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War and the Separation of Powers:

War Powers and the Effects of Unauthorized

Engagements on Federal Spending

Testimony before the Federal Spending Oversight Subcommittee of the Committee on Homeland Security and Governmental Affairs

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It is an honor to appear before you today in this chamber. The issue before this body relates to a matter far more serious, and far more troubling than I would hope the Congress would ever need to confront. The fact that such legislation can even be considered by this Congress speaks volumes about the state of our Republic.

S.J. Res 59 of the 115th Congress threatens to extinguish the firewalls carefully erected by our Founders by delegating to the Executive Branch the power to make limitless war on a poorly defined enemy without any clear objective or end point. The separation of powers was designed, as James Madison reminds us in Federalist 51, with the belief that "[a]mbition must be made to counteract ambition."[1]

Many American law schools begin classes in Constitutional Law by asking students what sets the U.S. Constitution apart

[1] THE FEDERALIST NO. 51 (J. Madison).

from all others. Usually, students focus on free speech, privacy, and, perhaps, due process.

While each of these guarantees, when honored, proves vital to restraining government, they would falter without the separation of powers. The constitutions of many totalitarian countries pay lip service to free speech, privacy and even due process; but none has the strict separation of powers that we enjoy here in the United States.

Under our Constitution, you, and your Senate colleagues and your counterparts in the House of Representatives, write our laws. The president enforces them, and the courts interpret them; and those powers and functions may not constitutionally be mixed, exchanged, or traded.

The Congress also declares war. The president also wages war. The courts also invalidate the acts of the other two branches when they exceed their constitutional powers.

The Supreme Court has ruled that the separation of powers is integral to the Constitution not to preserve the prerogatives of each branch of government, but to divide governmental powers among the branches so as to keep power diffused — and thereby limited and thus protective of personal freedom.

James Madison, who wrote the Constitution and the Bill of Rights, wanted not only this diffusion by separation but also tension — even jealousy — among the branches so as to keep each in check. He believed that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, [self-appointed], or elective, may justly be pronounced the very definition of tyranny."[2] And it was in the same essay that James Madison stated, referring to the separation of powers, that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty."[3] As a legislator,

[2] THE FEDERALIST NO. 47 (J. Madison).
[3] THE FEDERALIST NO. 47 (J. Madison).

Madison repeated, as quoted by Chief Justice William Howard Taft, that: "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices."[4]

Separation of powers weighed heavily on the minds of the Framers of the Constitution. Indeed, as my dear friend, the late Justice Antonin Scalia observed while he sat on the United States Court of Appeals for the District of Columbia Circuit, "no less than five of the Federalist Papers were devoted to the demonstration that the principle [of separation of powers] was adequately observed in the proposed constitution."[5]

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[4] *Myers v. United States*, 272 U.S. 52, 116 (1926) (Taft, C.J) quoting 1 Annals of Cong. 581 (Statement of Rep. Madison).

[5] Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 SUFFOLK U. L. REV. 881, 881 (1983) (footnote omitted). See also, Felix Frankfurter and James M. Landis, *The Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts. A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1012 (1924): the

The Framers never imagined that one branch of government would abdicate its authority and cede an essential power to another branch since such a giveaway would be unconstitutional. The Supreme Court has ruled that the core functions of each branch of the federal government may not be delegated away to either of the other two without violating the separation of powers.[6]

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doctrine of separation of powers "embodies cautions against tyranny in government through undue concentration of power." Id. "The environment of the Constitution, the debates at Philadelphia, the writings in support of the adoption of the Constitution, unite in proof that the true meaning which lies behind the 'the separation of powers' is fear of the absorption of one of the three branches of government by another." Id. (footnote omitted). Justice Brandeis recognized the importance of the separation of powers. It "was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S 52, 293 (1926) (Brandeis, J., dissenting).

[6] The Supreme Court observed:

> We noted recently that "[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha*, 462 U. S. 919, 951 (1983). The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power the better to secure liberty." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). Justice Jackson's words echo the famous warning of Montesquieu, quoted by James Madison in The Federalist No. 47, that " 'there can be no liberty where the legislative and executive powers are united in the same person,

I recount this not as a mini-constitutional law history lesson but rather because it serves as necessary background to address a real and contemporary problem. In mid-April of this year, on the basis of evidence so flimsy that his own secretary of defense questioned it — and without any legal or constitutional authority — President Donald Trump dispatched 110 missiles to bomb certain military and civilian targets in Syria, where the President argued the Syrian government manufactured, stored, or used chemical weapons.

President Trump did not appeal to you for a declaration of war, nor did he comply with the U.N. Charter, a treaty to which

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> or body of magistrates'...." The Federalist No. 47, p. 325 (J. Cooke ed. 1961).

Bowsher v. Synar, 478 U.S. 714, 721-722 (1986) (Burger, C.J.).

> When the Court speaks of Congress improperly delegating power, what it means is Congress' authorizing an entity to exercise power in a manner inconsistent with the Constitution. For example, Congress improperly "delegates" legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power.

Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1241 (2015) (Thomas J. concurring). "The Constitution's structure requires a stability which transcends the convenience of the moment." Clinton v. City of New York 524 U.S. 417, 449 (1998) (Kennedy, J. concurring). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Id.* at 450.

both the U.S. and Syria are signatories. Though he did not articulate any statutory basis for his use of our military, his predecessors often based their unconstitutional uses of military force two statutes — one enacted in 2001 and the other in 2002, each known as the Authorization for Use of Military Force, or AUMF.

The AUMFs refer to either the Taliban or al-Qaida or their affiliated forces in Afghanistan or Iraq as targets, or to pursuing those who caused the attacks in America on 9/11 or those who harbor weapons of mass destruction. They are grievously outdated and inapplicable today.

Can a president legally use military force to attack a foreign land without a serious threat or legal obligation or a declaration of war from Congress? In a word: No. The President has never had that authority.

The Constitution is clear that only Congress can declare war,[7] and only the president can wage it. Federal law and international treaties provide that — short of defending the country against an actual attack — without a congressional declaration of war, the president can only constitutionally use military force to repel an enemy whose attack on America is imminent or to defend U.S. citizens and property in foreign lands from foreign attack or in aid of an ally pursuant to a treaty with that ally.

In the case of the President's bombing of Syria in April, none of those conditions was met.

Prior to the strike on Syria — but no doubt prodded by the prospect of it — a bipartisan group of your Senate colleagues offered legislation supported by the President that you are considering today. If enacted it would rescind both anachronistic AUMFs, which possess no useful moral or legal authority, in favor

[7] Congress shall have the power to "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. art. I, § 8, cl. 11.

of an unconstitutional mishmash that would permit a president to strike whomever and wherever he pleases. The president would be restrained only by a vote of Congress — after hostilities have commenced.

The legislation under scrutiny today would give the president far more powers than he has now, would directly violate Congress' war-making powers by ceding them away to the president, would defy the Supreme Court on the unconstitutionality of giving away core governmental functions, would commit the U.S. to foreign wars without congressional and thus popular support, and would invite dangerous mischief by any president wanting to attack any enemy — real or imagined, old or new — for foreign or domestic political purposes, whether American interests are at stake or not.

Speaking of the Supreme Court's approval of internment of Japanese-Americans during World War II, Justice Robert Jackson warned that such approval by the Court of expansive executive authority "lies about like a loaded weapon ready for the hand of

any authority that can bring forward a plausible claim of an urgent need."[8]

The proponents of this legislation will argue that Congress would retain its war-making powers by its ability to restrain the president through some future action. That is a naive contention because congressional restraint, which can come only in the form of prohibitory legislation or withdrawal of funds, would certainly be met by a presidential veto — and a veto can be overridden only by a two-thirds vote of both the House and the Senate.

The Constitution, written in war's aftermath, strictly limits war's offensive use only to when the people's representatives in Congress have recognized a broad national consensus behind it. John Quincy Adams, in his July 4, 1821 address, cautioned that America "goes not abroad, in search of monsters to destroy."

I could go on to explain the significance of the placement of the war power in the hands of Congress. I could also speak to the

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[8] *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., *dissenting*).

violations of our civil liberties and natural rights at the hands of the executive in times of war. However, 225 years ago, James Madison foresaw these dangers. Between 1793 and 1794, James Madison and Alexander Hamilton debated the roles of the executive and legislative branches after President George Washington had declared that the United States would remain neutral in the war between Revolutionary France and Great Britain. James Madison delivered an explanation of the importance the war power as congressional prerogative as elegant and precise as the Constitution itself.

He wrote this a scant ten years after the formal conclusion of the American Revolution. At that time, Congress met in Congress Hall in Philadelphia. John Jay still presided as Chief Justice of the Supreme Court, which also met in Philadelphia. Though our Republic remained in it infancy, James Madison understood the risks that wars presented to the United States. He wrote:

> In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive

> department. Beside the objection to such a mixture to heterogeneous powers, the trust and the temptation would be too great for any one man; not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement. In war, a physical force is to be created; and it is the executive will, which is to direct it. In war, the public treasures are to be unlocked; and it is the executive hand which is to dispense them. In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.[9]

Thank you, for the opportunity to speak with you today. I look forward to your questions.

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[9] James Madison, Helvidius No. 4 in LETTERS OF PACIFICUS AND HELVIDIUS, ON THE PROCLAMATION OF NEUTRALITY OF 1793 BY ALEXANDER HAMILTON (PACIFICUS) AND JAMES MADISON (HELVIDIUS) TO WHICH IS PREFIXED THE PROCLAMATION 89 (J and G.S. Gideon ed. 1845).