The Law

The Baker-Christopher War Powers Commission

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In July 2008, the National War Powers Commission released a detailed report that recommended the repeal of the War Powers Resolution of 1973 and its replacement with the War Powers Consultation Act. Co-chaired by former secretaries of state James A. Baker III and Warren Christopher, the commission report promised "equal respect" to the legislative and executive branches, but, in fact, it strengthened the president's capacity to initiate war and greatly weakened congressional and public control. Instead of addressing the framers' fear of placing the war power in the hands of a single executive with an appetite for military glory and fame, the report claimed that the U.S. Constitution is "ambiguous" about war powers and that federal courts "for the most part" have declined jurisdiction over war power cases. Both assertions are false.

In an op-ed piece published in the *New York Times* on July 8, 2008, former secretaries of state James A. Baker III and Warren Christopher summarize the findings and recommendations of the National War Powers Commission. The article begins on this note: "The most agonizing decision we make as a nation is whether to go to war." Quite true. The next sentence, however, offers a serious misconception: "Our Constitution ambiguously divides war powers between the president (who is the commander in chief) and Congress (which has the power of the purse and the power to declare war)."

In a column about the commission's proposal, David Broder (2008) of the *Washington Post* repeats the theme about constitutional ambiguity: "The Founders left a ton of confusion about a pretty important question: Who has the authority to make war? Article

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I of the Constitution gives Congress the exclusive right to declare war, but Article II makes the president the commander in chief." An editorial in *The Hill* (2008) newspaper parroted the commission's reference to the "ambiguity" of war powers.

These formulations—president as commander in chief and Congress as the war-declaring branch—are shallow. Referring to the title "commander in chief" does not explain what powers go with it. The powers do not include starting wars. Identifying only the war-declaring clause of Congress ignores seven other clauses in the U.S. Constitution that vest in the legislative branch military and national security powers (raise and support armies, make rules for the military, grant letters of marque and reprisal, call forth the militia, provide for organizing, arming, discipline the militia, etc.)

For 160 years, there was no ambiguity. Until President Harry S. Truman went to war on his own in 1950 against North Korea, no one recognized a conflict or tension between the war-declaring power of Congress and the commander-in-chief responsibilities of the president. No one argued that the president could initiate war. The president was only commander in chief *after* Congress declared or authorized war. He had certain limited defensive powers ("to repel sudden attacks"). There was nothing ambiguous about the constitutional requirement that Congress is the branch of government authorized to decide to take the country from a state of peace to a state of war. That constitutional principle was bedrock to the framers. They broke cleanly and crisply with the British model of William Blackstone that allowed kings to control everything external to the country, including going to war (Fisher 2004, 1-8). The framers created a Constitution dedicated to popular control through elected representatives. Citizens (not "subjects" under a monarch) empowered lawmakers to decide when to go to war.

In *Federalist No. 4*, John Jay reviewed what executive leaders had done over the centuries in taking their countries to war. They acted not for the national interest, he said, but for personal motives alone. Executives "will make war whenever they have a prospect of getting any thing by it; nay, absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans." Their military adventures repeatedly proved calamitous for the common people, in fortunes squandered and lives lost. Executive leaders engaged in wars "not sanctified by justice or the voice and interests of [their] people" (*The Federalist* 2002, 101). An appendix in the commission's report acknowledges that "only one Framer or Ratifier at the Philadelphia Convention of 1787, Pierce Butler of South Carolina, proposed that the power to commence wars should be vested in the President alone" (National War Powers Commission 2008, Appendix 4, 3). Aware of this evidence, the commission still found the picture "ambiguous."

Dahlia Lithwick (2008), writing for *Newsweek*, reviewed the proposal from the war powers commission and found that it "all but disregards the Framers' concern that Congress be given the ultimate authority over matters of war and peace." She quoted from James Madison, who wrote to Thomas Jefferson that the Constitution "supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war in the Legislature."

The Commission's Approach

Instead of independently analyzing the constitutional text and the legal principles at stake with the war power, the Baker-Christopher Commission decided to summarize conflicting positions: advocates of congressional power versus advocates of presidential power. Faced with disagreement among scholars, the commission concluded that the Constitution must be ambiguous. This approach amounts to "constitutional avoidance." Adopting that attitude empties the Constitution of meaning. Core principles simply disappear, including popular government. Other than provisions that are patently clear (the president must be at least 35 years old, Congress consists of two chambers, etc.), the Constitution invites extended debate on most issues, including federalism, free speech, religious liberty, and the rights of the accused. Disagreement on those and other issues does not mean that we abandon hope of understanding and preserving constitutional principles.

Consider free speech. Many consider it a fundamental value essential for civic discourse, democratic debate, free government, and individual growth. To Justice Benjamin N. Cardozo, the freedom of thought and speech forms "the matrix, the indispensable condition, of nearly every other form of freedom."[1] In the words of Justice Louis D. Brandeis, free speech exists to "make men free to develop their faculties."[2] A rival school can point to the Sedition Acts of 1798, 1917-18, and 1940, which provided prison terms for anyone who criticized the government. Over the years, many scholars and judges have argued that free speech must be restricted in times of war. Because of those conflicting positions, would we say that the principle of free speech is too ambiguous to merit protection, that disagreement about its scope or value prevents us from understanding which position deserves superior status?

Throughout the commission's report is the claim that "participants in the war powers debate fall into two broad categories . . . (1) *proponents of the President* . . . and (2) *proponents of Congress*" (National War Powers Commission 2008, Appendix 4, 2). When I appeared before the commission, I was placed on a "congressionalists" panel, with three others, and learned there had been a "presidentialists" panel earlier in the day. My first words to the commission urged that it not think in categories of congressional versus presidential. Although I had been a staff member of Congress throughout my career, I explained that I approached issues as an institutionalist or constitutionalist. For that reason, I had often testified against congressional bills that undermined presidential power or weakened judicial independence. My obligation was to the political system as a whole, including the essential safeguards of the separation of powers and the system of checks and balances. The commission's report reflects no appreciation of or interest in this essential framework.

If disagreement among contending schools of thought means ambiguity, the Constitution becomes not a founding document of basic principles but an exercise in jump-ball. If one branch gets there first, there you have it. With that attitude, there is no

1. *Palko v. Connecticut*, 302 U.S. 314, 327 (1937).
2. *Whitney v. California*, 274 U.S. 357, 375 (1927), concurring opinion.

purpose in talking about the Constitution or the rule of law. The Baker-Christopher report becomes a rudderless enterprise in suggesting what might be helpful or practical. Baker and Christopher explain in the introduction to the report, "We accepted the Miller Center's invitation to serve as members of the National War Powers Commission not to resolve constitutional conundrums that war powers questions present—only definitive judicial action or a constitutional amendment could do that" (National War Powers Commission 2008, 3).

Baker and Christopher agreed to serve "to see if we could identify a practical solution" (National War Powers Commission 2008, 3). Effective and persuasive solutions emerge only after studying a problem with thoroughness and depth, including fundamental principles. The commission decided not to do that. The emphasis on being "practical" turns out to be illusory. If a study commission on a controversial issue such as the war power fails to engage in independent analysis, its proposal has no practical value (Fisher 2008a).

Constitutional Analysis

Early in the report, the commission includes a short section on "The Constitutional Framework." It finds that the extent of "the authority of both the President and Congress to take the country to war is far from clear. Put simply, the Executive and Legislative Branches do not agree about the scope of their powers; our history provides no clear line of precedent; and the Supreme Court has provided no definitive answer to this fundamental question" (National War Powers Commission 2008, 12). Proponents of congressional authority "point to Article I, Section 8 of the Constitution, which provides that 'Congress shall have power . . . to declare War' and 'grant Letters of Marque and Reprisal' " (12). The report neglects to say that those two provisions give Congress authority over both large wars and small wars (reprisals). The only exception allowed by proponents of congressional authority, the report notes, is "when the President does not have time to secure congressional approval because the country has been invaded or American citizens abroad are in imminent danger" (13).

The competing school—proponents of presidential authority—points to the "Executive powers" and "Commander in Chief" clauses in the Constitution: "They say that the framers wanted to put the authority for making war in the hands of the government official who has the most information and the best ability to execute—the President." According to those proponents, the power to "declare" war "does not include the power to decide whether to go to war. Instead, it merely provides Congress the power to recognize that a state of war exists." As a consequence, "the President need not seek or obtain congressional approval before committing the country to military campaigns" (National War Powers Commission 2008, 13).

The report does not identify who represents this line of thought, or whether it is in any way a plausible reading of constitutional history or theory. The person most identified with that position is John Yoo. Beginning with his breakthrough article in 1996 in the *California Law Review*, and most recently in his 2005 book , Yoo argues that the framers

adopted the British model that gave the executive the power to initiate war. There is no need to dig deeply into "originalism" to disprove Yoo's position. One need only compare the list of prerogatives that Blackstone placed in the executive (including the power to make war) and read *the text of the Constitution* to understand that not a single one of his prerogatives is vested in the president. They are either given expressly to Congress or shared between the president and the Senate (appointing ambassadors and making treaties). The fact that the framers wholly repudiated the British/Blackstone model is never addressed by Yoo or by the Baker-Christopher Commission.

For the commission, an ipse dixit from a proponent of presidential power was sufficient to eliminate any possibility of discovering constitutional meaning or intent. Let there be two schools of thought, and the inescapable result is "ambiguity." The commission declined to analyze the strengths and weaknesses of a position, either of proponents of the president or Congress, to determine which reading had merit.

The commission report has a short section on the role of the judiciary in war power cases. It states that advocates of congressional power rely on Chief Justice John Marshall's opinions in *Talbot* v. *Seeman* (1801)[3] and *Little* v. *Barreme* (1804).[4] Marshall wrote in the first case, "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry." No ambiguity to that. *Barreme* featured a conflict between a presidential proclamation in time of war and a congressional statute. Marshall had no difficulty in concluding that the statute defined national policy, not the proclamation. Again: unambiguous.

But the commission then adds, "Advocates of presidential power counter with statements Marshall made while in Congress. They regularly cite a speech he made in 1800 about the President's 'sole organ' in matters concerning 'external relations'—an arena of power that some modern advocates of executive power treat as equivalent to the power to make war" (National War Powers Commission 2008, 14). Why would a study commission regard a speech by one member of Congress as equivalent in weight to two Supreme Court decisions, each of which was unanimous? But let us concede that anything said by Marshall, regardless of his office, deserves serious consideration.

This the commission did not do. It did not bother to read Marshall's speech to see whether he said anything about presidents having the authority to initiate war. There is not even a hint of such a position in the "sole organ" speech. Anyone who reads it can see that Marshall did not argue for plenary, exclusive, or independent presidential power in external affairs, whether regarding foreign policy or military operations (Fisher 2007). The president, Marshall said, is the "sole organ" in carrying out congressional policy as expressed in statutes and treaties. He is the sole organ in *carrying out* the law, not in *making* it.

The misconceptions about Marshall's speech arise because of erroneous dicta written by Justice George Sutherland in his *Curtiss-Wright* decision in 1936.[5] It is

3. 5 U.S. 1 (1801).
4. 6 U.S. (2 Cr.) 169 (1804).
5. United States v. Curtiss-Wright, 299 U.S. 304 (1936).

extraordinarily careless of a study commission to refer to a speech but never to read it to see whether there is any basis for the claims of "modern advocates of executive power." Rather than read easily available original sources, the commission chose to summarize one side and then the other and throw up its collective hands. For that very reason, the commission report loses credibility because of its incapacity or unwillingness to analyze and understand the issue of war powers. Failing that fundamental task, it had no basis to offer remedies or proposals for a constitutional issue it never bothered to study or comprehend.

The Historical Practice

The commission report approached the historical practice in the same manner as the constitutional framework. No effort was made to study original documents and reach independent judgments and conclusions. The commission examined two sides of a debate and reported on their disagreement. The report concludes, "In arguing about the scope of the President and Congress's constitutional war powers, commentators point to historical practices, but disagree what lessons, if any, history teaches. Again, the record can be read different ways" (National War Powers Commission 2008, 14). Pointing to some examples, the report states that President Thomas Jefferson "deferentially sought approvals from Congress to wage military campaigns against the Barbary pirates. Similarly, President James Madison asked Congress to declare the War of 1812, and in so doing, Congress purported to 'authorize' the President to use the 'whole land and naval forces of the United States' to wage the campaign" (14).

Congress "purported" to do something? The documents were available to the commission. Did Congress authorize Madison to act? Yes, it did. Madison never claimed any independent authority to take the country to war. He told Congress that British actions amounted to "a state of war against the United States," but he left to Congress the decision to declare war, "a solemn question which the Constitution wisely confides to the legislative department of the Government" (Fisher 2004, 38). Why did the commission hide behind "purport" instead of reading Madison's message to Congress and the subsequent declaration of war?

As for Jefferson, he was not merely "deferential" to Congress. He understood what he could do with limited defensive actions in the Mediterranean and what Congress needed to do, under the Constitution, in moving from defensive responses to an offensive war. He told Congress that he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense," and it was up to Congress to authorize "measures of offense also" (Fisher 2004, 34). He gave Congress all the documents and communications it needed so that the legislative branch, "in the exercise of this important function confided by the Constitution to the Legislature exclusively," could deliberate and decide what to do (34). That power was placed in Congress *exclusively.* No ambiguity.

The commission report states, "Advocates of congressional power point to Jefferson's seeming admission that the letter of the law required him, as President, to seek

Congress's approval to go to war" (National War Powers Commission 2008, 15). There was no "seeming" admission. Jefferson conceded the point forthrightly and emphatically. For Jefferson, seeking and obtaining approval from Congress was a constitutional requirement. Congress passed 10 statutes authorizing military action against the Barbary pirates (Fisher 2004, 32-37).

The foregoing quotations from Madison and Jefferson come from my book, *Presidential War Power*, which was in the hands of each commission member, its professional staff, and the historical advisor, Doris Kearns Goodwin. No heavy digging was necessary. Just go to the sources listed in my footnotes and read the materials. Interpret the sources not as I read them, but as the commission could read them. That was not done.

After discussing Madison and Jefferson, the commission claimed that the "next 100 years of American history are similarly inconclusive" about the war power (National War Powers Commission 2008, 15). A careless and baseless generalization. An appendix in the commission's report points out that in the Prize Cases (1863), the Supreme Court stated that the president "has no power to initiate or declare a war either against a foreign nation or a domestic State" (National War Powers Commission 2008, Appendix 5, 5). How unambiguous and conclusive can the record be? The Court's decision had only to do with the president's acknowledged responsibilities in taking defensive actions, in this case domestically. The report could have added that Abraham Lincoln's attorney, Richard Henry Dana, Jr., told the Court in oral argument that presidential actions during the Civil War had nothing to do with "the right *to initiate a war, as a voluntary act of sovereignty.* That is vested only in Congress."[6] Look at the administration's words: zero ambiguity.

Turning to the Korean War in 1950, the report offers this account: "In the years following World War II, President Harry Truman asserted his right to wage war in Korea without congressional approval. He justified taking the United States to war based upon the country's obligations under the United Nations treaty and a U.N. Security Council resolution. Advocates of congressional power cite Truman's decision as a turning point in the war powers debate, when Presidents began asserting more and more power. Advocates of presidential power dispute that the Korean War represented a sea change" (National War Powers Commission 2008, 17).

Once again, the commission is satisfied by summarizing the positions of two contending sides without analyzing either one. No one can credibly dispute that the Korean War represented a sea change for the war power. It was the first time that a president had taken the country to war without obtaining either an authorization or a declaration from Congress. It was the first time that a president sought "authority" from an agency outside Congress, relying on a resolution from the United Nations Security Council. The commission does not mention the United Nations Participation Act of 1945, which required (without the slightest ambiguity) the president to seek prior approval from Congress before entering into any special agreement with the Security Council regarding a military operation. Nor does the commission explain how the president and the Senate, acting through a treaty (the United Nations Charter), can

6. Prize Cases, 67 U.S. 635, 660 (1863).

eliminate the future role of Congress (including the House of Representatives) in initiating war. If that is the commission's position, let it make it directly and in plain sight.

According to the commission's draft bill, past efforts to call upon the judiciary "to define the constitutional limits of the war powers . . . have generally failed because courts, for the most part, have declined jurisdiction on the grounds that the issues involved are 'political questions' or that the plaintiffs lack standing" (National War Powers Commission 2008, 44). An appendix in the report explores this issue in greater detail, claiming that "few" war power cases "are ever filed in the first place" (Appendix 5, 2). Not true. Beginning in 1800, federal courts took war power cases on a regular basis and decided them. In only two cases after the Civil War, involving Reconstruction policy, did the Supreme Court sidestep a dispute involving military operations.[7] This uniform pattern of accepting and deciding war power cases continued at least until the Steel Seizure Case of 1952. Even in the Vietnam period, when courts began to rely on various threshold tests to avoid war power cases (including the political question doctrine and standing), a few judges began to understand their constitutional duty to ensure that presidents act pursuant to legal authority (Fisher 2005).

Having discussed "The Constitutional Framework" and "The Historical Practice," the commission presents a weak framework: "We take no position on the underlying constitutional questions. Nor do we judge the actions of any President or Congress. We merely note the persistence and intensity of the debate, as it informs any recommendations we can reasonably and practically make" (National War Powers Commission 2008, 19). It is not possible to decide what is reasonable and practical without constitutional analysis.

The War Powers Resolution of 1973

The commission devotes a section to the War Powers Resolution (WPR), summarizing the objections that have been directed to it. Elsewhere, I have criticized the WPR as an abdication of congressional power. It is constitutionally indefensible to permit the president to go to war for whatever reason, whenever and wherever, for up to 60 to 90 days (Fisher and Adler 1998). The commission report does not offer that objection. Instead, it states that constitutional scholars "generally agree that Section 5(c) of the Resolution is unconstitutional in light of the Supreme Court's subsequent decision in *INS* v. *Chadha*, 462 U.S. 919 (1983). Section 5(c) provides that Congress may compel the President to remove troops—otherwise lawfully committed to the battlefield—merely by passing a concurrent resolution" (National War Powers Commission 2008, 23). A concurrent resolution must pass each chamber but is not presented to the president for signature or veto. Therefore, it has no force of law. Oddly, the commission's draft bill relies on congressional action through a concurrent resolution.

Baker and Christopher (2008) object to the WPR because it "too narrowly defines the president's war powers to exclude the power to respond to sudden attacks on

7. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867); *State of Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1867).

Americans abroad." A very interesting remark. On this issue, Baker and Christopher do not hesitate to take a constitutional position. Suddenly the fog of ambiguity lifts. The WPR, they argue, improperly restricts presidential war power. With all the disagreement among the congressionalists and the presidentialists, how did they decide that? They do not explain. Actually, there is nothing in the WPR that limits a president's capacity to respond to sudden attacks on Americans abroad. The WPR leaves the door entirely open to anything the president wants to do for the first 60 to 90 days of military operations.

Baker and Christopher raise another objection to the WPR: "It empowers Congress to terminate an armed conflict by simply doing nothing." Why is that a constitutional defect? The commission provides no answer. There is nothing unconstitutional about Congress controlling its prerogatives by doing nothing. If the president submits a proposal to use military force in some other country and Congress ignores it, or if the president requests funds to start or continue a war and Congress provides nothing, Congress has decided. No further actions or vote taking are needed, either in committee or on the floor. As a separate branch, Congress has every right to decide which presidential proposals to vote on.

The War Powers Consultation Act

To replace the WPR, the commission offers a proposed bill "to establish a process that will encourage cooperative consultation and participation in a fashion that we believe is both pragmatic and promotes the underlying values embodied in the Constitution" (National War Powers Commission 2008, 30). The commission never establishes or identifies those values and, in fact, specifically declines to take any position "on the underlying constitutional questions." It claims that its proposal "takes great care to preserve the respective rights of the President and Congress to take actions they deem necessary to exercise their constitutional powers and fulfill their constitutional duties" (30). It could not reach that judgment without constitutional analysis, which it never claims to have done.

According to language in the draft bill, procedures can be devised "without prejudice to the rights of either branch to assert its constitutional war powers or to challenge the constitutional war powers of the other branch" (National War Powers Commission 2008, 44). The bill is "not meant to define, circumscribe, or enhance the constitutional war powers of either the Executive or Legislative Branches," and compliance with the recommended procedures shall not "in any way limit or prejudice its right or ability to assert its constitutional war powers or its right or ability to question or challenge the constitutional war powers of the other branches" (45). Nothing in those generalizations is supported by the commission's analysis. If the commission finds itself incapable of deciding which branch holds the war power, it is similarly incapable of knowing which of its recommendations will "limit or prejudice" another branch.

Notwithstanding its assurances, the process advocated by the commission clearly favors unilateral presidential action to initiate wars and greatly limits the capacity of Congress to stop such initiatives. The report cites national polls that express support for

Congress being "involved in decisions to go to war" (National War Powers Commission 2008, 45). It claims that its bill will provide "greater opportunities and incentives for the President and Congress to engage in meaningful consultation" (31). The Constitution is not designed to ensure that Congress will be "consulted" before the president initiates war. It is written to place singularly in the hands of Congress the decision to take the country from a state of peace to a state of war. The president needs authorization or a declaration from Congress, *in advance*, and not simply "consult" with a few senior lawmakers before committing U.S. forces to an offensive war.

The commission's bill states that "the American people want both the President and Congress involved in the decision-making process" when U.S. armed forces are committed to "significant armed conflict" (combat operations lasting more than a week). This language glides by key constitutional principles. Although the Constitution provides for shared power and joint action over much of foreign affairs, including treaties and foreign commerce, nothing is shared about initiating war. That decision is solely for Congress.

Having promised some type of power sharing, the bill nevertheless allows the president to initiate war without any congressional authority. Here is the process recommended by the commission: The president merely consults with a newly formed "consultation committee" of 20 senior lawmakers before deploying U.S. troops into a significant armed conflict. The committee includes the Speaker of the House, the Senate majority leader, the House and Senate minority leaders, and the chairmen and ranking members of eight committees. The president has no obligation to accept the advice of the committee. What role is assigned to the other 515 members of Congress? Very little. The Constitution vests the war power in Congress as an institution, not in a designated subgroup (representing less than 4% of the lawmakers). In deciding to go to war, the most junior member of Congress has the same voting power and constitutional duty as a committee chairman, the House Speaker, or the Senate majority leader.

Currently, the president and executive officials must negotiate with a number of congressional committees in passing legislation. Often that takes place in public and allows constituents to follow the debate. The Baker-Christopher proposal encourages the president to narrow the circle of congressional participation to 20 people, meeting in secret. Don Wolfensberger (2008), a former congressional staffer, notes that this "new arrangement will give the president both the incentive and justification to deal exclusively with the joint committee in closed sessions. This is something administrations have wanted for years given the burden of officials delivering duplicative testimony in open forums before multiple committees and subcommittees." The procedural mechanisms in the commission's bill proposes "to vastly expand presidential powers" and "flies in the face of everything the Framers of the Constitution had in mind" when they entrusted war-power decisions to Congress. Two former House members, David Skaggs (D-CO) and Mickey Edwards (R-OK), also concluded that the Baker-Christopher proposal tilted too far in favor of executive power (J. Broder 2008)

Baker and Christopher (2008) argue that the commission bill would give Congress "access to intelligence [and] a full-time staff for studying national security issues." Actually, it would give a mere handful of members access to intelligence and staff, quite

likely with the admonition not to share sensitive information with anyone else. The model here could be the "Gang of Eight" (congressional leaders and the chair and ranking members of the intelligence committees). Originally, this group was established to review certain types of covert operations—actions so sensitive that they could not be shared with even the full intelligence committees.

After 9/11, this group was briefed about illegal surveillance by the National Security Agency. That experience underscores the risks of the commission's proposal. A small group of congressional leaders were at the mercy of executive officials who decided what information to share. Lawmakers were told not to take notes or consult with their colleagues. It is difficult for lawmakers to say no when executive officials in closed-door meetings hint darkly of imminent threats to the nation (Fisher 2008b, 296-297).

Given the record of executive branch refusals to release "national security" information to Congress, even to committees with jurisdiction over military operations and the intelligence community, there is little reason to believe that the consultative committee will receive what it needs to make an independent and informed judgment. Michael Glennon, currently a law professor at Tufts University and previously general counsel for the Senate Foreign Relations Committee, warns that "the likelihood is great that the key decisions would continue to be made in the closed quarters of the Executive Branch, by the usual actors, without congressional participation" (2008, 4).

In cases calling "for secrecy or other emergent circumstances," the bill does not even require prior consultation with the special committee. The president need only consult within three calendar days. By that time, a substantial military commitment would be under way, ordered single-handedly by the president. That is unconstitutional on its face. The bill provides that the term "significant armed conflict" shall not include any commitment of U.S. armed forces by the president for these purposes: "(i) actions taken by the President to repel attacks, or to prevent imminent attacks, on the United States, its territorial possessions, its embassies, its consulates, or its armed forces abroad; (ii) limited acts of reprisal against terrorists or states that sponsor terrorism; (iii) humanitarian missions in response to natural disasters; (iv) investigations or acts to prevent criminal activity abroad; (v) covert operations; (vi) training exercises; or (vii) missions to protect or rescue American citizens or military or diplomatic personnel abroad" (National War Powers Commission 2008, 45).

Items (ii) and (v) are of special concern. States identified by the State Department as sponsors of international terrorism include Cuba, Iran, North Korea, Sudan, and Syria (Glennon 2008, 3). The bill would allow unilateral presidential actions against those countries, without any congressional participation, and assign to the executive branch the exclusive determination of what constitutes "limited" and "reprisal." As for covert operations, the United States continues to pay a political price for intervening covertly with the Central Intelligence Agency (CIA) in Iran in 1953 to overthrow a democratically elected prime minister (Kinzer 2008). Little credibility attaches to America's current commitment to spreading democracy in the Middle East. The CIA was very active in Afghanistan and Iraq from 2001 to 2003, and newspaper reports in 2008 revealed it was involved in Iran. Congress needs to monitor and control these "paramilitary operations" and not give them a free pass, as the commission's draft bill does.

Other procedures in the bill undermine Congress and popular government. If Congress has not enacted a formal declaration of war or expressly authorized the military commitment within 30 days, the consultation committee must introduce a concurrent resolution of approval. The bill provides for seven days to report the resolution and five days for floor action. It is not clear from the language of the bill whether those days apply to each chamber or to Congress as a whole. Another 12 to 24 days would elapse to complete those steps. In short, the president would have close to two months to initiate and continue an unauthorized and unconstitutional war.

If Congress were to pass the resolution of support, it would have no legal or constitutional meaning. The resolution would merely express the view or opinion of Congress. In their introduction to the report, Baker and Christopher identify three "guiding principles" in deciding to work with the commission: "the rule of law, bipartisanship, and an equal respect for the three branches of government" (National War Powers Commission 2008, 3). A nonbinding resolution of approval has nothing to do with the rule of law. The procedures adopted by the commission do not demonstrate "equal respect" for all three branches. They tilt decisively toward executive power. Bipartisanship cannot be achieved by allowing the president to initiate war after consulting with 20 lawmakers and engaging in war for two months while awaiting passage of a concurrent resolution of approval.

What happens if the resolution of approval fails to pass? The bill provides that any lawmaker may file a joint resolution of disapproval, requiring a vote within five calendar days. Five in each chamber or five total? The bill is unclear. What is clear is the next step: A joint resolution must go to the president, who would be expected to veto it. Congress must then muster a two-thirds majority in each chamber to override the veto. In other words, the president could initiate a war and continue it as long as he has one-third plus one in a single chamber. That procedure is flatly unconstitutional.

Conclusions

The Baker-Christopher Commission fails to offer a solution for war powers disputes in part because it never addressed the central tenets of the Constitution, including the principle of popular government and the explicit text that places the war power with Congress. The commission's draft bill weakens Congress, plays to executive strengths, and undercuts the rule of law. It does great damage to the core structural safeguard of separation of powers and checks and balances. It seeks to compel Congress to vote when there is no need to.

Baker and Christopher (2008) describe the commission's recommendations as "good" because they would force Congress "to take a position on going to war." They never explain why Congress is required to take floor votes on war power disputes. Lawmakers had every constitutional right to simply ignore the administration's request in October 2002 for an Iraq resolution. Congress should have told the administration to send United Nations inspectors into Iraq to gather more information. The administration's arguments about Iraqi weapons of mass destruction had been strained and slanted,

pushing Congress to make an uninformed vote (Fisher 2003). Requiring Congress to vote without reliable information produced a policy damaging to the nation. When the president and Congress disagree over the sending of troops, a decision by lawmakers to say no by doing nothing is often a wise and always a constitutional policy.

Baker and Christopher were guided by several principles, including their decision that a proposal "be practical, fair, and realistic. It must have a reasonable chance of support from both the President and Congress." They wanted to construct a proposal that "avoids clearly favoring one branch over the other" (National War Powers Commission 2008, 7). What they agreed to is a proposal rooted in the deeply divisive presidential initiatives after World War II, including the wars in Korea, Vietnam, and the second Iraq War. In doing so, they departed from the constitutional framework and produced a bill that falls far short of being practical, fair, or realistic.

References

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