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“The Executive Branch Perspective on the War Powers Resolution”

Subcommittee on International Organizations, Human Rights, and Oversight  
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Mr. Chairman, Congressman Rohrabacher, Members of the Subcommittee, it is a great pleasure for me to appear before you for a second time to testify on the War Powers Resolution. As I noted when I appeared here on March 13 to testify on congressional perspectives on the War Powers Resolution, I am something of a switch hitter on the subject, having served for four years as an Associate White House Counsel to President George H.W. Bush, followed by ten years as Minority Chief Counsel and then Chief Counsel to this Committee. I can only assume that someone here decided to test my claim by inviting me back to testify on the Executive branch perspective. Whatever the reason, I appreciate the opportunity to appear again.

The View From the Executive Branch

As you know, there are profound differences in opinion between the Executive branch and many Members of Congress about the proper allocation of powers between the Executive and legislative branches with respect the use of armed force. As I pointed out on March 13<sup>th</sup>, these differences are institutional rather than partisan in nature. President Nixon vetoed the War Powers Resolution in 1973 because he believed it was unconstitutional, and every President since him has come to share his view of this law. It is a safe bet that our next President will be someone who is today a United States Senator, but it would defy experience to expect that former Senator’s view of the War Powers Resolution to be any different than that of his or her predecessors in the White House.

There are two factors that, in my opinion, account for the consistent view of Presidents that Congress need not give its prior approval to the use of armed force abroad. First, all Presidents take very seriously their responsibility to protect the security of the American people, and more broadly to promote international peace and security. They quickly find that one of the most powerful tools at their disposal in seeking to influence crisis situations abroad is their ability to bring to bear, or threaten to bring to bear, armed force. As a result, they come to see congressional efforts to constrain their ability to use armed force as not just inconvenient, but potentially dangerous.

Second, there is within the Executive branch an entrenched view of the Constitution with regard to war powers that is at odds with the views of many Members of Congress. This is not the idiosyncratic view of a few extremist lawyers, but rather, so far as I am aware, the shared view of all the lawyers at the relevant Executive branch agencies, including the Departments of Justice, State, and Defense, as well as the White House.

I know you have devoted an entire hearing to the constitutional issues, and I will not seek to replot that ground today. But I do think it is worth pointing out some of the key legal precepts that are widely accepted within the Executive branch:

- Under the Constitution, the President is Commander in Chief of the Armed Forces. Congress does not have to give the President an army, but if it does, there are very serious limits on Congress's ability to tell him what he can do with it.
- The Constitution's grant of authority to Congress to declare war cannot be read as a grant of exclusive authority to Congress to authorize the use of military force. Historically declarations of war were one way that nations got themselves into a state of war, but by no means the only way. A state of war arises once a nation is attacked, for example, and in such a case there is no need under international law for the attacked nation to declare war. Moreover, there have always been many uses of force that take place outside a state of war. For all these reasons, the function of declaring war is easily distinguishable from the function of authorizing the use of force.
- The history of the "declare war" clause at the constitutional convention—in particular the switch to the term "declare war" from the original language which would have granted Congress the power to "make war"—leaves no doubt that the founders wanted the President to be able to defend the nation from attack without first obtaining the approval of Congress. It therefore can be argued that "non-defensive" uses of force may require the prior approval of Congress—uses of force that in modern usage would be termed "acts of aggression." But defensive uses of force do not require prior congressional approval. Defensive uses of force include not only repelling attacks on the territory of the United States, but also defending our deployed land and naval forces abroad, our shipping, American citizens, American property, and also in some circumstances our vital national interests.
- As first articulated in President Nixon's veto message in 1973, the War Powers Resolution is constitutionally defective in at least two process-related respects. First, its requirement that the President withdraw U.S. Armed Forces from foreign deployments when so directed by a concurrent resolution of Congress denies the President his right to veto legislation set forth in the presentment clause of the

Constitution. Second, the so-called “60-day clock”, under which the President is required withdraw U.S. Armed Forces from foreign deployments after 60 days unless Congress has authorized the deployment, also effectively denies the President his right to presentment of legislation. The first of these constitutional objections appears to have been vindicated by the Supreme Court’s 1983 decision in INS v. Chadha.

- Beyond these process-related objections, for all of the reasons set forth above, it is questionable whether Congress has the constitutional authority to order the President to terminate deployments of U.S. Armed Forces—at least defensive deployments. Could Congress constitutionally forbid the President to defend some part of the United States from attack? If not, there must be other defensive uses of force that are also beyond the authority of Congress to forbid.

### The Executive Branch’s Perception of Congress

The Executive branch finds Congress to be a difficult partner on war powers questions. In part this is because Congress is not a rubber stamp, as all Presidents wish it would be. But it is also because Congress can be a fickle institution, particularly on questions of war and peace. I saw first-hand as a congressional staffer how often Members of Congress agonize over how to vote on whether to authorize particular military operations. For many Members, this is the only time they are ever called on to make what amounts to life-or-death decisions, and they can be uncomfortable with the responsibility. Sometimes rather than give a clear “yes” or a clear “no”, they look for a way to say “maybe”.

This is an understandable human impulse, but when the Congress as a whole responds to a use of force question by saying “maybe”, the Executive branch is left shaking its head. Not only is the question of legal authority for the use of force left ambiguous, but the political landscape is even more confused. When the Congress says “maybe”, the Executive branch believes Congress is trying to have it both ways: Congress wants to be able to share in the credit if the operation turns out well, and condemn it as ill-conceived and illegal if it turns out poorly. Needless to say, the Executive branch regards this as an evasion of responsibility and a non-serious approach to what are in fact deadly serious questions.

Congress, of course, does not literally say “maybe” to proposed uses of force, but it has a number of ways of doing the functional equivalent. I would contend that this is the answer that Congress gave to all of the peacekeeping and peacemaking operations undertaken during the Clinton Administration—Somalia, Haiti, Bosnia, and Kosovo. The most important functional equivalent to saying “maybe” is permitting the sixty-day clock set forth in the War Powers Resolution to expire. According to the War Powers Resolution, this clock requires the President to terminate a use of force if Congress has not affirmatively authorized it within sixty days. It is, in other words, a default that kicks in if Congress does absolutely nothing. No President has ever

curtailed a military operation because the sixty-day clock was about to expire, and Congress has never seriously sought to enforce it. It therefore serves in practice as a way of permitting a military operation to go forward, while reserving to Congress the right to disavow it should it go badly.

### The Executive Branch and Congressional Authorization for the Use of Force

As you know, the Executive branch is not fond of the War Powers Resolution and would be happy to see it go away. But in the years since the Resolution was enacted in 1973, the executive branch has certainly learned how to live with it. In my testimony last month I described some of the ways the Executive branch has come to apply the Resolution in order to minimize its impact. Most importantly, it has developed legal theories under which it does not report to Congress at all on foreign deployments of U.S. Armed Forces, or else reports that such deployments are not into situations where involvement in hostilities is imminent. In either case, the result is the same: the Executive branch satisfies itself that sixty-day clock of the War Powers Resolution has not been triggered. Some of the most extreme examples of this took place during the 1990s when the Clinton Administration was eager to extend U.S. participation in UN peacekeeping operations that had not been authorized by Congress.

This is not to say that the Resolution has no effect on the actions of the Executive branch. The legal theories I have described are of little use in cases where U.S. forces are to be deployed into sustained combat that will likely last more than sixty days. In such cases, the President's lawyers may advise him that he has authority under the Constitution to proceed with the deployment irrespective of the War Powers Resolution, but they also have to warn him that after sixty days he will be unable to argue that he is in compliance with the letter of the Resolution. In other words, after sixty days, he will be in clear noncompliance with the Resolution, and the only legal justification for his actions will be his claim that the Resolution is unconstitutional. As a former White House lawyer, I can assure you that this is the kind of situation that we tried mightily to avoid for our client.

We had precisely this sort of discussion during the Administration of President George H.W. Bush with regard to his decision to liberate Kuwait from Saddam Hussein. President Bush was advised by his lawyers that he had the constitutional authority to order a military operation to liberate Kuwait even without advance approval from Congress. His lawyers went on to warn him, however, that he would likely be in violation of the letter of the War Powers Resolution if combat operations lasted longer than sixty days. I believe that in the end President Bush decided to seek congressional authorization for political rather than legal reasons, but certainly one of the political considerations in his mind was that domestic political opposition to his policy would be much stronger if his opponents were able to argue that he was breaking the law.

I had occasion to briefly discuss this with President Bush shortly after the successful conclusion of Operation Desert Storm. Recalling the enormous political pressure he came under

not to commence ground operations following the air campaign against Saddam Hussein, he commented to me: “Thank God we got that authorization from Congress. Can you imagine the mess we would have had on our hands if we hadn’t gotten that?” I can only imagine how many times our current President has had the same thought about his decision to seek authorization from Congress for the Second Persian Gulf War.

### Reforming the War Powers Resolution

The current arrangement under the War Powers Resolution suits the Executive branch reasonably well. As a practical matter, the Resolution does not stand in the way military operations that will be intense but short in duration (e.g., Grenada, Panama), nor operations of longer duration that arguably do not involve hostilities (e.g., the UN peacekeeping operations of the Clinton era). The Resolution does discourage Presidents from initiating much larger military operations without congressional authorization, but as demonstrated by the two Persian Gulf Wars, that generally serves the President’s own political interests.

It follows that, short of repealing the War Powers Resolution as Congressman Hyde tried to do in 1995, there are not many reforms in this area that the Executive branch would likely support. Needless to say, the Executive branch would not favor tightening the restrictions of the War Powers Resolution or removing any of the definitional flexibilities that it has developed over time.

When I testified last month I laid out my own thoughts about how Congress could reform the War Powers Resolution if it wishes to be a full partner with the President in national decision-making with respect to the use of force. I suggested that Congress could replace the sixty-day clock with a mechanism requiring Congress to vote under expedited procedures when U.S. forces are deployed into hostilities. Under this mechanism, an affirmative vote would be a vote to authorize the deployment and a negative vote would be a vote to order the withdrawal of U.S. forces.

The Executive branch would like this mechanism to the degree it induced to Congress to authorize deployments ordered by the President. Certainly there would be many cases where it would have that effect. But the Executive branch would strongly dislike the mechanism to the degree it resulted in cases where Congress voted to order the President to withdraw U.S. forces. In such cases, the President either would have to comply with the wishes of Congress, or rely on the strength of his veto pen to carry forward with his policy. This means that, on balance, the Executive branch would not like the mechanism very much at all.

I doubt, however, that the Executive branch is worried my suggestion will become law. As I indicated earlier, the Executive branch does not believe that Congress wishes to fully share the responsibilities of national decision-making with respect to the use of force.

Thank you, Mr. Chairman.