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WAR POWERS IN THE 21ST CENTURY

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BEFORE THE

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CONTENTS

WAR POWERS IN THE 21ST CENTURY

TUESDAY, APRIL 28, 2009

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:05 a.m., in room SD–419, Dirksen Senate Office Building, Hon. John F. Kerry (chairman of the committee) presiding.

Present: Senators Kerry, Feingold, Kaufman, Lugar, Corker, and Barrasso.

OPENING STATEMENT OF HON. JOHN F. KERRY, U.S. SENATOR FROM MASSACHUSETTS

The CHAIRMAN. The hearing will come to order.

Today we have the privilege of hosting three of our Nation's most distinguished statesmen, and they are here to discuss one of the most vital questions that comes before our democracy, the question of how America goes to war.

Secretaries Baker and Christopher and Chairman Hamilton, we're very grateful to you for joining us today, and we're very grateful to you for the work you've put into trying to find a practical solution to this complex problem that has dogged us for decades now. Your experience in government and your firsthand knowledge of this issue and its application make your testimony before this committee today particularly valuable. We look forward very much to hearing your views.

Let me just share a couple of quick thoughts. We all understand that what brings us here is the fact that there's a fundamental tension in the way that America decides to go to war. The President is Commander in Chief of the Armed Forces, while Congress has the power to declare war. But, how those constitutional powers interact has been the subject of considerable debate these last years.

Uncertainty over Congress's role in two successive wars—Korea and then Vietnam—led to the passage of the War Powers Resolution in 1973. I think it's fair to say it was significantly a reaction to America's longest war, one that pulled the country apart and left many questions about responsibilities and Presidential decisions.

The resolution, which today's witnesses recommend repealing, has been controversial ever since it was enacted over President Nixon's veto. The 1973 resolution represented Congress's best effort to try to clarify and make concrete its role in the decision to go to war. That resolution required that the President consult with Congress prior to, and on a regular basis after, U.S. forces were

deployed. More controversially, the law required that the President withdraw our forces within 60 days of their deployment into combat, absent specific congressional authorization or an extension of the deadline by Congress.

This approach raised important questions. Some believe that imposition of a deadline for withdrawal inappropriately constrained the Executive and projected uncertainty to enemies. Others more sympathetic to legislative power in the decisionmaking argued that allowing the President to go to war for 60 days or longer without authorization is an indefensible abdication of Congress's prerogative under the Constitution; a prerogative of Congress to declare war.

What is clear to all is that the 1973 War Powers Resolution has simply not functioned as intended. Presidents since Nixon have questioned the statute's constitutionality. None have complied by filing a report that would trigger a 60-day deadline for congressional reauthorization.

Over the years, there have been various efforts within Congress, including by this committee, to amend the War Powers Resolution. Nonetheless, the fundamental issue has remained unresolved.

The National War Powers Commission consciously avoided trying to resolve the basic constitutional debate, and also avoided trying to define the contours of each branch's powers. And I must say, I respect the pragmatism of that approach.

The Commission's proposal is, instead, the War Powers Consultation Act of 2009. It would repeal the 1973 War Powers Resolution and provide a new framework for interaction between Congress and the President. The proposed statute would require that the President consult with a newly formed Joint Congressional Committee prior to ordering the deployment of U.S. Armed Forces into, "significant armed conflict" or, under certain circumstances, within 3 days of deployment. The statute would also create a mechanism to ensure that both Houses of Congress vote on a particular military action within 30 days of that deployment.

In their work on this issue, our witnesses today have struggled to grapple with the exigencies of a global struggle against terrorism and the changing nature of America's military involvements, which today obviously look very different than they did in 1973. As one would expect of an effort from a group of statesmen who have tackled some of the world's most intractable conflicts, this is a thoughtful and a formidable effort, and it is very much worthy of this committee's further, and the Congress's further, consideration.

I'm sure that our witnesses will go into more detail and specifics of their proposal, but, again, let me just thank each of them for their contribution, not just to this particular work, but to our country's work throughout their public service.

And it's my pleasure to turn to the ranking member, Senator Lugar.

OPENING STATEMENT OF HON. RICHARD G. LUGAR, U.S. SENATOR FROM INDIANA

Senator LUGAR. Well, thank you very much, Mr. Chairman.

As you mentioned, the committee meets today to discuss important questions about the respective roles of the President and the

Congress in decisions to use force. And we're really very fortunate to have very dear friends with us today, Secretary of State Jim Baker and Warren Christopher, and my colleague in the Indiana delegation for so many years, Congressman Lee Hamilton. Each of them has unique insights into these issues, both from experience in government, and from their study as members of the National War Powers Commission. We welcome them to the committee and look forward to their testimony.

Sending members of the United States military into harm's way is perhaps the most significant decision our Government can make. We know from long experience that a military mission is more likely to be successful if it is broadly supported by the American people. Joint actions by the President and the Congress in authorizing the use of force can play an important role in building and expressing such support. In addition, both allies and enemies will be more convinced of the determination of the United States to achieve its objectives for which the force is being used if those objectives are understood to be broadly supported by both branches.

Under our Constitution, decisions about the use of force involve the shared responsibilities of the President and the Congress, and our system works best when the two branches work cooperatively in reaching such decisions. While this is an ideal toward which the President and Congress may strive, it has sometimes proved to be very hard to achieve in practice.

Today's hearing gives us an opportunity to consider the framework in which decisions about the use of force are made, and whether there are ways in which it might be improved. Questions of how best to harmonize the roles of the President and the Congress on the use of force have proved vexing since the founding of the Republic. The Framers of the U.S. Constitution designated the President as Commander in Chief of the Armed Forces, but entrusted to the Congress the authority to declare war.

In the period following the Vietnam war, the Congress passed the 1973 War Powers Resolution in an effort to regularize Executive/congressional cooperation on the use-of-force decisions, and, in particular, to ensure an appropriate role of the Congress in such matters. It provides requirements for Presidential consultation with, and reporting to, the Congress on issues related to the use of force, and a requirement that the President terminate uses of armed force not specifically authorized by the Congress within the timeframe specified by the resolution.

The War Powers Resolution has not proven to be a panacea, and Presidents have not always consulted formally with the Congress before reaching decisions to introduce U.S. force into hostilities, and may have objected to the assertion that inaction by Congress can compel the termination of a military action initiated by the President. The Congress has not always taken up legislation authorizing or expressing disapproval of Presidential uses of force. Both Presidents and Members of Congress have voiced dissatisfaction with the resolution's operation and practice.

Interaction between the President and the Congress related to the War Powers Resolution has also been affected by inherent ambiguities. In today's world, many potential military actions are very small scale, having a very limited purpose or target terrorists or

other nonstate combatants. The recent rescue operation mounted against the Somali pirates is an example, and combined all three of these conditions. Does every movement of the military ordered by the Commander in Chief that might lead to some use of force require congressional consultations?

Ambiguity also exists about what constitutes adequate notification and consultation. On April 14, 1986, for example, I was called to the White House at 4 p.m. along with other Senate and House leaders. We were informed that, 2 hours earlier, United States warplanes had taken off from airbases in the United Kingdom headed for targets in Libya. They were due to strike that country at about 7 p.m. During the ensuing 2½-hour meeting, we received a full briefing and engaged in a detailed conversation with President Reagan and national security officials on the bombing operation and its implications. In my judgment, this meeting constituted acceptable consultation, given the need for secrecy and the possibility that the planes could have turned around had the President encountered strong opposition from the group assembled. But, some commentators believed the meeting fell well short of the requirements for full congressional consultation.

The report of the National War Powers Commission proposes a new statute to replace the War Powers Resolution. Under the proposed statute, the President would be required to consult with a newly created Joint Congressional Consultation Committee, in most cases before ordering the deployment of United States Armed Forces into significant armed conflict. The statute would also require both Chambers of Congress to hold a timely up-or-down vote regarding any significant armed conflict in which the President introduces U.S. forces. The proposed statute further provides for the President to consult with, and report to, the Congress regularly during the course of significant armed conflicts in which the United States forces are engaged.

We look forward the testimony of our witnesses about the issues which the Commission has grappled with in formulating this proposal, and ways in which they believe their proposed approach would improve collaboration between the President and Congress on decisions relating to the use of force.

I thank the chairman again for calling the hearing. I look forward to our discussion.

The CHAIRMAN. Thank you very much, Senator Lugar.

Again, we welcome you. None of you are strangers to this room or this table. I must say, looking out at you, I was looking at you and remarking that none of you seem to have changed. And I'm not sure if you think that, but certainly from this side of the dais, whatever you're imbibing down there in Texas, California, and elsewhere, seems to sit well.

Mr. Secretary Baker, do you want to lead off.

STATEMENT OF HON. JAMES A. BAKER, FORMER SECRETARY OF STATE, HOUSTON, TX, ACCOMPANIED BY HON. LEE H. HAMILTON, PRESIDENT AND DIRECTOR, WOODROW WILSON INTERNATIONAL CENTER, WASHINGTON, DC

Mr. BAKER. Mr. Chairman, thank you very much.

The CHAIRMAN. Thank you.

Mr. BAKER. We are very appreciative of the committee entertaining this hearing today.

The CHAIRMAN. Your microphone? Could you just press the button?

Mr. BAKER. First, we thank you for holding this hearing. We thank Ranking Member Lugar for holding this hearing, members of the committee. It really is a privilege and an honor for us to be back in this room and to be before you.

As you have quite accurately pointed out, we're here to discuss the report of the National War Powers Commission, which Secretary Christopher and I cochaired, and on which your former congressional colleague Lee Hamilton served so very ably as a valuable member.

Let me, if I might, start with a little background on the Commission and the problem that you have quite accurately pointed out that it deals with, and then Secretary Christopher will outline our proposed new statute.

Two years or so ago, Chris and I were approached by the Miller Center at the University of Virginia to cochair an independent bipartisan commission to consider this issue that has bedeviled the legal experts and government officials since the Constitution was framed—the question of how our Nation makes the decision to go to war. Of course, we all know the Constitution gives the President the powers of Commander in Chief, and it gives the Congress the power of the purse, but also specifically the power to declare war. History, though, indicates that Presidents and Congresses have often disagreed about the scope and extent of their respective roles in the decision to go to war. And the Supreme Court has consistently shied away from settling the constitutional issue.

So, it was evident to us after a few meetings of our Commission that what we really needed to try and come up with was a pragmatic and practical solution to this conundrum. As we put together the Commission, it was important, we thought, that we have a very wide range of perspectives and voices, both political and from a policy standpoint. And so, our Commission includes legal experts, former congressional staffers, former White House staffers, and former military leaders. The 12-member Commission, if you look on—I think you all have a copy of our report—at the names on the front page there, the 12-member Commission is equal parts Democrats and Republicans.

After 14 months of study, we concluded, as you stated, Mr. Chairman, that the central law governing this critical decision—that is, the War Powers Resolution of 1973, which was passed over a Presidential veto—is ineffective and that it really should be replaced with a better law. It should be repealed and replaced with a better law.

The 1973 resolution's greatest fault, I suppose, is that most legal experts will tell you that it is unconstitutional, although I'm quick to add that the Supreme Court has never expressly ruled on that point.

We happen to believe that the rule of law, which is, of course, a centerpiece of our American democracy, is undermined and it is damaged when the main statute in this vital policy area is regularly questioned or ignored.

The resolution has other problems. It calls for the President to file reports of armed conflicts, and then it uses these filings to trigger an obligation for the President to remove troops within 50—within, sorry, 60 or 90 days if Congress has not affirmatively approved the military action. This, of course, purports to allow Congress to halt military campaigns simply by inaction. Unsurprisingly, no President, Democrat or Republican, has ever filed reports in a way that would trigger the obligation to withdraw forces. As a result, the 1973 statute has been honored more in the breach than by its observance.

Recognizing this, others have suggested amending or replacing the flawed law, but no such proposal has ever gotten very far, typically because most of them have sided too heavily with either the President or the Congress.

A common theme, however, in all of these proposals and that runs through them, the importance of meaningful consultation—meaningful consultation—between the President and the Congress before the Nation is committed to war.

Our proposed statute would do exactly that, promote meaningful discussion between the President and Congress when America's sons and daughters are to be sent into harm's way, but it expressly does so, Mr. Chairman, in a way that does not limit or prejudice either the executive or the legislative branches' rights or ability to assert their respective constitutional war powers. Neither branch is prejudiced by what we are proposing. And, in fact, we think that both branches and the American people will benefit from it.

Now, before I turn the microphone over to Secretary Christopher, let me first say how rewarding it has been to work with this fine gentleman and this able statesman and this dedicated public servant. It has, of course, been equally rewarding to once again be working with my former cochairman on the Iraq Study Group, Lee Hamilton, and your former colleague up here in the Congress.

So, Chris, you want to pick up from there?

[The prepared statement of Mr. Baker follows:]

PREPARED STATEMENT OF JAMES A. BAKER III, FORMER SECRETARY OF STATE, HOUSTON, TX

Chairman Kerry, Ranking Member Lugar, members of the committee, it is an honor to be with you today.

We are here to discuss the report of the National War Powers Commission, which Chris and I cochaired and on which your former congressional colleague, Lee Hamilton, served as a very valuable member.

Let me start with background on the Commission and the problem it dealt with. Secretary Christopher will then outline our proposed new law.

Two years ago, Chris and I were approached by the Miller Center at the University of Virginia to cochair an independent bipartisan commission to consider an issue that has bedeviled legal experts and government officials since the Constitution was framed—the question of how our Nation makes the decision to go to war.

Our Constitution gives the President the powers of Commander and Chief. The Congress has, of course, the power of the purse and the power to declare war.

But history indicates that Presidents and Congresses have often disagreed about their respective roles in the decision to go to war. And the Supreme Court has shied away from settling the constitutional issue.

It was evident that we needed a practical solution to this conundrum.

As we put together the Commission, it was important that we have a wide range of perspectives and voices. And so our Commission includes legal experts, former congressional members, former White House staffers and former military leaders. The 12-member Commission is equal parts Democrats and Republicans.

After 14 months of study, we concluded that the central law governing this critical decision, the War Powers Resolution of 1973, is ineffective, and should be repealed and replaced with better law.

The 1973 resolution's greatest fault is that most legal experts consider it unconstitutional, although the Supreme Court has never ruled on it. We believe that the rule of law, a centerpiece of American democracy, is undermined and damaged when the main statute in this vital policy area is regularly questioned or ignored.

The resolution has other problems. It calls for the President to file reports of armed conflicts and then uses these filings to trigger an obligation for the President to remove troops within 60 or 90 days if Congress has not affirmatively approved the military action. This purports to allow Congress to halt military campaigns by inaction.

Unsurprisingly, no President—Democrat or Republican—has filed reports in a way that would trigger the obligation to withdraw. As a result, the 1973 statute has been honored more in the breach than by observance.

Recognizing this, others have suggested amending or replacing the flawed law. But no such proposal has gotten very far, typically because most of them have sided too heavily with either the President or Congress.

A common theme, however, runs through all of these efforts: The importance of meaningful consultation between the President and Congress before the Nation is committed to war.

Our proposed statute would do exactly that—promote meaningful discussion between the President and Congress when America's sons and daughters are to be sent into harm's way.

But it expressly does so in a way that does not limit or prejudice either the executive or legislative branches' rights or ability to assert their respective constitutional war powers. Neither branch is prejudiced by what we are proposing.

And in fact, we think both branches and the American people will benefit from it.

Before I turn the microphone over the Secretary Christopher, let me first say how rewarding it has been to work with this fine gentleman, able statesman, and dedicated public servant.

STATEMENT OF HON. WARREN M. CHRISTOPHER, FORMER SECRETARY OF STATE, LOS ANGELES, CA

Mr. CHRISTOPHER. Thank you very much, Mr. Chairman, ranking member, members of the committee.

My testimony will follow up briefly on Secretary Baker's statement. I appreciate those kind things that Secretary Baker had to say about me. Without going on about it, let me just say it's a lot more pleasant working with Secretary Baker than it was working against him, and I've had both experiences.

The statute that we propose is really quite straightforward. It establishes a joint bipartisan congressional consultation committee consisting of the leaders of the House and the Senate and the chairs of the relevant committees—including this committee, Intelligence, Armed Forces.

Under the proposed statute, the committee is provided with a permanent professional staff and access to relevant intelligence information. This is a new provision, and, I think, one that's quite salutary.

The statute requires that the President consult with this committee before deploying U.S. troops into "any significant armed conflict," which is defined as combat operations lasting, or expected to last, more than a week. Now, for purposes of this statute, "consultation" means providing an opportunity for a timely exchange of views, not just notification.

Within 30 days after the armed conflict begins, Congress is required to vote up or down on a Resolution of Approval. If the Resolution of Approval is defeated, any Senator or Representative may

file a Resolution of Disapproval. A Resolution of Disapproval would have the force of law, of course, only if it's presented to the President and signed by him, or if it's passed over the President's veto. However, if a Resolution of Disapproval does not survive the veto, Congress can express its opposition through internal rules.

Mr. Chairman, I recognize that many of the advocates of congressional power argue that Article I, Section 8 of the Constitution puts the decision to go to war exclusively in the hands of Congress by giving Congress the power to declare war. On the other hand, opponents of the Presidential authority point to the fact that the President is the Commander in Chief under the Constitution. They say that the Framers wanted to put the authority to make war in the hands of the Government official who had the most information and the ability to execute.

Although both sides of this longstanding argument have good points to make, I would just make three points about these arguments.

First, no consensus has emerged from this debate over the last 200 years. Nobody has won this longstanding argument.

Second, I think it's become fairly clear that only a constitutional amendment or a decisive Supreme Court opinion is likely to resolve this debate, and neither of these is likely to be forthcoming anytime soon. The courts have turned down war powers cases filed by more than 100 Members of Congress, either on the grounds that they are political questions or that the plaintiffs in those actions lacked standing to sue.

Third, whatever our Commission might have felt about this debate—and we discussed it for a long time, as Secretary Baker said—we recognize that we could not resolve this longstanding issue. And the last thing we wanted to do as a commission was to file yet another report on who is right or wrong, and have it gather dust on the library shelves.

Therefore, in drafting this statute, our Commission decided deliberately not to try to resolve this longstanding debate. Indeed, our proposed statute says that 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.

Instead of trying to call balls or strikes, we unanimously agree that any legislative reform must focus on practical steps to ensure that the President and the Congress consult in a meaningful way before going to war. We believe that, among all the various alternatives—and we certainly talked about a lot of them—this proposed statute best ensures consultation. We believe it's a significant improvement over the 1973 resolution, and it's good for the President, the Congress, and for the American people.

Now, from the standpoint of the Congress, the statute gives it a much more significant seat at the table when our Nation is deciding whether or not to go to war, provides not only a seat at the table, but it gives a permanent staff to the committee and access to all relevant intelligence information. It requires real consultation, not just lipservice.

Now, in my experience, the seasoned views of the congressional leaders constitute a very vital resource for the President in his decisionmaking process. Indeed, it's very healthy, I think, for the

President to hear the independent opinions of people who don't work for the President. I know how confining it is when the President only talks to people who happen to work for him.

For the President, of course, this law that we're proposing eliminates a law that every President since 1973 has found to be unconstitutional and has largely ignored. The statute provides a mechanism for consultation with the Congress, and it identifies a leadership group with whom the President should consult.

I know, down in the White House, they have often had a question as to who the President should consult with. Sometimes I think the President has consulted with those who are most likely to agree with him, and we think that's probably not a healthy situation.

From the standpoint of the American people, the statute will really enhance the prospect of consultation between Congress and the President on matters of war, and make it a regular thing. This is something that public opinion polls have consistently indicated, for more than 70 years, the American people have wanted. We really believe the American people deserve something better than a law that's ineffective and has been largely ignored for 70 years.

Mr. Chairman, Mr. Ranking Member, and Senators, thank you very much for hearing us, and we look forward to trying to respond to any questions that you may have.

[The prepared statement of Mr. Christopher follows:]

PREPARED STATEMENT OF WARREN CHRISTOPHER, FORMER SECRETARY OF STATE, LOS ANGELES, CA

Mr. Chairman, Ranking Member, and members of the committee, my testimony will follow up briefly on Secretary Baker's statement.

Without going on about it, let me just say that it is a lot more fun working with Secretary Baker than working against him. He is an extraordinary American leader.

The statute we propose is straight forward. It establishes a bipartisan Joint Congressional Consultation Committee consisting of the leaders of the House and the Senate, and the chairs of the key committees. Under the proposed statute, the committee is provided with a permanent professional staff and access to relevant intelligence information.

The statute requires the President to consult with the Congressional Consultation Committee before deploying U.S. troops into any significant armed conflict, which is defined as combat operations lasting or expected to last more than a week. If the need for secrecy precludes prior consultation, the President is required to consult with the committee within 3 days after the conflict begins. For purposes of the statute, consulting means providing an opportunity for a timely exchange of views, and not mere notification.

Within 30 days after the armed conflict begins, Congress is required to vote up or down on a resolution of approval. If the resolution of approval is defeated, any Senator or Representative may file a resolution of disapproval. A resolution of disapproval will have the force of law only if it is passed by both Houses and signed by the President, or if the President's veto is overridden. However, if the resolution of disapproval has not survived the President's veto, Congress can express its opposition through its internal rules.

Mr. Chairman, I recognize that many advocates of congressional power argue that article 1, section 8 of the Constitution puts the decision to go to war exclusively or primarily in the hands of Congress by giving Congress the power to declare war. They say that by this provision, the Framers of the Constitution stripped the executive branch of the power to commence war that the English King enjoyed.

On the other hand, proponents of Presidential authority point to the Executive power and Commander in Chief clauses in the Constitution. They say that the Framers wanted to put the authority to make war in the hands of the government official who had the most information and the ability to execute; and they point to recent history as proof of the President's predominance.

A whole forest of trees has been felled to publish writings on this debate. Although both sides make compelling arguments, only three propositions hold true:

(1) No consensus has emerged from the debate in 200 years; no one has "won" the argument.

(2) Only a constitutional amendment or decisive Supreme Court opinion will resolve the debate; neither is likely forthcoming anytime soon, and courts have turned down war powers cases filed by as many as 100 Members of Congress.

(3) Despite what I or my fellow commission members may feel about the debate, we cannot resolve it, and the last thing we wanted to do was offer yet another opinion on who was right or wrong.

Thus, in drafting the statute before you, our Commission deliberately decided not to try to resolve the debate. Indeed, our proposed statute says "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."

Instead of trying to call balls or strikes, we unanimously agreed that any legislative reform must focus on practical steps to insure that the President and Congress consult in a meaningful way on the decision to go to war. We believe that, among all available, practical alternatives, the proposed statute best accomplishes that result, is a significant improvement over the 1973 resolution, and is good for the Congress, the President, and the American people.

From the standpoint of Congress, the statute gives a more significant seat at the table when our Nation is deciding whether or not to go to war. It provides not only a seat at the table, but a permanent staff and access to all relevant intelligence information. It calls for genuine consultation, not mere lip service. The seasoned views of congressional leaders constitute a vital resource for the President in his decision-making process. It is very healthy for the President to hear the independent opinions of people who don't work for him.

For the President, the proposal eliminates a law that every President since 1973 has regarded as unconstitutional. It provides a mechanism for his consultation with the Congress, and it identifies the leadership group with whom he should consult.

From the standpoint of the American people, this statute will enhance the prospect of cooperation between the Congress and the President on matters of war. This is something that public opinion polls have consistently indicated Americans have wanted for the past 70 years.

The American people deserve something better than a law that is ineffective and has been largely ignored for 70 years. The new statute achieves that result.

Mr. Chairman, we have sought to set a careful balance between the Congress and the President on this matter of grave importance. Neither the strongest advocates of congressional power nor those of Presidential power are likely to be completely happy with our proposal, but we think that this is a reflection of the balance that we have sought to strike.

The CHAIRMAN. Thank you very much, Mr. Secretary.

Mr. Chairman, I understand you're not going to make a statement, is that correct?

Mr. HAMILTON. No.

The CHAIRMAN. OK, but submit to questions?

Well, let me thank each of you for this. Let me emphasize, if I can, how important this is. I think my colleagues here understand that, while the Nation's attention is not focused on this issue today, and while the Klieg lights and the sort of hot breath of the media is not intense here at this moment, everybody in this room, particularly those at this table, understand the implications and how important it is to be here now, trying to figure out the best path through this, rather than in the middle of the crisis, when all the attention is focused on it, but when you have the least ability to be able to do something about it.

So, this is the moment, and I want to thank each of the participants. I also want to thank Governor Baliles and the Miller Center for their support of this project. It's a very important contribution to our Nation's discourse. And, without objection, I intend to put the entire War Powers Commission Report into the record, because

I think this is a record that's going to be studied and analyzed as we go forward, and we want to lay the predicate for our thinking and for whatever legal proceeding might one day occur as a consequence of this. So, we are laying a record with respect to all of that at this time.

[EDITOR'S NOTE.—The War Powers Commission Report can be found in the Appendix on page 33 at the end of this hearing.]

The CHAIRMAN. In your proposal, you set out types of operations that are specifically excluded; three, in particular: Actions taken to repel attacks, or prevent imminent attacks on the United States; two, limited acts of reprisal against terrorists or states that sponsor terrorism; and three, missions to protect or rescue American citizens and military or diplomatic personnel.

Now, many of our operations today—military operations—are focused on our counterterrorism efforts, and I'd just like to try to clarify, if we can, a little bit, sort of, what your thinking is here.

Under what circumstance do you envision these exceptions allowing a President to order military strikes against state sponsors of terrorism without any consultation with Congress? Do you envision that? For instance, there are certain states engaged in proliferation activities today; one might envision some sort of counterterrorism preemptive effort with respect to them, and I wonder if you'd comment on that.

Mr. BAKER. Thank you, Mr. Chairman.

The exclusions or exceptions that are listed—and you noted three of them; there are some others—operate—the President would be free to undertake those types of actions without prior consultation, without satisfying the requirements of our proposed statute. But, once those actions ripened into a significant armed conflict—that is, once those actions extended for more than 7 days—the statute would be triggered, there would have to be consultations and then continuing consultations, as the statute requires.

The CHAIRMAN. So, is "significant armed conflict" defined by the amount of time or by the size and scope of the operation?

Mr. BAKER. It's defined by the—it requires combat operations, and it requires the expiration of 7 days. So, I think I would say the amount of time. But, it is not just 7 days during which combat operations are taking place. If the President knows, or has reason to believe, that a particular operation will last more than 7 days, the statute is triggered. Now, that's difficult, of course, because you can't always get inside a President's head. But, it's more, really, the time, but there is a requirement that the operations be combat operations as opposed to just preparations therefore.

Mr. HAMILTON. Mr. Chairman——

Mr. CHAIRMAN. Lee.

Mr. HAMILTON. Mr. Chairman, you want to contrast that with the War Powers Resolution, which uses the term "hostilities" and is very inadequately defined. Definitions, of course, are extremely difficult in this area, and we didn't want to overdefine terms. We think we've struck the right balance here, but obviously that's our judgment.

The CHAIRMAN. Can you—and you are correct, Mr. Secretary, I—those are several—those are three of a number of exclusions, and

I don't want to make it sound like those were exclusive. But, the President has to consult with the Joint Committee prior to the conflict unless there's a need for secrecy or other emergent circumstances precluding that. Can you give us a sense of what the—what would qualify as "emergent circumstances" that would relieve the President of the duty for predeployment consultation?

Mr. BAKER. Well, I think the ranking member gave us a good example of one, the air strike on Libya, where secrecy was critical. There would be others—that's a separate provision, Mr. Chairman, of course, from the exclusion provision and exemption provision. There is one separate provision—I think it's 4(c)—that says, if there is a need for secrecy to protect the lives, for instance, of American servicemen, then the President can begin his consultation 3 days after ordering or beginning the operation. That's a separate provision, of course.

Under the ones that you initially read off, the general exclusions and exemptions, those are—there would be no requirement to consult there before those actions were undertaken, but, once they had gone on for 7 days, then there would be an obligation to consult. A good example might be, from your experience, training operations, perhaps, in Vietnam that ripened into something a heck of a lot more than training operations. If those training operations ripened into combat operations that extended for more than 7 days, the statute would be triggered.

The CHAIRMAN. So, does the consultation component of this depend on the good faith of the President, or is there any kind of guillotine, is there any sort of——

Mr. BAKER. To some extent, when you're talking about requiring more meaningful consultation, there has to be good faith, and it depends upon good faith, I think, on the part of the President, but also on the part of the Congress, the people being consulted.

I would make the point, Senator Kerry, that many people would argue that the President could do, anyway, some of the things that are listed in here as exemptions; that is, take actions to protect American possessions or embassies or citizens abroad. I think a lot of people would argue whether the President has that right anyway. Under our statute, he would have that right, but he—but, it wouldn't extend ad infinitum. He could—if he took action to protect an embassy or American citizen abroad, and it ripened into a combat event that lasted more than 7 days, then the statute's triggered and there would have to be ongoing consultation.

Mr. HAMILTON. And the important thing there is that the President must consult in that situation. He doesn't have an option. If he's going to commit troops for a significant armed conflict, he shall consult, which is——

Mr. BAKER. But, not obtain approval. No requirement in here for approval, but there's a mandatory requirement of consultation.

The CHAIRMAN. Right, but there is, then, a mandatory requirement for a vote within 30 days——

Mr. BAKER. That's correct.

Mr. HAMILTON. Correct.

The CHAIRMAN. So you are triggering a requirement for Congress to engage, which has been significantly absent with respect to war powers. I mean, you know, it seems to me that the constitutional

mandate, "Congress shall declare war," does not require Congress to declare war.

Mr. BAKER. No.

The CHAIRMAN. It simply gives them the power to declare war, if they choose to do so. Correct?

Mr. BAKER. That's correct.

The CHAIRMAN. And, in effect, Congress has complicated this significantly, not the least of which, for instance, in the longest war in our history, Vietnam, where they refused to ever step up and either do the purse or make the declaration.

Mr. BAKER. That's correct, sir. And we think, in something as important and serious as this, and particularly given the fact that the polls over the last 50-plus years have showed that the American people really want both the Congress and the President involved when the Nation sends its young men and women into battle, we don't think it's unreasonable to say Congress, after 30 days, should take a position on the issue.

Now, if a vote—if a Resolution of Approval does not pass, our statute provides that any Member of the House or Senate could introduce a Resolution of Disapproval. If that Resolution of Disapproval passes, it would not have the force of law unless the constitutional requirement of the presentment clause was met and it was presented to the President for his signature or veto. If he vetoed it and Congress overrode the veto, then, of course, you would have an actionable event of disapproval.

The CHAIRMAN. All of which, in total, I believe, actually—and this is what I think is very significant about your proposal and one of the reasons why I think it threads the needle very skillfully—is that you actually wind up simultaneously affording the President the discretion, as Commander in Chief, and the ability to be able to make an emergency decision to protect the country, but you also wind up empowering Congress. And, in fact, subtly, or perhaps not so subtly, asking Congress to do its duty. I think that's not insignificant at all, and I think you've found a very skillful way of balancing those without even resolving the other issues that have previously been so critical, in terms of the larger constitutional authority, one way or the other.

Mr. BAKER. Thank you, sir.

The CHAIRMAN. So, I——

Mr. BAKER. May I just make one final——

The CHAIRMAN. Absolutely.

Mr. BAKER. [continuing]. One other statement? I don't mean to be doing all the talking, here.

We think, as Chairman Hamilton said, I think, over on the House side, this proposal presents an outstanding opportunity for bipartisanship. We talk a lot about bipartisanship these days. Here's a really good example of an opportunity to achieve that.

The disagreements in this area have been disagreements between the branches, not so much disagreements between the parties. And this is something that is—it's practical, it preserves the ability of each branch to continue to make their constitutional arguments, but gives us a pragmatic and practical way of going forward, and it should not be a matter of partisan political difference.

The CHAIRMAN. I couldn't agree more.

Senator Lugar.

Senator LUGAR. Well, thank you, Mr. Chairman.

In my opening comments, I mentioned this date of April 14, 1986, because it framed several of the issues that we're discussing today. It was a pragmatic judgment by President Reagan to call this group together, which looks very much like the sort of group that you're suggesting. They—I think it encompassed the chairmen and ranking members of Foreign Relations and Intelligence, and that was—and Armed Services—and that was true of House Members. They may not all have been there. But, I put the thing into my statement, because I have a picture of us sitting around the table. This is not anecdotal, there's sort of documentary evidence of who was at the meeting.

And it was a rather awesome experience to hear the President, and then he turns to the Secretary of Defense, describing the fact that there are aircraft in the air and they are taking action because some European countries at the time were making it difficult to fly over on a mission of this variety, so it was taking them a while to get there, and that's why the 3-hour lapse.

And also, it was interesting that there was enough anxiety or difference of opinion that the conversation went on for 2½ hours, during which you have the sense that these planes are approaching.

I remember coming back to my office and hearing, sort of breaking into the 7 o'clock newscast, the thought that aircraft were bombing Libya. And I said, "Well, that's right. That's what's happened."

Now, in this particular instance, however, there was this degree of consultation and responsibility. None of us knew what Libya would do, what kind of retaliation and what the aftereffects might be. As it turned out, there are not immediate ones, so the 7-day rule, or the 30-day rule, probably would not have kicked in, which was sort of a mission-accomplished at that point.

But, the thing I want to raise is, Libya was a nation-state. The attack really was on areas very close to the President—or the Great Leader of the country, and, in fact, some of his relatives were killed, as I recall, in the process.

The problems that we have talked about in this committee recently revolve around such thoughts as al-Qaeda might be not only in the mountains of Pakistan, but in Somalia or in Yemen or, as we have found out in attacks on our embassies before.

Now, one of the values of this, as I've thought through this, is that this Joint Committee possibly might meet with some regularity, as opposed to just simply on the occasion of a Libya situation in which the President or those responsible could say, "Now, this is very confidential, but, in fact, a war on terror is being fought in several fronts. There's a conspicuous one out in Afghanistan and Pakistan, and we talk about that every day, because it's very important, but what all of you folks in Congress need to understand is that our intelligence services are very good, they've ferreted out where al-Qaeda may be. These people are fully as capable of launching or planning an attack on the United States as the people were in camps in Afghanistan earlier. And therefore, they might say, "We're going to take action," or they might describe continuous action they are taking, in which various members of

al-Qaeda may be losing their lives or losing something in the process. And the ramifications of that are not really clear in the host country, which may be a failed state, This doesn't negate the fact we may deal with nation-state war in the future, but many would describe the more probable course in the war on terror as dealing with, if not al-Qaeda, other cells that are a threat to ourselves, our allies, to world stability, a much more difficult thing, perhaps, to define. And this is why I find attractive the idea of this committee.

Now, the dilemma, I think, for Chairman Kerry and—as chairman of this committee, for example, would be, well, this new committee has staff, and it has some jurisdiction on some of the most difficult issues. How does that work out with the staff of our committee, bipartisan staff that works all the time on these issues, or Armed Services or Intelligence? You know, you may say, "Well, that's for you folks to work out. You have—you're going to be serving as chairman or ranking member on both of these committees, and you already have certain staff members on your own staff, quite apart from the committee, and so forth." I'm just curious, did you have any discussion in your group about, as a practical matter, how this works out with regard to committee staff, who has jurisdiction, where—which committee do we really discuss this? Do we take it up in the joint meetings, regularly with the President, or so forth, or—is our responsibility really to our entire committee, to a certain degree of public hearing, so that we're all up to date on this? Do you have any feeling about these internal workings of how this might work?

Mr. CHRISTOPHER. Senator Lugar, our Commission talked quite a lot about the new forms of war and nonstate actors. We had a number of witnesses—I think almost 50 witnesses—among them, Dean Harold Koh, who I understand you'll be hearing this afternoon in his nomination. And we understood that, and one of the reasons we put in section 4(a) of the statute was to meet that exact problem. We say, "The President is encouraged to consult regularly with the Joint Congressional Consultation Committee regarding significant matters of foreign policy and national security."

So, we certainly don't mean to preempt the jurisdiction of this committee or other committees, but I think this new committee would become the major forum for consultation on issues of war and peace, and that's why we have given this committee a separate professional staff, an ongoing professional staff that can be very useful in the future, as well as access to all relevant intelligence.

Sometimes, it seemed to me that Congress did not have as fully adequate access to information as sometimes they have down in the White House. So, I think we understood that very well, and we understood that these committees would continue to have their jurisdiction, but a major jurisdiction would be in this new joint committee, which had a staff that would be working on it on a rather continuous basis.

Senator LUGAR. Well, I appreciate that answer. I think—maybe they're just my own personal reflections, but as our Nation approached the current war with Iraq, I think the feeling that I had during the summer vacation, as I heard statements by Vice President Cheney or others, was that we might be going to war before we got back in the fall. Now, I was reassured when we had

a meeting with President Bush around the table with many of the people who will be in this committee that you've suggested, and he said, "We're going to the United Nations. Secretary Powell is going to testify." And so, that was somewhat reassuring we were not going to war, since we were going to the United Nations. But, then things deteriorated. And before long there were at least thoughts that we were going to war sooner than later, because the weather in Iraq gets warmer, and therefore, if you were going to do something, it would be better to do it in the spring than in the summer, if you were to be effective with a strike of that sort.

Now, this sort of came through the rumor mill. There was no committee in which some of us might have asked the President, "Is that true? Is the fact—in a military situation, that this is going to have to work out at this particular point?" I just reflect on this anecdotally, because these are very large decisions that finally involved us for a long time, and the need to have this consultation and some access to the President and the Secretaries, and what have you, for many of us, we feel is very important, our responsibilities.

But, I ask the question, just in behalf of our committees, as they are constituted, while this committee of leaders is meeting, that—after all, we were also trying to draw together, ultimately, if we were going to have votes on this subject, votes in the committee, votes in the Congress, relevant debate of all of us, as well as those sitting around the table—and I'm, in my own mind's eye, trying to think how all of this progresses.

Mr. BAKER. Well, Senator, if I might chime in here, Section 5(b), if you'll take a look at 5(b) of our proposed statute, says that it is our view that the committees of jurisdiction for the Resolution of Approval or Disapproval should be the Senate Foreign Relations Committee in the Senate and the House Foreign Affairs Committee in the House. So, we suggest the lead role for these two committees.

Senator LUGAR. They're mentioned specifically in this section.

Mr. BAKER. They are mentioned specifically in 5(b), and they are—and it is our recommendation that they have the lead role.

Mr. HAMILTON. Senator Lugar——

Mr. BAKER. That doesn't answer all of your questions, about——

Senator LUGAR. No, but that's——

Mr. BAKER. [continuing]. How do you——

Senator LUGAR. [continuing]. Explicitly you've tried to meet that.

Mr. BAKER. Yes, sir. Yes, sir.

Mr. HAMILTON. Senator Lugar, my impression is that the decision to go to war involves a lot more than foreign policy; it involves intelligence, and it involves, certainly, the Armed Forces. And you have enormous responsibilities in this committee, extending far beyond the questions of war and peace. Your committee, this committee, would not in any way be diminished by this proposal. But, what we try to do is to put in the room with the President the key players in all of the areas that would be involved in making a decision to go to war—Intelligence, Armed Services, Foreign Relations, Foreign Affairs in the House—and, of course, the ranking member and the chairmen of these key committees would serve on the consultative committee, so there would be good coordination.

This is, as I think you said in your statement, the most important decision government makes, whether or not you go to war. And you want to get it right, as best you can. And I think you have a better chance of getting it right if you have all perspectives brought to bear and available to the President for consultation.

Senator LUGAR. Thank you very much.

The CHAIRMAN. If I could just follow up on that quickly, and I apologize, Senator Kaufman, but—3(c) "says the Joint Congressional Consultation Committee consists of." You've referred to it prior to that, but this is where you create it, so to speak. And it simply says who it will be made up of. And then, the chairmanship and the vice-chairmanship will rotate.

My question is, Would it be—I interpret it as a purely consultative committee for the sole purpose of—not with an ongoing standing obligation under the rules of the Senate; in other words, requiring staff and an enormous amount of work. Now, maybe you interpret that differently, but would it be better to clarify that in some way, that its purpose will be solely consultative with respect to the issue of armed conflict, without staff?

Mr. BAKER. Well, the Congress, of course, could do that.

The CHAIRMAN. I'm just wondering what your thought is on that. It strikes me that that may be a way of dealing with some of Senator Lugar's concerns, which I think are legitimate.

Mr. BAKER. That would be, I would think, Mr. Chairman, subject to the rules of the House and of the Senate; and whatever those—whatever the wishes of the two bodies were would be—would be, of course, I'm sure, embodied in the final legislation. It was not our intent to sit up here and write the——

The CHAIRMAN. Write all the details.

Mr. BAKER. [continuing]. Details of those rules. But, we did expressly think it was worthwhile recommending that the leadership in this area remain with House Foreign Affairs and Senate Foreign Relations.

Mr. HAMILTON. I think the chairman—Senator Kerry, you've got it exactly right. This is not a legislative committee. You're not authorizing money. You are consulting with the President—that's your sole purpose—on the question of going to war. And so, it's a very limited purpose; obviously hugely important, but very limited.

The CHAIRMAN. Well, we need to clarify that, because paragraph 4(h) actually gets specific about staff and what we might or might not do. So, I think this is worthy—this is exactly why we have the hearing, and it's a good thing to explore.

Senator Kaufman.

Senator KAUFMAN. Thank you, Mr. Chairman. I think this—there is—as the panel said, there is no important—more important issue facing the Congress than how we deal with going to war, and I—having served this place for a long time, it's the single most difficult decision that a Member of Congress makes, and I'm sure it's the most difficult decision a President makes.

The War Powers Act. I showed up in the Senate just about the same time as the War Powers Act, and it's been like a rugby football that's been kicked around for 36 years. And I think that—I can't think of better people to try to get at the heart of this than the people on this panel. And we're very, very fortunate to have

you here and working on this thing. And I am very much in sympathy with your proposal. I think consultation is a good idea.

But, if there's an—if the War Powers Act is a 300-pound gorilla in the room, there's a 1,000-pound gorilla in the room, and that is declaration of war, beyond the war powers. So, we decide we have the War Powers Act, but at some point the Congress act. And clearly we've not—we've only declared war five times in our history, and the last one was the Second World War. Secretary Christopher, you said there were discussions about war, declaration of war, and I just think I would be making a dereliction of duty if I didn't ask the three of you, kind of, your opinion on what we should do—how we deal with this declaration-of-war problem, which is—we just don't do it, and we probably should, and I'd just like your thoughts.

Mr. CHRISTOPHER. The Congress has decided, apparently, Senator, to go the route of authorization to conduct military operations, and that's taken the place of a declaration of war, and seem to give the President all the authority he feels he needs to go ahead. So, the declaration of war may well have fallen into disuse. And whether that's fortunate or unfortunate, I think that's the reality of where we are.

And so, we're trying to provide a certainty here that there's consultation, even if there is not an issue about the declaration of war. So, we provide for this consultation whenever there are significant military actions contemplated, whenever there is combat action lasting longer than 7 days, without regard to whether or not there has been a declaration of war or a motion for a declaration of war.

Mr. BAKER. Congress has, in one way or another, authorized every action, I think, Senator Kaufman, in the last 50 years, with the exception of Grenada, Panama, and Kosovo, where there was not express authorization.

Senator KAUFMAN. But, are you comfortable with the idea that we—I'm not saying we can do—probably need a constitutional amendment to change it—that essentially we have this perception that we've never been—everybody knows we're at war, but no one says we're at war. Does that bother you, though? I mean, you deal with international leaders. Is that a problem?

Mr. BAKER. Well, I don't think there is—it was not a problem, in terms of the conflicts that I was involved in, certainly not the first gulf war. Everybody knew that was a war, including—and all the foreign leaders treated it as such when we talked to them about it. So, I don't—I'm not sure—I would imagine that there are a lot of—there are a number of other arcane provisions in the Constitution that don't have ready application today.

And so, I don't—I don't know that a lot is lost. If the Congress authorizes the action, in one way or another, is it really magic for them to do it by way of a declaration of war? I don't know.

Senator KAUFMAN. OK. And I would follow up on the chairmen and ranking members. I think the staff question is an interesting question. When you have, you know, staff in the Foreign Relations Committee, Armed Services Committee, they're studying this every day, they're up on what's going on. To have another staff group off to the side that then meets, what you're going to have is a meeting—consultative meeting, the Senators are going to bring their

own staff from their own committees. It just kind of gets more people in to the room and more people in the decision, which, as you have said, is the most important decision you make.

Mr. BAKER. You know, following up on what Chairman Hamilton said, it may be—it may be preferable for the people on the Joint Consultative Committee, the chairmen and ranking members of the relevant committees and the leadership of the House and Senate, to bring their own personal staffs and use them, although what we were seeking to provide here is enough support so that the Congress would feel that it has a more equal place at the table. And I think at least from my own view—and maybe Secretary Christopher and Chairman Hamilton have a different view—I thought there was—that it was primarily oriented toward providing information to that Joint Consultative Committee; intelligence information, particularly.

Mr. HAMILTON. Senator, to address your previous question, I think one of the advantages of the bill that we're proposing here is that it builds into the process broader support for the military action. Everybody agrees that the country's better off, and the President is better off, if he has broad support. Today, a President can commit military forces, really, without congressional involvement, and usually, of course, the Congress comes along and supports the President, but that's not always going to be true; it may be true most of the time.

But, what happens here is, the President notifies the Congress. The Congress must act. To be blunt about it, in almost every case I can imagine, the Congress is going to support the President. It may be possible that it would be otherwise, but not likely because Presidents are able to carry the country on a national security issue, because they're the only ones that have the voice to reach all the people.

Therefore, one of the things you want to do is to build as broad a support base as you possibly can for that action. And I think this provides the framework to do it.

I can well imagine some Members of the House, I'm sure no Members of the Senate, would not want to vote on it. But, it's important, we think, that they do vote on it and that the Congress get on record, for the action or against the action, as they choose. The result, I think, as a practical matter, will be that a President will go into military action—lead the country into military action—with much broader support than otherwise might be the case.

Mr. CHRISTOPHER. Senator, let me follow up with just a thought or two on your very thoughtful question.

It seems to me that the joint committee that we propose is a way for the President to talk to all the Members of Congress, not just one committee or another committee. It's a conduit for him to speak to all 535 members, which he lacks right now, and that staff would enable him—enable this committee to really get to the bottom of the President's request, and not have the information flow be dominated by what's known in the NSC down at the White House.

Mr. HAMILTON. That's a very important point. Presidents today do not know with whom to consult. Five hundred thirty-five mem-

bers. They know, of course, a few of them they need to consult with.

Here, you provide a clear group of people with whom the President should consult, built into law, and a Member of the House or the Member of the Senate cannot complain, as they usually do, "I wasn't consulted." They have voted for a mechanism for the President to consult with the Congress. And they can't complain, then, if the mechanism is followed.

I think it's very important for a President to be able to know, "With whom do I consult on this question?"—and not just do it hit or miss because Senator Kerry or Senator Lugar are key players. There are a lot of key players in the Congress. And this provides a President with a focal point for consultation.

Senator KAUFMAN. I think it's an excellent proposal, and I think it's been interesting to sit here and watch, in the absence of real affirmation of the War Powers Act or the declaration of war, there's a kind of a kabuki theater that goes on, where the President, before they go to war or goes into action, says, "I have the power. I can do this. I don't need you in the Congress to do it." But, in every single case, what have they done? They've come to the Congress, because of the point that they need that broad support. So, the system works, and I think it works well. We do—but, I couldn't agree with you more, I think knowing who to consult with, people understanding what their responsibilities are, is always good, no matter what kind of organization you have. So, I think this is especially good, and I think that what you've come up with—I think the staff thing is something that we just—you know, we should take a hard look at.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Kaufman.

Senator Corker.

Senator CORKER. I want to thank all of you for long years of public service and continuing to help us through these things, and certainly for your help in this particular issue. So, I have some—just some specific questions.

In the event of the actionable event of disapproval, where the Congress says, "We disapprove of war taking place," and the President—and even in the case—and I know this is very unlikely, because, Chairman Hamilton—the fact is that Congress generally does support the President in matters of this type. Sometimes they go on longer, and sometimes they lose that support. But, since we're not wrestling with the constitutional issue of who really has the authority, there still—is there still a remainder conflict there if the President decides, "Look, I've declared war, and whether Congress overrides me with more than 67 percent," or whatever—we still have that conflict, constitutionally, do we not, with this solution?

Mr. BAKER. You're always going to have that, Senator. Unless you get a constitutional amendment or unless you get the Supreme Court to rule on the matter, there's no other way to resolve the constitutional problem. But, it would be——

Senator CORKER. And——

Mr. BAKER. [continuing]. Very difficult for a President, if the Congress voted a Resolution of Disapproval, he vetoed it, and they

passed it over his veto, it would be extraordinarily difficult for him to continue to support the military action politically within the country. When you lose—and, of course, the will of the American people is the final arbiter of our foreign policy in a democracy such as we enjoy. Once he loses that, he's going to be in trouble. So, it's the political imperative that would then kick in, but you will not have a resolution, you're quite right, of the underlying constitutional problem.

Senator CORKER. So, what we're really creating here is sort of the code of conduct that will exist between Congress and the President. It really is not going to have the effect of law. Is that correct?

Mr. BAKER. Oh, it would have the effect of law, I think. That's what we have in mind. It would be a statute that would be on the books. It could be challenged, I suppose, constitutionally, ex post facto, by either the—somebody in the Congress, but, you know, we've had many cases where Members of Congress have filed suit against the President, and the courts won't entertain the suit. Or, it could be challenged by the President, saying, "I don't care whether they overrode my veto of the Resolution of Disapproval. I'm going forward anyway." Very risky business for the President.

Senator CORKER. So, let's—you want to say something?

Mr. CHRISTOPHER. I just wanted to say that if there was a Resolution of Disapproval passed by both Houses, and even if the President was able to avoid a veto and not have it overridden, nevertheless, the Congress could then, through its internal rules, have their will expressed. For example, Congress, I suppose, could have a rule that if there was a Resolution of Disapproval approved in both Houses, that thereafter there could be a point of order if there was any military appropriation. Congress has a great deal of power, of course, in the fiscal sense, so they can express their will. If there was a Resolution of Disapproval that either the President signed or was passed over his veto, that would be true even to a greater degree and Congress could express its will through failure to make appropriations.

Senator CORKER. So, we're sitting here today, and as we're sitting here, there are drones flying over Pakistan. And when the intelligence is appropriate and we actually know a target is zeroed in on, we're dropping Hellfire missiles on top of living rooms or whatever we might call where folks are occupied today. So, that's happening as we're sitting here. That's in the public domain. Everybody understands that. So, explain to me exactly, since we know that's ongoing, and it's been ongoing for a long time, how does that fit into this particular scenario that's been laid out?

Mr. BAKER. There are a number of exclusions and exemptions, Senator Corker. Some of those, the chairman mentioned, that might cover the situation you're talking about, actions taken by a 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; limited action of reprisal against terrorists or states that sponsor terrorists; covert operations. Some of this stuff that's going on perhaps has been authorized as a covert operation. Those are not covered by the statute, unless, as I said early on, they ripen into a significant armed con-

flict by virtue of having a continuing combat operation for more than 7 days.

Senator CORKER. So, to get back to Senator Lugar's question about Somalia and Yemen and lots of places where, "al-Qaeda" is and exists, actions like that, that continue to be surgical in nature, that don't necessarily involve lots of troops, if you will, those types of actions can continue ad infinitum without any types of action by Congress.

Mr. BAKER. Well, the only thing that's required under this statute of a President, to begin with, is consultation. So, no approval is necessary. Simply consultation. Those things could continue until they would ripen into a significant armed conflict, by virtue of a, I think, continuing combat operation for more than 7 days.

Senator CORKER. So, if we're moving down the spectrum to that, one of the exclusions also is the safety of our troops——

Mr. BAKER. Right.

Senator CORKER. [continuing]. That—so, it's hard to imagine many armed conflicts taking place in areas like that, which appears to be our greatest threat today—I mean, it seems that the types of wars we've had in the past are changing somewhat—so, it seems to me, if we were to—going to go into Somalia or Yemen or Pakistan, which even is more immediate—if we were to go into that kind of conflict, the safety of our troops would always be an issue, it seems, and especially in the surgical types of operations that we've had. So it seems like, in many cases, per the way this is drafted, the President would actually consult 3 days after it took place, at which time we're semiengaged.

Mr. BAKER. Right.

Senator CORKER. And I think that's where Congress finds itself many times. It's hard to undo an engagement that already has men and women, that we don't want to see harmed, in harm's way. Is that correct?

Mr. BAKER. That's correct. I think that's correct.

Mr. CHRISTOPHER. Senator, it's difficult to get into this refined definitional issue in this kind of a hearing. I suppose it might be argued that some of the actions in Pakistan at the present time would be covered by the resolutions after 9/11 which authorized the President to take action against al-Qaeda and other terrorist groups. I'd say that's a very difficult definitional issue. There will always be difficult definition of issues as to what involves combat operations lasting longer than 7 days. But, after working on this issue for a long time, that was the best we could do to find some definition that had some meaning for the future.

Senator CORKER. Well, I think the contributions that have been made are outstanding, and I thank you for coming before our committee and doing this work. I think that what it also does is, raises lots of issues for us to think through as we try to refine it.

I would just reiterate, just to be the third person to mention this—I think, to the extent you establish staff with a consultative group, I think it does, in fact, give the President, on one hand, one place to go. I think, in the process of giving the President one place to go, I think that the other committees of jurisdiction end up sort of becoming even more irrelevant, which we're already—I mean, I—in fairness, this committee's pretty irrelevant as it relates to

those kinds of actions anyway. That's just the way it is. I'm not complaining. But, it seems to me that this committee, with staff, could end up creating a situation where Armed Services, Intelligence, Foreign Relations even become less relevant in the process. That could be one of the byproducts. I understand why, in fact, you did it, to make the knowledge at that consultative time equal, as much as possible. It's never going to be equal to the administrative branch, because they just—look, they have the tools and—and should have the tools, OK—but, I think there's a—there's a balance there that one ought to think about, and I wonder whether we'd be better off having specific individuals in each of these committees that are on the committee staff of Foreign Relations, of Armed Services, of Intelligence, that are—that make up—that are specifically aligned or part of that consultative group. I think that's a much better way of doing it. Otherwise, Chairman Kerry, you know, I—I think, in essence, you and Senator Lugar become far less relevant in the process.

So, anyway, thank you very much. I see that my time is up. It looks like somebody might want to say something.

Mr. HAMILTON. Senator, may I say that I think these staff members really are an internal matter, that your judgment may be better than ours on the Commission, and we would recognize that.

With regard to the definitional problems, you cannot define precisely everything that might occur. You just can't do it. And we wrestled a lot with the definitions. And we did the best we could. And we did not want to overdefine anything. But, at the end, it seems to me, what is really important here is that we require meaningful consultation. That's what's really important. And I think you can, to be blunt about it, just get lost in the definitions. You're trying to define the undefinable, in effect. And so, while attention has to be paid to those—and I don't want to denigrate that effort—you have to understand that you cannot get precise definitions for all of these possible engagements across a wide spectrum.

At the end of the day, what you really have to focus on is, you've got a situation today where there is no requirement for a President to consult with Members of Congress on this issue. And we're saying, "Mr. President, you must consult." And that, to me, is the overwhelming point.

Mr. CHRISTOPHER. Mr. Chairman, I wonder if I could use Senator Corker's question to make a broader comment.

The CHAIRMAN. Absolutely.

Mr. CHRISTOPHER. When we finished our discussions in the committee, we had an important decision to make. Should we just make it a recommendation, put out a report like this, or should we try to draft a statute? And we felt it was more likely to be practically useful to draft the statute.

Having done the draft, we don't have any great pride of authorship and we would be glad to work with Senators or their staff to try to perfect it and find some better ways to deal with these issues.

I think we were right in trying to draft the statute so you'd have something concrete before you, but, as I say, this cannot be the

final word, and the Congress will work its will, and we'll work with you so you can work your will.

The CHAIRMAN. Well, thank you, Mr. Secretary.

I don't think it's a—frankly, as complicated as maybe some people think it sounds, but I'm—I think the power of this is, No. 1, that you require the consultation. But, it's also equally as powerful that you require Congress to step up after a period of time and take a position.

And, frankly, both serve all of our interests. I mean, the—you know, the term "significant armed conflict," including any operation that either lasts 7 days or that the President knows is going to last 7 days—so, he comes to you, and, in the consultative process, says, "Look, this is going to take a few weeks. It's a tough, big operation," so you know that you're in that posture. But, it also requires us to apply a certain amount of practical common sense and reasonableness standard here.

I can easily see what's happening—I mean, we're not at war with Pakistan. I don't think, by anybody's definition, we'd say we're at war with Pakistan. We are at war in Afghanistan against al-Qaeda and Taliban efforts, et cetera, that are supportive of al-Qaeda. And—but the actions in Afghanistan—in Pakistan are sort of cross-border, that clearly would fit into either paragraph 1 or paragraph 2 of the limitations—all right, not paragraph 1 or 2, but those particular two limitations. And I think a reasonable standard applied to that finds that pretty quickly.

What's important here is that we resolve something we haven't been able to do, which is get Congress to act. I mean, that's pretty significant. And it's in the interest of any President to consult, because a President who doesn't consult and doesn't have the support of Congress isn't going to be able to sustain this for very long, and then we're all weakened as a consequence of that.

So, I think that, again, you know, we can work out the details of it, but I think the consultative piece—you know, if we're consulting as a group and it is specified who the President is going to consult with, we're going to bring our existing staff, either from this committee, Carl Levin, John McCain, et cetera, from Armed Services, Intelligence people. We're all going to consult, anyway, because this is big stuff. It's important stuff that has lives at stake and the interests of the country. So, I think the staff thing is the least of our issues. I think, just keeping it clean and simple and setting it up so you require the consultation, and then have this vote structure, is a very significant step forward, because we've been at absolute gridlock on this issue for 35, 40 years now—30 years.

Senator CORKER. If I could respond to Secretary Hill, I want to say that, from my perspective—and I appreciate what he's saying, "no pride of ownership"—I think the offering of legislative language is a huge contribution. I think, otherwise—and I think the fact that you've done that actually allows us to think through some of these details that otherwise we wouldn't. So, I thank all three of you, and I certainly appreciate your being here today.

Senator KAUFMAN. Mr. Chairman, I'd just——

The CHAIRMAN. Senator Lugar and I want to thank you for protecting our relevancy here. We're particularly grateful.

Senator CORKER. Well, I will say this, that I don't think the Foreign Relations staff, because of the way we deal with foreign aid, deal with other kinds of things, just willy-nilly passing out program after program, and not really looking at eliminating the ones that we feel are less—I think we do, in fact, render ourselves very irrelevant on some of these things. And I know that you want to change that, and I——

The CHAIRMAN. Appreciate the——

Senator CORKER. [continuing]. Appreciate it.

Senator KAUFMAN. Mr. Chairman, just one other comment, and that is, you know, like, for instance, a covert action has to be approved by the Intelligence Committee, so I think one of the things we can do on this—and it's not as big a problem as I think you think it is, because the Congress does have power in a lot of these areas, and it's our job to go through and find out where different Congress committees have to approve different actions by the President, and we all know that one of the big things is the power of the purse strings. I mean, eventually——

Mr. BAKER. Right.

Senator KAUFMAN. [continuing]. They've got to get the appropriations approved. So, this—think this is an excellent, excellent proposal, and I think when you look at it in the total of the Congress's responsibility and the Congress's powers in this, wrestling with the President, I think this is going to turn out to be something that'll be—the definitional problems are not as great as they may sound.

Mr. BAKER. May I make one point, Mr. Chairman, on relevancy? I think this proposal of ours—now, of course, I'm biased, but—I think this offers an opportunity for this committee to take the lead on a matter that would enhance the relevancy, Senator Corker, of this committee. You have a statute in this area, which is a joke. It is observed more in the breach than in the observance. And at the very least, that is not good in a nation of laws, that our primary statute in this area is observed more in the breach than in the observance.

So, if we can replace that with something that's workable and practical and pragmatic, that enhances consultation between the branches, that alone, I think, will help the relevancy of the committee, if this were the movant committee in doing that.

The CHAIRMAN. Senator Feingold, thanks for your forbearance for this little dialogue. We appreciate it.

Senator FEINGOLD. Thank you, Mr. Chairman.

Obviously, we're so fortunate to have such an exceptionally distinguished panel. And thank you for all your work on this subject.

I'd like to use some of my time to just make a statement and then ask a couple of questions.

As we continue to grapple with the profound costs of rushing into a misguided war, it is essential that we review how Congress's war powers have been weakened over the last few decades, and how they can be restored.

The war in Iraq has led to the deaths of thousands of Americans and the wounding of tens of thousands, and will likely end up costing us a trillion dollars. What if we had had more open and honest debate before going to war? What if all the questions about the administration's assertions had been fully and, to the extent

appropriate, publicly aired? So, clearly any reforms of the War Powers Resolution must incorporate these lessons and foster more deliberation and more open and honest public dialogue before any decision to go to war.

And I appreciate that attention is being drawn to this critically important issue, which, of course, goes to the core of our constitutional structure. It's a conversation that we need to continue to have.

But, I am concerned that the proposals made by the Baker-Christopher Commission cede too much authority to the executive branch in the decision to go to war. Under the Constitution, Congress has the power "to declare war." It is not ambiguous in any way.

The 1973 War Powers Resolution is an imperfect solution. However, it does retain Congress's critical role in this decisionmaking process. The Commission's proposal, on the other hand, would require Congress to pass a Resolution of Disapproval by a veto-proof margin if it were unhappy with the President's decision to send our troops into hostilities. That means, in effect, that the President would need only one-third of the Members, plus one additional Member of either House, to continue a war that was started unilaterally by the President. Now, that cannot be what the Framers intended when they gave to the Congress the power to declare war.

Since the War Powers Resolution was enacted, several Presidents have introduced troops into battle without obtaining the prior approval of the Congress. The campaigns in Granada and in Panama, are a few examples. Neither of these cases involved imminent threats to the United States that justified the use of military force without the prior approval of Congress. The simple solution to this problem would be for the President to honor the Constitution and seek the prior approval of Congress in such scenarios in the future.

And, while the consultation required by the War Powers Resolution is far from perfect, I think it is preferable to the Commission's proposal to establish a consultation committee. If this bill had been in place before the war in Iraq, President Bush could have gone—could have begun the war after consulting with a gang of 12 Members of Congress, thereby depriving most of the Senators in this room of the ability to participate in those consultations as we did in the runup to the Iraq war.

The decision to go to war is perhaps the most profound ever made by our Government. Our constitutional system rightly places this decision in the branch of government that most closely reflects the will of the people. History teaches that we must have the support of the American people if we are to successfully prosecute our military operations. The requirement of prior congressional authorization helps to ensure that such public debate occurs and tempers the potential for rash judgment. Congress failed to live up to its responsibility with respect to the decision to go to war in Iraq. We should be taking steps to ensure it does not make this mistake again. We should be restoring this constitutional system, not further undermining it.

Mr. Baker, part of the premise of the Commission's finding is that several Presidents have refused to acknowledge the constitutionality of the War Powers Resolution. And I note that, of course,

in practice, most do honor the resolution. In your view, does the President's Commander in Chief authority give him the authority to ignore duly enacted statutes?

Mr. BAKER. Duly enacted statutes? Not in my view. On the other hand, there has been—you said "most Presidents," Senator Feingold. All Presidents have refused to acknowledge the—or, all Presidents have questioned the constitutionality of the War Powers Resolution.

Senator FEINGOLD. Right.

Mr. BAKER. Both Democrat and Republican.

Senator FEINGOLD. Right. I simply said "several Presidents refused."

Mr. BAKER. Yes.

Senator FEINGOLD. Right. But, most have honored the resolution, in practice.

Mr. BAKER. Well, that's not really quite accurate, sir. They send—they file reports in keeping with—the language is "in keeping with," but never has one President filed a report "pursuant to" the War Powers Resolution.

Senator FEINGOLD. Well, I—and, nonetheless, I appreciate your answer to the basic question, and it seems to me that much of the ambiguity you attribute to the War Powers Resolution would be resolved if future Presidents simply abided by the resolution. That would help solve the ambiguity.

Mr. Hamilton, before the Iraq war, every Senator had the opportunity to at least review the intelligence assessments on Iraq, particularly the October 2002 NIE. I concluded that there was insufficient evidence to justify the decision to go to war. Under your bill, wouldn't the full Congress have even less access to the intelligence supporting the decision to go to war? Wouldn't that intelligence be limited to the gang of members on the consultation committee?

Mr. HAMILTON. With the consultative committee, I think you expand the number of members that would be brought into the discussions involving the highest level of intelligence. In other words, you'd have more members involved, under our proposal, that you do now, because you have a——

Senator FEINGOLD. But—well, I was a—I was a relatively middle, junior member of the Foreign Relations Committee. It was not, at that time, a member of the Intelligence Committee.

Mr. HAMILTON. Yes.

Senator FEINGOLD. At some point, I was afforded the opportunity to go down to a secured room and to hear directly from the CIA people whether they felt the same thing that we were hearing publicly. And I've got to tell you, their tone, when they were trying to express these arguments that the President was making, was rather tepid. And it gave me a feeling that something was wrong here. And I would, apparently under this scenario, not have been a part of that process. Now, I'm not saying my role was critical, but I did end up being one of the people who went to the floor immediately and said, "I'm not buying this al-Qaeda connection. I'm not buying the notion that Saddam Hussein is likely or ready to attack the United States." It appears that somehow somebody in my situation would not necessarily be a part of that pre-, you know, military action process.

Mr. Hamilton.

Mr. HAMILTON. Well, I think, under the law today, the President doesn't even have to consult with Members of Congress before he takes you into war, because the provisions in the War Powers Resolution are very vague with regard to consultation.

We expand greatly the number of Members who would be involved in that consultative process here.

Senator FEINGOLD. It appeared, though, in this circumstance of Iraq, that this was part of the consultative process, that our access to the people from the President's CIA was pursuant to a discussion that led to a vote of the full Senate.

Mr. HAMILTON. Well, the other——

Senator FEINGOLD. So, this was a process where all Members—well, perhaps not all, but at least members of the Foreign Relations—all members of the Foreign Relations Committee were given the opportunity to participate in that kind of——

Mr. HAMILTON. And the proposal that we're putting before you—Members of Congress are required to vote on it.

The CHAIRMAN. Senator——

Mr. HAMILTON. You didn't have that—you don't have that requirement, under present law.

The CHAIRMAN. Yes, there is no requirement, under the present law, at all. What happened is, we did it, under the prerogatives of each of the committees, because the committee chairs and ranking members understood that that was part of the responsibility.

Nothing in here—and we discussed before you came here—about this consultative component being strictly in fulfillment of the requirement that the President let us know what he's thinking of doing so that those other committees—that's why each of them are part of it—the Intelligence Committee, the Armed Services Committee, the Foreign Relations Committee—would then go about their normal business of involving all of their members. I mean—but, there no statute that required that for you, either, at this point.

Senator FEINGOLD. I'd like to believe that, Mr. Chairman, but it strikes me that this provides an opportunity, that the President doesn't currently have, to say, "Look, I went to this consultative process that's provided by this new statute, so I have even less need to go through a formal vote," which, you know, as we just talked about, most Presidents have decided—President Bush, on the first gulf war, even though he may not have taken the view that he had to do it, he went ahead and did it. I think this creates a process that could end-run the feeling on the part of a President that he needs to go through a process that would actually involve this kind of participation. But, I'm not saying this doesn't literally require it. It's what——

Mr. BAKER. But, Senator——

Senator FEINGOLD. [continuing]. Effective—yes, Mr. Baker.

Mr. BAKER. [continuing]. We require a vote within 30 days, so the President is going to be facing a vote of the Congress. And if the vote is a Resolution of Disapproval, that's going to have very serious adverse impacts on the President's ability——

Senator FEINGOLD. But, in the case of Iraq, of course——

Mr. BAKER. Well, that—of course, you know——

Senator FEINGOLD. Thirty days after it would have been not too helpful.

Mr. BAKER. Well, that's true, but the President—both Presidents went to the Congress to get approval, and actually obtained approval.

Now, back to the point you made about the observance of a statute duly enacted and whether a President can question its constitutionality, they've—there's always been the ability of Presidents to question constitutionality. And in this area, it has consistently been questioned by both Democratic and Republican Presidents.

Presidents have sent troops abroad, Senator Feingold, 264 times, during which period the Congress has declared war 5 times. So, we're faced with a situation—we expressly—I think, before you arrived, we made it—we had a dialogue here about the fact that we have expressly preserved the rights of Congress to make the argument that I think you're making, and the right of the President to make the argument that all Presidents have made since the War Powers Resolution was passed, that the Constitution gives either (A) the Congress the authority, or (B) the President the authority. So, we expressly reserve those constitutional arguments, put them to the side, because they are not going to be solved in the absence of a constitutional amendment or a Supreme Court opinion. So, we don't prejudice either branch. What we're trying to do is find a workable solution here that will improve the relationship and the consultation that takes place between the President and Congress when the Nation's going to war.

Senator FEINGOLD. I respect the effort, and I respect the intent. And it may well work that way. My concern—and I know my time's up, Mr. Chairman——

The CHAIRMAN. No, take your—no problem.

Senator FEINGOLD. [continuing]. Is that I witnessed, as a non-Senator, the excellent debate that was held on the floor of the United States Senate prior to the first gulf war. I also was involved in the truncated and, unfortunately, weak debate prior to the Iraq war. But, any process that could somehow make a President feel that he did not need to go through that process prior to such a major action would trouble me. So, that's how I need to review this. Could this lead to that practical effect, as opposed to the literal effort you have made to avoid such a consequence?

Mr. BAKER. Well, I don't think so——

Senator FEINGOLD. That is the nature of my concern.

Mr. BAKER. Well, my—let me just quickly answer it. I don't believe so, because the President has that power today. So, we're not—in this effort, we—I don't see this as giving the President something he doesn't have today.

Senator FEINGOLD. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Feingold. Those are—an important inquiry, and I think it's worth examining the sort of Iraq experience, in terms of the vote up front versus late.

But, there may be some way, Mr. Secretaries and Mr. Chairman, in terms of the definitions—I know you all have struggled with this, and maybe we can spend a minute sort of reviewing that, as to whether you can, you know, cover those rare circumstances where you have such a level of deployment and such a level of con-

frontation—i.e., I mean, the invasion of a country is a pretty big deal. There ought to be some way—I mean, that is certainly separate-able from about 200-and-some of those instances of use of force. And so, maybe there's a way to try to have a balance here, and I think we ought to sort of examine that.

At any rate, are there any further questions from any colleagues?

[No response.]

The CHAIRMAN. There will be some questions for the record, if you don't mind. I think we want to try to fill this out a little bit. And so, I'm going to leave the record open for a week, and if you—I hope we don't overly impose on your goodwill here, but I think there will be a few questions for the record that might be helpful.

Mr. BAKER. Chairman, we'll be glad to respond to those questions.

The CHAIRMAN. Again, we really thank you. This is just a huge and complicated topic, as we can see, but I think you've made a major, major contribution to our thinking about how to proceed forward and we want to work with you very closely to see how we can take this further. So we thank you for coming today.

Mr. BAKER. Thank you, sir.

The CHAIRMAN. We stand adjourned.

[Whereupon, at 11:38 a.m., the hearing was adjourned.]

ADDITIONAL QUESTIONS AND ANSWERS SUBMITTED FOR THE RECORD

RESPONSES OF HON. WARREN M. CHRISTOPHER TO QUESTIONS SUBMITTED BY SENATOR RUSSELL D. FEINGOLD

Question. Mr. Christopher, in your view, since 1973, have past Presidents always sought advance congressional approval of military operations in all situations in which such approval would have been feasible?

Answer. Presidents have not always sought advance congressional approval for military operations, including the sorts of operations defined under our proposed statute as "significant armed conflicts." Examples of Presidents not seeking or obtaining formal approval would include the military actions in Grenada in the 1980s and Panama in the early 1990s. And while President Clinton sought congressional approval for the military actions he initiated in the former Yugoslavia in the 1990s, no express approval was obtained before those significant armed conflicts began. In other instances, of course—including both Iraq wars and the war in Afghanistan—Presidents have obtained advance approval. However, even when there has been advance approval or consultation—and this goes back to the Vietnam war and before—there have been claims that the consultation or approval was rushed or based on incomplete information. Also, there have been charges that the consultation after Congress gave the initial approval has been lacking, either through fault of the President or Congress.

In any event, the focus of our proposed statute is to ensure a meaningful exchange of views and formal consultation, both at the outset, and throughout any conflict in which the country engages. We call for Congress within 30 days of the initiation of a significant armed conflict to vote up or down on the action, so its will is known. We believe that the Joint Congressional Consultation Committee that our statute creates will allow the President to share information with the Congress more directly and obtain its meaningful, independent advice. We also think the full Congress will work with the Joint Committee and its members to obtain the necessary information to vote on resolutions of approval or disapproval. The Joint Committee will also serve as a conduit for the full Congress and its Members to express their views to the White House.

All in all, we think our proposed statute will significantly improve the current state of affairs. We do not believe the War Powers Resolution of 1973 has encouraged or facilitated meaningful consultation (just the opposite). And we do not believe the 1973 law has encouraged or compelled Presidents to seek congressional approval.

Question. Mr. Christopher, the consultation and approval procedures of your bill only apply to significant armed conflict which does not include "limited acts of reprisal against terrorists or states that sponsor terrorism." Given that the use of military force against another government could provoke an extended military conflict and is defined as an act of war under the laws of armed conflict no matter how "limited" it may be, wouldn't it be preferable to seek prior congressional approval whenever possible?

Answer. Prior approval is usually ideal for a number of reasons, but sometimes it is impossible to obtain as a practical matter because of the need for secrecy or other emergent circumstances. Most constitutional scholars agree that the President has some latitude to act unilaterally to protect the country's interests. Section 4(A) of our proposed statute encourages the President to consult regularly with the Joint Congressional Consultation Committee, even with regard to such matters.

Our statute recognizes, however, that even short, swift military actions can lead to longer engagements. Thus, sections 3(A)(ii) and 4(B) require the President to consult and trigger the congressional voting mechanisms in section 5 in the case of "any combat operation by U.S. armed forces . . . expected by the President to last more than a week." One might cynically argue that Presidents will purposefully underestimate the time required for a particular operation so as to avoid the consultation and voting requirements in sections 4 and 5. However, any statute in the war powers area must, at some level, assume the good faith of the parties involved, and Congress always has political means at its disposal to address such concerns. The enforcement provisions established in the 1973 resolution, while defended as good policy by some, have never been invoked by the full Congress or enforced by the courts.

In any event, section 4(B) of our proposed statute makes clear that if a "limited act of reprisal against terrorists"—one of the sorts of actions described in section 3(B) of the statute—"becomes a significant armed conflict as defined in section 3(A) [by reason of lasting more than seven days], the President shall similarly initiate consultation with the Joint Congressional Consultation Committee," pursuant to section 4, and section 5's voting procedures are triggered as well.

Question. Mr. Christopher, do you believe that congressional authorization to fight al-Qaeda extends to the entire world, including, for instance, U.S. military strikes in Somalia? What are the limitations on the global use of such authorization and what is Congress's role in defining those limitations?

Answer. The September 18, 2001, joint resolution that Congress enacted, Public Law 107–40, S.J. Res. 23, provides (italic added):

> That the President is authorized to use *all necessary and appropriate force* against those nations, *organizations*, or *persons* he determines *planned, authorized, committed, or aided* the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, *in order to prevent any future acts of international terrorism* against the United States by such nations, organizations or persons.

Such hypothetical questions are hard to answer given the limited facts, but in light of the open-ended language of the joint resolution, if the President found there was an organization in Somalia that aided the September 11 attacks and that organization posed a current threat, one could certainly argue that the authorization extends that far.

Congress can always limit or define the scope of its authorizations—either by time or geographic scope. Presidents may debate the constitutional force of such limitations, but Congress, in drafting its authorizations, controls the pen and can be as clear as it wants in what is being authorized. 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 also 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. During the Vietnam war, Congress passed measures, including what is known as the "Fulbright Proviso" in the War Forces-Military Procurement Act of 1971 that placed limitations on providing military support and assistance to the Governments of Cambodia or Laos. This Proviso was criticized, however, as being unclear. In recent years, Senator Byrd, for example, proposed a

sunset, or time, limitation on the recent Iraq War Authorization. That amendment was rejected.

RESPONSE OF HON. LEE H. HAMILTON TO QUESTION SUBMITTED BY SENATOR RUSSELL D. FEINGOLD

Question. Mr. Hamilton, in your view, were the consultations with the Gang of Eight on President Bush's warrantless wiretapping and interrogation programs sufficient to ensure adequate oversight? If not, would we be well advised to extend a similar oversight structure of the power to go to war?

Answer. Our Commission has gone out of its way not to call balls and strikes, particularly concerning recent events.

The Gang of Eight structure is different than the one proposed in our statute. We propose involving a larger group (20 key leaders in Congress from both sides of the aisle) and requiring up-or-down votes of the whole Congress concerning any significant armed conflict, as well as smaller conflicts that grow into significant ones. We think our procedure provides not only a considerable amount of oversight, but a good and productive forum for the open and timely exchange of views.

APPENDIX

NATIONAL WAR POWERS COMMISSION

REPORT

TABLE OF CONTENTS

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 gives 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 the 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 concerning 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 reaction 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 (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.

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

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.

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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 signifi cant 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 signifi cant armed confl ict.

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 signifi cant 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 private 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 fi rm.

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

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 Confl icts 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.

Stanford Law School is one of the nation's leading institutions for legal scholarship and education. Faculty members argue before the Supreme Court, testify before Congress, and write books and articles for academic audiences, as well as the popular press. A curriculum that begins with the fundamentals but is then rich in interdisciplinary learning opportunities, clinics that teach law students how to be lawyers who make a difference, and programs and centers that catalyze scholarship, research, and dialogue on important issues — these are the forums through which Stanford Law shapes the future. In addition, cutting edge facilities and the diverse advantages of Stanford University with its easy access to interdisciplinary resources and faculty provide an ideal environment for exploring and mastering the law in an intimate setting.

Freeman Spogli Institute for International Studies at Stanford University is the primary center for rigorous and innovative research on major international issues and challenges conducted by its university-wide faculty, researchers, and visiting scholars. By tradition, the Institute undertakes joint faculty appointments with Stanford's seven schools and draws faculty together from the University's academic departments and schools to conduct interdisciplinary research on international issues that transcend academic boundaries. Scholars at the Institute's four research centers conduct research 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.

University of Virginia School of Law is a world-renowned training ground for distinguished lawyers and public servants. Consistently ranked among the top law schools in the nation, Virginia has educated generations of distinguished lawyers and public servants. A faculty of nationally acclaimed experts in their fields and outstanding teachers lead Virginia's 1,100 students to appreciate the power of law to shape human behavior and to infl uence political, social, and cultural life. Students learn together, reading each other's work and freely sharing course outlines and other materials, confi dently relying on the nation's oldest student-run Honor System to maintain the highest ethical standards. Virginia has a national reputation for producing highly skilled lawyers with a healthy combination of legal acuity and personal balance.

College of William & Mary's Marshall-Wythe School of Law is nationally recognized for its rigorous curriculum and excellent faculty. The Law School attracts students from all regions of the nation. Its alumni practice law throughout the United States, in Canada, and in several foreign countries. The School offers a three-year J.D. degree program and the joint degrees of Law and Master of Business Administration, Master of Public Policy, and Master of Arts in American Studies. The one-year Master of Laws in the American Legal System provides advanced education for individuals who received their legal training outside the U.S. The Chair of Law at William & Mary, created in 1779 by the Board of Visitors at the urging of Thomas Jefferson, was the first established in the United States. The fi rst occupant of the Chair was George Wythe, in whose offices studied Thomas Jefferson, John Marshall, James Monroe, and Henry Clay.

ACKNOWLEDGEMENTS

The Miller Center gratefully acknowledges the Eugene V. Fife Family Foundation and the Horace W. Goldsmith Foundation. Without their support the work of the Commission would not have been possible. The Miller Center similarly is indebted to the Commission's Co-Chairs,

Secretaries James A. Baker, III and Warren Christopher, and its Members and Advisors.

The Miller Center further thanks its partnering institutions, the James A. Baker III Institute for Public Policy Research at Rice University, the Freeman Spogli Institute and Stanford Law School at Stanford University, the University of Virginia School of Law, and William & Mary School of Law.

The Miller Center recognizes the law firms of Baker Botts LLP, O'Melveny & Myers LLP, and Hunton & Williams LLP for generously offering support and staff assistance for research and planning related to the work of the Commission. Sandy Hatcher, Ashley Anderson, Charlotte Cheadle, and Kathy Osborne offered excellent assistance both to the Co-Chairs and the Commission. As principal staff members for the Co-Chairs, John Williams of Baker Botts and Matt Kline of O'Melveny & Myers provided invaluable insight with all aspects of the Commission's work. Carol Garges at the University of Virginia School of Law and Cassi Fritzius at William & Mary School of Law also deserve many thanks for their time and efforts on behalf of the Commission's Co-Directors, John Jeffries and Taylor Reveley III.

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Commission, Governor Gerald Baliles and Taylor having persuaded Andrew to join the effort in its early days.

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