

Testimony on War Powers

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Chairman Delahunt, Congressman Rohrabacher, Members of the Subcommittee; I thank you for your invitation today and the attention you are devoting to this vitally important constitutional topic. You invited me here today to provide an Executive Branch perspective on the war powers issue. As you will hear, my perspective is a bit broader than that. I worked on the original war powers legislation in the U.S. Senate before I served as Assistant Secretary of State for Congressional Relations in the Carter Administration. The suggestions I offer today relate to my desire to see a healthier relationship between the Executive and Congress and a sharing of the war powers as the founders intended.

I authored an article in the Fall 2007 edition of the St. Louis University Law Journal titled, "The War Power Resolution in the Age of Terrorism." My testimony will be based on much of the research contained in this work. I have provided a copy to the subcommittee for the record.

Mr. Chairman, in my opinion, the War Powers Resolution enacted in 1973 has failed to recreate balance in our system. I share the view of many legal scholars that the Resolution's design is contrary to the intent of the Constitution in that it concedes that presidents may initiate a war without prior congressional approval. The Resolution has produced perversions in internal Executive Branch decision-making; and in recent years it has been largely ignored. Furthermore, its consultations provision has been easily avoided because Congress has failed to organize itself in such a way as to make consultations unavoidable, secure, and meaningful.

I commend you and the other sponsors of HJ Res 53, the legislation introduced by Congressman Walter Jones. This legislation corrects the constitutional flaw in the 1973 War Powers Resolution by restoring the Congress' power to declare – or authorize -- war except in specified emergency situations. In essence, HJ Res 53 defines the very limited authority the founders gave to the president to "repel sudden attacks" by describing three generic types of emergencies the nation faces in the modern day. The delegated power given to the president under HJ Res 53 is then limited in duration pending congressional authorization, as would be appropriate if indeed the emergency action taken is in the nature of "repelling" an attack.

I wish you well in this effort to reclaim the congressional role in decisions related to deploying U.S. forces in hostile situations. Were this legislation to pass and be sent to the president, it would constitute an important message about unilateral presidential war-making. I hope you will continue to build strong bi-partisan support for this bill because it is unlikely that a president would sign such legislation into law. A veto override would most likely be needed.

The Constitution, as Edwin Corwin said, is an "invitation to struggle." Presidential lawyers and advisors will point to many decades of practice wherein Executive action has created new precedents, in essence rendering the "declare" clause of the Constitution much more ambiguous, or so they will argue. They will point to the national security challenges of the day – terrorism and nuclear proliferation – and argue for maximum flexibility.

Whether or not the sponsors of HJ Res 53 can create a strong enough bi-partisan coalition to override a veto, Congress is not without options. You do not need a presidential signature to strengthen your institutional capacity to assert your war powers.

The Constitution is not just "an invitation to struggle;" it is also an invitation to reach accommodation in the national interest. This is particularly important in this modern era when the nation is threatened by non-state actors and when the president has at his disposal a wide variety of options for countering the threat, not all involving the deployment of forces on the ground.

It is more important than ever that presidents seek the confidential advice and counsel of senior members of Congress, and that Congress establish for itself a capacity to ask tough questions behind closed doors even before a president has decided on an option. “What would we do if...?” and “What are the alternatives...?” are questions infrequently asked by Congress, but when they are, they invariably introduce new factors, both political and substantive, that the Executive must consider. I will say more about this phenomenon.

President Nixon’s veto message to Congress in 1973 made a rather sweeping case that the War Powers Resolution interfered with the Commander-in-Chief’s powers in an unconstitutional way. This was not surprising. What was surprising was the President’s endorsement of the consultation provision in Section 3 and his invitation to participate in “regularized consultations with the Congress in an even wider range of circumstances.” Later, the Carter administration urged Congress to create “efficient machinery for conducting those consultations.”

Unfortunately, these invitations have never been accepted. Today, the various committees that are responsible for national security policy, including this one, examine aspects of security policy, often effectively, but in piecemeal fashion. Too often, and out of necessity, the subjects of your hearings involve reviewing the facts after the horse is out of the barn. This is not meant to be a criticism of the way you carry out your duties: rather, it is a recognition that your jurisdictional mandate is limited to oversight of the departments and agencies you authorize. In an era when claims of a unitary executive have been made, your oversight mission has been made even more complicated.

How then does Congress interact with the executive to produce an environment of openness, candor and trust involving the major threats to our nation so that advice and counsel can be given *prior* to decisions to use force? Several members of this body, including the former chairman of the committee, Lee Hamilton, have recommended the creation of a permanent Joint Consultative Committee made up of the bipartisan leadership of the House and Senate and the chairs and senior minority members of the Foreign Affairs/Relations, Armed Services, and Intelligence Committees. This committee would be staffed by professional experts on defense, intelligence, diplomacy and constitutional law.

Why constitutional law? As I have discussed in my St. Louis University article, Executive Branch lawyers in the past have conjured some interesting legal scenarios to get around the provisions of the War Powers Resolution. Disputes will arise over whether prior authority from Congress is needed, or whether a president can act on his or her own in an emergency. The committee must have the staff capacity to inform the members on these issues.

The organization within the Executive Branch with the mandate to “find and interpret the law” is the Office of Legal Counsel at the Justice Department. This office in recent years has been politicized, according to the former director of the office under President Bush, Jack Goldsmith. He has called on future presidents to “genuinely engage congress” on national security and terrorism. It is Goldsmith’s view that such engagement will improve understanding of the threat and provide support for what a president needs to fight terrorism.

Goldsmith is assuming that consultations will produce consensus and that the Executive, with its superior access to information and analysis, inevitably will persuade Congress that its preferred course is correct. This may happen, but it is just as likely that senior members with vast experience in these matters will challenge assumptions and warn against a particular path.

When I hear worries that a special committee will be co-opted by the Executive, I hear the argument that ignorance is bliss. If we don’t know the arguments of the Executive, we won’t be compromised by them. Yet, we have seen entire Congresses co-opted by the political environment created by a Commander-in-Chief who, in lieu of consulting with Congress, decides to issue a public call to arms. When that happens, the Executive is in the political driver’s seat.

Congress needs to institutionalize its capacity to provide advice and counsel and it should trust its most senior members to represent the interests of the entire body. If they succumb to the appeal of the Executive, perhaps, just perhaps, they will be acting in the national interest. In any case, when it comes to war, Congress is going to be more effective acting *a priori* than it will be when acting *ex post facto*.

If a president publicly requests authority to go to war, the recommendations of this senior committee will be telling. One cannot institutionalize good judgment, but one can create a process wherein it is more likely that the hard questions are asked. When Congress votes to give authority to a president to enter hostilities, it is, as we have seen, providing that authority for the duration, as defined by the Commander-in-Chief. The evidence of a threat to the national interest must be examined carefully in advance by Congress. It is far better to have the House and Senate influenced by the best judgment of its senior members, staffed by experts, than by the president acting alone and influencing the decision through the court of public opinion.

As many experts have testified, the military option in the battle against terrorism is limited. Often our forces are faced in the field with an asymmetric force capable of achieving a political victory by simply avoiding defeat. Often, as we have seen, the use of traditional military force exacerbates the terrorist threat rather than suppressing it. These are questions that need to be explored, not only by professionals within the Executive Branch, but by senior members of Congress who have fewer inhibitions in raising the difficult questions.

What about the security of this committee's deliberations? This committee would be comprised of 16 of the most senior members of Congress and possibly a half dozen staff. All would be cleared for the most sensitive classified material. Most likely, they will have been exposed to pieces of the puzzle in their own committees. I do not see this as increasing to unacceptable limits the risk of leaks.

Let me give you an example of a very sensitive rescue operation to illustrate the magnitude of the risk factor. I refer to President Carter's effort to rescue hostages in Iran. This effort, which took several months to plan, was very tightly held. Yet, we estimated that over 20,000 military and civilian personnel possessed information about some aspect of the operation. A single member of Congress was told of the operation *after* the helicopters were in the air heading toward Iran. It is my view that the risk of discussing this highly sensitive operation with a committee of senior members would have constituted an extremely low risk. In addition, the benefits would have been great after the mission was later aborted, because key leaders would have better understood what had gone wrong. They should have readily comprehended the President's decision to pull the plug. As it was, even before the facts were known, President Carter was severely criticized for failing to consult Congress.

In my experience in the Executive Branch, a subcommittee of this Committee employed a model that strikes me as highly relevant to this special consultative committee. That was the Middle East and Europe Subcommittee on Foreign Affairs, then chaired by Lee Hamilton. Every other month the State Department's Middle East and European Bureaus would be given a set of questions related to US policy and asked to appear in closed session to present their view. Not only were the members well informed, the two bureaus were forced to struggle with questions they might not have addressed previously. A relationship of trust existed and both branches benefitted greatly.

In my St. Louis University Law Journal article, I refer to two situations in the 1980s wherein it is possible that our military forces were placed at risk because the "rules of engagement (ROE)," were not changed to fit the circumstances. This is again an area for a special joint committee to explore. We should never fail to provide adequate ROE just because we want to avoid consultations and the other provisions of the War Powers Resolution. Issuing wartime ROE is a good indication that "hostilities may be imminent," to use the phrase contained in the Resolution. When Congress ignores this, it is ignoring its own institutional responsibilities and placing our forces at risk.

One final point must be addressed or all the changes recommended in the Jones Resolution or for a special committee will be moot. I refer to the current National Security Strategy (NSS) document which establishes Executive Branch policy. In his cover letter, the president referred to this as “wartime national security strategy.” The implication is that we are in a permanent state of war. The question is whether this is simply a rhetorical flourish, or whether this statement has any legal standing. In the document itself there is reference to a doctrine, called a pre-emption policy, wherein “we do not rule out the use of force before attacks occur, *even if uncertainty remains as to the time and place of the enemy’s attack.*”

This statement presumes that the president’s limited authority to “repel sudden attacks” is limitless in this age of terrorism; that it is not necessary to provide Congress or the American people an evidentiary basis for the use of force. The implication of this is to render Congress’ constitutional responsibility null and void. With all due respect, our constitutional system requires that you not permit this assertion of authority to stand.

Mr. Chairman, I have participated in and closely observed the Executive-Congressional interaction over issues of war and peace for over thirty years. I have become convinced that even the best crafted law cannot protect the nation when, in Alexander Hamilton’s words, “the national councils may be warped by some strong passion or momentary interest...” Yet, a well-crafted law that requires prior congressional authority before we go to war, except in specified emergencies, and an institutional arrangement that makes consultation unavoidable, secure and meaningful, will assure the participation of both branches of government in the most fateful decision we can make as a nation. As the late Alexander Beckel said, the two branches can “fall into bad errors, of commission or omission.” But together that is “somewhat less likely, and in any event, together they are all we’ve got.”