



NATIONAL
**War
Powers**
COMMISSION
REPORT

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Carla A. Hills
John O. Marsh, Jr.
Edwin Meese, III
Abner J. Mikva
J. Paul Reason
Brent Scowcroft
Anne-Marie Slaughter
Strobe Talbott

John T. Casteen, III, *Ex Officio*
David W. Leebron, *Ex Officio*
John C. Jeffries, Jr., *Co-Director*
W. Taylor Reveley, III, *Co-Director*
Doris Kearns Goodwin, *Historical Advisor*
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NATIONAL WAR POWERS COMMISSION

AT A GLANCE

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Warren Christopher
63rd Secretary of State

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National Security Advisor
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Rice University

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Counsel to Secretary
Christopher

Andrew J. Dubill
Staff Director

Juliana E. Bush
Policy and Planning Analyst

John B. Williams
Policy Assistant to Secretary
Baker

W. Taylor Reveley, IV
Miller Center Assistant Director
for Policy Programs and Planning

Lisa M. Todorovich
Miller Center Assistant Director
for Communications



TABLE OF CONTENTS

Letter from the Commissioners	3
Executive Summary	5
The Report	
A Unique Problem: Two Centuries of Uncertainty	11
A Flawed Solution: The War Powers Resolution of 1973	20
A New Approach: The War Powers Consultation Act of 2009	27
The Specifics of the Proposed Statute	34
The Proposed Statute	43
Letter from the Co-Directors	49
John C. Jeffries, Jr. and W. Taylor Reveley, III	
Appendices	
Biographies of Commission Members and Advisors	52
Commission Staff	61
Experts Appearing before the Commission	62
Meetings of the Commission	65
List of Background Materials and Bibliography Available Online	65
Partnering Institutions	66
Acknowledgements	68





LETTER FROM THE COMMISSIONERS

Famously, ours is a “government of laws, and not of men.” As a result, many expect clarity about the most fundamental features of our constitutional structure. Despite such expectations, the respective war powers of the President and Congress remain unsettled after more than two centuries of constitutional history. Indeed, few areas of American constitutional law engender more fierce debate. And few areas of contested constitutional law have received less definitive attention from the courts. As a result, the issue today remains vexed in ways that can undermine policy and confidence in the integrity of law itself. The relevant law now on the books – the War Powers Resolution of 1973 – tends to be honored in the breach rather than by observance.

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. Instead, we chose to serve on the Commission to see if we could identify a practical solution to help future Executive and Legislative Branch leaders deal with the issue. Our guiding principles in working on this project were the rule of law, bipartisanship, and an equal respect for the three branches of government.

The Commission convened regularly over the past year in Washington, D.C. as well as at our partnering institutions: the University of Virginia, Rice University, and Stanford University. In preparation for these meetings and during our deliberations, we interviewed scores of witnesses from all political perspectives and professional vantage points, and we greatly thank them for their time. We also drew on the collective experiences of the Commission and its advisors in government, the armed forces, private enterprise, the law, the press, and academia. Finally, we reviewed and studied much of the law, history, and other background literature on this subject.

The Commission’s intent was not to criticize or praise individual Presidents

or Congresses for how they exercised their respective war powers. Instead, our aim was to issue a report that should be relied upon by future leaders and furnish them practical ways to proceed in the future. The result of our efforts is the report that follows, which we hope will persuade the next President and Congress to repeal the War Powers Resolution of 1973 and enact in its place the War Powers Consultation Act of 2009.

Often expert reports end up collecting dust rather than catalyzing changes in policy. We hope ours will avoid that fate. While recognizing that our recommendations will be the subject of criticism from various directions, we hope that a solid, bipartisan majority in the next Congress will see merit in our suggestions and, with the support of the next President, enact the statute, and adopt the other measures we propose.

The Commission's report is organized in four parts. Part I is an executive summary of the Commission's recommendations. Part II is the full report, including the text of the proposed statute and illustrative historical anecdotes prepared by the Commission's Historical Advisor, Doris Kearns Goodwin. Part III is a letter from W. Taylor Reveley, III, and John C. Jeffries, Jr., of the College of William & Mary and the University of Virginia, respectively, who helped conceive of the idea for the Commission, served as its Co-Directors, and provided invaluable guidance. Part IV is biographical material regarding the Commission's members and staff, as well as a list of the witnesses we interviewed (none of whom were asked to review or endorse this report before it was published). Finally, posted for the reader's reference on the Commission's website, www.millercenter.org/warpowers, are the appendices cited in the body of the report, a bibliography of war powers literature, and other reference and research materials. These website materials reflect due diligence done by the Commission's staff, but not necessarily the views of the Commission.

On behalf of the National War Powers Commission:



James A. Baker, III
Co-Chair
61st Secretary of State



Warren Christopher
Co-Chair
63rd Secretary of State



EXECUTIVE SUMMARY OF THE REPORT



We urge that in the first 100 days of the next presidential Administration, the President and Congress work jointly to enact the War Powers Consultation Act of 2009 to replace the impractical and ineffective War Powers Resolution of 1973. The Act we propose places its focus on ensuring that Congress has an opportunity to consult meaningfully with the President about significant armed conflicts and that Congress expresses its views. We believe this new Act represents not only sound public policy, but a pragmatic approach that both the next President and Congress can and should endorse.

The need for reform stems from the gravity and uncertainty posed by war powers questions. Few would dispute that the most important decisions our leaders make involve war. Yet after more than 200 years of constitutional history, what powers the respective branches of government possess in making such decisions is still heavily debated. The Constitution provides both the President and Congress with explicit grants of war powers, as well as a host of arguments for implied powers. How broadly or how narrowly to construe these powers is a matter of ongoing debate. Indeed, the Constitution's framers disputed these very issues in the years following the Constitution's ratification, expressing contrary views about the respective powers of the President, as "Commander in Chief," and Congress, which the Constitution grants the power "To declare War."

Over the years, public officials, academics, and experts empaneled on commissions much like this one have expressed a wide range of views on how the war powers are allocated — or could best be allocated — among the branches of government. One topic on which a broad consensus does exist is that the War Powers Resolution of 1973 does not provide a solution because it is at least in part unconstitutional and in any event has not worked as intended.

Historical practice provides no decisive guide. One can point to examples of Presidents and Congresses exercising various powers, but it is hard to find a "golden age" or an unbroken line of precedent in which all agree the Executive and Legislative Branches exercised their war powers in a clear, consistent, and agreed-upon way.

Finally, the courts have not settled many of the open constitutional questions. Despite opportunities to intervene in several inter-branch disputes, courts frequently decline to answer the broader questions these war powers cases raise, and seem willing to decide only those cases in which litigants ask

them to protect individual liberties and property rights affected by the conduct of a particular war.

Unsurprisingly, this uncertainty about war powers has precipitated a number of calls for reform and yielded a variety of proposals over the years. These proposals have largely been rejected or ignored, in many cases because they came down squarely on the side of one camp's view of the law and dismissed the other.

However, one common theme runs through most of these efforts at reform: the importance of getting the President and Congress to consult meaningfully and deliberate before committing the nation to war. Gallup polling data throughout the past half century shows that Americans have long shared this desire for consultation. Yet, such consultation has not always occurred.

No clear mechanism or requirement exists today for the President and Congress to consult. The War Powers Resolution of 1973 contains only vague consultation requirements. Instead, it relies on reporting requirements that, if triggered, begin the clock running for Congress to approve the particular armed conflict. By the terms of the 1973 Resolution, however, Congress need not act to disapprove the conflict; the cessation of all hostilities is required in 60 to 90 days merely if Congress fails to act. Many have criticized this aspect of the Resolution as unwise and unconstitutional, and no President in the past 35 years has filed a report "pursuant" to these triggering provisions.

This is not healthy. It does not promote the rule of law. It does not send the right message to our troops or to the public. And it does not encourage dialogue or cooperation between the two branches.

In our efforts to address this set of problems, we have been guided by three principles:

- First, that our proposal be practical, fair, and realistic. It must have a reasonable chance of support from both the President and Congress. That requires constructing a proposal that avoids clearly favoring one branch over the other, and leaves no room for the Executive or Legislative Branch justifiably to claim that our proposal unconstitutionally infringes on its powers.
- Second, that our proposal maximize the likelihood that the President and Congress productively consult with each other on the exercise of war powers. Both branches possess unique competencies and bases of support, and

the country operates most effectively when these two branches of government communicate in a timely fashion and reach as much agreement as possible about taking on the heavy burdens associated with war.

- Third, that our proposal should not recommend reform measures that will be subject to widespread constitutional criticism. It is mainly for this reason that our proposal does not explicitly define a role for the courts, which have been protective of defining their own jurisdiction in this area.

Consistent with these principles, we propose the passage of the War Powers Consultation Act of 2009. The stated purpose of the Act is to codify the norm of consultation and “describe a constructive and practical way in which the judgment of both the President and Congress can be brought to bear when deciding whether the United States should engage in significant armed conflict.”

The Act requires such consultation before Congress declares or authorizes war or the country engages in combat operations lasting, or expected to last, more than one week (“significant armed conflict”). There is an “exigent circumstances” carve-out that allows for consultation within three days after the beginning of combat operations. In cases of lesser conflicts — *e.g.*, limited actions to defend U.S. embassies abroad, reprisals against terrorist groups, and covert operations — such advance consultation is not required, but is strongly encouraged.

Under the Act, once Congress has been consulted regarding a significant armed conflict, it too has obligations. Unless it declares war or otherwise expressly authorizes the conflict, it must hold a vote on a concurrent resolution within 30 days calling for its approval. If the concurrent resolution is approved, there can be little question that both the President and Congress have endorsed the new armed conflict. In an effort to avoid or mitigate the divisiveness that commonly occurs in the time it takes to execute the military campaign, the Act imposes an ongoing duty on the President and Congress regularly to consult for the duration of the conflict that has been approved.

If, instead, the concurrent resolution of approval is defeated in either House, any member of Congress may propose a joint resolution of disapproval. Like the concurrent resolution of approval, this joint resolution of disapproval shall be deemed highly privileged and must be voted on in a defined number of days. If such a resolution of disapproval is passed, Congress has several options. If both Houses of Congress ratify the joint resolution of disapproval and the President

signs it or Congress overrides his veto, the joint resolution of disapproval will have the force of law. If Congress cannot muster the votes to overcome a veto, it may take lesser measures. Relying on its inherent rule making powers, Congress may make internal rules providing, for example, that any bill appropriating new funds for all or part of the armed conflict would be out of order.

In our opinion, the Act's requirements do not materially increase the burdens on either branch, since Presidents have often sought and received approval or authorization from Congress before engaging in significant armed conflict. Under the Act, moreover, both the President and the American people get something from Congress — its position, based on deliberation and consideration, as to whether it supports or opposes a certain military campaign. If Congress fails to act, it can hardly complain about the war effort when this clear mechanism for acting was squarely in place. If Congress disapproves the war, the disapproval is a political reality the President must confront, and Congress can press to make its disapproval binding law or use its internal rule-making capacity or its power of the purse to act on its disapproval.

We recognize the Act we propose may not be one that satisfies all Presidents or all Congresses in every circumstance. On the President's side of the ledger, however, the statute generally should be attractive because it involves Congress only in "significant armed conflict," not minor engagements. Moreover, it reverses the presumption that inaction by Congress means that Congress has disapproved of a military campaign and that the President is acting lawlessly if he proceeds with the conflict. On the congressional side of the ledger, the Act gives the Legislative Branch more by way of meaningful consultation and information. It also provides Congress a clear and simple mechanism by which to approve or disapprove a military campaign, and does so in a way that seeks to avoid the constitutional infirmities that plague the War Powers Resolution of 1973. Altogether, the Act works to give Congress a seat at the table; it gives the President the benefit of Congress's counsel; and it provides a mechanism for the President and the public to know Congress's views before or as a military campaign begins. History suggests that building broad-based support for a military campaign — from both branches of government and the public — is often vital to success.

To enable such consultation most profitably to occur, our proposed Act establishes a Joint Congressional Consultation Committee, consisting of the

majority and minority leaders of both Houses of Congress, as well as the chairmen and ranking members of key committees. We believe that if the President and Committee meet regularly, much of the distrust and tension that at times can characterize inter-branch relationships can be dissipated and overcome. In order that Congress and the Committee possess the competence to provide meaningful advice, the Act both requires the President to provide the Committee with certain reports and establishes a permanent, bipartisan congressional staff to facilitate its work. Given these resources, however, our proposed Act limits the incentives for Congress to act by inaction — which is exactly the course of conduct that the default rules in the War Powers Resolution of 1973 often promoted.

To be clear, however, in urging the passage of War Powers Consultation Act of 2009, we do not intend to strip either political branch of government of the constitutional arguments it may make about the scope of its power. As the Act itself makes plain, it “is not meant to define, circumscribe, or enhance the constitutional war powers of either the Executive or Legislative Branches of government, and neither branch by supporting or complying with this Act shall 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 branch.”

In sum, the nation benefits when the President and Congress consult frequently and meaningfully regarding war and matters of national security. While no statute can guarantee the President and Congress work together productively, the Act we propose provides a needed legal framework that encourages such consultation and affords the political branches a way to operate in this area that is practical, constructive, fair, and conducive to the most judicious and effective government policy and action.



A UNIQUE PROBLEM: TWO CENTURIES OF UNCERTAINTY



Whether to go to war is perhaps the most serious decision a country can make. In this section, we will provide a summary of (1) the constitutional basis for executive and congressional claims to primacy in war making; and (2) a cursory view of two centuries of the American experience about going to war.

THE CONSTITUTIONAL FRAMEWORK

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.

Advocates on both sides find the answer obvious. Each of their claims to power, however, is met with contrary legal authority, historical counterexamples, and countervailing policy arguments. The only branch of government capable of resolving these disputes — the Judicial Branch — has consistently declined to do so, largely on the ground that questions of war and peace present political questions within the exclusive purview of the other two branches. So, unlike the rich tapestry of case law interpreting other provisions of the Constitution, such as freedom of speech or interstate commerce, the constitutional interpretation of war powers has largely been left to a competition between the Executive and Legislative Branches. As a result, the debate has sometimes focused more on process rather than on the merits of going to war and how best to prosecute it.

In these debates over process, many argue that the Constitution is perfectly clear, depending on which branch of government one supports. Proponents of congressional authority point to Article 1, Section 8 of the Constitution, which provides that “Congress shall have power...to declare War” and “grant Letters of Marque and Reprisal.” Proponents of this view say that by vesting Congress with the power to declare war, the framers stripped the Executive of the powers the English king enjoyed. They say the framers placed the powers to decide to go to war in the hands of Congress because it is the branch most deliberate by design, most in touch with the American people, and thus least inclined to

commit soldiers to the battlefield.

Advocates of congressional power further argue that after Congress has authorized or declared war, the President then — but only then — has the power to conduct war through his role as Commander in Chief of the armed services. They say the President can initiate war without congressional authorization only in limited circumstances, such as 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. Advocates of congressional power also note that Congress, once it has authorized a war, has many tools at its disposal to shape its conduct and duration. For example, Congress can define narrowly what military objectives the President may pursue. And, they also note, Congress can terminate an armed conflict in a variety of ways.

For their part, proponents of presidential authority point 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 their argument, congressional advocates overstate the significance of Congress’s power to “declare” war. The power to “declare” war, as advocates of executive power interpret the Constitution, 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. These advocates argue that the President need not seek or obtain congressional approval before committing the country to military campaigns. Although it may be politically expedient for the President to obtain such popular support, they argue that the Constitution does not require it.

According to this view, Congress should exercise its constitutional powers if it wishes to check the President’s actions. First, Congress can use its constitutional “power of the purse” to cut off funding. Second, Congress may impeach the President in an effort to change policy and conclude hostilities. The most ardent proponents of executive power argue that short of exercising one of these two options, Congress cannot regulate when or how the President wages war. They reason that the President has extensive unilateral powers to protect national security.

Though scholars, commentators, and others have thoroughly examined these issues, the contemporaneous writings of the Constitution’s framers con-

cerning war powers are sparse and often contradictory. Alexander Hamilton, James Madison, Thomas Jefferson, John Marshall, and other founders wrote and spoke about war powers at various points in their careers. But their writings are markedly less thorough than on other constitutional subjects. Although it is easy to marshal quotes from these and other founders to support almost any position in the war powers debate, no unbroken thread runs through their thinking other than the general principle that the system of checks and balances best promotes the values the Constitution strives to protect and that both branches were thus given some share of war powers.

Beyond that, the search for clear answers from the founders runs headlong into contradiction. To take just one example, advocates of congressional power often quote Chief Justice John Marshall's opinions in *Talbot v. Seeman*, 5 U.S. (1 Cr.) 1 (1801), and *Little v. Barreme*, 6 U.S. (2 Cr.) 170 (1804), which upheld limits Congress placed on President John Adam's prosecution of the "quasi-war" with France. They seize on Marshall's statement in the *Talbot* case that: "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." 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" power 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.

THE HISTORICAL PRACTICE

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. For example, in the early years of the Republic, 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.

In that same era, however, President Jefferson acted without congressional approval — while Congress was on recess — to respond to a British attack on an American vessel. Years later, he famously argued that he was correct not to consult with Congress or seek its approval in advance, because “[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself...thus absurdly sacrificing the end to the means.”

These early historical examples are interesting, but reference to them has not resolved the ongoing debate. 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. Yet Jefferson’s national security justification for his failure to follow the law to the letter can be interpreted as justifying a broad range of unilateral military actions that the President may take, if the President considers them necessary and appropriate to defend the country. Meanwhile, Madison’s example teaches a political lesson as much as a legal one. The congressional authorization Madison obtained helped him and the country weather what became the costly and divisive War of 1812.

The next 100 years of American history are similarly inconclusive. For example, Abraham Lincoln’s career provides fodder for advocates of both executive and congressional power. When Lincoln was a Congressman, as is explained in the inset (page 16), he and some of his colleagues criticized President James Polk for his unilaterally beginning the Mexican-American War. Later, as President, Lincoln faced similar challenges — and was also the subject of impeachment threats — for his conduct of the Civil War, especially for his unilateral actions in the early days of the war and for his alleged violations of civil liberties.

Before both World Wars, Presidents Woodrow Wilson and Franklin Roosevelt faced protests from those in Congress opposed to our entering these wars. In both instances, Presidents worked diligently with the Legislative Branch to resolve difficult issues and Congress ultimately declared war. President Wilson called Congress into special session to examine whether the United States could remain neutral in light of Germany’s conduct in World War I. Franklin Roosevelt, as Doris Kearns Goodwin discusses later in this report, took different approaches over time. Initially, he acted unilaterally to aid the British war effort against the Nazis in approving the so-called “Destroyer Deal.” He later lobbied Congress both to pass the Lend Lease Act, which provided the British with more extensive support, and to declare war on behalf of the United States.

Lincoln and the Story of Two Wars

In his maiden speech on the House floor in 1848, Lincoln joined with other members of the minority Whig party in denouncing the war with Mexico as “unnecessarily and unconstitutionally commenced” by the Democratic President, James Polk. He claimed that Polk’s argument that Mexico had initiated hostilities on our soil was “from beginning to end, the sheerest deception,” for, as he later elaborated, “the United States Army, in marching to the Rio Grande, marched into a peaceful Mexican settlement.” To accept Polk’s position without question was to “allow the President to invade a neighboring nation ... whenever he may choose to say he deems it necessary,” he also wrote.

A dozen years later, as President, he seemed to take a different stance toward the powers of Commander in Chief, but on closer look, the two positions can be reconciled. When the firing on Fort Sumter opened the Civil War, Congress was not in session. Consequently, Lincoln acted on his own, calling out state militias, instituting a blockade, and suspending habeas corpus. No sooner had Congress convened, however, than he called upon them to ratify his actions.

“It was with the deepest regret,” he explained, “that the Executive found the duty of employing the war-power, in defence of the government, forced upon him. He could but perform this duty, or surrender the existence of the government.” His address to the Congress traced in full the events that led up to the war and gave eloquent voice to the meaning of the struggle for the Union — to maintain that form of government “whose leading object is, to elevate the condition of men ... to afford all, an unfettered start, and a fair chance in the race of life.”

Finally, he called on Congress to “give the legal means for making this contest a short, and a decisive one.” Congress responded with alacrity, providing retroactive authority for nearly all of Lincoln’s executive actions taken before they convened, remaining silent only on his suspension of habeas corpus. Indeed, responding to the President’s powerful message, its members authorized more money and an even larger mobilization of troops than he had requested.

—Doris Kearns Goodwin

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.

Since the Korean War, Presidents have sought and received approval or authorization from Congress for most of the extended, significant armed conflicts in which our country has engaged. However, in many of these and other shorter conflicts, the President has questioned his need to obtain congressional approval for military campaigns he deemed vital to national security interests or necessary to enforce international treaty obligations.

Congress's reactions to military campaigns in the years since Korea has been varied. Urged by the President, Congress passed authorizations for the Vietnam War, the second Iraq War, and the current War on Terror. None of these authorizations included a specific "sunset clause" calling for the reauthorization or termination of the conflict by a certain date. Many read all three authorizations as providing the President with a great deal of discretion in deciding when, how, and by what means to wage the military campaign. In the years that followed these authorizations, members of Congress — both those who voted for and against the resolution — complained how each war was prosecuted, argued the war should be terminated, or threatened to withdraw Congress's authorization. Congress, in fact, voted to cut off funds for the Vietnam War, which resulted, in part, in the halting of controversial bombing campaigns.

In other cases since the Vietnam War, Congress has set clearer parameters for a specific engagement. In the first Iraq War, for example, Congress authorized the President to take military action against Iraq, but limited the authorization to enforcing existing U.N. Security Council resolutions. Thus, once the U.S.-led coalition expelled Iraq from Kuwait, there was a strong argument to be made that had the armed forces deposed the Iraqi government, the President would have been acting beyond his congressional authorization. Congress and President Ronald Reagan's Administration worked closely on the United States peacekeeping mission in Lebanon. After negotiations between congressional leaders and the White House, Congress specifically authorized American troops

to remain in Lebanon for 18 months.

In other cases, Congress has played a lesser role. Congress gave no formal approval — and none was sought — for the invasions of Grenada in 1983 and Panama in 1989. Nor did President Reagan seek approval before launching air strikes against Libya in 1986 in response to terrorist attacks Libya had supported in Europe. Given the speed and success of these three campaigns, however, little lasting constitutional controversy ensued. In fact, the House of Representatives passed a resolution praising the success of the Panama campaign. In the case of Grenada, the House of Representatives passed a resolution requiring that military operations cease within 60 days. The resolution became irrelevant when American forces withdrew less than two months after the initial invasion.

In the cases of Somalia starting in 1992, Haiti in 1994, and the former Yugoslavia in the mid- to late-1990s, Congress became more involved. But even when asserting itself, it never drew a hard line claiming the exclusive power to decide when and where to make war. Instead, in the case of Somalia — after the loss of American lives in Mogadishu in 1993 — Congress considered legislation mandating a troop withdrawal, but only did so as the decision to withdraw the troops was being made. With Haiti, Congress stated its belief that the President needed congressional approval to wage the campaign, but took no formal action to enforce this view. In the cases of Bosnia and Kosovo, Congress gave the military campaigns tacit support by funding the missions. However, Congress passed a non-binding joint resolution questioning the wisdom of the Bosnia campaign and never formally authorized the air campaign against Serbia over Kosovo.

These examples from the 1980s and 1990s did not result in the kind of Executive Branch-Legislative Branch acrimony that characterized the Vietnam War because they were short in duration, were considered successful, and thus did not attract significant opposition from the American people. Equally important was the contact between the White House and Congress during these more recent conflicts. Indeed, experts we interviewed described some of the inter-branch discussions from this era at length and said that, even in cases where the President and Congress openly disagreed, the two branches engaged in some form of dialogue.

However, in many instances — including El Salvador and Nicaragua in the

1980s, Grenada, President Reagan's use of the U.S. Navy to escort oil tankers through the Persian Gulf in 1987, the first Iraq War, and Kosovo – individual members of Congress filed suit in federal court challenging the President's actions. Although over 100 members of Congress joined one of these lawsuits, the courts dismissed all these cases. The courts' reasoning varies, but the consistent, bottom-line view is that these war powers cases are political thickets the courts should not enter.

Because the courts have not ruled on the merits in these cases, the questions of which branch may exercise which war powers remain open. Over the years, Congress has conducted periodic hearings on these process issues, inviting some of the brightest legal minds to offer competing views. A great deal has been written in the popular and academic press concerning the legitimacy, or lack thereof, of various armed conflicts in which the country has been engaged. Whenever these issues are debated, the same quotations from the founding fathers and historical anecdotes are employed to support equally robust but competing claims for presidential power and congressional power. Scholars and government officials debate these issues today with, if anything, greater intensity and frequency.

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.



A FLAWED SOLUTION:
THE WAR POWERS RESOLUTION
OF 1973



The War Powers Resolution of 1973 attempted to resolve the fundamental constitutional questions that had been debated for almost two centuries, but it has failed to do so. The Resolution purports to formalize a role for Congress in making the decision whether to go to war. While it seeks to limit presidential power, the Resolution — either because of drafting error or political miscalculation — arguably invites Presidents to wage any military campaign they wish for up to 90 days. Once a conflict begins, however, the President is required under the Resolution to terminate it within 90 days if Congress has not authorized it.

As the date in its title suggests, the War Powers Resolution of 1973 was a response to the Vietnam War, a watershed event in both American history and the law of war powers. Both Presidents John Kennedy and Lyndon Johnson sent troops to Vietnam between 1960 and 1964 without congressional blessing. (President Dwight Eisenhower had sent military advisors before them.) In August of 1964, Johnson sought and obtained congressional approval for the controversial Tonkin Gulf Resolution, which broadly authorized what was called the Vietnam War. As the war grew increasingly unpopular and congressional efforts to end or limit its scope stalled, Congress attracted criticism for passing the Tonkin resolution too quickly and with little scrutiny. (These developments are discussed in the inset on page 22.) During these same years, citizens, soldiers, and members of Congress unsuccessfully filed lawsuits challenging the propriety of the war, and particularly the United States' incursions into Cambodia.

In the early 1970s, members of both Houses of Congress began urging the passage of a statute that would empower Congress to order an end to the war and require the President more openly and actively to consult with Congress before engaging in future hostilities. The final version of the War Powers Resolution of 1973 was a hasty compromise between competing Senate and House bills. President Nixon vetoed the statute, arguing it infringed on the President's constitutional powers. Congress overrode his veto.

The War Powers Resolution has been widely criticized, even by its original sponsors. For example, even ardent advocates of congressional power recognize that Section 2(c) of the Resolution too narrowly defines the President's war powers, and many agree it has been regularly breached. Section 2(c) says the President may exercise his powers as Commander in Chief “only pursuant to

History's Lesson Lost: Vietnam

"I believe this resolution to be a historic mistake," Senator Wayne Morse argued on the eve of the near unanimous Senate passage of the Tonkin Gulf resolution in 1964, which gave Lyndon Johnson what turned into a blank check to prosecute the Vietnam War.

Morse's warning went unheeded as the Congress rushed to respond to confusing reports of an attack by North Vietnamese torpedo boats on an American destroyer patrolling the Gulf. "The mood then," Senator Ernest Gruening lamented, "was that 'papa knows best' — that the President had information we didn't have... We assumed that what the president told us was true." Debate in the House lasted only 40 minutes; in the Senate nine hours.

Concerned about the unnecessary breadth of the resolution, Senator Gaylord Nelson proposed an amendment explicitly stating that Congress wants "no extension of the present military conflict" and the United States should "continue to attempt to avoid direct military involvement." While the Chairman of the Foreign Relations Committee, William Fulbright, agreed that the amendment was "unobjectionable," he persuaded Nelson to back down, arguing that as Chairman, he could not "take responsibility for delaying matters." Later, Fulbright acknowledged publicly that he had been wrong.

Ironically, what seemed a masterstroke for Lyndon Johnson turned out to be his Achilles heel. "I knew the Congress as well as I know Lady Bird," he said, "and I knew the day it exploded into a major debate on the war, that day would be the beginning of the end of the Great Society." To the contrary, had the Tonkin resolution been more narrowly drawn, had Johnson been forced to return to Congress with a persuasive rationale and shared intelligence, he might have moved more cautiously before escalating American involvement into the full-fledged war that would shatter his domestic dreams.

—Doris Kearns Goodwin

(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States.” Since the enactment of the Resolution, Presidents have sent troops into conflict on several occasions when none of these circumstances were present: including Grenada, Yugoslavia, and Haiti.

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. In *Chadha*, the Supreme Court struck down the long-standing congressional practice of using one-house “legislative vetoes” to invalidate regulations that federal administrative agencies had promulgated. The Supreme Court held that both Houses of Congress needed to vote to approve a measure and then, pursuant to the “Presentment Clause” in the Constitution, present the bill to the President for his signature or veto if the measure is to have the force of law. The general view is that if the War Powers Resolution were put to the same test in *Chadha*, Section 5(c) of the Resolution, and perhaps other provisions, would fail.

Many other aspects of the War Powers Resolution provoke criticism. Section 3 requires the President to “consult” with Congress before and during any armed conflict, but does not identify with whom among 535 congressional members the President must meet. In practice, the statute generally has ensured some form of notification, but not always consultation. As a 2007 Congressional Research Service study of the 1973 War Powers Resolution concluded: “there has been very little consultation with Congress under the Resolution when consultation is defined to mean seeking advice prior to a decision to introduce troops.”

Section 4 of the statute contains detailed reporting requirements compelling the President to provide Congress with information regarding all conflicts in which the country’s military engages. Experts told the Commission that the general, ongoing reporting requirements in Section 4(c) have devolved into tedious paperwork obligations that are relegated to lower-level executive personnel. The reports produced, they add, are stripped of so much content in the interest of preserving secrecy as to make them hardly useful. On the other hand, the reports have been loaded up with material to address minor matters,

such as limited humanitarian relief efforts in which military personnel were tangentially involved. They are widely considered a waste of time.

The 1973 Resolution's specific reporting requirements, in Section 4(a), have come under especially heavy criticism. Reports filed under Section 4(a)(1) serve to trigger the Resolution's enforcement mechanisms in Section 5, which provides that if Congress has not approved a new military campaign within 60 to 90 days (depending on the exigencies), the President must halt that campaign. Not only does this allow Congress to halt a military campaign by inaction — a concept which many have criticized — *no* President has ever filed a report “pursuant to” Section 4(a)(1). One obvious reason not to file such reports is to avoid triggering the 60- to 90-day clock in Section 5(b), and the legal and constitutional fight that breaching this provision might provoke. President Gerald Ford submitted one report that “took note of” Section 4(a)(1), when he reported on U.S. military strikes in Cambodia in response to the capture of an American merchant ship. But the report Ford filed was submitted well after the hostilities had ended, so Congress had no role to play. Moreover, after Ford left office, he stated, “If anything, I am in firmer opposition to the so-called War Powers Resolution than when I was in the White House or when I was in Congress.”

Every President since Ford has questioned the constitutionality of the War Powers Resolution and submitted reports that are “consistent with,” but not “pursuant to” the statute. In President Reagan's September 23, 1987 report to Congress on activity in the Persian Gulf, he noted he was “mindful of the historical differences between the legislative and executive branches of government, and the positions taken by all of my predecessors in office, with respect to the interpretation and constitutionality of certain of the provisions of the War Powers Resolution.” Reagan's White House Counsel, A.B. Culvahouse, reflecting on the War Powers Resolution of 1973, has noted: “There's a real Kabuki dance that's done here. You send a notice up to the Hill while protesting all the time that you're not really providing notice and that it's all unconstitutional.” Democratic officials have expressed similar views.

Despite these and similar sentiments, Congress as a whole has never sought to compel the President to comply with the War Powers Resolution of 1973 or file a report under Section 4(a) of the Resolution. Individual members of Congress have, at times, filed lawsuits seeking to enforce the Resolution, by compelling, for example, the President to file Section 4(a)(1) reports and to start

the Section 5(b) clock running. The courts have dismissed every such case.

Critics of the Resolution further note that it allows both branches to justify inaction. They point out that Presidents have regularly involved the country's armed forces in what are clearly "hostilities" under the terms of the statute, while claiming the statute is unconstitutional or not triggered in that particular case and therefore largely ignoring it. Critics further contend that Congress is only too willing to let the President navigate around the statute this way, because if the statute were triggered Congress might need to vote up or down on the conflict. Some defenders of the Resolution say, with scant supporting evidence, that despite all its flaws, it still acts to keep Presidents from unwisely rushing into military campaigns.

In sum, we encountered broad dissatisfaction with the 1973 Resolution. Unsurprisingly, there have been widespread bipartisan efforts over the years to amend or replace the statute. Arguments for repealing the statute and putting nothing in its place come mainly from staunch advocates of executive power. Conversely, arguments to give it real bite come from those who believe in congressional predominance. Still others suggest more modest reforms.

No proposal has gotten very far. (Several past reform efforts are discussed in Appendix 1, posted on the Commission's website at www.millercenter.org/warpowers.) Those advocating outright repeal — and, in their view, restoring the constitutional balance — have been met with the objection that their proposal too greatly favors the President and is unconstitutional. Those advocating significantly strengthening the Resolution to check executive power — and in so doing, in the congressionalists' view, restoring the constitutional balance of power — have been met with similar claims of unconstitutionality and the threat of veto. Still other proposals set forth detailed ways in which members of Congress, U.S. military personnel, and others would be authorized to bring suit to enforce their putative rights under the War Powers Resolution of 1973, some new statute they propose, or the Constitution. Although many argue it would be worthwhile to involve the courts to add some clarity to this body of law, these judicial review proposals have not been successful.

Even amidst these conflicting approaches, a unifying theme emerges: the need for greater consultation between the President and Congress. Indeed, many of the proposals would establish specific consultation groups with which the President would meet, as well as when and how these meetings should occur.

(Examples of such consultative groups are collected in the table at Appendix 2 on the Miller Center website.)

Our Commission repeatedly heard calls for better communication between the President and Congress in regards to war. These views reflect the observations of constitutional scholar Alexander Bickel, who once said: “Singly, either the President or Congress can fall into bad errors. ... So they can together too, but that is somewhat less likely, and in any event, together they are all we’ve got.” Indeed, even President Nixon, in vetoing the War Powers Resolution called for further study about how Congress and the President could better consult. In so doing, he argued: “The responsible and effective exercise of the war powers requires the fullest cooperation between the Congress and the Executive and the prudent fulfillment by each branch of its constitutional responsibilities.”



A NEW APPROACH:
THE WAR POWERS CONSULTATION ACT
OF 2009



We see the beginning of a new Administration and Congress in January 2009 as an opportune time to enact a reasonable, practical replacement of — and improvement on — the War Powers Resolution of 1973. In writing this report, we speak to the next President and the next Congress. Based on our collective years of experience, and after a year of careful study, we believe that our country is best served — and has often been well served by many Presidents and Congresses — when the two branches work together to protect our nation’s security.

Given the profound consequences of the decision to take the nation to war, there will, almost inevitably, be disagreement when the two branches consult. But disagreement and substantive debate, as history shows, often breed better decisions and more lasting popular support. The “Tale of Two Approaches” outlined in the inset below offers an insightful example.

A TALE OF TWO APPROACHES

Destroyer Deal

At Dunkirk, in May, 1940, more than half the British fleet of destroyers were sunk or damaged. Additional destroyers were desperately needed, Churchill wrote Roosevelt that summer, to protect British merchant ships from submarines and to repel the expected German invasion. “Mr. President, with great respect I must tell you that in the long history of the world, this is a thing to do now.”

Roosevelt agreed, believing “the survival of the British Isles under German attack might very possibly depend on their getting these destroyers.” A proposal was developed to exchange the destroyers for access to various British bases around the world. Assuming congressional authorization was necessary, the Administration reached out to members of the Republican minority, whose votes would be necessary to fashion a majority. When told that the legislation had “no chance of passing,” Roosevelt decided to negotiate with England in secret without securing congressional approval, based on a legal opinion that his twin powers as Commander in Chief and head of state combined to provide constitutional authority.

When Roosevelt announced the bases-for-destroyers deal, members of Congress were furious. Republican presidential nominee Wendell Willkie

denounced Roosevelt's decision to bypass Congress as "the most dictatorial and arbitrary of any President in the history of the US." As far as Roosevelt was concerned the end justified the means. If fifty old destroyers helped turn the tide of battle in Britain's favor, then the risk was worth taking. But by not going to Congress he lost the chance to educate the country on the critical need to help Britain survive.

Lend Lease

Later that year, with Britain reeling under the Blitz — the sustained German air attack which had destroyed more than 300,000 homes and left more than 20,000 civilians dead in the London area — Churchill turned to Roosevelt again. Britain had no cash left to pay for desperately needed shipping, weapons and supplies. In answer to Britain's need, Roosevelt came up with the unconventional idea that the U.S. could lend Britain weapons and supplies without charge, and then, after the war, be repaid not in dollars but in kind.

This time, Roosevelt worked long and hard to secure congressional approval, which once again looked doubtful given the strength of the isolationists in Congress, who feared that aiding Britain would lead us into war. He began by appealing to the public with the simple analogy that if your neighbor's house was on fire, you would lend your garden hose in order to protect both his home and yours, knowing that the hose, if damaged, could be replaced after the fire was put out.

The situation the Administration faced was tricky: every day taken up in congressional debate was another day lost in Britain's struggle to ready itself for the expected invasion. For six weeks the pros and cons received a full airing, and over this time, the public which had been divided down the middle at the start had risen to 61 percent in favor and the bill passed both Houses with substantial majorities. For Roosevelt, the triumph was not simply the passage of the bill but the successful education of the American public.

"Yes," Roosevelt remarked after signing the historic bill, "the decisions of democracy may be slowly arrived at. But when that decision is made, it is proclaimed not with the voice of one man but with the voice of 130 million."

—Doris Kearns Goodwin

How best to promote consultation is an issue that has dominated much of the Commission's deliberations. Based on our collective experience, we think the best approach is the simple, short statute we propose in the next section of this report. We believe the War Powers Resolution of 1973 should be repealed and our proposed statute enacted in its place. Our statute does not try to answer the constitutional questions or compel behavior by the President, Congress, or courts that history proves is unlikely to occur. Instead, our statute seeks 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.

As pointed out in the preceding section, the War Powers Resolution of 1973 needs to be repealed because it has not worked as intended. No President since 1973 has recognized its constitutionality. No military campaign has been halted as a result of the statute's default mechanisms. Perhaps the greatest problem with the Resolution is that the rule of law is undermined when the country's centerpiece statute in this vital area of American law is regularly and openly ignored. This breeds cynicism and distrust among citizens toward their government.

The statute we propose endeavors to address these shortcomings. It does so by:

- Eliminating aspects of the War Powers Resolution of 1973 that have opened it to constitutional challenge. The new statute 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.
- Promoting meaningful consultation between the branches without burdening the President's time or too greatly tying his or her hands. The President has a responsibility to defend the country and its security interests. But as Gallup Polls show, Americans strongly favor congressional involvement in decisions to go to war. This desire is, notably, not of recent vintage. At the time of the passage of the War Powers Resolution, 80% of those polled said Congress should be significantly involved in decisions to go to war. Similar polls, including recent ones, indicate that for some seven decades Americans have wanted Congress involved in decisions to go to war. That is why Presidents usually have sought and received approval

or authorization from Congress before engaging in significant armed conflict.

- Providing a heightened degree of clarity and striking a realistic balance that both advocates of the Executive and Legislative Branches should want. On the presidential side of the ledger, the statute involves Congress only in “significant armed conflict,” not minor campaigns, and it reverses the presumption that inaction by Congress means it has disapproved a military campaign. The statute also affords the President independent and valuable advice from Congress and gives Congress greater resources to serve this consultative role. On the congressional side, the statute gives Congress a role that it presently does not have — *i.e.*, a seat at the table, providing the President meaningful advice. Our proposed statute also provides Congress clear and simple mechanisms by which to approve or disapprove war-making efforts — mechanisms *not* readily open to constitutional attack, as are those in the War Powers Resolution of 1973.

If the War Powers Resolution of 1973 is repealed and replaced with the War Powers Consultation Act of 2009, we firmly believe that there will be greater opportunities and incentives for the President and Congress to engage in meaningful consultation. The Joint Congressional Consultation Committee, which the Act creates, provides such a vehicle. The statute also provides clear mechanisms by which Congress can state its support or disapproval of significant armed conflicts.

When congressional consultation and support are obtained during times of war, our country can most effectively execute a unified response to hostilities. That is particularly important today, with the face of war changing and with non-state actors being one of the greatest threats to national security. The more the President and Congress work together to confront these threats, the more likely it is that the country can avoid political and constitutional controversies and also devise the best strategies for defending against those threats. Almost all of the witnesses with whom we met — even outspoken advocates respectively of executive or congressional power — agreed that our nation is best served when the President and Congress work jointly to achieve a common objective, not when they test the limits of their respective powers. In the conduct of war against a foreign adversary, the Commander in Chief clause, the President’s executive powers under Article II of the Constitution, and military realities

ensure that the President will play the dominant role. However, no matter the strength of the President's claims to power in this domain, experience teaches us that the President's powers are not unlimited and, in some instances, benefit by consultation with or statutory approval from Congress.

A cornerstone legal case here — and a notable instance where the Supreme Court did get involved in a war powers case — is popularly known as the “Steel Seizure” case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case, the Supreme Court held that President Truman exceeded his constitutional authority by ordering the Secretary of Commerce to seize and operate most of the nation's steel mills to avert a strike and support the Korean War. The Court said that such action would be “a job for the nation's lawmakers, not for its military authorities.”

The most enduring legacy of the Steel Seizure case is Justice Robert Jackson's concurring opinion. Jackson reasoned that constitutional powers fluctuate depending on the circumstance and that the President's powers roughly could be grouped in three tiers depending on how Congress had acted. First, a President's powers are at their maximum when the President has received direct or implied congressional authorization. Second, the President's powers are at their least when the President takes measures contrary to the express or implied will of Congress. And third, Jackson described a “zone of twilight” when the President acts and Congress has neither granted nor denied authority, and the President and Congress's respective powers in that area are “concurrent” or their “distribution is uncertain.”

Thus, not only can congressional consultation, concurrence, and assent be important as a political matter — as Doris Kearns Goodwin explains in her examples involving Presidents Lincoln, Roosevelt, and Johnson — it can have an impact on the scope of the President's legal authority to take actions in conducting the war. Supreme Court jurisprudence before and since the Steel Seizure case has generally reflected Jackson's common-sense logic. As Chief Justice William Rehnquist observed in his book, *All the Laws But One: Civil Liberties in Wartime*, courts give Presidents wide berth in exercising their war powers when Congress has voiced its support. For example, Rehnquist reasoned that the Supreme Court was willing to uphold President Roosevelt's controversial internment of Japanese-Americans during World War II — even on weak evidence that they posed a national security threat — because Congress had

enacted criminal laws enforcing the President's executive orders. These cases exemplify the deference the Supreme Court is willing to grant the President and Congress when they act jointly. *E.g., Hirabayashi v. United States*, 320 U.S. 81 (1943).

In contrast, when Congress has not been consulted or the President acts against Congress's will, courts have been more receptive to challenges to the President's actions. The Supreme Court's ruling that President Truman had exceeded his powers in the Steel Seizure case is a classic example. The current Supreme Court has also acted to preserve its role in recent cases seeking to protect individual liberties arising out of the detention of enemy combatants at Guantanamo Bay. *E.g., Boumediene v. Bush*, No. 06-1195 (U.S. 2008). These cases stress the need for the President and Congress to work together to confront new threats. *E.g., United States v. Hamdan*, 126 S. Ct. 2749, 2799 (2006).

Finally, it is important to mention that Presidents are not only well served to consult with Congress regarding the conduct of war, but also concerning its termination. As with all areas of the war powers debate, advocates dispute the precise powers the President and Congress have to curtail or cease hostilities. No matter who is correct, consultation and coordination are far preferred as a matter of policy, and best allow for an orderly and optimal withdrawal from any military campaign. As with most of our recommendations, we believe such coordination best occurs when the President and Congress have a continuing dialogue, and in this case, have previously and regularly consulted both before and during the war.



THE SPECIFICS OF THE PROPOSED STATUTE



LEGISLATIVE PURPOSE

The preamble of the War Powers Consultation Act of 2009 contains “whereas clause” paragraphs that sum up the need for the statute:

- The War Powers Resolution of 1973 has not worked as intended, and it harms the country to have the centerpiece statute in this vital area of American law regularly and openly questioned or ignored;
- The American people want both the President and Congress involved in decisions to go to war, and involvement of both branches is important in building domestic understanding and political support;
- The country can and should replace the Resolution with a constructive and practical way in which the judgment of both the President and Congress can be brought to bear.

Section 1 of the statute makes clear that the War Powers Resolution of 1973 is repealed and replaced by a new statute, entitled the “War Powers Consultation Act of 2009.” We chose the word “Act” for our statute to avoid the confusion surrounding the term “Resolution.”

Section 2 expresses the basic purpose of the statute — i.e., to ensure that the collective judgment of Congress and the President will be brought to bear in deciding whether the United States should engage in significant armed conflict. The Section also recognizes that we cannot resolve the constitutional questions underlying the war powers debate. Section 2 thus states: “This Act is not meant to define, circumscribe, or enhance the constitutional war powers of either the Executive or Legislative Branches of government, and neither branch by supporting or complying with this Act shall 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 branch.”

DEFINITIONS

Section 3 of the War Powers Consultation Act of 2009 contains several important sets of definitions. Section 3(A) defines the scope of the statute, which reaches only “significant armed conflict,” and not minor hostilities, emergency defensive actions, or law enforcement activities where the President

should have license to act more unilaterally. We believe our use and definition of the term “significant armed conflict” is an improvement on the War Powers Resolution, which focused on the term “hostilities” and both inadequately defined it and swept too much into its net.

Our definition seeks to clarify what sorts of situations are covered by the statute and which are not. The draft statute does so in two ways. First, Section 3(A) defines “significant armed conflict” to include “(i) any conflict expressly authorized by Congress, or (ii) any combat operation by U.S. armed forces lasting more than a week or expected by the President to last more than a week.” Second, Section 3(B) specifically defines the sorts of operations that are not covered: “(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.”

It is obviously impossible to account for every conceivable armed conflict. But we want to provide more detail and definition in our draft statute than has existed before. We also want to involve Congress only in conflicts where consultation seems essential. To use some recent historical examples as a guide, President Reagan’s limited air strikes against Libya would not count as a “significant armed conflict.” The two Iraq Wars clearly would be considered “significant armed conflicts” (and of course Congress authorized both). The United States’ campaign in Bosnia in the 1990s would also count as a “significant armed conflict.”

The statute also accounts for the ways in which missions can change. What may begin as a “training exercise” under Section 3(B)(vi) could well transform into a “significant armed conflict,” as happened in Vietnam, requiring congressional consultation under Section 3(A)(ii) and Section 4(B).

Section 3(C) sets forth the membership of the “Joint Congressional Consultation Committee,” with whom the President is required to consult regarding “significant armed conflicts” and encouraged to consult regarding national security and foreign policy issues more generally. The make-up of this group comes largely from prior proposals to amend the War Powers Resolution,

particularly from those proposed by Senators John Warner, Robert Byrd, and Joseph Biden and Congressman Lee Hamilton. The Chairman and Vice Chairman of the group are identified in Section 3(D). Our country has established permanent joint congressional committees to address some of the most pressing and complicated concerns it faces, including the Joint Committee on Atomic Energy and Joint Committee on Taxation.

CONSULTATION AND REPORTING

Section 4 of our proposed statute prescribes when and how the President should or must confer with Congress regarding armed conflict. Section 4(A) is not mandatory, but encourages the President “to consult regularly with the Joint Congressional Consultation Committee regarding significant matters of foreign policy and national security.”

Section 4(B) is mandatory. It provides: “Before ordering the deployment of United States armed forces into significant armed conflict, the President shall consult with the Joint Congressional Consultation Committee.” The President need not obtain the consent of Congress to order such a deployment, but consultation is required. “To ‘consult,’ for purposes of this Act, the President shall provide an opportunity for the timely exchange of views regarding whether to engage in the significant armed conflict, and not merely notify the Joint Congressional Consultation Committee that the significant armed conflict is about to be initiated.” As mentioned above, the character of campaigns can change over times. Thus, Section 4(B) concludes: “If one of the military actions described in Section 3(B) of this Act becomes a significant armed conflict as defined in Section 3(A), the President shall similarly initiate consultation with the Joint Congressional Consultation Committee.”

Section 4(C) permits the President to consult with the group within three calendar days *after* significant armed conflict has begun, if the “need for secrecy or other emergent circumstances precludes consultation with the Joint Congressional Consultation Committee.” This carve-out addresses the belief of Presidents and their advisors that certain military operations are too sensitive to discuss in advance with a large group. While the testimony from several of our panelists has suggested leaks come just as often from the White House, we

thought it wise to preserve some discretion for the President in this area.

Section 4(F) requires that, “[f]or the duration of any significant armed conflict,” the President and Joint Congressional Consultation Committee meet and consult at least every two months. Like Section 4(A), Section 4(F) reflects the widely held view the President should be encouraged to consult regularly with Congress on national security and foreign policy matters. We have tried to strike a balance here, encouraging enough face-to-face meetings between the President and the Committee to allow for meaningful consultation, while not requiring so many meetings so as to prompt the President to ignore the requirement or send subordinates in his stead.

Sections 4(D), (E), and (G) are reporting requirements. Section 4(D) requires the President to submit a report to the Joint Congressional Consultation Committee “setting forth the circumstances necessitating the significant armed conflict, the objectives, and the estimated scope and duration of the conflict.” Pursuant to Section 4(D), such a report shall be submitted “[b]efore” the President “order[s] or approve[s] any significant armed conflict.” Although advance consultation is greatly preferred, Section 4(E) provides the report may be submitted “within three calendar days after the beginning of the significant armed conflict” if “the need for secrecy or other emergent circumstances” requires it.

Section 4(G) requires the President to make an annual report to the Joint Congressional Consultation Committee regarding ongoing uses of armed forces. Section 4(G) allows the President to submit this report on a classified basis, thereby enabling the Committee and the President to have franker discussions regarding significant armed conflicts and more limited uses of force in which the United States has engaged in the prior year. For similar reasons, and to avoid overlap with statutory schemes providing for congressional oversight of covert operations, the statute excludes covert operations from such reports.

Finally, Section 4(H) addresses a shortcoming several witnesses with whom we met identified in Congress’s ability to consult meaningfully with the President. It does so by providing the Joint Congressional Consultation Committee with a professional staff and access to the needed national security and intelligence information to help it engage on these issues.

CONGRESSIONAL APPROVAL AND DISAPPROVAL

Along with Section 4’s consultation requirement, Section 5 is the heart of the War Powers Consultation Act of 2009. Section 5(A) provides:

If Congress has not enacted a formal declaration of war or otherwise expressly authorized the commitment of United States armed forces in a significant armed conflict, then within 30 calendar days after the commitment of United States armed forces to the significant armed conflict, the Chairman and Vice Chairman of the Joint Congressional Consultation Committee shall introduce an identical concurrent resolution in the Senate and House of Representatives calling for [its] approval.

Section 5(B) provides for an expedited hearing and vote on the resolution. In passing such a resolution approving the conflict, Congress could attempt to limit its temporal or geographic scope, but we have not included a requirement that it do so in the statute.

Section 5(C) provides for what happens if the resolution of approval is defeated in one or both Houses of Congress: “If the concurrent resolution of approval is defeated, any Senator or Representative may file a joint resolution of disapproval of the significant armed conflict, and the joint resolution shall be highly privileged, shall become the pending business of both Houses, shall be voted on within five calendar days thereafter, and shall not be susceptible to intervening motions, except that each house may adjourn from day to day.” The next sentence of this provision reads: “The effect of this joint resolution shall not have the force of law unless presented to the President and either signed by the President or subsequently approved by Congress over the President’s veto, but Congress may specify the effect of the joint resolution of disapproval in the internal rules of each House of Congress.”

Taken together, Sections 5(A) through (C) advance several goals. First, the framers of the Constitution clearly intended Congress to play *some* role in deciding whether the United States should go to war, and the American people want that as well. Section 5 requires Congress to have a timely up-or-down vote regarding any significant armed conflict in which the United States engages. If Congress does not act, its failure will not tie the President’s hands, as Congress tried to do under the War Powers Resolution of 1973. Forcing a vote will also promote accountability and provide members of the Joint Congressional

Consultation Committee incentive actively to engage the President.

Second, our proposed statute makes clear that a joint resolution of disapproval will have the force of law only if presented to the President and signed, or if his or her veto is overridden. However, even if not approved by the President or if Congress is unable to override any veto, the new statute identifies other legitimate means at Congress's disposal to work its will. Section 5(C) recognizes that each House may specify, through its internal rules, the effect of the passage of any joint resolution of disapproval. Relying on their inherent internal rulemaking powers, both Houses of Congress may make rules providing, for example, that any new bill appropriating new funds for the armed conflict would be out of order. *Chadha* acknowledged Congress's power to bind itself through internal, parliamentary rulemaking:

One... "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses [is that] [e]ach House has the power to act alone in determining specified internal matters.... [T]his "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Relying on internal rulemaking is a somewhat novel concept, but Congress has employed such mechanisms — as well as the concurrent resolution, expedited consideration and voting, and point of order procedures — to aid decision-making and accomplish difficult objectives in other contexts, including in federal budget and trade statutes. *See, e.g.,* 2 U.S.C. § 636; 19 U.S.C. § 2192. Those advocating reform of the War Powers Resolution, including experts we interviewed, have recognized this power.

REMAINING PROVISIONS

Section 5(D) provides that Congress may always pass other bills — separate and apart from those contemplated by our proposed statute — to authorize, end, or otherwise govern a war. The constitutionality of each such statute would obviously depend upon its own terms.

Section 6 addresses the effect of treaty obligations that compel the United

States, for example, to provide aid to its treaty partners in armed conflicts. Our statute provides: “The provisions of this Act shall not be affected by any treaty obligations of the United States.” This treaty issue is unlikely to arise, in our view, as every operative treaty and international obligation we could locate contemplates that member states will follow their normal, internal constitutional processes in deciding whether to go to war.

Section 7, the final section of our draft statute, is a severability provision. It says if the courts were to deem any part of the statute unconstitutional, the remainder of the Act would not be affected thereby.

* * * * *

In sum, our goal in proposing this statute is not to resolve every aspect of the war powers debate — and, in particular, not to resolve the issue of how the Constitution assigns prerogatives to the two political branches. Instead, it is to propose a constructive, workable, politically acceptable legal framework that will best promote effective, cooperative, and deliberative action by both the President and Congress in matters of war. In shaping such a framework, we have tried to craft a statute that both Presidents and Congress could endorse.



THE PROPOSED STATUTE



WAR POWERS CONSULTATION ACT OF 2009

WHEREAS, the War Powers Resolution of 1973 has not worked as intended, and has added to the divisiveness and uncertainty that exists regarding the war powers of the President and Congress; and,

WHEREAS, the American people want both the President and Congress involved in the decision-making process when United States armed forces are committed to significant armed conflict, and such involvement of both branches is important in building domestic understanding and political support for doing so and ensuring the soundness of the resulting decision; and,

WHEREAS, past efforts to call upon the Judicial Branch to define the constitutional limits of the war powers of the Executive and Legislative Branches of government 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; and,

WHEREAS, it harms the country to have the War Powers Resolution of 1973, the centerpiece statute in this vital area of American law, regularly and openly questioned or ignored; and,

WHEREAS, the country needs to replace the War Powers Resolution of 1973 with a constructive and practical way in which the judgment of both the President and Congress can be brought to bear when deciding whether the United States should engage in significant armed conflict, 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.

NOW THEREFORE BE IT RESOLVED:

Section 1. Short Title.

The War Powers Resolution of 1973, Pub. L. No. 93-148, is hereby repealed. This Act shall be cited as the War Powers Consultation Act of 2009.

Section 2. Purpose.

The purpose of this Act is to describe a constructive and practical way in which the judgment of both the President and Congress can be brought to bear when deciding whether the United States should engage in significant armed

conflict. This Act is not meant to define, circumscribe, or enhance the constitutional war powers of either the Executive or Legislative Branches of government, and neither branch by supporting or complying with this Act shall 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 branch.

Section 3. Definitions.

3(A). For purposes of this Act, “significant armed conflict” means (i) any conflict expressly authorized by Congress, or (ii) any combat operation by U.S. armed forces lasting more than a week or expected by the President to last more than a week.

3(B). The term “significant armed conflict” shall not include any commitment of United States armed forces by the President for the following 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.

3(C). The “Joint Congressional Consultation Committee” consists of:

- (i) The Speaker of the U.S. House of Representatives and the Majority Leader of the Senate;
- (ii) The Minority Leaders of the House of Representatives and the Senate;
- (iii) The Chairman and Ranking Minority Members of each of the following Committees of the House of Representatives:
 - (a) The Committee on Foreign Affairs,
 - (b) The Committee on Armed Services,
 - (c) The Permanent Select Committee on Intelligence, and
 - (d) The Committee on Appropriations.
- (iv) The Chairman and Ranking Minority Members of each of the following Committees of the Senate:
 - (a) The Committee on Foreign Relations,
 - (b) The Committee on Armed Services,

- (c) The Select Committee on Intelligence, and
- (d) The Committee on Appropriations.

3(D). The Chairmanship and Vice Chairmanship of the Joint Congressional Consultation Committee shall alternate between the Speaker of the House of Representatives and the Majority Leader of the Senate, with the former serving as the Chairman in each odd-numbered Congress and the latter serving as the Chairman in each even-numbered Congress.

Section 4. Consultation and Reporting.

4(A). The President is encouraged to consult regularly with the Joint Congressional Consultation Committee regarding significant matters of foreign policy and national security.

4(B). Before ordering the deployment of United States armed forces into significant armed conflict, the President shall consult with the Joint Congressional Consultation Committee. To “consult,” for purposes of this Act, the President shall provide an opportunity for the timely exchange of views regarding whether to engage in the significant armed conflict, and not merely notify the Joint Congressional Consultation Committee that the significant armed conflict is about to be initiated. If one of the military actions described in Section 3(B) of this Act becomes a significant armed conflict as defined in Section 3(A), the President shall similarly initiate consultation with the Joint Congressional Consultation Committee.

4(C). If the need for secrecy or other emergent circumstances precludes consultation with the Joint Congressional Consultation Committee before significant armed conflict is ordered or begins, the President shall consult with the Joint Congressional Consultation Committee within three calendar days after the beginning of the significant armed conflict.

4(D). Before ordering or approving any significant armed conflict, the President shall submit a classified report, in writing, to the Joint Congressional Consultation Committee setting forth the circumstances necessitating the significant armed conflict, the objectives, and the estimated scope and duration of the conflict.

4(E). If the need for secrecy or other emergent circumstances precludes providing such a report before significant armed conflict is ordered or begins, such a report shall be provided to the Joint Congressional Consultation

Committee within three calendar days after the beginning of the significant armed conflict.

4(F). For the duration of any significant armed conflict, the President shall consult with the Joint Congressional Consultation Committee at least every two months.

4(G). On the first Monday of April of each year, the President shall submit a classified written report to the Joint Congressional Consultation Committee describing (i) all significant armed conflicts in which the United States has been engaged during the previous year; (ii) all other operations, as described in Section 3(B) of this Act, other than covert operations, in which the United States was engaged in the same time period.

4(H). Congress shall employ a permanent, bi-partisan joint professional staff to facilitate the work of the Joint Congressional Consultation Committee under the direction of its Chairman and Vice Chairman. The members of the Joint Congressional Consultation Committee and the professional staff shall be provided all relevant national security and intelligence information.

Section 5. Congressional Approval or Disapproval.

5(A). If Congress has not enacted a formal declaration of war or otherwise expressly authorized the commitment of United States armed forces in a significant armed conflict, then within 30 calendar days after the commitment of United States armed forces to the significant armed conflict, the Chairman and Vice Chairman of the Joint Congressional Consultation Committee shall introduce an identical concurrent resolution in the Senate and House of Representatives calling for approval of the significant armed conflict.

5(B). Such a concurrent resolution shall be referred to the House of Representatives Committee on Foreign Affairs and Senate Committee on Foreign Relations and the Committees shall report on the concurrent resolution within seven calendar days. When the Committees so report, the concurrent resolution may be called up by any Senator or Representative, shall be highly privileged, shall become the pending business of both Houses, shall be voted on within 5 calendar days thereafter, and shall not be susceptible to intervening motions, except that each house may adjourn from day to day.

5(C). If the concurrent resolution of approval is defeated, any Senator or Representative may file a joint resolution of disapproval of the significant

armed conflict, and the joint resolution shall be highly privileged, shall become the pending business of both Houses, shall be voted on within five calendar days thereafter, and shall not be susceptible to intervening motions, except that each house may adjourn from day to day. The effect of the passage of this joint resolution shall not have the force of law unless presented to the President and either signed by the President or subsequently approved by Congress over the President's veto, but Congress may specify the effect of the joint resolution of disapproval in the internal rules of each House of Congress.

5(D). Nothing in this Section 5 alters the right of any member of Congress to introduce a measure calling for the approval, disapproval, expansion, narrowing, or ending of a significant armed conflict.

Section 6. Treaties.

The provisions of this Act shall not be affected by any treaty obligations of the United States.

Section 7. Severability.

If any provision of this Act is held invalid, the remainder of the Act shall not be affected thereby.



LETTER
FROM THE CO-DIRECTORS

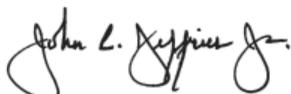


For more than two centuries, the war powers have bedeviled a host of Presidents, Congresses, and, at times, the courts. Contentious debates about the war powers have imposed great costs on both the credibility of our government and the strength of our national security. This Commission confronted these challenges, and through the course of more than a year of meetings and deliberation considering a rich range of insight and views, it has crafted a framework for consensus.

The Commission has not only studied the war powers; its members have lived them. Its Co-Chairs, Secretary of State James A. Baker, III (Republican) and Secretary of State Warren Christopher (Democrat), have forged consensus in matters of war and peace at the highest levels of American government. The Commission's members, indeed, have been centrally involved in war powers decision-making for a generation.

In formulating its recommendations, the Commission grappled with some of the most unsettled issues in American constitutional law. The Commission listened to the counsel of more than thirty experts of different parties and perspectives, including members of the U.S. Senate and House of Representatives, Executive Branch officials, scholars, attorneys, and journalists. Throughout its deliberations, the Commission engaged this divisive debate while maintaining a spirit of nonpartisan intellectual rigor. Moreover, it steadfastly pursued a practical course that future Presidents and Congresses would do well to consider. The Commission's work under the aegis of the Miller Center of Public Affairs is a testament to Thomas Jefferson's vision of the University of Virginia's public service mission.

Jefferson once noted soon after a politically charged period of his day that there is "a strength of character in our nation which augurs well for the duration of our Republic; and I am much better satisfied now of its stability than I was before it was tried." As the Deans of the two law schools Jefferson founded, we were privileged to serve this Commission, as it sought consensus in the tumultuous debate surrounding the war powers — a debate that has endured since the country's birth. Now we commend to your attention the Commission's recommendations as a powerful catalyst for constructive change.



John C. Jeffries, Jr.



W. Taylor Reveley, III



APPENDICES

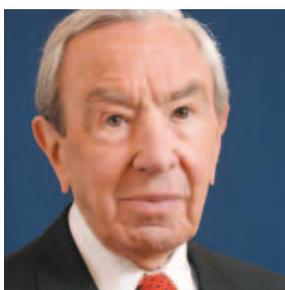


BIOGRAPHIES OF COMMISSION MEMBERS AND ADVISORS

COMMISSION CO-CHAIRS



James A. Baker, III served as the 61st Secretary of State under President George H.W. Bush from 1989 to 1992, and as President Bush's White House Chief of Staff from 1992 to 1993. Mr. Baker, a 1991 recipient of the Presidential Medal of Freedom, served during President Ronald Reagan's administration as Chief of Staff from 1981 to 1985 and as Secretary of the Treasury from 1985 to 1988. Mr. Baker is the Honorary Chairman of the James A. Baker III Institute for Public Policy at Rice University and Senior Partner at the law firm Baker Botts LLP. Mr. Baker and former U.S. Congressman Lee H. Hamilton served as Co-Chairs of the Iraq Study Group in 2006. Mr. Baker and former President Jimmy Carter served as Co-Chairs of the Commission on Federal Election Reform in 2005. From 1997 to 2004, Mr. Baker served as the Personal Envoy of United Nations Secretary-General Kofi Annan to seek a political solution to the conflict over Western Sahara. In 2003, Mr. Baker was appointed Special Presidential Envoy for President George W. Bush on the issue of Iraqi debt. He earned his bachelor's degree from Princeton University and his law degree from the University of Texas School of Law.



Warren Christopher served as the 63rd Secretary of State under President William J. Clinton from 1993 to 1997. He served as the Deputy Attorney General of the United States from 1967 to 1969, and as the Deputy Secretary of State of the United States from 1977 to 1981. A 1981 recipient of the Presidential Medal of Freedom, Mr. Christopher is Senior Partner at the law firm of O'Melveny & Myers LLP, where he was Chairman from 1982 to 1992. Mr. Christopher served as Director of the Presidential Transition process for President Clinton, President of the Board of Trustees of Stanford University,

Chairman of the Board of Trustees of the Carnegie Corporation of New York, and Director and Vice Chairman of the Council on Foreign Relations. Mr. Christopher is currently Co-Chair of the Board of Directors of the Pacific Council on International Policy. He earned his bachelor's degree from the University of Southern California. After serving as an ensign in the Navy in World War II in the Pacific Theater, he earned his law degree from Stanford Law School, where he was President and a founder of the *Stanford Law Review* and named to the Order of the Coif. After law school, Mr. Christopher served as law clerk to Justice William O. Douglas of the U.S. Supreme Court.

COMMISSION MEMBERS



Slade Gorton represented Washington in the United States Senate from 1981 to 1987 and 1989 to 2001. There he served as a member on the Committees on the Budget, Appropriations, Commerce, Science & Transportation, and Energy & Natural Resources. He was Washington's Attorney General from 1969 to 1981, and served as a state representative from 1958 to 1969. After leaving the Senate, Mr. Gorton joined Preston Gates Ellis LLP, where he is of counsel to the firm now known as K&L Gates. He has served on several commissions, including the National Commission on Terrorist Attacks Upon the United States (9/11 Commission), the Markle Foundation's Task Force on National Security in the Information Age, and the Miller Center's National Commission on Federal Election Reform. Mr. Gorton is a graduate of Dartmouth College and Columbia University School of Law.

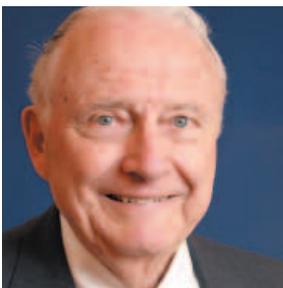


Lee H. Hamilton is President and Director of the Woodrow Wilson International Center for Scholars, and Director of Indiana University's Center on Congress. During his tenure representing Indiana's Ninth District in Congress from 1965 to 1999, he served as Chairman and Ranking Member of the House Committee on Foreign Affairs (now the

Committee on International Relations). He was also Chairman of the Permanent Select Committee on Intelligence, the Select Committee to Investigate Covert Arms Transactions with Iran, the Joint Economic Committee, and the Joint Committee on the Organization of Congress. Mr. Hamilton was Vice Chair of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission) and Co-Chair of the Iraq Study Group. He is a graduate of DePauw University and Indiana University Law School, and a member of the President's Foreign Intelligence Advisory Board.



Carla A. Hills was U.S. Trade Representative under President George H.W. Bush from 1989 to 1993. She was Secretary of Housing and Urban Development under President Gerald Ford from 1975 to 1977, and also served in the Ford administration as Assistant Attorney General in the Civil Division of the U.S. Department of Justice. She is Co-Chair of the Council on Foreign Relations, Board Chair of the National Committee on U.S.-China Relations and Vice Chair of the Inter-American Dialogue. Her other boards and councils include the Executive Committee of the Institute for International Economics, the Trilateral Commission, and the Center for Strategic & International Studies Advisory Board. Mrs. Hills received her bachelor's degree from Stanford University and her law degree from Yale University. She is Chair and Chief Executive Officer of Hills & Company, an international consulting firm.



John O. Marsh, Jr., was Secretary of the Army under President Ronald Reagan from 1981 to 1989 and represented Virginia's Seventh District in Congress from 1963 to 1971, serving as a member of the Committee on Appropriations. He was named National Security Advisor for Vice President Gerald Ford in 1974, and served as Counselor to the President until 1977. From 1999 to 2004, Mr. Marsh served as a member of the Advisory Panel to Assess Domestic Response Capabilities for Terrorism Involving Weapons of Mass Destruction. After he retired from public service, Mr. Marsh returned to pri-

vate practice, while also serving as a Distinguished Adjunct Professor of Law at George Mason University's School of Law and working with the Marsh Institute for Government and Public Policy at Shenandoah University. He holds a law degree from Washington and Lee University.



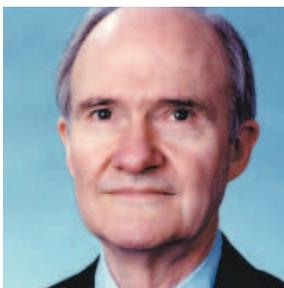
Edwin Meese, III was the U.S. Attorney General under President Ronald Reagan from 1985 to 1988 and a Counselor to the President from 1981 to 1985. As Attorney General, he chaired the Domestic Policy Council and the National Drug Policy Board and was a member of the National Security Council. He served previously as Director of the Center for Criminal Justice Policy and Management and a Professor of Law at the University of San Diego, and as the Executive Assistant and Chief of Staff to Ronald Reagan's gubernatorial staff. A graduate of Yale University and the University of California, Berkeley School of Law (Boalt Hall), Mr. Meese is Chairman of the Center for Legal and Judicial Studies and a Ronald Reagan Distinguished Fellow in Public Policy at the Heritage Foundation, a Distinguished Visiting Fellow at the Hoover Institution, and served as a member of the Iraq Study Group.



Abner J. Mikva was White House Counsel under President William J. Clinton from 1994 to 1995. From 1979 to 1994, he served on the United States Court of Appeals for the District of Columbia Circuit, where he presided as Chief Judge for the final three years of his tenure. After serving as a member of the Illinois House of Representatives from 1956 to 1966, Mr. Mikva represented Illinois for five terms in the U.S. Congress, where he was a member of the Committees on Ways and Means and the Judiciary. A graduate of the University of Chicago School of Law and the former editor-in-chief of its Law Review, Mr. Mikva returned to his alma mater as a Schwartz Lecturer and Senior Director of the Mandel Legal Aid Clinic. He is a founding member of the American Constitution Society and presently engages in arbitration and mediation work with JAMS, a national dispute resolution firm.



J. Paul Reason is a Four Star Admiral (retired). He served as Commander in Chief of the U.S. Atlantic Fleet of the U.S. Navy from 1996 to 1999, and commanded an armada of more than 185 ships and submarines, 1,356 aircraft, 18 shore bases, and 121,350 Navy and Marine Corps personnel. ADM Reason became Deputy Chief of Naval Operations in 1994 after nearly thirty years in the U.S. Navy serving in a variety of posts including Commander of the Naval Surface Force of the U.S. Atlantic Fleet from 1991 to 1994, and Commander of Cruiser-Destroyer Group One from 1988-1991. ADM Reason earned his bachelor's degree from the United States Naval Academy and a master's degree from the Naval Postgraduate School. He retired as Vice Chairman of Metro Machine Corporation in 2006 and presently serves as a member of the Naval Studies Board and the Boards of Directors of Amgen, Inc., Norfolk Southern, and Todd Shipyards Corp.



Brent Scowcroft was National Security Advisor under President Gerald R. Ford from 1975 to 1977 and under President George H. W. Bush from 1989 to 1993. He previously served as a Lieutenant General in the United States Air Force. Mr. Scowcroft also served as Military Assistant to President Richard Nixon and as Deputy National Security Advisor. He was Chairman of the Foreign Intelligence Advisory Board under President George W. Bush from 2001 to 2005. He is the founder and President of the Forum for International Policy, a member of the Council on Foreign Relations, and President of the Scowcroft Group, Inc., an international business consulting firm. Mr. Scowcroft earned his undergraduate degree from the United States Military Academy at West Point, where he also served as Professor of Russian History, and received his master's and doctorate degrees from Columbia University.



Anne-Marie Slaughter is the Dean of the Woodrow Wilson School of Public and International Affairs and the Bert G. Kerstetter '66 University Professor of Politics and International Affairs at Princeton University. She joined Princeton in 2002 from the faculty of Harvard Law School, where she was the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law. She is the former President of the American Society of International Law and a Fellow of the American Academy of Arts and Sciences. Ms. Slaughter serves on the boards of the Council on Foreign Relations, the New America Foundation, and the Center for the Study of the Presidency, and is a member of Citigroup's Economic and Political Strategies Advisory Group. She received her master's and doctorate degrees from Oxford University, a law degree from Harvard Law School, and a bachelor's degree from Princeton University.



Strobe Talbott is President of the Brookings Institution. He served in the State Department under President William J. Clinton from 1993 to 2001, first as Ambassador-at-large and special adviser to the Secretary of State for the newly independent states of the former Soviet Union, then as Deputy Secretary of State. Prior to joining Brookings, he was the founding director of the Yale Center for the Study of Globalization. Before entering government service, Mr. Talbott spent 21 years as a reporter, Washington bureau chief, foreign affairs columnist, and editor-at-large of *Time* magazine. He holds an M.Litt. degree from Oxford University and bachelor's and master's degrees from Yale University. He has served as a Fellow of the Yale Corporation, a Director of the Council on Foreign Relations, on the North American Executive Committee of the Trilateral Commission, and as a Trustee of the Carnegie Endowment for International Peace.

EX OFFICIO COMMISSION MEMBERS



John T. Casteen, III, is President of the University of Virginia and George M. Kaufman Presidential Professor of English. Prior to joining the University in 1990, he served as President of the University of Connecticut from 1985 to 1990 and as Virginia's Secretary of Education from 1982 to 1985. Mr. Casteen has served as Chair of the Association of American Universities, as Chair of the College Entrance Examination Board, and as President of the Southern Association of Colleges and Schools. He also has been a director of the American Council on Education, a member of the Board of the National Collegiate Athletic Association, and a commissioner of the Education Commission of the States. He serves on the Audit Committee of the Board of Directors of Wachovia Corporation. Mr. Casteen holds his bachelor's, master's, and doctoral degrees in English from the University of Virginia.



David W. Leebron is President of Rice University and a Professor of Political Science. He joined Rice from Columbia Law School, where he served as Dean and Lucy G. Moses Professor of Law. Prior to joining Columbia, he was Director of the International Legal Studies Program of the New York University School of Law, where he was a member of the faculty. He has served as a member of the Commission for Federal Election Reform, the Council on Foreign Relations, the American Society of International Law, the Association of the Bar of the City of New York, the Board of Directors of the IMAX Corporation, and the Editorial Board of Foundation Press. Mr. Leebron earned his bachelor's degree from Harvard College and his law degree from Harvard Law School, where he was president of the *Harvard Law Review*.

COMMISSION CO-DIRECTORS



John C. Jeffries, Jr., is the Emerson Spies Professor of Law at the University of Virginia School of Law and served as Dean of the Law School from 2001 to 2008. He joined the Virginia law faculty in 1975 and subsequently served as Academic Associate Dean and acting dean before becoming Dean in 2001. He was the John V. Ray Research Professor from 1989 to 1991, the Horace W. Goldsmith Research Professor from 1992 to 1995, and the William L. Matheson and Robert M. Morgenthau Distinguished Professor from 1996 to 2001. The author of numerous publications on civil rights, constitutional law, federal courts, and criminal law, Mr. Jeffries has been a Visiting Professor of Law at the University of Southern California and at Yale and Stanford Universities. He earned his law degree from Virginia and his bachelor's degree from Yale. After graduation, Mr. Jeffries clerked for Justice Lewis F. Powell, Jr. of the U.S. Supreme Court from 1973 to 1974.



W. Taylor Reveley, III, is Interim President of the College of William & Mary and holds the John Stewart Bryan Professorship of Jurisprudence. He served as Dean of William & Mary School of Law from 1998 to 2008. Before joining the faculty in 1998, he practiced law at Hunton & Williams LLP for 28 years, serving as Managing Partner for nine years and head of its Energy and Telecommunications team. Mr. Reveley clerked for Justice William J. Brennan, Jr. of the U.S. Supreme Court from 1969 to 1970 and studied the war powers as a Fellow of the Woodrow Wilson International Center for Scholars and an International Affairs Fellow of the Council on Foreign Relations. He is a trustee emeritus of Princeton University and a current trustee of the Andrew W. Mellon Foundation and the Carnegie Endowment for International Peace. Mr. Reveley earned his bachelor's degree from Princeton University and his law degree from the University of Virginia School of Law.

HISTORICAL ADVISOR TO THE COMMISSION



Doris Kearns Goodwin is a presidential historian and Pulitzer Prize-winning author of *No Ordinary Time: Franklin and Eleanor Roosevelt: The Home Front in World War II*. She also is author of the national bestsellers *Wait Till Next Year*, *The Fitzgeralds and the Kennedys*, and *Lyndon Johnson and the American Dream*. From 1968 to 1969, Ms. Goodwin worked as an assistant to President Lyndon Johnson and later assisted him on the preparation of his memoirs while also serving as a Professor of Government at Harvard University. Ms. Goodwin recently published *Team of Rivals: The Political Genius of Abraham Lincoln*, which received the Lincoln Prize and was a *New York Times* bestseller. Ms. Goodwin currently serves as a News Analyst for NBC News. She received her bachelor's degree from Colby College and a Ph.D in Government at Harvard University, where she was a Woodrow Wilson Fellow.

DIRECTOR OF THE MILLER CENTER



Gerald L. Baliles is the Director of the Miller Center and served as Governor of Virginia from 1986 to 1990. Prior to his election as governor, he was the Attorney General of Virginia from 1982 to 1985 and a member of the Virginia House of Delegates from 1976 to 1982. After leaving public office, he entered private law practice as a partner in the firm of Hunton & Williams LLP, where his practice specialties included aviation, trade, and transportation. Formerly the Chairman of the Board of PBS, Governor Baliles also chaired the Commission to Ensure a Strong Competitive Airline Industry for the President and Congress, the Commission on the Academic Presidency, and the Task Force on the State of the Presidency in Higher Education. He is a member of the Boards of Directors of the Norfolk Southern Corporation and the Shenandoah Life Insurance Company, and is a graduate of Wesleyan University and the University of Virginia School of Law. In addition, he holds eleven honorary degrees.

COMMISSION STAFF

COMMISSION STAFF DIRECTOR

Andrew J. Dubill is the Staff Director for the Commission. He previously was an attorney with Kirkpatrick & Lockhart, where his practice centered on securities enforcement and litigation. He is a graduate of Princeton and the University of Virginia School of Law.

STAFF TO SECRETARIES BAKER AND CHRISTOPHER

John B. Williams is the Policy Assistant to Secretary Baker. He also served as Special Assistant to the Iraq Study Group. Mr. Williams joined Baker Botts after a long career at the *Houston Chronicle*, where he was a political columnist and reporter.

Matthew T. Kline is serving as Counsel to Secretary Christopher and is a partner at O'Melveny & Myers. He received his undergraduate degree from the University of California, Santa Barbara, and is a graduate of University of California, Berkeley School of Law (Boalt Hall).

MILLER CENTER LEADERSHIP AND STAFF

W. Taylor Reveley, IV, is the Miller Center's Assistant Director for Policy Programs and Planning, where he oversees the Center's coordinated operations. He previously was an attorney with Hunton & Williams. He is a graduate of Princeton, Union Seminary, and the University of Virginia School of Law.

Lisa M. Todorovich is the Miller Center's Assistant Director for Communications, having joined the Center after more than 10 years as a journalist for washingtonpost.com and ABC News. She is a graduate of Northwestern University.

Juliana E. Bush is the Policy and Planning Analyst for the Commission. She received her bachelor's degree from the University of Virginia. Ms. Bush previously worked as a client account manager for CSI Capital Management.

EXPERTS APPEARING BEFORE THE COMMISSION

As part of its study, the Commission invited a wide range of experts to offer their views on the war powers. Those who were able to appear before the Commission are listed below. The biographical information reflected here is current as of the time of their appearances.

- John B. Bellinger, III, Legal Adviser to the Department of State; Senior Associate Counsel to the President and Legal Adviser to the National Security Council (2001-2005)
- Samuel R. Berger, National Security Advisor (1997-2001); Deputy National Security Advisor (1993-1997)
- Admiral Dennis Blair, Consultant, Institute for Defense Analyses; former Commander in Chief, U.S. Pacific Command (1999-2002)
- Douglas G. Brinkley, Editor, *The Reagan Diaries*; Author of *The Unfinished Presidency*; Co-Author of *Rise to Globalism: American Foreign Policy since 1938*; Professor of History and Baker Institute Fellow, Rice University (2007)
- Walter E. Dellinger, III, Acting Solicitor General (1996-1997); Douglas B. Maggs Professor of Law, Duke University; Partner, O'Melveny & Myers LLP
- John M. Deutch, Director of Central Intelligence (1995-1996); Deputy Secretary of Defense (1994-1995); Institute Professor, Massachusetts Institute of Technology
- Viet D. Dinh, Assistant Attorney General for Legal Policy (2001-2003); Professor of Law, Georgetown University; Founder and Principal, Bancroft Associates
- Noah Feldman, Professor of Law, Harvard Law School
- Louis Fisher, Special Assistant to the Law Librarian, Library of Congress
- Leslie H. Gelb, Former National Security Correspondent, *The New York Times* (1981-1993)

- John Gibbons, Director, Gibbons P.C.; former Chief Judge, U.S. Court of Appeals for the Third Circuit
- Michael Glennon, Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University
- David M. Golove, Hiller Family Foundation Professor of Law, New York University
- Robert Kaplan, National Correspondent, *The Atlantic Monthly*; Distinguished Visiting Professor in National Security, United States Naval Academy
- David M. Kennedy, Donald J. McLachlan Professor of History, Stanford University
- Harold H. Koh, Dean and Gerard C. And Bernice Latrobe Smith Professor of International Law, Yale Law School
- Larry Kramer, Richard E. Lang Professor of Law and Dean, Stanford Law School
- Jeffrey A. Lamken, Partner, Baker Botts LLP
- James A. Leach, Member of Congress from Iowa (1977-2007); John W. Weinberg Professor of Public and International Affairs, Princeton University
- Senator Carl Levin, Senator from Michigan (1978- present); Chairman, Armed Services Committee; Member, Committee on Homeland Security and Governmental Affairs (Chairman, Permanent Subcommittee on Investigations) and Select Committee on Intelligence
- Jenny S. Martinez, Associate Professor of Law and Justin M. Roach, Jr., Faculty Scholar, Stanford Law School
- Frank M. Newport, Editor-in-Chief, The Gallup Poll; Vice President, The Gallup Organization and The National Council of Public Polls
- John D. Podesta, White House Chief of Staff (1998-2001); Assistant to the President and Deputy Chief of Staff (1997-1998); President, Center for American Progress
- Michael D. Ramsey, Professor, University of San Diego School of Law
- David E. Sanger, Chief Washington Correspondent, *The New York Times*

- John L. Seigenthaler, Sr. Author of *James K. Polk, 1845-1849*; Former Editor, Publisher, and Chairman of *The Tennessean*; Advisor to Robert F. Kennedy
- David E. Skaggs, Member of Congress from Colorado (1987-1999); Executive Director, Colorado Department of High Education and Commission on Higher Education
- Abraham D. Sofaer, Senior Fellow and George P. Shultz Distinguished Scholar, Hoover Institution; Legal Advisor to the Department of State (1985-1990)
- William O. Studeman, Deputy Director of Central Intelligence (1992-1995); Director, NSA (1999-1992); Past Vice President, Intelligence & Information Superiority, Northrop Grumman
- John H. Sununu, White House Chief of Staff (1989-1991); Governor of New Hampshire (1983-1989); President, JHS Associates, Inc.
- William H. Taft, IV, Legal Advisor to the Department of State (2001-2005); Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP
- William M. Treanor, Dean and Professor of Law, Fordham University School of Law; Deputy Assistant Attorney General, Office of Legal Counsel (1998-2001)
- Patricia M. Wald, Former Chief Judge, U.S. Court of Appeals for the District of Columbia Circuit (1988-1991)
- John W. Warner, Jr., Senator from Virginia (1979-present); Member, Senate Armed Services and Intelligence Committees; Secretary of the Navy (1972-1974)
- William H. Webster, Former Director of Central Intelligence (1987-1991); Former Director of the FBI (1978-1987); Former Judge, U.S. Court of Appeals for the Eighth Circuit (1973-1978)
- Allen S. Weiner, Senior Lecturer in Law, Stanford Law School; Counselor for Legal Affairs at the Hague, U.S. State Department (1998-2001)
- Bob Woodward, Assistant Managing Editor, *The Washington Post*

MEETINGS OF THE COMMISSION

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|--------------------------|--|
| April 4, 2007 | ▪ Washington, DC |
| May 30, 2007 | ▪ Washington, DC |
| July 10, 2007 | ▪ Washington, DC |
| October 25, 2007 | ▪ Washington, DC |
| November 28, 2007 | ▪ James A. Baker III Institute for Public Policy
Rice University, Houston, TX |
| January 9, 2008 | ▪ Stanford Law School
Stanford University, Stanford, CA |
| April 29, 2008 | ▪ Miller Center of Public Affairs
University of Virginia, Charlottesville, VA |

LIST OF BACKGROUND MATERIALS AND BIBLIOGRAPHY AVAILABLE ONLINE

www.millercenter.org/warpowers

1. An Overview of Proposals to Reform the War Powers Resolution of 1973
2. War Powers Consultation Committee Proposals at-a-Glance
3. An Overview of Facts Relevant to War Powers Issues in Selected Conflicts since World War II
4. A War Powers Primer
5. Federal Courts and the War Powers
6. Polling Information concerning War Powers Matters
7. Text of the War Powers Resolution of 1973
8. Text of the War Powers Consultation Act of 2009
9. United States Constitution (with war powers provisions highlighted)
10. A War Powers Bibliography

PARTNERING INSTITUTIONS

- **James A. Baker III Institute for Public Policy** at Rice University has established itself as one of the leading nonpartisan public policy think tanks in the country, researching domestic and foreign policy issues with the goal of bridging the gap between the theory and the practice of public policy. The Baker Institute has a strong track record of achievement based on the work of Rice University faculty and the Institute's endowed fellows and scholars and collaboration with experts from academia, government, the media, business, and nongovernmental and private organizations. In conjunction with its more than 20 programs — including its research, speaker series, events, and special projects — the Institute attracts many domestic and foreign leaders who provide their views and insights on key issues.
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and teaching on such issues as nuclear proliferation, chemical and bioterrorism, democracy and the rule of law, conflict prevention and peacekeeping, international health policy and infectious diseases, and the political economy and regional dynamics of Asia.

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NATIONAL WAR POWERS COMMISSION



The Miller Center of Public Affairs

at the University of Virginia convened the National War Powers Commission in 2007. Over 2007 and 2008 the Commission met together in person seven times, in Washington, DC and at Rice University, Stanford University, and the University of Virginia.

The Miller Center of Public Affairs, founded in 1975, is a national nonpartisan center to research, reflect, and report on American government. In 2006, former Virginia governor and PBS chairman Gerald L. Baliles became the Center's Director.

The Miller Center's more than 50 faculty and staff include two Bancroft Prize winners, and its programs range from analysis of the secret White House tapes of the 60s and 70s, to oral history study of each administration from Carter forward, to its National Discussion and Debate Series in partnership with MacNeil/Lehrer Productions, to its tradition of national commissions. The National War Powers Commission is the tenth national commission the Center has convened during the past quarter century. The Miller Center's most recent prior national commission, led by Presidents Gerald Ford and Jimmy Carter following the 2000 election, addressed federal election reform.

Miller Center of Public Affairs

2201 Old Ivy Road
P.O. Box 400406
Charlottesville, VA 22904

434-924-7236 VOICE
434-982-2739 FAX
www.millercenter.org



UNITED STATES CONSTITUTION

ARTICLE I

“All legislative Powers herein granted shall be vested in a Congress of the United States...”

“The Congress shall have Power To ... declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water...”

ARTICLE II

“The executive Power shall be vested in a President of the United States of America.”

“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States...”