

WHEN THE SHOOTING STARTS

Not even an elite commission can take away Congress' exclusive power to authorize war.

BY LOUIS FISHER

James Baker III and Warren Christopher have a new solution to the ongoing dispute over how this country decides to go to war. They laid out the short version of proposed legislation in a July 8 *New York Times* op-ed.

The same day, the National War Powers Commission, a private initiative co-chaired by the two former secretaries of state, issued a full report on their answer to authorizing military commitments.

The commission spent a year identifying “a practical solution” to help future executive and legislative leaders. According to the July 8 report, the guiding principles were “the rule of law, bipartisanship, and an equal respect for the three branches of government.”

But the report falls far short in either offering a practical solution to the war powers debate or protecting the rule of constitutional law. As for giving respect to the three branches, the proposed War Powers Consultation Act heavily favors the executive branch. What threw this effort so far off-course?

A MISSED OPPORTUNITY

Partly it was the bipartisan commission's decision to remain pragmatic and neutral on constitutional values. The report says: “We take no position on the underlying constitutional questions. Nor do we judge the actions of any President or Congress.” Baker and Christopher claim in

their op-ed that the Constitution “ambiguously” divides war powers between the president and Congress.

In fact, there is nothing ambiguous about Congress being the only branch of government with the constitutional authority to take the country from a state of peace to a state of war. As an essential ingredient of popular sovereignty, the first Americans gave elected legislators the power to decide when to declare or authorize war.

In *Federalist 4*, John Jay reviewed what executive leaders had done over the centuries in taking their countries to war. They often acted not for the national interest, he wrote, but out of ambition and “a thirst for military glory.” Their military adventures repeatedly proved calamitous for the common people, in fortunes squandered and lives lost. Executive leaders engaged in wars “not sanctified by justice or the voice and interests of [their] people.”

In particular, the Framers of the Constitution were well aware of the British tradition of placing all foreign policy and war powers in the hands of the king. They expressly rejected that model and placed their trust in the deliberative process of the legislative branch.

AIMING FOR THE MIDDLE?

While the War Powers Commission decided not to take a direct stand on how the Constitution assigns the war power, its report does analyze that power—to the detriment of constitutional values.

The report says that advocates of congressional power

cite two opinions by Chief Justice John Marshall—*Talbot v. Seeman* (1801) and *Little v. Barreme* (1804). In the first, Marshall wrote: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.” In the second, Marshall held that when a presidential proclamation issued in time of war conflicted with a congressional statute, the statute prevailed.

Sounds unambiguous, but the report looks for evidence to offset those two rulings. Advocates of presidential power point to a statement by Marshall when he served in the House of Representatives: “They regularly cite a speech he made in 1800 about the President’s ‘sole’ power in matters concerning ‘external relations’—an arena of power that some modern advocates of executive power treat as equivalent to the power to make war.”

It is curious that the commission regards a speech by one member of Congress as somehow equivalent in weight to two Supreme Court opinions, both of which were unanimous. But let us concede that anything said by Marshall, regardless of his office, deserves serious consideration.

The problem is that the commission did not seriously consider the purpose of Marshall’s speech. Anyone who reads it can see that Marshall was not arguing for plenary, exclusive, or independent presidential power in external affairs, whether regarding foreign policy or military operations. The president, Marshall concluded, is the “sole organ” in carrying out congressional policy as expressed in statutes and treaties. He is the sole organ in *carrying out* the law, not in *making* it.

Failing to understand Marshall, the commission thought his speech counterbalanced the two Court decisions, but the three are on the same side. Indeed, nothing in Marshall’s long public career as secretary of state, member of Congress, or chief justice ever argued in favor of independent presidential power in external affairs.

The Justice Department regularly cites the *Prize Cases* (1863), upholding Abraham Lincoln’s power to institute a blockade of Southern ports, as authority for independent presidential war power. But any pro-president tilt in that Supreme Court decision applies to a civil war at home, not to the use of military force abroad.

Writing for the majority in the *Prize Cases*, Justice Robert Grier stated, “By the Constitution, Congress alone has the power to declare a national or foreign war.” Grier adds that while the president is commander in chief, he has “no power to initiate a war either against a foreign nation or a domestic State.” Unambiguous.

Even Lincoln’s high court advocate conceded that. During oral argument in the case, Richard Henry Dana Jr. agreed that the president’s power did not include “the right to *initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress.”

RESOLVED IN 1973

The War Powers Commission was seeking to address problems with the War Powers Resolution of 1973,

undoubtedly a flawed statute. Thirty-five years ago, it was billed as a “legislative reassertion” of authority following presidential initiatives in Korea and Vietnam. It actually marked a striking abdication of congressional power to the president.

But that is not the flaw to which Baker and Christopher point in their op-ed.

They object that the War Powers Resolution “empowers Congress to terminate an armed conflict by simply doing nothing.” But there is nothing unconstitutional about Congress controlling its prerogatives by doing nothing. If the president submits a proposal to use military force and Congress ignores it, if the president requests funds to start or continue a war and Congress provides none, then Congress has decided. No offensive actions are allowed.

Baker and Christopher assert that the 1973 act “too narrowly defines the president’s war powers to exclude the power to respond to sudden attacks on Americans abroad.” In fact, the War Powers Resolution leaves the door entirely open to anything the president wants to do for the first 60 to 90 days of military operations.

As for their solution, the War Powers Consultation Act is too concerned with protecting the president’s freedom to act. For example, it would not restrict the president’s power to order “covert operations” abroad. This is no minor acquiescence. The Central Intelligence Agency was very active in Afghanistan and Iraq from 2001 to 2003, and there are reports that it is now involved in Iran. Congress should be monitoring and controlling any paramilitary operations, including the secret ones.

YET ANOTHER COMMITTEE

The proposed legislation would establish a consultative committee, consisting of the speaker of the House, the Senate majority leader, the House and Senate minority leaders, and the chairmen and ranking members of eight committees. The president is to “consult” with this committee before or shortly after the start of significant armed conflict.

Baker and Christopher argue this measure would give Congress “access to intelligence [and] a full-time staff for studying national security issues.” Actually, it would give a mere handful of members access to intelligence and staff, quite likely with the admonition not to share sensitive information with anyone else.

The model here could be the “Gang of Eight”—congressional leaders and members of the Intelligence Committees—who were briefed about illegal surveillance by the National Security Agency after 9/11. But that experience only underscores the risks of this approach. A small group of congressional leaders were at the mercy of executive officials who decided what information to share. The lawmakers couldn’t take notes, consult with colleagues, or seek out other sources of information. It’s hard to say no when executive officials in secret meetings hint darkly of imminent threats to the nation.

Congress should not make the same mistake and transfer

its war power to a small subgroup of legislators. The war power belongs to the institution as a whole, including its most junior members.

DOING NOTHING

Another key aspect of the War Powers Consultation Act would require Congress to vote on a concurrent resolution of approval once it had been informed about a significant armed conflict. A concurrent resolution is passed by both houses but not presented to the president for signature or veto. It expresses the sense of Congress but has no legal status.

If that concurrent resolution were defeated in either house, any member of Congress could then propose a joint resolution of disapproval. A joint resolution does have the force of law.

There are two key problems here: First, if a resolution of approval were defeated in either house, that should end congressional deliberation. There is no need for Congress to vote twice.

Second, if the resolution of disapproval were vetoed, lawmakers would need a majority of two-thirds in each house to override the veto. The consequence: the president could start a war and continue it as long as he maintained a margin of one-third plus one in a single house.

Baker and Christopher describe the commission's recommendations as "good" because they would force Con-

gress "to take a position on going to war." What they do not explain is why Congress should be required to take floor votes in war powers disputes.

Lawmakers had every constitutional right to simply ignore the Iraq Resolution in October 2002. Congress should have told the administration to send United Nations inspectors to Iraq to gather more information. The administration's arguments about Iraqi weapons of mass destruction had been strained and slanted, pushing Congress to make an uninformed vote. When the president and Congress disagree over the sending of troops, a decision by legislators to say no by doing nothing is often a wise and always a constitutional policy.

The War Powers Commission hoped to make a proposal with "a reasonable chance of support" from both the president and Congress, one that avoided "clearly favoring one branch over the other." Neither goal is met. The War Powers Consultation Act would weaken the legislative branch, play to executive strengths, and undercut popular government and the rule of law. Congress should do nothing.

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