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# Applying the War Powers Resolution to the War on Terrorism: Hearing Before the S. Comm. on the Judiciary, 107th Cong., Apr. 17, 2002 (Statement of Jane E. Stromseth, Prof. of Law, Geo. U. L. Center)

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**APPLYING THE WAR POWERS RESOLUTION TO  
THE WAR ON TERRORISM**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,  
FEDERALISM, AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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# CONTENTS

## STATEMENTS OF COMMITTEE MEMBERS

	Page
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin .....	1
Hatch, Hon. Orrin, a U.S. Senator from the State of Utah .....	80
Thurmond, Strom, a U.S. Senator from the State of South Carolina .....	96

## WITNESSES

Fisher, Louis, Senior Specialist in Separation of Powers, Congressional Research Service, Library of Congress, Washington, D.C. ....	13
Frye, Alton, Presidential Senior Fellow and Director, Program on Congress on Foreign Policy, Council on Foreign Relations, Washington, D.C. ....	31
Glennon, Michael, Professor of Law and Scholar in Residence, Woodrow Wilson International Center for Scholars, Washington, D.C. ....	54
Kmiec, Douglas, Dean of the Columbus School of Law, Catholic University of America, Washington, D.C. ....	23
Stromseth, Jane, Professor of Law, Georgetown University Law Center, Washington, D.C. ....	46
Wedgwood, Ruth, Edward B. Burling Professor of International Law and Diplomacy, Yale Law School and Paul H. Nitze School of Advanced International Studies, Baltimore, MD .....	38
Yoo, John, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, Washington, D.C. ....	7

## QUESTIONS AND ANSWERS

Responses to Questions from Senator Thurmond by:	
Fisher, Louis .....	85
Frye, Alton .....	82
Glennon, Michael J. ....	88
Stromseth, Jane .....	90

## SUBMISSION FOR THE RECORD

American Civil Liberties Union, submitted by Timothy H. Edgar, Legislative Counsel, Washington, D.C. ....	5
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**STATEMENT OF JANE STROMSETH, PROFESSOR OF LAW,  
GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.**

Ms. STROMSETH. Thank you very much, Mr. Chairman. I am grateful to be here today.

And if I may, I would like to ask your permission to put my longer statement in the record.

Chairman FEINGOLD. Without objection.

Ms. STROMSETH. Thank you.

Since the horrific attacks of September 11th, we have begun to mobilize a broad range of tools in a global war against terrorism. The military components of this campaign are diverse. They include combat operations, continuous air patrols, maritime interception of shipping, the training and equipping of foreign militaries for combat operations, and assistance to post-conflict peacekeeping, just to name a few.

This campaign is likely to be long-term, far-reaching, and in contrast to more conventional military operations, it will be much harder to determine when or if the war is over or what constitutes victory.

Despite these complexities, and indeed in fact because of them, I will argue here that the basic principles of our Constitution concerning war powers remain as vital and relevant as ever, indeed more so, in this war against terrorism.

I will also argue that Congress' post-September 11 authorization of force correctly recognized that both Congress and the President have a vital role to play in this war; that meaningful, high-level consultations are essential as the campaign unfolds; and that additional congressional authorization may be constitutionally required in some situations in the future.

Our Constitution's division of war powers between Congress and the President is part of a structural system of checks and balances designed to protect liberty by guarding against the concentration of power. The division of war powers was also designed to draw upon the distinctive attributes of both Congress and the President, the legislature's deliberative qualities and the President's ability to act with efficiency and dispatch in creating an effective national government capable of protecting and defending the United States.

Mr. Chairman, there is a huge scholarly literature about the Framers' intent and about the meaning of subsequent historical practice, and time does not permit me to engage in a comprehensive discussion here. But let me highlight four points from the record that in my view are essential to understanding the constitutional division of war powers and how they apply to the war on terrorism.

First, the power to declare war vested in Congress was intended by the Framers to be a power to decide, to make a choice about whether the United States should go to war. It was not a formalistic power to simply validate that a previous state of war existed. On the contrary, the Constitution gave Congress the power to decide whether the United States should initiate war because the founders believed such a significant decision for the country should not be made by one person alone but rather by the legislature as a whole to ensure careful deliberation by the people's elect-

ed representatives and broad national support before the country engaged in such an action.

Second, the founders clearly expected the President as Chief Executive and Commander in Chief to protect the United States by repelling attacks, or imminent attacks, against the United States, its vessels, its forces, and to protect American citizens. Moreover, they wanted effective, unified military command in a single set of hands.

However, if an enemy engaged in limited acts, limited attacks that did not themselves bring us into a full state of war, the Constitution envisioned that that decision would be made by the Congress.

Third, Congress' power of the purse, though critically important, is not a substitute for congressional authorization of war before it is commenced. Reliance on the power of the purse alone as a check on executive war powers, moreover, can be overly blunt and sometimes ineffective and counterproductive as a tool for expressing Congress' will.

Fourth, historical practice has not fundamentally altered how we should understand the Constitution's allocation of war powers today. Of the dozen major wars in American history, five were formally declared by Congress and six were authorized by other legislative means.

Now, there is, to be sure, a practice of limited presidential uses of force that falls short of major national conflicts. A substantial number of these, 70 out of the sometimes 200 cases cited by scholars, involve the protection or rescue of U.S. nationals, actions far short of deliberate war against a foreign state and reasonably falling within the President's authority to respond to sudden attacks.

Other cases went beyond this. But as a general matter, one has to be very cautious about drawing broad conclusions about presidential war powers from a very disparate set of cases, some of which were protested by Congress. And so one has to look at the instances very carefully.

And the fact remains that major wars have been authorized by Congress.

Well, which side of the line, in any event, does the current global campaign against terrorism fall? The global war on terrorism in which we are now engaged aims to destroy a multistate terrorist network and potentially to defeat or overthrow sponsoring regimes. The scope and complexity of this global campaign against a terrorist network based in over 60 countries goes beyond any common-sense notion of a limited police action.

Congress, in authorizing the use of force after the September 11th attacks, recognized that the situation we faced implicated the war powers both of the Congress and of the President. And the authorization, though it has no geographical limits and allows for appropriate executive flexibility, is not a blank check.

The joint resolution authorizes the use of necessary and appropriate force against those responsible for the September 11th attacks or those who harbored those responsible. And the purpose of using force is focused in the future, oriented to prevent additional terrorist attacks against the United States by those responsible for the September 11th attacks.

Mr. Chairman, let me make two final points, one about consultation and one about the possibility for future authorizations.

In a campaign against terrorism that is likely to be long and far-reaching, regular and meaningful consultations between Congress and the President as envisioned in the War Powers Resolution are essential to ensure that there is a shared understanding between Congress and the President on future directions in that war and broad support for the steps ahead. A commitment by the President and Cabinet officials to hold regular consultations with the bipartisan leadership, and ideally with the broader group of members as well, I think would be invaluable.

Moreover, given the complexity of the campaign against terrorism, its open-ended nature, its geographic scope, the enormous stakes involved, Congress, I think, should request that a broader range of information be provided in the regular war powers reports that are submitted pursuant to the War Powers Resolution. I think the combination of fuller reports, and perhaps seeking high level testimony when those reports are filed, that combination would, I think, spur a more significant and effective dialogue between Congress and the administration regarding future goals as this campaign unfolds.

But, as Alton Frye and others have I think properly suggested, as important as consultations are, they are not a substitute for congressional authorization in those situations where the Constitution envisions and expects Congress to authorize the choice for war.

As our country moves ahead in the campaign against terrorism, threats to our security that are not linked to September 11th may well present themselves. Whether and when additional congressional authorization is constitutionally required will depend on the facts of the situation and on the nature and magnitude of the military action contemplated.

While the President clearly possesses the power to repel and forestall attacks, the decision to commence a war belongs to Congress. Major military action with far-reaching objectives, such as toppling a government, for instance, is the kind of action that constitutionally the founders expected would be debated and authorized by Congress in advance.

And in this connection, I realize Iraq is not the focus here, but since it was brought up by a previous panelist, let me just say that absent a connection to the September 11th attacks, which may be established—we do not know that at this point—but absent that connection, I do not think that statutory authority currently exists to go to war against Iraq. The 1991 Gulf War authorization does not provide a current authorization to commence such a war. And I think for exactly the reason, Senator, you mentioned: The American people have a sense that these issues have to be debated contemporaneously in light of current circumstances, not relying simply on a resolution adopted over a decade ago in a different set of circumstances.

The war against terrorism, unfortunately, will be with us for a long time. However, as our Nation moves ahead on various fronts, using a variety of tools and means, our response will be both more effective and more sustainable if the Congress and the President

continue, as they have done so far, to work together in the best tradition of our great Constitution.

Thank you.

[The prepared statement of Ms. Stromseth follows:]

STATEMENT OF JANE STROMSETH, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY  
LAW CENTER, WASHINGTON, D.C.

#### INTRODUCTION

Mr. Chairman, I am grateful for this opportunity to appear before the Subcommittee to discuss the important constitutional question of war powers in the context of the war on terrorism.

The September 11th attacks pose unprecedented challenges for our Nation.

We were attacked by a global network that was able to inflict massive casualties upon innocent civilians and would do so again, possibly with greater effect, if given the opportunity. Under such circumstances, we have begun to mobilize a broad range of military, diplomatic, intelligence, law enforcement, economic, and financial tools in order to wage this global war on terrorism. This campaign is likely to be long-term and open-ended, with conflict potentially on multiple fronts; and, in contrast to more conventional operations, it will be much harder to determine when or if the war is over or what constitutes victory.

Despite these complexities, indeed, in fact because of them, I will argue here that the basic principles of our Constitution regarding war powers remain as vital and relevant as ever—indeed even more so—in the fight against global terrorism. I will also argue that Congress's post-September 11th authorization of force correctly recognized that both Congress and the President have a vital constitutional role to play in prosecuting the global war on terrorism; that meaningful high-level consultations are essential as the campaign against terrorists with global reach and their State sponsors unfolds; and that additional congressional authorization may be constitutionally required in some situations in the future.

#### THE CONSTITUTION'S ALLOCATION OF WAR POWERS

Our Constitution deliberately divided war powers between the Congress and the President. In making this choice, the framers sought to create an effective national government capable of protecting and defending the country while also remaining accountable to the American people. The Constitution's provisions concerning war powers—like those concerning other aspects of governance—reflect a structural system of checks and balances designed to protect liberty by guarding against the concentration of power. In a deliberate break with British precedent, the Constitution gave Congress the power to declare war because the founders believed such a significant decision should be made not by one person, but by the legislature as a whole, to ensure careful deliberation by the people's elected representatives and broad national support before the country embarked on a course so full of risks. Reflecting on this allocation of power, James Madison wrote: "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."<sup>1</sup>

At the same time, the framers wanted a strong Executive who could "repel sudden attacks" and act with efficiency and dispatch in protecting the interests of the United States in a dangerous world. By making the President Commander in Chief, moreover, they sought to ensure effective, unified command over U.S. forces and civilian accountability. The Constitution's division of war powers between the President and the Congress has led inevitably to tension between the branches—and to an enduring tug of war over war powers—even as the participation of both branches clearly is essential in protecting our country and advancing American interests.

Mr. Chairman, there is a huge scholarly literature about the Framers' intentions with respect to constitutional war powers and about whether historical practices in the two centuries since the Constitution was ratified should alter how we should understand these authorities today. It is impractical for me to offer a detailed and comprehensive discussion here,<sup>2</sup> but let me instead highlight four propositions from

<sup>1</sup> Alexander Hamilton & James Madison, *Letters of Pacifcus and Helvidius on the Proclamation of Neutrality of 1793*, at 89 (James Madison) (Washington, D.C., J. Gideon & G.S. Gideon 1845).

<sup>2</sup> In a longer piece, I discuss original intent, historical practice, and current arguments about war powers more fully and systematically, and I draw on my conclusions in that piece here. See

Continued

the historical record that, in my estimation, are central for understanding the constitutional roles of Congress and the President today.

*First, the power to "declare war" vested in Congress was intended by the Framers to be a power to decide, to make a choice, about whether the United States should go to war; it was not a formalistic power to simply validate that a legal State of war existed.* On the contrary, Congress was given the power to determine whether the United States should initiate war in order to ensure that the decision to expose the country to such risks and sacrifices reflected the deliberation and judgment of the legislature—the branch most directly representative of the American people, whose lives and resources will be placed on the line—and to ensure broad national support for such a course of action. This interpretation is further validated by the Constitution's grant of authority to Congress to authorize reprisals, or acts of limited war, that could lead to a wider war, which clearly indicated a broader understanding of Congress's war-commencing role than simply a formal declaration that a State of war existed.

*Second, the Chief Executive's authority to repel sudden attacks by force is incontestable.* The founders expected the President, as Chief Executive and Commander in Chief, to protect the United States by repelling actual or imminent attacks against the United States, its vessels, and its armed forces. Moreover, if another Nation effectively placed the United States in a State of war—by declaring or openly making war upon the United States—the President as Commander in Chief was expected to exercise the nation's fundamental right of self-defense. However, if an enemy engaged in limited attacks that did not rise to the level of war, the founders expected the President to repel those attacks but not to go beyond this authority and change the State of the Nation from peace to war without congressional authorization.

*Third, Congress's power of purse, though critically important, is not a substitute for congressional authorization of war before it is commenced.* The founders understood that the British monarch's power to go to war was qualified to a substantial degree by the Parliament's power of the purse and its control over military supplies. In giving Congress the power of the purse, including the power of appropriating money to "raise and support Armies" and to "provide and maintain a navy," the Constitution continued this important legislative check. But the Constitution did not stop here. The Constitution also gave Congress the power to declare war and authorize reprisals, so that congressional deliberation would occur before war was commenced. Reliance on the power of the purse alone as a check on executive war powers, moreover, can be an overly blunt and sometimes ineffective tool for expressing the will of Congress. Limiting or cutting off funds after forces have already been committed is problematic because it undercuts both troops in the field and America's credibility with her allies. Restricting funds in advance is often undesirable as well because it can harm the President's ability to carry out effective diplomacy. In short, as important as Congress's power of the purse is, it is not a substitute for Congress's power to authorize war.

*Fourth, historical practice has not fundamentally altered how we should understand the Constitution's allocation of war powers today.* Practice, of course, cannot supplant or override the clear requirements of the Constitution, which gives the power to declare war to Congress. Furthermore, of the dozen major wars in American history, five were formally declared by Congress and six were authorized by other legislative measures.<sup>3</sup> There is, to be sure, a pattern of practice involving more limited Presidential uses of force falling short of major national conflicts, a substantial number of which involved the protection or rescue of U.S. nationals caught up in harm's way. For example, of the 200 or so cases sometimes cited as examples of unilateral commitments of force by the President, nearly 70 involved the protection or rescue of U.S. nationals, actions far short of deliberate war against foreign countries and reasonably covered by the President's authority to respond to sudden threats. A number of other operations were interventions or peace enforcement actions that aimed at limited goals. Others involved more far-reaching objectives, however, even if the risks were relatively low. In some of these cases, like Haiti, for instance, Congress protested unilateral actions taken by the President and made

Jane E. Stromseth, "Understanding Constitutional War Powers Today: Why Methodology Matters," 106 Yale L.J. 845 (1996).

<sup>3</sup>The five declare wars are the War of 1812; the Mexican-American War of 1848; the Spanish-American War of 1898; World War I; and World War II. The wars authorized by other legislative measures include the Naval War with France (1798–1800); the First Barbary war (1801–1805); the Second Barbary War (1815); the Civil War; the Vietnam War; and the Persian Gulf War. The Korean War stands alone as the only major war not expressly authorized by Congress in advance.



clear its view that its authorization should have been sought in advance.<sup>4</sup> My basic point is this: one must be very cautious in drawing broad conclusions about Presidential power from a numerical list of cases. These instances each have to be examined carefully, and the authority claimed by the President and Congress's reaction fully assessed.<sup>5</sup> Ultimately, however, whatever conclusions one comes to concerning the constitutional implications of small-scale Presidential actions undertaken without congressional authorization, the fact remains that major wars have been authorized by Congress.

Where exactly does a global war on terrorism fall on the spectrum between major war and smaller scale military actions? If it were purely a police action against hostile non-state actors, akin to operations against pirates or to other small-scale operations with limited objectives, a case can be made that historical practice indicates a record of Presidential deployments without advance congressional authorization. The President, after all, clearly possesses authority to repel and to forestall terrorist attacks against the United States, its forces, and citizens.

Yet, this global campaign is much more ambitious than apprehending terrorists. It aims to destroy a multi-state terrorist infrastructure and potentially defeat or overthrow sponsoring regimes. While military force is not the only, or even indeed the main, instrument for waging this war, the range of military activities that we have mounted to date is very diverse—combat operations, continuous air patrols, maritime interception of shipping, the training and equipping of foreign militaries for combat operations, operational assistance to post-conflict stability operations, just to name a few. Given that the current campaign is focused against a global terrorist network that is based in over sixty countries, that has the capacity to inflict massive casualties, and that requires or depends upon the sponsorship or acquiescence of various countries for its training and safe-harbors, the scope and complexities of this military campaign would appear to defy any commonsense notion of a limited police action.

#### CONGRESS'S POST-SEPTEMBER 11 AUTHORIZATION OF FORCE: SCOPE AND LIMITS

Congress's authorization for the use of force against those responsible for the attacks of September 11 is an express recognition that Congress and the President both have a critical constitutional role to play in the war on terrorism. Mindful of the centrality of congressional war powers in a campaign against terrorism that will be long-term and far-reaching, Congress sought to craft an authorization that both allowed for appropriate executive flexibility but at the same time is not a blank check.

Though not restricted geographically, Congress's post-September 11 authorization does contain some clear limits. The Joint Resolution authorizes the President:

"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."

The joint resolution, in essence, authorizes (a) necessary and appropriate force, against those states, organizations, or persons who (b) planned, authorized, committed, or aided the September 11th attacks, or (c) harbored such organizations or persons, (d) in order to prevent future acts of international terrorism against the United States by such nations, organizations or persons. Thus, the force must be directed against those responsible in some way for the September 11th attacks, or those who harbored such organizations or persons; and the purpose of using force is focused and future-oriented: to prevent additional terrorist acts against the United States by the states, organizations, or persons responsible for the September 11th attacks or who harbored those responsible. The President determines whether the necessary link to the September 11th attacks is established, and presumably Congress expected he would make his determination and the basis for it known to Congress in some fashion, perhaps through a war powers report or through briefings, e.g., to the intelligence committees. Moreover, in signing the Joint Resolution,

<sup>4</sup>Both Houses of Congress adopted identical resolutions declaring that the President "should have sought" congressional approval before sending U.S. troops to Haiti and urging "prompt and orderly withdrawal." S.J. Res. 229, 103d Cong., 1st Sess. (1994). The vote was 91 to 8 in the Senate, and 258 to 167 in the House.

<sup>5</sup>For discussion of historical practice, see Francis D. Wormuth & Edwin B. Firmage, *To Chain the Dog of War* (2d ed. 1989); Louis Fisher, *Presidential War Power* (1995); and Jules Lobel, "Little Wars" and the Constitution, 60 U. Miami L. Rev. 61 (1995).

President Bush made clear that he would consult closely with Congress as the United States responds to terrorism.

'Congress' post-September 11th resolution was an unambiguous decision to authorize force. Like the Gulf War authorization in 1991, the authorization explicitly affirms that it "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." This removes any actions that fall within the scope of the authorization from the War Powers Resolution's 60-day time-clock provision. At the same time, Congress made clear that the requirements of the War Powers Resolution otherwise remain applicable.

#### THE WAR POWERS RESOLUTION AND THE WAR AGAINST TERRORISM

For all the controversy it has spurred, key elements of the War Powers Resolution are constitutionally compelling and warrant broad support. First, its overriding purpose is to "insure that the collective judgment of both the Congress and the President" applies to the introduction of U.S. forces into hostilities and to the continued use of those forces. Second, it seeks to enable Congress to better fulfill its constitutional responsibilities by requiring the President "in every possible instance" to "consult with Congress before introducing" U.S. armed forces into hostilities or imminent hostilities and to continue to "consult regularly" with the Congress while U.S. forces are in those situations. Moreover, the legislative history of the War Powers Resolution makes clear that Congress expected consultations to be meaningful:

"Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions, and in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available." (H.Rep. 93-287 (1993), p. 2351).

Third, under the War Powers Resolution, the President is required to report to Congress within 48 hours in designated situations,<sup>6</sup> and to make periodic reports to Congress at least once every 6 months if U.S. forces remain in hostilities or imminent hostilities.

Whatever conclusions one reaches about the more controversial provisions of the War Powers Resolution, such as the 60-day time clock,<sup>7</sup> the consultation provisions are sound and reasonable efforts to ensure that both the President and the Congress fulfill their constitutional responsibilities concerning the commitment of U.S. forces abroad. Moreover, even when Congress has authorized the use of force, as it did after September 11, regular, meaningful consultations between Congress and the President remain vital in the ongoing war on terrorism. Such consultations are imperative to ensure that there is a frank exchange of views and a shared understanding between Congress and the President on future directions in the war on terrorism and broad support for the steps ahead. To give a counter-example: The experience in Somalia is a cautionary reminder that congressional authorization and support in the early phases of an operation does not replace the need for continued dialog about the goals and risks of a changing mission. We cannot afford to make the same mistakes in the current context.

#### CONSULTATIONS

How should a system of regular, meaningful consultations between Congress and the Administration be structured as the country faces up to what will likely be a long, complex campaign against terrorism? Clearly, a commitment by the President to hold regular consultations with the bipartisan congressional leadership would be invaluable. Second, as the War Powers Resolution expressly provides in section 4(b), Congress should request that a broader range of information be included in the periodic war powers reports provided by the Administration. Those reports, which have

<sup>6</sup>These include when U.S. forces are introduced into hostilities or imminent hostilities, "into the territory, airspace or waters of a foreign nation, while equipped for combat," or "in numbers which substantially enlarge" existing deployments of combat-equipped forces in foreign nations.

<sup>7</sup>The controversial portions of the War Powers Resolution include section 2c, which I think does too narrowly state the President's constitutional war powers, but does not affect the operation of the rest of the resolution, and the 60-day time clock provisions, including the concurrent resolution provision (section 5(b)). At the same time, however, the War Powers Resolution explicitly states that it is not intended "to alter the constitutional authority of the Congress or of the President," 8(d)(1), and it also contains a severability clause, which provides that if any provision or application of the resolution is held invalid, the remainder of the resolution shall not be affected. (Section 9).

generally been perfunctory since the War Powers Resolution was first enacted, should, in the context of the war on terrorism, include a fuller discussion of the objectives and effectiveness of U.S. action, including our efforts to work closely with allies on multiple fronts. Congress may also wish to request that the reports be made more frequently, say every 3 months, and, in any event, invite Cabinet officials to testify on the State of the war on terrorism when those reports are submitted. The combination of fuller reports and high-level testimony could, in conjunction with meaningful consultations, make for a more significant and effective dialog between Congress and the Administration regarding future goals and strategies in the war on terrorism.

#### FUTURE AUTHORIZATION

As important as consultations are, however, they are not a substitute for congressional authorization if military action is contemplated that clearly implicates Congress's war powers. While the post-September 11 authorization is broad, it does contain limits, most notably the requirement of a clear link to the attacks of September 11. Other threats to U.S. security unrelated to those attacks may exist or arise in the future, and various military options may be considered, including options that go beyond measures to prevent future acts of terrorism by those responsible for the September 11th attacks. Whether and when additional congressional authorization is constitutionally required will depend on the facts of the situation and on the nature and objectives of the military action contemplated.

Constitutionally, the President clearly possesses the power to repel attacks and to forestall imminent attacks against the United States and its armed forces, and to protect Americans in imminent danger abroad. But the decision to go beyond this and commence a war belongs to Congress. Major military action with far-reaching objectives such as regime change is precisely the kind of action that constitutionally should be debated and authorized by Congress in advance. The Constitution's "wisdom" on this point is compelling: Authorization, if provided by Congress, ensures that the risks and implications of any such action have been fully considered and that a national consensus to proceed exists. Congressional authorization also ensures American combat forces that the country is behind them, and conveys America's resolve and unity to allies as well as adversaries.

The war against terrorism will, unfortunately, be with us for a long time. However, as our Nation moves ahead on various fronts, using a variety of tools and means, our response will be more effective and more sustainable if the Congress and the President continue to work together in the best tradition of our great Constitution.

Chairman FEINGOLD. Thank you very much, Professor.

I just want to mention two items here, in light of your testimony.

One is, I was pleased to have you sort of join the point that Dean Kmiec had raised, which I had not heard before, the idea that declaring war is merely to in effect have Congress ratify something that is already happened. I would submit—and I certainly know that he has a dean of law, so I am careful to do this—but that if the Framers had intended that to be the case, they could have used words like "ratify" or "endorse" or "acknowledge." To me, "declare" has always been a strong word suggesting a proactive role for Congress.

But that is an interesting point that I had not thought about before. And as we get into the questions, you can respond to that.

Secondly, some of the testimony seems to merge or maybe even confuse consultations over broad scope of policy directions versus consultation over tactical decisions, which is a dangerous thing. Because none of us, at least nobody that I work with here in the Senate, really believes that we should be consulted about every tactical decision. That is a scary thought, in terms of our armed forces.

And the trouble is, though, as the discussion proceeds, if the goal for consultation is portrayed as trying to get into all that, it makes people turn off on the whole idea of legitimate consultation. And that is something we have to avoid.



Questions by Senator Strom Thurmond for Professor Jane Stromseth, regarding her testimony before the Constitution Subcommittee of the Senate Judiciary Committee on April 17, 2002

1. Professor Stromseth, in your testimony, you indicate that there is historical precedent for the President to act without Congressional authorization when pursuing police actions. Isn't the current war on terrorism a police action as well as a military action because the enemy is dispersed throughout the world? Didn't Congress acknowledge this in S.J. Res. 23, authorizing the President to use force not only against nations, but persons and organizations as well?

Presidents historically have used limited force in "police" actions in pursuit of individuals, including pirates and bandits, both with and sometimes without the authorization of Congress. The President, moreover, has clear constitutional authority to repel attacks against the United States, its forces, and citizens and to forestall imminent attacks. The current war on terrorism is a complex and multi-faceted campaign involving a wide range of both law enforcement and military actions. Some of the military operations are akin to small-scale "police" actions designed to apprehend individual terrorists. Other aspects of the war against terrorism go well beyond this and, as in Afghanistan, involve sustained combat operations against a state that supported and harbored those responsible for the September 11 terrorist attacks. S.J. Res. 23 recognizes that the war against terrorism will include a diverse range of military actions directed against both non-state and state actors. The joint resolution authorizes the President to use necessary and appropriate force against nations, organizations or persons responsible for the September 11 attacks in order to "prevent any future acts of international terrorism against the United States by such nations, organizations or persons." In enacting S.J. Res. 23, Congress recognized the importance of its authorization and support in a campaign that is likely to be long and far-reaching, that is focussed on a global terrorist network based in over sixty countries, and that will involve military actions that vary in scope and complexity, including military operations that go beyond limited "police" actions to apprehend individual terrorists.

2. You state in your testimony that the President has the power to repel actual or imminent attacks against the United States. If the President received intelligence information that an attack on the United States was imminent, would he have the ability to strike preemptively in an offensive manner?

The President's constitutional authority to repel attacks against the United States is incontestable. This includes the power to repel imminent attacks against the United States. Thus, if the President received intelligence information that an attack on the United States was imminent, he certainly would have the authority to exercise the country's right of anticipatory self-defense by using force to

prevent and preempt the imminent attack. I would not characterize such a preemptive act of anticipatory self-defense against an imminent attack as "offensive" in nature; instead, using necessary and appropriate force preemptively to forestall and prevent an imminent attack upon the United States would, in my view, be a defensive action undertaken as an exercise of the right of self-defense.

3. Professor Stromseth, you have argued that the framers intended Congress to have broad powers over the initiation of hostilities that are not conducted pursuant to a declaration of war. This argument is partly based on Article I, Section 8, Clause 11 of the Constitution, which gives Congress the power to "grant Letters of Marque and Reprisal, ..." Isn't the Marque and Reprisal Clause fundamentally different because it authorizes *private* parties to engage in hostilities?

The Constitution's Marque and Reprisal Clause, which gives Congress the power to "grant Letters of Marque and Reprisal," is important in understanding the scope of the war powers vested in Congress. Letters of marque and reprisal have a long history dating back to the 12<sup>th</sup> or 13<sup>th</sup> century. Originally, as your question indicates, they were governmental authorizations permitting private parties to use force – to settle their own grievances against another state or its citizens. By requiring sovereign permission for private reprisals, European states during the 12<sup>th</sup> to 17<sup>th</sup> centuries aimed to control private warfare and to satisfy their citizens' grievances. But by the mid-18<sup>th</sup> century, governmental control over warfare had increased substantially, and reprisals were generally authorized by sovereign states to pursue their own claims against other states. During the 18<sup>th</sup> century, letters of marque and reprisal were used by states as a way to authorize private forces, and sometimes public forces, to take military action in support of state goals. (For an historical analysis of marque and reprisal, see Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U.Pa.L. Rev. 1035 (1986)). In other words, at the time of the Constitution's drafting, letters of marque and reprisal were likely understood as a way for states to authorize or commence limited hostilities against another state short of declared war. Eighteenth century statemen and treatise-writers on the law of nations referred to reprisals, in particular, as acts of limited hostility or "imperfect war" that interrupted the public tranquility only partially and that generally had the narrow objective of rectifying a specific injustice. The Constitution's founders understood, however, that state reprisals could and often did lead to full-fledged or "perfect" war. Thus, they likely understood Congress's power to grant letters of marque and reprisal as the power to authorize the initiation of hostilities such as reprisals short of declared war – hostilities that could easily escalate and lead to war. This power is in addition to Congress's clear constitutional power to declare or authorize war.

4. Professor Stromseth, do you feel that historical precedent is valuable in terms of defining the war-making powers of the President and Congress? What past Presidential actions provide precedential value and what actions do not?

Yes, I do think historical practice is valuable in understanding the respective war powers of the President and the Congress. Historical practice cannot override or amend the clear provisions of the Constitution, but it can help illuminate those aspects of the division of war powers that are uncertain or open-ended. Analyzing the precedential significance of historical practice is an extremely important and complex matter. I've discussed it at some length in Jane Stromseth, "Understanding Constitutional War Powers Today: Why Methodology Matters," 106 *Yale Law Journal* 845, 872-886 (1996). Let me try to summarize some key points here in answering your question.

In evaluating the significance of historical practice in constitutional interpretation, I think the approach taken by Justice Frankfurter in his *Youngstown* concurrence is a promising one if applied thoughtfully to the war powers context. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Frankfurter's general approach to historical practice was embraced by the Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). It has several key components:

- First, practice cannot "supplant" a clear constitutional requirement. *Youngstown*, 343 U.S. at 610. The Constitution clearly gives Congress the power to declare war, and thus the President cannot, by virtue of historical practice, appropriate that power. To argue otherwise would be to claim, in effect, that the President alone or with congressional acquiescence can "amend" the Constitution in contravention of the document's explicit amendment provisions. In contrast, where the constitutional text is genuinely ambiguous or silent, as it is regarding issues such as the President's power as Commander in Chief to deploy forces abroad for foreign policy purposes in peacetime or the precise scope of the President's authority to "repel sudden attacks," historical practice can shed light on how we should understand the President's constitutional power today.
- Second, Frankfurter wrote, the practice must be "systematic," "unbroken" and "long-pursued." *Id.* In the war powers context, the requirement of a "systematic" practice means that one must differentiate between types of actions: Cases in which the President has used limited force to rescue or protect American citizens, for instance, cannot be used to claim executive authority to commit American forces unilaterally to major hostilities.
- Third, the executive practice must be "long pursued to the knowledge of the Congress and never before questioned . . ." *Id.* Congress, in other words, must not only be on notice of an executive practice and accompanying claim of authority to act; Congress also must accept that practice and claim of authority. Assessing whether Congress can fairly be said to have done so, of course, raises many complex and difficult issues of interpreting legislative intent, particularly in the war powers context, which certainly argues for caution in making conclusions about the significance of history.

As I discuss more fully in my Yale Law Journal piece, with respect to war powers, only two categories of historical practice seem to me unambiguously to meet the Frankfurter standard embraced in *Dames & Moore*. The first is the long-standing presidential practice of deploying forces abroad for foreign policy purposes in peacetime -- deployments that do not involve commencing hostilities. The Constitution does not clearly allocate this power, and successive congresses generally have accepted or acquiesced in this executive practice over the years. By accepting substantial presidential latitude in making peacetime troop deployments, congresses over the years have recognized the value of presidential discretion and flexibility in the fluid and often dangerous realm of foreign affairs. Yet Congress has not thereby given up its own authority over such troop deployments and it can exercise concurrent authority. The second category of historical practice that meets the Frankfurter standard, in my judgment, is the long-standing presidential practice of using limited force to rescue American citizens abroad whose lives are in imminent danger. Neither the constitutional text nor the original debates clearly address executive authority in this context. The practice is well established historically. Congress, moreover, generally has accepted or acquiesced in such protective actions involving minimal risk of either sustained hostilities or escalation and has provided statutory authority for certain actions that do not amount to acts of war. In contrast, historical practice has not given the President the legal authority to commence war against another country, whether the war be large or small. The Constitution clearly vests that authority in Congress.

5. Professor Stromsæth, you argue that the Congress should provide judgment before combat operations because it is responsible to the people. However, isn't the President, as an elected official, responsive to the people? Aren't the President's actions further constrained by Congress' power of the purse and the power to impeach?

Yes, as an elected official who represents all Americans, the President is clearly responsive and accountable to the people. Moreover, in exercising his considerable foreign affairs powers he can act with efficiency and dispatch in protecting the United States and the American people. In dividing the war powers between Congress and the President, however, the Constitution provides for two lines of accountability before the United States commences or initiates war. The President is Commander in Chief of the armed forces of the United States and has clear authority to repel attacks, to exercise the nation's rights of self-defense, and to conduct war authorized by Congress. But, as I discuss in my statement, the Constitution vests the power to declare or authorize war in the legislature as a whole, to ensure careful deliberation by the people's elected representatives in Congress and broad national support before the United States commences a war. In short, both the President and the Congress are responsible to the people and each has valuable attributes that are important in the constitutional distribution of war powers and in the current campaign against terrorism.

Certainly Congress's power of the purse and the power to impeach are important elements of the structural system of checks and balances set forth in our Constitution. But, as I discuss in my statement, the Constitution in addition gives to Congress the power to decide whether the United States should commence war. Legislative deliberation before the United States initiates war serves a number of important purposes in addition to those served by Congress's power of the purse. Moreover, the power of the purse, though extremely important, can be an overly blunt instrument for expressing congressional will and, in some situations, can risk undercutting U.S. diplomacy and deployments at critical moments. This underscores the importance and value of deliberation by both the Congress and the President before U.S. forces initiate hostilities in order to ensure a strong national consensus for the action undertaken.

6. Professor Stromseth, does the President have the power to use force to respond to a national emergency created by an attack on the United States? Isn't the President currently responding to a national emergency, and shouldn't he have some latitude in his response?

Yes, the President clearly has constitutional authority to use force to respond to an attack upon the United States. The President's constitutional power to repel attacks upon the United States has been clear from the beginning. The War Powers Resolution, in section 2©, likewise recognizes the President's constitutional powers as Commander in Chief to respond to "a national emergency created by attack upon the United States..." The President currently is responding to the September 11 attacks upon the United States and, as Commander in Chief, the President should have some latitude in his response. Congress recognized this in crafting S.J.Res.23, which gives latitude to the President to use "all necessary and appropriate force" against those responsible for the attacks of September 11 and contains no geographical limits, in recognition of the global nature of terrorist networks and the role of organizations and individuals as well as states. In enacting S.J.Res.23, which the President welcomed and signed into law, both branches recognized that the most effective response to the September 11 attacks upon the United States is a unified one in which both Congress and the President act together.

7. Professor Stromseth, would you agree that the language of S.J. Res. 23, which passed the Senate by a vote of 98-0, places no time or geographic restrictions on the President's ability to act, provided that he can connect the object of his military actions with the terrorist attacks of September 11? Does S.J. Res. 23 satisfy the War Powers Resolution for any future use of military force?

S.J. Res. 23 authorizes the President "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." The resolution contains no geographic restrictions on the President's ability to use "all necessary and appropriate force" against those nations, organizations, or persons he determines "planned, authorized, committed, or aided" the September 11 terrorist attacks, or harbored such organizations or persons. The resolution contains no time limits, although it does indicate that the purpose of using force is focused and future-oriented: to prevent additional terrorist acts against the United States by the states, organizations, or persons responsible for the September 11 attacks or who harbored those responsible. In short, S.J. Res. 23, though broad in several respects, also has limits and is focused on preventing future acts of terrorism against the United States by those responsible for the September 11 attacks.

S.J. Res. 23 explicitly affirms that it "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." This language clearly and expressly states Congress's intent to authorize force, consistent with section 8(a)(1) of the War Powers Resolution. As a result of this language, military action that falls within the scope of S.J. Res. 23 is not subject to the 60-day time clock contained in section 5(b) of the War Powers Resolution. At the same time, S.J. Res. 23 also states that "[n]othing in this resolution supercedes any requirement of the War Powers Resolution." Thus the reporting and consultation requirements of the War Powers Resolution are still applicable to actions authorized by S.J. Res. 23. Given the likely scope and time-frame of the war on terrorism, regular reports and meaningful, high-level consultations will be important as the campaign against those responsible for the September 11 attacks continues.