

**Statement of
Deborah N. Pearlstein**

**Prepared Testimony to the
Committee on Foreign Affairs
United States House of Representatives
March 13, 2019**

**Hearing on H.R. 1004
Prohibiting Unauthorized Military Action in Venezuela Act**

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Introduction

Chairman Engel, Ranking Member McCaul, members of the Committee, thank you for giving me the opportunity to discuss legal issues surrounding the Committee's consideration of H.R. 1004, a bill to prohibit the introduction of U.S. Armed Forces into hostilities in Venezuela. Congress plays an indisputably central role in our constitutional democracy in defining the purpose and regulating the use of U.S. military power overseas, most importantly when it comes to the introduction of U.S. forces into hostilities. This responsibility is evident in the Constitution's text and history, and in Congress' engagement throughout the nation's history both in authorizing the use of force, and in placing a wide range of restrictions on its use. While I take no position on whether it is wise policy to engage the U.S. Armed Forces in addressing the crisis in Venezuela today, I have no doubt that H.R. 1004 is an unremarkable – and constitutional – assertion of congressional power to restrict the introduction of U.S. Armed Forces into hostilities there.

This testimony presents two primary arguments. First, H.R. 1004 is a lawful exercise of Congress' Appropriations Power under Article I of the Constitution to restrict federal expenditures. The bill as drafted is consistent with many such appropriations restrictions Congress has enacted in the past, and it is carefully limited by its terms to

preserve the United States' ability to respond in self-defense to armed attacks. Second, while the President possesses some independent power to use force absent congressional *authorization* under Article II of the Constitution (notably, the power to repel attacks against the United States and its embassies), any residual presidential power to use force in the face of an express congressional *prohibition* against the use of funds for such a purpose is narrow indeed. In all events, H.R. 1004 cannot properly be construed to infringe upon that power here.

H.R. 1004 Is a Constitutional Exercise of Congress' Appropriations Power

It is among the least controversial propositions in constitutional law that Congress enjoys exclusive power over the expenditure of federal funds. Congress holds not only sweeping spending authority under Article I, Section 8 "to provide for the common Defense and general Welfare of the United States," but also authority directed toward spending for the military particularly, including the power to "raise and support Armies," to "provide and maintain a Navy," and indeed "To declare War." Of equal significance is the Constitution's parallel requirement in the Article I, Section 9 Appropriations Clause, providing: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." As reflected in these and other express provisions of the Constitution, Congress' "power of the purse" is among our democracy's most fundamental checks on the exercise of Executive power.¹

¹ See, e.g., THE FEDERALIST NO. 58, at 297-98 (James Madison) (Ian Shapiro ed., 2009). (describing Congress' power of the purse "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure").

Far from understanding these powers to be more constrained in the realm of foreign affairs or national security, the Constitution's Framers recognized the appropriations power as an especially important check on the Executive's ability to deploy the military.² Determined to learn the negative example of the British military they had foremost in mind, the Framers thought it essential that control over the military not be vested in an Executive alone. Indeed, to ensure that the President and the military remained politically accountable to the public, the Constitution expressly requires Congress to authorize military expenditures "in the face of their constituents" every two years,³ ensuring that the government's most profound power remained squarely in the hands of "the representatives of the people."⁴ Preserving accountability in this sense was equally favored by the military itself, which feared being made the political scapegoat of civilian policy decisions.⁵

Given this history, it should be unsurprising that Congress has repeatedly enacted legislation in the modern era prohibiting the use of appropriated funds to support various U.S. military activities abroad – and Presidents have repeatedly complied. Congressional appropriations restrictions were ultimately pivotal in curtailing U.S. participation in

² See, e.g., Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, 392, 397 (Julian P. Boyd ed., 1958) ("We have already given ... one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.").

³ U.S. CONST., art. I, § 8, cl. 12; see also THE FEDERALIST NO. 26, at 170 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁴ THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 3, at 179-80 ("Independent of all other reasonings upon the subject, it is a full answer to those who require a more peremptory provision against military establishments in time of peace to say that the whole power of the proposed government is to be in the hands of the representatives of the people."); see also THE FEDERALIST NO. 41 (James Madison), *supra* note 3, at 259 (arguing that giving control over military appropriations to representatives facing elections every two years provides a check on the dangers of a powerful military).

⁵ CHARLES ROYSTER, A REVOLUTIONARY PEOPLE AT WAR: THE CONTINENTAL ARMY AND AMERICAN CHARACTER, 1775-1783, at 312 (1979).

combat operations in Indochina in the 1970s;⁶ appropriations restrictions likewise operated to prohibit the use of funds for various military activities in Nicaragua in the 1980s;⁷ and analogous provisions were again enacted to limit the role of U.S. military forces in Somalia and Rwanda in the 1990s.⁸ While it is true that a few Presidents have occasionally voiced objections to such congressional constraints on policy grounds,⁹ the most comprehensive historical survey of which I am aware examining presidential responses to legislative restrictions on military force (from the founding era through 2008) was able to identify only a single instance in which a President could be said to have actually violated a specific appropriations restriction.¹⁰ As to that incident, involving President Ford's 1975 decision to engage the military in evacuating a group of U.S. and foreign nationals from Vietnam, it remains entirely unclear whether Congress would have in fact objected to the particular operation under the circumstances.¹¹

The measure currently under consideration by this Committee, H.R. 1004, is fully consistent with Congress' historic exercise of its appropriations power in this realm.

⁶ See, e.g., P.L. 91-652, §7(a) (1971) (prohibiting funds appropriated from being used to introduce U.S. ground troops into Cambodia); P.L. 93-50, §307 (1973) (prohibiting appropriated funds from being used in U.S. combat activities in Indochina after August 15, 1973).

⁷ See, e.g., P.L. 98-473, §8066 (1984) (providing that "no funds available" to the Defense Department or any other agency "may be obligated or expended for the purpose ... of supporting ... military or paramilitary operation in Nicaragua by any nation, group, organization, movement, or individual").

⁸ See P.L. 103-139, §8135 (1993) (barring appropriations from being used for combat forces in Somalia after March 31, 1994). For additional examples, see CRS Report RS20775, Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments, and CRS Report RL33803, Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches, by Amy Belasco et al.

⁹ See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb--A Constitutional History*, 121 HARV. L. REV. 941, 1067 (2008) (recounting President Nixon's veto of early congressional efforts to restrict funding for operations in Cambodia).

¹⁰ See *id.*, at 1072-73 (describing President Ford's decision to authorize U.S. forces to aid in rescuing U.S. and foreign nationals in Vietnam, notwithstanding the statutory prohibition on the use of appropriated funds to involve U.S. forces in "hostilities").

¹¹ See Zachary S. Price, *Funding Restrictions and the Separation of Powers*, 71 VAND. L. REV. 357, 432 (2018) (noting that the President had convened a special session of Congress to amend the operative restriction, and that "while Congress was still searching for precise language when he acted unilaterally, it appeared receptive to his general objectives").

Tracking the 1973 War Powers Resolution (WPR) framework,¹² H.R. 1004 provides that “[n]one of the funds authorized to be appropriated or otherwise made available” to any Federal agency “may be used to introduce the Armed Forces of the United States into hostilities with respect to Venezuela” absent a declaration of war, specific statutory authorization, or an attack “upon the United States, its territories or possessions, or the Armed Forces.”

While H.R. 1004 thus contains clear prohibitory language against the expenditure of funds, it is carefully limited in two significant ways. First, H.R. 1004 mirrors the WPR in applying only to the introduction of forces into “hostilities”; the use of U.S. forces in circumstances not rising to the level of “hostilities” (including, for example, the ongoing mission of U.S. Marine guards at the U.S. Embassy in Caracas) are thus excluded from the bill’s coverage.¹³ Second, H.R. 1004 likewise exempts from its coverage circumstances in which it may be necessary for the U.S. Armed Forces to respond in exigent circumstances to an “attack upon the United States,” or against our Armed Forces otherwise lawfully present. The bill thus does nothing to undermine the long settled recognition, under U.S. and international law, of a nation’s right to respond to armed attacks in self-defense.¹⁴

¹² P.L. 93-148 (1973).

¹³ *See, e.g.*, 10 U.S.C. § 8183.

¹⁴ *See, e.g.*, LOUIS FISHER, PRESIDENTIAL WAR POWER 6-8 (1995) (describing debates of Constitutional Convention); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 76-96 (2002) (recognizing as legitimate self-defense within the meaning of Article 51 of the UN Charter state efforts to protect nationals abroad where threat is “demonstrably real and grave” and intervention is proportionate).

The President's Article II Power to Repel Sudden Attacks

Given the scope of congressional power to set the terms of federal appropriations, the sole constitutional objection that might be raised to H.R. 1004 is the prospect that the restriction somehow infringes upon the exercise of a power that the Constitution grants *exclusively* to the President under Article II. Such a power is not lightly to be assumed. As the Supreme Court has long recognized: “Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.”¹⁵ While the President’s power is accordingly at its constitutional maximum when he acts pursuant to express congressional authorization, his power is likewise “at its lowest ebb” when he takes steps “incompatible with the expressed or implied will of Congress.”¹⁶ At this lowest ebb, the President’s claim to any such “preclusive” power “must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹⁷ An equilibrium that ensures the President is bound by the duly enacted laws of the United States.

Whatever initiative the President may enjoy to commit U.S. forces to hostilities in the absence of congressional *authorization*, it is an entirely different matter to suggest he retains any such power in the face of a congressional *prohibition* like the one contemplated in H.R. 1004. Indeed, the single occasion in U.S. history in which the Supreme Court has recognized the existence of such a preclusive Executive power (respecting the issuance of passports), it did so only while making clear at the same time that it was identifying an extraordinary exception to the application of legislative restrictions, not the rule. As the Court put it then: “The Executive is not free from the

¹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁶ *Id.*, at 637-638.

¹⁷ *Id.*, at 638.

ordinary controls and checks of Congress merely because foreign affairs are at issue. It is not for the President alone to determine the whole content of the Nation's foreign policy."¹⁸

Here, to the extent the President retains any residual authority to exercise an Article II power as Commander in Chief in contravention of congressional funding limits, it could only be, as the WPR itself implies, "in a moment of genuine emergency, when the Government must act with no time for deliberation,...[and when there is] an imminent threat to the safety of the Nation and its people."¹⁹ Indeed, among the lessons one can glean from the debates at the Constitutional Convention is that the Framers' decision to change the text of Article I – from an earlier version giving Congress the power to "make war" to the version adopted, giving Congress the power to "declare war" – was in order to ensure the President would retain "the power to repel sudden attacks."²⁰

Yet for reasons noted above, I do not think H.R. 1004 can fairly be read to curtail the President's power in this respect. The bill expressly exempts from its coverage circumstances in which it may be necessary for the U.S. Armed Forces to respond to attacks on U.S. forces or on the United States. Were there any doubt in this regard – H.R. 1004 does not, for example, define what might constitute "a national emergency created by an attack on the United States" – longstanding principles of statutory construction require that a court facing a statute of ambiguous meaning prefer a reading of the statute that avoids any constitutional question.²¹ This 'canon of constitutional avoidance'

¹⁸ *Zivotofsky v. Kerry*, 576 U.S. 1059 (2015) (holding that "Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports").

¹⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

²⁰ *FISHER*, *supra note* __, at 6-7 (describing the framers' desire to recognize the President's duty to take actions necessary to resist sudden attacks).

²¹ *See, e.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1935).

without question includes avoiding any interpretation of a statute that might trench on any presidential power that remains available “at its lowest ebb.”

Conclusion

For the foregoing reasons, I have no doubt that it is well within Congress’ constitutional power to enact the appropriations restriction contained in H.R. 1004. The greater challenge, of course, is to see it done. Justice Jackson’s often-quoted opinion in the *Steel Seizure Case* is in this respect especially prophetic: “I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems.... We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”²² This Committee’s work to bring attention to these critical questions of military force is essential to preserving Congress’ constitutional role as a co-equal branch of U.S. Government responsible for the weighty decision to put U.S. troops in harm’s way. I am grateful for the Committee’s efforts, and for the opportunity to share my views on these issues of such vital national importance.

²² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).