

**THE ROLE FOR CONGRESS AND THE PRESIDENT
IN WAR: THE RECOMMENDATIONS OF THE
NATIONAL WAR POWERS COMMISSION**

HEARING

BEFORE THE

**COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES**

ONE HUNDRED ELEVENTH CONGRESS

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THE ROLE FOR CONGRESS AND THE PRESIDENT IN WAR: THE RECOMMENDATIONS OF THE NATIONAL WAR POWERS COMMISSION

THURSDAY, MARCH 5, 2009

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 10:04 a.m., in room 2172, Rayburn House Office Building, Hon. Howard L. Berman (chairman of the committee) presiding.

Chairman BERMAN. The committee will come to order. I yield myself 7 minutes.

Today we turn our attention to one of the most sacred trusts of any government, with the decision to send its sons and daughters into harm's way. For decades, constitutional experts and policy analysts have struggled to delineate the responsibilities of Congress and the President in authorizing the use of U.S. Armed Forces.

The "war powers" question is far from academic. American men and women in uniform are engaged in hostilities on the other side of the world. As eloquently stated by our two esteemed witnesses, whether or not to go to war is the most agonizing decision a country can make. The War Powers Resolution of 1973, which we will be reviewing today, was born of congressional frustration over the executive branch's commitment of forces in Southeast Asia in the 1960s without appropriate involvement of Congress, a co-equal branch of government.

The law states, in essence, that the President must withdraw U.S. forces from any conflict within 60 days of their deployment unless Congress has specifically authorized the continuation of their involvement. Unfortunately, this has been a near-constant exercise in futility. Presidents from both parties have declared that the War Powers Resolution is inconsistent with the Constitution. No President in the past 35 years has filed a report pursuant to the War Powers Resolution.

And while the War Powers Resolution specifically directs the President to consult "in every possible instance" prior to introducing U.S. troops into harm's way, there have been numerous instances of U.S. military action where there has been no prior meaningful consultation with Congress—sometimes with calls coming while things were in the air.

Examples include the invasions of Grenada in 1983 and Panama in 1989. Then the President believed he could deploy forces for short periods of time without adhering to the resolution's consult-

ative requirements. Similar cases occurred in Somalia in 1992 and Haiti in 1994.

To be fair, Presidents have sought at various times the collective judgment and backing of Congress prior to significant armed conflict, in part in response to congressional efforts to return to a more faithful adherence to the Constitution's division of war powers.

Major combat operations, including the Gulf War of 1991, the conflict in Afghanistan in 2001 and the 2003 Iraq War, were all the subject of congressional debate and a vote by both the House and the Senate, resulting in an authorization to use U.S. Armed Forces.

The conflict in Kosovo was also subject to congressional votes, albeit conflicting ones, and usually negative ones, on the opposite sides of the same issue in fact. And the House voted to limit United States military involvement in Central America during the Reagan administration, which led to a scaling back of American intervention in the region.

But to the extent Presidents have negotiated around the War Powers Resolution, or not consulted Congress at all, the resolution has not fulfilled its original purpose. It essentially remains a well-intentioned yet toothless mechanism to force consultations and, if necessary, a withdrawal of U.S. Armed Forces should Congress not approve of their deployment within 60 days. Indeed, Presidents, scholars and even some members of this body continue to dismiss the resolution as unconstitutional and unworkable.

I became particularly seized with the war powers question during Secretary Baker's term as Secretary of the Treasury, when President Reagan authorized U.S. warships to defend reflagged Kuwaiti tankers in the Gulf during the Iran-Iraq War. We could never quite get the administration to admit that these warships had been deployed into hostilities and were subject to the War Powers Resolution.

In close cooperation with my respected former colleagues, Dante Fascell and Lee Hamilton, several of us undertook an effort to rewrite the War Powers Resolution and invite the President to seek prior authorization for military action.

The thrust of that legislation from 1988—H.J. Res. 675—was to require the President to consult with a permanent consultative group consisting of congressional leadership and some Members chosen by the Democratic Caucus and the Republican Conference of the House and Senate. It effectively preempted claims by the administration that consultation was unnecessary or improvident.

I welcome a rekindling of this debate through the commendable work of the National War Powers Commission, chaired by Secretaries Baker and Christopher, which believes Congress should repeal the War Powers Resolution. In its place, the Commission has recommended a consultative mechanism and a procedure for Congress to take the measure of support for the President's military actions. If such deployment does not command majority support, then any Member of Congress may propose a joint resolution of disapproval that would require an end to the military involvement, with such resolution being subject to expedited procedures.

A resolution, of course, would be subject to a veto, which would have to be overcome by a two-thirds majority. I am not sure if the proposed legislation would sufficiently balance the authorities be-

tween the executive and legislative branches. However, I am certain that the proposed draft is a real and substantial improvement over the existing law. I am gratified the Commission has made this contribution to the war powers debate, and I can think of no better witnesses to address the critical issue of how to make the decision to go war.

I am now happy to yield to the distinguished ranking member for her opening statement.

Ms. ROS-LEHTINEN. Thank you so much, Mr. Chairman, and I also join you in welcoming our most distinguished witnesses this morning, and I am grateful for the time invested by our great Secretaries of State, Mr. Baker, Mr. Christopher, as well as our former chairman and dear friend of this committee, Lee Hamilton, as well as all of their colleagues on the Commission. Their insight and their expertise are highly welcome.

The life-and-death issue, as you pointed out, Mr. Chairman, of committing our Armed Forces to combat is one of the most solemn responsibilities of our Federal Government, a responsibility that has only become even more complex since the deplorable attacks on our Nation on 9/11.

The Constitution vests the Congress with the power to declare war and to raise and support armies while making the President the Commander-in-Chief of the Armed Forces. The proper exercise and the interrelation of these war-making powers has been a source of historical ambiguity and tension, which some see as healthy and others as dangerous.

The War Powers Resolution and attempted congressional corrective that was passed over President Nixon's veto in 1973 has not produced a settled consensus. In this context, it would be useful to hear from our witnesses about the details of their proposed replacement for the War Powers Resolution, which they have titled the "War Powers Consultation Act."

I am interested in learning why they believe it represents an improvement over the current War Powers Resolution and how it would operate in current circumstances. Congress always possesses the constitutional authority to cut off funding for U.S. participation in any particular conflict, but where no such consensus exists, our servicemen and -women deserve our full support, including political support, for their mission and their sacrifices.

The Commission has attempted to address some of these issues by offering a proposal to serve as a starting point for possible legislative action. I ask our witnesses to provide us with additional insight on how they intend their proposal to operate on several issues.

First, I would be interested in understanding their decision to shift the statutory consequences of congressional inaction. The War Powers Resolution requires congressional approval for the President to continue U.S. troop commitments beyond 60 days, although it has not been enforced in practice. The proposed War Powers Consultation Act would allow such deployment to continue in the absence of congressional disapproval.

Second, their definition of "significant armed conflict" specifically excludes a number of circumstances, such as actions to repel or prevent imminent attacks, limited acts of reprisals against terror-

ists, acts to prevent criminal activity abroad and covert operations, among others.

Given the generality of these exceptions and the ingenuity of the executive branch, I would like to understand better how this new definition would improve rather than intensify the conflicting interpretations on authorities that have arisen under the War Powers Resolution.

Third, the Commission's proposal would create a standing committee, the Joint Congressional Consultation Committee (JCCC), as the focus for enhanced congressional executive consultation. Aside from the question of whether Congress can constitutionally require the President to consult before exercising his authorities, how do you see this joint congressional committee fundamentally improving preconflict resolution and consultation?

Again, I want to thank Secretaries Baker and Christopher and former Chairman Hamilton for their work on this report, the "National War Powers Commission Report," which represents a fitting continuation of their distinguished careers in public service. So thank you, gentlemen, for being with us here today. Thank you, Mr. Chairman.

Chairman BERMAN. Thank you very much, Ms. Ros-Lehtinen, and we have excellent witnesses. Does any member want to overcome the natural barrier to seeking 1 minute for initial comments? The gentleman from New Jersey, Mr. Payne, is recognized for 1 minute.

Mr. PAYNE. Thank you very much. I just would like to also welcome our two great Secretaries, former Secretaries of State. I had the pleasure to serve under both of them and, of course, our chairman, Lee Hamilton.

I think that it is certainly fitting that we try to come up with a resolution to this question. Ever since the Bay of Tonkin Resolution, and December 7, I guess, or December 8, 1941, was the last time we really declared war I suppose, but since then, we have been into Grenada, Panama. We have been into Haiti, and we have been to Liberia. We were in Somalia. We have been to Bosnia and Sudan. We have gone, of course, to Iraq, some while ago, to Iran, North Korea.

So I do think that, at some point in time, we need to have a clarification of the duties, and I commend the committee for the War Powers Commission, such distinguished persons. I hope that we can come to grips with the resolution, and, with that, my time has expired.

Chairman BERMAN. The time of the gentleman has expired. On behalf of the institution, I would say you served with the two Secretaries, not under the two Secretaries.

The gentleman from New Jersey, Mr. Smith, is recognized for 1 minute.

Mr. SMITH OF NEW JERSEY. Mr. Chairman, thank you. Let me just say very briefly that our three witnesses are extraordinary, wise and experienced men, all of whom have profoundly and positively shaped foreign policy during some of this Nation's most challenging years.

The War Powers Act clearly has failed to provide any meaningful framework for the President or for the Congress to deal with the

profound issues of war and taking a country to war. I think this Commission's report, and I have read it cover to cover, like, I am sure, every member of this committee has, provides a very, very meaningful blueprint for action, and I think having Mr. Hamilton, our former chairman, who I served with as well, as a very eminent member of this Commission bodes well.

Not only has the 9–11 Commission, which he and Tom Kean so ably chaired, made a difference; most of the recommendations, almost every one of the recommendations they made, either through administrative action or by congressional action, has been put into policy and into law.

I think this is a starting date for Congress, and hopefully we will come out of the blocks and take very seriously your recommendations, and I thank you.

Chairman BERMAN. The time of the gentleman has expired.

We served under Chairman Hamilton, and we served with Secretaries Baker and Christopher.

The gentleman from Massachusetts is recognized for 1 minute.

Mr. DELAHUNT. Thank you, Mr. Chairman. As you are aware, in chairing the Subcommittee on Oversight, I conducted a number of hearings on these same issues, and I applaud you for taking it to the full committee. I want to express my gratitude to all three gentlemen in taking on what is clearly an issue that deserves serious consideration and is not susceptible to easy resolution.

I am particularly pleased that you have taken the concept of consultation and elevated it. I think that is absolutely essential to a thoughtful decision. I am reminded of the quote by Senator Hagel during the course of the debate on Iraq where he claimed that the Bush administration considered Congress as a constitutional nuisance in terms of that particular conflict. I dare say that that has occurred previous to the Bush administration as well both with Democratic and Republican Presidents.

However—am I done?

Chairman BERMAN. You can finish the sentence.

Mr. DELAHUNT. I will either make it a very long sentence or I will stop. I thank the gentleman.

Chairman BERMAN. The time of the gentleman has expired. The gentleman from Texas, Mr. Paul.

Mr. PAUL. Thank you, Mr. Chairman, and welcome, panel.

I do appreciate the chairman bringing this very important issue before us because it is something that I have been talking about for a long time, and I think it is crucial. I agree that the War Powers Resolution has not functioned very well, and a lot of people have argued that it is unconstitutional. Of course, the Presidents have argued it was unconstitutional because they wanted more power and more leeway, and others, such as myself, have argued that it has given the President too much power. It actually legalized war for 90 days, and it is very difficult to get out of a war once it gets started.

Since World War II, we have had, essentially, perpetual war with no significant congressional approval, in that there has never been a declaration of war. There is a lot of ambiguity, but, quite frankly, I think the ambiguity comes from the fact that we do not follow precisely, which is very, very clearly stated in the Constitution:

You cannot go to a war unless a war is declared. We would be a lot better off if we just followed that mandate.

Chairman BERMAN. The time of the gentleman has expired. The gentleman from Georgia, Mr. Scott, is recognized for 1 minute.

Mr. SCOTT. Thank you very much, Mr. Chairman. I, too, want to commend you all for coming before us and doing this extraordinary work. There is no more important work than what we do to make the decision before we send our young men and women into harm's way, but this one point: This legislation calls for a congressional vote approving military action 30 days after its start. If Congress does not approve of the military action, it can submit a resolution expressing its disapproval.

My point is, submitting a disapproval resolution seems unnecessary when Congress can simply practice the constitutional rights and deny funding. So the question is, why is there a need for this additional measure? I think that was the point we wanted to make.

Chairman BERMAN. The time of the gentleman has expired. The gentleman from Missouri, Mr. Carnahan, is recognized for 1 minute.

Mr. CARNAHAN. Thank you, Mr. Chairman. A quick thanks to the members of the Commission for this work—I think it is long overdue—also to Subcommittee Chairman Delahunt for the hearings we had in his subcommittee last Congress and to the chairman for bringing this up.

It is an issue that me and my colleagues believe needs to be reexamined and revisited in ways that are constitutional and practical. I cannot begin this debate without mentioning my friend, the late Missouri Senator, Tom Eagleton, who was one of the original champions of preserving the war powers with the popularly elected Congress.

While he ultimately voted against the final committee report because he viewed it as too watered down, his work on subsequent attempts to strengthen the War Powers Resolution left an indelible mark on the debate surrounding Congress's role in war.

Senator Eagleton also sought to prevent an end-run around congressional authorization by the executive branch by seeking to prevent the President from using treaties and other authorities as basis for going to war.

So I am anxious to hear the panel talk about that today. A timely hearing, Mr. Chairman.

Chairman BERMAN. The time of the gentleman has expired. The gentleman from Indiana, Mr. Burton.

Mr. BURTON. Mr. Chairman, it is nice to have these three great people here, especially Lee Hamilton from Indiana. We have that Hoosier intelligence here at the desk, and we really appreciate it.

You know, there have been times when Presidents have gone beyond their authority, such as Lincoln and Jackson, and what I want to find out today is how we deal with those gray areas, because there are gray areas. So if you could illuminate those areas, I would really appreciate it.

Chairman BERMAN. The time of the gentleman has expired. The gentleman from California, Mr. Rohrabacher, is recognized for 1 minute.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. Let me note, I have served under two of our witnesses today, Chairman Hamilton, but also under Mr. Baker, who was the Chief of Staff at the White House when I worked at the White House. But I have listened a great deal to Mr. Christopher, and I do not usually listen to people who I am working under, so they have noticed.

Chairman BERMAN. All right.

Mr. ROHRABACHER. Let me just note both of them were fine bosses and contributed a lot to my understanding of how the world works, and I appreciate the guidance from both of them in my career and look forward to this testimony.

Let me just say very quickly, I do not think we need a change in the law. We need to have Congress have courage enough to use the powers that we already have to balance out the authority of the President in this very important area in terms of war-fighting and committing of our troops.

As far as I am concerned, Congress has been gutless and unwilling to exercise the power it already has. Why change the law when we are not even exercising the authority we have got? Thank you.

Chairman BERMAN. The time of the gentleman has expired. The gentleman from Virginia is recognized for 1 minute.

Mr. CONNOLLY. Thank you, Mr. Chairman, and thank you for holding this hearing.

Article 1, Section 8 of the Constitution explicitly grants the legislative branch the exclusive power to declare war. Article 2, Section 2 declares the President shall be the Commander-in-Chief with respect to carrying out the exercise of such powers declared by the Congress.

In no way did the Founding Fathers envision vesting the power to declare war with the President. In fact, they were fleeing from that very model of government, yet, for the past half-century, this body has abrogated its responsibility and watched an all-too-willing executive branch step in to fill the void. To wit, the last formal declaration of war made by this Congress was World War II, but we have repeatedly sent and currently have troops deployed at war.

Today, we are 7 years in this largest kinetic U.S. military engagement since the Revolutionary War, predicated on a flimsy congressional authorization and a string of exaggerated intelligence from the Executive.

Since it was enacted in 1973, no President has ceded the argument that the War Powers Resolution was necessary, let alone constitutional, and I think they are right. I think Congress needs to step up to its responsibility, and I think we need to have this kind of dialogue about what are the proper roles of the Executive.

Chairman BERMAN. The time of the gentleman—

Mr. CONNOLLY. Thank you, and if I may, Mr. Chairman, simply acknowledge that the former Governor of Virginia, Gerry Baliles, is here today. We are very pleased to have him.

Chairman BERMAN. Yes. Do any other members of the committee seek recognition? The gentlelady from California, Ambassador Watson.

Ms. WATSON. Thank you so much, Mr. Chairman, for this hearing, and it is clear from the War in Iraq that discourse between

Congress and the President must begin at the onset of significant armed conflict.

Looking back, in retrospect, the War Powers Resolution of 1973 does not provide a need forum. It is unclear that adopting the proposed War Powers Resolution of 2009 will encourage the President to begin the necessary discussion and truly consult with Congress and the people, but it is a start to making necessary changes on how our country enters significant armed conflict.

So I look forward to the testimony, and I welcome our expert witnesses. Thank you.

Chairman BERMAN. The time of the gentlelady has expired. The gentlelady from California, Ms. Lee, is recognized for 1 minute.

Ms. LEE. Thank you, Mr. Chairman. I, too, want to thank you and recognize all of you for the service that you have provided to our country, and I am so glad that you are here today and we have come to this point.

My predecessor, Ron Dellums, was very involved in issues around the War Powers Act, and I have been deeply involved in them also as a result of being on his staff and now as a Member.

There are several issues, and I hope the Commission will be able to address some of these issues. One is, of course, the President has the authority to use force to prevent imminent attacks on the United States. So I want to find out, did the Commission address the authorization or an authorization to use force as a preemptive strike to prevent future military attacks, just how that would proceed within your recommendations of the War Powers Act revision.

Also, I am one who believes that only Congress can declare war. I still believe that, and I do not believe we have the authority to provide the authority to the President to do whatever, and so let me just ask you if you could address the authorization to use force versus a declaration of war.

Chairman BERMAN. The time of the gentlelady has expired.

Ms. LEE. Thank you very much.

Chairman BERMAN. If there is no one else seeking recognition, I will now turn to our witness panel, for whom no introduction is really necessary, but I will give one anyway.

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.

Mr. Baker and former U.S. Congressman Lee Hamilton served as co-chairs of the Iraq Study Group in 2006, and Mr. Baker and former President Jimmy Carter served as co-chairs of the Commission on Federal Election Reform in 2005.

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

1979 to 1981. A 1981 recipient of the Presidential Medal of Freedom, Mr. Christopher is senior partner at the law firm of O'Melveny & Myers, where he was chairman from 1982 to 1992.

In order to not look parochial, I will not specifically refer to the major contributions he has made to the Los Angeles community in a whole variety of areas, and, of course, he now lives there.

Lee Hamilton is president and director of the Woodrow Wilson International Center for Scholars and a director of the Center on Congress at Indiana University. Lee Hamilton served for 34 years in Congress, representing Indiana's Ninth District from January 1965 to January 1999. During his tenure, he served as chairman and ranking member of this committee. He also chaired the Subcommittee on Europe and the Middle East from the early 1970s until 1993, along with at least four other committees during his congressional tenure.

Since leaving the House, Hamilton has served on every major commission on national security, including a stint as vice chair of the National Commission on Terrorist Attacks Upon the United States, known as the 9-11 Commission, and co-chair of the Iraq Study Group.

Congressman Hamilton, thank you very much for returning to the committee. I understand you will not be giving an opening statement, but you will be available to answer questions. And I want to, as Jerry Connolly did, recognize the director of the Miller Center, who sponsored this Commission, the former Governor of Virginia, Gerald Baliles, who performed a valued role as an adviser to the Commission.

Without objection, the executive summary of the National Commission's Report and the proposed legislation offered by the Commission shall be inserted into the record, and, Mr. Baker, I call upon you to proceed with your opening statement.

[The information referred to follows:]

NATIONAL WAR POWERS COMMISSION**R E P O R T****EXECUTIVE SUMMARY
OF THE REPORT**

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

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

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

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

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

rights affected by the conduct of a particular war.

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

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

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

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

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

First, that our proposal be practical, fair, and realistic. It must have a reasonable chance of support from both the President and Congress. That requires constructing a proposal that avoids clearly favoring one branch over the other, and leaves no room for the Executive or Legislative Branch justifiably to claim that our proposal unconstitutionally infringes on its powers.

Second, that our proposal maximize the likelihood that the President and Congress productively consult with each other on the exercise of war powers. Both branches possess unique competencies and bases of support, and the country operates most effectively when these two branches of government communicate in a timely fashion and reach as much agreement as possible about taking on the heavy burdens associated with war.

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

Consistent with these principles, we propose the passage of the War Powers Consultation Act of 2009. The stated purpose of the Act is to codify the norm of consultation and "describe a constructive and practical way in which the judgment of

both the President and Congress can be brought to bear when deciding whether the United States should engage in significant armed conflict.”

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

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

If, instead, the concurrent resolution of approval is defeated in either House, any member of Congress may propose a joint resolution of disapproval. Like the concurrent resolution of approval, this joint resolution of disapproval shall be deemed highly privileged and must be voted on in a defined number of days. If such a resolution of disapproval is passed, Congress has several options. If both Houses of Congress ratify the joint resolution of disapproval and the President signs it or Congress overrides his veto, the joint resolution of disapproval will have the force of law. If Congress cannot muster the votes to overcome a veto, it may take lesser measures. Relying on its inherent rule making powers, Congress may make internal rules providing, for example, that any bill appropriating new funds for all or part of the armed conflict would be out of order.

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

We recognize the Act we propose may not be one that satisfies all Presidents or all Congresses in every circumstance. On the President’s side of the ledger, however, the statute generally should be attractive because it involves Congress only in “significant

armed conflict,” not minor engagements. Moreover, it reverses the presumption that inaction by Congress means that Congress has disapproved of a military campaign and that the President is acting lawlessly if he proceeds with the conflict. On the congressional side of the ledger, the Act gives the Legislative Branch more by way of meaningful consultation and information. It also provides Congress a clear and simple mechanism by which to approve or disapprove a military campaign, and does so in a way that seeks to avoid the constitutional infirmities that plague the War Powers Resolution of 1973. Altogether, the Act works to give Congress a seat at the table; it gives the President the benefit of Congress’s counsel; and it provides a mechanism for the President and the public to know Congress’s views before or as a military campaign begins. History suggests that building broad-based support for a military campaign — from both branches of government and the public — is often vital to success.

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

To be clear, however, in urging the passage of 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.

THE PROPOSED STATUTE

WAR POWERS CONSULTATION ACT OF 2009

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

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

WHEREAS, past efforts to call upon the Judicial Branch to define the constitutional limits of the war powers of the Executive and Legislative Branches of government have generally failed because courts, for the most part, have declined jurisdiction on the grounds that the issues involved are “political questions” or that the plaintiffs lack standing; and,

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

WHEREAS, the country needs to replace the War Powers Resolution of 1973 with a constructive and practical way in which the judgment of both the President and Congress can be brought to bear when deciding whether the United States should engage in significant armed conflict, without prejudice to the rights of either branch to assert its constitutional war powers or to challenge the constitutional war powers of the other branch.

NOW THEREFORE BE IT RESOLVED:

Section 1. Short Title.

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

Section 2. Purpose.

The purpose of this Act is to describe a constructive and practical way in which the judgment of both the President and Congress can be brought to bear when deciding whether the United States should engage in significant armed conflict. This Act is not meant to define, circumscribe, or enhance the constitutional war powers of either the Executive or Legislative Branches of government, and neither branch by supporting or

complying with this Act shall in any way limit or prejudice its right or ability to assert its constitutional war powers or its right or ability to question or challenge the constitutional war powers of the other branch.

Section 3. Definitions.

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

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

(i) actions taken by the President to repel attacks, or to prevent imminent attacks, on the United States, its territorial possessions, its embassies, its consulates, or its armed forces abroad; (ii) limited acts of reprisal against terrorists or states that sponsor terrorism; (iii) humanitarian missions in response to natural disasters; (iv) investigations or acts to prevent criminal activity abroad;

(v) covert operations; (vi) training exercises; or (vii) missions to protect or rescue American citizens or military or diplomatic personnel abroad.

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

(i) The Speaker of the U.S. House of Representatives and the Majority Leader of the Senate;

(ii) The Minority Leaders of the House of Representatives and the Senate;

(iii) The Chairman and Ranking Minority Members of each of the following Committees of the House of Representatives:

(a) The Committee on Foreign Affairs,

(b) The Committee on Armed Services,

(c) The Permanent Select Committee on Intelligence, and

(d) The Committee on Appropriations.

(iv) The Chairman and Ranking Minority Members of each of the following Committees of the Senate:

(a) The Committee on Foreign Relations,

(b) The Committee on Armed Services,

(c) The Select Committee on Intelligence, and

(d) The Committee on Appropriations.

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

even-numbered Congress.

Section 4. Consultation and Reporting.

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

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

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

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

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

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

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

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

Section 5. Congressional Approval or Disapproval.

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

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

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

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

Section 6. Treaties.

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

Section 7. Severability.

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

STATEMENT OF THE HONORABLE JAMES A. BAKER, III, SENIOR PARTNER, BAKER BOTTS LLP (FORMER SECRETARY OF STATE)

Mr. BAKER. Thank you, sir, very much.

Chairman Berman and Ranking Member Ros-Lehtinen and members of the committee, it is a real honor for us to be with you today. We are here of course to discuss the report of the War Powers Commission, which Secretary Christopher and I co-chaired and on which your esteemed and very distinguished former chairman, Lee Hamilton, served as a very valuable member. We are quite fortunate, as you have noted, Mr. Chairman, that Chairman Hamilton is with us here this morning.

Let me begin with a bit of background on the Commission and the serious problem that it was formed to deal with, and then Secretary Christopher will detail our proposed new legislation.

Two years ago, Chris and I were approached by the Miller Center at the University of Virginia, and as you have noted, Mr. Chairman, the director of that very fine center, the distinguished former Governor of Virginia, Gerald Baliles, is with us today.

We were asked at that time to co-chair an independent but bipartisan commission to consider an issue that has deviled legal experts and government officials since the very day our Constitution was framed, and that is of course the question of how our Nation makes the decision to go to war.

As we know, our Constitution gives the President the powers of Commander-in-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. So it was evident to us that if we were going to recommend anything meaningful that there had to be some practical or pragmatic solution to this conundrum.

As we put together the Commission, we thought it was important to 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. Our 12-member Commission is equal part Democrats and Republicans.

After 14 months of study, Mr. Chairman, we concluded that the central law governing this critical decision, the War Powers Resolution of 1973, is ineffective, it is unworkable, and it should be repealed and replaced with a better law. The 1973 resolution's greatest fault is that most legal experts would consider it unconstitutional, although I think it is important to note that the Supreme Court has never ruled on it.

We believe that the rule of law, which, of course, I am sure everybody in this room would agree, is a centerpiece of American democracy, is undermined and is damaged when the main statute in this vital policy area is regularly questioned or ignored.

The War Powers Resolution of 1973 has other problems. It calls for the President to file reports of armed conflicts and then use these filings to trigger the obligation for the President to remove troops within 60 or 90 days if Congress has not affirmatively approved the military action. This of course purports to allow Con-

gress to halt military campaigns simply by inaction. Unsurprisingly, not one President, Democrat or Republican, has filed reports in way that would trigger the obligation to withdraw forces. As a result, the 1973 statute has been honored more in the breach than in the observance.

Recognizing this, others have suggested amending or replacing that flawed 1973 law, but no such proposal has gotten very far, typically because most of them have sided too heavily either with the Congress or with the President. A common theme, however, runs through all of these efforts, and that common theme is the importance of meaningful consultation between the President and the Congress before the Nation is committed to war, and our proposed statute would do exactly that. It would promote, in fact mandate, meaningful discussion between the President and Congress when America's sons and daughters are to be sent into harm's way.

But, Mr. Chairman, it does so in a way that does not in any way limit or prejudice either the executive branch's right or the Congress's right or ability to assert their respective constitutional war powers. Neither branch is prejudiced by what we are proposing, and, in fact, our statute expressly preserves each branch's constitutional arguments. In fact, we think that both branches—and we know the American people—would benefit from an enactment of this statute.

Mr. Chairman, our report is unanimous. That is somewhat remarkable given the different political philosophies on the part of the members of our Commission. I would submit to you that there is something good about a solution we suggest when you can get people from different political perspectives like Judge Abner Mikva and former Attorney General Edwin Meese to agree on a solution, but both of these gentlemen served very ably on our Commission, and both of them support this result.

Before I turn the microphone over to Secretary Christopher, let me simply say how rewarding it has been for me, personally, to work with this fine gentleman and this able statesman and this dedicated public servant, a truly great American, Secretary Christopher.

[The prepared statement of Mr. Baker follows:]

Opening Remarks of James A. Baker, III
House Foreign Affairs Committee
10 a.m. Thursday, March 5, 2009
Washington DC

Chairman Berman, 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 co-chaired and on which your former chairman, Lee Hamilton, served as a very valuable member.

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

Two years ago, Chris and I were approached by the Miller Center at the University of Virginia to co-chair an independent bi-partisan 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 the 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 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 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, dedicated public servant, and truly great American.

CC1:802114.1

Chairman BERMAN. Thank you very much, Secretary Baker. Secretary Christopher, I look forward to your testimony.

**STATEMENT OF THE HONORABLE WARREN M. CHRISTOPHER,
SENIOR PARTNER, O'MELVENY & MYERS LLP (FORMER SEC-
RETARY OF STATE)**

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

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

The statement I have will be brief. Let me just say that the statute that we are putting forward is quite straightforward and almost simple. It establishes a bipartisan joint congressional consultation committee consisting of the leaders of the House and 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, and this is an innovation which we think the Congress ought to very much welcome.

The statute requires, as the chairman has said, the President to consult with the committee before deploying U.S. troops into any significant armed conflict, which is defined as a combat operation lasting more than 1 week. Now, if secrecy precludes prior consultation of that kind, the President is required to consult with the committee within 3 days after the conflict begins.

Within 30 days after the armed conflict begins, Congress is required to vote up or down on the resolution. If the resolution is defeated, any senator or representative may file a resolution of disapproval.

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 in the hands of Congress by giving the Congress the power to declare war. These proponents say that, by this provision, the framers of the Constitution stripped the executive branch of the power to commence war, which the King of England enjoyed and which the framers wanted to avoid.

On the other hand, on the other side of the argument, proponents of Presidential authority point to the Executive power and Commander-in-Chief clauses of 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 ability to execute and the most information, and they point to the recent history of the President's predominance as proof of their position.

Now, Mr. Chairman, a whole forest of trees has been felled in writings on both sides of the issue, pro and con, and although both sides have good arguments to make, I would say that only three propositions hold true.

First, no consensus has emerged from the debate in 200 years of our constitutional history. No one side or the other has "won" this argument.

Second, only a constitutional amendment or a decisive Supreme Court opinion will resolve the fundamental debate, and neither one

of those things is very likely to happen. Courts have turned down war powers cases filed by as many as 100 Members of Congress.

Third, Mr. Chairman, despite what I and my fellow Commission members might feel about this debate, one way or the other, we determined that we simply cannot resolve the debate, and the last thing we wanted to do was simply offer up another report that contained an opinion as to who is right and wrong.

Thus, in drafting the statute before you, we have deliberately decided not to try to resolve this underlying constitutional debate and have preserved the rights of both the Congress and the Executive.

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

From the standpoint of the Congress, the statute gives the Congress a more significant seat at the table when the Congress is thinking about whether or not the Nation should go to war. It provides not only a seat at the table but a permanent staff and access to all relevant intelligence information. The statute also calls for a genuine consultation, not just lip service, not just notification.

Furthermore, I strongly believe that the seasoned views of congressional leaders constitute a vital resource for the President in his decision-making process. Having heard a number of these debates over the years, I can say I think it is very healthy for the President to hear independent views from people who do not work for him. The President I think is also advantaged because this proposal would eliminate a law that every President since 1973 has regarded as unconstitutional but nevertheless has to worry about and is an overhang. This proposal also provides a mechanism so he knows who to consult with in Congress, he just does not have to guess.

Mr. Chairman, working with the former chairman of the committee, Lee Hamilton, here on my left, we have sought to set out a careful balance between the Congress and the President on matters like this of enormous importance. I am sure that neither the strongest advocates of congressional power nor those of Presidential power will be happy completely with our proposal, but we think that what we have done is a fair reflection of the right balance to strike. We think it is a practical and pragmatic reform. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Christopher follows:]

Opening Remarks of Warren Christopher

**House Foreign Affairs Committee
10 a.m. Thursday, March 5, 2009
Washington DC**

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 US 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 three 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 I, 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, working with the former Chairman of this Committee, Lee Hamilton, 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 or 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.

CCI:802115.1

Chairman BERMAN. Thank you very much.

Am I correct, Lee, that you have no opening statement?

Okay. Then I will yield myself 5 minutes to begin the questioning, and this to any of you who would care to respond.

Now I have two questions. I will throw them both out and remind my colleagues that the 5 minutes includes what I say and their answers, so pace yourself.

Question No. 1: I mentioned this earlier; one thing that worries me about this is the extent to which this more formalized, institutionalized, consultative process, which I find appealing, does that become the basis for, at least on the occasions where the White House has asked the Congress for the authorization to use force—sometimes thought of as the functional equivalent of a declaration of war, but others disagree—but will that reduce the incentive for the White House to do what on at least three occasions they have done, which is come before the House—started to seek a direct vote by both Houses?

The second question is as to the exceptions in terms of the time limits and the bases for not applying this process.

I raise the hypothetical question about a decision to hit nuclear installations in another country in order to prevent them from developing a nuclear weapon. The timeframe might be thought of in less than 1 week, but the consequences of that decision could lead to a conflict that could go much longer than 1 week.

In a more general sense, to what extent do these exceptions threaten to swallow the general rule that your proposal makes?

Mr. BAKER. Mr. Chairman, with respect to your first question, I do not believe that this would reduce the White House's information to come to the Congress for approval. In fact, I think it would increase it. As I think you pointed out in your opening statement, that has been the case over the last 50 years, with the exceptions I think of Grenada, Panama and Bosnia. The White House has actually come to the Congress for approval and gotten a vote of approval.

But I think the reason Presidents come to the Congress is because they need the political support that is gained by getting the approval of the representatives of the people, and by requiring extended and more intensive consultation in the first instance, we think it would move that practice forward positively and not negatively.

I do not think the fact that the President consulted would mean that he would be satisfied to go forward without trying to get Congress's approval. Presidents normally want Congress's approval for the political benefit that that brings, not because they think they need it because no President believes he, so far, he absolutely needs it.

So they come to the Congress for the political benefit that that brings, and I think they would continue to do so.

I might take a quick shot at your second question, and then maybe Chris wants to add.

Chairman BERMAN. Only because of the time maybe on the second one, just because we only have another minute before I have to gavel myself down.

Mr. CHRISTOPHER. Mr. Chairman, any hypothetical such as you put forward would have to be measured against the statute. To be brief about it, any conflict that goes on longer than 7 days requires the President to consult and the Congress to vote up or down on that particular action. You can guess as well as others as to whether such a conflict that would take out nuclear facilities might take longer than 7 days. It probably will, but with respect to any such hypothetical, I always suggest that it be laid down against the statute and see how the statute affects it.

Mr. HAMILTON. Mr. Chairman, may I simply observe that every President confronts a really difficult judgment how to consult with the Congress. The Congress is a very large, very diffuse institution. One of the great advantages of the proposed statute is that it gives the President a mechanism, a focal point, by which to consult, and I think any President would use that extensively.

There is also a provision in this bill that encourages, but it does not require, that a President consult regularly with this consultative committee. I think that you cannot impose consultation on anybody if they do not want to consult, I guess, but we try to encourage it here. The result of these two things, in my view, would be you would develop an ongoing relationship between the President and the Congress on many questions of foreign policy and particularly the one of going to war.

Chairman BERMAN. My time has expired. The gentlelady from Florida.

Ms. ROS-LEHTINEN. Thank you so much, Mr. Chairman, and thank you for your excellent testimony this morning.

Following up on my opening remarks, your legislative proposal on page 9, Section 9, "Definitions," talks about the term "significant armed conflicts." It says that "it shall not include any commitment of the United States Armed Forces by the President for the following reasons: (A) covert operations, (B) training exercises, (C) acts to prevent criminal activity, (D) limited reprisals against terrorists."

Couldn't a creative Executive construe these exemptions very broadly to avoid the reporting and legislative requirements of the statute, and why do you expect that those ambiguities would be less problematic than the interpretative disputes that have arisen under the War Powers Resolution now? Thank you, gentlemen.

Mr. BAKER. Not in my opinion, Congresswoman. I think that what we are calling for here is a certain amount of exercise of good faith on both sides. We are not going to resolve the constitutional question here, as we point out in our testimony. You can only do that by a Supreme Court decision or a constitutional amendment. We are not going to get either one of those. But we do need to try to move toward greater cooperation and consultation.

The exclusions that we have listed here all disappear if a conflict has extended for more than 7 days. Nothing in here would be exempt after the conflict.

Let us suppose the President took action to prevent an imminent attack on the United States and that if that extended for more than 7 days, the obligation to consult would be triggered, and the obligation to periodically consult as the conflict went on would be

triggered, and the obligation to file a report once a year listing all significant armed conflicts and other operations would be triggered.

Ms. ROS-LEHTINEN. Thank you. Mr. Christopher? Mr. Hamilton?

Mr. HAMILTON. Mrs. Ros-Lehtinen, let me just observe that the exceptions to the significant armed conflict are really quite precise, and they are very limited in scope, and I do not think they create loopholes, if you would.

We would have to acknowledge here that we spent as a commission an awful lot of time on the definition of "significant armed conflict." Obviously, that is very hard to do, and we resolved it by defining it in terms of length of time, a conflict lasting more than 1 week.

The exceptions that are made there are precise, they are ones clearly where you want the President to act on his Executive authority, and they are quite limited.

Ms. ROS-LEHTINEN. Mr. Christopher, if you wanted to comment.

Mr. CHRISTOPHER. Congresswoman, I would just point to Section 4(b), which specifically provides that if any action goes on longer than 7 days, then it is subject to the provisions of the statute, and as Congressman Hamilton has just said, we worked a long time on that particular provision, and we think that this does give the President the authority to act in emergency situations but constrains that authority by the 7-day rule.

Ms. ROS-LEHTINEN. I still have a minute. On this 7-day rule, "The term 'significant armed conflict' shall not include any commitment of the U.S. Armed Forces by the President for the following purposes," and that is not subject to the 7 days.

Mr. CHRISTOPHER. Yes. I think if you look at Section 4(b), Congresswoman, you will see that if any one of the actions described in Section 3(b) of this act becomes a "significant armed conflict," as defined in Section 5(a), then the President shall initiate the consultation with the Joint Consultation Committee. So that 7-day provision is an override on each of the exception provisions.

Ms. ROS-LEHTINEN. Thank you. I think, in my 20 seconds that are left, we have different versions obviously, but it is the definitions of the exemptions that I believe that are just as open to controversy, to interpretation, as the original act itself. Thank you very much.

Mr. CHRISTOPHER. I am very sorry, Congresswoman. I did not realize that you had a different numbering than we have here.

Chairman BERMAN. Just to clarify the substantive issue, you are saying, number one, 9.1. The other sections are subject to 9.1, so if there is a combat operation lasting more than 1 week, it does not matter what kind of consultation process triggers it.

Mr. CHRISTOPHER. Chairman, that is correct.

Chairman BERMAN. The gentleman from New Jersey, Mr. Payne, is recognized for 5 minutes.

Mr. PAYNE. Thank you very much. I just have a question. As it has been indicated in the testimony that the courts have failed to involve themselves, the judiciary, in the question of who has the authority, whether it is the executive branch totally or whether it is the Congress, and I guess my question is that I said in the past, courts have declined jurisdiction for deciding whether the President

violated the War Powers Resolution by entering into hostilities without congressional authorization.

If a Member of Congress in your opinion were to file suit against the President for violating the War Powers Consultation Act of 2009, the one that we have before us, would in your opinion a court be more likely to accept jurisdiction for deciding the merit of the case? Mr. Baker.

Mr. BAKER. That is a great question. That is a great question, and you may get differences of opinion among the lawyers here at this witness table. I do not know what Secretary Christopher's view is. My view is, no, they would not be any more likely to. I think they would still consider it to be a political issue that they might try to decline to take jurisdiction of, but you would have a much more clearer situation, I think, than the case of the statute, the constitutionality of which is generally widely questioned.

Mr. CHRISTOPHER. Congressman, you never predict what the Supreme Court is going to do for sure. More than 100 Members of Congress have sought to invoke the jurisdiction of the Supreme Court of the United States. For one reason or another, usually because the lower courts called it a political question, often because they say the plaintiff does not have standing to sue, the Court has declined to get into that. I think it wants to stay away from that issue on political grounds.

Mr. HAMILTON. Mr. Payne, we had a battery of lawyers advise us on this question, and I think there was total unanimity among the lawyers, and the two Secretaries have stated, that courts have just stayed away from this and do not think it is an appropriate role for the courts to get into this most political of all questions, Do you go to war?

Mr. PAYNE. Well, thank you very much. They usually say up there, "If there are two lawyers in the room, you will at least have two opinions."

Mr. BAKER. At least we all agreed on this, Congressman.

Mr. PAYNE. Yes. Thank you. I will yield back, Mr. Chairman.

Chairman BERMAN. Of course, that used to be the rule about re-districting. Then *Baker v. Carr* came along, and all of a sudden, the political question was not a political question. You were not the *Baker*, though, I do not think.

The gentleman from New Jersey, Mr. Smith, is recognized for 5 minutes.

Mr. SMITH OF NEW JERSEY. Thank you very much, Mr. Chairman.

Let me just say the draft that we have underscores some of the concerns that the ranking member made. I would hope that if we talked about "significant armed conflict," we would allow exclusions only in the most egregious matters. The legislation we have suggests that such exclusions would include prevention of "imminent attacks, limited acts or reprisal against terrorists or states that sponsor terrorism." That is exactly in a way without a doubt what got us into the Iraqi War, and then "covert operations."

So it seems as if the exclusions page on our draft just makes it so that just about anything from an elasticity point of view could be included. I believe we have got to be very careful how we draft

it. I was going to ask about that, but I thank the ranking member for making that very important point.

Let me just ask about the makeup of the Joint Committee. I served as chairman of the Veterans Affairs Committee, and I often thought of that committee as the "consequences committee," having spent so many years working with service-connected disabled veterans.

I know you drew your ideas from prior proposals, but would it be advisable to include the Veterans Committee chairman and ranking member? No one knows the burden of war better than a veteran, especially a disabled veteran, and certainly their representatives on that committee would have a very unique perspective.

Secondly, the talk of consultation with the Joint Congressional Committee and the conveyance of a classified report setting forth the circumstances necessitating the significant armed conflict, the objectives and the estimated scope and duration of the conflict before ordering the deployment of U.S. Armed Forces into significant armed conflict is in my opinion necessary, prudent and will make potentially reckless deployments less likely. It may also enhance the sustainability, especially over the long run, of a deployment.

But the concern is that the secrecy part, which can be exercised by the President, and you recognize that in Section 5(a), could render the consultation and reporting provisions before an action moot. Every President thinks, and I say this with respect, they know best, and Congress might be left out, and that language then becomes almost sent to the Congress. What are your thoughts on that?

Mr. CHRISTOPHER. Congressman, on the first part of your question, I think we wanted to keep the Consultation Committee relatively simple, relatively narrow, but that would certainly be an issue that Congress could decide. If it wanted to add the chairman and ranking member of another committee, that could certainly be done. That would simply be something that would be up to Congress.

On the other question, I think we considered very carefully the provisions, and we have gone about as far as I think we can practically go in requiring consultation.

Mr. SMITH OF NEW JERSEY. Secretary Baker?

Mr. BAKER. Are you concerned that—

Mr. SMITH OF NEW JERSEY. I am concerned that a Chief Executive, a Commander-in-Chief, might construe everything to be secret and then after the fact we get the information, and then if these exclusions on the "Definitions" page were to be enacted in the way our draft has it, you could fit everything into that exclusion, and we will then have had very well-meaning but ineffective legislation.

Mr. BAKER. I think there is still some difference of view on that last point.

First of all, on the secrecy issue, any President, particularly one that wanted to act in bad faith, could keep everything secret from you for 3 days but no more than that, okay? But I think we have to assume here since we are talking about trying to encourage cooperation and consultation that there will be a modicum of good faith on both sides when dealing with this difficult issue.

With respect to the exclusions, I think we tried to make clear, and I believe this is correct, that after 7 days, you have got to consult, that covert action is exempted completely because there are other processes, procedures and statutes that govern that. But I believe that it is correct to say that, after an engagement has gone on for 7 days, even if they were undertaken as one of the exclusion items, then the obligation to consult would take place and the statute would be triggered. Now that is my view.

Mr. HAMILTON. Mr. Smith, obviously there are limitations to the language here, and it is very, very difficult to try to foresee the kind of events the President and the Congress would be confronted with.

I do not know that we have got this language exactly right, but it does seem to me that there are going to be a number of instances, and we have identified, I think, most of them, where Presidents must act quickly in emergency situations, and you do not want to invoke the process that we have here in this statute.

So we were trying to balance here the role of the Congress on conflict on the one hand and the role of the Commander-in-Chief to act quickly in defense of the Nation, and I think we have done a reasonably good job of it, but obviously it is not the easiest thing to write into statute.

Mr. SMITH OF NEW JERSEY. Secretary Baker, did you want to add something? I am long out of time.

Chairman BERMAN. You are a minute gone. I got so interested in your question.

The time of the gentleman has expired. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman, and, again, let me repeat, I think encouraging consultation is profoundly important and very well might obviate much of the tension and the conflict between the executive and the legislative branches. But I would put forth that meaningful consultation, even if it is genuine and done in good faith, and, presumably, it does, in the end, does not give the President the power to engage in military action without the approval or authorization of Congress.

I take that view, and myself and my colleague from North Carolina, Mr. Jones, will be introducing legislation before the end of the month that embraces consultation but obviously takes a different course in terms of Congress's role.

I agree with the gentleman who spoke earlier, my ranking member, Mr. Rohrabacher, that the avoidance of the congressional burden of authorization of military action in a large degree is responsible for this debate and for this tension and for this conflict, and I believe that the course that we are on now is dangerous in the sense that Congress, not the Executive, continues to allow the erosion of what is our obligation.

Let me just also note that you refer to the funding mechanism as a way for Congress to assert itself. I do not accept that because I do not think it is always post facto. It is after the initiation of a military action, and, again, going back and reading, at least my reading of the Constitution is that some sort of authorization is required, and we cannot just simply look for rationales to avoid our burden, and again, I think the consultative mechanism will help.

I think it is important, and I think it should be enthusiastically embraced by this committee.

But I do not know if any of you had the opportunity to note this morning's—I think it was in the Washington Post—opinion piece by George Will related to the Iraq War, and it is entitled, I think, "Congress Shares the Burden." With the expiration of the U.N. mandate, I would submit that there is no authority, no authorization, for American military to conduct offensive combat actions, and, again, that was the position that was articulated by both the President, but the Secretary of State, and by the Vice President prior to the election.

Unless we accept or confer or embrace the so-called Status of Forces Agreement, which I believe it is not, and take some action, we will continue to allow the erosion of the congressional responsibility to occur, and I just wonder if any of you had any comment on that observation, on the George Will opinion piece.

Mr. HAMILTON. Mr. Delahunt, I did see Mr. Will's piece, but the point that you make, it has struck me, and the preliminary comments of several members of the committee, you made the point that Congress has been timid, that it has not been aggressive enough in asserting its constitutional powers and the like, and I think that view is widely shared among many Members of Congress, I do not know if a majority, but widely shared.

I think we believe what we have put forward is a very practical approach, and it certainly does not resolve the question that you are raising. You want to increase the power of the Congress with regard to this critical question of when you go to war.

There have been many, over a period of many years, who have taken that position, and to be very candid about it, that viewpoint has not been able to get a law enacted.

The reverse is also true. There have been many Members of Congress who take the opposite view you do, and they want to increase Executive power, and the argument has gone on and it has not been resolved, and the proposal before you does not try to resolve that question. We punt on it, if you would.

Our proposal avoids the constitutional debate, and it respects, I think, the constitutional powers of both branches. We are dealing with a very practical problem. The President thinks we have got a national security threat out there. He thinks that armed service action is needed, and we are trying to make sure that you enhance the opinion available to the President before he makes that decision by going outside his official family and consulting Members of Congress.

We think people can agree on that and still take the position that you take, Mr. Delahunt. In other words, you could vote for this bill and still advocate your position. You would not be prejudicing your position at all.

Chairman BERMAN. The time of the gentleman has definitely expired, and the gentleman from California, Mr. Rohrabacher, is recognized for 5 minutes.

Mr. ROHRBACHER. Thank you very much, Mr. Chairman.

We note that, in 1999, when President Bill Clinton sent our military forces to battle Bosnian Serbs, the House of Representatives rejected authorization by a vote of 213 to 213. Then the House de-

feated a measure declaring a state of war between the United States and the Federal Republic of Yugoslavia, and then we defeated a measure directing the President to remove U.S. Armed Forces from operations against the Federal Republic of Yugoslavia, and then both Houses of Congress agreed to an emergency supplemental appropriation to pay for it.

I do not necessarily think that increasing the influence of people who now have demonstrated an inability to make a decision on this end of the government, just improving consultation between us and the executive branch is going to make things better. I do not think it will necessarily create any harm, and I will be reading your book. I have not done my homework, but I will be reading it thoroughly, and I thank you for spending the time and effort to focus on this relationship.

Clearly, the Constitution gave the preponderance of power in terms of foreign policy, and at least the carrying out of military operations, to the executive branch. Do you believe that we need to in some way nudge that back?

I happen to believe that those people who are opposed to the Iraq War—and you have heard a lot of rhetoric about it—never were willing to act on that, so that is one of the reasons we are here today discussing this issue.

Let me just get to the heart of the matter. Do you, as wise men who are advising us, would you suggest that we need to grant more authority, and this is a way to give a little bit more emphasis on the legislative branch's role in conducting military operations? Is that what we need to do? Is that what this is all about?

Mr. BAKER. No, not at all, Congressman, and that is not what this act seeks to do, and that is not what this act does. There are benefits in this act, we think, for the executive branch and for the legislative branch, and what this act calls for is frankly what most Presidents have done in most of the conflicts that we have been engaged in over the past 50 years.

We do not see this as granting more authority to one branch or the other; we see this as beneficial to both branches. There are benefits in here for each branch, and we think it would be beneficial as far as the general public is concerned, because the testimony of 40 experts that came before us. And if you look at the polling over the past 70 years, the American people, when the question comes to war, they would like to think that the congressional and executive branches are on the same page. So they would like to see this. All this does is enhance consultation.

Mr. ROHRBACHER. Is that because there is an imbalance now?

Mr. BAKER. It is because it is not structured, number one. It is because this would tend, as Chairman Hamilton said, to build trust between the branches if that consultation took place. This specifies how Presidents should consult. Right now you say, "Consult with the Congress," and some Presidents do it one way and some do it another. This would tell you how to do it, and it would do it, by the way—and I want to volunteer this for the chairman and the ranking member's benefit—it would do it in a way that locks in the jurisdiction of this committee, that does not take away any aspects of the jurisdiction of this committee.

The resolution of approval called for in this legislation, it specifically says, would originate here in this committee and in Senate Foreign Relations. So, by setting up a consultative committee, we are reflecting what Presidents have done recently, most all of the time, in these cases of going to war, but the leadership of the relevant committees and the leadership of the Congress.

Chairman BERMAN. Seconds.

Mr. HAMILTON. Mr. Rohrabacher, if this bill is perceived as tilting power, constitutional power, to the Congress, or if it is perceived the other way, as tilting power to the executive branch, the bill is dead. It will never pass.

Mr. BAKER. It might pass, but it would not become law.

Mr. HAMILTON. "It would not ever become law" is a better way to phrase it.

Mr. ROHRBACHER. All of us need to exercise the authority that we have been given. Thank you.

Chairman BERMAN. The time of the gentleman has expired. The gentleman from Missouri, Mr. Carnahan, is recognized for 5 minutes.

Mr. CARNAHAN. Thank you, Mr. Chairman. I have two questions I would like to present to the panel.

First, Presidents have used treaties and institutional authorities, such as the U.N. and NATO, to avoid congressional authorization for going to war. Do the recommendations in the Commission's report address this issue, and, if so, how?

My second question: What are the consequences if the President does not consult with the Joint Committee within 3 days after an emergency situation, and, frankly, what teeth are in this proposal that are absent from the current law?

Mr. CHRISTOPHER. Congressman, on your first question, we dealt with that specifically what in your discussion draft is called Section 7 on page 8, saying: "The provisions of this Act shall not be affected by any treaty obligations of the United States." That means the President could not rely on a treaty in order to avoid the consultation provisions of this Act.

Mr. CARNAHAN. Thank you.

Mr. BAKER. Now, with respect to what is the penalty, what is the sanction, it is diminished political support for a foreign engagement that the President might think is important to the national security of this country because if he does not comply with a law that is as plain and as clear as this and on the books, then he would suffer the political consequences of not doing so.

We have already answered the question about whether we think the Federal courts would grant jurisdiction of a dispute between a Member of Congress and the President for his refusal to abide by the provision, but he would suffer I think substantial political damage.

Mr. HAMILTON. We believe, Congressman Carnahan, that you have got a win-win-win situation in this bill. We think the President will look favorably upon the bill because it frees his hand to address minor armed conflicts, it frees his hand to respond to emergencies, and it provides him with specific people in Congress to consult with. There is always a big question of, Who do I consult

with in the executive branch? This answers the question for him and for the Congress.

We think it is a win situation for the Congress because we empower the Congress to have a joint consultative committee, fully staffed, bipartisan, fully resourced and available to classified information. It has a very clear mechanism for the Congress to vote up or down, and, above everything else, it assures the Congress of the United States that it has a seat at the table when the decisions are being discussed. You do not always have that. You will be assured of it with this bill.

It is a win for the American people. We went back 70 years, I believe, to look at poll results, and they show over and over and over again that the American people want this most serious of all questions to be a shared decision by Members of Congress and, of course, the executive branch. They do not want the decision of going to war to be made by one person even if that person is the President. So we analyzed this proposed statute as a win-win-win situation.

Mr. CARNAHAN. Secretary Christopher?

Mr. CHRISTOPHER. Mr. Chairman, I wonder if I could take a minute, not on anyone's time, to clarify the record.

There has been quite a lot of confusion because the discussion draft that you have before you misstates the section, and the ranking member I think was onto this. If you look at page 5 where it refers in the middle of the page to Section 3(b), that should read "Section 9.2," and the Section 3(a) later in that should read "Section 9, subparagraph 2."

So that means that if there is a military action described in Section 3(b), that is the exception section. If it becomes a significant armed conflict that is longer than 7 days, then the consultation provision provides, and that will I think clarify the record and perhaps clarify some of the questions that have been raised. The exceptions in Section 9.2 are really subject to the consultation requirement if the conflict goes on longer than 7 days.

Thank you, Mr. Chairman, for the chance to clarify that.

Mr. BAKER. If it morphs into a significant armed conflict, then the requirements for consultation—

Chairman BERMAN. Consultation trumps exceptions after 7 days.

Mr. CHRISTOPHER. Precisely.

Chairman BERMAN. Okay.

Mr. BAKER. There is a specific provision in the report that was misprinted in the committee print.

Chairman BERMAN. The time of the gentleman has expired. We appreciate the clarification.

The gentleman from Texas, Mr. Paul, is recognized for 5 minutes.

Mr. PAUL. Thank you, Mr. Chairman. I hear three points that the panel has made: That the War Powers Resolution has been ineffective, and I agree with that; it should be repealed, and I agree with that. The conclusion, though, I do not agree with, that we need a new law, and I think that is where the real important part comes.

When the Congress passed the War Powers Resolution in the 1970s, it was motivated by the antiwar people thinking it would

help, but the unintended consequence was disastrous, not only the chaos that you described but the fact that it legalized war for 90 days. That is what it did.

It gave greater power to the President, not less power to the President, and it took away this assumption that Congress had the responsibility to declare war.

The panel says that they do not pretend to resolve the constitutional issue, which is fine—that is not your job—and you reassure us that the courts seem to want to stay away so that we do not have to worry about the courts, but what we should worry about is our Oath of Office and our responsibilities here as Congresspeople, and that to me is the ominous responsibility we have.

I am reassured by Mr. Baker's comment that if it tilts toward one branch of government, maybe this thing will not get passed, and the way I interpret it, it obviously does, and I will challenge the panel on this, and then they can answer my comments.

The reason I challenge this is, first, the consultation is not with the Congress. You pick out a few people, select people, and they are supposed to represent us. No. The responsibility for war is the Congress, not a select group.

So the President starts a war, it lasts 1 week, he comes to this select committee, and they say, "Okay. It sounds like we had better do it," and then, after 30 days, we have this opportunity to vote. Then we vote that we disapprove of the war, and then we have to have another vote, a vote of disapproval. So we pass that, and then the President vetoes it.

So what we are establishing here is the power of the President to pursue war with a select committee and then endorsed by the Congress with one-third of the Congress because he can veto this.

I think this is going absolutely in the wrong direction, and I think, as Mr. Rohrabacher pointed out earlier, it is mostly because we do not live up to our commitments.

Once again, I think the panel makes the point that we do have a fallback, and the fallback is that we can deny funds, but then we are politically trapped. We never could do that in Korea or Vietnam—it goes on and on—because then we get painted as un-American and we do not care about the troops.

So once they get the upper hand, they can start the war, run the war, and the further the Congress endorsed the war, get the people in harm's way, and then they say, "Oh, you are un-American if you vote against this process."

So I ask the panel, show me why this is not tilting power to the executive branch and to a small group of congressmen rather than reestablishing the principle that, in this country, very precisely, it was stated that the Congress declares war. This has no interference whatsoever for the President to act in emergencies. That is clear-cut. We knew that even before the War Powers Resolution, and this does not change it. So why am I wrong in thinking that this is tilting toward the President and against the Congress?

Mr. BAKER. I think you are wrong, Congressman, because, if you do not do anything, you have the situation you are talking about. You are not going to have anything, and Presidents are going to do what they consider necessary to protect the national security of

the country, and they have the power, they claim, under the Constitution to do that, and you are not going to be able to do anything about it.

So you are better off I think, we think, if the two branches consult with each other rather than continuing to knock heads over who has the power, the ultimate power, because we are not going to get an answer to that.

Mr. PAUL. Of course, I put most of the blame on the Congress for being derelict in their responsibility, but if Presidents just go out and start wars, sure, the Congress has something to do. They should not fund them, and, if necessary, they need to impeach the President.

Actually, a third of the Congress and the President can pursue war. Is that not correct?

Mr. BAKER. Well, you say that because the President has a right to veto bills presented to him under the presentment clause. That happens to be in the Constitution. If you do not like that, you can get a constitutional amendment passed that would delete that. I do not think you will have any success.

Mr. PAUL. I am not arguing that point. I am arguing whether or not I am right that one-third of the Congress and the President can pursue war. That is the point.

Mr. BAKER. No, you are not right because you have, under our legislation specifically, not only a right to vote but a duty to vote with respect to it, and if it is voted down here in the Congress, you are just on the losing side. That is what that is.

Mr. HAMILTON. Congressman Paul, may I?

Chairman BERMAN. I am only concerned that the votes are going to come, and I want to get as many members as possible. So the 5 minutes has expired, and I apologize. It is a very interesting discussion.

The gentleman from Georgia, Mr. Scott.

Mr. SCOTT. Thank you very much, Mr. Chairman, and, again, welcome to the committee.

I wanted to kind of get to a point. I think we could get a better understanding if we try to get an applicable example here, especially within the area of what is a significant armed conflict, and I think that most immediate to us would be a decision coming affecting a terrorist attack, a reprisal to a terrorist attack or an attack from a nation that sponsors terrorists.

Within your proposal, you are exempting limited acts of reprisal against terrorists or states that sponsor terrorism and not considering that as a significant armed conflict.

So let us suppose if we said—where would this fall? If, for example, we were to retaliate and had evidence that terrorists work on the border in Pakistan and would involve the President making the decision to send Armed Forces into Pakistan, where would that fall within your proposal as far as consultation?

Mr. CHRISTOPHER. Congressman, if that response lasted longer than 7 days, the consultation provisions would be required. If it simply lasted a day or two, that would be within the exemption.

The theory of our bill is that almost any action that is significant would be 7 days or longer, and that would bring on the consultation provision and thus invoke a whole series of things that follows

on the consultation provision, that is, the vote up or down by the Congress.

Mr. SCOTT. So that would trigger the President coming and meeting with the select committee. Now would you share with me, under your proposal, how are the members of this Joint Committee for Consultation selected?

Mr. CHRISTOPHER. They are designated in the statute to be the leaders of both the House and the Senate and the chairmen and ranking members of the key committees, a group of about 20: The chairman and ranking member of this committee, the chairman and ranking member of the Senate Foreign Relations Committee, the Armed Services Committee, the Intelligence Committee and so forth. You get a group of congressional leaders previously designated so the President will know who he should consult with.

Mr. SCOTT. Does the President have any input into, before this election is made, as to who is being considered?

Mr. CHRISTOPHER. No. The selection is made deliberately by the legislation itself because, in the past, there has been a tendency of Presidents naturally enough to consult with people who they think will agree with them, and this proposal sets up a body that provides people from both parties and the key Members of Congress on this particular issue.

Mr. SCOTT. Now, in Section 5 of the legislation, it calls for a congressional vote approving military action 30 days after its start—

Chairman BERMAN. Mr. Scott, let me just interject 1 second. I am advised there was a timekeeper mistake, so you have about a minute, or a minute and a quarter, left, notwithstanding what the clock shows.

Mr. SCOTT. Okay. Thank you very much.

Thirty days after its start, and if Congress does not approve of the military action, it can submit a resolution expressing its disapproval.

My point is, submitting a disapproval resolution seems unnecessary when Congress can simply practice its constitutional rights and deny funding. So why is there a need for this additional measure?

Mr. CHRISTOPHER. Mr. Scott, Congress could certainly do that, but we thought it was perhaps more propitious to require first a resolution of disapproval, and then Congress can act within its internal rules to deny funding the conflict.

Congress can deny funding at any point, but we thought from the standpoint of public impression, it is a better approach to have the Congress go ahead and exercise their power of disapproval; hence, the American people would know that Congress had not only failed to approve but they had disapproved, and then you could move to denial of funding if that was the will of Congress.

Mr. HAMILTON. Appropriation bills often take a little time to come before the Congress. This would require the Congress to act rather quickly.

Chairman BERMAN. The time of the gentleman has expired. The gentleman from Indiana, Mr. Burton. We are going to try and take Mr. Burton and Ms. Lee, but I understand the witnesses have to leave by 12:15. Am I correct in that assumption? You do not want to come back and spend the afternoon with us?

Well, if that is the case then, unfortunately, we will have to adjourn after our next two questions.

Mr. BURTON. Mr. Chairman, I am going to just ask one question because I know you want to get as many people involved as possible.

This all boils down to, there is going to be consultation, but as far as teeth are concerned, the only real teeth in this is public opinion.

Mr. BAKER. Right.

Mr. BURTON. If the President is hell bent to go ahead with a conflict, even though he has a strong disagreement with the Congress, he is going to be able to do it. So the constitutional authority he has is in no way impaired.

Mr. BAKER. That is correct, Congressman. That is right.

Mr. BURTON. Okay. That is all I wanted to know. I wanted to make sure. Thank you.

Chairman BERMAN. The gentlelady from California.

Ms. LEE. Thank you very much, Mr. Chairman. Let me reiterate again my belief and understanding that based on Section 8, Article 1, the Congress has the authority to declare war. I have been listening to what you have said with regard to the constitutional issues, and that is not what this is about. It is unfortunate that the Supreme Court has not ruled because it almost makes this Constitution moot, but I still believe in it.

So let me ask you how this would work if in fact, and I am going to go dead to the resolution of September 14 that I could not vote for, the Congress authorized the President to use force. It was a blank check. It was a resolution that said against any organization, individual or country connected to 9/11 or that harbored those connected with 9/11. It was a total blank check 3 days after the horrific events of 9/11.

How would this kick in? At this point, would this body in this consultative process sit down and say, "Mr. President, what countries are you talking about?" "Mr. President, how long will this resolution, the authority to use force, be in effect?"

Would this body say, "Mr. President, will this be in this region only?" "Mr. President, would this allow for terror?" "Mr. President, would this body be able to define these blank checks that we have been given to the administration to use force?" Because I am concerned about this resolution still being in play quite frankly.

Mr. BAKER. No, Congresswoman, it would not, but the Congress of course could come forward at any time it wants to and limit the scope of that prior resolution.

Our proposed statute is forward looking. It does not have application to anything that has happened before except to the extent that something happens that meets the definition of "significant armed conflict." Then there would be an obligation on the President for the ongoing consultations that we call for.

Ms. LEE. So it is not retroactive at all.

Mr. BAKER. No. It is forward looking.

Ms. LEE. Okay. But had your bill been the law on 9/14, how would that have worked with the consultation process?

Mr. BAKER. Well, assuming if it had been in law then, I assume there would have been consultation as we call for here between the

President and the Congress, and if you would still pass that same resolution, that resolution would be effective, but the President would have to have continuing consultations with you as it was implemented.

Ms. LEE. If the President wanted to use that resolution to go into another country, any country, would the President have to say, "Okay, Congress. This is where we are going now," in terms of the use of force and military action?

Mr. HAMILTON. The President has to spell out the scope and what he thinks the duration of the conflict may be.

Ms. LEE. And where?

Mr. HAMILTON. I do not think we say "where"; I think we say "scope and duration." It could be covered under "scope" I suppose.

I do want to comment, Ms. Lee. We have cited to it several times today as if it is definitive that the power to declare war resolves the constitutional question. It does in the mind of a lot of people, but the other side of the argument is that the "Commander-in-Chief" phrase resolves the question for people on the other side of the issue, and they both take their positions with equal intensity, and that is an argument that has proceeded for over 200 years in this country.

Now, as the Secretary has testified, we said we just could not solve this problem on the Commission. We wanted to find a way to improve consultation when you are confronted with this very question.

Ms. LEE. I understand that.

Mr. HAMILTON. It is a very limited bill, and it does not deal with this constitutional question.

Ms. LEE. I understand that. I am just saying, though, I am trying to see how this would work—

Mr. HAMILTON. Yes, I understand.

Ms. LEE [continuing]. Because, as a Member of Congress—

Mr. HAMILTON. Right. I was responding to your earlier comment about the declaration, which others have made here. Quite frankly, I have a good bit of personal sympathy for that having served in the legislative branch, but to suggest that that sentence in the Constitution resolves the question is short of the mark.

Ms. LEE. Thank you.

Mr. BAKER. Mr. Chairman, may I just add? This bill, Congresswoman, will not satisfy the absolutists on either side of this issue, the congressionalists who think only the Congress has the power or has the preeminent power, nor the executive branch people who think the President should have totally unlimited scope.

But the fact of the matter is that, over quite a number of years, troops have been sent abroad 264 times; war has been declared five times. So we are trying to deal with a situation that we face and to increase the cooperation and consultation between the two branches.

Chairman BERMAN. Are you measuring it against what you believe or what the reality is? I guess that is the first question one has to ask.

Mr. BAKER. We are trying to deal with the reality, and we are expressly saying, "Look, we are trying to do it in a way that does

not diminish the ability of either branch to make their constitutional arguments.”

Chairman BERMAN. We are now being called for four votes. There is less than 5 minutes to make the vote. I understand your time constraints.

I think it has been a fascinating hearing, and I am very sorry that a number of my colleagues were not able to ask questions, but I do not see, practically speaking, how we can get back if you have to leave in 1/2 hour, because it will be at least 12:30 before we will be able to get back. Am I accurately describing the situation?

Mr. CHRISTOPHER. We reluctantly agree, and we apologize for not being able to be available later than that. I would like to stay as long as the committee would want to ask questions, but it does not seem possible.

Mr. HAMILTON. Mr. Chairman, I cannot speak for the Secretaries obviously, but there would be those of us on the Commission I know that would be happy to return if some members wanted to discuss this further.

We are deeply appreciative of the interest of the committee in the proposal, and we want to make sure that we respond to all questions that all members have. So, if it requires a second hearing, I think we would be responsive.

Chairman BERMAN. I think either a second hearing, questions that perhaps we submit in writing, or an informal discussion of these issues at a future time will be the better course.

Mr. BAKER. We would be delighted to do that, Mr. Chairman. We have a lot of our Commission members who live up here in the Washington area, and it would be easier for them to come, and I know Chairman Hamilton would be pleased to. So, if that would be your desire, it would be ours as well.

Chairman BERMAN. Good. We will get back in touch.

Ms. JACKSON LEE. Mr. Chairman, if I could have an opportunity for a privilege just to simply welcome my constituent, who I claim to be my constituent, from Houston, Texas, Mr. Baker, and to welcome all of those who are here and to thank him for his presence here today.

I was looking forward to being able to question, so I am going to hope he will come back. Thank you. I yield back.

Mr. BAKER. Thanks a lot.

Ms. JACKSON LEE. I thank him for his service.

Mr. BAKER. Send it to us in writing, Congresswoman. We will respond.

[Whereupon, at 11:43 a.m., the committee was adjourned.]

A P P E N D I X



MATERIAL SUBMITTED FOR THE HEARING RECORD

FULL COMMITTEE HEARING NOTICE

Committee on Foreign Affairs

U.S. House of Representatives

Washington, D.C. 20515-0128

Howard L. Berman (D-CA), Chairman

February 26, 2009

TO: MEMBERS OF THE COMMITTEE ON FOREIGN AFFAIRS

You are respectfully requested to attend an OPEN hearing of the Committee on Foreign Affairs, to be held in **Room 2172 of the Rayburn House Office Building**:

DATE: Thursday, March 5, 2009

TIME: 10:00 a.m.

SUBJECT: The Role for Congress and the President in War: The Recommendations of the National War Powers Commission

WITNESSES: The Honorable Warren M. Christopher
Senior Partner
O'Melveny & Myers LLP
(Former Secretary of State)

The Honorable James A. Baker, III
Senior Partner
Baker Botts LLP
(Former Secretary of State)

The Honorable Lee H. Hamilton
President and Director
Woodrow Wilson International Center for Scholars
(Former Chairman, House Foreign Affairs Committee)

By Direction of the Chairman

The Committee on Foreign Affairs seeks to make its facilities accessible to persons with disabilities. If you are in need of special accommodations, please call 202/225-5021 at least four business days in advance of the event, whenever practicable. Questions with regard to special accommodations in general (including availability of Committee materials in alternative formats and assistive listening devices) may be directed to the Committee.

Attendance - HCFA Full Committee
The Role for Congress and the President in War: The Recommendations of the National
War Powers Commission
March 5, 2009 @ 10:00 a.m. , 2172 RHOB

Howard L. Berman (CA)
Donald Payne (NJ)
Brad Sherman (CA)
William D. Delahunt (MA)
Diane E. Watson (CA)
Russ Carnahan (MO)
Gerald E. Connolly (VA)
John S. Tanner (TN)
Sheila Jackson-Lee (TX)
Barbara Lee (CA)
Shelley Berkley (NV)
Joseph Crowley (NY)
Brad Miller (NC)
David Scott (GA)
Jim Costa (CA)
Keith Ellison (MN)
Ron Klein (FL)

Ileana Ros-Lehtinen, (FL)
Christopher H. Smith (NJ)
Dan Burton (IN)
Dana Rohrabacher (CA)
Donald Manzullo (IL)
Ron Paul (TX)
John Boozman (AR)
Jeff Fortenberry (NE)
Michael T. McCaul (TX)
Ted Poe (TX)
Bob Inglis (SC)

Verbatim, as delivered

March 5, 2009

Opening Statement by Chairman Berman at hearing, "The Role for Congress and the President in War: The Recommendations of the National War Powers Commission"

Today we turn our attention to one of the most sacred trusts of any government – the decision to send its sons and daughters into harm's way.

For decades, constitutional experts and policy analysts have struggled to delineate the responsibilities of Congress and the President in authorizing the use of U.S. armed forces.

The "war powers" question is far from academic. American men and women in uniform are engaged in hostilities on the other side of the world. As eloquently stated by our two esteemed witnesses, whether or not to go to war is the most agonizing decision a country can make.

The War Powers Resolution of 1973, which we will be reviewing today, was born of Congressional frustration over the Executive Branch's commitment of forces in Southeast Asia in the 1960's without appropriate involvement of Congress, a co-equal branch of government.

The law states, in essence, that the President must withdraw U.S. forces from any conflict within 60 days of their deployment, unless Congress has specifically authorized the continuation of their involvement.

Unfortunately, this has been a near-constant exercise in futility. Presidents from both parties have declared that the War Powers Resolution is inconsistent with the Constitution. No president in the past 35 years has filed a report pursuant to the War Powers Resolution.

And while the War Powers Resolution specifically directs the President to consult "in every possible instance" prior to introducing U.S. troops into harm's way, there have been numerous instances of U.S. military action where there has been no prior meaningful consultation with Congress -- sometimes with calls coming while planes were in the air.

Examples include the invasions of Grenada in 1983 and Panama in 1989. The President believed he could deploy forces for short periods of time without adhering to the Resolution's consultative requirements. Similar cases occurred in Somalia in 1992 and Haiti in 1994.

To be fair, presidents have sought at various times the collective judgment and backing of Congress prior to significant armed conflict, in part in response to congressional efforts to return to a more faithful adherence to the Constitution's division of war powers. Major combat operations, including the Gulf War of 1991, the conflict in Afghanistan in 2001, and the 2003 Iraq War, were all the subject of congressional debate and a vote by both the House and the Senate resulting in an authorization to use U.S. armed forces.

The conflict in Kosovo was also subject to congressional votes, albeit conflicting ones – and usually negative ones, on the opposite sides of the same issue, in fact. And the House voted to limit U.S. military involvement in Central America during the Reagan Administration, which led to a scaling back of American intervention in the region.

But to the extent Presidents have negotiated around the War Powers Resolution, or not consulted Congress at all, the Resolution has not fulfilled its original purpose. It essentially remains a well-

intentioned, yet toothless mechanism to force consultations and, if necessary, a withdrawal of U.S. armed forces should Congress not approve of their deployment within 60 days. Indeed, presidents, scholars, and even some members of this body continue to dismiss the Resolution as unconstitutional and unworkable.

I became particularly seized with the war powers question during Secretary Baker's term as Secretary of the Treasury, when President Reagan authorized U.S. warships to defend re-flagged Kuwaiti tankers in the Gulf during the Iran-Iraq War. We could never quite get the Administration to admit that these war ships had been deployed into hostilities and were subject to the War Powers Resolution.

In close cooperation with my respected former colleagues Dante Fascell and Lee Hamilton, several of us undertook an effort to rewrite the War Powers Resolution and invite the President to seek prior authorization for military action.

The thrust of that legislation from 1988 – H.J. Res. 675 – was to require the President to consult with a permanent consultative group consisting of Congressional leadership and some members chosen by the Democratic Caucus and the Republican Conference of the House and Senate. It effectively preempted claims by the Administration that consultation was unnecessary or improvident.

I welcome a rekindling of this debate through the commendable work of the National War Powers Commission, chaired by Secretaries Baker and Christopher, which believes Congress should repeal the War Powers Resolution.

In its place, the Commission has recommended a consultative mechanism, and a procedure for Congress to take the measure of support for the President's military actions. If such deployment does not command majority support, then any member of Congress may propose a joint resolution of disapproval that would require an end to the military involvement, with such resolution being subject to expedited procedures.

A resolution, of course, would be subject to a veto, which would have to be overcome by a two-thirds majority.

I'm not sure if the proposed legislation would sufficiently balance the authorities between the Executive and Legislative branches. However, I am certain that the proposed draft is a real and substantial improvement over the existing law. I'm gratified that the Commission has made this contribution to the war powers debate, and I can think of no better witnesses to address the critical issue of how to make the decision to go to war.

COMMITTEE ON FOREIGN AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, D. C. 20515

Donald A. Manzullo (IL-16)
Opening Statement

March 5, 2009

Mr. Chairman, thank you for calling this important hearing regarding the findings of the National War Powers Commission. This is a truly important hearing that examines the critical balance between the President's powers as Commander in Chief to commit America's armed forces to battle and the Congress' powers to declare war. There are no weightier issues that any President, Member of Congress, or Senator must undertake than the decision to send America's sons and daughters into combat. I commend Secretaries Baker and Christopher for delving into this complex and controversial subject.

The War Powers Resolution is in my opinion a flawed law that requires updating. In the past, I have been critical regarding the Resolution's limited ability to prevent presidential overreach in deploying American forces. The Commission's proposal for the War Powers Consultation Act is a step in the right direction, but it suffers from several fundamental flaws. On the positive side, the Commission's proposal for Congress to take a more engaged role in deciding about "significant armed conflicts" is helpful in preventing the overreach described above. However, the mechanisms proposed by the Commission to enhance executive-legislative branch consultation on armed conflict in my opinion miss the mark.

First, in recommending the creation of a Joint Congressional Consultation Committee, the Commission falls into the old trap that more government must mean progress. I am not at all confident that adding another layer of legislative bureaucracy will allow better cooperation with the executive branch. This is especially true when the format of the proposed Committee has as its Chairman and Vice Chairman the Speaker of the House of Representatives and the Majority Leader of the Senate respectively. In a situation when one party controls both chambers of Congress and the White House such a structure allows for more politicking than actual consultation.

Furthermore, I am concerned about the Commission's proposal that a concurrent resolution of approval be submitted by the Chairman and Vice Chairman of the Joint Congressional Consultation Committee to authorize conflicts in the absence of for a formal declaration of war or other authorization. The Commission is not at all clear on what consequences there might be if the Chair and/or Vice Chair refuse to introduce such a concurrent resolution, particularly if the occupant of the White House is of a different political party than Congress. I firmly believe that any Member of Congress or Senate should be allowed to introduce such a measure.

Deciding whether to approve the deployment of American women and men into a significant armed conflict is one of the most difficult decisions any President, Member of Congress, or Senator must make. In a post-September 11 world, it is imperative that the President be able to act rapidly to counter any threat that rises against the United States and her people, particularly from non-state actors. I am heartened that the Commission's recommendation does allow for the President to take these actions. However, its advice on renewing the War Powers Resolution in my opinion falls short of resolving the controversy that has lasted over 30 years.

March 5, 2009
Opening statement of Congressman Gerald E. Connolly
House Committee on Foreign Affairs
The Role for Congress and the President in War:
The Recommendations of the National War Powers Commission

Mr. Chairman,

I thank you for hosting this hearing today, and I welcome the opportunity to discuss with today's panel what I believe has been a fundamental breach of the responsibilities laid out in the Constitution.

Article I, Section 8 of the Constitution explicitly grants the legislative branch the exclusive power to declare war. Article II, Section 2, declares the President shall be the Commander in Chief with respect to carrying out the exercise of such powers as declared by the Congress. In no way did the Founding Fathers envision vesting the power to declare war with the President. In fact, they were fleeing from that very model of government.

Yet for the past half century this body has abrogated its responsibility and watched as an all-too-willing executive branch has stepped in to fill the void. To wit, the last formal declaration of war made by Congress was World War II, but we have repeatedly sent and currently have troops deployed at war.

For too long the legislative and executive branches have engaged in a shadowy dance, avoiding our responsibilities and hiding behind euphemisms. Korea was not a war; it was a police action. An isolated incident in the Gulf of Tonkin ballooned into half a million troops and the tragedy of Vietnam. And today we are seven years into the largest "kinetic" U.S. military engagement since the Revolutionary War, predicated on a flimsy Congressional authorization and a string of exaggerated intelligence from the Executive.

Since it was enacted in 1973, no President has ceded the argument that the War Powers Resolution was necessary, let alone Constitutional. And they're right. But I come at it from the other direction. What we need is the political will to exercise the respective authorities clearly given to the legislative and executive branches by the Constitution of the United States.

No one is saying that the President should not have the powers to defend the nation and its interests when threatened, but the Congress must play its constitutionally mandated role in making those decisions. We've gone so far afield in this relationship that the time is long overdue for a free and open discussion about the meaning of the power to declare war and those powers explicit and imputed to the President as commander-in-chief as spelled out in the Constitution.

I look forward to that discussion beginning here today. Thank you.

**Statement of Congressman Gene Green
House Committee on Foreign Affairs
“The Role for Congress and the President in War:
The Recommendations of the National War Powers Commission”**

Thank you, Mr. Chairman, for holding this hearing today and I would like to welcome Secretary Christopher, Secretary Baker, and former Chairman Hamilton. I would like to extend my gratitude to this panel for their years of service to our country.

Today we are here to discuss the consideration of repealing the War Powers Resolution of 1973 and replacing it with the War Powers Consultation Act of 2009. I appreciate Secretary Baker’s input in his testimony on the flaws within the 1973 Resolution, a piece of legislation so vital to our democracy, but often questioned or consciously negated.

I appreciate your recommendation that there be practical steps to insure that the President and Congress consult in a meaningful way on the decision to go to war. However, Presidents have always been able to convene a select group of Congressional leaders to discuss the contemplation of taking military action. So isn’t it fair to say that the President already has the authority to meet with Congressional leaders on war “planning” issues at any time and place of his choosing? I understand your argument that this would give the Congress a more formal seat at the table and that public opinion favors this method, but do you think that it would really affect the outcome? Isn’t it safe to assume that by the time the President consults a Congressional Consultation Committee, the decision to go to war as far as the President is concerned has probably already been made?

Lastly, after reviewing the differences between the War Powers Resolution of 1973 and the War Powers Consultation Act of 2009, does the panel truly believe that the controversy over the delegation of war powers will be alleviated between the President and Congress if the War Powers Consultation Act was implemented?

Again, I appreciate your time and commitment to resolving this decades-old issue. I look forward to hearing from our panel today and once again thank you, Mr. Chairman for holding this hearing.

Committee on Foreign Affairs
The Role of Congress and the President in War:
The Recommendations of the National War Powers Commission
Thursday, March 5, 2009

Questions for the Record

Joint response from Honorable Warren M. Christopher and James A. Baker, III
National War Powers Commission

Rep. Barbara Lee

Question 1:

A key component of the Commission's proposal appears to be the mandatory introduction of a joint Congressional resolution calling for approval of a significant armed conflict after 30 days without a formal declaration of war or expressed authorization for the commitment of United States armed forces.

By compelling Congress to vote on war power disputes, are we not jeopardizing the ability of Congress to withhold specific authorization for use of force by simply not taking such a vote?

We don't think so for two reasons, but let us say at the outset that seven decades of polling strongly suggest that the American people would like to have Congress and the President consult on matters of war, and for the Congress to make its positions on such matters known—and not, as some have put it, to “act by inaction.”

First, the constitutional effect of Congress “acting by inaction” is debatable. While those who advocate for Congressional predominance in this area argue that Congress must expressly authorize or declare war, those who advocate Executive power have made contrary constitutional arguments. The courts have never decisively resolved these debates (and seem unlikely to do so), and Presidents, as a historical matter, have led the nation into significant armed conflict even when Congress has not expressly authorized or disapproved the conflict (e.g., the armed conflicts in former Yugoslavia in the 1990s and Grenada in the 1980s).

Second, our proposed statute preserves for both branches all of their constitutional arguments and rights. (See Sections 2 and 5(D) of the proposed statute, as published in the Commission's report.)

Question 2:

At that time Congress was first debating the authorization for the use of force against Iraq, many arguments were made by the Administration qualifying the use of force in Iraq War that have since been discredited or called into question. Some of these findings were made much later than 30 days after the initial engagement of United States armed forces.

How does the Commission's proposal reconcile the potential inaccuracies of existing information upon which members of Congress would be forced to base their vote, and effective authorization for use of force, on a required congressional resolution of approval?

We think this concern is addressed in two ways—one procedural, and one substantive.

On the procedural side, our proposed statute creates a Joint Congressional Consultation Committee made up of key leaders in the House and Senate, including from key committees with expertise in these areas. The statute provides that Joint Committee with a permanent, bi-partisan, professional staff to facilitate the Committee's work and ensures that the Committee and its staff shall be provided all relevant national security and intelligence. The statute requires the President to not only meet and meaningfully consult with that committee, but submit reports to it setting forth the circumstances necessitating significant armed conflicts, their objectives, and their estimated scope and duration. The intention here is to create a conduit through which the President can communicate with the 535 members in Congress, and to create a body within Congress that, in the first instance, can form a judgment about military actions.

On the substantive side, our proposed statute preserves both branches' constitutional arguments and rights (as noted above), and if Congress feels upon reflection that it approved or disapproved a conflict based on inaccurate information, it can take actions it deems appropriate.

Question 3:

The War Powers Consultation Act of 2009 provides clear guidelines for Presidential and Congressional action guided by a set of key definitions, including actions covered by the statute, otherwise known as "significant armed conflicts," as well as exceptions including:

- "Limited acts of reprisal against terrorists or states that sponsor terrorism"; and
- Actions taken by the President "to prevent imminent attacks on the United States"

The United States has experienced prolonged periods of engagement in both Iraq and Afghanistan, both efforts currently or at one point referred to as central in the professed "War on Terror"

Can you elaborate on the categorical exclusion for limited acts of reprisal against terrorists or states that sponsor terrorism given the elusive nature of terrorist actors and their networks?

How would you define “imminent” in this context, and should specific requirements to meet such a definition be integrated into the proposal to ensure a consistent and common application of relevant military and intelligence information and to avoid ambiguity?

To be clear at the outset, if any of these armed conflicts that fall under the exception to the statute (as set forth in Section 3(B)) last or are expected to last more than a week, then they fall within the heart of our proposed statute (see section 4(B)), and consultation and the other mechanisms set forth in the statute are required. The exceptions in Section 3(B) apply only to actions that are, in fact, short term.

In terms of defining with greater specificity the exceptions in Section 3(B), we were hesitant to do so for several reasons. First, the chief aim of the proposed statute is to establish a framework for substantive consultation between the President and Congress, fostering good-faith engagement between the branches on matters of armed conflict. If one branch breaches that good faith by trying to misread the terms of the statute, there are political means to address that. Legal means – e.g., suing to enforce provisions or terms of the War Powers Resolution of 1973 – have proven ineffective.

*Second, we felt that the plain language of the exceptions (e.g., “imminent”: likely to occur at any moment; impending”) was sufficient and were hesitant to try to over-define these terms. As both Congressional and Presidential advocates have recognized, “it is impossible to predict and specify all possible situations in which the president will need to act to protect the nation’s security before he has time to obtain congressional authorization.” John Hart Ely, *War and Responsibility* 117-18 (1993). Thus, even a staunch advocate of Congressional power like the late Dean Ely of Stanford Law School favored repealing parts of the 1973 Act that he believed sought to define the scope of the President’s power to exclude the power to repel “imminent attacks” or protect American citizens abroad. *Id.* at 117, 230 n.13 (“even moderate commentators think” that “forestalling an imminent attack” should be included among the President’s powers).*

Question 4:

The War Powers Consultation Act of 2009 eliminates the automatic withdrawal provision which required the president to withdraw US forces from hostilities 60-90 days after a report is submitted.

What authority does the Act provide for Congress to compel the withdrawal of the United States from armed conflict?

The primary goal of our statute was to propose a law that both the President and Congress could endorse and that would promote meaningful consultation between the branches regarding matters of war and peace. We strove to avoid proposals that one branch or the other would deem unconstitutional or that would provoke stalemates which, at times, have been a problem in this area.

No president has ever recognized the constitutionality of the 60-90 day automatic withdrawal provision set forth in the 1973 Resolution. No court, despite a number of lawsuits on the subject, has ever enforced its terms. Courts have declined to weigh in on such cases on political question and related grounds.

Accordingly, instead of adopting such a mechanism, we sought to encourage regular consultation between the branches, so that Congress could clearly and regularly communicate its views on a particular conflict to the President. If such talks do not prove effective, our statute in no way prejudices Congress's rights to exercise its constitutional and other powers.

*For example, it is well recognized that Congress has the power of the purse, and in an extreme case, Congress could impeach the President. More practically, and buttressing Congress's power of the purse, Section 5(C) of our proposed statute recognizes that each House of Congress may specify, through its internal rules, the effect of a joint resolution of disapproval that it passes. Relying on its inherent internal rulemaking powers, either House could set in place rules providing that any bill appropriating new funds for the armed conflict would be out of order. While such rulemaking is a somewhat novel approach to this set of problems, the Supreme Court has recognized its constitutionality, see *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983), and Congress has employed such mechanisms to aid decision-making and accomplish difficult objectives in other contexts, including federal budget and trade statutes, see e.g., 2 U.S.C. § 636; 19 U.S.C. § 2192.*

In sum, we think this approach is better for the President, Congress, and the American people than the current 1973 Resolution.

Question 5:

Without a veto-proof majority, it appears that under this proposal Congress would be unable to require Presidential action to disengage the United States from a "significant armed conflict" even after successfully registering a vote of disapproval.

Doesn't this proposal effectively guarantee the President authorization for the use of force as long as he carries the support of 1/3 of the House?

No; the vote of disapproval, even if it did not become binding law, would still be an express repudiation of the significant armed conflict. The political

consequences of a joint resolution of disapproval should not be minimized. In addition, Congress could give the resolution of disapproval additional teeth by saying that its effect would be to alter both Houses' internal rules, in the manner set forth above. Importantly, moreover, because there would be no authorization in this circumstance, Congress could advance its constitutional arguments that absent a declaration or authorization of war, the President is acting without constitutional authority.

Do you think it is necessary to have statutory language that would require a president to withdraw from an armed conflict if Congress disapproved of his decision to deploy troops, but without a veto-proof majority?

No, chiefly because such a provision would likely be unconstitutional under INS v. Chadha, 462 U.S. 919 (1983). Chadha struck down the practice of Congress making law—as opposed to binding itself with its internal rules—without presenting the law to the President for signature or veto. In fact, no provision of the 1973 Resolution has come under more constitutional criticism than the ones that arguably violate the Constitution's Presentment Clause in this way.

Furthermore, we wanted to craft a proposal that had a chance of becoming law and that would be honored as the rule of law. It would be hard to conceive of any President signing legislation that included such a provision, when Chadha appears to hold that such provisions are unconstitutional. Additionally, under the proposed Act, it would in practice be exceptionally difficult for a President to be able to engage or continue in a conflict in the face of opposition by a majority of Congress, let alone opposition by a strong majority.

Question 6:

Assuming the War Powers Consultation Act had been passed into law prior to the passage of the authorization for use of military force in Afghanistan, can you explain in a step-by-step manner what actions or events it would have triggered in both the Legislative and Executive Branch leading up to the present?

What actions or events would have been triggered related to the use of military force in Iraq leading up to the present?

Our focus is prospective, and so we have not looked to judge or analyze specific military conflicts in detail. We offer the following thoughts in overview concerning the Afghanistan and Iraq conflicts. Congress of course voted to authorize both conflicts, and the following steps would have been in place if our proposed statute had been the governing law at the outset.

The Joint Congressional Consultation Committee would have been a standing body, with expert nonpartisan staff that had access to all relevant national security and intelligence information. See Section 3(B) and Section 4(H).

In advance of the conflicts, the Joint Committee and the President would have consulted substantively, engaging in a timely exchange of views. The President would also have submitted a classified written report to the Joint Committee setting forth the circumstances necessitating the conflicts, the objectives, and the estimated scope and duration of the conflicts. The President would likewise file further written reports each year. See Sections 4(B), 4(D), 4(G).

As indeed was the course of events concerning the Afghanistan and Iraq conflicts, Congress would have been called upon to vote on the conflicts. See Section 5(A) through 5(D).

For the duration of the conflicts, the President and the Joint Committee would consult at least every two months. See Section 4(I'). Accordingly, a framework would have been in place for the President to exchange views with leaders of Congress of the opposing party as well as his own party and to receive independent advice from those outside the Executive Branch.