

RESTORING THE RULE OF LAW WHERE IT MATTERS MOST: The new debate over war powers, defense policy, and the National Guard

This study memo—maybe more dependent on computer literacy than on a knowledge of Latin legal maxims—consists of three features: The author’s narrative, documents or parts of documents integrated into the syllabus for easy reference, and links to the full texts of these documents as well as to other documents.

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Overview

Quick answers, please: Who decides when this country goes to war? What are the criteria? How is information about the war managed, both before and during the war? How is a war brought to an end?

Don’t feel at all bad if your responses are not quick. After well more than 200 years, the answers are not at all clear, and since 9/11 they are murkier than ever. Because the occasion for this meeting is the launch of Wisconsin’s “Bring the Guard Home – It’s the Law,” and time is always too short, we will start with a discussion of that campaign and then go back and consider some of the basic constitutional, statutory, and policy considerations governing the exercise of war powers.

I. What is the Bring the Guard Home campaign about?

In 22 states organizers are proposing *state* legislation that would limit the further call-up and deployment of state National Guard troops where the call-up is not supported by a valid federal order. Many of the bills and resolutions proposed focus on the war in Iraq¹ and some on both Iraq and Afghanistan.² Yet others—Wisconsin³ and Maryland⁴ are examples—would

¹ New Jersey: SJR 55; see footnote 9.

² Oregon: HR 4; <http://www.leg.state.or.us/09reg/measpdf/hr1.dir/hr0004.intro.pdf>

³ Wisconsin’s bill, with its full text, is discussed below.

apply to any call to federal active service that was not supported by a valid federal order, without singling out Iraq or Afghanistan.

An important consideration underlying all of the bills and resolutions is the fact that a federal call to active service involving the use of military force must be authorized by Congress, with inapplicable exceptions.⁵ Congress adopted Authorizations for Use of Military Force (AUMF) for both the Afghanistan and Iraq wars, and these laws are the only basis for the call-up—sometimes called “federalization”—of state Guard units to serve in Iraq or Afghanistan.

“Iraq Only” Legislation

Focusing first on the legislation addressing the war in Iraq, the predicate is strikingly simple: The 2002 Authorization for Use of Military Force (AUMF) in Iraq⁶ was narrow and specific. It sought to protect the United States from the perceived threat posed by Iraq and to enforce UN Security Council Resolutions relating to Iraq:

SEC. 3. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) AUTHORIZATION.—The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—

(1) defend the national security of the United States against the continuing threat posed by Iraq; and

⁴ Maryland: HB907; <http://mlis.state.md.us/2009rs/billfile/hb0907.htm>; SB501 <http://mlis.state.md.us/2009rs/billfile/sb0501.htm>

⁵ 10 USC (U.S. Code) § 12301(a); <http://www4.law.cornell.edu/uscode/10/12301.html>

⁶ Public Law 107-243; http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ243.107.pdf

(2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

The purposes of the 2002 AUMF have been accomplished (Iraq is not a threat to the United States), have proven to be unfounded (the existence of WMDs), or have lapsed (No relevant Security Council resolution remains to be enforced). The Iraq AUMF has therefore expired by its own terms, and other than this AUMF, there is no authority under the Constitution or the laws of the United States for the continued presence of National Guard members in Iraq, and indeed no authority for the use of force at all in Iraq. Yet the war goes on.

Why?

First—and most obviously—President Bush did not feel bound by the 2002 AUMF, maintaining that his powers as Commander-in-Chief trumped the powers of the Congress to direct his conduct of the war, ⁷including the power to set conditions on the use of force.

Second, other than the power of the purse, Congress has no practical power to enforce its conditions. Legislative attempts to set a timetable for the end of the war in funding legislation are subject to a presidential veto and an elusive veto override that must achieve a two-thirds majority in both houses of Congress. Congress could in theory withhold funding for the war altogether, but that alternative has never been seriously considered by Congress, since a vote to withhold funding for troops in the field is considered politically risky, and might not be effective in bringing the war to a close.

Paradoxically perhaps, the states, which do not share Article I or

⁷ John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel [to President George W. Bush], "The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them," September 25, 2001; <http://www.usdoj.gov/olc/warpowers925.htm>

Article II war powers with the Congress and the President under the Constitution,⁸ may, in our view, question the federal call-up of their National Guards, not on the basis of objections to a particular use of military force or, in the case of 15-day training call-ups, the location, purpose, type, or schedule of such duty,⁹ but rather because a particular order is no longer valid and enforceable. And, again, without an authorization from Congress, units of a state National Guard may not be called into active service.

Thus, even if the President can continue a war that is no longer supported by congressional authority, and even if it is unlikely that a court would order the recall of units already federalized and deployed in Iraq, if the President, under the same circumstances, orders additional Guard units from the states, it is our view that without (1) valid and subsisting congressional authorization or (2) independent authority under federal law, that order should be declined. Though the language of bills and resolutions varies in states where they have been proposed or introduced, the core concept is the same: Invalid orders calling a state National Guard into federal service should be declined and the Guard units called up retained in their home states.

We must emphasize that *validity* must be determined independently of the location, purpose, type, or schedule of such active duty. In other words, the validity of the order must be determinable, not as the result of

⁸ The states have always been closely involved with their respective National Guards, which in turn have been involved in wars. But the federal authority to “call out the militia” has been the primary link to active federal service, beginning with the Militia Acts of 1792 and linked even more closely by the Militia Act of 1903, establishing the role of the National Guard of the United States; the National Defense Act of 1916, making the militias the primary reserve force and mandating use of the term “National Guard” for that force; and the National Guard Mobilization Act of 1933, making the National Guard a part of the U.S. Army.

⁹ *Perpich v. Department of Defense*, 496 U.S. 334 (1990) decided that Congress has barred states from refusing to comply with certain federalization orders on the basis of the location, purpose, type, or schedule of such duty. See 10 USC §12301(f).

a governor's disagreement with the policies or wisdom of the underlying military mission, but as the result of readily determinable factors demonstrating invalidity. In the case of the 2002 AUMF it was readily determinable that the purposes set forth in the Authorization had been achieved or were moot, even though some extrinsic facts had to be assumed as true, such as the nonexistence of WMDs. Examples of other "readily determinable" factors might be the inclusion in the AUMF of a termination date, a specific limit as to where force might be used, or a condition precedent to the use of force, such as the adoption of a UN Resolution consonant with the use of force. There might be many other examples. Again, although some extrinsic facts might need to be assumed (such as the day of the year, in the example of the termination date), "readily determinable" is a manageable standard, noting that federal call-up orders will arrive on a governor's desk with a strong, but rebuttable, presumption of validity. a72

The "Iraq Only" Model: New Jersey

The New Jersey resolution (SJR 55)¹⁰ deals only with Iraq and states as follows:

1. The Governor and Legislature of the State of New Jersey declare that the Congressional Authorization for the Use of Military Force of October 16, 2002 has expired and no further authorization has issued, and therefore the President is urged to order the return of the New Jersey National Guard's 50th Heavy Brigade Combat Team.

2. The Governor and Legislature resolve that the New Jersey National Guard shall hereafter be limited to service within and on behalf of the State of New Jersey, unless called into

¹⁰ http://www.njleg.state.nj.us/2008/Bills/SJR/55_I1.PDF

federal service pursuant to a declaration of war or a duly enacted and substituting federal statute authorizing the use of military force.

Section 1 requests the defederalization of units of the State National Guard and their return to the home state as members of the National Guard of that state. The states do not have the power to defederalize the Guard once called into federal service, but it would be inconsistent—and curious—for the states to zealously defend their powers over state Guard members not yet federalized and not use their moral suasion to ask the President to look critically at the 2002 AUMF and do the same thing. Section 1 emphasizes that “Follow the Law” is the core idea in the Bring the Guard Home campaign—a concept that the new President, a legal scholar as well as the commander-in-chief, should welcome.

Section 2 is the heart of the New Jersey bill. Under this provision the State would decline to accept as valid a mobilization order issued under the 2002 AUMF. It is important to stress that the reason for the rejection of such order will not relate to the 2002 AUMF as adopted, which for purposes of the National Guard legislation proposed in this campaign is accepted to have been valid and constitutional when adopted. On the contrary, as stated earlier, the reason is based squarely on what Congress said—a facial reading—in that enactment and the conviction that what Congress said should control the President’s power to mobilize state National Guard units for service in Iraq.

Legislative models addressing both Iraq and Afghanistan: Oregon

While the 2001 Afghanistan AUMF has not expired, some proposed legislation—Oregon’s HR 4 is an example¹¹--questions the validity of that enactment for the very reason (among others) that it has not expired, *and by its terms may never expire*. The legal theory is that the 2001 AUMF amounts to a permanent delegation of congressional authority to the

¹¹ <http://www.leg.state.or.us/09reg/measpdf/hr1.dir/hr0004.intro.pdf>

President, with neither standards to rein in his or her actions, nor a clear means of regaining control in Congress.

HR 4 states in relevant part:

Whereas the 2001 congressional resolution . . . is overly broad and could be construed to allow the President to call up the National Guard again to go to Iraq, Afghanistan or any other country deemed part of the "War on Terror"; and

Whereas the 2001 and 2002 congressional resolutions contain neither a termination date nor a process or procedure for determining when the authorization should terminate; . . .

Be It Resolved by the House of Representatives of the State of Oregon:

That we, the members of the House of Representatives of the Seventy-fifth Legislative Assembly, urge the Governor to withhold deployment of the Oregon National Guard to Iraq or Afghanistan.

The advantage of the Oregon model is that it would hold Congress to standards of specificity and transparency in framing AUMFs, a requirement implied but not spelled out in the WPA. The legislation relating to the 2002 AUMF focuses solely on its expiration—a factor that may be easier to demonstrate objectively than the excessive delegation claim in HR 4, but one that would not go so far as HR 4 in holding Congress to specific standards by which to weigh the adequacy of future AUMFs. (Note that HR 4 is a resolution, not a bill, and would not be binding on the governor.)

The legislative model addressing any invalid order: Wisconsin

The Wisconsin bill, drafted by Rep. Spencer Black, as of April 2, 2009 states as follows:

321.02 (3) The governor shall examine every federal order that places the national guard on federal active duty after the effective date of this subsection, to determine whether the order is lawful and valid. If the governor determines that the order is not lawful or valid, he or she shall take appropriate action to prevent the National Guard from being placed on federal active duty. Appropriate action may include commencing a legal action in state or federal court to prevent the National Guard from being placed on federal active duty. The governor shall submit a report to the standing committees of the legislature with specified subject matter jurisdiction over military affairs, as provided under s. 13.172 (3), that summarizes his or her review of every order that places the national guard on federal active duty and any action he or she takes in response to that review, within 30 days after his or her review is complete.

The Wisconsin bill does not focus on Iraq or Afghanistan specifically and allows the governor to review a particular federal call to active duty and determine its validity on a case-by-case basis, unlike that of New Jersey (see below), which makes a legislative determination that the congressional authorization for the war in Iraq has expired and is no longer valid. At some point, the legislature might or might not choose to make such a determination, but in that event or under the bill as it is now written, it would become the duty of the governor to review and to act.

Challenges for All Three Models of Legislation

For all models of state Bring the Guard Home legislation, common questions put to proponents are (1) "What is the authority of a state to challenge a federalization order on the basis that the federal government is not following federal law?" and (2) "If the bill became law, would it survive a court challenge?"

(1) The state authority to challenge a federalization order.

The state authority to challenge a federalization order has been questioned in a few states under the Supremacy Clause of the Constitution, which states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

See, e.g., *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819).

Supremacy Clause questions arise where federal and state laws are in conflict, and the issue is generally whether federal law expressly or impliedly preempts a conflicting state enactment. See, generally, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (Explicit language, structure, and purpose of the Employee Retirement Income Security Act of 1974 (ERISA) demonstrate a congressional intent to preempt a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under an ERISA-covered plan.)

None of the models of legislation proposed by Bring the Guard Home advocates and legislators should present a federal preemption issue, since there is no conflict between a state and federal statute. Under all three legislative models, it is the conflict between a federal call-up order and the congressional act triggering the authority to federalize the Guard that enables a governor to resist the call-up, rather than a conflict between the state law and a federal enactment, for example, the 2002 AUMF. *Cf. Printz v. United States*, 521 U.S. 898 (1997) ("Federal law establishes policy for the States just as firmly as laws enacted by state legislatures, but that does not mean that state or federal officials must implement directives that have not been specified in any law.") In the unlikely event that a governor erred in declaring a federal order invalid, it would be an error by the governor, and not an unconstitutional state law, that would be at issue. Only if

Congress passed legislation requiring states to comply with invalid, as well as valid, federal orders would a Supremacy Clause issue arise.

(2) Would Bring the Guard Home legislation survive a court challenge?

Courts have usually declined to hear war powers cases—cases challenging the exercise of war powers, typically the initiation of the use of military force—under the political question exception to subject matter jurisdiction.¹² Courts would be unlikely to hear an action brought by a plaintiff, say, a Guard member, a legislator, or a governor, seeking a declaration that the 2002 AUMF is no longer in effect because its purposes have been achieved or are moot. Again: A political question.

But the reluctance of courts to accept jurisdiction of war powers cases at the present time cannot be cited as grounds for states to willingly comply with invalid federalization orders. If Bring the Guard Home legislation is adopted and appropriately applied, there may come a time when a federal agency seeks judicial assistance in compelling state compliance. Win or lose in such an event, the issue of accountability in the exercise of war powers would be brought more clearly into the public square.

It would be useful to know if Congress can impose enforceable conditions in an Authorization for Use of Military Force, and if so, what the path to enforcement might be. And if conditions cannot be imposed, then members of Congress and the public would know that AUMF requests to Congress are, in the political patois, straight up-or-down votes.

It would be useful to know if Congress can constitutionally adopt an AUMF that delegates such broad powers to a president that the intended

¹² See *Holtzman v. Schlesinger*, 414 U.S. 1316 (1973). See, generally, *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department;”)

division of war powers in the Constitution is thwarted.

Finally, it would be useful to know if states retain any of the powers with respect to their militias that the Founders believed were prudent, or whether even the power to resist invalid federal call-ups has been lost.

History makes all of these questions vital, and as study committees and Congress consider the future of war powers in America, Bring the Guard Home legislation should play an important part in setting the agenda.

- Under the Constitution war powers are shared between the President and the Congress. Why should states have a role in determining whether or not Guard members should be deployed overseas?
- In a world of increasing complexity and peril, is it practical or efficient to bring state and local governments into decision-making about war? Isn't the Guard legislation a formula for disunity?
- If the 2002 Authorization for Use of Military Force has so plainly expired, as Guard legislation supporters contend, why not encourage the courts to step in and settle the question?

II. War Powers: The Constitution and Federal Law.

The Constitution

The problems giving rise to the Bring the Guard Home legislation just outlined are not novel. In laying down the blueprint for a republic, the Founders in 1787 struggled throughout their deliberations over the question of how much power to give the Nation's President—simultaneously reeling from the absence of a strong executive branch under the Articles of Confederation and yet recalling the Colonies' pains in dealing with royal bureaucrats over whom they had scant influence prior to the American Revolution. The remedy for this ambivalence in the Constitution was, of course, the application of checks and balances. But the use of military force stood out—and stands out—as a difficult subject to encompass via checks and balances. *Federalist* #69 reflected the dichotomy and the concern:

The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy.

In *Federalist* 70 and 74, Alexander Hamilton writes about the need for "energy in the executive" that it is "essential to the protection . . . against foreign attacks." The executive will need to exercise "decision, secrecy, and dispatch." "Of all the cares or concerns of government," he adds, "the direction of war most peculiarly demands those qualities which distinguish the exercise of power" by the executive.

However, Article II, Section 2, states simply that “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . .” Yet it is arguable that Hamilton’s vision has largely prevailed, despite the Constitution’s attempt to bring about a functional balance between the branches as to war powers. Article I, section 8 of the Constitution grants Congress the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;”. . . to “raise and support Armies . . . to provide and maintain a Navy . . . To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress . . .”

So much for the words. In practice the President’s power has been formidable, and in the past century Congress has rarely had the mettle to become an equal partner to the Executive Branch in matters involving military force, especially when an identifiable national threat exists or is perceived to exist. Hamilton’s conviction that the executive will need to exercise “decision, secrecy, and dispatch” was clearly observed by President Bush. The question remaining is whether “decision, secrecy, and dispatch” is a sufficient model for nontraditional conflicts, which, at least under the 2001 Afghanistan AUMF do not have a clear endpoint—conflicts about which Congress should arguably have a greater voice.

The War Powers Act

In 1973 Congress adopted the War Powers Act,¹³ usually, but inaccurately, called the War Powers Resolution. As well summarized by the Congressional Research Service, “The purpose of the War Powers Resolution (P.L. 93-148, passed over President Nixon’s veto on November 7, 1973) is to ensure that Congress and the President share in making

¹³ <http://www.thecre.com/fedlaw/legal22/warpow.htm>

decisions that may get the U.S. involved in hostilities. Compliance becomes an issue whenever the President introduces U.S. forces abroad in situations that might be construed as hostilities or imminent hostilities. Criteria for compliance include prior consultation with Congress, fulfillment of the reporting requirements, and congressional authorization. If the President has not complied fully, the issue becomes what action Congress should take to bring about compliance or to influence U.S. policy."¹⁴

No president has recognized the constitutionality of the WPA, which proponents of very broad presidential war powers see as conflicting with the Commander-in-Chief's Article II powers and a time-consuming impediment, despite the WPA's provision recognizing the President's power to initiate the use of force in exigent circumstances without prior notice to Congress.

Section 3 of the WPA states:

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Following the required report by the President, the Afghanistan and Iraq AUMFs were adopted in accordance with § 5 of the WPA, which states:

¹⁴ "War Powers Resolution: Presidential Compliance (Feb. 2009) <http://www.fas.org/sgp/crs/natsec/RL33532.pdf>. This is an invaluable guide to the WPA and the very current question of affirming, amending, or repealing it.

[(a) covers the reporting process.]

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

These congressional powers are at the heart of the longstanding controversy over the WPA, and are also the basis for the Guard legislation. Since Congress authorizes the federalization of the National Guard, AUMFs enacted by Congress are often—as in the cases of U.S. involvement in Afghanistan and Iraq—the source of the authority to call up the Guard to serve in theaters for which Congress has passed AUMFs. In the case of Iraq, since Congress deliberately established limited goals for military force in the 2002 AUMF, it is at least arguable that the fulfillment of those goals should bring the use of force to an end—which states cannot bring about—and at the very least should vitiate the AUMF as the basis for calling state Guard units into active federal service—which states can do something

about.

III. Revisiting the War Powers Act: A Constitutional Challenge

The calls to amend or repeal the War Powers Act have been frequent and often loud almost from the day it was passed. The Iraq and Afghanistan wars have increased the debate. But like Mark Twain's quip about the weather, everyone complains about the War Powers Act, but nobody does anything about it—or at least hasn't done anything till now.

But two thoughtful reports, following studies by two bodies of well-qualified experts, have emerged since the start of the Iraq War. The War Powers Initiative Committee, working with the Constitution Project of Georgetown University, issued a report in 2005 entitled, "Deciding to Use Force Abroad: War Powers in a System of Checks and Balances."¹⁵ In July 2008 a commission co-chaired by former Secretaries of State James Baker and Warren Christopher issued its National War Powers Commission Report.¹⁶

The War Powers Initiative Committee summarizes its conclusions as follows:

1. Congress must perform its constitutional duty to reach a deliberate and transparent collective judgment about initiating the use of force abroad except when force is used for a limited range of defensive purposes.

There is no automaticity in the war power decision-making process intended by the framers, no substitute for the particularized consideration of whether to initiate the use of

¹⁵ <http://constitutionproject.org/manage/file/28.pdf>

¹⁶ <http://millercenter.org/policy/commissions/warpowers/report>

force abroad. Congress should not wait for the President to ask it for its judgment on initiating a use of force. Instead, it should involve itself early in the decision-making process, demand and acquire relevant information, and reach a collective judgment by a roll call vote after full and public debate.

2. The President must seek advance authorization from Congress for initiating the use of force abroad except when force is used for a limited range of defensive purposes.

The Constitution requires the President to obtain the authorization of Congress for initiating the use of force abroad except when it is used for a limited range of defensive purposes: to defend against actual attack on the United States or its armed forces, to forestall a reasonably imminent attack, to protect or rescue Americans abroad, and, in exceptional circumstances, to defend against urgent and severe threats to the United States when time does not permit obtaining advance congressional authorization. Even in such a case, the President should seek authorization from Congress as soon as circumstances do permit.

Neither consulting nor notifying Congress is a substitute for its collective judgment expressed in authorizing legislation. In any case, all members of the War Powers Initiative agree that it is in the President's institutional interests and in the national interest for the use of force abroad to be supported by the collective judgment of Congress and the President, because such a judgment reflects a political consensus that makes them jointly responsible for the resulting costs. To persuade a majority of both houses of Congress to make the collective judgment that the use of force is in the national interest, a President must, in effect, persuade the people. If he cannot persuade the people's representatives, he is unlikely to

persuade the people who elected them.

3. To obtain the informed collective judgment of Congress on initiating the use of force abroad, the President should supply Congress with timely and complete information about a use of force, when circumstances permit, and Congress should also use its own investigatory tools to determine the reliability and completeness of the information on which it relies to reach a collective judgment.

Congress cannot perform its constitutional war powers duty if it is uninformed. The corollary to the President's constitutional duty to obtain advance authorization from Congress for initiating the use of force abroad is that he must supply Congress with timely and complete information, when circumstances permit, to enable it to reach an informed collective judgment. Such information should include not only the circumstances and specific legal authority for the use of force, but also the anticipated contributions from other nations, the goals of the operation, its anticipated costs, and a plan for funding it.

As soon as time allows, such information should ideally include a timely copy of a formal legal opinion of the Attorney General or the Assistant Attorney General for the Office of Legal Counsel to the President on the authority for the use of force.¹¹⁰ Especially given the paucity of judicial opinions on war powers, the published war powers opinions of the Office of Legal Counsel can form an important body of legal analysis, even if often one-sided, against which to measure the authority for uses of force.

The President should also supply to Congress a copy of a

written assessment by the Comptroller of the Department of Defense to the President of the anticipated costs of the military operation and how they will be funded, or its equivalent. Several controversial U.S. military operations abroad have proven the military adage, "Going in is easy; getting out is the hard part." Even if detailed statutory specification of an "exit strategy" or schedule is impractical and unwise, an insistence on a good faith estimate of the costs of a proposed use of force may prompt a beneficial exploration of its possible duration and aftermath. It is also a proper exercise of Congress's appropriations power.

Finally, Congress must not be passive in accepting information from the executive branch to justify initiating the use of force abroad. History shows that such information can be inaccurate, misleadingly incomplete, or even false. Congress should therefore employ its own investigative tools to determine the reliability and completeness of information it uses to decide on initiating the use of force abroad.

4. Congress should authorize initiating use of force abroad only by declaration of war or a specific statute or appropriation, except that it can more generally authorize clandestine counter-terrorist operations that require secrecy and speed provided that such authorization states clearly the purposes and scope of the authorization.

The Declare War Clause gives Congress the choice between authorizing the use of force abroad by declaration of war or by legislation. Public accountability for the decision to use force requires that Congress speak as clearly in legislation as it does in a declaration. Under this constitutionally-derived clear statement rule, which is restated in the WPR, authorization for the use of force abroad should not usually be inferred from a general defense appropriation, let alone from other legislation

regarding military procurement, conscription or other collateral subjects.

However, the nature and source of terrorist attacks and threats posed by WMD, and the need for secrecy and speed in clandestine operations against them, may justify more general authorization of some counter-terrorist operations that are not already authorized by the President's defensive war power. Even in such cases, Congress must always state the purposes and scope of its authorization as clearly as the circumstances permit in order to satisfy the constitutional objectives of legislative deliberation and political accountability.

5. Although Congress can condition its authorization for the use of force on compliance with international law or treaty obligations, or consultation with international organizations, it should not and cannot delegate the use-of-force decision to an international body. Authorization by a treaty organization, international body, or international law is not a constitutional substitute for authorization from Congress.

Although treaties are part of the supreme law of the land, authorization by a treaty organization such as the North Atlantic Treaty Organization or by an international body such as the United Nations Security Council for the use of force to preserve international or regional peace and security is not a constitutional substitute for authorization by Congress. Whether or not initiating the use of force abroad by the United States is lawful under international law or authorized by a treaty to which the United States is a party or by an international organization of which it is a member, under our Constitution only Congress can authorize initiating the use of force abroad except for a limited range of defensive purposes.

Congress can also condition the use of force on compliance with international law or with treaty obligations. Furthermore, it can express its sense that the President should consult with an international organization before he or she orders the use of force abroad. But it cannot delegate to any international body the decision whether to use force.

6. Congress should replace the War Powers Resolution with legislation that fairly acknowledges the President's defensive war powers, omits any arbitrary general time limit on deployments of force, reaffirms the constitutionally -derived clear statement rule for use-of-force bills, and prescribes rules for their privileged and expedited consideration.

The War Powers Resolution is a flawed shortcut for Congress's exercise of its constitutional war powers. Its under-inclusive statement of purpose and policy, coupled with the link of its consultation and reporting provisions to the constitutionally problematical sixty-day clock, have given presidents an excuse to ignore the WPR and Congress an excuse to do nothing. Any war powers bill intended to replace the largely ineffective WPR should align the bill's scope with the President's defensive war powers and eliminate the sixty-day clock.

Such legislation, however, should also preserve and strengthen those elements of the WPR that promote the constitutional objectives of legislative deliberation and political accountability. Although the WPR's consultation and reporting provisions have not worked as intended because of their association with the sixty-day clock, they are elements of the improved information flow between the executive and Congress that is the object of our Recommendation. Any new war powers bill should reflect that recommendation.

Similarly, the WPR's clear statement rule is consistent with our Recommendation. A statutory clear statement requirement is an important reminder to Congress of its obligation of specificity in formulating use-of-force authorizations. Finally, the WPR attempts by several largely unused legislative procedures to address the inefficiency of the ordinary legislative process for considering sometimes time-urgent use-of-force bills. In any war powers bill intended to replace the WPR, Congress should consider adopting expanded statutory requirements and internal rules for privileged and expedited consideration of all use-of-force resolutions. These should include automatic committee referral; tight deadlines for committee discharge and reporting to the full house; procedures for privileging a bill to make it the pending business of a house and setting deadlines for a vote; expeditious referral to the other house; and expeditious procedures for resolving disagreements between the houses.

7. Congress should update and clarify the almost 200 standby statutory authorities, triggered variously and often ambiguously by "declared war," "war" alone, "time of war," or "national emergency," and it should codify selected laws of war.

An authorization for the use of force affects not just the foreign target. By virtue of almost 200 statutes providing standby domestic legal authority, each authorization triggers "domino" domestic legal effects. Unfortunately, not all of these are known to or intended by Congress because the domestic standby statutes have accumulated haphazardly over many years and have not been updated or clarified to fit the contemporary congressional preference for using use-of-force authorizations rather than declarations of war. Congress has not codified important aspects of the law of war, especially regarding the scope and procedures for military detention and military trial of enemy combatants – law which has recently been invoked by

the President to detain even U.S. citizens in conjunction with the 2001 use-of-force authorization.

In 1976, Congress tackled a similar statutory problem of accumulated national emergencies with unintended domino effects by enacting the National Emergencies Act.¹¹³ That act, however, dealt only with national emergency standby legislation, not all war-related standby legislation. Congress should undertake a comparable inventory and updating of all war-related and national emergency legislation, codify and elaborate those parts of the law of war that have supposed domestic legal effects, clarify the statutory triggers in light of contemporary war powers practice and the ongoing “war on terrorism,” and require notice to it from the executive of selected standby authorities that the President invokes pursuant to an authorization for the use of force. In the alternative, Congress should itself identify and address the chief domino effects of each proposed use-of-force bill as it considers the authorization.

8. Congress does not complete its war powers duties by authorizing a use of force abroad. It should also conduct appropriate and regular oversight of the strategic use of force, monitor the domino domestic legal effects of the authorization, and, when appropriate, revise or rescind the authorization or standby legal authorities the authorization triggers.

While the President makes tactical command decisions in an authorized war, the enactment of the authorization does not end Congress’s war power duties. They continue as long as the use of force continues. Congress should not only conduct continuing oversight of the strategic uses of force, but also collect the information necessary to decide on supplemental appropriations and the domino legal effects of the authorization. New information, or changes in the facts on the ground, may

require Congress by ordinary legislative process, in fulfillment of its continuing war powers duties, to revise or rescind the original authorization, to restrict appropriations, or to revise or rescind standby legal authorities, leaving the President to modify or end the use of force abroad consistent with his or her duty as Commander in Chief to protect the forces themselves.

9. To preserve the system of checks and balances of which war powers are part, the federal courts should, in appropriate cases, decide whether authority exists for the use of force abroad.

The federal courts have historically, if infrequently, decided the authority for uses of force abroad, as well as the domestic legal effects of war and authorizations for use of force. If courts, on vaguely reasoned claims of non-justiciability, avoid deciding such issues in cases properly before them, they remove a vital check from the constitutional system of war powers. Whether a use of force is constitutionally authorized is not a political question beyond the judicial power. When plaintiffs have standing, the courts should not erect insuperable prudential obstacles to deciding this question incidentally to private rights disputes, or to deciding it directly in the rare case in which there is no reasonable expectation that further action by the political branches will avoid the question.

Here is how the Baker-Christopher study summarizes its conclusions:

[W]e 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.

Other proposals may surface if and when Congress decides to address the issue of war powers, but the two we have included for the present forum cover a wide range of alternative choices. It is a subject that every state legislature should keep high on its list, since the successor to the War Powers Act—and there will surely be one in time—will be certain to affect the role of “state militias” in future military planning. “Bring the Guard Home—It’s the Law” has been fueled by overseas deployments in derogation of the expressed will of Congress, and in the case of Afghanistan by the unwarranted, excessive, and perhaps irremediable delegation of power to the Commander-in-chief. But it has also been moved to action by the nonchalance with which wars can be started and with which laws intended to bring some rationality to the deadly business of war can be brushed aside.

“Bring the Guard Home” is surely about Iraq and Afghanistan, but it is also about tempering our reliance on war as an instrument of national policy with grassroots wisdom going back to the days when state militias really meant defending the public good.

- What are the major differences between the War Powers Initiative Committee (WIPC) recommendations and those of the National War Powers Commission (NWPC)?
- The WIPC would require “advance authorization from Congress for initiating the use of force except when force is used for a limited range of defensive purposes.” How does that compare with the process set forth by the NWPC for coordination between the President and Congress on the use of force?
- As applied to the Iraq War, “Bring the Guard Home” is grounded in Congress’ inability to enforce the conditions it prescribed in the 2002 AUMF. Would either proposal allow Congress to prescribe specific conditions in authorizing the use of force? How would Congress enforce conditions under either proposal?
- The WIPC proposal would curtail the “political question” doctrine that federal courts apply in declining to hear war powers cases. Can Congress by statute abrogate a doctrine that the Supreme Court considers to be a constitutional principle?