

STATEMENT OF SENATOR RUSS FEINGOLD ON WAR POWERS

September 14, 2001

The attack on the United States this week leaves all of us jolted and angered. To respond to this terror is both our fate and our challenge. Our response to that attack must reflect our national character. As a great nation, we must respond powerfully. But our response must be guided by justice and by our right to self-defense, not by vengeance. We must act to hold accountable those responsible for these terrorist attacks. But to be true to our traditions and our Founders, we must act within the confines of the Constitution and the law. I believe that the resolution before us achieves that goal.

The War Powers Resolution of 1973 explicitly recognizes the President's authority to take immediate action as Commander in Chief of the United States Armed Forces to respond to this unprovoked attack on the United States. As such, there is no reason to suggest that the action we take here today is required in advance of any immediate military response by the President. In the interest of demonstrating our national resolve to act firmly and decisively, however, and as a demonstration of our commitment to working in close cooperation with our Commander in Chief to respond to this aggression, we act today to authorize the use of force, as required by the War Powers Resolution.

I commend the President and his administration for seeking the resolution before us today, for working with the Congress, and for recognizing the requirement under the Constitution and the law for joint authorization. As well, I commend those who negotiated the specific language of this resolution, and in particular, Senators Biden, Levin, and Kerry. They deserve our thanks for insisting that we honor the War Powers Resolution.

Like any legislation, this resolution is not perfect. I have some concern that readers may misinterpret the preamble language that the President has authority under the Constitution to take action to deter and prevent acts of international terrorism as a new grant of power; rather it is merely a statement that the President has existing constitutional powers. I am gratified that in the body of this resolution, it does not contain a broad grant of powers, but is appropriately limited to those entities involved in the attacks that occurred on

September 11. And I am particularly gratified that this resolution explicitly abides by and invokes the War Powers Resolution.

In taking this action today, we are not responding to a distant threat to international peace and security; we are responding to a direct attack on the United States. This is not a humanitarian response to a foreign crisis, but a defensive action to protect the lives of Americans here at home.

At the same time, we must recognize that this war will be unlike any other we have fought in the past. Our enemy is not a state with clearly defined borders. We must respond instead to what is quite likely a loose network of terrorists that do not function according to a strict hierarchy. We must respond to a highly mobile, diffuse enemy that operates largely beyond the reach of our conventional war-fighting techniques.

Given the immense difficulties involved in identifying our enemies, we must take great care to guard against making mistakes as we pursue them across an obscured terrain. We must not act on misguided prejudices or incomplete information. We must not cause needless harm to innocent bystanders. Our response will be judged by friends and foes, by history, and by ourselves. It must stand up to the highest level of scrutiny: It must be appropriate and constitutional.

Within this confusing scenario, it will be easy to point fingers at an ever increasing number of enemies, to believe that the "the enemy" is all around us, that the enemy may even be our neighbor. The target can seem to grow larger and larger every day, before the first strike even occurs. And this, of course, is exactly what the terrorists want. They seek to inflate their numbers and their influence by retreating into the shadows. They seek to turn us against each other, and to turn us against our friends and allies across the world, but we will not allow this to happen.

We must also take great care to maintain a careful distinction between those organizations or states that have knowingly harbored or assisted terrorists, and those that have acted carelessly in providing unintended aid or shelter. We must punish those who have knowingly supported our enemy, we must strengthen the capacity of all others to respond appropriately. We must invite those who have unintentionally harbored terrorists to work with us to locate them, to eliminate them, to renounce them, and to begin a new era of vigilance, if they are to be regarded as friends of the United States.

Our fight against a faceless, shadow enemy also raises another difficult dilemma, for how will we know when we have defeated this enemy? How can we tell whether our enemy has merely regrouped to strike again on another day or at another hour? There can be no peace treaty with such an enemy, but there must be a lasting and discernible peace. We should consider this in determining the frequency and duration of consultations between the Congress and the President over the conduct and status of this demanding struggle.

The Constitutional Setting

We enthusiastically support our President as he prepares the response to this unparalleled attack. The President has two paths open to him, as any President would under the Constitution. On the one hand, he may act using his powers as Commander in Chief, while remaining subject to the terms of the War Powers Resolution for any sustained action. Or on the other hand, he may seek a declaration of war under Article I of the Constitution.

If this is indeed to be a war, then the President should seek a declaration of war. We cannot allow our cherished Constitution to become a dead letter. And it should go without saying that to declare a war, he must identify our adversary.

If this will be something short of a war in the broadest sense, then it is proper that we will pass a resolution that does not give such broad powers to the President that he could thereby conduct a full-scale war across the globe without the consent of Congress. This would, as well, fly in the face of the structure that our Constitution sets up.

The drafters of the War Powers Resolution sought to fulfill the intent of the Framers of the Constitution and to ensure that the collective judgment of both the Congress and the President would apply to the introduction of U.S. Armed Forces into hostilities.

In today's world, when candor and cooperation between co-equal branches of government seem paramount, the War Powers Resolution has become a bit like the family relative that nobody wants to talk about. But we need to talk about it. Our legislative horizons need to move beyond the era when a President could secretly deploy thousands of troops in Cold War struggles outside of the view of a television camera.

There is only one circumstance in which a President may act without statutory authorization, and that is to respond to legitimate emergencies. None among us doubt that we confront such an emergency today, and that it may grow into a sustained struggle.

The Constitution foresaw and history has since demonstrated that there will continue to be events to which the President must respond in the defense of the country, or in response to urgent and vital interests abroad. Congress owns the war power. But by this resolution, Congress loans it to the President in this emergency. In so doing, we demonstrate our respect and confidence in both our Commander in Chief and our Constitution.

Emergencies can well demand a response of such decisiveness, secrecy, or dispatch that can only be provided by the President as Commander in Chief. But even when emergencies occur, it is our tradition for the President to act, and then seek what has been called "indemnification" from the Congress.

In prosecuting the Korean War, President Truman decided not to do that in 1950. And his decision is widely viewed as the most egregious abuse of constitutional war powers in the history of the United States. President Eisenhower's more constructive working relationship with Congress was tempered by the Truman experience.

Even President Johnson, the father of the Tonkin Gulf resolution, considered Truman to have made a serious error in failing to seek congressional authorization.

As one U.S. Congressman has said: "Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you allow him to do so, whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at pleasure."

Those were the words of Congressman Abraham Lincoln. Years later, at the outbreak of the Civil War, President Lincoln himself deployed U.S. Armed Forces without the authorization of Congress, but later told the Congress that these actions—whether strictly legal or not, were ventured upon under what appeared to be a popular demand and public necessity, trusting then, as now, that Congress would readily ratify them.

Thus Lincoln explicitly sought congressional approval of his emergency actions by statute. He never claimed to have full and independent constitutional support for his initiatives.

Congressional ratification was an essential legitimating step for his actions. Later the Supreme Court upheld his action in the famous 1863 prize cases.

So, Mr. President, by this resolution, Congress vouchsafes the legitimacy of a struggle that must have the continuing approval of the representatives of the people. It is the framework for a continuing consensus and communicates support to our President in this emergency. We acknowledge that this legitimate emergency permits the President to act unilaterally without turning our back on who wields the war power under the Constitution, and we trust that if he does, he will turn to Congress to legitimize his actions as appropriate. We have made clear that our support for appropriate action will be forthcoming. And we trust that, by taking up this resolution at this time, there will be no need for after-the-fact measures such as indemnification, no question in anyone's mind about our resolve and commitment.

I take pains to raise these issues because they matter—they go to the core of our Constitution and the brilliant separation of powers that guard our democracy. Unfortunately, there have been too many cases in which we have been asked to make loans of the war power in other than emergency situations. As many of our colleagues said during the 1994 debate regarding Haiti, it is not enough to seek the approval of the U.S. Security Council or of a regional alliance like the OAS or NATO only then to ignore the role—the central role—of the United States Congress.

I also recognize that power-of-the-purse legislation relating to the commitment of U.S. armed forces is an available remedy, but not an ideal model. The distinguished President Pro Tempore, Senator Byrd, in testimony before the Foreign Relations Committee in February 1994, likened the power of the purse to a watering hole in the forest to which all the animals eventually must come to drink. I agree with the distinguished President Pro Tempore's characterization; the power of the purse is an excellent and effective tool in most matters for which we appropriate public funds.

But I worry, nonetheless, about how close we would come to a constitutional crisis if we were to rely on such measures as a last resort in a war powers struggle with the President. In a way, it illustrates our level of urgency about preserving our constitutional war power responsibilities, and they risk infringement upon the President's equally valid constitutional responsibilities as Commander in Chief.

Relevance of the War Powers Resolution

The War Powers Resolution is as relevant today as it was when it was enacted in 1973.

It is all too apparent that the post-Cold War environment has ushered in an era of threats unforeseen by the founders. These threats reinforce the need for the Congress to make its will known when our troops are to be deployed in potentially dangerous situations. While I believe that the heinous acts perpetrated against the United States by still-unidentified terrorists on September 11, 2001, could justify U.S. and allied military action, I believe that any such actions, if they are to be sustained, must be properly authorized by the Congress.

Since coming to the Senate in 1993, I have encouraged discussion and vigorous congressional debate regarding the situations in Haiti, Bosnia, and Kosovo because of my conviction that Congress has both a right and a duty to express its will about the wisdom of committing our troops to a potential conflict. Many of these instances were not adequately considered and did not follow an appropriate Congressional authorization.

That same conviction makes it essential that the Congress should make its will known. We must not abdicate our responsibility to the victims of September 11, and to the mothers and fathers, the sons and daughters, the wives and husbands of our servicemen and women, who for us will be the point of the sword of justice.

Moreover, abiding by the constitutional and statutory scheme in this case is not only the right thing to do as a matter of law, but it is also the most effective thing to do. Because it follows the constitutionally and statutorily prescribed procedures, this resolution will strengthen our nation's efforts. Our careful and deliberate acts in this Congress are the manifestation of the will of the American people, and we will marshal that mighty force behind our President and our military. When we abide by our Constitution and our law, we are as strong as we possibly can be, and we are far stronger than the malevolent force that we soon will engage.

[Note: This piece refers to the [Authorization for Use of Military Force](#) passed on September 18, 2001.]

Source: Yale Law School Avalon Project
http://avalon.law.yale.edu/sept11/feingold_001.asp