

# **Statement by Louis Fisher**

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**Subcommittee on International  
Organizations, Human Rights, and Oversight**

**House Committee on Foreign Affairs**

**“War Powers for the 21st Century:  
The Constitutional Perspective”**

**April 10, 2008**

Mr. Chairman, thank you for the invitation to offer my views on war powers and the pending legislation, H. J. Res. 53. The bill has many positive features, including an effort to restore the constitutional authority of Congress over military and financial commitments. I have a few suggestions to make with regard to the bill's language, but I very much support the fundamental purpose of the bill, which is to correct serious deficiencies with the War Powers Resolution (WPR) of 1973. H. J. Res. 53 is designed to safeguard and reinforce the constitutional system, representative government, and democratic values. The WPR claimed to "fulfill the intent of the framers" and ensure "collective judgment" of the legislative and executive branches but plainly it did not.

## I. War Powers Resolution

As passed by the Senate, the War Powers Resolution limited presidential military initiatives to narrow circumstances, such as repelling sudden attacks and protecting endangered U.S. citizens.<sup>1</sup> However, by the time the legislation cleared the House of Representatives and emerged from conference committee, those narrow circumstances were replaced by a congressional surrender of the war power to the President. Senator Tom Eagleton, a major sponsor of the Senate measure, voted against the conference product, telling his colleagues that the bill allowed "an open-ended, blank check for ninety days of warmaking, anywhere in the world, by the President . . ."<sup>2</sup> President Richard Nixon vetoed the bill but both houses of Congress overrode his veto.<sup>3</sup> The statute neither fulfills the intent of the framers nor ensures collective judgment.

As a result of the compromise reached between the House and the Senate, the WPR was enacted with sections that contradicted each other. Section 2(a) claimed that the purpose of the joint resolution was "to fulfill the intent of the framers of the Constitution of the United States and insure [sic] that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."<sup>4</sup> Other language in Section 2 appears to protect constitutional values. According to Section 2(c), presidential war powers could be exercised "only pursuant to (1) a declaration of war, (2) specified statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."<sup>5</sup> Yet Sections 4 and 5 do exactly the opposite, allowing the President to initiate

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<sup>1</sup> Louis Fisher, "Thomas F. Eagleton: A Model of Integrity," 52 St. Louis U. L. J. 97, 100 (2007).

<sup>2</sup> Id. at 102.

<sup>3</sup> Louis Fisher, *Presidential War Power* 144-48 (2d ed. 2004).

<sup>4</sup> Pub. L. No. 93-148, 87 Stat. 555 (1973).

<sup>5</sup> Id.

military operations for up to 90 days, without ever coming to Congress for any type of advance authorization.<sup>6</sup>

H.J. Res. 53 offers an opportunity to correct the defects of the War Powers Resolution by supporting principles that are consistent with constitutional values.

## II. Commander-in-Chief

The British model gave the king the absolute power to make war. The American framers repudiated that form of government because their study of history convinced them that executives go to war not for the national interest but to satisfy personal desires of glory, ambition, and fame. The resulting military adventures were disastrous to their countries, both in lives lost and treasures squandered. I have submitted to your subcommittee a number of my recent articles that elaborate on the lessons drawn from that history.<sup>7</sup>

At the Philadelphia Convention, only one delegate (Pierce Butler of South Carolina) was prepared to give the President the power to make war. He argued that the President “will have all the requisite qualities, and will not make war but when the Nation will support it.” Roger Sherman, a delegate from Connecticut, objected: “The Executive shd. be able to repel but not to commence war.” Elbridge Gerry of Massachusetts said he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” George Mason of Virginia spoke “agst giving the power of war to the Executive, because not <safely> to be trusted with it; . . . He was for clogging rather than facilitating war.”<sup>8</sup>

The debates at the Philadelphia Convention and the state ratification conventions underscore the principle that the President had certain defensive powers to repel sudden attacks but anything of an offensive nature (taking the country from a state of peace to a state of war) was reserved to Congress. That understanding prevailed from 1789 to 1950, when President Harry Truman went to war against North Korea without ever coming to Congress. I will discuss that precedent in detail later in my statement.

The President is Commander in Chief but that title was never intended to give the President sole power to initiate war and determine its scope. Such an interpretation would nullify the express powers given to Congress under Article I and undercut the framers’ determination to place the power of war in the elected representatives of Congress. Part of the purpose of the Commander in Chief Clause is to preserve civilian

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<sup>6</sup> Id. at 555-57.

<sup>7</sup> E.g., Louis Fisher, “Lost Constitutional Moorings: Recovering the War Power,” 81 *Ind. L. J.* 1199 (2006); Louis Fisher, “Domestic Commander in Chief: Early Checks by Other Branches,” 29 *Cardozo L. Rev.* 961 (2008); Louis Fisher, “To War or Not to War: That is Still the Question for Congress, not the President,” *Legal Times*, March 10, 2008, at 44-45.

<sup>8</sup> 2 *Records of the Federal Convention of 1787*, at 318-19 (Max Farrand ed. 1937).

supremacy. Military commitments are not in the hands of admirals and generals but are placed in civilian leaders, including members of Congress. Lawmakers can at any time limit and terminate military commitments. The framers vested the decisive and ultimate powers of war and spending in the legislative branch. American democracy places the sovereign power in the people and entrusts to them the temporary delegation of that power to elected Senators and Representatives.<sup>9</sup>

### **III. Barbary Wars**

In your hearing on March 13, a question was raised whether President Thomas Jefferson exercised unilateral power to engage in military actions against the Barbary powers in the Mediterranean. Consistent with the principles stated above, his actions were of a defensive nature. He reported to Congress on what he had done, asking for legislative guidance. He told Congress that he was “unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense.” Congress passed ten statutes authorizing Presidents Jefferson and Madison to use military force against the Barbary nations, resulting in a series of treaties in 1815 with Algiers, Tunis, and Tripoli.<sup>10</sup>

### **IV. Section 2 of the Pending Bill**

Section 2 of H. J. Res. 53 explains policy and purpose. Section 2(a)(2) states: “the conduct of the Armed Forces in hostilities requires undivided command by the Commander-in-Chief.” I would not use that language. Advocates of presidential power will cite it to object to any “interference” by Congress in the conduct of military operations. Congress has many express powers in Article I to control armed forces, including making rules concerning captures on land and water, raising and supporting armies, providing and maintaining a navy, making rules and regulations for the land and naval forces, providing for the organizing, arming, and disciplining of the militia, and of course the power of the purse.

I appreciate that subparagraphs (2) and (3) were probably intended to identify the respective presidential and congressional roles. Subparagraph (3) provides: “the continued use of the Armed Forces in hostilities ultimately requires continued appropriation and oversight.” That is true, but the word “ultimately” appears to put the President in the driver’s seat until at some later time Congress intervenes. Furthermore, singling out “appropriation” ignores the equally important power of Congress to control through authorization bills.

Instead of subparagraphs (2) and (3), I would substitute this language:

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<sup>9</sup> Louis Fisher, “Exercising Congress’s Constitutional Power to End a War,” statement before the Senate Committee on the Judiciary, January 30, 2007.

<sup>10</sup> Fisher, *Presidential War Power*, at 32-37.

“(2) the President is Commander-in-Chief to assure civilian supremacy and unity of effort; and

“(3) Congress is the branch of government that decides to take the country from a state of peace to a state of war and is responsible at all times for monitoring the purpose and scope of military force.”

## V. UN Military Operations

Section 2(b) of H. J. Res. 53 provides three subsections governing the collective judgment of Congress and the President for military action. The first two subsections are neutral. They speak of “(1) the initiation of hostilities by the Armed Forces” and “(2) the continued use of the Armed Forces in hostilities.” However, subparagraph (3) states: “the participation of the Armed Forces in certain military operations of the United Nations.” I would delete that subparagraph unless it can be changed and made consistent with the principles of the joint resolution. The use of “certain” is clarified to some extent by Sections 9 and 10, but “certain” raises many questions that are not answered and may imply approval of some unilateral military actions by the President through the UN — presidential actions that entirely circumvent Congress. As I indicate below, that presents serious constitutional problems and undermines the prerogatives of the House of Representatives.

### A. Treaty Process

When the Senate agreed to the UN Charter and Congress passed the UN Participation Act to implement the Charter, it was never contemplated that the President could use the Security Council as a substitute for Congress. All parties working on the Charter recalled what had happened with the Versailles Treaty and the failure of the United States to join the League of Nations. President Woodrow Wilson opposed a series of Senate amendment to the treaty, including language requiring that Congress “shall by act or joint resolution” provide approval for any military action by the League.<sup>11</sup>

The need for advance approval by Congress for any military commitment was recognized by those who drafted the UN Charter.<sup>12</sup> During Senate debate on the Charter, President Harry Truman cabled from Potsdam his pledge to seek advance approval from Congress for any agreement he entered into with the United Nations for military operations: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.”<sup>13</sup> Approval meant action by both Houses, and in advance. The Senate approved the Charter with that understanding.

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<sup>11</sup> Fisher, *Presidential War Power*, at 82.

<sup>12</sup> *Id.* at 84-87.

<sup>13</sup> *Id.* at 91.

Each nation had to decide, consistent with its “constitutional processes,” how to implement the provision in the Charter regarding the use of military force. To do that, Congress passed the UN Participation Act of 1945. Without the slightest ambiguity, Section 6 of that statute required that the agreements “shall be subject to the approval of the Congress by appropriate Act or joint resolution.”<sup>14</sup> Yet five years later, without ever coming to Congress for authorization, President Truman went to war against North Korea by relying on UN resolutions.<sup>15</sup>

Such a procedure is unconstitutional because it would allow the President and the Senate — acting through the treaty process — to eliminate a role for the House of Representatives. Truman’s action became a precedent for other Presidents seeking “authority” from the UN for military initiatives, including President George H. W. Bush in 1990 (for Iraq) and President Bill Clinton in 1994 and 1995 (for Haiti and Bosnia). The unconstitutionality of using the UN Charter to bypass congressional control applies to other treaties, such as mutual security pacts. It was a violation of the Constitution for President Bill Clinton, after failing to obtain Security Council support for the war in Kosovo, to use NATO for “authority.” It would be a remarkable constitutional argument to conclude that he needed the “approval” of each of the NATO countries but not the approval of Congress.<sup>16</sup>

### **B. H. J. Res. 53**

Subparagraph (3) of Section 2(b) refers to “the participation of the Armed Forces in certain military operations of the United Nations.” I would delete that language and add a new section (b) under Section 3, inserted on page 5, at line 4, along the lines of: “(b) before committing Armed Forces to an operation approved by the United Nations Security Council under Chapter VII of the United Nations Charter, or pursuant to a mutual security treaty, the President must obtain prior authorization from Congress by appropriate Act or joint resolution.”

If you made the change above, you would need to amend the UN Participation Act. The requirement for congressional action on an Act or joint resolution before the President could participate in an UN military action applied only to “special agreements.” There has never been a special agreement. As a result, the very procedure enacted to protect congressional power became a nullity, allowing President Truman to go to war against North Korea pursuant to a UN resolution without ever coming to Congress.

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<sup>14</sup> 59 Stat. 621, sec. 6 (1945).

<sup>15</sup> Fisher, *Presidential War Power*, at 97-104. See also Louis Fisher, “The Korean War: On What Legal Basis Did Truman Act?,” 89 *Am. J. Int’l L.* 21 (1995).

<sup>16</sup> Louis Fisher, “Sidestepping Congress: Presidents Acting under the UN and NATO,” 47 *Case W. Res. L. Rev.* 1237 (1997).

I would strike all of Section 6 of the UN Participation Act and insert: “The President may seek the support of the Security Council for military action, subject to the prior approval of the Congress by appropriate Act or joint resolution.”

Section 5 of the 1949 amendments to the UN Participation Act (63 Stat. 735-36) underscores the limited nature of UN military actions “directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the United States.” Armed forces are deployed in a “noncombatant capacity” and limited to one thousand troops. Congress never authorized the President to circumvent Congress by obtaining UN “authority” for major wars.

## **VI. Consultation**

For reasons given above, I would delete the following language in Section 4 of H. J. Res. 53 regarding consultation between the President and Congress (page 6, lines 11-14): “before committing Armed Forces to an operation authorized by the United Nations Security Council under chapter VII of the United Nations Charter.” I am concerned that this language implies that the UN Security Council can “authorize” U.S. action and that mere presidential consultation with Congress is sufficient.

On page 6, lines 15-23, of H. J. Res. 53, the bill contemplates that the President will consult with a group consisting of the President, senior executive branch officials, and six members of Congress (the Speaker, President pro tempore of the Senate, House Majority Leader and Minority Leader, and Senate Majority Leader and Minority Leader). I am uncomfortable with this approach for several reasons. First, however valuable and useful interbranch consultation can be, it is never a substitute for legislation that specifically authorizes a presidential military action. Presidents may decide to meet with lawmakers whenever they like. I would not add the Consultative Group to the bill to give it statutory credibility.

Second, the decision to take the country to war is set aside *for each member of Congress*, from the Speaker to the newly elected lawmaker. On a decision of that gravity, every member is equal. No member has rank or special power.

Third, a President and his executive aides should not be able to co-opt a small group of lawmakers, who might “sign off” on a military commitment and thereby pledge House and Senate support. The most recent example of that danger is the “Gang of Eight” that appeared to be supportive of the NSA surveillance program. Congressional leaders lack authority to imply or grant congressional support for a military operation. That decision is reserved to each member of Congress, including the most junior.

Fourth, the group of six members named in H. J. Res. 53 contains no lawmaker from a committee with primary jurisdiction and therefore substantive knowledge (including Judiciary, Armed Services, Intelligence, Foreign Affairs/Foreign Relations, and Appropriations). Adding those names would make the group too large and unwieldy.

For the reasons stated here, I would not support any type of standing joint committee to monitor military plans (sometimes referred to as a War Powers Committee). The decision to go to war is for all of Congress, not for a subset of the legislative body.

## **VII. Judicial Review**

In Section 8, H. J. Res. 53 states that any member of Congress may bring an action in federal district court for declaratory judgment and injunctive relief on the ground that the President did not comply with a provision of this joint resolution. I am always uncomfortable with this type of provision.

Instead of acting directly to defend legislative powers, it will be tempting for lawmakers to believe that judicial relief is available and to count on successful litigation. Only one branch was meant to protect congressional power: Congress. Lawmakers should not look elsewhere for support and assistance.

No one knows if a federal judge will side with the President. That would be the worst outcome for Congress: the President claiming independent or “inherent” power to conduct a military operation and a district judge agreeing. Of course that decision could be appealed, but why have a presidential-congressional dispute fought out in the courts while a war is underway?

The record of this kind of litigation is that 20-30 members will go to court objecting that the President has violated statutory policy or the Constitution, 20-30 members will file a separate brief denying any illegal action by the President, and the judge will view this as an intramural fight making judicial involvement extremely unwise. The court is very likely to tell the congressional litigants: “get out of court and resolve the issue through your own institutional powers by cutting off funds, etc. Only at that point will the dispute be ripe for judicial consideration.”

## **Conclusions**

H. J. Res. 53 is an important step in safeguarding not only the powers of Congress but the constitutional system that protects individual rights and liberties. The framers put their faith not in an all-wise, all-knowing Executive but in a republican form of government where sovereign power remains with the people and their interests are protected by the structure of separated powers and the operation of checks and balances.

### **Biosketch:**

Louis Fisher is a Specialist in Constitutional Law for the Law Library of Congress. He worked for the Congressional Research service from 1970 to March 3, 2006. During his service with CRS he was Senior Specialist in Separation of Powers and



research director of the House Iran-Contra Committee in 1987, writing major sections of the final report. He received his doctorate in political science from the New School for Social Research in 1967 and has taught at several universities and law schools.

Among his seventeen books are *Presidential War Power* (2d ed. 2004), *American Constitutional Law* (with David Gray Adler, 7th ed. 2007), and the forthcoming *The Constitution and 9/11: Recurring Threats to America's Freedoms*. He has received a number of book awards.

Fisher has been invited to testify before congressional committees on such issues as war powers, state secrets, CIA whistleblowing, covert spending, NSA surveillance, executive privilege, Congress and the Constitution, the legislative veto, the item veto, the pocket veto, recess appointments, the Gramm-Rudman-Hollings Act, the balanced budget amendment, biennial budgeting, presidential reorganization authority, presidential impoundment powers, and executive lobbying.