

WAR POWERS FOR THE 21ST CENTURY: THE EXECUTIVE BRANCH PERSPECTIVE

HEARING BEFORE THE SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT OF THE COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES ONE HUNDRED TENTH CONGRESS SECOND SESSION

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THURSDAY, APRIL 24, 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 3:15 p.m., in Room 2172, Rayburn House Office Building, Hon. William D. Delahunt (chairman of the subcommittee) presiding.

Mr. DELAHUNT. We will come to order.

First of all, let me apologize for the inevitable delay. I know that my ranking member will be arriving shortly, so I will take some liberty and commence and make what will be a brief opening statement. And again, once more, I extend my gratitude for your indulgence; and I promise you we will attempt, make every effort to be brief so that everyone will be able to make his or her connection.

Today we continue our series of hearings on perhaps the most important duty of any government, the duty to send—to make a sound decision when it sends young men and women into combat in defense of our national security. The topic has become known simply as the “war powers.”

In our first hearing in March we took testimony from current and former Members of Congress; in our second hearing, earlier this month, we heard from a panel of preeminent constitutional scholars; and today we consider the perspective of the executive branch. And we will hear from witnesses with substantial experience in terms of this particular issue, experience at both ends of Pennsylvania Avenue.

Before I introduce today’s witnesses I will take a moment, pause, and take stock of where the subcommittee is in its consideration of the war powers and why. Where we are is right in the middle of a careful review of the status of the current law of the land, a law whose intent was to establish a regular process for making the decision about going to war, which is reflected in the 1973 War Powers Resolution.

From our previous witnesses the subcommittee has heard insightful arguments both favoring and opposing the War Powers Act. We also asked them to comment on proposed changes to the procedure for congressional deliberation that the War Powers Act established, such as those contained in the so-called Constitutional War Powers Act, authored by our colleague, Congressman Walter Jones of North Carolina.

Our plan and our hope is to review all of the testimony and all of the suggestions that have been made, and then at some time, mid-summer or late summer, most likely, conduct a final wrap-up hearing; and our plan is to return to the full Foreign Affairs Committee with a revised version of the Jones bill that takes full advantage of what we have learned as a result of these hearings. So that is the "where."

And the "why" can be explained with two words: Jones and Iraq. The Vietnam War divided the country and precipitated a review of the constitutional roles of the Congress and the executive branch. That review resulted in the enactment of the War Powers Resolution of 1973. And today we find ourselves in a similar situation because of the war in Iraq.

There exists considerable public controversy about the decision to go to war in 2002 and to continue that war today; and that has generated an additional rethinking of the proper roles of both branches of government in the decision to go to war—or to stay in war, for that matter. And the individual who has forced us to this point in time, this rethinking, if you will, is a Member of the House who is among our most respected, across party lines, for honesty and dedication and to the well-being of American troops and for political courage. And that is our friend, Walter Jones of North Carolina.

I once more thank him for his dedication to the issue, as witnessed by his drafting of H. J. Res. 53, entitled the Constitutional War Powers Act, and by his attendance at all of our hearings to date. And I ask unanimous consent that he be considered a member of this subcommittee today for purposes of receiving testimony.

Hearing no objection, it is so ordered.

At the last war powers hearing I asked, do we need a change in the congressional culture so that more Members become convinced of their constitutional obligation, or as former Member Mickey Edwards said, of our constitutional burden to be partners with the President in the most crucial of all national decisions? Or do we need a change in the process by which we ensure that Congress meets its constitutional responsibility?

For today's hearing I would just rephrase that question slightly: Do we need a change in the executive branch culture so that Presidents become convinced of their constitutional obligation to be partners with the Congress, again, 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 the President meets his or her constitutional responsibilities and does not encroach on congressional prerogatives?

As I said in the last hearing, the answer doesn't have to be one or the other. I do believe we need a predictable, credible process for consultation and approval so that the collective judgment of the people's directly elected Representatives can be brought to bear on these crucial decisions, as demanded by the Constitution. But above all, I believe we need a political culture in which the executive and legislative branches can communicate and can make this partnership viable and workable.

For its part, Congress has to take its constitutional responsibilities seriously. And for its part, the executive branch has to stop

seeing dialogue and consultation as a sign of weakness or as a ceding of its constitutional prerogatives.

My friend and ranking member, Mr. Rohrabacher, shared with us in a previous hearing the instructions he received while working for President Reagan: Don't be afraid to talk to anybody. I firmly believe that our foreign policy process will be strengthened, not weakened, by the executive branch talking on a continuing, regular basis with Congress before—not after—decisions of war and peace have been made.

Now, before I introduce our witnesses, let me yield to my ranking member, Mr. Rohrabacher, for any remarks he wishes to make.

[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, SUB-COMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

The Subcommittee will come to order.

Today we continue our series of hearings on perhaps the most important duty of any government—the duty to make a sound decision when it sends its young men and women to kill and be killed in pursuit of the national interest.

This topic has come to be known simply as: “the War Powers.”

In our first hearing in March we took testimony from current and former Members of Congress. In our second hearing—earlier this month—we heard from a panel of pre-eminent constitutional scholars.

Today, as we consider the perspective of the Executive Branch, we will hear from witnesses with tremendous experience in the War Powers question at both ends of Pennsylvania Avenue.

Before I introduce today's witnesses, I would like to pause and take stock of where the Subcommittee is in its consideration of the War Powers, and why.

“Where” we are is right in the middle of a careful review of the status of the current law of the land—a law whose intent was to establish a regular process for making the decision about going to war—the 1973 War Powers Resolution.

From our witnesses, the Subcommittee has heard insightful arguments both favoring and opposing the War Powers Resolution. We also asked them to comment on proposed changes to the procedures for congressional deliberation that the Resolution established—such as those contained in the Constitutional War Powers Act authored by Congressman Walter Jones.

Our intent is to review all the testimony, and all the suggestions that have been made. And then, at some time this summer—most likely after a final, wrap-up hearing—I hope to return to the full Foreign Affairs Committee with a revised version of the Jones bill that takes full advantage of what we have learned through these hearings.

So, that is the “where”—and the “why” can be explained with just two words: Iraq, and Jones.

The Vietnam War divided the country—and precipitated a review of the constitutional roles of the Congress and the Executive Branch. That review resulted in the enactment of the War Powers Resolution.

Today we find ourselves in a similar situation because of the war in Iraq. The considerable public controversy about the decision to go to war in 2002—and to continue the war today—has generated another re-thinking of the proper roles of both branches of government in the decision to go to war—or to stay at war.

And the person who is forcing the re-thinking is a Member of the House who is among the respected—across party lines—for honesty, for dedication to the well-being of American troops, and for good old political courage. And that is our friend, Walter Jones Jr., of North Carolina.

I thank the gentleman for his dedication to the issue—as witnessed by his drafting of House Joint Resolution 53, the Constitutional War Powers Act, and by his attendance at all of our hearings. And I ask unanimous consent that he be considered a Member of this subcommittee today for purposes of receiving testimony.

Hearing no objection, it is so ordered.

At the last War Powers hearing, I asked:

Do we need a change in the congressional *culture*, so that more Members become convinced of their constitutional 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?

For today's hearing, I would like to rephrase that question just slightly:

Do we need a change in the *executive branch* culture, so that *Presidents* become convinced of their constitutional obligation to be partners with the Congress 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 the *President* meets his or her Constitutional responsibilities?

As I said in the last hearing, the answer doesn't have to be one or the other. I do believe we need a predictable, credible process for consultation and approval—so that the collective judgment of the people's directly elected representatives can be brought to bear on these crucial decisions, as required by the Constitution.

But above all, I believe that we need a political culture in which the executive and legislative branches can communicate—and can make the partnership work.

For its part, Congress has to take its constitutional responsibilities seriously. And for its part, the Executive Branch has to stop seeing dialogue and consultation as signs of weakness, or as a ceding of its constitutional prerogatives. My friend and Ranking Member Mr. Rohrabacher shared with us in a previous hearing the instructions he received while working for President Reagan—don't be afraid to talk to anybody. I firmly believe that our foreign policy process will be strengthened, not weakened, by the Executive Branch talking with Congress before—not after—decisions of war and peace have been made.

Now, before I introduce our witnesses, let me yield to Mr. Rohrabacher for his opening remarks.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. I will make this short because I will have to leave at 4 o'clock in order to see my children before they go to bed in California tonight at 10:30. Otherwise, the next plane has me in and they don't know their daddy is in the house. So there you go.

Thank you, Mr. Chairman. This is the last of a series of hearings—or, who knows, we might hold some more. But the testimony I have heard so far I have listened to, and I felt that we have had some very fine witnesses and some very fine discussions, but it has not led me to believe anything other than the fact that our Founding Fathers had in mind something that was the right kind of approach, and that is that Congress was to play second fiddle to the executive branch in times of war.

Not that there aren't congressional prerogatives. There are. Not that we don't have certain rights and certain authority within our hands, which we can exercise to have our influence. Not that there shouldn't be a viable discussion. But in times of war, especially in the exercise of those war powers, our Founding Fathers meant that to be in the hands of the executive branch.

That is because our Founding Fathers experienced war by committee firsthand. And if you read a history of the American Revolution and what happened to our country during the Articles of Confederation, you will be able to see that things were not defined in terms of the executive and that the legislative branch almost caused us to lose the war on a number of occasions; and thus, we would never have been a free country.

But I would say that very little has changed, actually, when you take a look at history and you look at the forces that prevented the legislative branch from serving as an executive decision-making and command, you know, institution.

Those same forces are at work today, and we have seen it throughout our history. Whenever the Hill does get involved, the legislative branch gets involved outside of its rightful areas of au-

thority, it has an atrocious record. Once, going back and forth between issues during the Vietnam War, we saw that happen.

And now let me just note that certainly I am not suggesting to you that, for example, the things that happened—the Gulf of Tonkin resolution and things like that—there you have an executive, the executive branch, I think, not dealing honestly with the Congress. Congress certainly has every right to step in and investigate things like that. But for Congress then to assert its authority and to try to hem in the executive branch once hostilities have begun and people's lives are at stake, I think would have been the wrong thing. And to the degree that Congress did exercise that type of authority during the Vietnam War, it had a very negative impact on that whole endeavor.

So I have seen this whole issue from the Congress for these last 20 years; and before that, I was in the White House for 7 years. And so I got a firsthand look at the culture and the functions of these two institutions, and I found them to be enormously different in terms of motivation, resources, and ability to make the kind of decisions that our Founding Fathers knew were important to make at a time when war was being conducted.

I will remain open-minded, and I am always open to discussion and interested in what people have to say, but I think that—again, for example, I think it would have been fine—we would have had a better hearing today if we would have had, for example, Professor Robert Turner, who was invited today, who with a snafu, some kind of staff snafu here, we weren't able to actually have him here with us today.

But he would have added greatly, for example, to the discussion, and I think both of us would have benefited by that. So I would ask that Professor Turner's excellent testimony be put into the record at this time.

Mr. DELAHUNT. Without objection so ordered.

[NOTE: The information referred to is not reprinted here but is available in committee records.]

Mr. ROHRABACHER. And it is unfortunate, as I say, we can't hear from him today. He served as a volunteer for two tours in Vietnam, and he has two doctorates and taught at the University of Virginia, and West Point, and the Naval War College. And he has testified on the Hill a dozen times about the Constitution and the War Powers Act.

So the professor's testimony goes into great depth, as you will see in the record, about what happened in Vietnam which went where Congress had—almost every Member of Congress was supporting that war in Vietnam, and then as the tide turned politically, Members of Congress found it almost impossible to maintain a long-term goal of what they had in mind when they first committed and first voted to support Vietnam and to continue to support Vietnam with their appropriations.

Of course, we face similar situations with the conflicts we are engaged in today, conflicts that have especially come to us after 9/11 in dealing with international terrorism and the great threat of radical Islam. And I don't think in that war, just like in Vietnam, just like in the wars that we have had before, that we need 535 secretaries of state. We do not need 535 commanders in chief.

We need to make sure that the prerogatives that Congress has are used to the extent that our Founding Fathers meant them to be used. And I don't think—before we expand those powers, we should not even be considering that, until we have exercised the powers that we already have.

Not once—I have heard a lot of complaints about the war in Iraq, but not once have I seen a move that looked like it was going to succeed in defunding the war in Iraq. If simply the people that claim they are against that war would say, I am not going to vote for any more money for it, well, that is how you tell what you really believe on Capitol Hill, whether or not you are willing to vote for something that does exactly what you claim needs to be done.

Now, expanding the role of Congress, forcing different consultations is not—before action can be taken I don't think is a way that is going to make America safer. And although I certainly believe that the executive branch has to be held accountable, we in the legislative branch have to use the prerogatives that we have got.

And I will just end by saying, one of those prerogatives deals with making sure that when there are status of forces agreements, that we act upon those and ensure that those status of forces agreements are in the interests of the American people.

I am very proud to be standing now with you, Mr. Chairman, on that very issue. So let's exercise that prerogative. And I am ready to hear the witnesses today.

Mr. DELAHUNT. I thank my friend from California.

And customarily I would ask Mr. Jones to make an opening—and the vice chair of the committee, Mr. Carnahan of Missouri, who has joined us. However, for the sake of time, understanding that Mr. Atwood has a commitment to get on a plane—and I also want to ensure that Mr. Rohrabacher, the ranking member of this committee, gets to see those triplets. So what I am going to do is introduce our witnesses and ask them to make their statements, and then I will go to Mr. Rohrabacher for any questions he might have, and then we will proceed in the normal course.

So, let me introduce our witnesses. Brian Atwood is a welcome sight at the witness table after a distinguished career in both the legislative and executive branches, including time as administrator of the Agency for International Development. He has moved on to become the dean of the Humphrey Institute of Public Affairs at the University of Minnesota.

For our purposes today, he has two particularly relevant listings on his rather lengthy resume. First, Brian was on the staff of Senator Eagleton in 1973, and assisted in the writing of Senator Eagleton's original war powers proposal, a proposal, I should note, whose main requirements track closely with the legislation authored by Congressman Jones.

Second, he then served as assistant secretary of state for congressional relations under President Carter. So put these two jobs together, and we have someone who knows what the word "consultation" means for the war powers and how it differs from the word "notification."

Brian, thank you for coming all this way, although I presume it is cold, still, in Minnesota.

And I am delighted that Steven Rademaker, who testified at our previous hearing from his perspective as a former counsel to the full committee, has returned today to provide us his perspective as a former assistant secretary of state—in this case, for arms control—under President Bush.

Steve is senior counsel at BGR International, and serves as the U.S. representative on the United Nations Advisory Board on Disarmament.

Thank you, Steve, for assisting us once more.

Our third witness is Dr. Richard Grimmett, specialist in international security at the Congressional Research Service, and the author of the definitive CRS report on war powers that serves as the committee's bible for these hearings. He has briefed me and others multiple times, and I asked him to come here today not to try to improve on his report with a prepared statement, but to answer questions and help clarify matters during the questioning period in case our witnesses should disagree. Because if you can't trust the CRS, I mean, who can you trust, I guess is the bottom line.

And I want to take note also of the fact that many of our hearings, since I became chair of this particular subcommittee, we have featured many CRS, Congressional Research Service, experts as witnesses and have been aided tremendously by that branch of Congress.

And I am sure you remember, Dana, Ken Katzman testifying on the situation in Iraq—and Jennifer Elsea—on whether the Iraq war was authorized if the U.N. mandate expires; and Chuck Mason on what constitutes a status of forces agreement. And I know that we all are grateful for the expertise that is provided by CRS.

So welcome, gentlemen. And why don't we first proceed with Secretary Atwood and then with Secretary Rademaker.

STATEMENT OF THE HONORABLE BRIAN ATWOOD, DEAN, HUBERT H. HUMPHREY INSTITUTE OF PUBLIC AFFAIRS, UNIVERSITY OF MINNESOTA (FORMER ADMINISTRATOR FOR U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT)

Mr. ATWOOD. Thank you very much, Mr. Chairman.

Mr. DELAHUNT. Would you hit that button, Brian?

Mr. ATWOOD. I am sorry.

Thank you very much, Mr. Chairman. And I congratulate you and the other members of the subcommittee for getting into this really important issue; and in particular, Mr. Jones for the initiative that he has taken.

It won't come as much of a surprise, given what you said about the Eagleton Senate version of the bill, that I would strongly support what Mr. Jones is suggesting here. Basically, there is a constitutional flaw, in my judgment, in the War Powers Resolution as it is currently written in that it concedes that presidents are going to enter into war without prior authority.

And what I think your bill does, Mr. Jones, is to bring great clarity to the kinds of emergencies that a president could be expected, in the modern age, to take the country into war to repel a "sudden attack," basically the phrase that was used at the Constitutional Convention.

And it would be interesting, certainly, as we look at the Presidential election to ask each of the three candidates what they think: Whether that delegation of power is adequate to repel a sudden attack upon the United States; to repel an attack on American forces stationed abroad; to rescue, under certain conditions, Americans that are in trouble in a country where the government doesn't protect them.

It seems to me that that is a logical delegation of the Congress to the President of the United States. And it is hard to imagine what more a president could want; and of course, the controversial aspect of cutting off the authority or basically asking that the President come back for authority if there is a need to extend that engagement beyond 30 days.

So I strongly support this approach. I think that the current War Powers Resolution could be effective if the consultation provisions were effective. And my concern is that Congress has not accepted the invitation of the executive branch, starting back when President Nixon issued his veto message. He basically said he welcomed the consultation provision. He urged Congress to create the machinery that would make it easier to discuss these kinds of issues across a broad range of circumstances. Those are the words he used in the veto message.

The Carter administration repeated that invitation. And yet the Congress really hasn't organized itself for those kinds of consultations.

Now, the committee structure here is interesting, but it gives you only a piece of the puzzle. Your committee's jurisdiction applies to the State Department and to other departments that you oversee. The Armed Services Committee oversees the Defense Department, and the Intelligence Committees the Intelligence Community. The problem, in my view, is, nowhere do you get the whole picture in a way that would make consultations with the executive branch "unavoidable, secure, and meaningful." So what I have recommended is what others have recommended, including the former chairman of this committee, Lee Hamilton. And that is that a joint consultative committee be established so that there can be no doubt downtown what the Congress wants with respect to consultations.

And I agree with Mr. Rohrabacher that in times of war, Congress really can't become 535 commanders in chief. The real issue here is influencing the decision before the decision is made. And it seems to me, the 16 members, including the leadership of this committee, the Committee on Armed Services, the Intelligence Committees, and the leadership of the House and Senate are very experienced people, many of whom have been in the military, many of whom are experts on constitutional law, many of whom understand, obviously, the politics of the issue.

And it seems to me that if the Congress were to organize itself that way and have periodic hearings run by a staff that was made up of military, intelligence and diplomatic experts who understood these issues, you could have a lot more influence than you have now over the way in which the decision is taken.

Mr. Goldsmith, who was President Bush's director of the Office of Legal Counsel at Justice, has urged genuinely engaging Congress in these decisions in an era of terrorism. And his assumption

is that if Congress would better understand the kinds of options the President has before him in dealing with terrorism, it may well be that the President would be persuasive. Maybe, maybe not.

I know that there are people who are concerned that a committee like that would be co-opted. But I can tell you from my own experience in dealing with one of the subcommittees of this committee during Mr. Hamilton's era, when he chaired the Subcommittee on Middle East and Europe, every other month he would have a closed-door session with the Middle East and the European bureaus and ask them very specific questions about policy matters.

There was a great deal of trust that emerged. The committee members were informed. And I will tell you that the executive branch had to consider questions that they might not have considered had it not been for the fact that that bipartisan committee was putting forth those questions. That is the kind of relationship I see this joint consultative committee having with the executive branch.

It has been said by Edwin Corwin that the Constitution is an invitation to struggle. But it is also an invitation to cooperate in the national interest. And it is vitally important that Congress get involved in these decisions and have some influence over the decisions prior to the balloon going up.

If people worry about being co-opted, they are much more easily co-opted if the President decides not to consult, and simply goes to the public with a call to arms. In that case, it is almost impossible for the Congress, the press, and everyone else to resist. And so what I am urging is that there be some discussion about a joint consultative committee somewhat similar to the Joint Economic Committee, except for the fact that it would obviously operate behind closed doors.

Finally, I don't exactly have an answer for this, but the current national security strategy is, in essence, a permanent declaration of war. It basically says that the President can take action because of the terrorism threat even when there isn't convincing evidence, in essence, that there is such a threat.

It seems to me that the executive branch needs to at least be challenged on this ground, because otherwise there is no sense talking about the Jones bill, there is no sense talking about anything; in essence, we are in a permanent state of war, and the Congress no longer has any role to play. I don't know that that is something that you would accept.

I have submitted written testimony, Mr. Chairman—I ask that it be made part of the record—as well as an article from the St. Louis University Law Review, which I think might shed some light on some of these issues.

One other point—and I have written to Mr. Rohrabacher about this because I watched the first hearing here, and there is something in that article about the Marine Corps barracks in Lebanon: The Long Commission that looked at that issue pointed out after the fact that the rules of engagement weren't changed to take into consideration the circumstances, which were obviously very hostile.

It seems to me that Congress has an interest, and this joint committee could play a role here in looking at rules of engagement, because I have evidence in this article that executive branch lawyers

in the past, because of concern about the need to consult and the possibility of triggering the cut-off provisions of the War Powers Resolution, have basically tried to get around changing the rules of engagement. This has put our military people in danger. There are two incidents that I cover in that article, the Gulf of Sidra and the Marine barracks in Lebanon. I think that is, again, something that Congress should be interested in.

If indeed the rules of engagement are changed to give our military more authority to deal with the situation, clearly that is an indication that "hostilities are imminent," which is the phrase that is used in the War Powers Resolution. So there are some effects of the War Powers Resolution that need to be examined as well.

So clearly there is a constitutional flaw and there is a flaw in the way we are doing business if, in fact, we are encouraging executive branch lawyers to deny our military an opportunity to defend themselves.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Atwood follows:]

PREPARED STATEMENT OF THE HONORABLE BRIAN ATWOOD, DEAN, HUBERT H.
HUMPHREY INSTITUTE OF PUBLIC AFFAIRS, UNIVERSITY OF MINNESOTA

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."

THE WAR POWERS RESOLUTION IN THE AGE OF TERRORISM

J. BRIAN ATWOOD*

INTRODUCTION

This analysis of the origins and the functioning of the War Powers Resolution is a product of research and personal experience in both Congress and the Executive Branch. I had the great privilege of working with Senator Thomas F. Eagleton (D-Mo.) from 1972 to 1977, a period when war powers and the Vietnam War were at the top of his and the country's national security agenda. The Senator was a leader in the Senate on war powers, and one of the original co-sponsors of the legislation, along with Senators Jacob Javits (R-N.Y.) and John Stennis (D-Miss.). Senator Eagleton's book, *War and Presidential Power: A Chronicle of Congressional Surrender*, fully explains his position on the constitutional issue and chronicles his efforts to promote a war powers bill that was consistent with the Constitution of the United States.¹

I returned to the Executive Branch in 1977 and assumed responsibility for managing relations with Congress for the State Department. That experience gave me a unique exposure to the attitudes and techniques employed by executive branch policymakers and their legal counsels as they sought to interpret—and frequently avoid—the requirements of the War Powers Resolution.

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1. See THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER* (1974).

This article concludes that the War Powers Resolution has failed to recreate balance in our system on issues of war and peace, that it has produced perversions in internal executive branch decision-making and that its key consultation provision has been easily avoided because Congress has failed to organize itself in such a way as to make consultations unavoidable, secure, and meaningful.

In an era when the predominant security threat comes from non-state actors—international terrorists—the Executive Branch has retained the legal and political initiative and dominates the debate over the use of force. Arguably, one consequence is that the option of engaging in conflict, especially in the face of terrorist threats, is far more attractive than less dangerous and more effective alternatives.

I. THE WAR POWERS RESOLUTION AND THE CONSTITUTION

The War Powers Resolution of 1973 was inspired by congressional frustration over an unpopular war. The Vietnam engagement evolved from a military advisory mission in the early 1960s to a hot war in 1964, when Vietnamese naval vessels allegedly attacked American ships in the Gulf of Tonkin.² President Lyndon Johnson asked Congress “to join in affirming the national determination that all such attacks will be met. . . .”³ With little debate and even less opposition, the Southeast Asia Resolution (popularly known as the Gulf of Tonkin Resolution) was passed and became law.⁴

Principal authors of the Tonkin Resolution later argued that it was not their intention to authorize a wider war.⁵ Still, the Executive Branch cited this authority in escalating the Vietnam conflict exponentially, starting with the landing of Marines in Vietnam in 1965.⁶ In 1967, Senator Clifford Case of New Jersey argued that President Johnson had “misused the Tonkin Gulf Resolution. . . . [And] that he has done it by relying on the exact language of the resolution, rather than upon the spirit in which we moved together in a particular emergency.”⁷ Case went on to say that “what we [the Congress]

2. John H. Messing, *American Actions in Vietnam: Justifiable in International Law?*, 19 STAN. L. REV. 1307, 1316–17 (1967).

3. 110 CONG. REC. 18,237 (1964) (message from President Lyndon B. Johnson, The Situation in Southeast Asia).

4. Joint Resolution of Congress, Pub. L. No. 88-408, 78 Stat. 384, H.J. Res. 1145 (1964).

5. 113 CONG. REC. 26,722 (1967) (statement of Sen. Case).

6. MICHAEL BESCHLOSS, REACHING FOR GLORY: LYNDON B. JOHNSON’S SECRET WHITE HOUSE TAPES 1964–1965 (2001); FAGLETON, *supra* note 1, at 109 (noting that the Gulf Tonkin Resolution authorized the executive branch to justify a major incursion in Southeast Asia); Jack Shulimson et al., *U.S. Marines in Vietnam: The Landing and the Buildup, 1965*, 67 J. OF AM. HIST. 200 (1980).

7. 113 CONG. REC. 26,722 (1967) (statement of Sen. Case).

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were doing when we adopted the resolution was showing unity at a time of emergency.⁸

Case, a Republican who later became one of the authors of an amendment to end combat activity in Indochina,⁹ was reflecting a common concern over the dynamic that tends to overwhelm more deliberative processes when a president declares that it is time to take military action. Professor John T. Rourke, in his book *Presidential Wars and American Democracy: Rally 'Round the Chief*, described this dynamic well:

Sometimes the urge to achieve unity is so strong that any degree of dissent comes under suspicion. . . . [E]very war spawns patriotic zealots who accuse war dissenters of sympathizing with, or even aiding and abetting, the enemy. The press is also restrained, and the public willingly accepts the argument that information will assist the enemy.¹⁰

A peace agreement was signed in 1973, and American POWs were released from Hanoi prisons. (The war officially ended with the Paris Peace Accords on January 27, 1973, but complete American withdrawal did not occur until the Fall of Saigon on April 30, 1975).¹¹ The Johnson and Nixon administrations justified the engagement in combat on the basis of the Tonkin Resolution until it was repealed by Congress in 1970.¹² Thereafter, their justification was based on the grounds that the Congress passed appropriations bills funding the war and that the Commander in Chief had the constitutional authority to pursue his military goals.¹³ Combat activity continued even after the POWs were released in Cambodia and Laos, on their borders with Vietnam.¹⁴ Then, in May 1973, Senator Eagleton introduced an amendment to an appropriations bill stating that no money in the present bill "or heretofore appropriated under any other act" may be used for combat activity in Indochina.¹⁵ This amendment passed both houses and was then vetoed by

8. *Id.*

9. 119 CONG. REC. 15,436 (1973) (statements of Sens. Case and Church).

10. JOHN T. ROURKE, PRESIDENTIAL WARS AND AMERICAN DEMOCRACY: RALLY 'ROUND THE CHIEF 8 (1993).

11. U.S. Department of State, *Ending the Vietnam War, 1973-1975*, available at <http://www.state.gov/r/pa/ho/time/dr/17411.htm>; *Fall of Saigon (1975)*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/05/vietnam_war/html/fall_of_saigon.stm.

12. Cooper-Church Amendment, Pub. L. No. 91-652 (Jan. 5, 1971). A revised Cooper-Church Amendment, Public Law 91-652, passed both houses of Congress on December 22, 1970, and was enacted on January 5, 1971. See EAGLETON, *supra* note 1, at 109 (noting that the Gulf Tonkin Resolution authorized the Executive Branch to justify a major incursion in Southeast Asia); *Id.* at 117 (noting the 1970 repeal of the Gulf Tonkin Resolution).

13. Cooper-Church Amendment, Pub. L. No. 91-652, 84 Stat. 1942 (1971); ROURKE, *supra* note 10, at 103.

14. *Fall of Saigon (1975)*, *supra* note 11.

15. EAGLETON, *supra* note 1, at 160.

President Nixon.¹⁶ Finally, a compromise—the Fulbright Amendment, named for the then-chairman of the Senate Foreign Relations Committee—was reached, allowing for forty-five more days of bombing and then terminating the war once and for all.¹⁷

It was against this background of presidential initiative and congressional frustration that members of Congress and legal scholars began to explore the Founders' intentions in distributing the Constitution's war powers to the two branches of government. Congress's war powers initiative was meant to recapture its powers for future situations. It was not proposed as a means to end the Vietnam War, but it was heavily influenced by Congress's ineffectiveness in its effort to convince the Executive to reverse course in that war.

II. THE FOUNDERS' INTENT: OVERTAKEN BY POLITICS

Congress was on firm constitutional ground in seeking to legislate in the war powers area. The bias reflected in the Founders' debates over this issue was overwhelmingly in Congress's favor.¹⁸ Senator Eagleton and his Senate co-sponsors focused on modern contingencies the nation faced and sought to update the delegation of authority to the President in emergency situations. Their bill defined the limited emergency situations wherein the President would be authorized to act to "repel sudden attacks."¹⁹ The minutes of the deliberations at the Federal Convention of 1787 reflect a motion made by James Madison and Eldridge Gerry to insert "declare," striking out "make" war, leaving to the Executive the power to "repel sudden attacks."²⁰ Sudden attacks in 1787 were seen as limited to the territory of the United States.²¹ The Senate sponsors saw the need to extend the scope of these emergency powers to defend U.S. forces stationed abroad and to rescue U.S. citizens if all other means to protect them had been exhausted.²² In *all* other cases, the President would be required to seek the prior approval of Congress.²³

The authors of the Senate bill cited the Constitution's "necessary and proper" clause as justification for legislating in this area. This clause, Article I,

16. *Id.* at 173.

17. See Fulbright Amendment to Second Appropriations Act, Pub. L. No. 93-50, § 307, 87 Stat. 129 (1973).

18. See THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318–19 (Max Farrand, ed., Yale University Press Vol. II 1937).

19. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 93d Cong. (1973).

20. THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 18.

21. *See id.*

22. See War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 93d Cong. (1973).

23. *See id.*

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Section 8, Clause 18, invites the two branches “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers...”²⁴ The power to “declare war” was an explicit “foregoing power.”²⁵

What emerged from the House-Senate conference committee seemed to turn the Constitution on its head in Senator Eagleton’s view. A non-binding “purpose and policy” section asserted that presidents could only introduce forces “into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances” pursuant to “(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”²⁶ However, this language was hortatory and non-binding. The binding provisions, in fact, contradicted the “purpose and policy” section, by conceding the right (House proponents would use the word “reality”) of presidents to initiate military action *without* prior approval.

This led Senator Eagleton, in an act of considerable courage, to oppose the legislation he had helped initiate, and then when the conference report passed, to support President Nixon’s veto.²⁷ He was joined by very few of his Democratic colleagues, who saw the War Powers Resolution as a good opportunity to override a veto and send a message to an unpopular President, Richard M. Nixon.²⁸ Eagleton said later:

We in Congress were frustrated with our failure to override eight successive Presidential vetoes, and, considering the tremendous pressures then created by the Watergate scandal, it is understandable how this Congress overrode President Nixon’s war power veto. *The irony, of course, is that we were actually expanding, not limiting Presidential war-making power.*²⁹

That, of course, is not how President Nixon and his legal advisors saw it. In his veto message to Congress, the President used sweeping language to condemn the resolution as unconstitutional. “House Joint Resolution 542 (the War Powers Resolution) would attempt to take away, by a mere legislative act, authorities which the [P]resident has properly exercised under the Constitution for almost 200 years,” the statement asserted.³⁰ The message focused on

24. U.S. CONST. art. I, § 8, cl. 18.

25. *Id.*

26. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res, 93d Cong. (1973).

27. EAGLETON, *supra* note 1, at 206.

28. See *id.* at 212–20.

29. *A Review of the Operation and Effectiveness of the War Powers Resolution: Hearings before the S. Comm. on Foreign Relations*, 95th Cong. 4–5 (1977) (emphasis added). The War Powers Resolution became law on November 7, 1973, after both houses of Congress overrode President Nixon’s veto.

30. Veto of the War Powers Resolution, PUB. PAPERS 893 (Oct. 24, 1973).

provisions that would “automatically cut off certain authorities after sixty days unless the Congress extended them.”³¹ It also protested a provision (Section 5(c)) allowing Congress to terminate engagement in hostilities by a concurrent resolution, “an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.”³²

What was perhaps more remarkable about the veto message was its endorsement of Section 3, which “calls for consultations with the Congress before and during the involvement of the United States forces in hostilities abroad.”³³ The Nixon statement called for “regularized consultations with the Congress in an even wider range of circumstances.”³⁴ This call for consultations was repeated over the years. The State Department legal advisor during the Carter administration, for example, urged Congress to create “efficient machinery for conducting those consultations.”³⁵

The Nixon veto statement and future executive branch communications have asserted that the sixty-day cut-off provision (which can be extended to ninety days with a presidential waiver) is unconstitutional in that it is automatic and requires no subsequent legislation.³⁶ Defenders of the provision state that Congress must be involved in making the initial decision to go to war and that an automatic cut-off by concurrent resolution preserves Congress’s explicit power over war. (A claim that an automatic cut-off provision is unconstitutional is unrealistically broad and would pick up many “sunset” provisions terminating legislative mandates on a date certain).³⁷ A subsequent Supreme Court decision, *INS v. Chadha* struck down the legislative veto and may have given the Executive Branch’s argument more credibility.³⁸ Even though *Chadha*’s rationale applied to legislation giving Congress the power to overturn presidential action in certain areas (such as arms sales) and did not deal with war powers, per se, the clear sentiment of the Court was to preserve the Executive’s final role in approving or vetoing legislation.³⁹

31. *Id.*

32. *Id.*

33. *Id.* at 895.

34. *Id.*

35. *A Review of the Operation and Effectiveness of the War Powers Resolution*, *supra* note 12, at 189.

36. Veto of the War Powers Resolution, *supra* note 30, at 894.

37. E-mail from Michael Glennon, Professor, Fletcher School of Law and Diplomacy of Tufts University, to J. Brian Atwood, Dean, University of Minnesota’s Humphrey Institute of Public Affairs (Aug. 21, 2007, 12:26:44 CST) (on file with author).

38. 462 U.S. 917, 951–60 (1983); JACOB K. JAVITS, THE PRESIDENT’S WAR POWERS: FROM THE FEDERALISTS TO REAGAN 2 (Demetrios Caraley ed., Academy of Political Science 1984).

39. JAVITS, *supra* note 38, at 2–3. This point continues to be debated among legal scholars, but it is the view of Professor Glennon that *Chadha* invalidates Section 5(c), the concurrent resolution cut-off provision. Glennon, *supra* note 37.

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The provision of the War Powers Resolution that triggers the sixty-to-ninety-day clock is Section 4(a)(1), a requirement to report to Congress within forty-eight hours the circumstances and the authorities used to deploy U.S. forces into hostile situations.⁴⁰ Reports have been sent to Congress over the years, but they have been very brief and contained no information that was not already in the public domain.⁴¹ Often the reports did not cite Section 4(a)(1) explicitly in an apparent effort to avoid the cut-off trigger.⁴²

We are left then with President Nixon's sweeping assertion that the resolution is unconstitutional in its entirety⁴³ and Senator Eagleton's more legitimate complaint that the delegation of authority to the President to initiate the use of force without prior approval usurps Congress's power to "declare war."⁴⁴ Most provisions in the resolution, however, are not controversial and clearly do not raise issues of constitutionality.

Anticipating that the Executive Branch would claim that certain provisions were unconstitutional, Congress inserted a "separability clause" at the very end of the resolution. This section states: "If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby."⁴⁵ This clause and the explicit reference to Congress's power "to declare war"⁴⁶ in the constitution when combined with the invitation of the "necessary and proper"⁴⁷ clause to legislate, gives considerable standing to many of the provisions of the resolution. Despite the Judicial Branch's traditional reluctance to resolve political disputes between the other two branches over war powers, until recently executive branch lawyers have proceeded with utmost caution in advising presidents of their legal obligations in this area.

It is important to note that while the automatic cut-off provisions in Section 5 of the resolution have been presented to the courts, the judiciary traditionally has either refused to give standing to the plaintiffs or has declared the issue to be "political" and a matter to be resolved between the other

40. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res, 93d Cong. (1973).

41. See Michael Rubner, *Antiterrorism and the Withering of the 1973 War Powers Resolution*, 102, POL. SCI. Q. 193, 201 02 (1987).

42. *Id.*

43. Veto of the War Powers Resolution, *supra* note 30.

44. FAGELTON, *supra*, note 1, at 208.

45. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, 559, H.R.J. Res, 93d Cong. (1973).

46. U.S. CONST. art. I, § 8, cl. 11.

47. U.S. CONST. art. I, § 8, cl. 18.

branches.⁴⁸ Within the Executive Branch, however, much attention has been given to the consultation and reporting provisions. As I testified in 1986 before the House Foreign Affairs Committee, “[I]t is with the knowledge that these provisions have the full weight of the law that succeeding administrations have constructed elaborate rationalizations to avoid their force.”⁴⁹

Executive branch legal advisors must constantly wind their way through Scylla and Charybdis, the mythological monsters on either side of the narrow strait traversed by Ulysses. On the one side is concern over yielding any of the constitutional territory claimed by a succession of presidents. On the other is the knowledge that the consultation and reporting requirements are legally binding and that it is a lawyer’s obligation to assure that one’s client respects the law.

There is a deep concern in the Executive Branch that any concession to Congress on war powers will create a precedent that could erode presidential powers. Administrations take seriously legal historian Edwin Corwin’s description of the Constitution as “an invitation to struggle.”⁵⁰ This is especially true in areas of foreign policy and national security. As Crenson and Ginsberg observed, “Over the course of more than two centuries . . . successive American presidents, beginning with George Washington, have labored diligently to make their office the dominant force in American foreign and security policy and to subordinate Congress’s role in the realm.”⁵¹

The issue for administration legal advisors, as they privately have described it to me, is the automatic cut off provisions in Section 5. While they challenge these as unconstitutional, they do not wish to bring on a court test, however unlikely. Nor do they wish to see a clash of wills that could lead Congress to use its power of the purse to end a combat operation. Thus, the argument goes, Section 4(a)(1), the reporting clause that triggers the cut-off provisions, must never be explicitly cited unless the military operation already

48. Glennon, *supra* note 37. Professor Glennon points out that 245 House Members challenged the 1988 operation to escort Kuwaiti ships during the Gulf War. The 245 Members contended that a 4(a)(1) report was required on the date the operation commenced and that the sixty-day clock was triggered. The D.C. District Court, in *Lowry v. Reagan*, 676 F. Supp. 333, 334 (D.D.C. 1987), affirmed, No. 87-5426 (D.C. Cir. Oct. 117, 1988), dismissed the request for a declaratory judgment as non-justiciable the D.C. Circuit affirmed. This case is discussed in detail in Professor Glennon’s book, *Constitutional Diplomacy*.

49. *War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, International Security, and Science of the Comm. on Foreign Affairs*, 99th Cong. 62 (1986) (statement of J. Brian Atwood, Dir. of the National Democratic Institute).

50. MATTHEW CRENSON & BENJAMIN GINSBERG, *PRESIDENTIAL POWER: UNCHECKED AND UNBALANCED* 215 (2007).

51. *Id.*

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has been terminated. In fact, it only was cited once, after the attack on Cambodia, *after* the Mayaguez incident of 1975.⁵²

Concern about triggering the cut-off provisions also influences internal executive branch deliberations over whether or when it is necessary to consult with Congress under Section 3. Administration legal advisors see the consultation provision as a slippery slope. Its conditions for consultation, especially the requirement to consult in “situations where imminent involvement in hostilities is *clearly indicated by the circumstances*,” could trigger the reporting requirement which, in turn, triggers Section 5.⁵³

How, then, to develop a rationale to avoid consultations? In cases where a choice is made not to consult under Section 3 or to report under Section 4(a)(1) a legal case is built by the Justice Department in coordination with State, Defense, and White House counsels. Over the years, these cases have grown more and more imaginative. Some of the more sensitive of these opinions have never been shared with Congress, as they are considered privileged communications. Yet, they form the internal case histories, available to future executive branch lawyers as important precedents.⁵⁴

In 1981, the Reagan administration decided to test Libya’s claim that the Gulf of Sidra was within its territorial waters.⁵⁵ The United States insisted that the gulf was in international waters.⁵⁶ The U.S. Navy had transited those waters during the Carter administration, but only after informing the Qaddafi government that their intentions were peaceful.⁵⁷ The Reagan administration had no intention of informing Libya, and they had to assume that their actions might be provocative.⁵⁸ Was this a situation where “imminent involvement in hostilities” could be “clearly indicated by the circumstances?”

Consulting Congress under the War Powers Resolution in this case might well have revealed an intent to provoke. Instead, the legal advisors developed a “probability-of-conflict” rationale.⁵⁹ If the Pentagon determined that the likelihood of combat was fifty percent or more, then—and only then—would

52. Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79, 89–90 (1984).

53. War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 93d Cong. (1973) (emphasis added).

54. *War Powers*, *supra* note 49, at 63.

55. Anne Bardin, *Coastal State’s Jurisdiction Over Foreign Vessels*, 14 PACE INT’L L. REV. 27, 69 (2002).

56. *Id.*

57. See Yehuda Z. Blum, *The Gulf of Sidra Incident*, 80 AM. J. OF INT’L L. 668, 669, 673 n.21 (1986).

58. *See id.* at 673, 673 n.21.

59. Louis Henkin et al., *War Powers and the Responsibility of Congress*, 82 AM. SOC’Y INT’L L. PROC. 1, 14 (1988) (various speakers, including Brian Atwood, participated in a panel discussion convened in the Senate Foreign Relations Hearing Room).

Congress have to be consulted in advance.⁶⁰ The fifty percent probability threshold was run through in various computer-generated scenarios and never reached.⁶¹ Congress was not consulted.⁶²

According to a State Department legal advisor who participated in the deliberations, a more serious issue arose when the Navy requested a change in the “rules of engagement” (ROE) prior to the Gulf of Sidra exercise.⁶³ ROEs are standing orders to the military command issued by the Joint Chiefs of Staff. They are fashioned to take circumstances into consideration, e.g., the probability of hostilities. The Navy requested the change from peacetime ROE to enable its pilots to fire on Libyan planes when they “locked on” to U.S. aircraft with their radar systems, thus indicating they were targeting our planes.⁶⁴ This request was denied when the lawyers pointed out that such a change in the ROE would demonstrate that the administration knew in advance that the hostilities clearly were indicated by the circumstances.⁶⁵ This change would have rendered the “probability of conflict” construct unusable and would have made a failure to consult Congress difficult to rationalize.⁶⁶ One can only assume that the margin of risk involved was small and acceptable. Navy pilots shot down two aircraft *after* the Libyans had launched air-to-air missiles at them.⁶⁷

The Long Commission, established to investigate the October 23, 1983, terrorist attack in which 241 U.S. Marines were killed in Lebanon, concluded ex post facto that peacetime ROE in that situation *were* an unacceptable margin of risk.⁶⁸ The Commission was highly critical of the chain of command for its failure to adjust the ROE to accommodate to a more hostile environment.⁶⁹ The Commission Report stated that the Marines were under orders “not to engage in combat” and that they were to use “normal . . . peacetime ROE.”⁷⁰ The Report went on to say that “for any ROE to be effective, they should incorporate definitions of hostile intent and hostile action

60. *Id.*

61. *See id.*

62. *Id.*

63. *Id.*

64. Henkin, *supra*, note 59.

65. *Id.*

66. *Id.*

67. *See War Powers*, *supra* note 49, at 64.

68. UNITED STATES COMMISSION ON BEIRUT, DEP’T OF DEFENSE, REPORT OF THE DOD COMMISSION ON BEIRUT INTERNATIONAL AIRPORT TERRORIST ACT, OCTOBER 23, 1983, 32–33, 47–48 (1983) [hereinafter LONG COMMISSION].

69. *Id.* at 48, 51

70. *Id.* at 45.

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that correspond to the realities of the environment in which they are to be implemented.⁷¹

There is no hard evidence that these Marines were made vulnerable because of the desire to avoid consultations with Congress under the War Powers Resolution. However, it seems clear that the administration knew that the Marines had been placed in a situation where hostilities were at least imminent, if not ongoing.

During the period prior to the terrorist attack, the administration was engaged in a major dispute with key members of Congress over war powers. The administration argued that U.S. forces in Lebanon were not involved in hostilities as defined by the law. Yet, on August 29, 1983, two Marines were killed and fourteen wounded when they received and returned hostile fire.⁷² On September 1, an additional 2000 Marines were sent in, along with fighter planes and artillery.⁷³ On September 12, the Marines were authorized to call in air strikes.⁷⁴ On September 19, U.S. naval forces offshore shelled the Suk el Gharb area in support of the Lebanese Army, an action cited in the Long Commission Report as having changed the fundamental nature of our involvement.⁷⁵

Rules of engagement should reflect the potential for danger to U.S. military forces, as the Long Commission stated. They represent a key factor in assessing whether the Executive Branch considers hostilities to be "clearly indicated by the circumstances." If Congress truly were interested in preserving its war powers and in assuring that our military forces are being adequately protected, it would take a keen interest in the state of these rules.

III. WAR POWERS IN THE AGE OF TERRORISM

Terrorism is not a new phenomenon, but it is a growing threat. The attack on the United States on September 11, 2001, evoked an overwhelming public response and a demand that our government protect the domestic population and punish the terrorists. The public looked to the president for leadership, and an immediate consequence was that an already assertive Executive Branch became even more dominant in the war powers area. Addressing the nation in the immediate aftermath of the attacks in New York, Washington, and Pennsylvania, President George W. Bush said "we stand together to win the war against terrorism."⁷⁶ The atmosphere inside the White House was captured by CIA Director George Tenet in his recent book:

71. *Id.* at 47.

72. *Id.* at 40; *War Powers*, *supra* note 49, at 64.

73. *War Powers*, *supra* note 49, at 64.

74. *Id.*

75. *Id.* at 65; LONG COMMISSION, *supra* note 68, at 40, 42.

76. Address to The Nation on the Terrorist Attacks, 2 PUB. PAPERS 1100 (Sept. 11, 2001).

After 9/11, everything changed. Many foreign policy issues were now viewed through the prism of smoke rising from the World Trade Center and the Pentagon. For many in the Bush administration, Iraq was unfinished business. They seized on the emotional impact of 9/11 and created a psychological connection between the failure to act decisively against al-Qa'ida and the danger posed by Iraq's WMD programs.⁷⁷

The National Security Strategy (NSS) document released to the public by the Bush administration in 2002 was described by President Bush in a cover letter as "a wartime national security strategy."⁷⁸ The document distinguished the new threat from the Cold War-era threat, saying that during the Cold War the adversary was "a generally status quo, risk averse adversary. . . ." Today, however, "our enemies see weapons of mass destruction as weapons of choice."⁷⁹ This led, in the same document, to the "preemption doctrine," wherin "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."⁸⁰

The concept of preemption has been with the nation since the very beginning. The discussion over giving the President the right to "repel sudden attacks" assumed that the Executive would not have to await an actual attack if solid information existed to the effect that an attack was imminent.⁸¹ However, the phrase in the NSS stating "even if uncertainty remains. . . ." dramatically changes the traditional concept of preemption.⁸² Both Ron Suskind (*The One-Percent Doctrine*) and George Tenet (*At the Center of the Storm: My Years at the CIA*) recount Vice President Cheney's instructions. Suskind quotes a source who recalled Cheney saying, "If there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response. It's not about our analysis, or finding a preponderance of evidence. It's about our response."⁸³

It is unimaginable that an administration that has such an expanded view of its authority to defend the nation against terrorism would pay heed to a requirement in the War Powers Resolution to consult in advance. The Bush administration also has adopted the "unitary executive theory," which centralizes power within the White House and constrains departments and

77. GEORGE J. TENET, *AT THE CENTER OF THE STORM: MY YEARS AT THE CIA* 305 (2007).

78. See Richard B. Doyle, *The U.S. National Security Strategy: Policy, Process, Problems*, 67 PUB. ADMIN. REV. 624, (2007).

79. *Id.* at 627.

80. *Id.* (emphasis added).

81. See War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, H.R.J. Res. 93d Cong. (1973).

82. Doyle, *supra* note 78 (emphasis added).

83. RON SUSKIND, *THE ONE PERCENT DOCTRINE* 62 (2006).

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agencies in their interactions with Congress.⁸⁴ It is doubtful that executive branch lawyers are playing the role they once did in the war powers arena.

For its part, Congress performed as Congresses often do in time of crisis. Just as in the case of the Gulf of Tonkin incident, Congress supported the President's desire to pursue the terrorists in Afghanistan and Iraq.⁸⁵ Rourke's description of the political dynamic that exists when the nation is facing a crisis certainly held in this case.⁸⁶

Concerns that irrational reactions can take hold when the nation is in crisis are not new. Supreme Court Justice Joseph Story in 1833 wrote that republics suffered from dangerous tendencies to be "too ambitious of military fame and conquest" "imbecile in defense, and eager for contest."⁸⁷ Alexander Hamilton warned of times when "the national councils may be warped by some strong passion or momentary interest. . . ."⁸⁸

The 9/11 attacks certainly created strong passion. As Hamilton observed, the Constitution envisioned an Executive who could act with "decision, activity, secrecy, and dispatch."⁸⁹ He added, however, that Congress's power over war provided "safety in the republican sense."⁹⁰ The question remains as to whether Congress played its role when it was asked by the President to authorize war against Iraq.

George Tenet has confirmed—and others have reported—that a National Intelligence Estimate (NIE) was sent to the Congress in the midst of the debate over Iraq.⁹¹ It was ninety pages long and was kept in a vault in the center of the Capitol.⁹² Dana Priest of the *Washington Post* quotes congressional aides responsible for safeguarding the material as saying "no more than six Senators and a handful of House members read beyond the five-page . . . summary. . . ."⁹³

It is doubtful that a full reading of the NIE would have changed many minds. According to Tenet, the document seemed to confirm that Iraq possessed WMD, though the evidence was skimpy and based more on

84. Karl Manheim & Allan Idcs, *National Security & the Law: Special Issue: The Unitary Executive*, LA. LAW., Sept. 2006, at 24.

85. H.R.J. 114, 107th Cong. (2002) (enacted); S.J. Res. 23 107 Cong. (2001) (enacted).

86. ROURKE, *supra* note 10.

87. 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 92 (5th ed. 1994).

88. THE FEDERALIST NO. 63 (James Madison).

89. Michael Ramsey, *The Framers' War-Making Powers*, 28 HARV. INT'L REV. 4, 4 (2006).

90. *Id.*

91. TENET, *supra* note 77, at 322.

92. *Id.* at 327; Dana Priest, *Congressional Oversight of Intelligence Criticized: Committee Members, Others Cite Lack of Attention to Reports on Iraqi Arms, Al Qaeda Threat*, WASH. POST, April 27, 2004, at A1.

93. Priest, *supra* note 92.

historical than current analysis.⁹⁴ It offered nothing to support the widely-held perception—promoted by the White House—that Iraq was behind the 9/11 attacks, and little to prove that there was an al Qaeda–Iraq connection.⁹⁵ The document was typically obscure. It was, as Tenet has said, an “estimate,” and estimates are often based on best guesses.⁹⁶ Still, hearings on the NIE might have enabled Congress to dig deeper into the administration’s rationale for war. They were never held. There was no time.

What was at play was the dynamic described by Rourke.⁹⁷ No member of Congress wanted to be seen as weak on terrorism. The administration timed its national campaign to win approval for the war for September in an election year, one year after the 9/11 attack.⁹⁸ If more time had been taken to examine the case for war more deeply, Democrats would have suffered at the polls, the pundits opined. There was no time.

There were many ex post facto explanations given for voting to approve the war. Most in Washington believed that Saddam had WMD, not perhaps nuclear weapons, but chemical and biological weapons.⁹⁹ Few accepted the case that there was an al Qaeda connection.¹⁰⁰ Many said they wanted to strengthen the President’s hand in his effort to gain the support of the Security Council and that they did not expect him to use the authority to go to war without U.N. approval.¹⁰¹ All of these explanations would have been unneeded if the war had gone well. As the nation has turned against the war, so has the Congress.

Congress was not the only institution that let down the Republic in the Iraq matter. There was an overwhelming internal dynamic in favor of war with Iraq inside the Bush administration that made open debate difficult, if not impossible. George Tenet put it this way: “There was never a serious debate that I know of within the administration about the imminence of the Iraqi threat. . . . Nor was there ever a significant discussion regarding enhanced containment of the costs and benefits of such an approach versus full-out planning for overt and covert regime change.”¹⁰²

94. See TENET, *supra* note 77, at 327–30.

95. See generally *id.* at 322–30 (discussing contents of the NIE).

96. *Id.* at 327.

97. ROURKE, *supra* note 10.

98. Jeff Gerth & Don Van Natta, Jr., *Hillary’s War*, N.Y. TIMES MAG., June 3, 2007, at 40.

99. See *id.* at 42.

100. See *id.*

101. *Id.* at 45.

102. TENET, *supra* note 77.

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IV. WAR POWERS, THE FUTURE

The Congress of the United States has become much more divided and partisan in recent years. There are serious questions as to whether the institution can play the role the Founders had envisioned for it on matters of war and peace. Meanwhile, the Executive Branch has used its natural attributes of decisiveness and secrecy to take the initiative. Yet, once again the Founders' fear that the Executive acting in crisis and alone would be prone to major mistakes seems as valid as ever. As constitutional scholar Louis Fischer has argued, "If the current risk to national security is great, so is the risk of presidential miscalculation and aggrandizement—all the more reason for insistence that military decisions be thoroughly examined and approved by Congress. Contemporary presidential judgments need more, not less, scrutiny."¹⁰³

Can Congress be trusted in an age when the nation clearly needs efficiency, flexibility, and secrecy in its struggle with terrorists? A government has a fundamental responsibility to provide for the security of its people. The terrorism challenge must be met with a wide variety of policies and techniques. The military option is one of these, but it is a highly visible and very blunt instrument. One counter-terrorism expert, Ambassador Henry Crumpton, has said that the military is at best twenty percent of the answer.¹⁰⁴ In fact, as we have learned, the use of the military in inappropriate situations can exacerbate the terrorist threat.

As we have learned from various confrontations between conventional military forces and terrorist organizations, there are inherent dangers in seeking battlefield victories over an asymmetric force. Terrorists retain a certain tactical advantage when they lure a conventional force onto territory known best by the terrorist organization. The terrorists' first victory may well be luring the dominant power into combat. The second victory is then gained when the terrorists avoid defeat by melting into the civilian landscape, radicalizing the local population over the incursion by foreign forces, and recruiting more to their cause who are willing to commit suicidal terrorist acts. We have seen this scenario play out in Iraq in the past several years, and in Southern Lebanon in 2006 when the Israeli army attempted to defeat Hezbollah and failed.¹⁰⁵

103. LOUIS FISCHER, PRESIDENTIAL WAR POWER 185–86 (1995).

104. Henry A. Crumpton, A New Era of Conflict, Address at the University of Minnesota Humphrey Institute (Jan. 31, 2007) (Audio Available at <http://blog.lib.umn.edu/hhhevent/news/audio/Crumpton.mp3>).

105. Tom Ruys, *Crossing the Thin Blue Line: An Inquiry Into Israel's Recourse to Self-Defense Against Hezbollah*, 43 STAN. J. INT'L. L. 265, 266 (2007).

In 1986, just after the Gulf of Sidra incident, House Foreign Affairs Committee Chairman Fascell challenged the Executive on the issue of taking preemptive action against terrorists:

... [The] new [Executive Branch] theory is that since we have state-supported terrorism, and since they have declared war on us, we do not really have to declare war on them. The United States, under the Commander in Chief theory, and under the theory of self-defense, can attack, can use the military might of the United States. . . .¹⁰⁶

Fascell went on to ask whether these theories were, in effect, "modifying the [C]onstitution."¹⁰⁷

As we have accumulated more evidence about terrorist tactics—and about the difficulties of engaging them with conventional forces on territory familiar to them—the danger of delegating the war power to the President alone has become more apparent. Yet, Congress has thus far failed to play its role as a brake as the founders envisioned. Perhaps its members have been intimidated by the ongoing "emergency" called the "war on terrorism."

If Congress is politically intimidated in times of crisis and unwilling to examine the case for war in depth, what then is the answer? If the institution is weakened and politicized to the point that it is incapable of performing its constitutional role, there are only two solutions: (1) change the Constitution or (2) strengthen the institution. I favor the latter.

V. COVERT WARS

When the Senate War Powers Bill (S-440) came to the floor in July 1973, Senator Eagleton proposed an amendment that would have the law cover so-called "covert operations," combat activity instigated and carried out by civilian intelligence officials.¹⁰⁸ He argued that the exclusion of combat operations undertaken by the Central Intelligence Agency constituted a loophole that future presidents would exploit.¹⁰⁹ Urging his colleagues to "make the language of legislation match the realities of war," Eagleton pointed out that "wars do not always begin with the dispatch of troops. They begin with more subtle investments . . . of dollars and advisors and civilian personnel."¹¹⁰

Eagleton's chief co-sponsors, Senators Stennis and Javits, opposed this amendment on the grounds that sensitive intelligence matters should not be covered by the legislation.¹¹¹ However, they agreed to undertake a study of the

106. *War Powers*, *supra* note 49, at 3.

107. *Id.*

108. 119 CONG. REC. 25,079 (1973).

109. *Id.*

110. EAGLETON, *supra* note 1, at 193.

111. *Id.* at 189-95.

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charter of the intelligence community and into covert activities that could lead to war.¹¹² The Eagleton amendment was defeated soundly, but it provided the impetus for enhanced congressional scrutiny and oversight of the intelligence community and, eventually, to the creation of permanent committees to perform this work.¹¹³

In this period after the 9/11 attacks on the United States, it is not any more likely that Congress would wish to close this “loophole” in the War Powers Resolution. Still, we have come to realize that taking covert combat action can be highly consequential and can lead to a wider war. Even an attack against “known terrorist bases” can produce added hostility toward the United States, especially if innocent civilians are killed. This is the danger of using force against an asymmetric force, e.g., international criminals who do not acknowledge or respect the international rules of war.

The demands created by the terrorism threat on the intelligence community are very real. Flexibility is required, and special needs are cited to meet the challenge of individuals who operate in the shadows. Congress has accommodated these needs by insinuating itself into the decision processes related to the requests made by intelligence agencies for presidential “findings,” the approval process for covert operations.¹¹⁴ This process may have its flaws in that Congress is normally notified on an ex post facto basis, but the Executive Branch understands that it will undergo scrutiny and that it will be held accountable. Likewise, the Intelligence Committees have demonstrated over time that they can keep a secret, especially when they believe that highly sensitive matters or lives are at stake.

There is no similar process when the Executive is contemplating the introduction of U.S. armed forces into hostile situations. When we take this step, whether to attack terrorists or states that we believe are sponsoring them, “we do not operate in the shadows; we operate under the glare of international scrutiny with all the risks inherent in using overt force in another nation.”¹¹⁵ As former CIA Director William Colby warned, “military engagements can lead ‘by an inexorable process of reactions’ to a general war and to nuclear confrontation. He . . . observed that the use of force as a consistently applied policy option might only contribute to the ‘sum of anarchy.’”¹¹⁶

112. *Id.* at 195-96.

113. *Id.* Later in the 1970s, when CIA abuses came to light, a special committee chaired by Senator Frank Church investigated the Agency and recommended major reforms, including enhanced congressional oversight. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 715 (2003).

114. Lori Fisler Damrosch, *Covert Operations*, 83 AM. J. INT'L. L. 795, 795, 805 (1989).

115. *War Powers*, *supra* note 49, at 81.

116. *Id.* at 82.

VI. INSTITUTIONALIZING THE WAR POWERS CONSULTATION PROCESS

The decisions we make in dealing with terrorism require consideration by the most experienced minds in our government, in both the Executive and Legislative Branches. The complexity of the problem is so great and the ramifications of using force so fateful that we should take the utmost care in considering the options.

What then is the relevance of the War Powers Resolution in this age of terrorism? I believe that a constructive role for Congress is even more important today than it was in 1973. It is my belief that the consultation provision provides the opportunity for Congress to play that role. Congress, however, needs to reassert itself as an institution. It needs to create a process that enables it to participate in the decision process *before* U.S. forces are on their way to battle stations. Congress cannot easily offer advice, manage, or even terminate an involvement in hostilities after they have begun. If Congress is to insist on the full implementation of the Section 3 consultation provision, it must organize itself to perform this function in a proactive manner that will inspire the confidence of the public and the Executive Branch. Above all, Congress must begin to take seriously its constitutional responsibility and find ways to avoid being swept away by the political forces so vividly described by Rourke.¹¹⁷

Senator Eagleton, Congressman Lee Hamilton, and Senator Robert Byrd have recommended the formation of a special leadership committee.¹¹⁸ This committee would be professionally staffed with military, diplomatic, and intelligence analysts and assigned responsibility for tracking situations that could require the introduction of U.S. forces into hostilities.¹¹⁹ Senator Byrd, who still serves in the U.S. Senate, has proposed that the "leadership of both Houses and the chairmen and ranking members of the foreign relations, armed services, and intelligence committees be assigned to this special 'consultative committee'.¹²⁰ The participation of these eighteen senior members of Congress from both parties could provide strong bipartisan support for whatever action is decided upon, including a decision not to use force. The presumption is that it would offer independent views, unintimidated by the bureaucratic pressures extant in the Executive Branch.

The founders of our nation lived in less complicated times, but their wisdom on the issue of war carries through to this day. They did not wish to leave the security of our nation and the world to the exclusive judgment of a single person whose accountability is limited in the short term.

117. See ROURKE, *supra* note 10.

118. *War Powers*, *supra* note 49, at 83.

119. *Id.* at 84.

120. *Id.* at 83.

Senator Eagleton met with very impressive legal scholars during his work on the Senate war powers legislation. The late Alexander Bickel, then of Yale University Law School, impressed him deeply. Professor Bickel summed it up best: "Singly, either the President or Congress can fall into bad errors, of commission or omission. So they can together, too, but that is somewhat less likely, and in any event, together they are all we've got."¹²¹ It is not a perfect system and the political dynamics surrounding the decision to use force will always make dissent difficult; however the decision to go to war should not be an easy one. Congress is a check and balance we need in this complex age of terrorism.

121. ROURKE, *supra* note 10, at 7.

Mr. DELAHUNT. Thank you, Mr. Atwood.
Secretary Rademaker.

**STATEMENT OF THE HONORABLE STEPHEN G. RADEMAKER,
VICE PRESIDENT, BGR INTERNATIONAL (FORMER U.S. AS-
SISTANT SECRETARY OF STATE FOR ARMS CONTROL)**

Mr. RADEMAKER. Thank you, Mr. Chairman. It is a pleasure for me to be back at the committee. I am glad to be in this hearing room rather than, I think, it was the Budget Committee last time. I have spent a lot more time in this one.

Mr. DELAHUNT. More comfortable.

Mr. RADEMAKER. Exactly.

I, too, have prepared a written statement which I have submitted. I think, however, you asked an interesting question at the outset, and perhaps I will gear my oral presentation around the question you presented.

Your question was, as I heard it, if we want to change the balance of power that currently exists between the legislative and the executive branches in the area of war powers what do we have to do? Do we have to change the culture of the Congress? Do we have to change the culture of the executive branch? Where do we start?

In the testimony that I submitted today, I think I didn't define it as an issue of culture, but I think I say a number of things that speak to the culture that governs executive branch thinking with regard to war powers issues.

The first point I make in my testimony is that there is a radically different view of the legal—the applicable legal principles in the executive branch, as compared to the thinking of many Members of Congress. And in my prepared testimony I outline—

Mr. DELAHUNT. Right.

Mr. RADEMAKER [continuing]. The views that I think are widely held, almost uniformly held, among the relevant executive branch agencies. And I am quite confident, Mr. Chairman, that you strongly disagree with the views that I set forth there.

But the way our Government is structured when there is a difficult legal question within the executive branch, the "Supreme Court" of the executive branch is the Office of Legal Counsel at the Justice Department. One of the relevant agencies submits a request to Justice for a legal opinion, and these are the principles that will guide any legal opinion that is written on war powers questions in the executive branch.

So I think that is the first point that is simply a reality in dealing with the executive branch in this area.

The second point that I address is the perception within the executive branch of the way Congress approaches war powers questions. And I explain that within the executive branch there is a feeling that the Congress is nonserious many times when it approaches what are life-and-death questions. And I explain some of the reasons that underlie that and, I think, the explanations. I comment about how in my experience, almost 10 years at this committee, I watched us deal with a number of discrete authorization questions that came up that principally dealt with the peacekeeping operations of the Clinton era.

And I watched members of this committee in many cases agonize over how to vote, and I was struck that there were two historical precedents; that they were sort of polar opposites, but Members constantly referred to them. One was the vote of the Congress to authorize the peacekeeping deployment to Lebanon, the Beirut deployment. And time and again, I would hear Members say, "That was the worst single vote I have ever cast in my career," to authorize that operation.

I think you may have said it, Mr. Rohrabacher, I don't remember it, but you were here when I first joined the committee.

And as these—as the question would come up on Somalia, or on Haiti, or on Bosnia, constant references to, "I am never going to make that mistake again, the mistake that I made in sending 240 Marines to their death."

But the other historical precedent was the first Persian Gulf War vote. And for a lot of—especially for a lot of the Democratic members of the committee, that stood for the opposite principle, that if you vote the wrong way on what turns out to be perhaps not a popular war, but a war that is seen as well conceived and justified, that can become a political liability. And Members were torn. And as every case would come up, the question in their minds would be, "Well, if I vote 'yes,' is this Lebanon? If I vote 'no,' is this Persian Gulf? God, can I do something else? I don't want to run that risk."

And so, as I comment in my prepared remarks, I often saw members looking for a way to vote "maybe." To, you know, come down somewhere between a "yes" and a "no." And that is a perfectly understandable impulse on the part of somebody who is facing a difficult choice. But for the executive branch, you know, to get a "maybe" from the Congress is not particularly helpful. And as I indicated in my prepared remarks, I think within the executive branch that is viewed as really an effort by Congress to have it both ways, to be able to criticize the war after the fact, if it turns out like Lebanon, and to share in the credit if it turns out well, like the first Persian Gulf War.

And because the executive branch thinks that that is the way the Congress, on a fairly consistent basis, ultimately approaches these questions, I think the executive branch tends not to want to reach out too soon to Congress, tends not to really want to ask the question, Can we have your authorization, because they are not sure what they are going to get, and they are not confident that there will be a process within the Congress brought to bear that is designed to give a serious answer to the question.

And so I think I would answer your question, what has to change, I think it is the Congress that wants to change. As I point out in my testimony, the executive branch is not unhappy with the current balance of power between the two branches. So if the Congress wants to change it, I think it needs to figure out a way to impose some discipline on itself. And when I last testified I laid out my suggestion about how the Congress might go about doing that.

Maybe I could go a little bit further than I did in my testimony last month and say, I don't know whether you or another member wants to take my idea and run with it. By all means, do so if you would like. I will make a prediction, though, that if you try to advance that idea you will run into roadblocks.

And based on my experience, I would suggest the main roadblock you are going to run into is the congressional leadership. Because the congressional leadership, and I don't mean today's congressional leadership, I mean any congressional leadership, Republican, Democrat, it doesn't depend upon the personalities involved; the leadership of the Congress wants to control the agenda. And the leadership of the Congress doesn't like expedited procedures because they deny the leadership control of the agenda. And to be really blunt, you know, the leadership of the Congress doesn't really believe in majority rule.

You know, the last thing any leadership wants is a third of their caucus to join with the minority party to pass legislation that they disagree with, and that is what expedited procedures threaten to do. I mean, if the leadership were totally on board with something, you wouldn't need expedited procedures. Expedited procedures exist to enable the majority to work its will even if the structure of power within the Congress doesn't favor what a majority of the Members would vote to do.

And so I laid out my suggestion. I think you will find that the biggest obstacle is not the executive branch, it is not Republicans, it is the leadership. And probably, frankly, the leadership of both parties, because they would rather address these cases on an ad hoc basis as they come up than confront a situation where their hand would be forced.

Anyway, that is my commentary on my own idea. Perhaps now or later I could comment on the joint committee idea that Secretary Atwood proposed. But I will defer to you on when you would like me to do that.

[The prepared statement of Mr. Rademaker follows:]

PREPARED STATEMENT OF THE HONORABLE STEPHEN G. RADEMAKER, VICE PRESIDENT, BGR INTERNATIONAL (FORMER U.S. ASSISTANT SECRETARY OF STATE FOR ARMS CONTROL)

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 13th, 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 replow 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 to 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 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.

Mr. DELAHUNT. Thank you, Steve, and I am sure we will get to that point.

My intention now, again looking at the clock, is to go to the ranking member for his questions; and then I will go to the vice chair, Mr. Carnahan.

We earlier had a conversation. Mr. Grimmett, who is here, is, if you will, to respond to questions. And while my mind is on this, I want to make a public apology. It wasn't a staff snafu; it was a chair snafu in terms of Mr. Turner, and I have to take responsibility for that issue. So I will at some time, hopefully, meet Bob Turner and personally convey to him my apologies.

But, Mr. Rohrabacher.

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

Mr. Atwood, you were mentioning—or Steve, it might have been you. But someone mentioned that the executive branch really doesn't think Congress is serious about much of this. Now which one of you was it? Okay.

Mr. RADEMAKER. Guilty.

Mr. ROHRABACHER. You have been in the executive branch, you have been in the legislative branch, and that is your impression over there, that the folks over at the State Department, folks over at the White House don't think the Members of Congress are serious.

Do you think that is justified?

Mr. RADEMAKER. First, Mr. Rohrabacher, let me say that I have served several tours in the administration, or in the executive branch. I didn't have much dealing with war powers questions during this administration. So when I—the comments I am making are really drawn from the 4 years I spent in the White House Counsel's Office during the first Bush administration. That is where my grounding in these issues comes from.

Mr. ROHRABACHER. So is this—maybe it was because it was a Republican administration that they didn't take Congress seriously. Because I will suggest to you that I now am having a great deal of difficulty.

I take my job very seriously, and—I have been involved in the personal investigations to try to find out information, and I have been thwarted time and time again by this administration. So if, for some reason, the executive branch doesn't take the legislative branch seriously when you have someone who is taking their job seriously, as I do, you find from this side that the executive branch is a roadblock to trying to do a serious job here.

And I can only speak—to be fair about it, the roadblocks under this administration are so much worse than the roadblocks were even under the Clinton administration. And I am a Republican, facing roadblocks from a Republican administration, and that doesn't speak well.

But to the central issue that we are at today, Mr. Atwood, are you suggesting that Members of Congress, Congress as an institution, should have something to say about the rules of engagement once we are in a conflict?

Mr. ATWOOD. I am saying that they ought to have the opportunity, mostly behind closed doors in a secure setting, to raise questions as to whether the rules of engagement are indeed appropriate.

In this case of the Lebanon, prior to the attack on the Marine barracks, as the Long Commission reported, a number of incidents occurred. A number of individual Members of Congress raised questions, but there wasn't any institutional capacity for Congress to say, "Are we doing this the right way?"

And then, of course, there was a decision made by the executive branch to actually take sides in the Lebanon civil war. The Naval bombardment of the Suq al Gharb area put the United States on one side, the Lebanese Army side, and that made us a target. And yet the rules of engagement were not changed and the Marines were vulnerable.

So if there had been an opportunity in a joint consultative committee, behind closed doors, to query the executive branch on the situation, it may well have been that you would have made an impact.

And I just go back to this point that Steve has raised. Individual Members of Congress are very serious, but collectively, the executive branch believes, as he suggested, that you haven't organized yourself in such a way as to be taken seriously.

Mr. ROHRABACHER. Well, I would agree that we are not, as a body, taken seriously. And I will suggest to you, there is every reason for us not to be taken seriously. When I see the type of decision-making that goes on here, I can understand why people who

are trying to get things done who are outside of the political context of the legislative branch don't take us seriously.

We have trouble—well, anyway, I could go into great detail and give you numerous examples of the stupidity that goes on here in the legislative branch.

Let me suggest to you that I think you have got it wrong. I think that you don't have to have an influence on the rules of engagement behind closed doors. And it does not have to be—to have an influence, Members of Congress do not necessarily have to have an authority granted to them by, for example, this specific piece of legislation that we are looking at today.

Instead, you can have your influence, and in fact, what we do in the public arena probably has more impact than what we do behind closed doors. I have always found it very easy to be dismissed behind closed doors. But when I start making speeches on the floor of the House, start trying to generate public opinion, that is how I get things done here.

Now, there are different approaches to being in elected office. There are people that play the outside game and people that play the inside game. I play the outside game, and I have had a certain amount of influence. But take just the rules of engagement concept: If those Members of Congress would have made themselves a royal pain to the administration, I think that we could have seen a change in those rules of engagement in Lebanon.

Just as, I might add, had I, as I testified, had I on the inside at the White House made myself a royal pain on the inside we could have had those rules of engagement changed as well.

So it could have been outside or inside, but what is important here is, nobody did. They could have spoken once or twice about it, and they didn't make themselves a pain. They didn't pound on the table. They simply mentioned it a couple times.

We have a wondrous system in the United States of America, and it is a system that allows us to utilize public opinion and to go forth and be in the media and to mobilize the people, and in doing so, to get the attention of the decision-makers.

In the case that we are talking about, nobody bothered to do that on the outside, and I didn't, as I admitted, and I have always regretted that I didn't make myself that kind of a nuisance, on the inside. So I would think that we don't want to have especially rules of engagement coming under dual authority of legislative and executive branch. Don't you think that would sort of—you don't think that would complicate things to the point—

Mr. ATWOOD. Oh, yes. I am not suggesting that. That is ultimately the responsibility of the Joint Chiefs, actually. In this case it is our military. All I am suggesting is that if you talk publicly about the fact that our military may be exposed because they are under peacetime rules of engagement, you may be causing them more of a problem by doing it publicly. That is the only point I was making.

Mr. ROHRABACHER. Your central point that I got out of what you were saying—and I think it is the central point also, frankly, of what we have here on legislation by Mr. Jones and by our chairman—is that it is important for us to prevent the executive branch

from getting us into a conflict that then is very difficult to extract ourselves from once the conflict is actually on.

I think your point was, influence the decision before the decision is made to go to war; and I think there is certainly reason for concern on that. Nobody in their right mind is going to sit back and say that is not something that we need to work on. Again, I think it requires the diligence on the part of Members of Congress to use their own instincts and to not be afraid to speak up at the right time; and once that decision is made, if someone feels strongly about it, to use the prerogatives that we already have.

If, from the very beginning, you would have had attempts to defund this effort, and people actually saw that this was a wrong-headed operation in Iraq, and they would have even come close to defunding it, there would have been a whole different situation today.

So I appreciate your testimony. I agree with the chairman and Mr. Jones as to the magnitude of what we are trying to do. But I think there might be some unforeseen consequences to making the system more complex.

Thank you, Mr. Chairman. And I would ask Mr. Jones if he could take over my role now as ranking member.

Mr. DELAHUNT. Thank you, Mr. Rohrabacher, and have a safe trip.

I would just note—I am going to go to Mr. Carnahan next, who serves as vice chair of this committee—that I think we are getting closer to an understanding; and I want to compliment you both on your testimonies.

I tend to agree with Mr. Atwood in terms of a mechanism to ensure an institutional guarantee of thoughtful deliberation. Yes, there are individual Members that make themselves a pain. One of them is to my left. And he does an excellent job, and accomplishes that frequently, and oftentimes to the benefit of the institution. But I don't think we should rely on the instincts of individual Members, particularly when they may not have available to them all of the information, and data, and staff that is really necessary to reach a fully informed decision.

But having said that, let me go to Mr. Carnahan and invite Mr. Jones to move up and sit to my left. Russ?

Mr. CARNAHAN. Thank you, Mr. Chairman, and I thank the panel for being here. I think this series of hearings is very important and timely; I think this needs to be reexamined and revisited. And I guess, on a personal note, I am very proud of my former Missouri senator, mentor, and friend, Tom Eagleton. We miss him, but he was an early champion of establishing Congress's authority regarding war powers. He firmly believed that our Founding Fathers correctly placed in Article I, Section 8, the responsibility to go to war with the Congress because of the danger and tendency of powers creeping to the executive.

Senator Eagleton also sought to prevent an end run around congressional authorization by the executive branch by seeking to prevent the President from using treaties or other authorities as the basis for going to war.

I would like the panel to tell us a little bit about—I guess, presidents before and after Senator Eagleton have used treaties and in-

stitutional authorities such as the U.N. and NATO to avoid congressional authorization for going to war. I would like to hear you discuss whether or not you think the President, pursuant to treaty authority such as the U.N. charter and NATO, can circumvent Congress and go to those organizations for so-called authority to go to war.

Why don't we start with Mr. Atwood?

Mr. ATWOOD. Just a brief comment: The United Nations Charter debate in the Senate made it very clear that this delegation of authority to the President to engage in the U.N. charter, under sections 6 and 7 of that charter, which involve the use of force, would not in any way supersede the constitutional authority of Congress to authorize war. And so while a treaty is the law of the land, there were reservations offered at the time.

Now, the U.N. charter was debated first, and the same consideration was given when the NATO treaty was enacted.

So that is my answer: There is nothing that can supersede the Constitution.

Mr. RADEMAKER. Yes, I agree with Secretary Atwood.

I suppose that you could find people who would make those arguments that a treaty like the U.N. treaty or the NATO treaty or some other treaty provides a basis of legal authority for the President to commit U.S. forces to combat.

I don't believe that is true, however, and I think that would be a very dangerous doctrine. I don't think the Congress would want to ever delegate its authority really to anyone, much less an international organization within which the United States is one of many voices.

In this connection, I would note that I recall in the early 1990s legislation was introduced in the Senate—I don't recall a corresponding House bill, but there was a bill introduced in the Senate—that would have provided that U.N. authorization would automatically provide legal authority to the President to commit U.S. forces. I found it a fairly astonishing bill at the time.

The premise of such legislation, of course, is that—it is not today the case that the U.N. can give such authority. But this was a legislative proposal to essentially—legally, I think this would work if Congress wanted to pass a law and say, well, any time the U.N. votes to authorize a peacekeeping operation then the President shall be authorized to commit U.S. Armed Forces to that operation. I think legally that would probably satisfy whatever constitutional requirements exist. But, again, I think that would be a very dangerous road for the Congress to go down.

Mr. DELAHUNT. Would my friend yield for a moment?

Mr. CARNAHAN. Yes.

Mr. DELAHUNT. It is my understanding that most of the treaties, I think all of the treaties that we are signatory to and have ratified, include in the language authorization pursuant—language to the effect, pursuant to constitutional processes of respective governments. And I have heard this issue raised about using treaties as a way to implicate American military forces in hostile actions overseas, and yet the language in the treaties would suggest strongly, would state explicitly that, again, constitutional processes must be complied with.

Is that an accurate statement?

Mr. ATWOOD. Yes. Thank you for reminding me of that. That is exactly right.

I would also make one other point, which is that treaties are ratified by only one body. The war powers are held by both parties.

Mr. DELAHUNT. I am sorry. I yield back to my friend.

Mr. GRIMMETT. Just to follow up on that, Mr. Chairman.

Mr. DELAHUNT. I am sorry.

Mr. GRIMMETT. The classic example of what you just outlined is in the NATO Treaty of '49. When the debate on that took place, one of the key points that was made by Senator Vandenberg, representing his party at that time on the issue, was that there was going to be no automatic war. That ratification of a mutual security treaty of that nature was clearly going to have contained within it clear language that made it clear that Congress or any other party to the treaty was going to have to act in accordance with its own constitutional processes. And that thing has been followed through in all of the other mutual security treaties. There is a clause in there to that effect that there is no automatic war.

Mr. DELAHUNT. Russ.

Mr. CARNAHAN. Thank you.

And I wanted to ask Secretary Atwood, having worked for Senator Eagleton and being familiar with his work on the Senate version of the bill in the 1970s, I always thought he had such a great grasp of this issue, and I heard him speak about it often. But I would really like to have you reflect on the work he did there on that bill.

And—I guess it is obviously relevant to today, but also how that compares to the bill that we are looking at here in the current Congress.

Mr. ATWOOD. Thank you, Mr. Carnahan. And I guess I wasn't aware that you were a member of the subcommittee, so I hope you will give my best wishes to the secretary of state of your State as well who is an old friend.

Mr. CARNAHAN. I will.

Mr. ATWOOD. He wrote a book after this whole episode called, "War and Presidential Power, A Chronicle of Congressional Surrender." He sided with President Nixon in the override vote, which took a lot of courage because he felt as though, as he said, it turned the Constitution on its head. And I think he was absolutely right about that. And legal scholars have now looked at his debates with Barry Goldwater, for example. And Barry Goldwater said, "I can almost support this because it gives more power to the President than I thought he had under the Constitution." And then his debate with Senator Javits, who was a co-sponsor of the Senate legislation with him. So I think that he was absolutely right; he believed that the War Powers Resolution has been a failure. He was a very courageous man in a lot of great ways. I guess I, you don't say these things very often in Washington, but he was a person that I loved and respected. He was a mentor, and I miss him greatly.

Mr. CARNAHAN. Thank you. One other question I wanted to ask, particularly about the Jones bill, thinking about a potential real-world situation, if I can imagine a situation in which a country at-

tacks a United States ally in the Middle East during a congressional recess, whether it would be Syria attacking Jordan, Turkey attacking Iraq, which in fact it has been recently, or it is China attacking Taiwan, if the President determines that this attack threatens United States national security, does the Jones legislation, in your opinion, require the President to convene the Congress and obtain authorizing legislation before ordering the U.S. to take action, say, to defeat an invasion, impose a no-fly zone or provide advice and training in the war zone to our ally?

Mr. RADEMAKER. I am sorry, Congressman, I would have to review the legislation again. I looked at it some weeks ago. But for a very precise legal question like that, I would be very reluctant to draw on my now somewhat hazy recollection of what the legislation provides.

Mr. ATWOOD. My view of it, having worked with this for a long time, is that if American forces were at immediate risk, then the President could take action under the delegation of authority and emergency power section. However, if they were not at risk and the U.S. territory was not at risk, then he would have to convene the Congress and get authority.

Mr. CARNAHAN. The example I was trying to describe was where an ally had been attacked.

Mr. ATWOOD. I think the same would stand. He would have to get authority, in my opinion, my reading of the Jones. Maybe we should ask Mr. Jones.

Mr. CARNAHAN. Mr. Grimmett.

Mr. GRIMMETT. Section 3 enumerates the specific circumstances. The one you just described is not listed. It says evacuation of U.S. citizens, armed attacks on U.S. Armed Forces, an armed attack on the United States. Those are the enumerated items in Section 3 of the bill. The contingency you described is an attack by a third party on an ally but not an attack on U.S. forces.

Mr. RADEMAKER. I guess, again, I haven't looked at it, but I am listening to your description. There would certainly be some attack on allies where there would be United States forces present, for example South Korea.

Mr. GRIMMETT. That could possibly be the case. But the scenarios you gave struck me as, essentially, Middle East-type scenarios where we may not have military personnel physically present that might be caught up in an instance of conflict you described.

Mr. RADEMAKER. Although you mentioned Turkey attacking Iraq.

Mr. GRIMMETT. Well, that is true, Turkey attacking Iraq. But, again, most of the examples you gave, it is not explicitly covered.

Mr. DELAHUNT. Would my friend yield for just a follow-up question?

I think it was you, Secretary Atwood, that indicated. But there is available to the executive the prerogative of calling for a special session of Congress. I presume that could be done in an expedited fashion. I don't—I consider myself somewhat of a history buff, but I can't think immediately of a situation where that has occurred. Maybe that occurred when North Korea invaded South Korea, I am not sure. Does anyone have an historical example?

Mr. GRIMMETT. Well, in the case of South Korea, we had military personnel physically present in South Korea. Everybody knows the

basics of the history of the Korean War; the Pusan Perimeter is emblazed in everyone's head, where you had a small pocket of American forces down there at the very small end as the country was almost overrun. Well, and we had forces in Japan, occupying forces physically present, and that is when President Truman took the unprecedented act of basically going to the U.N. Luckily, from the standpoint of the U.N. Security Council resolution, the Russians decided to take a walk, and so when they had a vote in the Security Council, they didn't have a veto, and they got the authority under the U.N. flag to come to the aid of the South Koreans. And that is when we got involved in it, and of course, the rest of the history you know. But certainly there was a case where we had forces physically present when an attack like that happened.

Mr. DELAHUNT. Has the gentleman completed his questions?

Mr. CARNAHAN. I yield back.

Mr. DELAHUNT. I thank Mr. Carnahan.

And now to Mr. Jones.

Mr. JONES. Mr. Chairman, thank you very much, and I thank the witnesses here today, and certainly the ranking member who just left to go home to California. I think I want to make a couple points. Then I have a question.

But, for me, I have listened to the testimony for two, three hearings now. And that is why I felt compelled to introduce legislation. First of all, we as a Nation do not meet our constitutional responsibility. We have abdicated the authority to the executive branch for too long when it comes to war. I appreciated hearing the history, plus reading some of the history about the 1973 War Powers Act. I personally wish that we didn't have the need for the War Powers Act, that we just stepped to the Constitution, but that doesn't seem to happen anymore.

So, therefore, these hearings and this issue itself are absolutely critical in my humble opinion. I am just going to read a couple of sentences. Then I will get to the point. I would assume that somewhere along the way you gentlemen read this article written by General Greg Newbold. It was in Time 2006, "Why Iraq Was a Mistake: A military insider sounds off against the war and the 'zealots' who pushed it." I had met with General Newbold on several occasions. He even appeared before a subcommittee that I sit on with the chairman being Vic Snyder. I read part of his article to him.

And I think I will, Mr. Chairman, with your permission, it won't take but a minute to read this, because I want to get to my point:

"From 2000 to 2002, I was a Marine Corps lieutenant general and director of operations for the Joints Chief of Staff. After 9/11, I was a witness and therefore a party to the actions that led us to the invasion of Iraq—an unnecessary war . . ."

unnecessary war, not needed, unnecessary.

"Inside the military family, I made no secret of idea that the zealots' rationale for war made no sense. And I think I was outspoken enough to make those senior to me uncomfortable. But I now regret I did not more openly challenge those who were determined to invade a country whose actions were peripheral to the real threat—al-Qaeda, Afghanistan, bin Laden.

"I retired from the military 4 months before the invasion, in part because of my position to those who had used 9/11's tragedy to hijack our security policy. Until now, I have resisted speaking out in public. I have been silent long enough."

Then I am going to turn to the back page, and this the real point, I think, of these hearings and why your testimony, and hope that we can come to some better resolution than what we have with the current War Powers Act because it is a new world. It is a new generation.

He further states toward the end of his writing:

"My sincere view is that the commitment of our forces to this fight was done with a casualness and swagger that are the special providence of those who have never had to execute these missions—or bury the results."

To me, Mr. Chairman, that is why there has to be some resolution to the current status. I have great respect for Mr. Rohrabacher. He and I have fought many battles up here, and are still fighting them, about our border agents. But the fact was that when this push for this war was made, we were all invited to hearing rooms. We had Donald Rumsfeld, General Myers. You have to believe those of us who don't have the expertise in foreign policy, I am much wiser today than I was 6 years ago, believe me, not smarter but wiser. But I am sitting in there. I am listening. I want to trust. I want to believe that I can trust what I am being told. And maybe that is my fault that I did not do more investigation, but I think I was average in that respect. Then I think about the fact that the Congress seemed to—and I am not faulting anybody, my party was in charge at the time—seemed not to really question. I don't blame the administration for that. I do not, but the Congress itself, in my humble opinion, did not have—again, we were the majority party—or did not seek to meet its constitutional responsibility. Again, the President didn't ask for a declaration of war, but we were not in a position, and I am not going to fault the leadership at that time, but we did not seem to be in a position to seriously challenge what we were being told. Now, I am not talking about so much in Iraq, but constitutionally, we were neutered, if I can use that word. We were just neutered, and we just went along.

Well, I think, to close and to get to my one point I want to make, Rudyard Kipling in the book that he wrote, "Epitaphs of War," and this has been so profound, is why with my staff we looked so hard at putting this legislation in. His son died in World War I. And he had been pretty much aggressive when it came to empire-building war. But under "Common Form," it says, "If any question why we died/Tell them, because our fathers lied."

And under no circumstances should a Congress abdicate its responsibility when we send young men and women to die for a country. So if we don't try to tweak the 1973 War Powers Act, how do we have more constitutional ability to be a partner or consultant before we send Americans to die? I know that is not an academic type question, but I am giving this to you because I think I speak for many, many Americans today in my district and outside my district by saying, what does Congress need to do? What do we need

to change? What do we need to rewrite to make the Congress meet its constitutional responsibility if we are going to have to have a caveat to declaring war?

Mr. ATWOOD. Mr. Jones, if I could, because this leads to the basic thrust of my testimony today. Congress needs to develop an institutional capacity to ask those kinds of questions. There are military experts on every network now that are being paid a lot of money to provide to the public their view of what is happening in Iraq. There is no reason why Congress can't hire some of those experts so that, when people like Secretary Rumsfeld come up, you can ask the right questions. The runup to the war in Iraq was a lot longer than the 6 weeks of debate that Congress had. There were preparations being made—there have now been books written. There is the story of General Marks, who was asked to lead the troops into Iraq. He said that he went all over this government for 6 months asking people, "Where are the weapons of mass destruction? Where are they?" "Well," he was told, "we know there are 3,000 depots; where are they? My troops are going to have to go into that country. I don't know where they are." Nobody could tell him because the evidence wasn't there. They didn't know where they were. All they had was an historical record, according to George Tenet's book.

So if there had been an institutional capacity, if there had been a committee that was well staffed that could operate in private, in a secure environment, those questions might have been asked. You can't predict that it would have come out the right way. As Alexander Bickel had said, Congress and the President can make foolish errors of commission or omission, but together that is somewhat less likely, and together that is all we have got.

The problem is that the Congress hasn't taken this seriously enough to create that kind of an institutional capacity. In a parliamentary system, where the prime minister is also the leader of a party, he wouldn't dare take the country to war without making sure that at least his party was behind him. In this system, which is a separation-of-powers system, we need a different method for assuring that the best minds of the country are at least together, thinking about these issues and asking the right questions before we make the decision to go to war. As we have seen, once the decision is made and the authority is granted, it is the President who will determine what the duration of that war will be.

Mr. RADEMAKER. Congressman, you obviously speak with great passion on this subject. I will try to choose my words carefully. I think there are a lot of criticisms that one can make of the current war, and how we got into the current war, and the way the administration has handled it. But I don't think one of the criticisms that can be made is that this war was put together in violation or conducted in violation of the War Powers Resolution.

Mr. DELAHUNT. If the gentleman would yield, I am not suggesting that, and I don't think that Mr. Jones is suggesting that, if I am correct.

Mr. RADEMAKER. I think that is right. I was simply going to make the observation that—well, let me finish, and then I would be happy to respond.

So I think it doesn't follow, from the retrospect of you and many Members of Congress, that our Nation made the wrong decision in

2003, that we need to fix the War Powers Resolution, because the War Powers Resolution I don't think contributed to the outcome in 2003. I don't think a different war powers resolution would have given us a different outcome.

I think the larger point of some of the remarks I made earlier about Congress taking responsibility and participating as an equal partner in the national decision-making on use of force, when you become a decision-maker, the risk is that sometimes you will make the wrong decision.

And I understand you to be saying, Congressman, that, in retrospect, you think Congress made the wrong decision in 2003. I think that would be, that will always be a risk for the Congress, especially if it tries to assert even greater responsibility with respect to the use of force.

Now, Secretary Atwood talks about ways that we can try to increase the likelihood that when Congress does make a decision, it makes the right decision. I don't think there is any procedural mechanism, any committee structure that is going to guarantee that Congress gets it right 100 percent of the time. There is no human institution that has 100 percent success rate. But to respond, maybe now I can just make one comment on this idea of relying on a committee of experts to help the Congress get it right. I think if, looking back on the decision that the Congress made in 2003, a lot of it was driven by intelligence assessments that, in retrospect, appear to have been wrong. And at least in the area of intelligence the Congress long ago did what Secretary Atwood is recommending be done in this area. There are committees in the House and Senate, select committees, that work full time on this issue. They are staffed by intelligence experts. Most of the staff of those committees have some background in the intelligence community. Their job is to oversee the intelligence community. And with their large reservoir of expertise and their oversight, they don't seem to have prevented the intelligence judgments from being wrong in 2003.

So I am not saying it is a bad idea, but I am saying, even a panel of experts with the best institutional support we can provide it is still capable of not getting it right.

Mr. JONES. Mr. Rademaker, if I could, Mr. Chairman, just real quickly, my comments are based on what I have learned. My comments are based on the fact that the Congresses of the future, there will be many people who will be more knowledgeable, such as the chairman and ranking member from Missouri, than others, putting myself in the others, who are here to do what they think is right. And yet if the system is structured as it is now, then I think more times than not that the Members that do not have the expertise that others have will probably make a similar mistake to what has been the mistake that has been made to go into Iraq. I don't know if this legislation or any legislation or the previous War Powers Act, but somewhere along the way, we have lost our way, if I can say it that way. Because I think it would be tragic if 5 years from now a chairman is having the same type of discussion on the issue of war powers, because that means nothing would have happened and possibly another war.

So this is good to have this institutional wisdom that you all are sharing with us, but the whole issue of—the point is that the Congress has got to come back to its constitutional responsibility. And if we need a war powers provision instead of just straight up-and-down declaration of war, then we have got to fix this problem, because it is a serious problem.

And with that, I will yield back, Mr. Chairman.

Mr. DELAHUNT. Before—I am going to ask Dr. Grimmett to respond as well, but I also want to note the time for Secretary Atwood. I know he has a plane to catch, and I do not want him to get to the airport and be delayed. But thank you so much. If I can just for one moment make an observation—and Brian, you can respond and then your co-panelists can respond, too—I think the point that Mr. Jones is getting to is, in the current system, it is not that I don't think that the 1973 War Powers Act was violated by the administration, but I do think this, that it was not a fully informed decision by the Congress. Many of us raise concerns because of issues, data, tidbits, factors that we saw in the public domain. And while there are some experts in the Intelligence Committee, I think that is not—I think it has been established that it is not necessarily reliable. That is why this idea of how Congress is structured, there are other elements to consider in terms of any kind of policy decision. The ability, the capacity of the armed services, that implicates the Armed Services Committee, in terms of destabilizing or the stability of the entire region in terms of our policy vis-à-vis the Mideast implicates the Foreign Affairs Committee. You know, the initial rationale put forth was weapons of mass destruction. But clearly that changed as the executive changed its rationale, some of us would say to accommodate its goal of deposing Saddam Hussein. That rationale changed. But the gentleman from North Carolina uses the word "neutered." I would put forth that we were flying blind. We did not have the information available to us, nor the ability and the capacity to ask the right questions as to whether this was a decision that was fully informed. So you are right, maybe simply an improvement in the War Powers Act, you know, response to our capacity to do a fully informed decision. And in part I agree, that I think it is a decision where many have attempted to defer to the executive and not accepted the burden of our constitutional responsibility. And that is why, in my opening remarks, I allude to accepting our responsibility unless we just want to continue to allow the constitutional responsibilities erode in deference to an executive.

Brian, I know you had a plane. If you want to make any comment.

Mr. ATWOOD. Just this, Mr. Chairman. I think it is important not only to change the law but to change the culture and to take this more seriously. And even this effort, even if you fail, Mr. Jones, the effort is worth it because the culture needs to be changed and people need to take this seriously. I do agree with Mr. Rademaker that, as I said in my testimony, even the best crafted law cannot protect a nation when, in Alexander Hamilton's words, "the national councils may be warped by some strong passion or momentary interest." The strong passion that we were feeling after 9/11 was really obvious to everybody. And when the President said this

relates to terrorism and wouldn't it be awful if weapons of mass destruction came into the hands of terrorists, I think that that was enough for most people.

I might also say that these passions can be aroused at times during the electoral calendar when people say, let us get this out of the way, so we can go out and campaign. We don't want to be accused of being weak on terrorism. And I think obviously that was a factor here. So let's be blunt about that.

But I still say that the institutional capacity of this body can be improved, and it can be made—the War Powers Resolution itself can be perfected.

Mr. DELAHUNT. Brian, very good seeing you.

I am going to counsel you to go out, take a right and get moving, but thank you.

If I could address a question to you, Steve. You talked about all the executive branches, particularly in an era where the concept of a unitary executive seems to be embraced vigorously and robustly by this administration. I think I make a fair statement to say that dissent is not welcomed. And we see that, whether it was the case of Larry Lindsay or General Shinseki. And this is not simply trying to focus on the war in Iraq and this administration, but there is much more discipline in an executive—in the executive branch. Whoever may be the head of the executive branch, Democrat, Republican, is irrelevant. But I believe this. To have a fully informed decision requires the competition of ideas, requires and demands dissent, and the ability to have appropriate transparency. And I think one of the lessons that I have learned, and I share Walter's passion on this issue, is that Congress has failed; we did fail in our responsibility. And we have to search for an answer so that it isn't just exclusively, because in real terms, the de facto reality is such that we do not have the institutional capacity, as Secretary Atwood indicated, to have that debate currently other than in a very fractured system. And I think that is what I am groping with as chair of this committee as I look at the Jones proposal. Because there has to be some sort of answer.

Now, Dick, you might be able to give us some ideas in terms of a mechanism to improve that, whether it is analogous to the Joint Economic Committee, but a standing committee that allows for vigorous debate. And when I hear the argument posed by my friend from California, Mr. Rohrabacher, that, well, we can always stop, I think what we need, the funding, that is much more difficult. We need that information in a more—in a larger capacity to make that decision, what is the Latin term, *a priori*, as opposed to *ex post facto*. Because once the Pandora's Box is open, it is tough to get, this is a fractured, like much in the U.S. Congress, this is a fractured analogy, to put the genie back in the bottle. And in that interim, there are huge amounts of treasury that are expended. There are substantial losses of life and individuals whose futures are impaired or destroyed.

I guess that is what I am looking for.

Dr. Grimmets.

Mr. GRIMMETT. Well, there are plenty of examples of how Congress has responded in the past to various specific controversies or issues, whether it is war or whether it is intelligence. I got my

start in my job, big detailed work on the two investigative committees, involving the scandals involving the intelligence community back in the 1970s. Select committees emerged from that. People were not being briefed. People did not have an exact idea what the Intelligence Committee was doing. So, out of that emerged the Select Committees on Intelligence that the House and Senate has. Obviously, there was not—when you look at that committee structure, the way those committees were formed at that point to deal with these kinds of questions, you had representing Members of the various policy committees who would have direct, you know, a concerted interest in it. You know, you had members of the Armed Services Committee, members of the Foreign Affairs Committee, and so on down the line. And what they did was they had rotating membership to make sure that you always had someone who had expertise that they could bring to the table in those committee meetings. They dealt with security. They dealt with clearance of staff. They dealt with the securing of information and all those things. And now those are institutional parts of the Congress and the House and the Senate.

At the end of the Second World War, we had the Joint Atomic Energy Committee. That committee had more power probably than any single committee ever had in modern times. It had legislative authority. It had membership that was bipartisan. It was bicameral. They had access to a tremendous amount of information, and they sorted out and they dealt with issues of the greatest sensitivity, atomic energy. Now, that committee was abolished in 1977, but from 1946 to 1977, there was a committee dealing with a specific series of issues. If you wanted to take any element of a model of all of that, you could theoretically create a committee, a joint committee if you wished, or two committees if it has to be that way because of the nature of the institutional rules of the House and the Senate, which would have the same kind of function as it related to war-related issues and which you could theoretically have people that are on the Armed Services Committee, the Foreign Affairs Committee, the Intelligence Committee, staff that is dedicated, that are specifically trained and has got the expertise and would provide a vehicle.

And of course, if the Congress as an institution was willing to give up its committee jurisdictional authority over a War Power Resolution, that committee could be the basis and original point of a declaration authorizing use of military force based upon private hearings they had had in advance of an action taking place. I mean, the committees of the Congress have got their own institutional interests and all of that. But at the end of the day, if the right combination of circumstances emerges, you probably could find some means of pulling that together.

And I would add that, in the midst of 9/11 reaction, it was a very difficult time for anybody to really understand quite what was going on. And a lot of decisions had to be made in a very rapid fashion, whether it was the original 107–40, you know, in September 2001, or subsequently the run-up to the war in Iraq in a second resolution. But if you take a look at that time frame, that was then, and this is now. We have had all the experience of investigations, all the debates that have come out, all the issues in the

information. Now you might have an environment that might be ripe and propitious for people to examine these kinds of questions in a way that they might not have been willing to do in 2003. I mean, it is theoretically possible sir.

Mr. DELAHUNT. You know, your last observation about—I think what we are doing here today is a public exercise in lessons learned. And I think it is clear that there is not a—we don't have the clarity yet for an answer. But I think I am beginning to diagnose the problem, and the problem is right here. It is in this institution. And various aspects of that problem have been touched on by a variety of witnesses over the course of the last three hearings. But I think it is probably the single most important effort that this committee can undertake. Because as Walter Jones has stated, I mean, this is an issue of great urgency of extreme importance in terms of our national life in not only how we are viewed in the world but its implications in the lives of everyday Americans and not just welcoming home some coffin or some wounded, grievously wounded, soldier, but our economy. And we are into, how do we go about ensuring that the decision-making process—and I grant you, Steve, it is not going to ever be infallible, and I think we understand that this is an institution of human kind, and we know that we are definitely clearly imperfect, flawed as my friend just noted, but we can do better. We can do better. I am not sure, but I am starting to have some inclinations.

Steve.

Mr. RADEMAKER. Well, perhaps now would be a good time for me to give a quick reaction to Secretary Atwood's suggestion of a joint committee with special jurisdiction in this area. I will confess at the outset, I don't like the idea very much, but maybe not necessarily for the right reason. The main reason I don't like it is because of my strong affection for this committee. And I think his proposal would have the effect of stripping this committee of one of the most important elements of its jurisdiction, which is the jurisdiction over questions of war and peace. And perhaps I could just make the further point that I think, when I listened to what he had to say and what he thought would be achieved, and I think it was mainly in the area of ensuring more careful review, bringing to bear greater expertise than is currently brought to bear, I guess I don't understand why this committee can't do that already. This is the committee that, under the Rules of the House of Representatives, has jurisdiction over questions of war and peace. If we have decided that the problem is insufficient staff expertise, insufficient oversight, insufficient diligence, I don't understand why a joint committee—

Mr. DELAHUNT. I understand your affection for this committee, and I am sure that others on the committee would agree with you, including, most likely, the chair of the full committee, but I think we have some recent precedent here where the Speaker made climate change, global warming, an issue. It was—and there was a Select Committee that was created. It was not done without controversy. But my response to you would be, and I have great affection for this committee, and I certainly don't want to cede jurisdiction either, but there are issues of such paramount concern that we can't in my opinion allow jurisdictional boundaries to interfere with

those issues that carry with them such profound consequences, not just for this country but for the world. Climate change, war and peace. Because when we do something, when we invade Iraq, it just doesn't impact Iraqis within the boundaries of Iraq, but it has far greater implications. I would not mind sharing jurisdiction with other committees. Maybe a select committee. And staffing and resources ought not even be an issue whether—I mean, war is costly in addition to the blood of innocence and combatants. CBO is saying somewhere between \$1 trillion and \$2 trillion, and Joe Stiglitz, the Nobel Prize winner in economics, is talking about a \$3 trillion war. I mean, we are talking infinitesimal amounts of money to provide Congress with the kind of resources that really have, that can contribute to a fully informed decision by the first branch of government with the constitutional burden of declaring war.

I mean, I read your testimony, Steve, and much of it I agree with; some of it I don't. I believe that the weight of constitutional precedent falls on the side of the constitutional responsibility of Congress to authorize, you know, to authorize sending troops into combat. But without this idea of a different mechanism—let us call it the consultative committee or the select committee in consultation—even if there is limited input—and I was unaware, I think it was Brian Atwood who testified that the Middle East Subcommittee had these policy briefings every day on a frequent basis. Maybe that is the approach we take. Maybe it is me ordering the institution here in Congress with additional mandates on regional subcommittees, for example, I don't know. But I am beginning to—but I think it is something that has to occur.

Mr. RADEMAKER. Just some further thoughts. And I am trying to be helpful to your thought process here.

Mr. DELAHUNT. No, I understand.

Mr. RADEMAKER. Another example that Brian probably doesn't know of because it occurred after he left the Congress, but during the 1990s, there was a lot of concern about the peacekeeping operations that were taking place around the world. And as part of the U.N. reform legislation that the Helms-Biden package that we passed during that time, there is an extensive provision requiring monthly consultation between the executive branch and the Congress about peacekeeping operations. And to the best of my knowledge, these consultations still take place on a monthly base. A group of administrative officials come up, and they go through peacekeeping operation by peacekeeping operation. And that has a statutory basis. But I do think it is a mechanism that has worked pretty well—

Mr. DELAHUNT [continuing]. Has just indicated to me, it does happen. But, again, to be candid with you, this subcommittee has jurisdiction of the United Nations. I am not aware. I have to acknowledge my own ignorance in this public venue.

Mr. RADEMAKER. There always have been staff briefings.

Mr. DELAHUNT. I know, that is just the point. It can't just be staff briefings. With all due respect to staff, it has to involve Members, and it has to be, I would advocate, it has to be regular and frequent, and you know, it has to be mandatory on the part of Members of Congress. Again, this goes within the institution of

Congress itself ceding too much authority, with all due respect, to their staff.

Mr. RADEMAKER. Let me throw out my other idea for your consideration. And that is, again, I come back to the point that the rules of the House of Representatives put the jurisdiction over these matters in this committee, and I think, to some extent, what we are hearing is that maybe this committee hasn't done as good a job as it should have in exercising that jurisdiction. And you know, one solution is to bring in other committees, bring in the leadership, sort of cede some of the responsibility to others and hope that collectively they can all do a better job than has been done. But perhaps another approach would be for the committee to redouble its efforts. I am just trying to think through how the committee might do that. One idea would be to set up a special subcommittee focused only on that. I think the problem with that is that you would then have some of the most junior members of the committee participating and not the most senior members of the committee. In all likelihood, the majority of the members of that subcommittee would not be the most senior members. Maybe if you wanted to give additional gravitas to mechanism, it could be some sort of ad hoc working group or give it some other title. But the chairman and ranking members of all the subcommittees, because they are the most senior members of the committee, and designate them as the consultative mechanism that is going to work with the executive branch on a close basis, is going to receive the staff briefings, the administration is to come and brief the chairman and ranking members of the subcommittees. But I would encourage you to think creatively about additional things this committee can do, because, first, because it is this committee's responsibility. But second, I guess I think the likelihood is pretty slim that this idea will actually prosper, just because when they hear about it over at the Armed Services Committee, they will say, here are 16 reservations, and the Intelligence Committee will have reservations, and I think you have suggested that Chairman Berman may have reservations. Those are the obstacles I foresee for that idea. If this committee is concerned and motivated, I think there is a lot more that it, acting by itself, can do.

Mr. DELAHUNT. Thank you, Steve.

Mr. GRIMMETT. I would just add one thing. We are talking about consultation, so we are talking about two branches of government. And even if you organized the committee structure or the new entity, however you want to characterize it, at this end, you are still going to confront the reality of the executive branch that has been very chary about giving information out, especially on something as sensitive as possible war activity or military operations, because of concerns about operational security and about people having the proper clearances and all that sort of thing. And even though most of the major committees that deal with foreign defense policy or intelligence have got the security clearances, the fact is there is a very, very strong reluctance on the part of the executive branch, based on past history, to even engage people on that level. So if you have a committee of 45 members, I mean, the likelihood of them wanting to engage that committee on the most sensitive operational activities that they may be contemplating is pretty slim,

unless some new millennium has occurred that, based on new experiences, that we are not fully aware of.

Mr. DELAHUNT. But what I guess my response would be that this would be an ongoing standing committee if we take, let us call it the Lee Hamilton-Brian Atwood concept, that would anticipate. So it is a continuum, if you will, a continuing initiative so that those potential conflicts would be on the horizon. And the committee, given the expertise that it would have, the expertise that it would have, the gravitas that it would have, would not be caught flat-footed, because I went to Kuwait in August 2002. There was such a huge build-up going on there, a massive, massive base was being constructed, in Qatar, and elsewhere in the Gulf. And I remember saying to myself, "There is a momentum here that is under way that is going to lead us to war." What was fascinating to me, going back to the executive branch, is that the decision-making process that is now revealing itself by this administration was practically nonexistent. And I rely on the various books that have been published by insiders in the administration; particularly I go back to Secretary Paul O'Neill, who served as a principal on the National Security Council. And he was just taken aback by lack of process. There was conversation about the removal of Saddam Hussein and regime change in Iraq 9 days after the President was inaugurated, at the very first National Security Council, where he disclosed, much to his surprise, and that of Secretary Powell, that the Israeli-Palestinian issue was not a priority. I mean, we all want to trust the executive, but our history has taught us, I think, that the Founders were correct in having these checks and balances. And information is key in terms of the coin of the realm, if you will. And it is the weighing and the balancing of, you know, the dissemination of information.

But I think, you know, as you step back and look at where we find ourselves now, I know a lot of us wish we had more information.

Again, I want to thank you both so much. I am sure that we will be reaching out for you again, because I think we are at the beginning of now taking this information, assimilating it, and hopefully coming up with some ideas that we can refine and present to others for their review and maybe have additional, not just necessary hearings, but discussions with the relevant decision makers.

So, Steve, thank you. And, Dick, thank you. Adjourned.

[Whereupon, at 5:09 p.m., the subcommittee was adjourned.]

