenced hostilities against Yugoslavia. The House had refused to authorize hostilities, and the Resolution explicitly denied the President authority to continue hostilities based on congressional enactment of appropriations for the war unless such provision specifically authorized hostilities. Where Congress is too divided, conflicted, or unsure to affirmatively authorize warfare, both the Constitution and the War Powers Resolution require that the United States not go to war. What had in effect occurred was that Congress had not wanted to specifically authorize the war because many members disagreed with it, but neither did it want to be responsible for forcing the President to terminate it. That situation was contemplated by the Resolution, which required explicit, affirmative authorization.

Nonetheless, the judicial response to Campbell's claims was that congressional refusal to authorize the war was insufficient to invoke judicial enforcement because "Congress has a broad range of legislative authority it can use to stop a President's war making . . . ."[17] Congress could have passed a law forbidding the use of U.S. forces in the Yugoslav campaign, or Congress could have cut off funds for continuing the war. Indeed, every time I argued a case seeking to enforce the constitutional or statutory mandate that Congress affirmatively authorize war—in the Central American cases of the 1980s, the first Iraq War before Judge Greene in 1990 or the Kosovo case almost a decade later—judges said in effect "why should I enforce congressional war powers when Congress will not." The answer I gave was that to require Congress to act affirmatively to stop a war reversed the Constitution's presumption that the President was required to obtain explicit, affirmative congressional authorization to go to war, not that he or she could go to war unless Congress could muster a majority to stop the war. Congressional silence is sufficient constitutionally to deny the President authority to go to war; nonetheless it was insufficient to force either the President to terminate warfare or to get the Courts to do so on behalf of members of Congress.

The difficulties of enforcing a congressional mandate requiring legislative action to review executive emergency action is not unique to the War Powers Resolution. The 1976 National Emergencies Act sought to ensure congressional review of any executive invocation of emergency power by mandating that within six months of the declaration of a national emergency, "each House of Congress *shall* meet" to consider terminating the emergency.[18] Nonetheless, Congress has not considered and voted on whether to terminate the emergencies declared by the President since 1976, despite their continuation for years. When plaintiffs injured by a presidential

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[16] See, for example, Letter from Assistant Attorney General Walter Dellinger to Sen. Robert Dole et al., (Sept. 27, 1994) in 140 CONG. REC. 140, at S14314 (1994) arguing that the War Powers Resolution "recognizes and presupposes" presidential power to initiate some hostilities for less than 60 days. While Dellinger's assertion is incorrect, his opinion reflects the practice of viewing the Resolution as allowing the initiation of hostilities for less than 60 days.

[17] Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000).

[18] 50 U.S.C. § 1622(b)(c) (1982) (emphasis added).

invocation of emergency power sought relief in federal court, the First Circuit Court of Appeals held that there was no legal remedy for a congressional failure to comply with the statute.[19]

III—REVISING THE WAR POWERS RESOLUTION

I believe that it is necessary and possible to reform the War Powers Resolution, and that H.R. Res. 53 is an excellent step in that direction. The first, crucial revision contained in the new statute is the language in Section 3 prohibiting the President from initiating warfare without clear authorization from Congress, unless he or she is acting to repel armed attacks on United States territories, troops or citizens.

Various administrations and commentators have argued that the situations in which the President requires independent authority to use American forces in an emergency cannot be limited to repelling or responding to an armed attack. The original Senate 1973 War Powers Legislation upon which Section 3 is modeled was criticized as being unduly restrictive of the President's power to use American armed forces abroad. The various attempts by Senators Biden and others in the late 1980s and early 1990s to reform the War Powers Resolution ran into difficulties in attempting to define exceptions to deal with a broad range of emergency situations. For example, Senator Biden's proposed 1988 Use of Force Act would have authorized the President to use U.S. troops "to respond to a foreign military threat that severely and directly jeopardizes the supreme national interests of the United States under extraordinary emergency conditions that do not permit sufficient time for Congress to consider statutory authorization," and "to participate in emergency actions undertaken pursuant to the approval of the United Nations Security Council."[20] These exceptions would constitute enormous, and in my opinion unwarranted loopholes in the legislation that would essentially eviscerate the prohibition on unilateral Executive use of force. In my opinion, H.R. Res. 53's approach is fundamentally sound in only allowing the Executive to use force without congressional approval to respond to attacks on U.S. territories, troops or citizens.

One could, of course, hypothesize a myriad of situations where the nation might want the Executive to use force to respond to an emergency which did not constitute an attack on U.S. territories, troops or citizens. But the actual Executive uses of armed force in the decades since 1973 do not support the exceptions that various Administrations have claimed are necessary to protect national security. Can one think of any case in the past several decades where the President launched an armed action against another nation or terrorist organization but had no time to secure advance authorization from Congress? The air strikes against Libya in 1986, Baghdad in 1993 and again in 1998, Afghanistan and Sudan in 1998 and Yugoslavia in 1999 all could have been authorized by Congress in a timely manner before they were initiated. Military effectiveness merely required that the details and timing of the operation be secret—but there was sufficient time for Congress to decide whether to authorize those actions. The Panamanian and Haitian invasions were threatened for months and involved long-standing tensions. The Panamanian and Libyan operations were discussed for many months before they were actually launched. The Grenada invasion was arguably time driven, but only if you accept the implausible and factually inaccurate proposition that the operation was a direct response to the threat that American medical students would be taken hostage. Both of our attacks on Iraq in 1991 and 2003 took place after many months of military buildup and threats to invade, and after congressional authorization. Moreover, launching a surprise attack against a nation that has not attacked us ought not be a reasonable justification for avoiding the constitutional process. The phrase "repel sudden attacks" simply cannot, with any rationality, be turned into a justification for "launching sudden attacks."

Today, as in 1787, the reality is that American national security can be adequately served if the President's power to use American forces in combat unilaterally is reserved to repelling attacks or imminent attacks on American troops or territories, and evacuating citizens under attack. And repelling means just that; it does not mean retaliating for an attack on an American citizen or soldier that took place several days, weeks or months before. The President can respond defensively to attacks that have been launched or are in the process of being launched, but not to rumors, reports, intuitions, or even informed intelligence warnings of attacks.

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[19] Beacon Products v. Reagan, 814 F.2d 1, 4–5 (1st Cir. 1987).

[20] Use of Force Act, Sept. 16, 1988. See Joseph Biden, Jr. & John B. Ritch III, *The War Powers at a Constitutional Impassse: A Joint Decision Solution*, 77 GEO. L.J. 367, 397–98 (1988).

Moreover, Congress has demonstrated that where United States national security is seriously threatened, it can and will act quickly. On September 14, 2001, just three days after the September 11 attacks, Congress authorized the President to use military force against the perpetrators of those attacks. In all likelihood, congressional authorization could have been secured even earlier had the administration not initially sought an overbroad authorization. So too, the Clinton Administration could have sought quick congressional authorization to use military force in 1998 against the perpetrators behind the August 7, 1998 bombings of the American embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, or the 1993 World Trade Center bombing.

It is true that many situations will be murky, complicated or divisive and therefore that quick congressional action will not be forthcoming. But in those cases, the United States should not use military force until a substantial consensus develops in Congress and the public that military force is necessary, appropriate and wise.

While there might be rare future emergencies not covered under the repel armed attack exception in which we might want a President to act unilaterally, the solution is not to accord the President broad emergency authority or to dilute the statute with a host of exceptions. For as Justice Jackson said in Youngstown, "emergency powers kindle emergencies."[21] The better approach is to accept that in the rare situation where the force is really necessary and appropriate, and there is no time for Congress to meet to authorize warfare, the President should act openly and unconstitutionally and immediately seek congressional and public ratification of such action. That was what both President Jefferson and President Lincoln argued should be done when faced with such grave emergency crises.

From this constitutional perspective, section 3 of the Constitutional War Powers Amendments of 2007 correctly provides that the initiation of hostilities by the armed forces may only occur when authorized by Congress or in order to repel an armed attack upon the United States or its armed forces and citizens located outside the united States. I am troubled, however, by the language in Section 3(a), (3) and (4) that provides the President with the authority to use force "to the extent necessary" to repel such attacks. I realize that the probable intent of that language is to limit the President's use of armed force to *only* that force which is essential to repel an attack, but the phrase "to the extent necessary" seems vague, and could be read by future Presidents to justify a preventive use of force where he or she believes it necessary to repel or prevent a future attack on the United States or troops. That is not what the drafters of this statute intended, but the language could be subject to misinterpretation. As then congressman Abraham Lincoln argued in 1848,

> Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repell an invasion . . . and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect.[22]

I would therefore remove the words, "to the extent necessary," and substitute "to repel an armed attack or such an imminent attack that the President has no time to obtain congressional authorization."[23] I would also remove 3(B) which permits the President to take necessary and appropriate retaliatory actions in the event of such an attack. This provision, which seems to me a Cold War vestige contained in the original Senate War Powers Bill, is not necessary because the President can use force to actually respond to an attack and Congress should fairly quickly authorize whatever force is necessary to defend against an ongoing attack and respond to the aggressor.

I would also like to comment on the enforcement measures contained in the bill. Sections 3(b) and 6(c) prohibit the use of appropriated funds for any executive use of force that is unauthorized under the statute is a welcome strengthening of current law. Nonetheless, a President who claimed that the statute was unconstitutional and initiated hostilities in disregard of the statute would undoubtedly use appropriated funds to do so, forcing Congress into the difficult position of having to decide whether to authorize funds for troops engaged in combat.

The bill also tries to reverse the judiciary's past refusal to intervene to prevent presidential unilateral war making by providing that members of Congress have standing to challenge a violation of the law in federal court. I am doubtful that this

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[21] Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 690 (1952).

[22] Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848 reprinted in 1 Collected Works of Abraham Lincoln, 451 R. Basler, ed., 1953) (emphasis in original).

[23] I would also include a substantive limitation in the bill similar to that contained in Senator Biden's 1988 Use of Force Act which stated that the United States will not use force in violation of the U.N. Charter.

provision will accomplish its objective. In *Raines* v. *Byrd*, the Supreme Court held that members of Congress suffer no concrete injury sufficient to confer Article III standing in federal courts when they claim injuries not in any private capacity but solely because they are members of Congress.[24] The Court so held despite a provision in the statute at issue that specifically provided that any member of Congress could bring an action in federal court. The Court noted that although Congress's decision to grant a particular plaintiff the right to challenge an act's constitutionality eliminates any prudential standing limitations, Congress cannot erase Article III's core, constitutional standing requirement that a plaintiff have suffered a concrete, particularized, personal injury.[25] The Court did suggest that a narrow exception might exist allowing congressional standing when a member of Congress's vote is totally nullified, but the D.C. Circuit Court of Appeals seems to have foreclosed even that exception in *Campbell* v. *Clinton*.

The statute should also direct the courts to not apply the various non-justicability doctrines that courts have relied on to abstain from ruling on war powers challenges in the past. A provision should be added similar to that contained in Senator Biden's Use of Force bill providing that in any action brought by private plaintiffs or members of Congress seeking compliance with the provisions of this Act, the court shall not decline to make a determination on the merits based on the doctrine of political question or any other non-justicability doctrine. The statute could also state that a presidential violation of the bill would create an impasse with Congress and that Congress's view was that separation of powers principles required the Court to decide the merits of any challenge brought against an alleged violation. In the two wars against Iraq, soldiers who did have standing challenged presidential violations in court, but their claims were dismissed as presenting nonjusticiable political questions.[26] While Congress cannot override any core Article III requirement, it can negate the prudential judicial concerns that the resolution of the issue should be left to the political branches to determine.

Moreover, to ensure greater enforceability of the statute, I would define a privileged resolution in Section 7(a)(2) as one that is introduced after the President has submitted a written request *or was required by the statute to submit* such a report. Such a change would clarify that a privileged motion can be introduced even when the President is acting in violation of the statute and has not filed a report.

Finally, an important aspect of the statute is Sections 5's strengthening of the reporting provisions of the War Powers Resolution. Not only must Congress explicitly authorize non-defensive uses of force, but it ought to do so after searching, informed and independent review. I would therefore suggest that a subpart (8) be added to the statute which would require the President to report on why he or she believes that the use of force contemplated is consistent with international law and United States treaties, particularly the U.N. Charter. Hopefully, this requirement will help focus congressional attention on that issue, which in my opinion is critical to Congress's decision whether to authorize a non-defensive use of American forces.

In conclusion, the statute's revision of the War Powers Resolution to only permit Executive unilateral use of U.S. armed forces to repel an armed attack on American territories, troops or citizens is a welcome and excellent improvement on the current War Powers Resolution. Hopefully the statute will engender and encourage a debate on whether that position is correct and a bipartisan consensus will develop that it is.

Mr. DELAHUNT. Thank you.

Professor Glennon?

STATEMENT OF MICHAEL J. GLENNON, ESQ., PROFESSOR OF INTERNATIONAL LAW, THE FLETCHER SCHOOL, TUFTS UNIVERSITY

Mr. GLENNON. Thank you, Mr. Chairman.

Let me begin by commending you and this subcommittee for undertaking to do something very important, namely to address a sad situation that has arisen over the last 35 years. The War Powers Resolution has been in a state of disrepair for the better part of that period, and Congress, to its discredit, has done nothing about

[24] 521 U.S. 811 (1997).
[25] *Id.* at 820.
[26] Id.

it. I am really grateful that Members such as yourselves are finally taking the bull by the horns and trying to address this very difficult issue.

My views on the War Powers Resolution can be very quickly summarized. I believe that it is constitutional in its entirety, with the exception of the legislative veto set out in section 5(c). I believe that it has not worked and that the reasons that it has not worked are identifiable and that it can be fixed. The two principal reasons have to do with a flaw in the reporting requirement and the fact that it has proven, contrary to the expectations of the conference committee, to be judicially unenforceable.

My own preferred set of fixes is set out in Senator Biden's bill, S. 2387, which was last introduced in 1998. The so-called Use of Force Act is the result of hearings that were held by the Senate Foreign Relations Special Subcommittee on War Powers, which I had the privilege to be counsel to in 1988. I believe that the bill that Congressman Jones has introduced is very similar to it.

Both bills, in my view, take fundamentally the right approach, although there are some difficulties that I have with both of them. And I will enumerate those concerning Congressman Jones in just a moment.

There is a completely different alternative available, which doesn't impose a time limit, that I will talk about in a moment, which would attempt to affect Congress's power over the purse through a point-of-order procedure.

I am going to conclude by suggesting that, however important this task is of fixing the War Powers Resolution, there is an even more important issue, a war powers issue, before the Congress today. And that is posed by the question, what is the source of authority, what is the source of authority under which the war in Iraq is now being prosecuted? My answer to you will be, There is none.

So let me begin at the beginning.

It doesn't work because, number one, the reporting requirement is all screwed up. You can't really tell when the 60-day time period is triggered because there are three different kinds of reports required under section 4(a). Only a 4(a)(1) report triggers the time period. Presidents don't specify which paragraph of subsection (a) the report is submitted under. Consequently, everybody is left to guess whether the 60-day time period has been triggered.

It has proven judicially unenforceable, as Professor Lobel, who knows this as well as anyone, has described, because courts repeatedly find that its enforcement poses political questions or require standing on the part of Members of Congress who don't have it.

Now, Congressman Jones's bill attempts to fix all of these problems, with the exception of the political question impediment. In my view, it ought to have gone that step further and to have directed the courts, as does Senator Senator Biden's bill, not to dismiss cases because they pose a political question. I describe in my statement at length why I think that is constitutional. I won't get into it here.

I think Jules is correct that the standing provisions of Congressman Jones's bill may create problems. It is not clear that, after *Byrd* v. *Raines*, Congress can confer standing. It may be different,

however, under the Raines case, if Congress authorized Members to represent the Congress after Congress created adverseness with the Executive by adopting a concurrent resolution, placing itself in an oppositional posture to the President with respect to a given use of force.

I have real reservations about the super-consultative committee that is set up in Congressman Jones's bill. This is different from Biden's bill, which does not do that. If you will permit me, I recollect a conversation that I had with Senator Fulbright about this. He hesitated to recall it, but it was kind of embarrassing for him.

He was invited by President Kennedy to give his counsel to EXCOMM during the Cuban missile crisis. He was called in with Senator Russell just before President Kennedy went on national television to announce the quarantine. And he recommended that the United States invade Cuba. And we now know that that would have been catastrophic, that it would have quite probably entailed a catalytic nuclear exchange between the United States and the Soviets, with the loss of tens of millions of lives.

Now, how is it that someone like Senator Fulbright, a believer in the rule of law, the United Nations, sponsor of the War Powers Resolution, would recommend something like that? Well, I think there are two problems.

Number one, this consultative group that was set up, EXCOMM, didn't include Senators Fulbright and Russell at the outset. They didn't have a chance to participate, in short, in two critically important things: The stream of classified information, and, two, staff work that would have prepared them for the military briefing that they got.

That is the problem with this consultative committee. It doesn't have a permanent staff that will have been part of the deliberations from day one, and it is not clear that members of the committee will have access to all classified information. As a consequence, I am afraid they will be put in the same situation that Senator Fulbright was. Basically, he felt as though he was called in off the street, given a military briefing about the placement of the missile sites in Cuba, asked, "What do you think, Bill?," and he ended up recommending something that, in retrospect, really was quite ill-considered. That is the danger with these consultative committees.

Let me jump ahead to the point-of-order procedure. This gets involved, and I am not going to talk about the technicalities of it at this point. But the wholly different approach is set out in Senator Biden's bill, section 106, as I recall, as kind of a supplement to the fixes to the War Powers Resolution. It says, in effect, that we are amending the standing rules of each House to cause a point of order to lie on the floor of that House against any measure that comes to the floor that contains budget authority to carry out a use of force that that House has previously said by simple resolution is unlawful.

So it can be put in effect without the need for a two-thirds vote to override a Presidential veto. And after it is in effect, after that resolution is adopted, saying the use of force is unlawful, any single Member of either House can stop funding dead in its tracks, with-

out having to overcome a Presidential veto by a two-thirds vote. That, it seems to me, may be an option that needs to be considered.

Now, I don't want to take more time, but I do want to conclude just by saying for the record something that the chairman and I have talked about before. I think that the most pressing war powers issue of this day is the fact that the United States is now using force in Iraq with no authorization. None of the sources of authority that the administration claims to be available to authorize the use of force in Iraq is, in fact, available. The President's constitutional power as Commander in Chief is not available, because the Supreme Court has made clear in three cases during the earliest days of the Republic that when the Congress authorizes use of force subject to limits, the President has to respect those limits, and he does not have authority as Commander in Chief to use force for purposes for which Congress has not authorized force.

In 2002, Congress authorized the use of force for two purposes, and those two purposes have been fulfilled. Consequently, the 2002 joint resolution that authorized use of force in Iraq is, in Senator Lugar's words this morning on the Senate side, obsolete. It does not serve as a source of authority anymore.

The 2001 AUMF similarly is a weak reed on which to base the whole operation in Iraq. Number one, it is highly doubtful that this organization called al-Qaeda-in-Iraq is, in fact, the same organization that was behind the 9/11 attacks. And, in any event, only a very small portion of American casualties in Iraq are traceable to al-Qaeda-in-Iraq. The United States is using force in Iraq against elements that have no relationship to al-Qaeda.

The idea, as the administration has claimed, that Congress has somehow implicitly authorized the use of armed force by enacting funding resolutions, appropriations bills, and Pentagon supplementals since the invasion, knowing that the money would be used for this purpose, is flatly contradicted by section 8(a)(1) of the War Powers Resolution. It says, "We are not going to have any more implicit authorizations. You cannot, Mr. President—you cannot, courts—infer authority to use armed force unless the authority is specific and, two, it explicitly refers to the War Powers Resolution." None of those appropriations bills meets either one of those two requirements.

So my conclusion, Mr. Chairman, is that the most immediate question that Congress needs to confront is this arrogation of the war power by the President in Iraq; and my conclusion is that unless the Congress enacts new authorization to approve what is being done in Iraq, it is the President's constitutional duty to withdraw the Armed Forces from hostilities in Iraq with all deliberate speed, consistent with the need to protect forces in the field.

Thank you.

[The prepared statement of Mr. Glennon follows:]

PREPARED STATEMENT OF MICHAEL J. GLENNON, ESQ., PROFESSOR OF INTERNATIONAL LAW, THE FLETCHER SCHOOL, TUFTS UNIVERSITY

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on the War Powers Resolution and related issues.

My views can be quick summarized. I believe that the War Powers Resolution is, except for its legislative veto, constitutional in its entirety; that it has not worked; that the reasons that it has not worked can be identified; and that it can be fixed

and made to operate effectively. Most of the amendments proposed by H.J. Res. 53, 110th Cong., 1st sess. (2007), introduced by Rep. Walter Jones, would be salutary, although I in general prefer the changes proposed in a similar bill, S. 2387, 105th Cong., 2nd sess. (1998), introduced by Sen. Joseph Biden. Rather than attempting any fix, however, it may be time for Congress to consider another completely different approach, which relies upon the House's and Senate's own plenary rule-making power, which cannot be vetoed by a President, and which will permit the effective exercise of Congress's exclusive power over the purse—which has in recent months proven unwieldy as a check on the Executive's war power. Finally, I would counsel the Subcommittee to focus purposefully upon the most important war powers issue of the day, which is that the war in Iraq is currently being prosecuted without adequate statutory authorization.

An elaboration follows.

CONSTITUTIONALITY OF THE WAR POWERS RESOLUTION

It is commonly asserted that all Presidents have challenged its constitutionality of the War Powers Resolution. It is true that, before the legislative veto was invalidated by *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), all modern presidents objected to *all* legislative vetoes on constitutional grounds, including the War Powers Resolution's legislative veto. However, to the extent that that assertion relates to the Resolution's core restraint, the 60-day time period, it is wrong. Presidents Carter, Ford and Clinton did not challenge the time period. The State Department Legal Adviser during the Carter administration, Herbert Hansell, testified before the Senate Foreign Relations Committee in 1977 that the administration would "not challenge" the validity of the Resolution. War Powers Resolution: Hearings Before the Senate Comm. on Foreign Relations, 95th Cong. 207 (1977) (statement of Herbert J. Hansell, Legal Adviser, U.S. Dept. of State). The Carter Justice Department, which asked for an opinion on the validity of the Resolution's 60-day time period, said: "The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers." Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. Off. Legal Counsel 185, 196 (1980). As for President Ford, although he filed the required reports following the Mayaguez incident and during the evacuations of Phnom Pen and Saigon, the President apparently has come to doubt the Resolution's validity after he left office. See generally Michael J. Glennon, *Constitutional Diplomacy* 93–96 (1990). President Clinton never challenged the constitutionality of the time period, although he was the only President to introduce the armed forces into hostilities for longer than 60 days (while bombing Kosovo). Clinton claimed—wrongly, in my view—that he did so pursuant to statutory authorization.

The claim that the Resolution is unconstitutional is directed primarily at three provisions of the Resolution: the 60-day time period of section 5(b), the legislative veto of section 5(c), and the clear statement rule of section 8(a)(a)(1). I will address each in turn.

The 60-day time limit (§ 5(b))

Easily the most controversial provision of the Resolution is the 60-day time limit. Some commentators content that it impinges upon "independent" power conferred upon the President by the Constitution. What this claim overlooks is that there exists a second category of presidential power that is subject to congressional regulation: concurrent power. This is constitutional power that may be exercised initially by the President in the face of congressional silence, but which Congress may nonetheless subsequently choose to restrict.

It is this class of power to which Justice Jackson referred in his famous concurring opinion in the 1952 *Steel Seizure Case*. That case presented the Supreme Court with a stark choice. A nation-wide strike had broken out in the steel industry. According to the *Youngstown* court:

> The indispensability of steel as a component of substantially all weapons and other war materials led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel. The Steel Seizure Case, 343 U.S. at 583 (1952).

President Harry S. Truman consequently issued an executive order directing the Secretary of Commerce to take possession of most of the mills and keep them running, arguing that the President had "inherent power" to do so. The companies ob-

jected, complaining in court that the seizure was not authorized by the Constitution or by any statute.

Congress had not statutorily authorized the seizure, either before or after it occurred. Congress had, however, enacted three statutes providing for governmental seizure of the mills in certain specifically prescribed situations, but the Administration never claimed that any of these conditions had existed prior to its action. More important, Congress had in fact, considered, and rejected authorization for the sort of seizure Truman actually ordered.

Justice Hugo Black delivered the opinion of the Court. The President, Justice Black wrote, had engaged in law-making, a task assigned by the Constitution to Congress. The seizure was therefore unlawful, since the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Yet *Youngstown* is remembered mostly for the concurring opinion of Justice Robert Jackson. Jackson wrote that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." Because of the importance of Jackson's opinion, key portions are set forth without paraphrase:

> Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
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> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually mans that the Federal Government as an undivided whole lack power. A seizure execute by the President pursuant to an Act of Congress would be supported by the strongest of p[resumptions and the widest latitude of judicial interpretation and the burden of persuasion would rest heavily upon any who might attack it.
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers. But there is a zone of twilight in which he and Congress may have concurrent authority, on in which his distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test or of power is likely to depend on the imperatives of the events and contemporary imponderables rather than on abstract theories of law.
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers of Congress over the matter. Court can sustain exclusive Presidential claim to be power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

The opinion is thus notable for its unwillingness to decide the case by reference to "independent" presidential power, and in the weight it accords congressional will. It remained for a former Jackson clerk, Justice William Rehnquist, to give Jackson's opinion the force of law. The Supreme Court formally adapted this mode of analysis in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), in which Justice William Rehnquist applied Jackson's approach to uphold President Jimmy carter's Iranian hostage settlement agreement as having been authorized by Congress. In so doing, Rehnquist wrote that Jackson's opinion "brings together as much combination of analysis and common sense as there is in this area." Rehnquist then quoted from Jackson's opinion a passage that, today, is as significant as it is timely. He said: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."

This, then, is the mode of analysis pursued by the United State Supreme Court in the assessing the reach of presidential foreign affairs power. It bears repeating: *"Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." "When the President takes measures incompat-*

ible with the expressed or implied will of congress, hi power is at its lowest ebb . . ." The Steel Seizure Case, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

The War Powers resolution placed certain presidential use of armed forces in third category of Justice Jackson's analysis, where his power is at its lowest ebb. Under this analytical approach, the time limits of the War Powers Resolution, as well as the "prior restraints" set forth in the earlier Senate version, seem clearly constitutional. The scope of the President's concurrent power is the function of the concurrence or non-concurrence of the Congress; once Congress acts, its negative provides "the rule for the case."(12) That analytical framework provides a general foundation for the Resolution's mandate of consultation and reporting as well as the time limit imposed upon the use of force abroad—all of which, in the absence of a statement by the Congress, might fall within a "zone of twilight." This was Corwin's analysis, too: "Clearly such legislation did not require a consultation amendment, since it only spells out how a power already granted to Congress is to be exercised . . . [O]n the basis of the precedent of the Steel Seizure case . . . it is probable that the Court would uphold the act of Congress." E. Corwin, *The Constitution and What It Means Today* 110 (H. Chase & C. Ducat, eds., 14th ed., 1978).

In an important but largely unnoticed opinion of the Carter Justice Department, noted earlier, the Office of the Legal Counsel agreed:

> We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of [section 5(b)] of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of "unavoidable military necessity." This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his constitutional function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.
>
> Finally, Congress can regulate the President's exercise of his inherent powers by imposing limits by statute. Presidential Power to Use the Armed Forces Abroad without Statutory Authorization. 4A OP. OFFICE OF THE LEGAL COUNSEL,DEPARTMENT OF JUSTICE 185, 196 (1980).

I believe that the Justice Department was correct: the 60-day time period is constitutional.

The legislative veto (§ 5(c))

The so-called "Presentation Clause," however, does cause problems. Section 5 (c) of the Resolution, allowing Congress by concurrent resolution to force the President to withdraw the armed forces from hostilities, is in my opinionclearly invalid after the Supreme Court's decision in *Chadha*. The Court there found that Presentation Clause requirements must be met whenever legislative action has the "purpose and effect of altering the legal rights, duties, and relations of persons, including the . . . Executive Branch . . . outside the legislative branch." Adoption of a concurrent resolution under section 5(c) would have the purpose and effect of altering the rights and duties of the President. Justice White, in dissent, was doubtless correct in reading the majority opinion as invalidating the legislative veto in the War Powers Resolution.

To be sure, arguments can be made to the contrary, but none is persuasive. It might be argued, for example, that the legislative veto contained in section 5 (c) of the war Powers Resolution is distinguishable from that in *Chadha* in that the latter pertained to the exercise of statutorily delegated power, whereas, in the case of the War Powers Resolution (and, arguably, the Impoundment Control Acti as well), the legislative veto in question applies to the exercise of a power that derives entirely from the Constitution. This argument, however, proves too much and only fortifies the conclusion that *Chadha* applies to the War Powers Resolution: if Congress is unable to attempt the "string" of a legislative veto to a statutorily delegated power, surely it is on far weaker ground when it attempts to do so in connection with a power not delegated by it but conferred by the Constitution.

A broader argument against the application of *Chadha* is that it would be inconsistent with previous cases that affirm the power of Congress to express its will in other contexts without adhering to the requirements of the Presentation Clause. In the *Steel Seizure Case*, for example, the Court found that Congress had expressed its opposition to presidential seizure of the steel mills by rejecting an amendment that would have authorized that seizure; the President never had the opportunity to veto the congressional rejection of that amendment since it was not contained in the legislation presented to him. Similarly, in Dames & Moore v. *Regan, 453 U.S.*

654 (1981), the court inferred congressional approval of the Iranian claims Settlement Agreement from the failure of Congress to disapprove.

In each case, the courts necessarily reasoned that "the legal rights, duties and relations of persons . . . outside the legislative branch" were affected by congressional action accomplished without strict adherence to Presentation Clause procedures. Yet there is no suggestion in *Chadha* that the court intended to overrule either case or to limit the power of congress to so express its will. Although the court disapproves of a "binding" expression of congressional opinion through simple or concurrent resolution and will give such expression no legal effect, it seems willing to infer congressional intent from sources far less precise.(30) Accordingly, whereas a concurrent resolution adopted under section 5(c) can have no mandatory effect in requiring presidential withdrawal of the armed forces, such a resolution could nonetheless suffice under Justice Jackson's analysis to place the President's power at its lowest ebb. Indeed, it is hard to see why a concurrent resolution adopted without reference to the War Powers Resolution should not be accorded such effect.

The "clear statement" rule (§ 8(a)(1))

Section 8(a)(1) was adopted virtually verbatim from paragraph (4) of section 3 of the Senate-passed version of the Resolution, S. 440, 93rd Cong., 1st Sess. (1973). (The House bill contained no comparable provision.) Its meaning and purpose were explained in the report of the Senate Foreign Relations Committee on the bill. The Committee said as follows:

> The purpose of this clause is to counteract the opinion in the *Orlando* v. *Laird* decision of the Second Circuit Court holding that passage of defense appropriation bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war.

S. Rep. 93–220 at 25 (1973). In *Orlando*, the court had rejected the argument that authorization to use force in Vietnam could not properly be inferred from "military appropriations or other war-implementing legislation that does not contain an express and explicit authorization for the making of war by the President." 443 F.2d at 1043.

The case for the constitutionality of section 8(a)(1) is simply put. A law enacted by Congress is presumed to be constitutional. The burden of persuasion falls upon one who challenges a statute's constitutionality. The argument challenging the constitutionality of section 8(a)(1) (which may also extend to section 8(a)(2), concerning treaties) seems to be a two-pronged contention, roughly as follows:

> 1. One Congress cannot bind a later Congress; legislative acts must be alterable when the legislature chooses to alter them. One legislature is competent to repeal any law which a former legislature was competent to pass. New legislators cannot be bound by policies of earlier days. New legislators have a right to repeal by inference preexisting laws; the latest expression of the legislative will must prevail. Therefore, Congress remains free to authorize use of force implicitly, the words of section 8(a)(1) notwithstanding.
>
> 2. Use of force may be authorized constitutionally by appropriations statutes and other laws implicitly or indirectly facilitating that use. Therefore, section 8(a)(1) would take from Congress a constitutionally permissible method of authorizing war.

Each argument is easily answered. Although their premises are correct, their conclusions simply do not follow.

The first argument mistakes the premises that it posits with a very different implicit premise—that section 8(a)(1) is somehow "unrepealable." Obviously it is not. Any time Congress wishes to repeal section 8(a)(1) it can do so. It can do so, moreover, using precisely the same procedure applicable to the repeal of any other statute. The Congress that enacted section 8(a)(1) thus did not in this sense "bind" later Congresses, for later Congresses retain full discretion to alter that section if and when they choose to alter it. Any Congress wishing to authorize use of force implicitly can easily do so: it can either repeal section 8(a)(1) at the same time it enacts such implicit authorization, or it can simply provide by law that section 8(a)(1) does not apply to the legislation in question.

What this first challenge to section 8(a)(1) neglects to note is that the so-called "last-in-time doctrine" is not mandated or created by the Constitution. The doctrine is simply a canon of construction—a judicially-invented guideline for "finding" the will of Congress where that will is in doubt, i.e., in the event two statutes conflict. The courts simply assume, quite reasonably, that Congress probably intended the latter. But that assumption is always rebuttable. If the evidence is clear that Congress intended the former, the first in time will prevail, the object being, again, sim-

ply to give effect to the will of Congress. Like other canons of construction, the last-in-time doctrine therefore can be countermanded by Congress, which may intend that its intent be gleaned using a different canon of construction. (Legislatures regularly adopt their own canons of construction. State criminal codes, for example, typically subject all provisions to a canon that requires that their provisions be construed narrowly.) Section 8(a)(1) simply sets forth a canon of construction. That canon provides that, in specified circumstances, the intent of Congress should be gleaned not through application of the last-in-time doctrine, but through application of a first-in-time principle. There is no constitutional reason why the last in time must control if Congress indicates otherwise in a legislatively-prescribed non-supersession canon, nor is there any reason why Congress must leave its intent to be guessed at by the Executive or the courts.

The second argument proceeds from a similar presupposition of unalterability with respect to section 8(a)(1). But that presupposition is unfounded. Congress has not disabled itself from exercising its right to authorize hostilities through the enactment of appropriations legislation if it wishes to do so. Indeed, section 8(a)(1) places appropriations laws on a footing no different from general legislation. Either method may be used if Congress chooses to do so. Each, however, is subject to the canon of construction set out in section 8(a)(1). If Congress wishes to use appropriations legislation to authorize use of force, no impediment precludes it from doing that. The effect of section 8(a)(1) is simply to make clear the congressional intent that such authorization not be inferred unless Congress clearly intended to grant it. There is nothing novel in such a canon, which has, indeed, been used by Congress in other contexts in the realm of foreign relations. *See*, e.g., § 15 of the Act of Aug. 1, 1956, as amended, Pub. L. No. 84–885, 70 Stat. 890 (codified at 22 U.S.C. § 2680(a)(1)(b)), which prohibits appropriations not authorized by law to be made to the Department of State and precludes nonspecific supersession of that prohibition.

If these two objections were correct, Congress, in enacting the War Powers Resolution, wrote empty words: whatever the constitutional validity of the 60-day time limit, that requirement will virtually never apply because Congress will almost always be deemed to have enacted some implicit authorization contemplated by the Resolution. The objections proceed on the assumption that a disclaimer of authority cannot simply be stated once, but must be reiterated in every single piece of legislation from which authority might conceivably be inferred. Yet Congress, in enacting legislation, is deemed to be on notice as to what laws already exist; its intent is considered to embrace all acts *in pari materia*. Section 8(a)(1) is in effect a statement by Congress that it wants the non-supersession canon to apply to every piece of authorizing and appropriating legislation insofar as that legislation might be read as approving the introduction of the armed forces into hostilities.

Section 8(a)(1) serves a critically important purpose. It ensures that the decision whether to authorize armed force—the most significant decision Congress can make—will not be misinterpreted. Action that momentous calls for decisional clarity. That is all that section 8(a)(1) requires. Its enactment represented a triumph of congressional responsibility, and its validity ought not be doubted.

FLAWS IN THE WAR POWERS RESOLUTION

There are many problems with the War Powers Resolution and a comprehensive discussion would be too lengthy for the time here available. Suffice it to list the two major ones. The first and most serious problem with the Resolution from a seemingly minor drafting error, unnoticed at the time the resolution was enacted, that turned out to be fatal to its proper operation. The intent of its sponsors had been to require the President, upon introducing the armed forces into hostilities, to transmit to Congress a written report on that action within 48 hours. He would then have 60 days to keep them in hostilities.

The problem results, however, from the failure of the resolution to require the President to specify which kind of report he is filing. A "hostilities" report is only one of three different kinds of reports required by the resolution, and the other two do not set the clock ticking. The latter two requirements apply in situations that could also require a "hostilities" report, that is, when forces are introduced "into the territory, airspace or waters of a foreign nation, while equipped for combat," and when forces are introduced "in numbers which substantially enlarge United States armed forces equipped for combat already located in a foreign nation."

The result is that Congress has found itself required to "trigger" the 60-day limit of the Resolution through the enactment of legislation, over the President's veto. Even if those efforts at triggering the been successful, the very act of engaging in them amounted to an implicit admission that the resolution had failed. The central objective of the Resolution had been to put into place a self-activating mechanism

to control abuse of presidential discretion in the event Congress lacked the backbone to do so, as the sponsors believed had happened during the Indochinese War. Thus, in 1973 the 60-day time period had seemed to have the advantage of shifting to the White House the burden of justifying military actions by requiring their termination—automatically—despite congressional inaction. But these expectations proved unfounded. The element of "automaticity," as Senator Jacob Javits earlier had liked to refer to it, was grounded entirely upon the foundation of a written "hostilities" report submitted by the President. In the absence of such a report—and in the absence of the Executive's good faith adherence to the spirit of the resolution, which the sponsors also had mistakenly expected—the whole procedural edifice turned out to be a house of cards.

The second most serious problem is that it has turned out to be judicially unenforceable. Courts have declined to enforce it primarily because doing so would, they have concluded, constitute a political question. In 1983, for example, in *Crockett* v. *Reagan*, the United States Court of Appeals for the District of Columbia Circuit affirmed the holding of a federal district court that the question whether a report is required to be submitted under section 4(a)(1) of the resolution is, at least with respect to combat activities in El Salvador, a political question. *Crockett* v. *Reagan, 720 F.2d 1355 (D.C. Cir. 1983)*, aff'g *558 F.Supp. 893 (1982)*. That court reached the same result in a case that I litigated with Alan Morrison, *Lowry* v. *Reagan*, 676 F. Supp. 333(D.D.C., 1987), in which we represented 145 members of Congress in challenging the Reagan Administration's failure to submit such a report in connection with the Kuwaiti tanker escort operation. Rep. Tom Campbell confronted the same impediment in challenging the Clinton Administration's violation of the 60-day time period in the 1999 military actions concerning Kosovo.

Proposed improvements

In 1988 the Senate Foreign Relations Committee established a Special Subcommittee on War Powers, which I was privileged to serve as Special Counsel. The Subcommittee held extensive hearings on the Resolution's operation and effectiveness. It issued no final report, but its Chairman, Senator Joseph Biden, did introduce a bill that came out of those hearings. That bill was introduced most recently as S. 2387, 105th Cong., 2nd Sess. (1998). It sets out my own views as to how the Resolution should be strengthened. It would, among other things, fundamentally alter the conceptual scheme of the War Powers Resolution by *authorizing* the use of force in certain narrowly defined circumstances. The effect of authorization—as opposed to the War Powers Resolution's approach of limitation—would be to bring the new Resolution's constraints within the ambit of early war powers cases decided by the Marshall Court that held that the President is bound to respect congressionally imposed limits when Congress authorizes the use of force.

Sen. Biden's bill would also, among other things, fix the reporting requirement and direct that the courts not to dismiss such a case as presenting a political question to the extent that that is constitutionally permissible. There appears to be authority for the proposition that that application doctrine may, at least in some circumstances, be circumscribed by law. In *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the Supreme Court made clear that the courts of the United States will not sit in judgment on acts of state of a foreign government that apply within that government's own territory. The origins of the doctrine were clarified in 1972 in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), in which a four-justice plurality of the Court found that "the validity of a foreign act of state in certain circumstances is a political question not cognizable in our courts." The *Sabbatino* judgment was overruled in part by Congress in the "second Hickenlooper Amendment"—which was applied by the *Sabbatino* district court on remand, where the complaint was dismissed. The United States Supreme Court denied a petition for a writ of *certiorari*. 390 U.S.956 (1968). If the political question doctrine was not subject to statutory restriction, the Court would seemingly have taken that opportunity to say so.

Senator Biden's bill would, finally, cut off funds for prohibited uses of force and would establish a point-of-order procedure to implement that cutoff.

Rep. Jones's bill, S. 2387, 105th Cong., 2nd sess. (1998), would also seemingly alter the conceptual framework of the Resolution, but the wording in this respect is not entirely clear. His bill would not prohibit a court from relying upon the political question doctrine to dismiss an enforcement action. It would impose a funding cutoff but it would not enforce that cutoff with a point of order.

One principal point of difference between the two bills lies in the Jones bill's establishment of an "Executive-Legislative Consultative Group," which would consist of the President, senior executive branch officials, and six top Senate and House leaders. I believe that the establishment of such a group, as so structured, would

be ill-advised. Such a committee could be vulnerable to processes of psychological distortion that band both facts and analysis. These problems can prove debilitating to groups charged with decision-making in the cloistered, high-security environment necessitated by the sensitive subject matter. One is "irrational consistency," the tendency of decision-makers to ground conclusions upon previously formed images of reality, resulting in cognitive dissonance that causes a selective processing of information to conform to those presuppositions. Another is "defensive avoidance," an effort of decision-makers to reduce the stress that derives from uncertainty by unconsciously exaggerating the attractiveness of one or more options, thus denying responsibility for making the wrong choice. A third is "groupthink," phenomena of group dynamics that chill a full discussion of all alternatives open to highly cohesive groups constrained by unarticulated premises of loyalty and consistency.

Two measures can be taken to counter these tendencies, but the Jones bill does not incorporate them. First, access to information must be continuous and complete. Members of the group ought not have a sense of having "walked in off the street" only to be confronted by monumental questions never before contemplated. Given the historic disinclination of the Executive to share information with Congress, it would seem unduly optimistic to think that such a group would ever have access to all the information necessary to make a balanced, informed judgment in a crisis. The likelihood is great that the key decisions would continue to be made in the closed quarters of the Executive Branch, by the usual actors, without congressional participation.

Second, a highly qualified professional staff can diminish the effects of psychological distortion, but only under certain conditions. They too must have complete and continuous access to all pertinent information. They must be present at all meetings to analyze and answer arguments of executive experts. They must be able to travel instantly to trouble spots, sometimes under unsafe conditions. Most important, they must be skeptics, doubters, unbelievers—persons of independent judgment willing to say no, able to acknowledge uncertainty, and able to resist pressures for consensus. The Jones bill does not provide for continuously serving staff who are continuously within the pertinent, classified informational stream—or, for that matter, for any staff. The role, presence and ability of staff would be uncertain.

An Alternative: A Point-of-Order Procedure to Enforce Funding Cutoffs

One alternative to the broad approach of the War Powers Resolution would be patterned on section 106 (b) of Senator Biden's bill. That section would cut off funds for a given use of force if Congress were to adopt a concurrent resolution that contains a finding that ?

(1) a use of force abroad has exceeded the 60-day time period;

(2) the President has acted outside the authority to use force that was conferred by Congress; or

(3) a use of force is otherwise conducted in a manner inconsistent with the provisions of the Act.

Once such a concurrent resolution is adopted, a point of order will lie in each House against any measure that contains budget authority to carry out the use of force in question. That will preclude any further consideration of the measure in question until the budget authority is removed.

This is, in my mind, a clean, simple, and effective way for Congress to employ its ultimate check, the power over the purse, to curb unwanted use of force by the President. It is clearly constitutional in that it relies upon the plenary power of each House to set its own rules of procedure. It can be put in place with a concurrent resolution that cannot be vetoed. If Congress is serious about reclaiming the war power, this might be a good place to start.

The proposed procedure, while novel, is not entirely new. On May 15, 1978, the Senate Foreign Relations Committee reported a measure (section 502 of S. 3076, 95th Cong., 2nd Sess. (1978)) that would have subjected an unauthorized agreement to a point-of-order procedure that would have cut off funds for the implementation of the agreement in question, but the measure was rejected by the full Senate. (Section 502 incorporated the "Treaty Powers Resolution," S. Res. 24, 95th Cong., 2nd Sess. (1978)). The same measure, sponsored by Senators Clark, Church, Kennedy and Mondale, had been introduced in 1976 as S. Res. 486, 94th, Cong., 2nd Sess. (1976). Hearings on the proposal were held on the measure by the Senate Foreign Relations Committee on July 21 and July 28, 1976.

The Legal Status of Hostilities in Iraq

I would be remiss, Mr. Chairman, if I were to conclude without mention of the most significant war powers issue facing the Congress today. That is the legal status of hostilities in Iraq.

The Administration has cited a number of potential sources of authority for use of force in Iraq. In a February 13, 2008 opinion piece in the *Washington Post*, Secretary of State Condoleezza Rice and Secretary of Defense Robert Gates wrote that the new security arrangement with Iraq would include a provision that, in their words, confers "authority to fight." In a March 5, 2008 letter to Rep. Gary Ackerman, Jeffrey T. Bergner, Assistant Secretary for Legislative Affairs of the Department of State, transmitted a paper from Ambassador David M. Satterfield, dated March 4, 2008, responding to Rep. Ackerman's question whether the Administration believes it has constitutional authority to continue combat operations in Iraq beyond the end of this year absent explicit additional authorization from Congress. He answered in the affirmative. The President's authority, Ambassador Satterfield wrote, would derive from four sources:

(1) his constitutional authority as commander-in-chief;
(2) the Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, P. L. 107–243, enacted October 2, 2002;
(3) the Authority for Use of Military Force (AUMF), P.L. 107–40, enacted September 18, 2001; and
(4) the fact that "Congress has repeatedly provided funding for the Iraq war, both in regular appropriations cycles and in supplemental appropriations."

In my opinion, authority to use force in Iraq will not be conferred after December 31, and is not currently conferred, by any of those sources. To summarize my view, an executive agreement cannot confer authority to use force. A statute can confer such authority, but the Constitution prohibits use of force that exceeds statutorily authorized limits. Force now being used in Iraq exceeds the limits imposed by both the 2002 Joint Resolution and the AUMF. The 2002 Joint Resolution authorizes use of force against Iraq for two purposes: to "defend the national security of the United States against the continuing threat posed by Iraq," as its resolution put it, and to "enforce all relevant United Nations Security Council resolutions regarding Iraq." The first purpose has been fulfilled: the "continuing threat" posed by Iraq was seen as stemming from the government of Iraq—principally the regime of Saddam Hussein, and that regime is gone. The second purpose also has been fulfilled: "all relevant United Nations Security Council resolutions" referred to resolutions in effect at the time of enactment of the 2002 Joint Resolution, and, to the extent that they are still relevant, the current Iraqi government is now in compliance with them. A contrary interpretation would raise serious delegation, presentment and appointments problems under the Constitution and should therefore be avoided. As to the AUMF, while it does permit the use of force against "organizations" that "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," and while force currently is being used against Al Qaeda in Iraq, it is doubtful whether Al Qaeda in Iraq is the same organization that engaged in the 2001 attacks, and in any event force is being used in Iraq against persons and entities not related to Al Qaeda in Iraq. Authority to use force cannot lawfully be inferred from either of these two ambiguous statutes, or from subsequent appropriations statutes; such an inference is prohibited under the section 8(a)(1) of the War Powers Resolution, which requires that use of force be specifically authorized. An elaboration follows.

The President's commander-in-chief power as authority to use force in a limited or "imperfect" war

The starting point must be the Constitution. In its earliest cases, the Supreme Court recognized a president's obligation to respect congressional restrictions when Congress has authorized "imperfect war"—a war fought for limited purposes. In an imperfect war, Justice Bushrod Washington said in *Bas* v. *Tingy*, 4 U.S. 37, 41 (1800), those "who are authorized to commit hostilities . . . can go no farther than to the extent of their commission." The following year, in *Talbot* v. *Seeman*, 5 U.S. 1, 27 (1801), Chief Justice John Marshall wrote that "[t]he 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 enquiry." In the 2001 AUMF and in the 2002 Joint Resolution on Iraq, Congress in effect authorized limited or "imperfect" war. The President is therefore constitutionally required to respect the limits imposed in those two laws; Congress has implicitly prohibited any use of force not authorized therein, and the President's authority is at its "lowest ebb"—lower than it might have been had Congress been silent. This is the critical lesson im-

parted by Justice Jackson's famous concurring opinion in the *Steel Seizure Case*, 343 U.S. 579 (1952), which has since been adopted by the Supreme Court as the governing analytic framework.

An executive agreement as authority to use force

Ambassador Satterfield did not, in his March 4 paper, refer to the February 13, 2008 opinion by Secretary of State Condoleezza Rice and Secretary of Defense Robert Gates suggesting that the new arrangement will confer "authority to fight." In any case, whatever the import of such a provision under international law,[1] under U.S. domestic law, authority for the President to use force—"authority to fight"—in Iraq must come from either the Constitution or the Congress. The arrangement with Iraq, if entered into as a sole executive agreement, therefore could not serve as a source of such authority. The question whether a sole executive agreement can provide authority to use force was put to the State Department during the administration of President Gerald Ford. In connection with the appearance of Secretary of State Henry Kissinger appearance before the Senate Foreign Relations Committee on November 19, 1975, Senator Dick Clark submitted the following written question to the Department of State: "Does any executive agreement authorize the introduction of U.S. armed forces into hostilities, or into situations wherein imminent involvement in hostilities is clearly indicated by the circumstances?" Assistant Secretary of State Robert J. McCloskey responded as follows on March 1, 1976 in a letter to Senator Clark:

> The answer is "no." Under our Constitution, a President may not, by mere executive agreement, confer authority on himself in addition to authority granted by Congress or the Constitution. The existence of an executive agreement with another country does not create additional power. Similarly, no branch of the Government can enlarge its power at the expense of another branch simply by unilaterally asserting enlarged authority. . . .

The State Department's 1976 conclusion was correct. The President cannot confer upon himself authority to use force. So obvious is this principle that, when Congress made clear in 1973 in the War Powers Resolution (in section 8(a)(2)) that no treaty may be construed as conferring implied authority to use force, it made no reference to executive agreements. Congress no doubt deemed it unnecessary to affirm that if a treaty approved by two-thirds of the Senate cannot provide such authority, *a fortiori* a sole executive agreement cannot.

A treaty as authority to use force

Even if the new security arrangement were accorded the Senate's advice and consent as a treaty, it could not constitutionally authorize the use of force. Authority to use force would have to be conferred by implementing legislation, the enactment of which would of course include participation by the House of Representatives.

"A treaty may not declare war," the Senate Foreign Relations Committee said in its report on the Panama Canal Treaties, "because the unique legislative history of the declaration-of-war clause . . . clearly indicates that that power was intended to reside jointly in the House of Representatives and the Senate." S. EXEC. DOC. NO. 95–12, at 65 (1978). The events to which the Committee alluded are recorded in Madison's notes of the Constitutional Convention. The Convention considered a proposal that would have permitted the President to make war by and with the advice

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[1] Under international law, police activities, enforcement action and other uses of force by one state within the territory of another state are permitted if the government of that state consents. Provisions such as those in question could constitute consent by the government of Iraq for use of force by the United States within the territory of Iraq. Of course, any relevant limitations or restrictions imposed by humanitarian law (concerning, for example, requirements of humane treatment, proportionality, or the need to distinguish between combatants and non-combatants) would apply to any use of force by the United States. There is authority that a government cannot, under international law, lawfully consent to military intervention by another state if significant areas of its country or substantial parts of its population are under the control of an organized insurgency—*i.e.*, if the country is in a civil war. The theory is that principles of self-determination require that the people of a state be permitted to determine their own destiny free from outside interference. According to this theory, intervention in a civil war is impermissible whether that intervention occurs on behalf of the sitting government or on behalf of insurgentsunless another state has intervened unlawfully on behalf of either, in which case ″counter-intervention″ is permitted on behalf of the other side. These rules have been violated so many times by so many states in so many conflicts, however, that it is in my opinion doubtful whether they now constitute binding international law. As a question of fact it is, moreover, doubtful whether the insurgency in Iraq has risen to a level that would constitute a civil war for international law purposes, although that could of course change over the period within which any security arrangement is in effect.

and consent of the Senate, and the plan was rejected. The plan was rejected in the face of arguments that both Houses of Congress should participate in the decision to go to war. Accordingly, the United States has never entered into a treaty that would have placed the nation in a state of war. The Covenant of the League of Nations was rejected by the Senate in part because of concern that it would oblige the United States to use force if so required by the League's Assembly. In each of its post-World War II mutual security treaties, the United States has therefore made clear that none of those treaties imposes an automatic obligation upon the United States to use force.

The 2002 Joint Resolution as authority to use force

Section 3 of the 2002 Joint Resolution provides as follows:

> (a) Authorization.—The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to——
>
> (1) defend the national security of the United States against the continuing threat posed by Iraq; and
>
> (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

The resolution provided no automatic termination date and remains in effect until these objectives are accomplished. Each of the two "prongs" will be examined in turn.

The first prong: a "continuing threat posed by Iraq"?

The first question is whether the Joint Resolution continues to authorize use of force on the basis of its first prong—defense against "the continuing threat posed by Iraq." A review of the Resolution's text and legislative history reveals that it does not. The "continuing threat" referred to the danger posed in 2002 and earlier by the government of Iraq. That threat was seen to flow from the regime's pursuit and possession of weapons of mass destruction. Iraq, the Joint Resolution noted, "attempted to thwart the efforts of weapons inspectors to identify and destroy" these weapons. The Joint Resolution found that Iraq continued "to possess and develop a significant chemical and biological weapons capability," actively sought a nuclear capability, and supported and harbored terrorist organizations. The threat, the resolution found, was that "the current Iraqi regime" would either employ weapons of mass destruction in a surprise attack against the United States or "provide them to international terrorists who would do so."

That threat is gone. Saddam Hussein's regime is history, and the threat posed by it is gone. Hussein is dead. A different government is in place. It does not possess or seek weapons of mass destruction. It does not support or harbor terrorists. There are, of course, terrorists present in Iraq today who pose a threat to American troops there. They may someday pose a threat to the general U.S. population. But Congress in 2002 authorized use of force against the old Iraqi government, not against groups unaffiliated with Saddam Hussein's regime (many of which actually opposed it).

Our starting point is of course the text of the Joint Resolution. In and of itself, the text of the first prong says little about the scope of the "continuing threat posed by Iraq." Two aspects of the wording are significant, however. First, the text refers to the continuing threat posed "*by* Iraq"—not a continuing threat *from* Iraq. The Joint Resolution is not, and was not intended to be, an open-ended authorization to use force against any future threat arising from a group within the territory of Iraq. Its sponsors had in mind a particular "continuing threat"—one emanating in some way from the Iraqi government. Second, the threat in question was "continuing," *i.e.*, it is one that existed *before* the Joint Resolution was adopted and would continue to exist afterwards, until it could be eliminated with the use of force. Threats that emerged after the enactment of the Joint Resolution therefore would not be *continuing* threats—they would not have continued from the period before use of force was authorized. Whatever threat may be posed today by entities that were not operating within Iraq before enactment of the Joint Resolution—such as, for example, Al Qaeda in Iraq—these are not among the entities against which the Joint Resolution authorizes the use of force.

During the debate over this authorization and the decision to go to war, the most cited threat posed by Iraq was that arising from Iraq's programs to develop weapons of mass destruction. Nevertheless, based on the legislative history of the resolution, it is not possible to construe the authorization as limited to the threat posed by Iraqi weapons of mass destruction. Nor was the authorization limited to the WMD threat posed by the regime of Saddam Hussein. Several amendments offered in the

House and the Senate that would have imposed such restrictions were rejected. In the House Committee on International Relations, Representative Smith proposed an amendment that would have substituted the words "the current Iraqi regime" for "Iraq." The amendment was rejected by Committee. H.R. REP. NO. 107–721, at 38 (2002). In the Senate, Senator Durbin proposed an amendment that would have replaced the words "the continuing threat posed by Iraq" with "an imminent threat posed by Iraq's weapons of mass destruction." 148 CONG. REC. S10229 (daily ed. Oct. 9, 2002) (text of Amend. 4865). That amendment was rejected by the Senate. 148 CONG. REC. S10272 (daily ed. Oct. 10, 2002) (Rollcall Vote No. 236 Leg.).

The House committee report likewise confirms that the "continuing threat posed by Iraq" was not limited to the primary threat of Iraq's weapons of mass destruction, though it does focus on the Iraqi government in power at the time. The report's description of "The Current Threat in Perspective" mentions the threat posed by the Iraqi government's aid to and harboring of terrorist organizations. H.R. REP NO. 107–721, at 6–8 (2002). The Report declares that:

> The *current Iraqi government's* demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself. H.R. REP. NO. 107–721, at 7 (2002)(emphasis added).

Nevertheless, the House committee report repeatedly uses the "Iraqi regime" as a code word for "the Baathist government of Iraq led by Saddam Hussein." The report traces the history of Iraqi aggression and obstinacy in the face of international demands for transparence and compliance with human rights law and international standards for inspection and monitoring of its WMD-capable facilities. The report notes specifically:

> Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations. *The continuing threat posed by Iraq is the motivation for the Committee's favorable action on H.J.Res. 114.*

The report highlights repeated Iraqi renunciations of its obligations under U.N. Security Council Resolutions, "brutal repression of its civilian population," Iraqi "capability and willingness" to use WMD externally and internally (against Iran and its own Kurdish citizens), and continuous hostile acts towards the U.S., including the attempt to assassinate former President G.H.W. Bush in 1993. The report cites Iraqi attacks on U.S. and coalition aircraft enforcing the unilaterally-imposed no-fly zones over northern and southern Iraq.

These are the sorts of "continuing threats" that Congress had in mind.

It is thus clear from the House committee report, the floor debate, and the text of the Joint Resolution itself that the authorization's supporters were concerned about the continuing threat posed *by* the government of Iraq, not a threat from terrorist groups operating *in* Iraq or *from* Iraq. Numerous members of the House saw the "continuing threat" as stemming from the then-existing Iraqi government.

The same was true in the Senate. This interpretation is supported specifically by discussion in the Senate surrounding an amendment proposed by Senator Bob Graham that would have added authorization to "defend the national security of the United States against the threat posed by the following terrorist organizations: (A) The Abu Nidal Organization. (B) HAMAS. (C) Hizballah. (D) Palestine Islamic Jihad. (E) Palestine Liberation Front." 148 CONG. REC. S10088 (daily ed. Oct. 8, 2002) (text of Amend. 4857). In opposing the amendment, Senator Joseph Lieberman, one of the original co-sponsors of the Senate version of the text that became H.R.J. Res 114 (2002), argued that this would "open up new territory," 148 CONG. REC. S10159 (daily ed. Oct 9, 2002), and would likely be opposed by Senate Democrats, but he did not suggest that the authority to use force against terrorist organizations was already contained in the underlying resolution. Rather, he characterized the Authorization as follows:

> [I]n responding to the threat to our national security *posed by Iraq under the leadership of Saddam Hussein*, it represents our best effort to find common ground to dispatch our constitutional responsibility and to provide an opportunity for the broadest bipartisan group of Senators to come together and ex-

> press their support of action to enforce the United Nations resolutions that Saddam Hussein has constantly violated. . . . 148 CONG. REC. S10159 (daily ed. Oct 9, 2002)(emphasis added).

To conclude, both the text and legislative history of the Joint Resolution indicate that the authorization to use force in Iraq was limited to the continuing threat posed by the government of Iraq, in particular, but not limited to, the regime of Saddam Hussein and the threat of weapons of mass destruction. At present, U.S. forces in Iraq are engaged in the joint use of force with Iraqi forces and President Bush has praised the leadership of Iraqi Prime Minister Nouri al-Maliki. It is hard to see how any "continuing threat"—a threat that has continued since before 2002—is still posed by that government.

The most sensible conclusion, therefore, is that the first prong of the 2002 Joint Resolution is no longer available as a source of authority to use force in Iraq.

The second prong: "enforce all relevant Security Council resolutions"?

The second prong of the 2002 Joint Resolution further authorizes the use of force to "enforce all relevant United Nations Security Council resolutions regarding Iraq." To the extent that any resolutions adopted before enactment of the 2002 Joint Resolution are still applicable, all have been honored by the Iraqi government; the United States surely is not contemplating the use of force to enforce them against that government. The question, therefore, is the meaning of "relevant": does the term, as used in the second prong, refer to *future* United Nations Security Council resolutions—resolutions relevant to Iraq that might at some point in the future be adopted by the Security Council? The Joint Resolution, it is worth noting, does not set a pertinent time period; if it were construed as authorizing force to enforce a future Security Council resolution, there would be no reason, in other words, to believe that that authority would not continue indefinitely into the future, until the 2002 Joint Resolution is formally repealed.

The text of the second prong is ambiguous. The legislative history, however, is not. Congress appears clearly to have intended to authorize the enforcement of those Security Council resolutions outstanding at the time of the enactment and, at most, a limited set of potential future Security Council resolutions directed at implementing the outstanding resolutions. This set of future resolutions would not include Resolution 1790, which provides the current mandate for the Multinational Force in Iraq.

The second prong of the Authorization is not the only reference to "all relevant Security Council resolutions" in the 2002 Joint Resolution. 107 Pub. L. No. 243 § 2(2) (2002). The immediately preceding section expresses Congressional support for U.S. diplomatic initiatives regarding Iraq using the same language regarding Security Council resolutions. In addressing this provision, the House committee report specified exactly what constitutes a relevant Security Council resolution for these purposes:

> This section states that Congress supports the efforts of President Bush to strictly enforce, through the United Nations Security Council, *all Security Council resolutions adopted prior* to the enactment of this Act addressing the threats posed by Iraq, *or adopted afterward to further enforce the earlier resolutions*. H.R. REP. NO. 107–721, at 41 (2002) (emphasis added).

The use of the same language in the subsequent section authorizing the use of the Armed Forces implicitly includes the same set of Security Council resolutions.

Further support for this interpretation is provided by statements made during the House and Senate floor debates by Representative Richard Gephardt and Senator Lieberman, the original co-sponsor and sponsor of the House and Senate versions of the bill, respectively, who played a significant role in managing the debate over H.R.J. Res. 114. In the House, Representative Gephardt stated:

> The resolution and its accompanying report define the threat posed by Iraq as consisting primarily of its weapons of mass destruction programs and its support for international terrorism. They also note that we should continue to press for Iraqi compliance with *all outstanding U.N. resolutions*, but suggest that we *only contemplate using force to implement those that are relevant to our nation's security*.
>
> As for the duration of this authorization, this resolution confines it to the continuing threat posed by Iraq; that is, its current and ongoing weapons programs and support for terrorists. We do not want Congress to provide this or subsequent Presidents with open-ended authority to use force against any future threats that Iraq might pose to the United States that are not related to its current weapons of mass destruction programs and support for international

> terrorism. The President would need to seek a new authorization from Congress to respond to any such future threats. 148 CONG. REC. H7779 (daily ed. Oct. 10, 2002) (emphasis added).

In the Senate, Senator Lieberman emphasized that the two prongs of the Authorization are linked and that relevant resolutions are those relating to the continuing threat by Iraq:

> It seems to me *these two parts have to be read in totality as modifying each other*. The resolutions that are *relevant* in the U.N. Security Council are to be enforced particularly in relationship *to the extent to which they threaten the national security of the United States*. In doing this, we are expressing our understanding that the President is unlikely to go to war to enforce a resolution of the United Nations that does not significantly affect the national security of the United States. 148 CONG. REC. S10269 (daily ed. Oct 10, 2002) (emphasis added).

The legislative history thus conclusively reveals that the second prong of the 2002 Joint Resolution was intended to authorize (1) the enforcement of pre-existing Security Council Resolutions and (2) at most, future Security Council resolutions that were aimed at implementing the earlier resolutions and were related to "the continuing threat posed by Iraq." Security Council Resolution 1790—the current UN authorization for the Multinational Force—does not fall within the scope of either class.

Neither Resolution 1790 nor preceding resolutions passed to authorize the Multinational Force in Iraq can be construed as resolutions aimed at implementing resolutions that were active at the time H.R.J. Res. 114 was passed. Security Council Resolution 1790 renews the mandate of Security Council Resolution 1546 (2004). During the period in which the Coalition Provisional Authority exercised sovereign control over Iraq, the Multinational Force was authorized by Security Council Resolution 1511 (2003). Not one of these resolutions makes any reference, even in preambular language, to Security Council Resolution 687 or any other resolution relating to Iraq that was in force when the 2002 Joint Resolution was passed. Nothing in Resolution 1790 suggests that it was adopted to implement or enforce resolutions that were outstanding in October, 2002 when Congress's Joint Resolution was enacted.

If the 2002 Joint Resolution were to be interpreted as authorizing the enforcement of an unlimited set of future resolutions regarding Iraq that the Security Council might pass, three potentially serious constitutional problems would arise.

The first concerns the delegation of legislative power. The doctrinal specifics of constitutional jurisprudence governing the delegation of power to international organizations are amorphous; however, the constitutional principle that restricts the domestic delegation of legislative power—the principle that no delegated powers can be further delegated (*delegate potestas non potest delegari*)—would seemingly apply equally to international delegations. Among the domestic branches of the U.S. government, the delegation doctrine precludes Congress from delegating power without providing an "intelligible principle" to guide its application. *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 409 (1928) Internationally, an open-ended grant of power to the UN Security Council to determine—within U.S. domestic law—the time, place, manner and objectives of U.S. use of force in Iraq would squarely raise such concerns. Although not expressed in explicit constitutional terms, the statements by a number of Senators who opposed the Levin amendment reflected the same concern. The Levin amendment would have made Congress's authorization contingent upon a resolution from the UN Security Council authorizing the use of force; a number of Senators were concerned that its adoption would give the Security Council a veto over U.S. security policy in Iraq. President Bush himself expressed similar concerns in signing the U.S.-India Peaceful Atomic Energy Cooperation Act. The law as enacted prohibits the transfer of nuclear material to India in violation of guidelines set by the Nuclear Suppliers Group, a consortium of 40 nuclear-fuel-producing nations that includes the United States. The President's December 8, 2006 signing statement said that "a serious question would exist as to whether the provision unconstitutionally delegated legislative power to an international body," and that to "avoid this constitutional question" his Administration would interpret the provision "as advisory." To construe the Joint Resolution as delegating to the UN Security Council power to determine whether authority to use force is available in U.S. domestic law would raise the same constitutional question. The Constitution permits only 535 members of Congress to place the United States in a state of war—not the UN ambassadors of Belgium, Croatia and Indonesia.

A second constitutional problem is posed by construing the second prong as applying to future Security Council resolutions. That problem concerns the Constitution's Appointments Clause. Article II gives the President the power to appoint "officers of the United States" only with the advice and consent of the Senate, and permits Congress to permit the appointment of "inferior officers" by the President, the courts, or department heads. The Supreme Court has made clear that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed in the manner prescribed " by the Clause. The question arises whether the UN representative of a state that is a member of the Security Council would be exercising "significant authority pursuant to the laws of the United States" if that individual were permitted, in casting a vote within the Security Council, to give the resulting resolution force and effect within the domestic law of the United States. It is one thing to incorporate by reference into existing federal law Security Council resolutions that already exist; their terms are set and known to Congress when they are incorporated. It is be quite another, however, to so incorporate any and all Security Council resolutions that may be adopted at any point in the future—whatever their purposes, whatever their terms, and whatever their justification—with no time or subject matter limitations beyond the vague requirement of "relevance."

Construing the second prong as applying to future Security Council resolutions creates a third constitutional problem, concerning presentment. In *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), the United States Supreme Court made clear that Congress cannot give a measure the force and effect of law unless it is presented to the President for his signature or veto. Yet that would be precisely the effect of a future-looking construction of the second prong: it would give a future Security Council resolution the force of federal law without presentation to the President for his signature or veto.

That these three problems attend a future-looking interpretation of the term "relevant" counsels that that interpretation should be avoided. It is a settled canon of statutory construction that interpretations that raise constitutional doubts are to be avoided. As the Supreme Court made clear in *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932), "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." This is the canon on which President Bush relied in his signing statement on the U.S.-India nuclear law.

When President Bush signed the 2002 authorization, he said that "Iraq will either comply with all U.N. resolutions, rid itself of weapons of mass destruction, and end its support for terrorists, or it will be compelled to do so." He, too, seemed to believe that "relevant" referred to past resolutions, not future ones. Weighing all the evidence, it is reasonable to conclude that the second prong of the 2002 Joint Resolution also is no longer available as a source of authority to use force in Iraq.

The AUMF as authority to use force

The pertinent provision of the AUMF reads as follows:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. Pub. L. No. 107–40 § 2(a) (2001).

For two reasons, the AUMF ought not be construed as providing authority for the use of force in Iraq.

First, the AUMF requires some nexus between the organization or entity in question and the 2001 attacks on the Pentagon and World Trade Center. It is not clear that "Al Qaeda in Iraq" is properly considered to be the same organization that engaged in those attacks. The mere fact that both organizations share the same name is not legally sufficient to bring the Iraqi entity within the scope of the AUMF. As I understand it, a serious question exists whether Al Qaeda cells operating within Iraq are in a "command and control" relationship with the Al Qaeda leaders who were present in Afghanistan at the time of the 2001 terrorist attacks. A thorough examination of this question probably would require a closed session of the Committee. Suffice it to note, however, that one would have to scrutinize very closely the comparative leadership structure, personnel, weaponry, strategic objectives, tactical targets, recruiting methods, physical facilities, theaters of operation and other aspects of the two organizations before concluding that they are in fact one and the same.

Second, even if the AUMF were applicable to Al Qaeda in Iraq, force is being used by the United States in Iraq against persons and entities not related to Al Qaeda in Iraq. As I understand it, fewer than twenty or twenty-five percent of U.S. casualties in Iraq can be attributed to Al Qaeda in Iraq. Military operations directed at insurgents responsible for the remaining seventy-five or eighty percent of U.S. casualties are not authorized by the AUMF. Perhaps for this reason, as recently as January, 2007 the Administration did not rely upon the AUMF as a source of authority for U.S. military operations in Iraq. In response to a written question concerning sources of authority that was put to Secretary Rice by Senator Biden following her oral testimony, Secretary Rice cited only the 2002 Joint Resolution and the President's constitutional authority, not the AUMF. *Securing America's Interest in Iraq: The Remaining Topics:* Hearings Before the Committee on Foreign Relations, United States Senate, 110th Cong., 1st Sess. 161 (2007).

The War Powers Resolution's "clear statement" rule: no implicit authority, from appropriations or elsewhere

At most, it is debatable whether authority to continue to use force in Iraq is provided by the 2002 Joint Resolution. At most, it is debatable whether such authority is provided by the AUMF. (It is not even debatable whether such authority is provided implicitly from appropriations or other sources—it is not.) The War Powers Resolution establishes as a rule of law that, when it comes to the monumental question whether a statute confers authority to use force, debatable authority is not enough. The War Powers Resolution requires that such authority be *specific*. Section 8(a)(1) provides not only that the statute in question must explicitly refer to the Resolution; it provides that it must *specifically* authorize the use of force. That section provides as follows:

> Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred?
>
> (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution. . . .

Because serious ambiguities are present in both the 2002 Joint Resolution and the AUMF if they are construed as authorizing the use of force in Iraq, it cannot be said that either statute "specifically" does so.

This section also undercuts Ambassador Satterfield's claim that authority may be inferred from the fact that "Congress has repeatedly provided funding for the Iraq war, both in regular appropriations cycles and in supplemental appropriations." The section explicitly provides that authority to introduce the armed forces into hostilities "shall not be inferred . . . from any provision of law . . ., including any provision contained in any appropriation Act," unless those two conditions are met. No appropriations act meets either condition.

Accordingly, the War Powers Resolution precludes inferring authority to use force in Iraq from the 2002 Joint Resolution, from the AUMF, or from any appropriations legislation.

CONCLUSION

I commend the Chairman and this Subcommittee for undertaking this hearing. Nothing is more important to the safety and well-being of the nation than ensuring that force is used in the common defense in a manner that effectively addresses authentic security threats while respecting the constitutionally-mandated role of Congress. I know that Senators and Representatives have a strong incentive to duck these issues; nothing can be more damaging to a political career than voting on the wrong side in a decision to use armed force. But I am convinced that most members would prefer that their constitutional role be honored. It is hearings such as this that may ultimately make that possible.

Mr. DELAHUNT. Thank you, Professor Glennon.

Dr. Fisher.

STATEMENT OF LOUIS FISHER, PH.D., SPECIAL ASSISTANT TO THE LAW LIBRARIAN, LAW LIBRARY OF CONGRESS

Mr. FISHER. Thank you. We can get into a lot of technicalities here, but we shouldn't, particularly Members of Congress. You are our representatives; you represent your constituents. And I always admire Members at hearings because you speak in a way that your folks back home can understand. That is what we should do in a democracy.

So we should be talking about basic values. And we should think that when America broke with England, it adopted a very radical philosophy of self-government, not doing what the King says. Self-government, a republic, rule of law, separation of powers, checks and balances.

These are basic things that have been violated consistently in recent decades in the war powers area. So that is the heart of our system. We have to think about what values we want in this country.

The values I just ticked off are the values we are apparently trying to export to Iraq. So—we say we want those values in the Middle East; we should want them here. It is very important for Members of Congress to articulate those values and protect those values.

One of the interesting values when we broke with England was to reject the notion that kings can take us to war. What the Framers did when they looked at all the wars that other countries had gotten involved in, their conclusion was that Executives do not go to war for the national interest; they go to war for fame, and for glory, and for ambition, and for family reasons, you name it. For national interests, no. In fact, the wars were typically disaster for those countries in loss of lives, loss of money.

The Framers looked at that and they rejected that model. And as has been said here by the panel, they put the power—when you go from a state of peace to a state of war, there is only one branch that could do that. That was Congress. That was never a call for the President.

Now the War Powers Resolution, if you look at section 2, it has some very nice language that is to fulfill the intent of the Framers, to ensure collective judgment. Of course, it doesn't do any of that. If you look at what comes after section 2, you could tell those values are not protected at all. The Framers never would have given the President the right to go to war anywhere he wanted to for any reason for 60, 90 days.

As has been said here today, once you are at war, it is very difficult to get out of it. I agree with Jules that the control is in the front end, not the latter—right at the front. So the War Powers Resolution—I think Mike just mentioned it—I think started off in a form that was consistent with the Framers' intent on the Senate side. The House had a different bill.

When it came out of conference committee, it was something that one of the sponsors in the Senate, Tom Eagleton, voted against and explained why he voted against. He called the bill a bastard. It was an abdication, a surrender.

So we have in the War Powers Resolution something that pretends to support the Constitution, but in fact is flatly against it.

I have in my statement comments about section 2 of the Jones bill. I won't go into them here; it is just some language. But I really appreciate Mr. Jones for taking the lead, for whether you are an attorney or not an attorney, it doesn't matter. We are talking about what kind of fundamental values we have in this country that we have to protect.

I want to focus on just three things: One, part of the reason that we have gone off the rails in war powers is what we have done after World War II. Namely, we allow Presidents to go to war not by coming to Congress but by going to the U.N. Security Council, which Truman did in 1950 and which others have done since that time. I submit to you, you cannot have a President and the Senate, to the treaty process, adopt a procedure that eliminates you people, the House of Representatives; but that has been done, and it has been done repeatedly. So I have language in my statement to assure that no President can circumvent Congress by going to the Security Council.

And for the same reason, no President should circumvent Congress by going to NATO. A President has to get the approval of each NATO country, but not of Congress? That is absurd. So that is one point I make.

Consultation, I agree with Mike. On consultation, I am—any President can consult with Members of Congress anytime he wants, and they should consult. I don't like a consultative committee because I think the decision of Congress to go to war is for every Member of Congress, the junior Members; you are all representative people, and it shouldn't be for some kind of a consultative group. And I am afraid, also, a consultative group is easily co-opted; and the most recent example of that is the Gang of Eight that heard about the NSA surveillance, and that is not the way we should be authorizing or approving.

And the last point—I have done this before, so I am really stuck with the 5-minute rule; I can't go beyond. Judicial review, I am uncomfortable with that for the same reason, because I am afraid that Members of Congress will think—and I think, falsely—that if they don't protect themselves, the courts will.

You should not depend on another branch to protect yourselves. The Framers expected you to do it, and you can't give it to some consultative committee and you can't give it to the courts.

I will stop with that. Thank you.

[The prepared statement of Mr. Fisher follows:]

PREPARED STATEMENT OF LOUIS FISHER, PH.D., SPECIAL ASSISTANT TO THE LAW LIBRARIAN, LAW LIBRARY OF CONGRESS

Mr. Chairman, thank you for the invitation to offer my views on war powers and the pending legislation, H. J. Res. 53. The bill has many positive features, including an effort to restore the constitutional authority of Congress over military and financial commitments. I have a few suggestions to make with regard to the bill's language, but I very much support the fundamental purpose of the bill, which is to correct serious deficiencies with the War Powers Resolution (WPR) of 1973. H. J. Res. 53 is designed to safeguard and reinforce the constitutional system, representative government, and democratic values. The WPR claimed to "fulfill the intent of the framers" and ensure "collective judgment" of the legislative and executive branches but plainly it did not.

I. WAR POWERS RESOLUTION

As passed by the Senate, the War Powers Resolution limited presidential military initiatives to narrow circumstances, such as repelling sudden attacks and protecting endangered U.S. citizens.[1] However, by the time the legislation cleared the House of Representatives and emerged from conference committee, those narrow circumstances were replaced by a congressional surrender of the war power to the President. Senator Tom Eagleton, a major sponsor of the Senate measure, voted against the conference product, telling his colleagues that the bill allowed "an open-ended, blank check for ninety days of warmaking, anywhere in the world, by the President . . ."[2] President Richard Nixon vetoed the bill but both houses of Congress overrode his veto.[3] The statute neither fulfills the intent of the framers nor ensures collective judgment.

As a result of the compromise reached between the House and the Senate, the WPR was enacted with sections that contradicted each other. Section 2(a) claimed that the purpose of the joint resolution was "to fulfill the intent of the framers of the Constitution of the United States and insure [sic] that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."[4] Other language in Section 2 appears to protect constitutional values. According to Section 2(c), presidential war powers could be exercised "only pursuant to (1) a declaration of war, (2) specified statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[5] Yet Sections 4 and 5 do exactly the opposite, allowing the President to initiate military operations for up to 90 days, without ever coming to Congress for any type of advance authorization.[6]

H.J. Res. 53 offers an opportunity to correct the defects of the War Powers Resolution by supporting principles that are consistent with constitutional values.

II. COMMANDER-IN-CHIEF

The British model gave the king the absolute power to make war. The American framers repudiated that form of government because their study of history convinced them that executives go to war not for the national interest but to satisfy personal desires of glory, ambition, and fame. The resulting military adventures were disastrous to their countries, both in lives lost and treasures squandered. I have submitted to your subcommittee a number of my recent articles that elaborate on the lessons drawn from that history.[7]

At the Philadelphia Convention, only one delegate (Pierce Butler of South Carolina) was prepared to give the President the power to make war. He argued that the President "will have all the requisite qualities, and will not make war but when the Nation will support it." Roger Sherman, a delegate from Connecticut, objected: "The Executive shd. be able to repel but not to commence war." Elbridge Gerry of Massachusetts said he "never expected to hear in a republic a motion to empower the Executive alone to declare war." George Mason of Virginia spoke "agst giving the power of war to the Executive, because not <safely> to be trusted with it; . . . He was for clogging rather than facilitating war."[8]

The debates at the Philadelphia Convention and the state ratification conventions underscore the principle that the President had certain defensive powers to repel sudden attacks but anything of an offensive nature (taking the country from a state of peace to a state of war) was reserved to Congress. That understanding prevailed from 1789 to 1950, when President Harry Truman went to war against North Korea without ever coming to Congress. I will discuss that precedent in detail later in my statement.

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[1] Louis Fisher, "Thomas F. Eagleton: A Model of Integrity," 52 St. Louis U. L. J. 97, 100 (2007).

[2] Id. at 102.

[3] Louis Fisher, Presidential War Power 144–48 (2d ed. 2004).

[4] Pub. L. No. 93–148, 87 Stat. 555 (1973).

[5] Id.

[6] Id. at 555–57.

[7] E.g., Louis Fisher, "Lost Constitutional Moorings: Recovering the War Power," 81 Ind. L. J. 1199 (2006); Louis Fisher, "Domestic Commander in Chief: Early Checks by Other Branches," 29 Cardozo L. Rev. 961 (2008); Louis Fisher, "To War or Not to War: That is Still the Question for Congress, not the President," Legal Times, March 10, 2008, at 44–45.

[8] 2 Records of the Federal Convention of 1787, at 318–19 (Max Farrand ed. 1937).

The President is Commander in Chief but that title was never intended to give the President sole power to initiate war and determine its scope. Such an interpretation would nullify the express powers given to Congress under Article I and undercut the framers' determination to place the power of war in the elected representatives of Congress. Part of the purpose of the Commander in Chief Clause is to preserve civilian supremacy. Military commitments are not in the hands of admirals and generals but are placed in civilian leaders, including members of Congress. Lawmakers can at any time limit and terminate military commitments. The framers vested the decisive and ultimate powers of war and spending in the legislative branch. American democracy places the sovereign power in the people and entrusts to them the temporary delegation of that power to elected Senators and Representatives.[9]

III. BARBARY WARS

In your hearing on March 13, a question was raised whether President Thomas Jefferson exercised unilateral power to engage in military actions against the Barbary powers in the Mediterranean. Consistent with the principles stated above, his actions were of a defensive nature. He reported to Congress on what he had done, asking for legislative guidance. He told Congress that he was "unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense." Congress passed ten statutes authorizing Presidents Jefferson and Madison to use military force against the Barbary nations, resulting in a series of treaties in 1815 with Algiers, Tunis, and Tripoli.[10]

IV. SECTION 2 OF THE PENDING BILL

Section 2 of H. J. Res. 53 explains policy and purpose. Section 2(a)(2) states: "the conduct of the Armed Forces in hostilities requires undivided command by the Commander-in-Chief." I would not use that language. Advocates of presidential power will cite it to object to any "interference" by Congress in the conduct of military operations. Congress has many express powers in Article I to control armed forces, including making rules concerning captures on land and water, raising and supporting armies, providing and maintaining a navy, making rules and regulations for the land and naval forces, providing for the organizing, arming, and disciplining of the militia, and of course the power of the purse.

I appreciate that subparagraphs (2) and (3) were probably intended to identify the respective presidential and congressional roles. Subparagraph (3) provides: "the continued use of the Armed Forces in hostilities ultimately requires continued appropriation and oversight." That is true, but the word "ultimately" appears to put the President in the driver's seat until at some later time Congress intervenes. Furthermore, singling out "appropriation" ignores the equally important power of Congress to control through authorization bills.

Instead of subparagraphs (2) and (3), I would substitute this language:

"(2) the President is Commander-in-Chief to assure civilian supremacy and unity of effort; and

"(3) Congress is the branch of government that decides to take the country from a state of peace to a state of war and is responsible at all times for monitoring the purpose and scope of military force."

V. UN MILITARY OPERATIONS

Section 2(b) of H. J. Res. 53 provides three subsections governing the collective judgment of Congress and the President for military action. The first two subsections are neutral. They speak of "(1) the initiation of hostilities by the Armed Forces" and "(2) the continued use of the Armed Forces in hostilities." However, subparagraph (3) states: "the participation of the Armed Forces in certain military operations of the United Nations." I would delete that subparagraph unless it can be changed and made consistent with the principles of the joint resolution. The use of "certain" is clarified to some extent by Sections 9 and 10, but "certain" raises many questions that are not answered and may imply approval of some unilateral military actions by the President through the UN—presidential actions that entirely circumvent Congress. As I indicate below, that presents serious constitutional problems and undermines the prerogatives of the House of Representatives.

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[9] Louis Fisher, "Exercising Congress's Constitutional Power to End a War," statement before the Senate Committee on the Judiciary, January 30, 2007.

[10] Fisher, Presidential War Power, at 32–37.

A. Treaty Process

When the Senate agreed to the UN Charter and Congress passed the UN Participation Act to implement the Charter, it was never contemplated that the President could use the Security Council as a substitute for Congress. All parties working on the Charter recalled what had happened with the Versailles Treaty and the failure of the United States to join the League of Nations. President Woodrow Wilson opposed a series of Senate amendment to the treaty, including language requiring that Congress "shall by act or joint resolution" provide approval for any military action by the League.[11]

The need for advance approval by Congress for any military commitment was recognized by those who drafted the UN Charter.[12] During Senate debate on the Charter, President Harry Truman cabled from Potsdam his pledge to seek advance approval from Congress for any agreement he entered into with the United Nations for military operations: "When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them."[13] Approval meant action by both Houses, and in advance. The Senate approved the Charter with that understanding.

Each nation had to decide, consistent with its "constitutional processes," how to implement the provision in the Charter regarding the use of military force. To do that, Congress passed the UN Participation Act of 1945. Without the slightest ambiguity, Section 6 of that statute required that the agreements "shall be subject to the approval of the Congress by appropriate Act or joint resolution."[14] Yet five years later, without ever coming to Congress for authorization, President Truman went to war against North Korea by relying on UN resolutions.[15]

Such a procedure is unconstitutional because it would allow the President and the Senate—acting through the treaty process—to eliminate a role for the House of Representatives. Truman's action became a precedent for other Presidents seeking "authority" from the UN for military initiatives, including President George H. W. Bush in 1990 (for Iraq) and President Bill Clinton in 1994 and 1995 (for Haiti and Bosnia). The unconstitutionality of using the UN Charter to bypass congressional control applies to other treaties, such as mutual security pacts. It was a violation of the Constitution for President Bill Clinton, after failing to obtain Security Council support for the war in Kosovo, to use NATO for "authority." It would be a remarkable constitutional argument to conclude that he needed the "approval" of each of the NATO countries but not the approval of Congress.[16]

B. H. J. Res. 53

Subparagraph (3) of Section 2(b) refers to "the participation of the Armed Forces in certain military operations of the United Nations." I would delete that language and add a new section (b) under Section 3, inserted on page 5, at line 4, along the lines of: "(b) before committing Armed Forces to an operation approved by the United Nations Security Council under Chapter VII of the United Nations Charter, or pursuant to a mutual security treaty, the President must obtain prior authorization from Congress by appropriate Act or joint resolution."

If you made the change above, you would need to amend the UN Participation Act. The requirement for congressional action on an Act or joint resolution before the President could participate in an UN military action applied only to "special agreements." There has never been a special agreement. As a result, the very procedure enacted to protect congressional power became a nullity, allowing President Truman to go to war against North Korea pursuant to a UN resolution without ever coming to Congress.

I would strike all of Section 6 of the UN Participation Act and insert: "The President may seek the support of the Security Council for military action, subject to the prior approval of the Congress by appropriate Act or joint resolution."

Section 5 of the 1949 amendments to the UN Participation Act (63 Stat. 735–36) underscores the limited nature of UN military actions "directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the United States." Armed forces are deployed in a "noncombatant

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[11] Fisher, Presidential War Power, at 82.
[12] Id. at 84–87.
[13] Id. at 91.
[14] 59 Stat. 621, sec. 6 (1945).
[15] Fisher, Presidential War Power, at 97–104. See also Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?," 89 Am. J. Int'l L. 21 (1995).
[16] Louis Fisher, "Sidestepping Congress: Presidents Acting under the UN and NATO," 47 Case W. Res. L. Rev. 1237 (1997).

capacity" and limited to one thousand troops. Congress never authorized the President to circumvent Congress by obtaining UN "authority" for major wars.

VI. CONSULTATION

For reasons given above, I would delete the following language in Section 4 of H. J. Res. 53 regarding consultation between the President and Congress (page 6, lines 11–14): "before committing Armed Forces to an operation authorized by the United Nations Security Council under chapter VII of the United Nations Charter." I am concerned that this language implies that the UN Security Council can "authorize" U.S. action and that mere presidential consultation with Congress is sufficient.

On page 6, lines 15–23, of H. J. Res. 53, the bill contemplates that the President will consult with a group consisting of the President, senior executive branch officials, and six members of Congress (the Speaker, President pro tempore of the Senate, House Majority Leader and Minority Leader, and Senate Majority Leader and Minority Leader). I am uncomfortable with this approach for several reasons. First, however valuable and useful interbranch consultation can be, it is never a substitute for legislation that specifically authorizes a presidential military action. Presidents may decide to meet with lawmakers whenever they like. I would not add the Consultative Group to the bill to give it statutory credibility.

Second, the decision to take the country to war is set aside *for each member of Congress*, from the Speaker to the newly elected lawmaker. On a decision of that gravity, every member is equal. No member has rank or special power.

Third, a President and his executive aides should not be able to co-opt a small group of lawmakers, who might "sign off" on a military commitment and thereby pledge House and Senate support. The most recent example of that danger is the "Gang of Eight" that appeared to be supportive of the NSA surveillance program. Congressional leaders lack authority to imply or grant congressional support for a military operation. That decision is reserved to each member of Congress, including the most junior.

Fourth, the group of six members named in H. J. Res. 53 contains no lawmaker from a committee with primary jurisdiction and therefore substantive knowledge (including Judiciary, Armed Services, Intelligence, Foreign Affairs/Foreign Relations, and Appropriations). Adding those names would make the group too large and unwieldy.

For the reasons stated here, I would not support any type of standing joint committee to monitor military plans (sometimes referred to as a War Powers Committee). The decision to go to war is for all of Congress, not for a subset of the legislative body.

VII. JUDICIAL REVIEW

In Section 8, H. J. Res. 53 states that any member of Congress may bring an action in federal district court for declaratory judgment and injunctive relief on the ground that the President did not comply with a provision of this joint resolution. I am always uncomfortable with this type of provision.

Instead of acting directly to defend legislative powers, it will be tempting for lawmakers to believe that judicial relief is available and to count on successful litigation. Only one branch was meant to protect congressional power: Congress. Lawmakers should not look elsewhere for support and assistance.

No one knows if a federal judge will side with the President. That would be the worst outcome for Congress: the President claiming independent or "inherent" power to conduct a military operation and a district judge agreeing. Of course that decision could be appealed, but why have a presidential-congressional dispute fought out in the courts while a war is underway?

The record of this kind of litigation is that 20–30 members will go to court objecting that the President has violated statutory policy or the Constitution, 20–30 members will file a separate brief denying any illegal action by the President, and the judge will view this as an intramural fight making judicial involvement extremely unwise. The court is very likely to tell the congressional litigants: "get out of court and resolve the issue through your own institutional powers by cutting off funds, etc. Only at that point will the dispute be ripe for judicial consideration."

CONCLUSIONS

H. J. Res. 53 is an important step in safeguarding not only the powers of Congress but the constitutional system that protects individual rights and liberties. The framers put their faith not in an all-wise, all-knowing Executive but in a republican form of government where sovereign power remains with the people and their interests

are protected by the structure of separated powers and the operation of checks and balances.

Mr. DELAHUNT. Thank you, Dr. Fisher.

And I guess—do we have votes? No.

We are going to do Mr. Fein before we——

STATEMENT OF BRUCE FEIN, ESQ., THE LICHFIELD GROUP

Mr. FEIN. Thank you, Mr. Chairman. I will heed Dr. Johnson's wisdom about Milton's Paradise Lost. Despite the dazzle, none ever wished it were longer.

Why are we here today? The destruction of republics has invariably been excessive resort to war. When the Roman Senate voted a dictatorship in 28 B.C. in furtherance of war, that was the seed of the sack of Rome by Alaric the Great. It was James Madison who recognized that. A republic and perpetual warfare are irreconcilable.

Mr. Chairman and members of the committee, we are at present in the United States in a state of perpetual warfare. The definition of war against al-Qaeda and international terrorism has no end point. No one has even been able to conceive of a benchmark that says, The war is over.

So these are perilous times, even though it is not like standing at a precipice and jumping off. We have set in train institutional thinking about the Constitution and emergency powers that are the seeds of destruction of freedom.

I want to go back to the basic issue that you have raised today, what does the Constitution say about this? Exceptionally important because you all have an oath to support and defend the Constitution. Like the President, you have no options. Indeed, that is the only option you have under the Constitution. You don't swear to defend the Republican or Democratic Party. You don't swear to defend a new modern idea of what the Constitution ought to look like. It is the Constitution intended by the Founding Fathers that is binding.

Even if you couldn't necessarily obtain a court injunction to enforce that binding moral obligation, it is still binding on you nonetheless, as a matter of conscience. And there is very little dispute that the clearest provision in the Constitution does relate to the power to initiate warfare, confided to the Congress of the United States. And that was the consensus of every prominent Founding Father, ranging from James Madison at the Convention and, afterwards, James Wilson, who was also at the Convention and later Justice of the Supreme Court.

Chief Justice John Marshall, the first Chief Justice, who opined on these powers, made it very clear: The power is vested in Congress to decide on war or not. Indeed, think also of George Washington. It was said that there were problems during the Revolutionary War of a Continental Congress which was a collective of both legislators and executive officials, because there wasn't a distinction between the two at the time. He knew of the vexations of collective leadership in war, he was the general.

And yet he was the President of the Constitutional Convention. He sat and heard every moment of the debate there. And he never once insinuated, No, we need to change the wording of the Con-

stitution to make sure that a President, like him, is the one who will make a decision unilaterally to go to war because it needs energy. We can't tolerate laxness or slowness. And he knew because he was the Commander in Chief of the army at the time we had a collective Executive in government.

So the Constitution is absolutely clear on the matter. And I do not think it helps things to say, "Well, sudden attacks which were authorized by the President, understood by the Founding Fathers to be permitted, really in modern day doesn't mean an actual attack which has ocular evidence that convinces everyone it occurred." It now means just perceived imminent attacks without any ocular evidence that it will occur.

If that is the standard, it means the President then can invade any country at any time in any place, say, "I needed a preemptive attack because the risk was not zero that they might not attack. Hugo Chavez, maybe he will buy a missile from North Korea and launch it tomorrow; I guess I have authority to go in and throw him out."

The Founding Fathers understood, as Louis Fisher explained, all of the incentives of an Executive to contrive danger to initiate warfare because that is what gave the Executive more power over spending, gives the Executive more secrecy, the opportunity for fame, et cetera. And that was what history had taught.

Moreover, there hadn't been cases where legislative entrustment of this power resulted in a disaster. Where is the case in history where a country suffered from fighting too few wars? Too few wars? None. It is too many wars that bring countries down.

Now you can always contrive exceptionally remote circumstances that might justify a President taking unilateral action, maybe even in defiance of a congressional statute. And that was addressed by John Locke in his Second Treatise of Civil Government, where he explained in those circumstances an Executive may go beyond the law, but then he is subject to congressional or legislative review, to ratify what he has done if they think it is in the public interest or to condemn it if it is not. And, of course, we have one experience, if not more, with that in the United States history.

You all recall the decision of Abraham Lincoln unilaterally to suspend the writ of habeas corpus during the Civil War. This got into court and at a circuit level, Chief Justice Rogers Brooke Taney said, "No, you need the consent of Congress." And President Lincoln did not obey that. He went to Congress, explained what he had done. And in 1863, Congress retroactively ratified President Lincoln's actions.

So these extraordinary cases can be handled on a case-by-case basis. They do not justify warping the clear intent of the Constitution.

Even if that is not true, the Constitution says, "If these provisions become obsolete, the way you change them is through amending the Constitution." You don't have a living, breathing amendment process that goes through no formal deliberation or debate. Indeed, that was one of the hallmarks of the Reagan administration approach when I served there. The original intent of the Constitution governs no penumbras, emanations and that sort of thing; and there is not a single syllable in the Constitution that insinu-

ates the President is to have authority to decide if cause of war exists.

I believe that the genius of the Jones approach to amending the War Powers Act is this: It puts the benefit of inertia in favor of peace and against war; that is, it says, if Congress doesn't enact an appropriations measure that says, "You are authorized, Mr. President, to initiate warfare in X–Y–Z," he has no money to expend, to combat, to enter the military into combat.

And if Congress doesn't act, he has no money. The President can't veto inaction on a spending bill. That is what makes this have teeth where the previous measure did not.

Moreover, under the Anti-Deficiency Act, if the President or some of his subordinates spend money on combat that is not authorized, he then is committing a crime, which would concentrate the mind wonderfully for those who are thinking on conducting warfare outside of the appropriations power of Congress.

Now it is said that this would be unwise, that once warfare is initiated, that is the end of the matter for Congress. And it is certainly true that Congress should play the decisive role to enter into combat. But that doesn't end the matter.

You may recall in Vietnam after the Gulf of Tonkin Resolution, it was this Congress through the appropriations powers that said, You are not going to put military troops in Thailand; you are not going to extend the Vietnam War into Laos, into Cambodia.

And indeed when President Nixon had made a promise to President Thieu that, after the 1973 Paris Peace Accords, he would come to defend South Vietnam in the event that the Accords broke down, Congress said, "You don't have any money to do that." And they passed a bill that said, "There is no money to re-enter or engage in combat in North Vietnam, South Vietnam, Laos or Cambodia." And all of those were accepted and no one has insinuated this was a disaster, this was a catastrophe. Right now we have cordial relations with Vietnam.

And I want to address right now, perhaps, in my judgment, the most critical element here for the United States as a superpower in the 21st century. And it is, are we in danger of fighting too few wars? Congressman Rohrabacher suggested, well, Congress is oftentimes dilatory and irresolute. But I would suggest, well, where is the harm? Suppose that we didn't enter Bosnia and Kosovo; would that mean the sovereignty of the United States would be threatened?

There are all sorts of disasters around the globe. You can read about them every single day, whether it is in Sudan, or whether it is in Rwanda, or whether it is in Nepal, or otherwise.

The obligation of the President and of this body is to protect the interests of the United States and the United States citizens, not to become an empire. And this Congress is the best reflection of what the United States' interests require. And I would defy anybody to suggest a situation where the President took unilateral action and said, "Oh, if we weren't there, it would have been a disaster for the United States and we would have all fallen."

That is not the history of the warfare. And the United States, fortunately, has enough defense authority and technology to make certain nobody attacks us and succeeds.

Thank you, Mr. Chairman.
[The prepared statement of Mr. Fein follows:]

PREPARED STATEMENT OF BRUCE FEIN, ESQ., THE LICHFIELD GROUP

Dear Mr. Chairman and Members of the Subcommittee:

I welcome the opportunity to share my views on the Constitution's distribution of war powers in the 21st century or otherwise. In particular, I will focus my attention on the interaction between Congress, the President, and the judiciary in decisions to send the United States military into combat against either state or non-state actors like Al Qaeda. I will also examine the relatively pellucid intent of the Founding Fathers to entrust to Congress decisions over war because they feared the President would be inclined towards adventurism fueled by concocted dangers to aggrandize executive power. I conclude that the Constitution assigns ultimate authority over war to the Congress if it chooses to exercise the responsibility; that the Supreme Court would enforce congressional restraints on the President's power to employ the military in combat, for example, prohibiting the expenditure of any funds to invade Iran or bomb its nuclear facilities; and, that the President's defiance of a congressional war limitation should expose him to impeachment for high crimes and misdemeanors. I also believe that H.J. Res. 53 sponsored by Congressman Walter Jones is the correct constitutional and prudential framework for the exercise of war powers.

I. ORIGINAL INTENT

The Founding Fathers intended that Congress make decisions to initiate military hostilities against a foreign nation. The President was confined to waging wars authorized by Congress; and, to repel sudden attacks without awaiting congressional authorization when time was of the essence. The Constitution is not a suicide pact. After Pearl Harbor, Congress voted to recognize a state of war created by Japan and authorized the President to respond with military force. President Franklin D. Roosevelt did not claim unilateral authority to respond even though the death toll approximated 9/11.

Authoritative quotations to support the original understanding that the authority to initiate war measures lies exclusively with Congress are endless. Only a few will be supplied as a concession to the shortness of life. James Madison, father of the Constitution, declared that, "The executive has no right, in any case, to decide the question whether there is or is not cause for declaring war." James Wilson, an influential voice at the Constitutional Convention and later Justice of the United States Supreme Court, echoed: "It will not be in the power of a single man, or single body of men, to involve us in [war]. . . ." Alexander Hamilton, the loudest voice for a muscular executive, belittled the Commander-in-Chief power of the President as follows: "It would amount to nothing more than supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; While that of the British king extends to declaring war and to the raising and regulation of fleets and armies."

The original intent of the Founding Fathers over war found expression in the Constitution's text in three separate provisions. Congress is expressly authorized to declare war. Congress is entrusted with the power of the purse, which prevents the President from sending a single soldier into combat unless supported by a congressional appropriation. And Congress is crowned with power to enact laws "necessary and proper" for the execution of every power, including the war power, vested by the Constitution in any department or agency thereof, including the White House. In the nation's early semi-war with France, Congress limited President John Adams' authority to seize ships to vessels departing to French ports, but not to ships leaving France. The limitation was upheld by the Supreme Court speaking through Founding Father John Marshall in *Little* v. *Barreme* (1804). Chief Justice had earlier written for a unanimous Court in *Talbot* v. *Seeman* (1801): "The whole powers of war being by the Constitution of the United States invested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry [into the application of the laws of war]."

The Founding Fathers knew more about human nature and abuses of government power than any other constitutional architects in the history of mankind. The reasons they elaborated for seeking to construct a steel fence around the President's authority to initiate military combat remain more forceful today than at the time of the founding. At present, the United States is the globe's sole superpower. The President's temptation to initiate combat against any foreign country is at its high-water mark because the threat of serious retaliation but from Russia or China is

slim. In contrast, in 1787, the United States ability to project military power abroad was inconsequential. The temptation for the President to initiate war against foreign nations was comparatively slight because the probable immediate and adverse consequences were daunting. It speaks volumes that Congress, not President Madison, hurried the nation into the War of 1812 against the British.

The incentives for the President to inflate danger to justify resort to war are manifold were amplified by James Madison in 1793—wisdom that has been confirmed by the ages: "In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department. Besides the objection to such a mixture to heterogeneous powers, the trust and the temptation would be too great for any one man; not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war, physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, honors 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 honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.

"Hence is has grown into an axiom that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence."

Madison omitted an additional irresistible presidential motivation to war: to elicit immediate patriotic support to boost his political standing.

In the United States, President James K. Polk lied about the deaths of American soldiers at the hands of Mexico to justify the Mexican-American War. President Roosevelt lied about Nazi submarine attacks on American vessels in hopes of hurrying the nation into World War II. President Lyndon Johnson lied about North Vietnamese attacks on two navy destroyers to obtain congressional enactment of the Gulf of Tonkin resolution. President George W. Bush lied about weapons of mass destruction in Iraq to justify invasion and a seemingly endless United States occupation. President Bush has similarly exaggerated the danger of Al Qaeda logarithmically to the equivalent of Lenin, Stalin, Trotsky, Hitler, Hirohito, and Mussolini to justify perpetual warfare against international terrorism. Since 9/11, there have been approximately 150,000 murders in the United States without provoking cries of hurling the military into combat against would-be murderers. Madison admonished that, "No nation could preserve its freedom in the midst of continual warfare."

In sum, it is crystal clear that the Constitution assigns exclusively to Congress decisions as to whether to initiate warfare. But under the Supreme Court's ruling in *INS* v. *Chada* (1983), Congress may not use a legislative veto mechanism to force withdrawal of American troops from hostilities, as was attempted in the War Powers Resolution of 1973, section 5(c).

II. HISTORICAL PRACTICE

In practice, no President has waged war without the express or tacit approval of Congress. Although Congress has officially declared war on only five occasions, no President has employed the military without money set aside for that purpose by Congress. The power of the purse is invincible because it requires affirmative action by Congress to enable the President to wage war. If Congress does nothing, the President is powerless. The President cannot veto inaction. Congress, moreover, knows how to handcuff the President. During the Vietnam War, Congress wielded the power of the purse to prevent its extension into Laos, Cambodia, and Thailand or a re-engagement in combat after the Paris Peace Accords of 1973. The Joint Resolution Continuing Appropriations for Fiscal Year 1974, for example, stipulated: "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia." The Clark Amendment ended funds for covert action in Angola in 1975; and, was repealed a decade later.

Regarding contemporary war issues confronting the nation, it is clear that Congress would be acting constitutionally if it prohibited the use of any funds to support the United States military in Iraq other than to execute a withdrawal consistent with the physical safety of United States military personnel. Ditto with regard to

the expenditure funds of the United States in Afghanistan except to withdraw American troops. And it would be equally constitutional for Congress to prohibit the President from expending any monies of the United States to attack Iran militarily, including the bombing of its nuclear facilities.

In sum, Congress holds the constitutional authority through the power of the purse or otherwise to make every serious decision concerning the use of the military in combat operations. Moreover, the United States Supreme Court would be available to enforce power-of-the-purse limitations by injunctive relief, as was done in the preliminary stages of *Schlesinger* v. *Holtzman* (1973). A member of the military or the House of Senate as a body would have standing to challenge the President's defiance of a military spending limitation. In addition, Congress could make violations of the Anti-Deficiency Act strict liability felonies punishable by up to five years imprisonment. And Congress might pass a concurrent resolution expressing the sense of Congress that a President's violation of a congressional spending limitation on the use of the military in combat operations should be treated as an impeachable high crime and misdemeanor justifying the President's trial and conviction in the Senate and removal from office.

III. PRESIDENTIAL PREEMPTIVE WARS

It might be argued that the President's constitutional authority to repel sudden attacks should extend in modern times to preemptive warfare in the name of preventing an attack—even when Congress has explicitly prohibited funds for that purpose—because the world has shrunk geography and time through technological advances. The President should not be required to expose the nation to a second edition of 9/11 before responding to international danger. But the Constitution offers no support for unilateral presidential preemptive wars. If modern technology has changed the nature of war and international danger, then it is up to Congress to adapt to the change by authorizing preemptive wars with proper congressional guidelines. The broad power of Congress to delegate authority to the President in foreign affairs or national security has been repeatedly ratified by the Supreme Court.

IV. BOGUS SUPERIOR WISDOM OF THE PRESIDENT IN CHOOSING WAR

As noted above, Congress could constitutionally delegate its war powers to the President. Many urge that delegation on the errant belief that the President wisdom is superior to congressional wisdom in decisions to initiate war.

The President admittedly has access to secret intelligence that is not generally available to Congress. Further, only the President commands a national as opposed to a local constituency which avoids parochial distractions. The first advantage, however, is vastly overrated. Most strategic intelligence pivotal to deciding whether to initiate warfare is in the public domain. No spies were needed to discern Hitler's intentions prior to his invasion of Poland. And history is inconclusive as to whether presidential initiatives for war have been superior to what might have occurred had Congress been in the driver's seat. The Bay of Pigs invasion of Cuba proved a disaster. The Vietnam War proved a fiasco. The use of the military in combat in Lebanon and Somalia proved ill-conceived. The ongoing United States quagmires in Afghanistan and Iraq are undeniable. It is difficult to conceive of a greater folly than the Bush administration's conviction that a people with a history of four thousand unbroken years of despotism and centuries of religious and ethnic antipathies could be transformed into a unified democratic nation overnight at the point of a bayonet. President's repeatedly stumble in war for twofold reasons: intellectual endogamy; and, the incentive to initiate combat without cause to accumulate executive power and to boost immediate popularity. Congress is not infallible. Its Neutrality Acts during the 1930s may have been wrongheaded. But in deciding on war, the slowness of Congress is more often a virtue than a vice. It permits time to contemplate exit strategies and to assess the true nature of the asserted foreign threat. United States soldiers should not be required to risk that last full measure of devotion without a thorough vetting of all the alternatives and public discourse. That is a core feature of government by the consent of the governed.

V. WHAT SHOULD BE DONE?

The Founding Fathers intended to create high hurdles for entry into war because of its threat to the maintenance of a Republic. James Madison lectured: "Of all the enemies of public liberty, war is perhaps the most to be dreaded because it comprises and develops the germs of every other." He further amplified: "If Tyranny and Oppression come to this land, it will be in the guise of fighting a foreign enemy." H. J. Res. 53 establishes the proper equilibrium of war powers between Congress,

the President, and the Supreme Court. It should be enacted and strictly enforced. Congress should be highly skeptical of any claimed need to initiate warfare.

The greatest danger to any Republic is that it will fight too many wars, not too few. Just ask the Roman Senate which bowed to dictatorship in 44 B.C. amidst endless conflict and chaos.

Mr. DELAHUNT. Boy, that was perfect timing because we have to recess for a vote.

My understanding is there is only one vote. And that is the last vote of the day. If you could indulge us, we will come back within, say, 15 minutes and we will try to wrap up rather quickly.

Your testimony collectively was terrific.

And we shall return.

[Recess.]

Mr. DELAHUNT. I am just trying to get Mr. Rohrabacher's attention.

Let me say thank you to all of you for indulging us. I don't think our other colleagues are going to be returning. Why don't I just go right to Dana for his questions? We are going to try to make this brief.

Let me ask you—or let me make a request, which would be to return maybe separately, independently in the course of the next 3 or 4 months because we—the committee will make an effort to navigate the shoals of this particular issue. But it is of such consequence and importance, I really feel a profound commitment to make the effort.

Without being—being a pragmatist, I recognize that there is diversity of opinion, as evidenced by your testimony today, some more clear than others. But even once we make an effort to get into the weeds, so to speak, we are going to need the collective wisdom that you offer us.

So we will be reaching out, and you can be assured that there will be requests for you to return to the committee on this issue and those that are—where there is a clear nexus and where—Michael Glennon and I both talked about where we are heading in terms of the expiration, or the purported or intended expiration, of the U.N. mandate come December 31, 2008, and its applicability to the use of American military forces in Iraq subsequent to that. He takes a very clear position that even the U.N. mandate is insufficient as a legal basis.

But I think it is very, very important, because I think—I don't think, I know that this will become an issue of some attention over the course of the next 6 months. It has already emerged as an issue among the remaining three Presidential candidates. So I think it will be important for this committee and other committees in the Congress to address it.

But with that, let me turn to my friend from California.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. I will have to leave at 5:10 in order to catch my flight back to California. So I appreciate you yielding the first question in the session to me.

And a few things, a few observations: Number one, I appreciate in-depth discussions. I think that is important. I think it is establishing—people's philosophical basis is important to making decisions that are fundamental to the makeup and the character of the United States of America. And all too often we are just only fo-

cused on the pragmatic, which I think leads us to long-term problems that are much greater than what we need to do.

So I am very pleased that we are talking about fundamentals here. And let us proceed with that.

Let me note that I believe, Mr. Fein, I would disagree with your historical analysis that if the Romans just would not been so aggressively involved, they wouldn't have been sacked, which is, in essence, I believe what you were saying, they shouldn't have sent all those legions out there. And when they decided to go out there and get involved, that is when the barbarians determined, "Hey, let's go get those Romans."

No, I don't think that was it at all. My reading of history is that very wealthy but weak societies lose.

Mr. FEIN. If I could explain, I think what I was pointing at, what James Madison recognized, it is the war that sets in train the destruction of liberties and freedoms, that destroys the architecture of the government itself, that leads over a long period of time to something of that sort.

Mr. ROHRABACHER. When the knives went into Julius Caesar, Julius Caesar comes back, and nobody was willing to stand up to him except to stab him to death rather than to go through what was—we can have a long talk about history later. But let me just note, I believe that the sacking of Rome was due to weakness and not strength. And that is just a position that I would have.

We are talking today, it is interesting all of you are—now, Mr. Fein are you a lawyer?

Mr. FEIN. Yes.

Mr. ROHRABACHER. Okay. I think you are all lawyers.

Mr. FISHER. I am a political scientist.

Mr. ROHRABACHER. A political science professor, okay.

Whew, for a minute I thought we were going to be surrounded by lawyers.

Mr. DELAHUNT. You are surrounded by lawyers.

Mr. ROHRABACHER. At least I have one person there.

In looking at these issues, as I say, you are going into depth and you realize that lawyers go on and on. And there is always another layer. And you know somebody told me that lawyers are the only people in the world that can write a 500-page document and call it a "brief," for Pete's sake. So, unfortunately—I am a former journalist which means that my depth of knowledge is about that much on that number of issues, but it ain't that much on anything. So you are all experts that much, and I certainly respect that.

So let me get into a few questions about—in-depth on this particular issue.

Let me go to the point, I guess—Mr. Lobel was making, I believe, that is saying—it might have been you, but I think it was Mr. Lobel was suggesting that we should not have to require—the law should not require an action, an actual action by Congress in order to enforce its rights that are by law restricting the executive branch.

I don't believe—was that your point?

Mr. LOBEL. Yes. My point is that what the Constitution says—it is not just my own view—is that before we go to war, the Congress has to do something. If the Congress is silent for whatever

reason, or confused, muddled, they don't want to do anything, it means under the Constitution that we ought not to go to war.

Mr. ROHRABACHER. Is any use of military action "war"?

Mr. LOBEL. Yes. My point was that what I think the Constitution means by "war," as well as this point on letters of mark and reprisal, any offensive hostilities against another country.

Mr. ROHRABACHER. So any of that hostility, from what you are saying, would require this declaration of war?

Mr. LOBEL. No, no. It would require congressional authorization.

Mr. ROHRABACHER. Okay. But the Constitution doesn't say declaration of war and we have a right to declare war. And I am just suggesting that the author of the Constitution, if I am wrong—I think it was Madison who sent these ships off to fight in Tripoli.

I am not sure. I guess it was Jefferson maybe.

Mr. FISHER. Could I comment on that? Both Jefferson and Madison understood they had to come to Congress for authority, and there were 10 statutes passed to authorize what Jefferson and Madison did with the Barbary pirates.

I just wanted to say that I agreed with Jules that the Constitution is written in such a way that the only branch able to go from a state of peace to a state of war against another country is Congress. And Jules and I both agree that you shouldn't let a President do that because then you have Congress trying to get out, and we all know how difficult——

Mr. ROHRABACHER. That is why I reject the idea that any use of military force overseas is basically within Congress' power of war.

I will suggest that, number one, Jefferson did go to Congress and Madison did go to Congress when it came to the Barbary pirates. However, once that turned into our country's first fiasco in the Middle East, if you read about that, which I am sure some of you have, it had turned into a total fiasco.

I think it was the *Philadelphia*, one of our great warships—we only had five at the time—ran aground and all of the sailors were captured by the sultan then in Tripoli. At that point, Jefferson did what? Do you know what he did? He launched a covert operation with what has to be the equivalent of the CIA of that day and the military where he sent in Marines and a covert operator to go on a plan that was not approved by Congress ahead of time. And that is Jefferson and Madison.

Now you show me the congressional approval of the William Eaton mission that eventually captured over half of Libya and set up the situation where our prisoners were actually negotiated for and then we got out. If it wasn't for Eaton, that negotiation would have never gone anywhere.

So that seems to me to have the author of the Constitution, Thomas Jefferson, say, yes, the President of the United States can have operations overseas without having first approval by Congress.

Mr. FISHER. I think a lot of us are concerned—you are correct in saying that there are 150 or 200 examples of use of force without Congress either authorizing or declaring it. But I think we are concerned about the large wars. And the record is, from 1789 up to 1950 with Korea, all of the major wars were either authorized by Congress or declared by Congress. And now we are in the position

that the President is claiming they can go to the U.N. Security Council, can go to the NATO countries.

Mr. ROHRABACHER. I think what the argument is—and I am going to let Mr. Williamson argue this case—is that when we authorize—when we appropriate money for the military, it does not require an action on our part. If we just refrain from appropriating money that can be spent in that theater of operation, it is very clear we have the power to defund and, thus, force the President not to engage in that military action.

Mr. Williamson, would you like to expand on that?

Mr. WILLIAMSON. I would like to comment on a couple of the things that have been said.

One, Jules's last formulation of the President's power included the word "offensive," which is a dramatic change from anything I think that anybody is going to argue here.

Second, declaration of war is clearly not code for "use of force." And to Lou Fisher's comments, that is, a question of going from a state of peace to a state of war, I assume by that he means declare war. Those are not the two options. There are wars, there are hostilities that are not necessarily declared wars. We have had—you have said that no uses of force—you said, no wars prior to the Korean War without authorization of Congress; there were over 200 uses of force without authorization of Congress.

Mr. ROHRABACHER. I would suggest that, again, if we can focus on legalisms, which was a part of what we are here for, specific legislation and specific changes.

I do think it is significant that the Supreme Court has shied away from this, and—leaving Congress to be able to—realizing that Congress has this power. Anytime Congress wants to exercise getting out of Iraq, we don't even have to act. All we have to do is refrain from appropriating money for Iraq, and it ain't happening.

It is easy to try to blame it on some flaw in our system. That is just not the reality of it.

One last point, and then I will be happy to let you get into that. And that is, I think this discussion comes down to whether or not—and I think Mr. Fein really put it well as to what—how active we are going to be overseas.

And it is easy to talk about perpetual war. I think that that—yes, that is a very good phrase. When I was a speechwriter at the White House, I am sure I would have enjoyed coming up with phrases like that.

But let's look at the reality that in the world, it has been—the world is a place of perpetual threats and perpetual what? Perpetual conflict. That doesn't mean we have to be involved in every one of them. But if we are going to be involved and if we are going to have an impact, hopefully for the better, for the good, that will put us in a situation where we come up against evil things and evil forces in the world.

There is a saying: You cannot champion the oppressed unless you are willing to take on the oppressors. We can't be against terrorists unless we are willing to be involved and actually take those steps that will prevent them from having the leverage they need to kill our people.

Mr. FEIN. Mr. Congressman, it is not just a talking point. You raised an issue with me, Mr. Congressman. We are in perpetual warfare. No one has suggested the war against international terrorism will ever end. No one is insinuating, including yourself, benchmarks that say the war has ended.

Mr. ROHRABACHER. No, no. I am. I suggest if you look back in history, you will find that radical Islam has had cycles, and you will find it—you know, listen, I do not read fiction. The only thing I read is history. And you will find that there are cycles. And until something is—until a force of radical Islamism is confronted, it expands. This is what has been happening for 500 years.

And it is not true, we are in perpetual war; we are facing one of those cycles. Either we will be involved in a way that will protect us or we are going to be involved in a way that doesn't; or we are going to become so bureaucratic in our approach that we do not have the leeway to confront this in the modern era.

Mr. FEIN. When will the ocular evidence appear that says, now the war against radical Islam is over? When will we know?

Mr. ROHRABACHER. Well, we will know in Iraq when we can actually get out and the Iraqis have stepped up. And if not and we get out and they haven't stepped up and a group of radical Islamists who hate the United States take over, then we will know we have lost the war in Iraq, and we have lost that leverage that we would have had if there was a pro-Western government there.

Mr. DELAHUNT. Would the gentleman yield to me? Would the gentleman yield for a moment?

Mr. ROHRABACHER. Sure.

Mr. DELAHUNT. I am glad that the gentleman has defined the war against radical Islam strictly to the geographical boundaries of Iraq. I don't think that that is what he intended.

Well, that is one. The next is Iran and the next after that will be Pakistan, and you know, I think that—I think the point is——

Mr. ROHRABACHER. It is never ending. You are right. That would be a never-ending scenario.

Mr. DELAHUNT. And when the gentleman talks about good versus evil, would the gentleman agree that at least this body should have the choice as to which evil we will focus our efforts? I mean, Saddam Hussein certainly was not anyone to be admired, but we currently have some allies that certainly don't fit into the category of warm and fuzzy teddy bears.

Mr. ROHRABACHER. Right.

Mr. DELAHUNT. You know, one can think of Islam Karimov where—I think it was Admiral McMullen recently visited to discuss maybe utilization of an Air Force base. In any event, I think it is much more interesting for us to hear from them.

Mr. ROHRABACHER. Karimov, I know Karimov. And I am very happy that after 9/11 our military was going to try to come into Afghanistan from the southern border and using the Northwest Provinces as their staging area for heavy divisions; that I played a role in talking to Mr. Karimov and getting our Government aimed at the city of Termez, and Mr. Karimov allowed us to use that base of operations to help the Northern Alliance retake Afghanistan from the Taliban, who had been using Afghanistan to slaughter thousands of Americans.

However, later on, Mr. Karimov—you know, I told him all the time that we believe in democracy, and later on when Karimov did not participate in reform and actually started going the wrong way, I personally was the first one to step up and say he should step down. And we lost our base. But that was after we had driven the Taliban out.

Mr. DELAHUNT. And I am sure it was after he committed the massacre of some 1,000 innocent civilians in Andijan.

Mr. ROHRABACHER. That is right.

Mr. DELAHUNT. Atrocities that rank him in the hall of fame of thugs and terrorists.

Mr. ROHRABACHER. With this said, it was a good thing that we were able to use Karimov's territory to drive the Taliban out of Afghanistan; and the thousands of people that he had killed, that was exactly why we shouldn't have a long-term relationship with him.

Mr. DELAHUNT. As we allied ourselves with Saddam Hussein from 1980 to 1988 and thwarted a United Nations resolution condemning him for the gassing of Iraqi Kurds in Halabja. I think that, our colleague, we should end——

Mr. LOBEL. Mr. Rohrabacher, you say that we are really in a state where there are all sorts of threats out there. We are really in a state of not perpetual war but perpetual threat. And if you let the President respond to any threat that he sees as important, crucial to our national security, you are letting the President go to war whenever he wants to.

For example, Iran, will we allow the President to say, "I am going to go to war with Iran without even talking to Congress, without getting Congress' approval."

Mr. ROHRABACHER. Let me put it this way: The President understands there is a nuclear bomb about to be delivered somewhere, yes, the President has the right to use military force to stop that nuclear bomb from getting to Los Angeles.

Mr. LOBEL. I will grant you the nuclear bomb situation. Let's deal with reality.

Mr. ROHRABACHER. No, no. That is the reality today.

Mr. FEIN. Suppose he gets it wrong, Mr. Congressman, like he got it wrong on weapons of mass destruction in Iraq? What do you do then?

He got it wrong. He unilaterally decided to place us on a war footing where he could kill tens of millions, and he gets it wrong. The President is not infallible. That is what Madison understood.

Mr. ROHRABACHER. That is correct. But unless anyone at this table can say, "I can guarantee you, for the next 10 years there is never going to be a rogue state, a terrorist state like Iran, that will have possession of a nuclear weapon and will be planning surreptitiously to kill Americans with it."

Can any of you guarantee me that? Of course not.

Well, that means the President has to be able to use military force rather than having a bureaucratic government decision here. And, by the way, if this thing that he commits to, to try to get that bomb or whatever, it is lasts a certain length of time, we can defund it in the Congress. You can just pass a resolution; no more funds will be used by this President to fund this operation.

Is that correct, Mr. Williamson?

Mr. WILLIAMSON. I certainly agree with you.

Mr. FISHER. I think you know once you defund the military operation, people will say you are not supporting the American men and women, you are leaving them defenseless. And we have heard that debate for a long time.

Mr. ROHRABACHER. Okay. Look, but if somebody doesn't have to guts to stand up and actually debate the issue honestly, don't tell me we need to change our laws around and set up all sorts of bureaucratic mechanisms. Just say, hey, the Congressmen don't have guts enough to stand up when the President is wrong.

And, by the way, these arguments about Bush being wrong on that, I never used that particular argument about nuclear weapons. But—I have supported the operation, admittedly, but the fact is, anytime—anytime the Congress could have said, we are no longer appropriating any money, in fact, they could pass a resolution, an emergency resolution, saying, no money currently being spent will be spent for this military operation.

Why do we need to change the constitutional structural as it is now, or the structure that we have between the legislative and executive branch, if the option that is there is not being used.

Mr. FEIN. Because it seems to me there are a couple of answers. One, with regard to the hypotheticals, John Locke addressed that. He said if the President has enough guts to know what he does is in the public's interest despite the congressional law, he goes ahead and does it and gets ratification after the fact. That is what Locke says.

And if the President doesn't have enough guts to trust that the American people and the Congress will believe he acted in the public interest, he shouldn't be President.

Then the—then the second issue——

Mr. ROHRABACHER. I am with you.

Mr. FEIN. The second issue is, it is not always good enough after a calamity has begun to act after the fact.

Suppose the President starts unleashing bombs galore in Tibet because he thinks that the Dalai Lama is being oppressed there; and then the remedy is to say, all right, well after you have provoked a nuclear exchange with China, then the Congress is going to come in after the fact? The Founding Fathers wanted to prevent that decision at the outset.

Mr. ROHRABACHER. Well, obviously that is a totally ridiculous analysis. I mean, it is totally absurd to say the President is going to bomb Tibet because he thinks the Dalai Lama is bad.

The bottom line is this: There are realities, and yes, we have to deal with them. Yes, there are many questionable areas of whether or not, you know, what should be done, and should we trust the President's decision and the executive branch decisions more?

I think that in this world, right now, I can be persuaded on the other side. I can be persuaded because I do believe in liberty and justice and the American democracy and not supporting the Karimovs in the world and everything like that. But I know that I don't believe Rome was sacked. It comes right back down to, I don't believe Rome was sacked because it was too involved in the world and too strong. It was just——

Mr. DELAHUNT. The question, if the gentleman would yield, the question is, Is my friend willing——

I think—with the exception of Mr. Williamson, I think the panel may agree with me when I say that—is the gentleman suggesting that the constitutional scheme, the constitutional order that was designed by the Founders ought to be abrogated because of exigent circumstances, or it makes it a lot easier to do?

My sense is that the Founders in the course of their debates were very uneasy with power residing in a unitary Executive. I am also. And I think much of what we have seen that I disagree with over the course of the past 7 years is a result of that particular view of the constitutional order.

I think—I do agree with the gentleman and with others on this panel that we have failed. This institution has failed. We have not accepted the responsibility, and that is why in my opening remarks, I talked about a culture. And that has to be influenced—and that has to—and I think these kinds of hearings are little pieces of an effort to impact that culture. And the forthright statements and testimony that has been given here today adds to that.

We need this badly, this debate. This is the beginning, I hope, of congressional courage because I think it was former Congressman Mickey Edwards who said, this is not about congressional prerogatives, it is a burden, and we can't keep ceding it to the Executive. Whether that Executive be Republican or Democrat is irrelevant; this is about the constitutional order. And to suggest that we can do something simply by—well, we can always stop it after the—what gets out of the barn? The cat gets out of the barn or the cow gets out of the barn?

Thank you. The gentlewoman from Texas knows all about cows.

But that is the point. I mean, you talk about bureaucracy. Well, you know what? You are talking about—Congress is described in many ways, but it is certainly not a bureaucracy. And I think it demeans the institution to say that, well, you know, if you can't do it—but the Executive is aware of all of the threats that are existential in terms of our national security.

I have to tell you, I haven't been impressed with the decision-making process in the course of the past 7 years. And I recognize the fact that the Bush administration came and did seek and secured congressional authorization, so I am not debating that.

Mr. ROHRABACHER. If I could, I have to go catch a plane for California. It has been a very great discussion, and I am looking forward to our next series of hearings. And I am sorry that I can't be here for this exchange because I think it is very valuable. So thank you very much.

Mr. DELAHUNT. Thanks. Bon voyage. Safe trip.

Dr. Fisher.

Mr. FISHER. Mr. Chairman, you speak of the last 7 years. I would say another parallel is how we got into Vietnam. I think all the records we have of the conversations by, particularly, Lyndon Johnson and others, they were not going into that war for the national interest. They had concerns, the Democratic Party, that they would look weak on communism. And Republicans had concerns.

So we are not going to war in the executive branch with any thought of what is in the national interest. The Framers would

have understood that perfectly; they knew that people in the executive branch go to war for a lot of reasons, and they hardly ever have anything to do with the national interest.

Mr. FEIN. And, in fact, Lyndon Johnson kept saying he remembered the "Who-lost-China?" debate. He said, "I am not going to have a war lost on my watch." That was the beginning and end of the debate.

And with regards—I don't want to overstress it, Dana Rohrabacher suggested, well, no President would go in and bomb Tibet. When Clinton was under impeachment, I think the defense is, he rocketed Sudan, Khartoum, and Afghanistan as a distraction.

Now, people can do crazy things, in power, when they can act unilaterally, and those things are not insignificant dangers.

The last thing, we know politically that once you begin a war, the refrain will come up, We have to persist because we don't want the people to have died in vain. That is why it changes the political dynamic to enable a President to initiate warfare and to say, Now it is on the burden of the Congress to shut it off after the fact. That is not the way political reality works. And it exalts form over substance to say, well, it is just a matter of who goes first or not, because that oftentimes is the entire game.

Mr. DELAHUNT. Michael Glennon.

Mr. GLENNON. I think, Mr. Chairman, that Mr. Rohrabacher made an argument that I have heard many times, and I just wanted to get a response on the record because a lot of people seem to be persuaded by the argument that he made.

His argument basically was this: Why do we need a War Powers Resolution if we have already got the authority under the Constitution simply not to continue appropriations for a war that we don't like? I think a lot of your colleagues actually share that viewpoint, who have reservations about the whole idea of the War Powers Resolution. That may be one of the reasons that it hasn't worked too well.

I think there are two problems with Congressman Rohrabacher's approach; and I am sorry he is not here to engage in this colloquy.

Number one, the option of not voting for funds for a war really isn't available unless you are willing to close down the Pentagon. You don't—with very rare circumstances—get a simple supplemental, as you know, with money that goes explicitly and exclusively for the use of force. It is included in the Pentagon authorization or appropriations. So you are then locked into the kind of fight that Newt Gingrich had with Bill Clinton about whether you are basically going to close down the government over this particular dispute. That is not really an effective way of wielding the appropriations power.

The other alternative is, as he suggested, to offer a rider, an amendment to an appropriations bill. As Lou pointed out, that was done seven times between 1973–1975 when Congress said that no funds may be authorized or appropriated under this or any other legislation to carry out military or combat operations in over or off the shores of South Vietnam, North Vietnam, Cambodia or Laos.

The problem is, the President will veto that legislation and then you have got to override his veto by a two-thirds vote, creating the anomalous situation that you need a two-thirds vote to get out of

a war, but only a majority vote to get into war. As Lou Fisher has often pointed out, that really stands on its head the whole intent of the Framers of the Constitution. It was quite the reverse.

So Congressman Rohrabacher's instinct really leads down, I think, two impractical cul-de-sacs, and the only way out of that is to enact framework legislation like the War Powers Resolution that makes the use of the appropriations for war powers practicable.

Mr. DELAHUNT. I don't know whether it was Dr. Fisher or Mr. Lobel, but one of you made the statement that there has not been a single instance of hostilities which would have warranted the kind of approach that Mr. Rohrabacher would have made.

Mr. LOBEL. Yes. I would say if you look at history over the last 30 or 40 years, all of the uses of force that the President claimed are so essential for national security could—in each of those cases, there could have been time to come to Congress and get congressional authorization. None of them was such an emergency that Congress couldn't have been involved.

The only question——

Mr. DELAHUNT. Which we did in the case of Iraq.

Mr. LOBEL. Right. And the only question is then, why not go to Congress? And the reason you don't want to go to Congress is because Congress is slow, Congress might be divided.

But the point is that if Congress is divided——

Mr. DELAHUNT. Congress is a constitutional nuisance to the Executive.

Mr. LOBEL. Yes. That would be what I would say. But it is a nuisance which the Framers thought was an important check——

Mr. DELAHUNT. Right.

Mr. LOBEL [continuing]. On unilateral war.

Mr. DELAHUNT. This goes to the point that was made by Dr. Fisher. It is about values.

Mr. FEIN. But it is also, I think——

Mr. DELAHUNT. Balances.

Mr. FEIN. The value that the Constitution chose was more in favor of peace and less in favor of war. And the constitutional Founders knew the executive branch has an incentive to war. It has an incentive to inflate danger because it gets more power, it gets more fame, it gets people to rally behind them. That is why institutionally it is more dangerous to have the branch of government that will profit by war decide on whether it ought to exist.

Mr. DELAHUNT. Isn't that reflected in Washington's oft quoted statement regarding entangling?

Mr. FEIN. The farewell address.

Mr. DELAHUNT. Let me get to Mr. Williamson.

Mr. WILLIAMSON. Thank you, Mr. Chairman. I don't know exactly where to start.

Mr. DELAHUNT. A question for you, and then we can see where your co-panelists come out on this. In your statement you state that the President has the authority to use force in defending against threats to our national interest. Now the assessment of the threat and the assessment of our national interest are you suggesting is exclusively within the Executive and his power to respond to that is unfettered by any check or balance in terms of the

Congress, and I would suggest maybe—I would suggest the judiciary.

Mr. WILLIAMSON. Let's come back to the judiciary question. No, that is not what I am saying. I am just saying that the check on it is the power of the purse. If you think the President has made a mistake in his or her assessment, the thing that you do is you do not provide the funds for it. The Constitution says that there shall not be a standing army. But we clearly have one because every year it is appropriated in the funds. As you do that appropriation, if you don't want them being used for a specific purpose, then seems to me that you pass your funding that leaves that out. Granted, if you are going to try to do a funding of more than just that, then you may have run the risk of a veto of the overall funding and it may take two-thirds to override that.

Mr. DELAHUNT. I just want to be clear about your position. Let me rephrase it. Mr. Rohrabacher is adopting the Williamson approach. They mirror image each other. What you are saying is implicit in the funding is the authorization.

Mr. WILLIAMSON. Yes.

Mr. DELAHUNT. Okay.

Mr. LOBEL. As a constitutional matter, the problem with this approach is it writes the Declare War Clause out of the Constitution. It says essentially the President can go to war whenever he wants, subject to Congress' power over the funds, which has nothing to do with the Declare War Clause or all of the war powers of Congress. So it takes a whole set of powers given to Congress and says in today's world this is meaningless because what we are going to do is not follow that approach, we are going to let the President go to war and let Congress decide whether to fund it or not.

One last point. I think in addition to Mike Glennon's point, which I think was excellent, there is another point, which is if you say the President can use war in Iraq or in Iran, or wherever, without congressional approval, what do you say to the families of the soldiers that are killed and then Congress says, well, we will then later go back and fund it. Before you send any American troops into combat, shouldn't they know that the people, that the Congress, and the President are behind them? Or do you want to send troops into combat and say, "Well, now fight about the funding"?

I don't think that is a reasonable way for any society to go into war.

Mr. WILLIAMSON. That is a splendid casting of a very important policy issue, and that is why for the three of the last four major uses of force the President has gone to Congress and said I want you on board.

Mr. LOBEL. The curious thing is that the Constitution seems to be written to give Congress the power to initiate hostilities.

Mr. WILLIAMSON. I am sorry. There is a basic disagreement as to what declare war means. You and I disagree as to what it means. Congress talked about making war. They had the power of that, and then they reduced that to just an element. Making war would be the initiation of hostilities; that would include declaring war, which changes your relationship with mutuals and so forth. They took that and they put it in a clause that deals with other

things that don't really go to the basic use of force but that are things that define your relationships to other nations.

Mr. LOBEL. Right. But your main argument, as I read it, is a policy argument, that we want to give the President this power because we need to have a President who is strong in the world with all these threats. But then you say as a policy matter the President should go to Congress, generally.

Mr. DELAHUNT. That is as a policy matter, not as a constitutional requirement.

Mr. FISHER. Let me add one thing. When we talk about values, we are talking about deliberation. The Framers, as a constitutional matter, would have you as elected officials deliberate on policy. You wouldn't say the President is smarter or he has got better aides.

Mr. DELAHUNT. We know he is not smarter.

Mr. FISHER. We know he is not smarter. Once you go down this road of saying that Congress is a little bit slow and doesn't write the bill the way the executive branch wants, once you do that in the field of national security, national security swallows up everything. You know that every department, domestic or not, Agriculture, Homeland Security, suddenly you go in that direction, and what is the point of even electing people if they are not part of the deliberation process.

Mr. DELAHUNT. That is the value that you are referring to. That is the relationship.

Mr. FEIN. Mr. Chairman, could I add a couple of things? First, it is not just the clear constitutional intent, and the Founders in 1787 and Mr. Madison had no ambiguity about what declaration of war meant. It meant the decision to decide whether the cause justified the use of military forces against an enemy. James Madison was there in 1787, none of us were. We should trust on his recollection. It wasn't disputed.

Secondly, with regard to the situation of enabling the executive branch to initiate combat and then relying upon Congress to stop after the fact if they don't want to fund it, oftentimes that is not feasible. It compromises the options to Congress. And I think the current situation in Iraq is precisely that.

We have gotten into a quagmire there. The President has gotten us into a situation where they are all bad choices. There should have been much clear and complete deliberation at the outset. That is where the critical decision is being made, because oftentimes it is too late afterwards. They are all bad avenues.

Lastly, why is it that the Founding Fathers would care so deeply about involving Congress in the decision of moving from a state of war to peace. It is a simple proposition often forgotten. A state of war makes it legal to kill people. It sounds harsh, but that is what war is, legalized killing. Those are profound decisions to be made, and the Founding Fathers wanted that to be made through a collective process, even if it were slower.

I think you are accurate, Mr. Chairman, in suggesting the history of errors in the use of the military or force is a history of endogamous thinking within the executive branch. Think of the Bay of Pigs. President Kennedy said, "I wish Congress would have told me how stupid this was. All the super-experts there got around the table and said, 'Oh, yeah, everyone is going to over-

throw Fidel Castro. We only need this amount of force.' And we were all wrong."

Everyone in the current administration said that Mr. Chalabi is going to be the George Washington, Thomas Jefferson, and James Madison of Iraq. We don't have to worry after we get rid of Saddam. And they were all wrong. There wasn't any clear involvement of another branch, which didn't have the same incentive of the Executive to go to war.

Mr. DELAHUNT. I am going to go next to the gentlelady. I am going to ask her to take the chair because I am on my way to the Middle East right now.

I want to come back to the consultative committee. You all seem to dismiss it, with the exception of I think Mike Glennon, and I think maybe Dr. Fisher or Mr. Lobel, about the Gang of Eight. I agree because I know that if I walked into a meeting and was briefed, the surveillance program, the terrorist surveillance program, I would be sitting there saying: "I guess." The kind of analysis that I think was appropriate really required an in-depth understanding, review, examination and reflection.

That is not what happened. I can assure you. I wasn't there. But most of my life I was in law enforcement and familiar with the arcane and sometimes rather esoteric subtleties that occur in terms of electronic surveillance, and wiretaps, and the various courts, et cetera. If you are a civilian, and are new to that, it gets very, very confusing.

I think it was you, Professor Glennon, that made the point. As I look at the legislation, and, again, being a realist, in terms of what could come out of these series of hearings that we held, is having a committee, a consultative committee that is fully staffed, that has access to experts such as yourself, that is an ongoing and standing committee, let's make it a bicameral committee, that would clearly be able to foresee those potential incendiary situations that tragically appear on a regular basis in terms of the global landscape, I think there might be some value to that. Clearly, it would require a willing Executive.

But it is interesting, as I look at the current field, and I am going to digress a little bit, I think that the three candidates might very well be the kind of Executives that would understand and appreciate the significance and the importance of, whether it is policy, as Mr. Williamson wishes to categorize it, or would have an appreciation of the constitutional relationship.

Any ideas?

Mr. LOBEL. I think the key is getting an independent check. That is the point of Congress. If you could get a consultative committee to consult that would be really independent, that wouldn't be sort of captured in the way so many of these agencies and committees are, where the Executive says, "Well, you're one of us now and we are relying on you," then that seems to me the key to it.

Mr. FISHER. The objection I have to it is that the Constitution gives to all of Congress the decision whether to go to war, not just some consultative group. I think any junior Member who has just been elected has as much right as the Speaker of the House, or anyone else, to make that decision.

The Gang of Eight, as you know, was unfortunate because it is of course the leadership and the Intelligence Committees, yet it is the Judiciary Committee that has jurisdiction over the FISA court. The Judiciary Committees were excluded from the briefings.

Mr. DELAHUNT. I am not suggesting that it would only be that committee that would weigh in on behalf of Congress. But just to have the information vetted in a timely fashion with Members of Congress and a professional staff and experts and those resources necessary, clearly I think would provide to the Executive a read of the validity, of the legitimacy of the policy considerations and also benefit Members of Congress in terms of the basis on which the Executive would go forward.

With all due respect, I mean when I think of the famous 16 words in the State of the Union, just a cursory review of the documents would have revealed that many of them were just outright forgeries and had absolutely no substance.

Mr. FISHER. We have the Intelligence Committees supposedly with that capability.

Mr. DELAHUNT. The truth is when you have Members that have the kind of schedules, and all of you see what happens here, with the kind of schedules, we need to have, I think, something that is not a super intelligence committee but has policy implications and is just not reacting and has a different stature, it has a different role and responsibility in terms of the policy making deliberations of Congress. I would never deny any member, how junior or how senior, the right to vote on an issue of the order of magnitude of what we are discussing.

Mr. FEIN. I think the critical element here is getting access to information. Is the executive branch going to desist from claiming Executive privilege, state secrets, skewing all the information? They have so much information there. If they want to feed you a bill of goods, that is what you will get. Unless you address that other issue, which is very persuasive and far beyond what we have got here, you don't have any independent check because you are just ratifying what is precooked. It's called "cooking the books." Remember, Mr. Gates got turned down once to be head of the CIA because that is what was done when the CIA was told cook the books for this policy reason. The President is going to do the same thing unless you also complement this idea with access to that information.

Mr. FISHER. I don't think you will ever do that because the National Intelligence Estimate that was available in October 2002, the second sentence said, "Baghdad has chemical and biological weapons." There is nothing in the report to support that.

So someone decided in the Key Judgment section that we need a real screamer here to get attention. So that was false information. We do not know today, so far as I know, who added the second sentence. I don't know if it was the experts who did the report. But I think Congress has great capacity to be misled and misinformed by the executive branch.

Mr. LOBEL. I want to just raise one other issue of independent check. We have ratified the U.N. Charter. And in the U.N. Charter there is an independent check; namely, the Security Council. Yet over and over again we hear, "Well, we can't rely on the Security

Council." In the Iraq run-up, all these other nations, most of whom were our allies, refused to vote for war, even when we put pressure on them. Because even looking at what was being said, even looking at Powell's testimony, they said this doesn't warrant going to war. Yet Congress did not pay any attention to it, the President didn't pay any attention to it. I think there is this general presumption we don't have to listen to what the world says because we know better.

Mr. DELAHUNT. Those are policy issues.

Mr. LOBEL. The treaty, we have a treaty, we have a law which says we cannot use force except to repel an attack, without the Security Council approval. If we are being attacked, we don't have to go to the Security Council.

Mr. DELAHUNT. That goes to the point, the excerpt from Mr. Glennon's book that I read. I mean if we are not going to have, and I concur with Congressman Rohrabacher, if we are not going to have the courage to make what we believe is an informed decision on issues of this consequence, then we don't belong here. We are violating our oath.

I voted against the invasion simply because I started asking questions. There was an individual by the name of Greg Thielman, and he was over at the Department of State in the intelligence bureau there, and I had just noticed in the tenth paragraph of some matter in the Washington—might have been the Washington Times, where he said, "No, there's no nuclear program." I called him into my office, and I will never forget this, and I said, "It's the nuclear—the development of the nuclear program that is making me very uncomfortable." He said, "I have been doing this for 25 years, Mr. Congressman." And he was just as apolitical as you can imagine. He said, "There is no nuclear program." In the meantime, we are talking about mushroom clouds.

Well, I am going to depart. I want to thank you. I am going to ask the gentlelady from Texas, Sheila Jackson Lee, to take the chair. I thank her for her attendance. Thank you all. This has been good. We hope you all come back.

Mr. LOBEL. Thank you very much.

Ms. JACKSON LEE [presiding]. Let me say to the witnesses, and I thank the chairman for his bestowing of the chair, for fear of having you immediately go out and write a legislative response to persons taking the chair at quarter to six on a Thursday, I will be pointed and try to be brief. But the discussion is of such moment.

I serve with my colleague, Chairman Delahunt, on the Judiciary Committee, and Mr. Fein knows that we spent some time dealing with an impeachment process some years back in the 1990s. Some of you might like to know that I serve the 18th Congressional District, and the Honorable Barbara Jordan had her task some years back for an impeachment. I don't know what that says about certain districts in Texas.

But I think I would like to refer some of you to legislation that I wrote that is more directly focused on the Iraq war, H.R. 4020. I would like to just query a little bit more and maybe give some thoughts about the distinctions between the era of our Founding Fathers and where we are today.

I think it is obviously the Founding Fathers had it imprinted in their mind, because it was current and recent, the persecution, oppression of a monarchy. So they were very keen to write the Constitution in a way that, for them, and I think well, had protections, but also in essence legislative language that really pointed to the fact that they wanted three branches of government, they wanted the checks and balances.

But I think as we look at the Constitutional Convention, we were looking at 13 colonies, we were looking at a smaller sense, and I don't want to label my colleagues, but as we have grown, there are certain I think elements, and I would welcome you speaking to these, that really impact on Mr. Williamson's theory, this whole question of cutting off the funds.

There is something called mob rule, there is something called adhering to your party leadership. These are practical and not constitutional themes. But they do have some impact when you are talking about 435 Members and 100 Senators. Why didn't we get it in the fall of 2002? Why did we not pierce the veil of information? There were rotating groups of Members that went to the White House. You will hear them individually explain to you that there was a scheme of horrors that probably would have convinced any number of people that we were being threatened.

That is a different framework from what Madison was in. He didn't deal with the numbers, he didn't deal with this entrenched party loyalty that is now, and I don't discount it, it has its wonderful purposes, even though it bears on the parliamentary approach. The other point of it is America is proud of the fact that we are the oldest democracy. There is a sense of concern of tampering with anything that would roll that over; the Constitution, war powers.

So this resolution speaks only to Iraq. And, Mr. Glennon, and I will give everyone a chance, it goes through what you cited on page 14, where you suggest that we have literally gone through the task that was given in the fall of 2002, and in actuality my legislation says all this has been achieved. I think I am going to amend it to say, "[A]nd therefore the authorization has expired." But it suggests that we can claim a military success. That is a policy question because all of the elements of the military have been accomplished.

When I listen to Mr. Williamson, I want him to know how many times we have raised the question of appropriation. But this is not Madison's era, this is our era. This means that the politics undermining the military, putting the boys and girls out to wash, if you will, the young men and women, is an overwhelming powerful influence that the Executive has to, if you will, chill any mass attempt to cut the funds. It was attempted in Vietnam. I don't think we have been successful since. There is something about the largeness of this body.

So I would ask, I know, if I can start with Mr. Glennon first, the claim of military success obviously is a policy question. If you would sort of go through briefly what your argument was, specifically on page 14. And then I would ask my cerebral colleagues and panelists to comment on the largeness of the body that thwarts what Chairman Delahunt was talking about, this important oversight, this single-mindedness, this ability to effectively challenge

this other branch of government, which is supposed to be equal, and that is the Executive. And are we at a point in the constitutional life of America, its age, its size, where this whole question of equal branches of government is in essence being diminished.

Let me just say this one point before I ask the question. You look at the signing statements that seem to be getting totally out of control in terms of at least this administration. That is an extended use of power that has been used. You look at the bully pulpit that now has a much larger range than I think it has ever had. That causes some branches to shrink. Maybe not the judiciary, but it is rare that we can get there to get any kind of relief. Particularly, I must say, on these questions it would be interesting whether the Supreme Court would go with us, whether there is some partisanship there.

So is it the largess of this government that warrants an H.R. 4020 or an H. J. Res. 53 because we are now moving away from what the constitutional fathers wanted us to be engaged in?

I will start with Mr. Glennon.

Mr. GLENNON. Madam Chairwoman, before I answer your specific question, let me just say that I find your comment fascinating because this is the first time I have heard a Member of Congress ask of the Members' institution, Congress, what went wrong, what are the lessons we should have learned about how we got into this mess, what happened that led us to approve this?

We had a commission that looked at the executive branch, the Baker-Hamilton Commission. But Congress has yet to look at itself with a fine-tooth comb and a bright light to try to figure out what was it in the congressional process that led to this tragic mistake. I think you are really on to something here.

We had a little review, a retrospective, with respect to the Vietnam War. The Senate Foreign Relations Committee held hearings on the National Commitments Resolution and it issued a report, which is a classic, that made some suggestions about how to avoid another Vietnam, most of which were ignored in the case of Iraq.

But I really think that a committee such as the House Foreign Affairs Committee would spend some productive time looking at precisely the question that you have just raised, because I don't think any committee on either side of Capitol Hill has done that.

Now you have asked me an important question, and I appreciate it, and it is to elaborate my conclusion that the war in Iraq is unauthorized currently. My answer is that none of the sources of authority cited by the administration provides authority to fight the war in Iraq today. Not after December 31st, but today. I am going to go down those sources of authority and answer your question specifically.

The first source that they cite is the President's Commander in Chief laws. That source of power, however, is, as the Supreme Court made clear in three early cases, *Little* v. *Barreme*, *Bass* v. *Tingy*, and *Talbot* v. *Seeman*, a function of what Congress has said and specifically the court underscored in these three cases decided by the Marshall court; these are the first three war powers cases and have never been overruled.

These cases stand for the proposition that when Congress authorizes limited war—as it did then and did now in the case of

Iraq—when Congress authorized this limited war, the President is constitutionally required to respect those limits. The President cannot constitutionally rely upon his Commander in Chief laws as a source of authority to use force beyond those limits.

Ms. JACKSON LEE. When we instruct him, then he must be guided by that instruction?

Mr. GLENNON. That is precisely the holding of those three cases.

Now the second point is that in the 2002 Joint Resolution, that is exactly what Congress did, it gave the President instructions. It authorized "imperfect war." It provided authority for the President to use force, subject to two limits. The two limits are set forth in that resolution. The President is authorized to use force against the continuing threat posed by Iraq and, second, to enforce all relevant Security Council resolutions.

Now, Madam Chairwoman, the first condition has been fulfilled. The continuing threat posed by Iraq was thought by Congress to be present in the Iraqi Government, specifically in the person of Saddam Hussein and his alleged possession of weapons of mass destruction. Saddam Hussein is history. That Iraqi Government is gone. There is no threat today that has continued from before the invasion against which the United States is using force. The threat is not posed by Iraq. Of course, there are terrorists in Iraq, people shooting at our forces. There is a threat within Iraq. It is not posed by the Government of Iraq.

Second, relevant Security Council resolutions, the administration says, mean not only resolutions that were in effect at the time, but future resolutions that had not yet been proposed, let alone voted upon in the Security Council. Let me just say, number one, any fair-minded reading of the legislative history will cause one to conclude that that is simply wrong. What Congress had in mind in enacting this was——

Ms. JACKSON LEE. The resolutions that they had passed at that time?

Mr. GLENNON. Precisely. The word that was used by the House sponsor, Congressman Richard Gephardt, was "outstanding resolutions," resolutions that were already in force. If you interpret the 2002 law as applying to future resolutions of the Security Council, three very serious constitutional problems are created. Number one, under the delegation doctrine, you have in effect, as Lou suggested a moment ago, delegated the war making power that is assigned by the Constitution to the two Houses of Congress to the United Nations Security Council, indefinitely into the future.

Second, you are permitting individuals who have not been appointed pursuant to the constitutionally required process to exercise significant governmental power in violation of the appointments clause.

Third, there is a *Chadha* problem. As you know, the Supreme Court said in 1983 that if Congress wants to give something the force and effect of law, it has got to be presented to the President for his signature or veto. A U.N. Security Council resolution is not.

Now these are all issues on which reasonable people can differ. However, President Bush has cited this canon of constitutional construction repeatedly in signing statements: Where two interpretations of a statute are available and one of those interpretations

raises constitutional problems and the other doesn't, the interpretation that does not raise constitutional problems is to be preferred.

The interpretation of this statute that does not raise constitutional problems is an interpretation that it applied, as Congressman Gephardt said, to outstanding resolutions, not to future.

Ms. JACKSON LEE. Thank you for that. Where is our failure? And I am going to focus on the Iraq war because it is wrapped into H. J. Res. 53 going forward. It will not answer the question of where we are today.

Dr. Fisher, I will come right to you. You wonder why we just don't relegate ourselves to utilizing—we have the War Powers Resolution creatively, but why we didn't relegate ourselves to just saying we are sticking with Article I, Section A of the Constitution, Congress is the only one that can declare war, and you have to wait on us.

Why don't I go down and everyone can sort of comment. Let me, in deference to clearing the record, I have not called the Members of this esteemed body a mob. What I have said is that, as I clarify it and I use the term, but we have grown in size. And there is a sense of the political side of the coin that "so goes the group, so goes everyone."

Does that now bear upon a necessity of finding other vehicles to ensure that there is transparency and that we do make the right decisions on clear facts?

Dr. Fisher.

Mr. FISHER. I like the way you started out your remarks about the 13 colonies because when we broke from England I don't think the United States has ever been as vulnerable as it was then. We had the enemy in Britain, coming pretty soon in France, we had Spain here. If there was ever a time in our history where we would say we were so at risk that we need to expand Presidential power, it was then.

We didn't do that. We put our faith and our trust in the regular deliberative process. Four hundred and thirty five Members in the House today is a lot. But many people thought 65 in the House in 1789 was unwieldy. Sixty-five; how can you do it?

I think part of the answer that you are looking for has to do with the word "fear." Once you have an outside "enemy," and it was France fairly soon with the French Revolution we were afraid that was coming here, or with the Communist period, or now with al-Qaeda, you have a very powerful force to shut Members of Congress up. And just to come up to October 2002, the Republicans controlled the House, the Democrats controlled the Senate. The Senate could have said you haven't given us enough information that is reliable and what we are going to do is what the first Bush did; namely, we are going to wait until after the 1990 election to come to Congress, which is what happened.

In October 2002, the Senate had the power, as the Democrats, to say we are not going to take a vote now. We are going to have U.N. inspectors go in so we can get something we can rely on. After the election, we will consider what to do. But the fear was such that the Democrats, as you know, were afraid that they would look weak on national defense. The Framers understood that these are human beings, and human beings have to decide, What is war

worth? Fear the outside enemy or what we do to ourselves? I think our history in the United States is we do much more damage to ourselves, to each other, than any enemy outside could do. But fear is a very, very powerful force.

Mr. LOBEL. I concur with Mike Glennon.

Ms. JACKSON LEE. You were suggesting that the resolutions like H. J. Res. 53 are necessary.

Mr. FISHER. I think it is, yes.

Mr. LOBEL. I concur with Mike Glennon about the question you raised about why Congress failed is a critical one here, which would really behoove this committee to investigate further. My own thoughts on that start with what Bruce Fein said, which is that the whole constitutional framework was geared toward peace, was geared to promoting peace and making it difficult for us to go to war. I think if you look at what has changed, that in 1787 we were a weak country, threatened much more than we are today by outside powers who are on our borders, who could destroy us. Therefore, the Framers said we have to be very wary.

Ms. JACKSON LEE. You have to be studied.

Mr. LOBEL. Studied, wary, cautious about going to war against other countries because we don't want to involve ourselves in these European wars. We could lose our whole republic. Today, the situation is very different. I think if you look at both the Vietnam War and the more recent Iraq war, what has happened is that particularly Members of Congress, but both sides really, feel an arrogance of power. We are the greatest superpower, we have the military might to smash little Vietnam, we have the military might to roll over Saddam Hussein in Iraq. I think in that context the notion that we should really be cautious before we do that is not given serious attention and that Members of Congress would say well, all right, if they really thought that we would get into a war with Iraq and it would lead to our republic being really threatened, they would consider it much more seriously.

But if they think, well, what is Iraq going to do against our military might? Go into Iraq, go into Vietnam. I think what we have learned from Iraq and should have learned from Vietnam is that this great might leads us into terrible disasters and terrible messes, and in that context I do think Bruce Fein's view of looking at the Roman empire is a good one. But I think it is that culture, the arrogance of power, which has to be really challenged both in Congress and in the presidency.

Mr. FEIN. If I can go back to your opening comments about whether circumstances have changed, that the initial understanding of the Founders with regard to the allocation of power over war between Congress and the Executive ought to be altered. It seems to me that the case in 1787 is much stronger today. I just want to point out in 1787 they were reluctant to endow a President with authority to initiate war, even though it was George Washington. And indeed as James Madison pointed out when he was arguing against Executive power to conduct war and in an illusion describes Washington as a prodigy who comes around every century or two, and we can't have a Constitution based upon that illusion that we will have a magistrate who is a virtual saint.

But if you go and ask what it was that the Founding Fathers feared about the Executive use of power in combat that would cause recklessness, they are a millionfold greater today than 1787. That is what Professor Lobel was referring to. You couldn't be the superpower of the world. We didn't have huge armies and navies. What kind of fame can you get by conquering a little island?

Today, when we have all of that authority, it is a temptation that Madison worried would be irresistible. Fame, glory, go abroad, have men and women die, not in huge numbers but enough to give you some mark in the annals of history.

Ms. JACKSON LEE. Build a fear that others have of you.

Mr. FEIN. Exactly. This is not unique to the United States. When Great Britain was running wars, the first Afghan war, the second Afghan war, why was that? If you go and listen to their explanations, Well, we have to be powerful, we have to make other people fear us because we don't want to have to use force everywhere.

So the British suffer that same arrogance, if you will, of power. And where are they today? That is why, if anything, it is more important that Congress be a check on the executive branch's temptation for recklessness than it was 200 years ago. Human nature doesn't change. That is what the Founding Fathers understood.

Ms. JACKSON LEE. Thank you. My office is calling me about my airplane.

Mr. Williamson, I want to yield to you for a moment so you can comment.

Mr. WILLIAMSON. I will be very brief. First, I have not studied H.R. 4020. If H.R. 4020 does the same thing that defunding or not appropriating, cutting off funds would do, I don't understand why you should make a difference. If you are trying to avoid tough political issues, my reaction is that I thought that was your job. There is no doubt about it, there are some hard choices that you have to make. I think a failure to face up to those hard choices is not an excuse for upsetting the balance and procedures set by the Constitution.

Second, I am just baffled by this frantic panic as to what we are in. We have got to have new legislation; we have got to have a new understanding; the morass that Bruce Fein talks about our being in. If we are in such a morass, I would point out that we use the procedures that H. J. Res. 53 mandates. The President went to Congress and got Congress to get on board politically.

The third thing is that we don't have time to do this, but I want to assure you that most, if not all, of the constitutional interpretation that you have heard since you have been in the chair would be absolutely disputed by the Office of Legal Counsel of any administration, Democratic or Republican.

Ms. JACKSON LEE. Mr. Williamson, let me thank you and say to you, I started out critiquing my colleagues and myself and I end by saying that we are doing just what you have asked us to do, and that is to make the hard decisions. Frankly, we are making them in the backdrop of the Constitution, that it may not in and of itself be the document that can protect Americans against the abuse of power in any branch of government. We may need to look at the resolution before us, or H.R. 4020, which is specifically on the Iraq war, because we have asked the questions that you have asked,

and we have gotten failing grades. There have been any number of attempts to cut the resources. But we are facing against an empowered Executive, as Mr. Fein has noted, who takes their credits from how many they can conquer.

That means that we will twist or alter the counsel that they give to Members of Congress, who will then leave places like the White House or secret rooms in this place and be convinced that the weapons of mass destruction are headed toward their grandchild, son or daughter.

We have to be able to take the spirit of the Founding Fathers, of which I think you are trying to promote, mix it with the courage that we should continue to develop, with the modern day practices of an empowered President who is seen around the world, be it Democrat or Republican, male or female, in corners far and wide, and America being viewed as the solution to all problems.

With that, I believe, comes a necessity for restraint and analysis. The question is, How do we do it? For those of us who have been forever committed to the fact that this was a wrong war, we are forever, if you will, not suggesting that our soldiers have died in vain, but we are pained by the loss of life, and continue to ask ourselves why.

I think this hearing has brought us a long way to suggesting what we need to do. It might mean that Chairman Delahunt, who I commend for this hearing, we might all need to do it sooner rather than later.

The motion has been moved and second. The hearing has been adjourned. Thank you.

[Whereupon, at 6:12 p.m., the subcommittee was adjourned.]