S. HRG. 100-1012

# THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

## HEARINGS

BEFORE THE

## SPECIAL SUBCOMMITTEE ON WAR POWERS

OF THE

## COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

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**RESPONSES OF ABRAHAM SOFAER TO QUESTIONS ASKED BY SENATOR BIDEN**

Q. 1. In what circumstances, if any, other than those listed in section 2(c), does the Administration believe that the President has the constitutional authority to introduce the armed forces into hostilities without prior statutory authorization?

A. The Administration believes that it is neither possible nor wise to attempt an exhaustive listing of all situations that might arise in which the President's independent power as Commander-in-Chief to commit U.S. forces would be applicable. Furthermore, the phrase "without prior statutory authorization" is unclear. Statutory authority can be found in a variety of legislative actions short of the type of specific and explicit requirements of Section 8 of the War Powers Resolution.

Keeping these caveats in mind, the Administration is convinced that Section 2(c) fails to list all the circumstances in which the President may lawfully introduce U.S. Armed Forces into hostilities. Among the circumstances not listed in Section 2(c) are the protection or rescue from attack, including terrorist attack, of U.S. nationals; protection of ships and aircraft of U.S. registry from unlawful attack; responses to attacks on allied countries with whom we may be participating in collective military security arrangements or activities, even where such attacks may threaten the security of the United States or its armed forces; and responses by U.S. forces to unlawful attacks on friendly vessels or aircraft in their vicinity.

Q. 2. Under the circumstances extant on the date of this letter, does the Administration believe that the President would have the constitutional authority to introduce the armed forces into hostilities to overthrow the Government of Nicaragua without prior statutory authorization?

A. The President has made clear that he has no intention under present circumstances of introducing United States armed forces into hostilities in Nicaragua for any purpose whatsoever. We respectfully suggest that it would be neither constructive nor responsible to address hypothetically whether the President would have the constitutional authority to do so.

Q. 3. Does the Administration believe that the reporting requirement of section 4(a)(1) is constitutional?

A. We have never challenged the constitutionality of the reporting requirements of the War Powers Resolution, and have in fact gone to great lengths through briefings, testimony, reports and so forth to ensure that Congress is fully informed of our policies and of the actions that we have undertaken in the pursuit of our policies. Extreme situations could possibly arise in which the President might, in the interests of protecting national security, personally invoke the principle of executive privilege and decline to report within the 48-hour period, but I know of no such situation that has arisen in the past.

Q. 4. Does the Administration believe that any situation has arisen during its term of office in which that requirement [i.e., the reporting requirement], as applied, would have been unconstitutional?

A. No.

Q. 5. Does the Administration believe that any event that has occurred in the Persian Gulf has required a report under section 4(a)(1) of the Resolution?

Q.6. Have any of the Administration's communications to Congress concerning the Persian Gulf constituted reports under section 4(a)(1) of the Resolution?

Q.7. Have any such reports constituted reports under sections 4(a)(2) or 4(a)(3) of the Resolution?

A. Consistent with the practice of all Presidents since 1973, this Administration has taken no position regarding whether events in the Gulf require a report under specific subsections of section 4(a) of the Resolution. This has facilitated the President's ability to proceed in a spirit of mutual cooperation with Congress and to ensure that Congress continues to be fully informed.

Indeed, as the Department of Justice stated in the recent case of Lowry v. Reagan, the "President has provided Congress with written communications following each use of U.S. military force in the Gulf, which in their totality contain information that far exceeds the requirements of Section 4(a)(1) of the War Powers Resolution." Further information regarding our activities in the Gulf has been provided through extensive briefings, testimony, letters and in other ways. The Resolution does not require the President to specify the subsection under which a report is filed. In the event, however, that circumstances at any time existed that would have triggered any specific subsection of Section 4(a), the reports submitted by the President in every instance satisfied the requirements of those subsections.

Q. 8. Does the Administration believe that section 5(b) is constitutional?

Q. 9. Does the Administration believe that section 5(c) is constitutional?

A. The Administration's views on these issues are contained in the State Department Legal Adviser's statement to the Committee.

Q. 10. Does the Administration believe that section 8(a)(1) is constitutional?

Q. 11. Does the Administration believe that section 8(a)(2) is constitutional?

The Administration regards Section 8 as ineffective to the extent it attempts to bind future Congresses as to the manner in which they are entitled to approve military actions, and to the extent it attempts to bind future Presidents and courts as to the standards by which to determine whether military actions have been approved. It seems inconceivable that Congress could avoid its responsibility for approving a military action merely because it fails to state in specific terms its intention to satisfy the Resolution's requirements.

Q. 12. If the Administration believes that any provision of the Resolution is unconstitutional, does it believe that the President possesses the constitutional authority to disregard that provision prior to the ruling of a court that such provision is invalid?

A. Each branch of our government has an independent responsibility to uphold the Constitution of the United States. The President is sworn to uphold both the Constitution and the laws of the United States. Certainly, in our system, where the courts have ruled on the rights of parties properly before it, the parties have an obligation to comply with the ruling. That is of course true whether it is an executive official or a legislative official or any other party whose rights the courts have adjudicated. Exceptions have been proposed by Presidents in the past, but generally in the most extraordinary circumstances.

In the absence of final judicial resolution, however, the President has not only the right but the duty to consider whether a refusal to abide by a particular statutory provision is required to fulfill his constitutional responsibilities. Not every disagreement with Congress should lead a President to disregard a law that the President believes is unconstitutional. The normal practice, in fact, is to comply until the courts decide otherwise.

But in certain areas -- especially where the President has independent responsibilities that relate to protecting the national security -- the President will be held responsible by the people for failing to fulfill his duties under the Constitution. In the specific context of war powers, the President typically could not wait for a resolution of the issue by the courts, which are unlikely to pass on disputes under the Resolution. The Constitution entrusts war powers issues to the two political branches.

While this is a complex and delicate subject, the Committee should be aware of Attorney General Civiletti's statement in 1980 that "the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other." In such cases, according to the Attorney General, enforcement of the unconstitutional acts "would constitute an abdication of the responsibility of the Executive Branch, as an equal and coordinate branch of Government with the Legislative Branch, to preserve the integrity of its functions against constitutional encroachment."

Q. 13. Does the Administration believe that a statutorily-imposed time limit on the use of the armed forces in hostilities, such as the 18-month limit set forth in the "Lebanon War Powers Resolution" is constitutional?

A. The President may properly accept such a time limit, if he finds it consistent with U.S. national security interests. But Congress cannot impose such a limit where it would have the effect of constraining in a particular case the President's constitutional authority as Commander-in-Chief. The constitutionality of such a time limit would depend on the particular circumstances surrounding a proposed use of U.S. armed forces when the period expired. Thus, in signing the Multinational Force in Lebanon Resolution, the President stated that he did:

> not and cannot cede any of the authority vested in me under the Constitution as Commander in Chief of United States Armed Forces. Nor should my signing be viewed as any acknowledgment that the President's constitutional authority can be impermissibly infringed by statute, that congressional authorization would be required if and when the period specified in section 5(b) of the War Powers Resolution might be deemed to have been triggered and the period had expired, or that section 6 of the Multinational Force in Lebanon Resolution may be interpreted to revise the President's constitutional authority to deploy United States Armed Forces.

Q. 14. Does the Administration believe that section 7 of H.J. Res. 462, introduced by Rep. Peter Fazio, is constitutional?

A. Section 7 of H.J. Res. 462 gives "[a]ny Member of Congress" standing to challenge alleged violations of any joint resolution adopted under the War Powers Resolution, and orders the courts not to rely on the political question doctrine or any other principle of nonjusticiability in refusing to resolve the merits of such a lawsuit.

Limits on standing and justiciability have a prudential component and a constitutionally-based component. Congress has the power to eliminate the prudential component although, for reasons set forth at greater length in the testimony of the State Department Legal Adviser, it would be extremely unwise for Congress to do this. The prudential limits on standing and justiciability protect the Constitution's separation of powers. Elimination of these restraints would serve neither Congress nor the country, but would force the courts into the center of political crises that they have long and wisely left to the political branches.

Congress lacks power, moreover, to affect the constitutionally-based aspects of the law of standing and justiciability (including the political question doctrine). Insofar as it purports to eliminate these elements of the law, section 7 is appears to be unconstitutional. The Article III limitation on standing bars suits by individual legislators seeking to compel the President to obey or enforce the laws. The effort to create such standing in H.J. Res. 462 thus would order the courts to exceed the limits of their constitutional power.

Q. 15. Does the Administration believe that S.J. Res. 323, introduced by Sen. Robert Byrd, is constitutional?

A. Constitutional aspects of S.J. Res. 323 are addressed in the testimony of the State Department Legal Adviser.

Q. 16. Does the Administration favor the repeal of the War Powers Resolution?

Q. 17. Does the Administration suggest any amendment to the Resolution.

A. The Administration favors the repeal of the Resolution.

At a minimum, the Resolution should be amended to repeal

Sections 2(c), 5(b), 5(c), and 8(a).