

Testimony of Kevin B. Zeese
Before the House Health and Government Operations Committee
March 11, 2009
HB 907--Public Safety - National Guard Deployment - Governor's Powers

The focus of my testimony is the separation of powers between Congress and the President and between the Federal and State governments. Government in the United States is characterized by checks and balances. In recent years the United States has gone to war in ways that undermine those checks and balances.

HB 907 will help restore checks and balances on the issue of war and peace by empowering the governor when it comes to reviewing the federalization of the Maryland National Guard. The federal government will remain superior on the issue of war, but in order to do so they will have to properly authorize war. Therefore, having laws like HB 907 in the states will push the Congress to either declare war or pass an Authorization for the Use of Military Force that allows for the National Guard to be properly federalized under the law, not at the sole discretion of the president.

I. Iraq: A Narrow and Specific Purpose That Has Been Achieved

The 2002 Authorization for Use of Military Force (AUMF) in Iraq was narrow and specific. It sought to protect the United States from the perceived threat posed by Iraq and to enforce UN Security Council Resolutions relating to Iraq:

SEC. 3. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) AUTHORIZATION.—The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—

(1) defend the national security of the United States against the continuing threat posed by Iraq; and

(2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

The purposes of the 2002 AUMF have been accomplished (Iraq is not a threat to the United States), have proven to be unfounded (the existence of WMDs), and has lapsed (No relevant Security Council resolution remains to be enforced). The Iraq AUMF has therefore expired by its own terms, and other than the AUMF, there is no authority under the Constitution or the laws of the United States for the continued presence of National Guard members in Iraq, and indeed no authority for the use of force at all in Iraq.

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 War, Iraq War, Afghanistan), Congress is involved and adopts legislation, either as an explicit AUMF, starting with the 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 Congressional Research Service Report "War Powers Resolution: Presidential Compliance." And See, Kinkoph, Neil, "The Congress as Surge Protector," American Constitution Society for Law and Policy (2007).

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 complies, while couching compliance in language that preserves the 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).

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. . . .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 mandate 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, though supportive of strong executive powers with respect to national security, got it right. War powers are shared between the executive and legislative branches under the

Constitution. 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.

II. The States and the National Guard

Paradoxically perhaps, the states, which do not share direct war powers with the Congress and the President under the Constitution should question the federal call-up of Maryland's National Guard because a particular order for the call-up is no longer valid and enforceable.

Under federal law, except in certain cases where a President can call up the National Guard, which instances are not applicable here, without an authorization from Congress, units of a state National Guard may not be called into active service in the National Guard of the United States. Section 18 of the National Defense Act Amendments of 1933 makes clear that only when Congress acts, can Guard units be mobilized:

When Congress shall have declared a national emergency and shall have authorized the use of armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may . . . order into the active military service of the United States, to serve therein for the period of the war or the emergency . . . any or all units and the members thereof of the National Guard of the United States.

Thus, even if the President continues a war that is no longer supported by congressional authority, and even if it is unlikely that a court would order the President to order the defederalization of units already federalized and deployed in Iraq, if the President, under the same circumstances, orders additional Guard units from the states, without (1) valid and subsisting congressional authorization or (2) independent authority under federal law, that order may be declined.

Under the 1973 War Powers Act, Congress authorizes the use of military force, even though the President as commander-in-chief controls the day-to-day decisions in the war zone. Since Congress deliberately established limited goals for 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.

It is hard to argue that the stated purposes of the AUMF are unclear and this is central to the National Guard legislation, which relies not on Congress or the courts, but on those powers of state governments over their National Guards remaining after more than a century of whittling away by Congress. At the end of the day, under the Supremacy Clause of the Constitution governors must follow federal mandates, which enjoy a presumption of validity. But pursuant to their oaths to uphold the law, governors also have the duty to read and examine orders federalizing their National Guards and to determine whether a call-up based on the 2002 AUMF is a lawful and valid order as of 2008.

We contend that the 2002 AUMF has expired based on a facial reading of its text. Therefore either the Congress must explicitly extend the mandate of the AUMF or the entire enterprise of the Iraq War or the President should bring it to a close in a prompt, secure, and reasonable manner. The states lack the power to do that, but they should exercise the power to question the federalization of their National Guards when presented with an order to do so that is not valid and effective, not because of objections to a particular use of military force, but because the congressional authorization has by its clear terms expired.

Maryland will be acting reasonably in refusing to comply with a federalization order, as the President and the Department of Defense lacks the legal authority to issue a National Guard mobilization order based on a facial reading of the 2002 AUMF.

War and peace are back-home issues. They affect budget deficits and state expenditures. And, they affect the readiness of the National Guard to respond to natural disasters in Maryland. While no one is suggesting that the concept of a national defense be set aside, 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.

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