

Testimony of Attorney Benson Scotch  
to the Senate Education Health and Environmental Affairs Committee

March 4, 2009

SB 501--Public Safety - National Guard Deployment - Governor's Powers  
*SUPPORT*

*My name is Benson Scotch, and I am a member of the Vermont Bar. I worked with Vermont Rep. Michael Fisher on the crafting of a bill that was the model for the legislative campaign that now includes the bill before this Committee and similar initiatives in some 21 other states. I have served informally as an adviser to a number of the groups supporting these initiatives, and it is in this capacity that I present this testimony.*

*I served Vermont Sen. Patrick Leahy as staff counsel on the Constitution Subcommittee of the Senate Judiciary Committee in the 1980s (while a resident of Bethesda), returning to Vermont in 1985 and serving as chief staff attorney for 15 years. I was executive director of the ACLU of Vermont for three years before retirement from active practice in 2003.*

*I first focused on the law relating to the National Guard and War Powers under the U.S. Constitution in connection with some 52 Vermont Town Meeting Resolutions on the Iraq War in 2005 and a related bill in the Vermont Legislature the following year, providing for a Vermont National Guard study committee.*

*I thank the Chairman, Committee members, and Sen. Madaleno for this opportunity to present a written statement on SB 501 in my capacity as adviser to Maryland supporters of the bill. My focus will be on Sec. 13-401(c)(2) of the bill.*

I. Senate Bill 501: The Basis in Law

Though the legal principles governing war powers under the Constitution are complex and rife with open questions, the predicate for SB 501 is strikingly simple: *The 2002 Authorization for the Use of Military Force (AUMF) in Iraq was narrow and specific. It sought to protect the United States from the threat posed by Iraq and to enforce UN Security Council Resolutions relating to Iraq. Its purposes have been accomplished or have lapsed.*

Congress may or may not have the power in fact to enforce the conditions set forth in the 2002 AUMF and to set a timetable for the end of the war because the legal mechanisms to enforce AUMFs are uncertain and inadequate. But paradoxically perhaps, the states, which do not share direct war powers with the Congress and the President under the Constitution, may question the federal call-up of their National Guards, not on

the basis of location, purpose, type, or schedule of such duty, but because a particular order is no longer valid and enforceable. And under federal law, without an authorization from Congress, units of a state National Guard may not be called into service in the National Guard of the United States.

A common question put to proponents of legislation that breaks new ground is, "What is the Legislature's authority?" That question in turn often leads to the further question, "If the bill becomes law, will it survive a court challenge?" A fair enough question whenever a state legislature considers a bill that appears to question not only federal law, but conventional wisdom. Bills like SB 501 have been brushed aside by a number of attorneys advising state legislatures, with just one phrase: The Supremacy Clause of the Constitution, Article VI, paragraph 2, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding..

The Supremacy Clause is the mainstay of our federal system of government. SB 501 not only respects the Supremacy Clause, but actually promotes it. It is the supreme law of the land that the National Guard shall be called into service for deployment as a fighting force overseas only when Congress authorizes such action. A straightforward reading of the 2002 AUMF tells us that its clearly stated purposes have been achieved or are no long relevant. To make this statement requires no knowledge of military strategy, no review of foreign policy considerations that in our system are the domain of the President and the Congress, no fact-finders to scrutinize the level of conflict or else the return of docile civil life in Iraq. All that is required to make this statement is (a) a rudimentary understanding of the language of the AUMF, and (b) a review of commonly available sources of information about Iraq before and after 2002. In sum, there were no weapons of mass destruction in Iraq.

Nor is it a matter of judgment that there are no UN Security Council resolutions

stemming from the 1991 Gulf War and its aftermath to be enforced against an unwilling and recalcitrant Iraqi regime. These are the resolutions that Congress intended to cover in its 2002 AUMF, not UN resolutions adopted as a result of the invasion and occupation of Iraq in 2003—which did not exist when the 2002 AUMF was adopted.

It is the Supreme Law of the Land that U.S. military forces should be deployed for military purposes in foreign countries only with the consent of Congress, and I submit that contrary actions undertaken by the Executive Branch are not taken to uphold the Law of the Land. And I submit that governors who take steps to avoid contravening the law of the land are not violating the Supremacy Clause, but rather taking care not to use vital and far-reaching powers on the strength of a federal order of dubious provenance. SB 501 would not empower the Maryland Governor to resist a federal order on the basis of the location, purpose, type, or schedule of such duty—in other words because a Governor objects to a specific use of military force. *Cf.* 10 USC Sec. 12301(f). If SB 501 sanctioned that kind of gubernatorial power, it would indeed fall under the Supremacy Clause.

But let me stop here and take a moment out for a reality check. If the AUMF has so clearly expired, why does the war drag on? Are we on a different planet?

The answer is that in the real world, once Congress has authorized the use of military force, Congress' share of war powers under the Constitution is dramatically reduced. I am not suggesting that Congress should ever share battlefield powers—they reside with the commander-in-chief and the commander's officers in the field. But Congress cannot compete with a President whose views of a war are very different from those of Congress. Bills that include timelines for withdrawal are subject to a presidential veto, which is nearly impossible to overcome where a subject as divisive as war is at issue.

What about the courts?

Courts generally decline to hear war powers cases—cases challenging the exercise of war powers, typically initiating the use of military force—because they raise what the

courts call “political questions,” which the judicial branch considers itself ill-equipped to handle. Courts would be highly unlikely to hear an action brought by a plaintiff, say, a Guard member, a legislator, or the governor, seeking a declaration that the 2002 AUMF is no longer in effect because its purposes have been achieved or are moot. Again: A *political question*.

But the scarcity of court precedents in war powers cases does not mean that SB 501 has no basis in law; on the contrary, if it raises important issues that have long remained unsettled, it may perform an important service beyond its stated goals, especially at a time in history when 9/11 has made it imperative to think and rethink how and by whom war and peace are made.

Under the War Powers Resolution adopted by Congress in 1973, at the end of the Vietnam War era, Congress controls the decisions about the use of such force, even though the President as commander-in-chief controls the day-to-day decisions in the war zone. If Congress limited the goals of military force in the 2002 AUMF, it is at least arguable that the fulfillment of those goals should bring the use of force to an end. That lack of practical power in Congress has no amending effect on the language of the AUMF. It says what it says, and its implications are central to this bill. SB 501 focuses on a duty flowing from the very existence of the AUMF, and that is the duty to read and examine it as it was passed and as it remains, and to determine whether an order to federalize state National Guard units based on the 2002 AUMF is a lawful and valid order as of 2009.

## II. After SB 501 Becomes Law

Sec. 13-401(c)(2) is the heart of the bill and states:

The Governor shall withhold approval of the transfer of the National Guard to federal control in the absence of:

(I) An explicit authorization for Use of Military Force adopted by the U.S. Congress and in force on the date of the federal request for transfer, or

(II) A declaration of war by the U.S. Congress.

Under this provision the State of Maryland would decline to accept as valid a mobi-

lization order issued under the 2002 AUMF. It is important to stress (we will elaborate in Part III) that the reason for the rejection of such order would not relate to the 2002 AUMF as adopted, which for purposes of this bill was valid and constitutional when adopted. By contrast, in the leading Supreme Court case of *Perpich v. Department of Defense*, 496 U.S. 334 (1990) the refusal of the Minnesota Governor to allow that State's National Guard to submit to the federal order to train outside of the United States was based on the Governor's mistaken reading of Article I of the Constitution, which allows Congress to authorize members of the National Guard of the United States, which includes units of state National Guards, to be ordered to active federal duty for purposes of training outside the United States without either the consent of a State Governor or the declaration of a national emergency. This bill does not challenge the Constitution or the power of Congress to pass the 2002 AUMF. It in fact is based squarely on what Congress said in that enactment and the conviction that what Congress said should control the President's power to mobilize state National Guard units for service in Iraq.

It is difficult to predict the course of events after Maryland declines to follow an invalid federal mobilization order, particularly with a new President in office. However, differences about the war might or might not translate into differences over a state's prerogatives, given a federalization order that has been challenged, even if the challenge is narrow and limited and does not involve the location, purpose, type, or schedule of the service for which the federalization order has been presented. While it is possible that the federal government would do nothing, it is also possible that it would seek to enforce its order in federal court. And it is possible that the federal government would seek to curtail or eliminate federal financial support for the Maryland National Guard.

With reference to the second and third possibilities it is important to acknowledge the widely held spoken and unspoken assumptions about the diminished powers of the states over their National Guards. But in either context the government no less than Maryland would have to finally address issues of law as they are, not as popular history may wish they were.

That said, whether the forum is an administrative agency or a federal court on the

question of continued federal funding for the Maryland Guard or a court in which the federal government seeks to enforce a mobilization order and has the burden of proceeding first—sometimes called the burden of production—it is the safest course to assume that the State of Maryland would have the burden of showing that it has acted reasonably in refusing to comply with a federalization order and that the President and the Department of Defense lack the legal authority to issue a National Guard mobilization order based on the 2002 AUMF.

Given the dearth of judicial precedents, it is difficult to predict what a federal judge would require for the State to prevail. A Department of Defense requisition during wartime will come with a strong inference of validity, just as the power exercised by the President will be presumed to be valid. But these would not be conclusive presumptions, and I believe that a strong case could be presented in favor of the authority granted by this bill. I can think of no better way to raise the question of how the longstanding debate between the President and the Congress over war powers impacts the use of a state's National Guard in an overseas war that Congress has sanctioned with limitations that it now lacks the practical power to enforce. III. The Major Opposition Arguments

I referred earlier to the “widely held spoken and unspoken assumptions about the diminished powers of the states over their National Guards,” and it is with these assumptions in mind that I will address the probable criticisms of the bill especially closely.

Though with no opposition testimony in hand the following suggestions are speculation, among the major arguments of opponents might be:

(1) The President never needed the 2002 AUMF to go to war in Iraq, since he is the commander-in-chief and presidents have deployed the military, including the National Guard (as a component of the Reserves), on many occasions without the consent of Congress.

(2) Even if the 2002 AUMF was necessary to go to war in Iraq, it is still in force, since Congress has authorized continued funding for the war, thereby extending the AUMF.

(3) Even if continued funding does not amount to an extension of the AUMF, the AUMF has not yet achieved its purposes (and has therefore not expired), because:

(a) Iraq is still a continuing threat to the national security of the United States, and

(b) There are still relevant United Nations Security Council Resolutions regarding Iraq to be enforced.

Let us consider each:

*(1) The President never needed the 2002 AUMF to go to war in Iraq, since he is the commander-in-chief and presidents have deployed the military, including the NG (as a component of the Reserves), on many occasions without the consent of Congress.*

The 1973 War Powers Resolution (WPR) is squarely at the center of the current and ongoing debate over the President's war powers and those of Congress. The WPR states that:

the President's powers as Commander-in-Chief to introduce U.S. forces into hostilities or imminent hostilities are exercised only pursuant to (1) a declaration of war; (2) specific statutory authorization; or (3) a national emergency created by an attack on the United States or its forces. It requires the President in every possible instance to consult with Congress before introducing American armed forces into hostilities or imminent hostilities unless there has been a declaration of war or other specific congressional authorization. It also requires the President to report to Congress any introduction of forces into hostilities or imminent hostilities, Section 4(a)(1); into foreign territory while equipped for combat, Section 4(a)(2); or in numbers which substantially enlarge U.S. forces equipped for combat already in a foreign nation, Section 4(a)(3). Once a report is submitted "or required to be submitted" under Section 4(a)(1), Congress must authorize the use of forces within 60 to 90 days or the forces must be withdrawn. . .

The WPR does not distinguish between peacekeeping or containment operations, on the one hand, and actions that are broader in scope and involve the U.S. as a combatant nation in a war, whether or not the action has been mandated by the UN or is

part of a NATO operation. Bosnia, Kosovo, post-1991 Iraq (i.e., after the first Iraq war and prior to the present war), and Haiti are all examples of actions that generally fit the words of the WPR ("introduce U.S. forces into hostilities or imminent hostilities") but were short of a war involving the U.S. as a combatant or as part of a NATO, UN, or (in the case of Iraq 2003) Coalition force acting as combatants.

A few key points emerge: First, when the U.S. initiates or participates in a war as a belligerent (Gulf Wars I and II, Afghanistan), Congress is involved and adopts legislation, either as an explicit AUMF, starting with the first Gulf War's AUMF, P.L.102-1 or legislation relating the use of force to the WPR, *though not denominated an AUMF, as made clear in CRS 33532. And See, Kinkoph, Neil, "The Congress as Surge Protector,"* American Constitution Society for Law and Policy (2007) ([www.acslaw.org/pdf/Kinkopf-Surge.pdf](http://www.acslaw.org/pdf/Kinkopf-Surge.pdf)).

Second, while Presidents and Congress have often disagreed about the necessity for complying with terms set down by Congress for the use of force, the President usually does so, while couching compliance in language that preserves his or her claim of Art. II powers. And a strong case can be made that in wars that do not involve an attack on the United States, Congress should have the last word. Even scholars who favor strong presidential powers are careful not to state that the President may act without congressional authorization in calling up the National Guard. This point is clear, e.g., in an article *disfavoring* a strong role for governors when their National Guards are called up: Kester, J.G., *State Governors and the Federal National Guard*, 11 Harv. J.L. & Pub. Pol'y 177 (1988)(also available on the Web).

In sum, when Congress decides to play no role or a minor role in a decision to use military force overseas, the President has in the past controlled policy. When the Congress becomes involved, as in the 2002 AUMF, the terms of the Authorization should govern the scope and extent of the action. As Prof. Walter Dellinger of Duke Law School and an assistant attorney general under President Clinton stated in testimony to the Senate Judiciary Committee on January 30, 2007:  
*I believe that the president has extensive inherent powers to protect and defend the United States. In the absence of any congressional legislation on point, I would be ready*

*to conclude that a president can act on his own authority and pursuant to his own judgment in matters of national security. Once Congress has acted, however, the issue is fundamentally different. The question then becomes whether the Act of Congress is itself unconstitutional.*

*What is a valid exercise of congressional control over war making? Presidential administrations have generally acknowledged that Congress may by legislation determine the objective for which military force may be used, define the geographic scope of the military conflict and determine whether to end the authorization to use military force. Consider, for example, the position taken by the late Chief Justice William Rehnquist while serving as Assistant Attorney General in 1970. "Assistant Attorney General Rehnquist opined as follows:*

[The following two paragraphs of text, quoting Asst. Atty. Gen. Rehnquist, are included as text in Prof. Dellinger's statement.]

*It is too plain ... to admit of denial that the Executive, under his power as Commander-in-Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior Congressional approval. However, if the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include Executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale. Constitutional practice also indicates, however, that Congressional sanction need not be in the form of declaration of war.*

*A declaration of war by Congress is in effect a blank check to the Executive to conduct military operations to bring about subjugation of the nation against whom war has been declared. The idea that while Congress may do this, it may not delegate a lesser amount of authority to conduct military operations, as was done in the instances referred to above, is both utterly illogical and unsupported by precedent.*

Prof. Dellinger and Asst. Atty. Gen. Rehnquist got it right. Congress has always passed an AUMF before or in connection with the use of force in which the United States is a combatant.. And there is an AUMF governing the use of force in the present Iraq war.. While no President has acknowledged the WPR as controlling—always submitting reports to Congress *consistent with* the AUMF, but not *in compliance with* the AUMF—the fact is that Congress has acted in this case, and here the presumption of validity favors the constitutionality of the WPR and the validity of the 2002 AUMF.

*(2) Even if the 2002 AUMF was necessary to go to war in Iraq, it is still in force,*

*since Congress has authorized continued funding for the war, thereby extending the AUMF.*

There may be several reasons why Congress continues to fund the war in Iraq, and without taking evidence from members of Congress, it is hard to say that pouring more dollars into the effort amounts to an intent to extend the AUMF. Congress' continued funding of the war is not what our constitutional system requires as a thoughtful contemplation and authorization for the use of the military. One can rather argue forcefully that continuing the funding without any reexamination of the Authorization for the war is a flight from the Founders' intent to share war powers between the President and the Congress.

During the Bush presidency there was evidence that a majority of the members of both houses wanted to condition further war funding upon a timetable for withdrawal—negating the presumed intent argument. Of course, no funding bill containing withdrawal language was ever signed by President Bush, and neither the House nor Senate had large enough majorities on withdrawal to override a presidential veto.

Courts dismissing suits by members of Congress to enforce the WPR in various cases have stressed that in a question of law among the branches of government over the WPR, the Congress cannot be heard to ask the judiciary for relief if it has not done everything it could on its own to effect a change in policy.

Congress can authorize a war by a *majority vote* of both houses, but can only reverse the course by a *two-thirds vote* of each house when the President chooses to continue the war. This factor alone should raise serious questions about Congress's intent.

The point is that there is an argument—but only an argument—that authorizing additional funding for the war in Iraq is the equivalent of broadening the goals of the AUMF or implying that the goals have not yet been achieved. And as CRS Report 33532

teaches us, once the Congress writes an AUMF, even one with conditions, it is difficult to rein in a President who decides to continue the war despite and in the face of those conditions. In the words of Justice Jackson in a notable concurring opinion in the *Steel Seizure Cases, Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 638 (1953):  
*When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.*

While we know of no court case in which the question is whether the right to federalize state national guards is always identical to and coincident with the President's power to use military force in an overseas war, the 2002 AUMF may raise such an issue. If we are correct that the two goals set forth in the AUMF have been achieved or are no longer applicable, and if Congress has not amended the AUMF (and indeed has tried to require a timetable for departure in bills to continue funding for the war), President Bush continued the war "*only by disabling the Congress from acting upon the subject,*" to quote Justice Jackson in the *Steel Seizure Cases*.

And when a President chooses to continue the use of force where arguably the authorization from Congress has expired, it does not follow that he can continue to federalize state National Guard units. Section 12301(a) makes clear that, subject to exceptions not relevant here, only when *Congress* acts, can Guard units be mobilized:

(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty for the duration of the war or emergency and for six months thereafter.

The President can, for reasons explained by the CRS in Report 33532, continue a war that is no longer supported by congressional authority, and it is unlikely that a court would order the President to halt the use of force or would order the de-federalization of any National Guard units, given the bar of the political question. But if the President,

under the same circumstances, orders *additional* Guard units from the states, the language of 10 USC Sec. 12301(a) presents a credible obstacle—a question that the courts have not considered or decided.

*(3) Even if continued funding does not amount to an extension of the AUMF, the AUMF has not yet achieved its purposes (and has therefore not expired), because:*

*(a) Iraq is still a continuing threat to the national security of the United States.*

Iraq—a nation—is no longer a continuing threat to the national security of the United States. End of the matter.

And we know from the 2001 AUMF concerning the use of post-9/11 military force that Congress knows full well the difference between nations and terrorist groups:

## SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those *nations, organizations, or persons* he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such *organizations or persons*, in order to prevent any future acts of international terrorism against the United States by such *nations, organizations or persons*. (*Emphasis supplied.*)

Opponents may argue that only a continued U.S. presence in Iraq prevented Al Qaeda in Iraq from menacing that country and spreading instability in the region during President Bush's tenure and that President Obama's plan to leave up to 50,000 military personnel in Iraq after August 2010 indicate ongoing security concerns. If the Iraq mission changed under President Bush, he should have gone back to Congress and asked for an expanded AUMF. And though President Obama plans to reduce the number of troops in Iraq and eventually bring most, if not all, home, a significant period of U.S. involvement remains without proper congressional authorization.

Public concern may well abate as the numbers of military personnel in Iraq fall. However, only Congress can pass federal legislation, and, while supporters of SB 501 will surely join other Americans in looking toward an end of this nation's military involvement in Iraq, to ignore the still-palpable effects of an expired war authorization would ill serve the nation's military, the American public, and the rule of law.

*(3) Even if continued funding does not amount to an extension of the AUMF, the AUMF has not yet achieved its purposes (and has therefore not expired), because:*

\* \* \*

*(b) There are still relevant United Nations Security Council Resolutions regarding Iraq to be enforced.*

The CRS reports assume, without citing any legislative history, that “relevant United Nations Security Council Resolutions” means existing or future resolutions. I think we could support the counter-argument that endorsing future UN resolutions is an unconstitutional delegation of legislative power, since such future resolutions would not be constrained by the language of the AUMF (unlike, for example, federal agency regulations that must conform to authorizing statutes).

But my judgment is that the arguments supporting SB 501 should go “the extra mile” and address the CRS view, since the conventional wisdom—or folklore—about withholding consent to future call-up orders is that “You can’t do that.”

A convenient resource for UN Security Council Resolutions on Iraq is found at [http://en.wikipedia.org/wiki/United\\_Nations\\_Security\\_Council\\_Resolutions\\_concerning\\_Iraq](http://en.wikipedia.org/wiki/United_Nations_Security_Council_Resolutions_concerning_Iraq)

The only resolution that would appear to even come close to a “relevant” resolution under United Nations Security Council Resolution 1723, which can be found at [http://en.wikisource.org/wiki/United\\_Nations\\_Security\\_Council\\_Resolution\\_1723](http://en.wikisource.org/wiki/United_Nations_Security_Council_Resolution_1723)

Not even former Secretary of State Condoleezza Rice’s letter to the Security Council and annexed to Resolution 1723 hints at the notion that Iraq is a threat to the United States.

A counter-argument will surely be heard that if U.S. Forces, or any fraction of the forces were to leave, Iraq would descend into chaos. But even if this thesis were taken as a fact, no one suggests that Iraq would become the species of threat that it was claimed to be in 2002—allegedly armed to the teeth with WMD. It would become the same kind of threat that any unstable country in this region is or might become, and that would include Afghanistan and Pakistan and in a longer perspective possibly Iran

and Saudi Arabia.

But these assumptions are very far from the language in the 2002 AUMF, and even if future UN Security Council resolutions are contemplated in that document, no such resolution comes even close.

In any event, President Obama can request and Congress can adopt additional AUMF language including new goals for the use of military force—making SB 501 moot—  
if it chooses to do so. IV. The Inevitable Subtext

Try as we like, much of the debate about this bill will be a debate about whether states should have any role—even a highly constricted one—in questioning the authority of the government where the subject is military force. It is hard to say how supporters of the bill should respond, other than to repeat that this is not about the decision to go to war or how the war has been conducted.

Congress and the President may continue to struggle over who should have what powers to go to war and to make peace. The least the states can do is to insist that federal law be followed.

In doing so, they would be setting the stage for a broader debate about involving state and local governments in an appropriate way on questions of war, peace, and U.S. power. If anyone demurs on grounds that states and localities have no policy role in the areas of international affairs and terrorism, it is appropriate to point out that the U.S. has lost power, prestige, and a sense of its mission in the world, as U.S. states and localities have been brushed to the sidelines.

War and peace are back-home issues, and while no one is suggesting that the concept of a national defense be set aside or diluted, we are noting that state and local voices have been out of the debate for too long, with sorry results. Let these voices be heard, let broad policy decisions be truly shared, and let the law be followed.