Baker-Christopher Proposal of 2008 Violates the Constitutional Requirement that Congress Declare War.

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James Baker, Warren Christopher and their War Powers Commission, along with the drafters of the War Powers Resolution of 1973, and the lower federal courts have erroneously assumed that "war powers" are shared between Congress and the President. Baker and Christopher introduced their proposal in The New York Times on July 8, 2008, stating bluntly "Our constitution ambiguously divides war powers between the president (who is the commander in chief) and Congress (who has the power of the purse and the power to declare war)."[3] As a matter of constitutional law, this statement is wrong.

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3. James A. Baker III, Warren Christopher, Co Chairs, NATIONAL WAR POWERS COMMISSION REPORT, Miller Center of Public Affairs, University of Virginia, undated. For a equivalent statement in the Report, see p.6."The Constitution provides the President and Congress with explicit grants of war powers, as well as a host of arguments for implied powers…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.""

A. THE CONSTITUTIONAL REQUIREMENTS ARE CLEAR.

1. Constitutional principles

There was no ambiguity in the Constitution as to which branch of government could decide to take the nation to war. To the contrary, in the opening days of the Constitutional Convention, delegates made clear that the president could not decide to take the nation to war. This issue was first addressed on June 1, 1787, when the Convention began to consider Virginia's plan to strengthen the federal government.[4] The Framers first adopted the separation of powers concept espoused by the leading political theorists – Locke, Montesquieu and Blackstone. They had written that declaring and making war were "executive powers" of monarchs like the Kings in France and England.

The Framers quickly divided the government they proposed into executive, legislative and judicial branches.[5] The Virginia plan introduced on May 29 gave the President "executive powers" of the Congress under the Articles, without defining what those powers included. [6]

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4. The weakness of the government under the Articles of Confederation were discussed at length by Virginia's Governor Edmund Raldolph at the beginning of the Convention. I Farrand's Records of the Federal Convention, 18-23. Max Farrand, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES, Yale University Press, 1913. Chapter III, The Defects of the Confederation, pp. 42-51. For a more detailed introduction to the Articles, see Merrill Jensen, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-1781, (University of Wisconsin Press, 1940).

5. Farrand, Records, note 4 supra, 30-31.

6. Articles of Confederation, "Article IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war..... unless nine States assent

On June 1, Charles Pinckney, delegate from South Carolina, feared that the term "executive powers" would give the President the power of "peace and war." Pinckney

> "…was afraid the Executive power of [the existing] Congress might extend to peace & war & etc., which would render the Executive a monarchy, of the worst kind, to wit and elective one."

Pinckney's fear of presidential power of "peace and war" was shared by all who spoke to the issue.[7]

The Framers had solid reasons to insist that the president not be granted the power of war that was characteristic of monarchies. The next day, Delegate John Dickinson explained:

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to the same:" There was no separate executive branch under the Articles; only a revolving President of the Congress, and no occasion to separately define executive powers.

7. "Mr. Rutledge ... was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace.

Mr. Sherman said he considered the Executive magistracy as nothing more than an institution for carrying the will of the Legislature into effect, that the person or persons ought to be appointed by and accountable to the Legislature only, which was the despositary of the supreme will of the Society.

Mr. Wilson preferred a single magistrate, as giving most energy dispatch and responsibility to the office. He did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c. The only powers he conceived strictly Executive were those of executing the laws, and appointing officers, not ….appointed by the Legislature." I Farrand, Records, 65-67

"Rufus King stated that Madison: agrees with Wilson in his definition of executive powers -- executive powers ex vi termini,[from the words alone] do not include the Rights of war & peace &c. but the powers should be confined and defined -- if large we shall have the Evils of elective Monarchies…" I Farrand, Records, page 70 [abbreviations modified]

> "A limited Monarchy he considered as one of the best Governments in the world…. A limited monarchy however was out of the question. The spirit of the times--the state of our affairs, forbade the experiment, if it were desireable."[8]

That spirit had been encouraged by Tom Paine's Common Sense that had influenced many colonists who opted for revolution in 1776.[9] Historian Joseph Ellis, in 2001 described that "spirit" of the times:

> "At the very core of the revolutionary legacy...was a virulent hatred of monarchy and an inveterate suspicion of any consolidated version of political authority. A major tenet of the American Revolution… was that all kings, and not just George III, were inherently evil. The very notion of a republican king was a repudiation of the spirit of '76 and a contradiction in terms." [10]

To make doubly clear that the President would not have the power to make war, the convention not only deleted the clause challenged by Pinckney but also

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8. I Farrand, Records, 87

9. Tom Paine's Common Sense, concluded in a section entitled Of Monarchy and Hereditary Succession that "In England a King hath little more to do than to make war and give away places; which, in plain terms, is to empoverish the nation..." http://www.constitution.org/civ/comsense.htm. David McCullough, 1776, 112, quotes George Washington: "[B]y private letters I have lately received from Virginia, I find Common Sense is working a powerful change there in the minds of many men..." Pauline Maier, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE, 28-34, Alfred A. Knopf, New York, 1997 discusses the impact of Common Sense on the public.

10. Joseph Ellis, FOUNDING BROTHERS, THE REVOLUTIONARY GENERATION, 127-128, Alfred A. Knopf, New York, 2001

determined that "making war" was not to be an "executive power" of the President. It was a "legislative power" to be exercised by Congress.[11]

On August 6, 1787, the Convention's Committee on Detail reported to the Convention the conclusion that Congress should have the power to "make war." The Committee's report was considered by the Convention on August 17.

Pierce Butler of South Carolina was the only delegate who sought to vest the power to "make war" in the President. Elbridge Gerry (Massachusetts) responded,

> "I never expected to hear in a republic a motion to empower the executive alone to declare war."

Butler's view was not further considered.[12] The Convention voted to allow the president to repel a "sudden attack" without first seeking an action by Congress by replacing the word "make" with "declare".[13] George Mason, George Washington's friend, neighbor and advisor, was

> "..against giving the power of war to the Executive, because it is not safely to be trusted with it. He preferred *'declare'* over *'make'*."

Nothing in the debates suggests that the replacement of "make" with "declare" would reduce the power of Congress to decide whether to take the nation

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11. James Madison, who had a major role in developing the Virginia Plan, understood that the phrase giving the president the "executive powers" of the Continental Congress was confusing the issue of whether the executive should consist of more than one person. He succeeded in his motion to delete that part of the proposal. I Farrand, Records of the Federal Convention, 67.

12. II Farrand, Records of the Federal Convention, 318-319

13. id

to war. Assigning such a crucial decision to a Congress that included the House of Representatives – the only body directly elected by the people – reflected the sentiment of Declaration of Independence, the anti-monarchial attitudes of the people, and the deliberations of June 1.[14]

The Framers expected that the decision for war would be made by the vote of each member of Congress "in the face of their constituents," thus assuring that members of the House would be accountable to voters at the next election.[15] Opponents of the Constitution – the "anti federalists" – did not identify a risk that a President could take the nation to war in their analysis of its defects. [16]

Thus, there was no ambiguity or difference within the Federal Convention or the ratifying conventions that the authority to take the nation to war rested in the Congress. Alexander Hamilton explained in Federalist #26:

> ... [The president's] authority would ...amount to nothing more than the supreme command and direction of the military and naval forces, while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, <u>all</u>

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14. Senators were elected by State Legislatures; Presidents were selected by the Electoral College.

15. Alexander Hamilton, Federalist papers, #26.

16. Ralph Ketcham, ed., THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES, (Soft Cover, Signet, 1986,.) While the anti-federalists worried about a President becoming a tyrant, and about the risks to the people of standing army that might take control of the country, there is not one word about the President having the power to take the nation to war. It is inconceivable that those who opposed the Constitution would not have relied heavily on such a claim if they had conceived that the constitution could be interpreted to allow the president to take the nation to war. See particularly pp.174-175, 287-292.

which, by the Constitution.... would appertain to the legislature." [Emphasis added] [17]

2. Early practice under the Constitution confirmed congressional power to declare and limit war.

Practice of the government under the Constitution demonstrated how those who first administered its provisions viewed its requirements.[18] For example, during the "quasi war" with France, Congress specified that the President could order the navy to capture French ships in territorial waters and on the high seas – but not elsewhere – and to limit the time of presidential authority. The Supreme Court held that Congress had full power to define and limit the scope of military action.[19]

The leading commentator on the Constitution in the 1830's was Justice Joseph Story. His view was:

> "...the power of declaring war… is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings…. Indeed, the history of republics has but too fatally proved that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who

17. Federalist Papers, #69.

18. District of Columbia v. Heller, 128 S.Ct. 2783 (2008)

19. Bas v. Tingy, 4 US 37, 1800; Little v. Barreme, 6 U.S. 170, 1804

> flatter their pride, and betray their interests. It should therefore be difficult in a republic to declare war; but not to make peace."[20]

3. Federal courts never considered the June 1 understanding that gave Congress authority over war.

The careful discussion of June 1, 1787 confining the power to "make war" to Congress was not considered at all in the leading case of Massachusetts v. Laird in 1971[Vietnam War].[21] This decision upheld the Congressional transfer to the President of its authority to take the nation to war. The Laird court wrote that "the Congress was given the power to declare war and nothing was said about undeclared hostilities."[22] [Emphasis added] The underlined statement was not true. What the court called "Undeclared wars" was fully encompassed within the concept of "imperfect" or "limited" wars that had been described by the Supreme Court in connection with the "quasi war" with France.[23]

Ignoring these discussions enabled the Laird court to invent a joint authority between President and Congress to initiate war even though the Founders rejected such an approach. Compounding this error, Laird was followed by Doe v. Bush

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20. Joseph Story, COMMENTARIES ON THECONSTITUTION OF THE UNITED STATES, Vol... III, Chapter xxi. sec.1166, (1833) http://www.constitution.org/js/js_005.htm.
21. Massachusetts v. Laird, 451 F.2d 26 (0ctober 21,1971), [Vietnam War].
22. Laird, supra at 33.
23. Bas v. Tingy, note 19, supra.

(2003) concerning the Iraq war as were other lower Federal courts.[24] The Supreme Court has never reviewed these decisions. No US Court has examined the June 1 discussion at the Convention concerning the power to declare war.

The "authorization for the use of military force" by the President in Vietnam and the Iraq wars defeated the intention of the Founders and the early practices of the government.[25] Since World War II, presidents have taken us into four major wars – Korea, Vietnam, and the Iraq wars. If members of Congress had assumed their political and legal responsibility to their constituents, they would have made these decisions themselves. By giving the authority to the president, congress avoided the necessity to scrutinize proposals for war in light of their personal reelection prospects. More attention by congress would require presidents to present the reasons for war in greater detail. Greater clarity may lead the nation to sharpen its attention to the details of going to war, and the congress to shape presidential authority with attention to the time, place and manner of a limited war.

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24. Doe v. Bush, 323 F.3d 133 (1st Cir, 2003); rehearing denied, 322 F.3d 109 (1st. Cir,2003) [Iraq War of 2003].

25. New Jersey Peace Action v. Bush has been filed in the Federal District Court in Newark, New Jersey, in 2008 in an effort to address this issue. See Warpower.US for details. The case includes the argument that because Congress must make the decision for war rather than the President, citizens have rights to enforce this duty under the principles of Marbury v. Madison: 5 U.S. 137(1803). "The conclusion from this reasoning is that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." [emphasis added] The relief sought in New Jersey Police Action is a declaratory judgment.

This would conform to the requirements of the Constitution and to the practices in the early years under the Constitution.

We have learned that informal consultation between presidents and congress is not enough. Such discussions took place in September and October, 2002, concerning Iraq. The decision to go to war was resolved by agreement between the national political party leaders before the Congressional debate was commenced! [26]

B. BAKER-CHRISTOPHER PROPOSAL AND CURRENT EXECUTIVE POLICY VIOLATE THESE CONSTITUTIONAL PRECEPTS.

1. Reversing the Constitutional order.

For wars the Baker-Christopher Commission considers "significant," the president may conduct hostilities for a month while Congress – with little time to hold hearings on the merits – votes on a resolution favoring his taking the nation to war.[27] If Congress does not vote in favor of the war, the president may continue hostilities and Congress may take a second vote to disapprove his actions.[28] If the second vote disapproves the war, the president may veto it.[29] It takes a 2/3rd vote

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26. President, House Leadership Agree on Iraq Resolution: The Rose Garden, http://www.whitehouse.gov/news/releases/2002/10/20021002-7.html. At the October 2 White House meeting when the agreement between leaders of both parties to support the war was reached and before any debate in Congress, the President announced, "The issue is now before the United States Congress… This debate will be closely watched by the American people, and this debate will be remembered in history… As the vote nears, I urge all members of Congress to consider this resolution with the greatest of care. The choice before them could not be more consequential."

27 . Baker-Christopher, p. 47, Sec. 5A.

28. Id at 5B.

29. Id at 5C.

of each house to overcome the veto. Thus, if the president has 1/3 plus one support in either house of congress, the veto will stand and he can continue the war.

The result is legalistic jujitsu – reversing the positions of the president and Congress. Under the Constitution, Congress has the power to declare war by majority vote in both houses approved by the president. Under Baker-Christopher, that power to commence and conduct war would be assigned to a president who may have less than majority support. By the time the Baker-Christopher plan has played out, we will have been at war for months. This is more than a contest between the president and congress. When the president can maintain a war against the will of a majority of congress, the Constitution is violated and democracy is endangered.[30]

2. Authorizing preventive war.

The Baker-Christopher Commission's plan allows presidents to conduct a laundry list of wars – "preventive war," "retaliatory war," wars against nations that support terrorism, wars against any other nation we may attack hoping to defeat the enemy within a week – with no required Congressional approval. [31]

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30. Once our military forces are in action, Congressional monetary support may be based on protecting our forces, and does not reflect approval of the war. Mitchell v. Laird, 488 F.2d 611, 615, (D.C. Cir. 1973).

31 . Section 3(A) and 3(B), on page 45, and section 5 on page 47 of the Baker/Christopher report would enable presidents to conduct preventive wars and reprisal against terrorists or state sponsors of terrorism for at least 7 days without consulting Congress. This is an expansion over the existing War Powers Resolution which allows only 48 hours.

This approach usurps the Congressional obligation to determine the circumstances under which the president may engage in hostile military action. "Preventive War," even one the president hopes to end within seven days, risks evasion of Congressional authority. Its promulgation in the National Security Strategy of 2002 and 2006 has sullied the perception of the US abroad. President Obama, who must present his National Security Strategy soon after taking office, should question the use of preventive war without first seeking a Congressional judgment concerning its necessity. Congressional power to declare war includes the authority to determine when a war is justified.

C. CONCLUSION

Only the Supreme Court can fully resolve Constitutional issues concerning Presidential powers.[32]

The assertion by many presidential administrations that the President has authority independent of Congress to use military force because he has done so in

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32. United States v. Lopez, 514 US 549, 577-78 (1995) [concurrence of Justices Kennedy and Ginsburg): "[I]t would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance….The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.

At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role…. the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far."

the past is without merit.[33] Nor may Congress and the President jointly approve a reallocation of the powers mandated by the Constitution.[34] The "Authorization for the Use of Military force by the President" that has been argued as equivalent to a declaration of war by Congress is precisely the kind of shift in Constitutional authority that has been condemned by the Supreme Court.[35]

Baker-Christopher makes some recommendations for consultation between the President and Congress that are sound; but its procedures will hurt us when the next president wants to take us to war. The adoption by Congress of procedures proposed in Baker-Christopher will violate separation of powers principles established in 1787 by the founders precisely to protect us from Presidential decisions to take us to war. We need to enforce the procedure adopted by the framers. In that procedure Congress by roll-call vote defines the time, place, and manner of using military force, its objective, and a date when Presidential authority expires.

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33. Youngstown Sheet and Tube v. Sawyer, 443 US 579 (1952) .

34. I.N.S v Chada, 462 US 919 (1983); Clinton v. New York, 524 US 417 (1998); "The necessary implication of the argument is that by surrendering formal sovereignty over any unincorporated territory to a third party, while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint.

35. Boumediene v. Bush, 128 S.Ct. 2229, 2258 (2008). " Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." Marbury v. Madison, 1 Cranch 137, 177.60 (1803)."