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WAR POWERS

JUNE 14, 1973—Ordered to be printed

Mr. FULBRIGHT, from the Committee on Foreign Relations,
submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany S. 440]

The Committee on Foreign Relations, to which was referred the bill (S. 440), to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress, having considered the same, reports favorably thereon and recommends that the bill do pass.

PREVIOUS SENATE ACTION

The bill, S. 440, is identical in text to S. 2956 which was passed by the Senate on April 13, 1972 by a vote of 68 to 16. No agreement having been reached in conference in the 92nd Congress, S. 2596 was reintroduced as S. 440 on January 18, 1973 by Senator Javits and 57 cosponsors. S. 440 has a total of 61 cosponsors as it goes to the Senate floor.

PURPOSES OF THE BILL

A detailed explanation of all the bill's provisions is given at the end of the Committee Report, beginning on page 21.

The purpose of the war powers bill, as set forth in its statement of "purpose and policy," is to fulfill—not to alter, amend, or adjust—the intent of the framers of the United States Constitution in order to insure that the collective judgment of both the Congress and the President will be brought to bear in decisions involving the introduc-

tion of the Armed Forces of the United States in hostilities or in situations where imminent involvement in hostilities is indicated by circumstances. The constitutional basis for this bill is found in Article 1, Section 8, of the Constitution, which enumerates the war powers of Congress, including the power to declare war and to make rules for the Government and regulation of the Armed Forces, and further specifies that Congress shall have the power "to make all laws necessary and proper for carrying into execution" not only its own powers but also "all other powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."

The essential purpose of the bill, therefore, is to reconfirm and to define with precision the constitutional authority of Congress to exercise its constitutional war powers with respect to "undeclared" wars and the way in which this authority relates to the constitutional responsibilities of the President as Commander-in-Chief.

Section 3 of the bill defines the emergency conditions in which, in the absence of a declaration of war by Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is indicated by circumstances.

The designation of conditions for the emergency use of the armed forces spelled out in Section 3 is the result of a concerted effort on the part of the Committee and the principal sponsors of the "War Powers Act" to make provision for the exigencies of modern warfare and international politics but to do so in such a way as to fulfill the intent of the Constitution, particularly with reference to war powers of Congress.

Senator Javits, the initial sponsor of war powers legislation, in testimony before the Committee in 1971 explained the rationale for the proposed legislation as follows:

My cosponsors and I regard this bill as basic national legislation. It is legislation essential to our security and well being. It is legislation in the interest of the President as well as the Congress. . . . We live in an age of undeclared war, which has meant Presidential war. Prolonged engagement in undeclared, Presidential war has created a most dangerous imbalance in our Constitutional system of checks and balances. . . . [The bill] is rooted in the words and the spirit of the Constitution. It uses the clause of Article I, Section 8 to restore the balance which has been upset by the historical disenthronement of that power over war which the framers of the Constitution regarded as the keystone of the whole Article of Congressional power—the exclusive authority of Congress to "declare war"; the power to change the nation from a state of peace to a state of war.

In testimony before the Committee in 1971, Senator Stennis, Chairman of the Armed Services Committee, stated: ". . . I believe that all of the bills and resolutions so far introduced are important chiefly because they attempt to delineate between those circumstances in which the President can first act unilaterally and those in which prior authority by Congress is required before armed forces can be used."

Section 3 of the bill makes these crucial delineations. Subsections (1), (2) and (3) are codifications of the President's authority to "repel

sudden attacks” and protect U.S. nationals whose lives are endangered abroad—powers based on established precedent and the intention of the Constitutional Convention, as evidenced by Madison’s notation about “leaving to the Executive the power to repel sudden attacks.” Subsection (4) of Section 3 of the bill is a crucial provision of the legislation, requiring that all other use of the Armed Forces in hostilities, or situations where hostilities are clearly imminent, must be “pursuant to specific statutory authorization.”

In allowing of emergency action to forestall the direct and imminent threat of an attack the majority of the Committee accepted the view expressed in testimony before the Committee by Alexander M. Bickel, Professor of Law, Yale University, that the authority involved is “a reactive not a self-starting affirmative power. . . .” As Professor Bickel put it in 1971:

The “sudden attack” concept of the framers of the Constitution denotes a power to act in emergencies in order to guard against the threat of attack, as well as against the attack itself, when the threat arises, for example, in such circumstances as those of the Cuban missile crisis of 1962. So long as it is understood that this is a reactive, not a self-starting affirmative power, I have no trouble agreeing that it is vested in the President by the Constitution, that it provides flexibility, and that Congress cannot take it away.¹

Again, in testimony before the Committee in 1973, Professor Bickel expressed his belief that:

The actual draft of Section 3 of S. 440 is precise and is, on any fair reading, not only a full implementation of the constitutional grant to the President, but also more restrictive than many a claim of power that has in past years been made by Presidents, and indeed acted upon. Moreover, as a matter of effective drafting, it seems to me impossible to state with any clarity what is reserved to Congress without stating first what belongs to the President. The task is one of line-drawing, of separating one thing from another, and in doing so one must state what is on both sides of the line.²

With respect to the provisions of subsection (4) of section 3, Professor Bickel made the following point:

The Constitution does not say that the President shall declare war subject to Congressional veto by failure to appropriate. It says that Congress shall declare war, and that must mean that Congress, whether by formal declaration or other legislation, must expressly authorize the initiation of hostilities, save only in the limited conditions in which the President may act on his own independent authority, and in which, indeed, his authority may be exclusive. To appropriate money in support of a war the President is already waging, it seems to me, is no more to ratify his action in responsible fashion than to appropriate for the payment of his salary.³

¹ “War Powers Legislation,” *Hearings Before the Committee on Foreign Relations, U.S. Senate, 92d Congress, 1st Session.* (Washington: U.S. Govt. Printing Office, 1972), p. 553.

² “War Powers Legislation,” *Hearings Before the Committee on Foreign Relations, U.S. Senate, 93rd Congress, 1st Session.* (Washington: U.S. Govt. Printing Office, 1973), p. 21.

³ “War Powers Legislation,” (1973), p. 23.

In his testimony before the Committee in 1971, Senator Eagleton made the point forcefully concerning the need for reporting:

For Congress to pay more than pious lip service to its war making role, it must not only pass a strong war powers bill, but also must be willing to demand, receive and act upon relevant information it needs to exercise the most solemn of its constitutional responsibilities—making the final decision that takes this country to war.

Section 5, which with Section 3 is the heart and core of the bill, provides that the use of the armed forces under any of the emergency conditions spelled out in Section 3 shall not be sustained for a period beyond thirty days unless Congress adopts legislation specifically authorizing the continued use of the armed forces. The intended effect of Section 5 is to impose a prior restriction on the emergency use of the armed forces by the President. Emergency use of the armed forces by the President—under Section 3—would be undertaken with full knowledge on his part that the operation could be continued beyond a thirty-day period only with the specific authorization of Congress. The President would thereby stand forewarned against any emergency use of the armed forces that did not conform with the law and that he did not feel confident would command the support of majorities of both Houses of Congress.

BACKGROUND AND COMMITTEE ACTION

On June 15, 1970, Senator Javits introduced the first war powers bill (S. 3964) with the cosponsorship of Senator Dole; and on February 10, 1971, he reintroduced a revised version as S. 731 with the cosponsorship of Senators Mathias, Pell and Spong. War powers bills were subsequently introduced on January 27, 1971 by Senator Taft; on March 1, 1971 by Senator Eagleton; on May 11, 1971 by Senator Stennis; and on May 15, 1971, by Senator Bentsen. All of these bills, except that introduced by Senator Taft, contained the requirement of advance Congressional authorization for the commitment of the armed forces to hostilities by the President, except in certain designated emergencies, in the event of which the President would be authorized to commit the armed forces to combat for a period not to exceed thirty days unless explicitly authorized by Congress.

The immediate legislative history of the war powers bill can be dated to the controversial Gulf of Tonkin Resolution of 1964 and the subsequent conduct of hostilities in Vietnam, Laos and Cambodia without valid Congressional authorization. In 1969, by a vote of 70 to 16, the Senate adopted the National Commitments Resolution, which expressed the sense of the Senate that "a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government. . . ." This enactment has been ignored by the executive. Recent Presidents have relied upon dubious historical precedents and expansive interpretations of the President's authority as Commander-in-Chief to justify both the initiation and perpetuation of foreign military activities without the consent—in some instances without even the knowledge—of Congress. As Presi-

dent Johnson put it in a press conference, "We stated then, and we repeat now, we did not think the [Tonkin Gulf] resolution was necessary to do what we did and what we are doing."⁴

The purpose of the National Commitments Resolution, as the Committee commented in its Report of April 16, 1969, was "not to alter the Constitution but to restore it." The resolution was understood by the Committee as essentially ". . . an invitation to the executive to reconsider its excesses, and to the legislature to reconsider its omissions, in the making of foreign policy, and, in the light of such reconsideration, to bring their foreign policy practices back into compliance with that division of responsibilities envisioned by the Constitution and sanctioned by over a century of usage." The Committee also held the view at that time that no further legislative enactment was required, that, indeed, ". . . all that is required is the restoration of constitutional procedures which have been permitted to atrophy." Much to the Committee's disappointment, the executive has chosen not to accept the "invitation" conveyed in the National Commitments Resolution. The executive—not just the present Administration but its recent predecessors as well—has chosen to ignore Congressional expressions of constitutional principle which do not carry the force of law.

Following upon the adoption of the National Commitments Resolution it was hoped that the then newly installed Nixon Administration would take a view different from that of its predecessor. That hope has not been realized. The commitment of American military forces to Cambodia in 1970, and to Laos in 1971, without the consent or even the knowledge of Congress, showed that, like its predecessor, the present Administration believes the President may initiate foreign military actions without reference to the authority of the Congress.

Following upon extensive hearings before the Committee in 1971, Senators Javits, Stennis, Eagleton, and Spong joined in introducing a joint bill, S. 2956, on December 6, 1971 and were joined by Senators Taft and Bentsen. It was this bill, representing a synthesis of separate bills offered by the co-sponsors, which the Committee favorably reported and which the Senate subsequently adopted 68-16 on April 13, 1972, with three perfecting amendments, offered by the bill's sponsors, which were adopted unanimously.

Between March 8, 1971 and October 6, 1971, and again on April 11 and 12, 1973, the Foreign Relations Committee conducted public hearings on the war powers bills. The hearings began with testimony from a number of leading scholars and academic authorities on the formation of the Constitution and the early period of our nation's history. These early hearings, combined with the later testimony of eminent contemporary legal scholars, were important in establishing the constitutionality of the war powers legislation before the Committee. Several close advisors of the previous two Presidents testified as to the desirability and workability of the proposed legislation viewed from the perspective of their own experience as Presidential advisors. In this regard, the Committee takes particular note of the testimony in favor of S. 440 offered by Nicholas deB. Katzenbach, who as Under

⁴ "Foreign Relations Committee on the National Commitments Resolution." *Reproduced in Documents Relating to the War Power of the Congress, the President's Authority as Commander-in-Chief, and the War in Indochina*, 91st Congress, 2nd Session, compiled by the Senate Foreign Relations Committee (Washington: Government Printing Office, 1970), p. 24.

Secretary of State in the Johnson Administration had testified forcefully against the National Commitments Resolution. In his testimony of April 11, 1973 Mr. Katzenbach expressed a new viewpoint: "I conclude that this legislation is constitutional and, if enacted, binding upon the President." With respect to the impact of the bill's provisions on crisis diplomacy, McGeorge Bundy, who served as President Kennedy's National Security Assistant during the Cuba missile crisis, while testifying in support of the legislation, stated: "I think the essential processes of the Cuban missile crisis would not have been sharply affected by this resolution or this bill or this kind of procedure."

In two years the Committee has heard testimony in public session by a total of 28 witnesses, including the Secretary of State speaking for the Administration, 10 Senators, 2 Congressmen, and a number of distinguished historians and legal scholars. Significant additional material and opinion were inserted in the record.

Speaking in favor either of specific bills or the general concept of war powers legislation were the following:

- (1) Henry Steele Commager, Professor of History, Amherst College.
- (2) Richard B. Morris, Professor of History, Columbia University.
- (3) Alfred H. Kelly, Professor of History, Wayne State University.
- (4) Claiborne Pell, U.S. Senator from Rhode Island.
- (5) Jacob K. Javits, U.S. Senator from New York.
- (6) Thomas F. Eagleton, U.S. Senator from Missouri.
- (7) Alpheus T. Mason, Professor of Political Science, Princeton University.
- (8) Robert Taft, Jr., U.S. Senator from Ohio.
- (9) Charles McC. Mathias, U.S. Senator from Maryland.
- (10) Paul Findley, U.S. Congressman from Ohio.
- (11) Frank Horton, U.S. Congressman from New York.
- (12) McGeorge Bundy, President, Ford Foundation.
- (13) George Reedy, former Press Secretary to President Johnson.
- (14) Alexander M. Bickel, Professor of Law, Yale University.
- (15) Lloyd M. Bentsen, U.S. Senator from Texas.
- (16) William D. Rogers, Arnold & Porter, Washington, D.C.
- (17) William B. Spong, Jr., U.S. Senator from Virginia.
- (18) John Stennis, U.S. Senator from Mississippi.
- (19) Lawton Chiles, U.S. Senator from Florida.
- (20) Arthur J. Goldberg, Esq., former U.S. Ambassador to the United Nations.
- (21) Raoul Berger, Charles Warren Senior Fellow in American Legal History, Harvard Law School.
- (22) Nicholas B. Katzenbach, Vice President and General Counsel, IBM Corporation.

Speaking in opposition to the war powers legislation were the following in chronological order:

- (1) Barry Goldwater, U.S. Senator from Arizona.
- (2) John Norton Moore, Professor of Law, University of Virginia.
- (3) William P. Rogers, Secretary of State.
- (4) George Ball, Lehman Bros. International, New York.
- (5) Charles N. Brower, Acting Legal Adviser, Department of State.

(6) David F. Maxwell, member, Advisory Panel on International Law (Department of State).

Those supporting war powers legislation emphasized the intent of the framers of the Constitution and the importance of the Congressional war power for a system of government based on the separation of powers and checks and balances. Those testifying against the war powers legislation cited historical instances in which the President has used the armed forces without the consent of Congress and the necessity of rapid action under the conditions of the nuclear age. Meeting in executive session, the Committee marked up the War Powers Act December 7, 1971, adopting clarifying and perfecting amendments. On the same day, by unanimous vote, the Committee ordered the bill reported favorably to the Senate.

The bill was debated in the Senate from March 28 to April 13, 1972, on which date it was adopted by a vote of 68 to 16.

The war powers act of 1972 failed of enactment into law owing to the inability of the two houses to agree in conference. In 1972 the Senate and House bills were markedly different in content and scope, and the Senate-House conference, able to convene only once late at the end of the session, was unable to reconcile the two bills.

Following its reintroduction on January 10, 1973, the Committee again considered the war powers bill in executive session. During the Committee mark-up, Senator Fulbright proposed substitute language for section 3 of the bill. This proposed amendment was identical to the one offered by Senator Fulbright during the 1972 floor debate, which was defeated on April 12, 1972 by a vote of 10-68. Following extensive discussion, the Committee rejected the proposed substitute by a vote of 4-10. The Committee on May 16, 1973 then voted 15-0 (with one member voting "present") to report the war powers bill favorably to the Senate.

COMMITTEE COMMENTS

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.⁵

Justice Harlan observed:

"We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. The Founding Fathers," said Justice Harlan, "staked their faith that liberty would prosper in the new nation not primarily upon declarations of individual rights but upon the kind of government the Union was to have." "No view of the Bill of Rights or interpretation of any of its provisions," the Justice warned, "which fails to take due account of [federalism and separation of powers] can be considered constitutionally sound."⁶

⁵ Justice Hugo Black in *Reid v. Covert*, 354 U.S. 5-6 (1957).

⁶ Excerpts from remarks to the American Bar Center, Chicago, Illinois, August 13, 1913. In 49 A.B.A.J. 943 (1963).

The Committee concurs in the view expressed by Justice Harlan: when checks and balances are disrupted in one area of our public policy, all others are affected, and so also are the basic rights of the citizen. As Professor Alpheus Thomas Mason said in his testimony before the Committee, "Separation of powers in war making, constitutionally shared by Congress and the President, has all but vanished. The President is in complete, unqualified control."⁷ In the Committee's view, as in the view of the framers of our Constitution, "complete, unqualified control" in one area poses the danger, if not indeed the inevitability, of "complete, unqualified control" over all other areas of our national life.

Advocates of Presidential power point out that the President is a responsible, elected official, the only official indeed who is elected by all the people. The President's accountability cannot be gainsaid, but of and by itself is dangerously insufficient. As Madison wrote in *Federalist 51*, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."⁸

Despite instances of executive "usurpation" of power, more often unintentional than deliberate, and an even greater number of instances of failure on the part of the Congress to defend and exercise its prerogatives, the major cause of the unhinging of the checks and balances of our political system as to war making has been the impact of three decades of almost uninterrupted crisis in foreign policy. In time of emergency there is a natural, powerful tendency to fall in line behind the leadership of the President. When the nation is thought to be in danger, it seems to most people irresponsible, capricious, or even unpatriotic to question the President's word as to the need for action of one kind or another. Secretary of State Acheson summed up this state of mind cogently when he advised the Senate in 1951 that it ought not to quibble over President Truman's claim of authority to station American troops primarily in Europe. Acheson said, "We are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour."⁹

Experience has shown that counsel of this nature is not meant to be taken quite literally: it is not meant to suggest that it does not matter where the power of decision lies, but rather that the power should be left with the President exclusively and Congress ought not to interfere. Similarly, executive branch lawyers have fallen into the habit of telling us that the Constitution is vague about the division of foreign policy and war powers and that questions as to "who has the power to do this, that, or the other thing" are best left to be resolved according to the requirements of the moment—according, as Under Secretary Katzenbach put it, to "the instinct of the nation and its leaders for political responsibility. . . ." ¹⁰ Or, as Mr. Justice Rehnquist put it when he was Assistant Attorney General,

⁷ "War Powers," Hearings, p. 254.

⁸ *The Federalist*, Henry Cabot Lodge, editor (New York and London: C. P. Putnam Sons, 1908), p. 323.

⁹ Assignment of Ground Forces of the United States to Duty in the European Area," *Hearing by Committees on Foreign Relations and Armed Services*, U.S. Senate, 82d Congress, 1st Session, on S. Con. Res. 8, Feb. 1-28, 1951 (Washington: U.S. Govt. Printing Office, 1951), pp. 92-93.

¹⁰ "National Commitments" Hearings, pp. 72-73.

The Framers here, as elsewhere in the Constitution, painted with a broad brush, and it has been left to nearly two hundred years of interpretation by each of the three coordinate branches of the National Government to define with somewhat more precision the line separating that which the President may do alone from that which he may do only with the assent of Congress.¹¹

In practice, the advocates of the "broad brush" have something more precise in mind: they want the President to be left unencumbered to use the armed forces and contract foreign obligations essentially as he sees fit, drawing Congress into the decision-making process insofar as he finds it useful and convenient.

The Committee does not contest the need of "flexibility," nor of adaptability, in our political process in order to accommodate to modern conditions. The Committee does, however, contest the view which holds that the price of adaptability is the repudiation of constitutional precept. The notion of a "living" Constitution ceases to make sense when it is taken as license for nullifying the Constitution's intent—or at least some part of it. The real issue, in the Committee's view, to which the war powers bill purports to address itself, is whether our constitutional process can be reconciled with the requirements of the nuclear age. The Committee believes that it can, that indeed, even as written in 1787, the Constitution made adequate provision for response to a genuine emergency with whatever speed might be required. No responsible citizen questions the right—or even the duty—of the President to take immediate action against a sudden attack, or imminent threat of an attack, upon the United States or its armed forces. What the Committee does contest is that expansive view of Executive prerogative which holds that the President may use the armed forces at will, even in conditions falling short of a genuine national emergency, and that he may sustain that use for as long as he, and he alone, sees fit. Such unrestricted Presidential control of the armed forces is neither necessary or wise in our nuclear age, reconcilable with the Constitution, nor tolerable in a free society.

Far from having been made obsolete by the necessity for dealing with fast-moving events in the nuclear age, the checks and balances of our Constitution have become, in the Committee's view, more essential than ever. Disposing as he does of a vast arsenal of nuclear weapons, ballistic missiles and an enormous number and variety of lesser weapons, the President of the United States has acquired something close to absolute power over the life and death of hundreds of millions of people all over the world. As Alexander Hamilton, even though an advocate of strong executive authority, warned in *Federalist* 75:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate created and circumstanced as would be the President of the United States.¹²

¹¹ Statement by William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, on the "President's Constitutional Authority to Order the Attack on the Cambodian Sanctuaries." *Documents Relating to the War Power of Congress*, p. 176.

¹² The *Federalist*, pp. 467-468.

A. THE INTENT OF THE FRAMERS

Whatever else they may have painted with a "broad brush," the framers of the American Constitution were neither uncertain nor ambiguous about where they wished to vest the authority to initiate war. In his testimony before the Foreign Relations Committee, Professor Raoul Berger expressed astonishment that anyone should consider the matter of the division of war powers between Congress and the President as "murky": "The power to wage war, it may be categorically asserted, was vested by the Constitution in Congress, not the President. If this be so," said Professor Berger with reference to the current legislation, "your bill merely seeks to restore the original design. It cannot be unconstitutional to go back to the Constitution."¹³ The Founding Fathers had been much dismayed by the power of the British Crown to commit Great Britain—and its American colonies—to war. They were also fearful of the danger of large standing armies and of the possible defiance of civilian authority by military leaders. In order to alleviate the threat of militarism and of the possible resurgence of monarchical tendencies in the new Republic, the Article I, Section 8 the framers vested the authority to initiate war in the legislature, and in the legislature alone, and established the framework for tight Congressional control over the military establishment.

The absence of extended debate over the war powers in the Constitutional Convention attests to the near unanimity of the Founding Fathers as to where that authority was meant to be placed. There was some discussion as to whether the war power should be vested in the Congress as a whole or only the Senate, but only one delegate, Pierce Butler of South Carolina, favored vesting the war power in the President.

The Constitutional Convention at first proposed to give Congress the power to "make" war but changed this to "declare" war, not, however, because it was desired to enlarge Presidential power but in order to permit the President to take action to repel sudden attacks. Madison's notes on the proceedings of the Convention report the change of wording as follows: "Mr. Madison and Mr. Gerry *moved* to insert 'declare,' striking out 'make' war; leaving to the executive the power to repel sudden attacks."¹⁴ It is noteworthy that the delegates who spoke on this change of wording all expressed concern with the possible enlargement of Presidential power. Elbridge Gerry, for example, declared that he "never expected to hear in a republic a motion to empower the Executive talons to declare war." George Mason firmly expressed himself as "against giving the power of war to the executive," on the ground that he was "not to be trusted with it."

A closely related concern of the framers was to make it more difficult to start a war than to stop one. It was essentially for this reason that the power to authorize hostilities was vested in the Congress rather than in the President as successor to the British Crown. It was also for this reason that the war power was vested in the two Houses of the Congress rather than in the Senate alone. As Oliver Ellsworth told his fellow delegates, it "should be more easy to get out of war,

¹³ "War Powers" (1973) p. 14

¹⁴ *The Records of the Federal Convention of 1787*, 4 volumes (Max Farrand, editor, New Haven and London: Yale University Press, 1966), vol. 2, p. 313.

than into it"; and as George Mason said, he was "for clogging rather than facilitating war; but for facilitating peace."¹⁵

The division of authority intended by the framers was explicit: the Congress was to "declare"—that is, to authorize the initiation of—war. The President, as Commander-in-Chief, was to respond to sudden attacks and to conduct a war once it had started and command the armed forces once they were committed to action. The powers of the President as Commander-in-Chief were explained by Alexander Hamilton in *Federalist 69*:

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, while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.¹⁶

Or as Jefferson put it in a letter to Madison in 1789:

We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.¹⁷

The Supreme Court has also declared that the power to initiate war is one which rests solely with the Congress. In the "Prize Cases" of 1862 the Supreme Court said:

By the Constitution, Congress alone has the power to declare a national or foreign war . . . The Constitution confers on the President the whole Executive power. . . . He is Commander-in-Chief of the Army and Navy of the United States. . . . He has no power to initiate or declare a war either against a foreign nation or a domestic state.¹⁸

In the early years of the Republic, Presidents acknowledged and carefully respected the war power of Congress. President Madison, for example, who had been one of the principal framers of the Constitution and one of its principal interpreters through his writings in the *Federalist Papers*, sent a message to Congress on June 1, 1812, in which, after recounting the depredations of British ships on American commerce on the Atlantic, he referred the matter to Congress in these words:

Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty disposer of events, avoiding all connections

¹⁵ Summarized by Richard B. Morris, Gouverneur Morris Professor of History, Columbia University, in a statement before the Foreign Relations Committee, March 9, 1971.

¹⁶ "War Powers" Hearings, p. 80.

¹⁷ *The Papers of Thomas Jefferson*, 17 volumes (Julian P. Boyd, ed., Princeton: Princeton University Press, 1955), vol. 15, p. 397.

¹⁸ 67 USC 635 (1962).

which might entangle it in the contests or views of other powers, and preserving a constant readiness to concur in an honorable reestablishment of peace and friendship, is a solemn question which the Constitution wisely confides to the legislative department of the Government.¹⁹

Madison summarized the issue in these unequivocal terms: "Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite and proper."²⁰

The Monroe Doctrine has been erroneously cited as an early precedent for use of the armed forces by the President acting on his own authority. In keeping with the intent of the framers of the Constitution, President Monroe made the appropriate distinction between a statement of policy and the authority to carry it out. When in 1824 the Government of Colombia inquired as to what action the United States might take under the Monroe Doctrine to repel certain European intervention in the Latin American Republics, Secretary of State John Quincy Adams replied,

With respect to the question, "in what manner the Government of the United States intends to resist on its part any interference of the Holy Alliance for the purpose of subjugating the new republics or interfering in their political forms" you understand that by the Constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government.²¹

President Buchanan, to cite another example, acknowledged the war power of Congress quite explicitly in his message to Congress of December 6, 1858:

The Executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It cannot legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks.²²

Daniel Webster, who served as Secretary of State during the early 1850's, was also a distinguished constitutional lawyer. On July 14, 1851, during his tenure as Secretary of State, he wrote as follows:

¹⁹ *A compilation of the Messages and Papers of the Presidents*, 10 volumes (James Richardson, ed., Washington: Govt. Printing Office, 1917), vol. 2, pp. 489-490.

²⁰ Quoted by Raoul Berger in "War-Making by the President," 121 *University of Pennsylvania Law Review* (1972), p. 48.

²¹ John Quincy Adams to Don Jose Maria Salazar, August 6, 1824, quoted in *The Record of American Diplomacy*, third edition (Ruhl J. Bartlett, ed., New York: Alfred A. Knopf, 1954), p. 185.

²² *A Compilation of the Messages and Papers of The Presidents* (New York: Bureau of National Literature, Inc., 1917), vol. 7, p. 3047.

In the first place, I have to say that the war-making power in this Government rests entirely in Congress; and that the President can authorize belligerent operations only in the cases expressly provided for the Constitution and the laws.²³

During the course of the nineteenth century it became accepted practice, if not strict constitutional doctrine, for Presidents acting on their own authority to use the armed forces for such limited purposes as the suppression of piracy and the slave trade, for "hot pursuit" of criminals across borders, and for the protection of American lives and property in places abroad where local government was not functioning effectively. An informal, operative distinction came to be accepted between the use of the armed forces for limited, minor or essentially non-political purposes and the use of the armed forces for "acts of war" in the sense of large-scale military operations against sovereign states. In the former category, custom and usage developed to give a certain informal sanction to unauthorized Presidential action; in the latter, involving full-scale warfare against a foreign power, no President was to claim the right to act without Congressional authorization until the twentieth century.

Nor indeed was it contended by any President until recent years that, because *declarations* of war might be obsolete, so also was the authority of Congress to authorize—or refuse to authorize—the initiation of war. Even if it be granted, as perhaps it must, that the former declaration of war is no longer a useful instrument in international politics, this is to say no more than that a particular form in which the Congress exercised its constitutional authority in the past is no longer appropriate. As Richard B. Morris, Gouverneur Morris Professor of History at Columbia University, said in his testimony before the Committee—after citing the provisions of the Constitution relating to Congress's power to declare war and "raise and support armies", the authority of the President as Commander-in-Chief, and the limitation of appropriations of money for the support of armies to a maximum of two years—

* * * it is a fair inference from the debate on ratification and from the learned analysis offered by the *Federalist* papers that the war-making power of the President was little more than the power to defend against imminent invasion when Congress was not in session.²⁴

It is also of great importance to note that the residual legislative authority over the entire domain of foreign policy—not just the war power—was placed in Congress by the Constitution. Members of Congress have themselves perhaps underestimated the authority vested in them by the "necessary and proper" clause of Article I, Section 8, of the Constitution. That clause entrusts the Congress to make all laws "necessary and proper for carrying into execution" not only its own powers but "all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Strictly interpreted, the "necessary and proper" clause entrusts the Congress not only to "carry into execution" its own constitutional war

²³ A letter from Daniel Webster to Mr. Severance, July 4, 1851, in *The Writings and Papers of Daniel Webster*, vol. 14, p. 440.

²⁴ "War Powers" Hearings, p. 81.

power, but also, should it be thought necessary, to define and codify the powers of the government as a whole, including those of the President as its principal officer.

B. THE GROWTH OF PRESIDENTIAL POWER

Prior to the Second World War Presidential use of the armed forces without Congressional authorization was confined for the most part to the Western Hemisphere, primarily to Mexico and the Caribbean. President McKinley's participation, in the Boxer expedition in China in 1900 was a noteworthy exception. Only since the Second World War have American Presidents claimed, and exercised, the power to commit the armed forces to full-scale and extend warfare overseas. The kind of foreign military intervention we have witnessed in the last quarter century is, in the words of Henry Steel Commager, Professor Emeritus of History. Almost College, "if not wholly unprecedented, clearly a departure from a long and deeply-rooted tradition."²⁵

Professor Alexander Bickel of the Yale Law School made the same point in his testimony before the Committee :

* * * the decisions discussed as early as 1964, made in the first half of 1965, and executed thereafter, to commit the moral and material resources of this Nation to full-scale war in Vietnam seem to me the mark the farthest, and really an unprecedented, extension of Presidential power. Certainly the power of the President in matters of war and peace has grown steadily for over a century. The decisions of 1965 may have differed only in degree from earlier stages in this process of growth. But there comes a point when a difference of degree achieves the magnitude of a difference in kind. The decisions of 1965 amounted to an all but explicit transfer of the power to declare war from Congress, where the Constitution lodged it, to the President, on whom the framers explicitly refused to confer it.²⁶

The transfer from Congress to the executive of the actual power—as distinguished from the constitutional authority—to initiate war has been one of the most remarkable developments in the constitutional history of the United States. For this change Congress as well as the Executive bears a heavy burden of responsibility.

When President Truman committed the armed forces to Korea in 1950 without Congressional authorization, scarcely a voice of dissent was raised in Congress. Senator Watkins of Utah challenged the President's authority to commit the country to war without consulting the Congress, even in compliance with a resolution of the United Nations Security Council, and said that, if he were President, he ". . . would have sent a message to the Congress of the United States setting forth the situation and asking for authority to go ahead and do whatever was necessary to protect the situation."²⁷ Senator Taft also challenged President Truman's action but not until January 1951. "The President," he said, "simply usurped authority, in violation of the laws and

²⁵ "War Powers" Hearings, p. 8.

²⁶ *Ibid.*, pp. 551-552.

²⁷ *Congressional Record*, 81st Congress, second session, vol. 96, pt. 7, Senate, June 27, 1950, pp. 9229-9233.

the Constitution, when he sent troops to Korea to carry out the resolution of the United Nations in an undeclared war."²⁸

The isolated voices of Watkins and Taft were ineffectual against the accelerating tide of growing executive power. Secretary of State Acheson virtually threw down the gauntlet to Congress—although few at that time were disposed to pick it up—when he testified before the Committee on Foreign Relations and Armed Services Committee in 1951 in support of President Truman's plan to station six divisions of American soldiers in Europe. He said on that occasion:

Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interefered with by the Congress in the exercise of powers which it has under the Constitution.²⁹

In the course of the Vietnam war, the Johnson Administration reconfirmed the executive's claim to unilateral authority in the use of the armed forces. In his now famous testimony of August 1967, Under Secretary of State Katzenbach contended that the Gulf of Tonkin Resolution was "as broad an authorization for the use of armed forces for a purpose as any declaration of war so-called could be in terms of our internal constitutional process."³⁰ In fact, the Johnson Administration went farther.

Where as Mr. Katzenbach at least claimed the existence of legislative authority, the President himself contended that no such authority was required. Speaking of the Gulf of Tonkin Resolution in his news conference of August 18, 1967, President Johnson said,

We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we're doing. But we thought it was desirable and we thought if we were going to ask them [Congress] to stay the whole route and if we expected them to be there on the landing we ought to ask them to be there on the takeoff.³¹

Making the same claim in more formal language, the Legal Advisor to the Department of State had written in March 1966,

There can be no question in present circumstances of the President's authority to commit U.S. forces to the defense of South Vietnam. The grant of authority to the President in Article II of the Constitution extends to the actions of the United States currently undertaken in Vietnam.³²

The attitude of the present Administration will be explored in greater detail in Subsection C below. It suffices here to point out that the Nixon Administration has shown that its conception of the war power differs in no important respect from that of its predecessor. It could hardly be otherwise, one suspects, if only because the accumulation of precedents of unauthorized Presidential use of the armed

²⁸ *Congressional Record*, 82d Congress, first session, vol. 97, pt. 1, Senate, January 5, 1951, p. 37.

²⁹ "Assignment of Ground Forces of the United States to Duty in the European Areas," pp. 92-93.

³⁰ "National Commitments." Hearings, p. 24.

³¹ *New York Times*, August 19, 1967, p. 10.

³² Leonard C. Meeker, "The Legality of U.S. Participation in the Defense of Vietnam," *The Department of State Bulletin*, March 28, 1966, p. 484.

forces seems to have had a spurious self-legitimizing effect. A President can hardly be blamed if, coming into office, he supposes himself to be properly vested with all of the powers exercised by his predecessor, however improperly exercised. A President can hardly be blamed if, under such circumstances, he regards an effort by Congress to reassert powers which it has long neglected to exercise as an attempt to infringe upon his own powers.

All of which is by way of making the point that it is far more difficult to reassert a power which has been permitted to atrophy than to defend one which has been habitually used. The Congress accordingly bears a heavy responsibility for its passive acquiescence in the unwarranted expansion of Presidential power. As the late Justice Robert H. Jackson pointed out in his concurring opinion in *Youngstown v. Sawyer*, there is a "zone of twilight" between the discrete areas of Presidential and Congressional power. Politics, like nature, abhors a vacuum. When Congress created a vacuum by failing to defend and exercise its powers, the President inevitably hastened to fill it. As Justice Jackson commented, "Congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility...."³³

To assert power is not, however, to legitimize it. As a Supreme Court Justice of the last century commented: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."³⁴ The same principle must apply to action by the executive.

In the pithy phrase of Professor Berger, "Illegality is not legitimated by repetition."³⁵

C. THE EXECUTIVE VIEW

The Nixon Administration has shown that it shares the expansive view of the President's power as Commander-in-Chief held by preceding Administrations. The commitment of American military forces to Cambodia in 1970, and to Laos in 1971, demonstrated the present Administration's determination to initiate new foreign military actions solely on its own authority.

In its public statements as well as in its foreign military operations the Nixon Administration has indicated its belief that the President is at liberty to commit the armed forces substantially as he sees fit. In its comments of March 10, 1969, on the then-pending National Commitments Resolution, the Department of State made the following assertion:

As Commander-in-Chief, the President has the sole authority to command our Armed Forces, whether they are within or outside the United States. And, although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific congressional approval.³⁶

³³ Justice Robert H. Jackson concurring in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³⁴ Justice Field in *Norton v. Shelby County*, 118 U.S. 425 (1886).

³⁵ Berger, "War-Making by the President," p. 60.

³⁶ "National Commitments" Hearings, p. 25.

The same assumptions of executive war-making authority were expressed in the Department of State's comments of March 12, 1970, regarding the proposal then before the Foreign Relations Committee for repeal of the Formosa, Cuba, Middle East, and Tonkin resolutions. Declining either to advocate or to oppose such action, the State Department took the position that ". . . the Administration is not depending on any of these resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans." More specifically, as to the war in Indochina, the State Department asserted that ". . . this Administration has not relied on or referred to the Tonkin Gulf resolution of August 10, 1964, as support for its Vietnam policy."

On January 12, 1971, President Nixon signed into law a bill which, among other things, repealed the Gulf of Tonkin Resolution. The repeal of that Resolution quite naturally raised the question as to the authority the Administration believed it was acting under in its continued prosecution of the war in Indochina. The Administration, so far as is known to the Committee, has never addressed itself to that question except to assert that it was protecting the lives of American troops. Even this contention, however, ceased to be available as an explanation for the bombing of Cambodia after the signing of the Paris peace agreement of January 1973 and the subsequent withdrawal of American forces from Indochina.

President Nixon himself has said little on the subject. Asked in a press conference on April 29, 1971, for his opinion of the pending war powers bills, the President replied, ". . . I believe that limiting the President's war powers, whoever is President of the United States, would be a very great mistake." The President went on to say: "We live in times when situations can change so fast internationally that to wait until the Senate acts before a President can act might be that we acted too late."³⁷

In Mr. Nixon's perspective there seems to be an association between the war power and the grandeur of the Presidential office itself. Speaking in Texas on April 30, 1972, President Nixon said:

" . . . each of us in his way tries to leave that office with as much respect and with as much strength in the world as he possibly can—that is his responsibility—and to do it the best way that he possibly can. . . . But if the United States at this time leaves Vietnam and allows a Communist takeover, the office of President of the United States will lose respect and I am not going to let that happen."

In its official comments on the war powers bills the Administration placed primary emphasis on historical precedents and the need for speedy action as the basis of its opposition to the bills. As with the previous Administration, emphasis was also placed on what the Executive regards as the imprecision of the Constitution, the need of Presidential flexibility, and the desirability, as expressed in Assistant Secretary Abshire's letter of May 1971, of some sort of undefined "common perspective" between the two branches of Government.

In his definitive presentation of the Administration's views on war powers legislation, presented to the Committee on May 14, 1971, Sec-

³⁷ *New York Times*, April 30, 1971, p. 18.

retary of State Rogers gave evidence of holding the impression that the war powers bills purported to alter the Constitution. "Any attempt to change it," he said, "should be subjected to long and full consideration of all aspects of the problem."³⁸

This viewpoint was reiterated on April 12, 1973, by the State Department's Acting Legal Adviser, who averred that the war powers bill would "alter" the "fundamental constitutional scheme."³⁹ The notion that Congress was somehow undertaking to change the Constitution by asserting its own war powers is one also offered by the Johnson Administration. Now, as on previous occasions, the Committee reconfirms its own conviction that, far from purporting to alter the Constitution in any way, the bill herewith reported is designed to restore constitutional practices which have been permitted to atrophy and, as a matter of necessity and propriety under Article 1 of Section 8, "to carry into execution" both the war powers of Congress and those of the President in his capacity as an Officer of the Government of the United States. Professor Bickel commented: "Nothing in the Constitution does or can empower Congress to do something unconstitutional, but much in the Constitution needs to be clarified or implemented, and except in the limited number of instances where exclusive power is specifically vested elsewhere, the necessary and proper clause authorizes Congress to do so, with respect to its own functions as well as those of the other branches of the federal government."⁴⁰

In his statement before the Committee, Secretary Rogers said he opposed war powers legislation because, in his view, it would attempt to fix in detail, or "freeze," the allocation of power between the President and Congress, and because such legislation would "narrow the power given the President by the Constitution." The exercise of the war powers, the Secretary emphasized, was consigned to the "political process" in a constitutional system "founded on the assumption of cooperation rather than conflict."⁴¹

The Committee is obliged to contest the Secretary's argument in all its major specifications. First of all, far from attempting to "freeze" the allocation of war powers between the President and Congress, the bill, through the emergency procedures spelled out in Section 3, allows of action by the President under almost any conceivable genuine national emergency, so much so, in fact, that some members of the Committee have expressed apprehension that Section 3 may go too far in the President's direction.

Second, as already noted, the bill would in no respect, "narrow the power given the President by the Constitution;" it does indeed purport to delineate Presidential power, but only because that power in recent practice has extended far beyond the confines of the Constitution.

Third, the Committee reiterates its view that the Constitution is not at all imprecise in allocating the war powers; on the contrary, the Constitution is quite specific—as the framers intended it to be—in giving Congress the authority to decide on going to war and in giving the President the authority, as Commander-in-Chief, to respond to an emergency and to command the armed forces once a conflict is under-

³⁸ "War Powers" (1972), p. 486.

³⁹ "War Powers Legislation" (1973), p. 52.

⁴⁰ "War Powers Legislation" (1973), p. 20.

⁴¹ "War Powers," (1972), p. 498.

way. In brief, the Constitution gave Congress the authority to take the nation into war, whether by formal declaration of war or by other legislative means, and the President the authority to conduct it.

There has grown up in recent decades a conception of what is required for a "strong Presidency" which the Committee finds disturbing. According to this school of thought, a "strong President" is not one who strengthens and upholds our constitutional system as a whole but one who accumulates and retains as much power as possible in the Presidential office itself. This outlook appears to have been an important factor in influencing recent Presidents to claim authority as Commander-in-Chief far exceeding the specifications and intent of the Constitution. It appears too to have been a factor in encouraging executive branch officials to invoke dubious past instances of foreign military operations undertaken by the President without Congressional approval—as if one act of usurpation legitimized another. A leading American historian, Thomas A. Bailey, has written:

The bare fact that a President was a strong one, or a domineering one, does not necessarily mean that he was a great one or even a good one. The crucial questions arise: Was he strong in the right direction? Was he a dignified, fair, constitutional ruler, serving the ends of democracy in a democratic and ethical manner? ⁴²

CONCLUSION

In the perspective of American history since World War II, the war powers bill must be perceived as necessary legislation which should not have been necessary. It would not have been necessary if Congress had defended and exercised its responsibility in matters of war and peace and so prevented the Executive from expanding its power in that "zone of twilight" of which Justice Jackson spoke.

The framers of the Constitution vested the war power in the Congress not primarily because they felt confident that the legislature would necessarily exercise it more wisely but because they expected the legislature to exercise it more *sparingly* than it had been exercised by the Crown, or would be likely to be exercised by the President as successor to the Crown. The framers, it would appear, were concerned with the way in which war would be initiated in making certain that it would not be initiated easily, capriciously, or often.

In this regard, Abraham Lincoln once wrote:

The provision of the Constitution giving the warmaking power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention undertook to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.

Whether and to what degree we might have avoided the war in Indochina is an issue outside of the scope of this Report. It is men-

⁴²Thomas A. Bailey, *Presidential Greatness* (New York: Appleton-Century, 1966), p. 227.

tioned here only in connection with the Committee's general belief that, in the long run, even the best conceived legislation for the reassertion of Congressional prerogative will not in and of itself prove sufficient to the maintenance of constitutional democracy in America. As Professor Kelly observed, war and peace in the American constitutional system and in the American value system are separate and distinct; and as Tocqueville observed, war breeds dictatorship. Strongly though it endorses the bill herewith reported, the Committee does not deceive itself that this bill, if enacted, will of itself restore checks and balances in matters of the war power. If the country is to be continually at war, or in crisis, or on the verge of war, or in small-scale, partial or surrogate war, the force of events must lead inevitably toward executive domination despite any legislative roadblocks that may be placed in the executive's way. During the Constitutional Convention, James Madison, often regarded as "father of the Constitution," at one point moved to authorize two-thirds of the Senate to make treaties of peace without the concurrence of the President. Although his motion was withdrawn, his argument for introducing it is instructive. "The President," he said, "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace."

Congress, in the Committee's view, can take no more useful and needed step toward the restoration of constitutional balance than to enact legislation to confirm and codify the intent of the framers of the Constitution with respect to the war power. The President, as Professor Bickel and as Mr. George Reedy, formerly of the White House staff, pointed out in their testimony before the Committee in 1971, is in many respects a remote and almost royal figure, shielded from direct personal participation in the adversary politics of democracy. "Under the American system," as one political scientist points out, "the executive is virtually *prevented* from engaging in public debate on policy by the institutional setting of his office; under the British system he is expected and, in fact, *compelled* to engage continually in it."⁴³ The processes through which the President reaches decisions are largely personal and private, beyond the reach of direct institutional accountability.

Congress, on the other hand, makes its decisions almost entirely in the open and under public scrutiny. The President is subject to quadrennial plebiscite, but Congress provides the American people with points of access through which they can hold their Government to day-to-day account and thereby participate in it. Inefficient and short-sighted though it sometimes is, Congress provides the only feasible means under the American constitutional system of drawing the President, at least indirectly, into the adversary processes of democracy. The executive branch is endowed with organizational discipline and legions of experts, but Congressmen and Senators have a unique asset when it comes to playing an effective, democratic role in the making of foreign policy: the power to speak and act freely from an independent political base.

The point the Committee wishes to stress is not that the President—the one now in office or any other—is an untrustworthy person but that all men wielding power must, in the interest of freedom, be treated

⁴³ Alexander J. Groth, "Britain and America: Some Requisites of Executive Leadership Compared," *Political Science Quarterly*, June 1970, p. 218.

with a certain mistrust. "Confidence," said Jefferson, "is everywhere the parent of despotism—free government is founded in jealousy; . . . it is jealously and not confidence which prescribes limited constitutions to bind down those we are obliged to trust with power . . . In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. . . ."⁴⁴

The Committee believes that the adoption of the war powers bill would help to restore the confidence of the American people in the processes of their government, particularly as they relate to the questions of war and peace. As Senator Stennis, a principal cosponsor of the bill, said in his testimony: ". . . I believe the overriding issue is that we must insure that this country never again go to war without the moral sanction of the American people. This is important both in principle and as practical politics. Vietnam has shown us that in trying to fight a war without the clear-cut prior support of the American people we not only risk military ineffectiveness but we also strain the very structure of the Republic.

EXPLANATION OF THE BILL

The provisions of this bill govern the use of the armed forces: "In the absence of a declaration of war by the Congress." In this bill we are dealing with *undeclared* wars—wars which have come to be called Presidential wars because the constitutional process of obtaining Congressional authorization has been short-circuited.

Section 1 of the bill contains its short title—the "War Powers Act.

Section 2 is a self-explanatory short statement of "Purposes and Policy," stressing the intention to ". . . insure that the collective judgment of both the Congress and the President will apply to the introduction of the Armed Forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances . . ."

Section 3 consists of four clauses which define the conditions or circumstances under which, in the absence of a Congressional declaration of war, the armed forces of the United States "may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances."

The first three categories are codifications of the emergency powers of the President, as intended by the Founding Fathers and as confirmed by subsequent historical practice and judicial precedent. Thus, subsections (1), (2), and (3) of section 3 delineate by statute the implied power of the President, in his concurrent role as Commander-in-Chief, with respect to emergency use of the armed forces.

The authority of Congress to make this statutory delineation is contained in the enumerated war powers of Congress in article I, section 8 of the Constitution, and especially in the final clause of article I, section 8, granting to Congress the authority:

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

⁴⁴ Quoted in A. T. Mason, *Free Government in the Making*. (New York: Oxford University Press, 1965), p. 371.

REPELLING ARMED ATTACK ON THE UNITED STATES

Subsection (1) of section 3 confirms the emergency authority of the Commander-in-Chief to: "repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;"

It should be noted that this subsection authorizes the President not only to repel an attack upon the United States and to retaliate but also "to forestall the direct and imminent threat of such an attack." The inclusion of these words grants a crucial element of judgment and discretion to the President. While it was thought by some that the power to "forestall" was inherent in the power to "repel," it was decided expressly to include the forestalling power to avoid any ambiguity domestically or in the eyes of any potential aggressor.⁴⁵

While the President clearly must apply his discretion and judgment to the implementation of this authority, it is by no means a "blank check." For the President to take forestalling action, the threat of attack must be "direct and imminent." Moreover, he must justify his judgment on this point under the mandatory reporting provisions contained in section 4.

REPELLING ATTACK ON U.S. ARMED FORCES

Subsection (2) further defines the emergency power of the President: "to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack; . . ."

The authority contained in this subsection recognizes the right, and duty, of the Commander-in-Chief to protect armed forces deployed outside the United States. Just as the President would not have to wait until the bombs actually started landing on our soil to act against an attack upon the United States, similarly our forces would not have to wait until enemy bullets and mortars hit them before they could react.

Nonetheless, it will be noted that the power to repel attacks upon the armed forces located outside the United States is less comprehensive in one respect than the power to repel attacks upon the United States itself. While the subsection contains the authority to repel and forestall, it does not include the separate and broader power to retaliate.

The wording of this provision is meant to retain safeguards against wider embroilment resulting from incidental attacks upon U.S. forces, or attacks resulting from questionable actions by local U.S. commanders. Thus, for instance, an attack upon a Marine Guard at an Embassy would not trigger an authority to retaliate by seizing the country. Likewise, for instance, a sneak attack on security guards at one of our airbases would not trigger an authority to retaliate by launching search and destroy missions.

⁴⁵ In *Martin v. Mott* (12 Wheat.) 18, 29 (1827). Justice Story speaking for the Supreme Court affirmed the constitutional authority of Congress to "provide for cases of imminent danger of invasion." He stated further: "In our opinion, there is no ground for a doubt on this point. . . . for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object."

PROTECTING U.S. CITIZENS ABROAD

Subsection (3) codifies the authority of the President to rescue United States citizens and nationals abroad and on the high seas. By defining the circumstances and procedures to be followed, this subsection is a conscious movement away from some of the excesses of nineteenth century gunboat diplomacy.

The tightly worded language of this provision grants the President the authority only to rescue endangered American citizens. He may not use the circumstance of their endangered position to pursue a policy objective beyond safe and expedient evacuation. Even before the President can take action under subsection (3) he must ascertain that the government of the country in question is either incapable of protecting Americans or is itself presenting a threat to them.

NATIONAL COMMITMENTS

Subsection (4) is perhaps the most significant part of the bill. For, while subsections (1), (2), and (3) codify emergency powers of the President as Commander-in-Chief, section 3 (4) deals with the delegation by the Congress of additional authorities which would accrue to the President as a result of statutory action by the Congress and which he does not, or would not, possess in the absence of such statutory action.

The key phrase in this subsection is contained in its initial five words: "pursuant to specific statutory authorization." The rest of the subsection is an explanation, elaboration and definition of the meaning (for the purposes of the bill) of the words "pursuant to specific statutory authorization." In an important sense, this subsection gives legislative effect to S. Res. 85, the National Commitments Resolution adopted by the Senate on June 25, 1969 by a vote of 70 to 16 which states: "that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment."

The significance of subsection (4) is multiple. First, it establishes a mechanism by which the President and the Congress *together* can act to meet any contingency which the Nation might face.

There is no way to legislate national wisdom, but subsection (4) does provide important protection to the American people by requiring that the Congress as well as the President must participate in the critical decision to authorize the use of the Armed Forces of the United States in hostilities, other than hostilities arising from such "defensive" emergencies as an attack upon the United States, our armed forces abroad, or upon U.S. citizens abroad in defined circumstances. It provides as much flexibility in the national security field as the wit and ingenuity of the President and Congress may be jointly capable of constructing.

There is a clear precedent for the action anticipated in subsection (4)—the "area resolution." Over the past two decades, the Congress and the President have had considerable experience with area reso-

lutions—some of it good and some quite unsatisfactory. In its mark-up of the war powers bill, the Foreign Relations Committee considered this experience carefully in approving the language of subsection (4). The wording of the final clause of subsection (4) holds the validity of three area resolutions currently on the statute books. These are: the “Formosa Resolution” (H.J. Res. 159 of January 29, 1955); the “Middle East Resolution” (H.J. Res. 117 of March 9, 1957, as amended); and the “Cuban Resolution” (S.J. Res. 230 of October 3, 1962).

The question may be asked: What is to guard against the passage of another resolution of the Tonkin Gulf type? The answer is that any future area resolutions, to qualify under this bill as a grant of authority to introduce the armed forces in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, must meet certain carefully drawn criteria—as spelled out in the language of subsection (4). The pertinent language is:

. . . unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in such situation and specifically exempts the introduction of such Armed Forces from compliance with the provisions of this Act . . .

In other words, any future area resolution must be a specific grant of authority which would contain a direct reference to the bill now under discussion. The phrase “exempts . . . from compliance with the provisions of this Act” is included to insure that the precise intention of the grant of authority is clearly established with reference to the War Powers Act. The exemption could of course establish other procedures—or it could reaffirm all, or part, of the provisions of S. 440. The bill thus allows for as much flexibility with respect to handling of any developing crisis or sudden emergency as the Congress and the President may jointly deem prudent.

Following the passage of this bill, Congress would have to review closely the three area resolutions which are left standing by the provision of subsection (4), and the Administration should review the world situation carefully and take the initiative in coming to the Congress with recommendations respecting the existing area resolutions—as well as recommendations for any new ones which the President might feel are needed for our national security.

Requests for new authority pursuant to subsection (4) do *not* qualify for the “Congressional Priority Provisions” contained in section 7. However, it is contemplated that Congressional consideration of new subsection (4) grants of authority can generally be undertaken in the absence of an imminent threat or emergency in a deliberative way, including Committee hearings. The point here is to obviate a repetition of the unfortunate experience of the Congress with the Tonkin Gulf Resolution, which it was later realized went through the Congress without enough inquiry in the respective Committees and in the related floor debate.

RENEWING CLOSE CONSULTATION

Last minute “crunches” can be avoided by a renewal of the earlier practice of continuing close consultation between the Executive branch and the relevant committees of Congress. The Executive would be obliged to make the Congress, again, its partner in shaping the broad,

basic national security and foreign policy of the Nation well in advance of the exercise of the war power.

CONGRESSIONAL AUTHORITY AND PRESIDENTIAL FLEXIBILITY

Some have argued that seeking Congressional authority to use the armed forces with respect to developing crisis situations would deprive the President of flexibility—or introduce ambiguity—in the conduct of foreign policy during crisis situations. It is said that the President would have to “telegraph his punches” and thus remove surprise from his diplomatic arsenal.

However, the President would not be compelled or obliged to use the armed forces just because the Congress granted him the authority to do so. Moreover, this legislation would not inhibit the President’s capacity to deploy the armed forces, i.e., to move elements of the fleet in international waters. To give a specific example, there is nothing in the bill which would have affected the President’s decision to move elements of the Sixth Fleet into the eastern Mediterranean during the 1970 Jordanian crisis. The right of United States naval forces to operate freely anywhere in international waters would not be abridged by this bill.

An important provision of subsection (4) is contained in its first qualifying clause (A). The purpose of this clause is to counteract the opinion in the *Orlando v. Laird* decision of the Second Circuit Court holding that passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war.⁴⁶

TREATIES

One of the most far-reaching aspects of subsection (4) is its provisions respecting treaties. Throughout the past two decades there has been continuing confusion respecting a crucial phrase that is standard in our nation’s collective and bilateral security treaties; to wit, that implementation of such treaties, as to involvement of U.S. forces in hostilities, will be in accordance with the “constitutional processes” of the signatories.⁴⁷

⁴⁶ Judicial opinion has shifted on this point. In *Mitchell v. Laird* (D.C. Cir. No. 71-1510 March 20, 1973) Judge Wyzanski speaking for the Court of Appeals stated: “This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war’s commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable recent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and plety as though they were votes freely given to express consent. Hence Chief Judge Bazelon and I believe that none of the legislation drawn to the court’s attention may serve as a valid assent to the Vietnam war.”

⁴⁷ In its Report on 1949 to the Senate recommending approval of the North Atlantic Treaty, the Foreign Relations Committee stated: “The committee wishes to emphasize the fact that the protective clause ‘in accordance with their respective constitutional processes’ was placed in article 11 in order to leave no doubt that it applies not only to article 5, for example, but to every provision in the treaty. The safeguard is thus all-inclusive.”

“The treaty in no way affects the basic division of authority between the President and the Congress as defined in the Constitution. In no way does it alter the constitutional relationship between them. In particular, it does not increase, decrease, or change the power of the President as Commander-in-Chief of the armed forces or impair the full authority of Congress to declare war.” (Senate Executive Report No. 8, 81st Congress, 1st Session, p. 18)

In an important sense, subsection (4) defines "constitutional processes" for the first time, as it relates to treaty implementation by the United States. The definition of "constitutional processes" respecting treaty implementation is both negative and positive.

Subsection (4) makes a finding in law that no U.S. security treaties can be considered self-executing in their own terms. With respect to existing treaties the bill states:

No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities or in any such situation . . .

Additionally, the subsection states that authorization for introducing the armed forces in hostilities shall not be inferred.

. . . from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the provisions of this Act.

It is important to bear in mind that these provisions with respect to treaties must be considered in conjunction with the authority of the President in subsections (1), (2), and (3). The authority contained in those subsections is in no way abridged or diminished by the provisions on treaties *per se*.

Moreover, as the language of the subsection makes clear, the bill envisages the adoption of treaty implementation legislation, as deemed appropriate and desirable by the Congress and the President. Such implementing legislation would constitute the authority "pursuant to specific statutory authorization" called for by subsection (4).

There are two principal reasons for including these provisions with respect to our collective and bilateral security treaties. First, is to ensure that both Houses of Congress must be affirmatively involved in any decision of the United States to engage in hostilities pursuant to a treaty. Treaties are ratified by and with the consent of the Senate. But the war powers of Congress in article I, section 8 of the Constitution are vested in both Houses of Congress and not in the Senate (and President) alone. A decision to make war must be a national decision. Consequently, to be truly a national decision, and, most importantly, to be consonant with the Constitution, it must be a decision involving the President and both Houses of Congress.

Second, the provisions with respect to treaties are important so as to remove the possibility of future contention such as arose with respect to the SEATO Treaty and the Vietnam war.

Treaties are not self-executing. They do not contain authority within the meaning of section 3(4) to go to war. Thus, by requiring statutory action, in the form of implementing legislation or an area resolution of the familiar type, the War Powers Act would perform the important function of defining that elusive and controversial phrase—"constitutional processes"—which is contained in our security treaties.

Subsection (4) contains one additional important provision. It states:

Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

The purpose of this provision is to prevent secret, unauthorized military support activities and to prevent a repetition of many of the most controversial and regrettable actions in Indochina. The ever deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. "advisers" to accompany South Vietnamese units on combat patrols; and in Laos, secretly and without Congressional authorization, U.S. "advisers" were deeply engaged in the war in northern Laos.

REPORTING REQUIREMENT

Section 4 requires the President to report "promptly" in writing to both Houses of Congress any use of the armed forces covered by section 3 of the bill. The provisions of this section are clear and simple. In his report to Congress, the President is required to include "a full account of the circumstances under which . . . [he has acted] . . . the estimated scope of such hostilities or situation, and the consistency of the introduction of such forces in such hostilities or situation with the provision of section 3 of this Act."

In addition, the President is required to make periodic, additional reports so long as the armed forces are engaged in circumstances governed by section 3. Such additional reports shall be submitted at least every six months.

It will be noted that the President is required to report "promptly." This word has been used in preference to "immediately" or a possible specific time limit such as 24 hours. The important thing is that the report must be prompt but it must also be comprehensive. It might take a few days for the executive branch to assemble all the facts and reports from the field, as well as to assemble the various intelligence reports and, most importantly, to prepare an informed judgment on the "estimated scope of such hostilities."

What is intended is a full and accurate report of events, combined with an authoritative statement by the President of his judgment about the direction in which the situation is likely to develop. The Congress can act intelligently and responsibly only when it has the necessary information at hand.

The reporting requirements of the bill apply independently of the provisions of sections 5, 6, and 7. The President's mandatory report is not to be considered a request for an extension of authority as might be granted subsequently under section 5. Such a request can only be introduced by a member of Congress.

Moreover, it is entirely possible that even a majority of the actions taken under the President's direction pursuant to section 3 full will be short-lived, one-shot actions completed well within the thirty-day time period, and thus requiring no extension in time of the authority spelled out in section 3.

30-DAY AUTHORIZATION PERIOD

Section 5 (along with section 3) is the heart and core of the bill. It is the crucial embodiment of Congressional authority in the war powers field, based on the mandate of Congress enumerated so comprehensively in article I, section 8 of the Constitution. Section 5 rests squarely and securely on the words, meaning and intent of the Constitution and thus represents, in an historic sense, a restoration of the constitution balance which has been distorted by practice in our history and, climatically, in recent decades.

Section 5 provides that actions taken under the provisions of section 3: "shall not be sustained beyond thirty days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless (1) the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of Armed Forces of the United States engaged pursuant to section 3(1) or 3(2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities; or (2) Congress is physically unable to meet as a result of an armed attack upon the United States; or (3) the continued use of such Armed Forces in such hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof."

Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the President in this age of instantaneous communications and of intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate and duty with respect to the great questions of war and peace.

The choice of thirty days, in a sense, is arbitrary. However, it clearly appears to be an optimal length in time with respect to balancing two vital considerations. First, it is an important objective of this bill to bring the Congress, in the exercise of its constitutional war powers, into any situation involving U.S. forces in hostilities at an early enough moment so that Congress's actions can be meaningful and decisive in terms of a national decision respecting the carrying on of war. Second, recognizing the need for emergency action, and the crucial need of Congress to act with sufficient deliberation and to act on the basis of full information, thirty days is a time period which strikes a balance enabling Congress to act meaningfully as well as independently.

It should be noted further, that the thirty-day provision can be extended as Congress sees fit—or it can be foreshortened under section 6. The way the bill is constructed, however, the burden for obtaining an extension under section 5 rests on the President. He must obtain specific, affirmative, statutory action by the Congress in this respect. On the other hand, the burden for any effort to foreshorten the thirty-day period rests with the Congress, which would have to pass an act or joint resolution to do so. Any such measures to foreshorten the thirty-day period would have to reckon with the possibility of a Presidential veto, as his signature is required, unless there is sufficient Congressional support to override a veto with a two-thirds majority.

The issue has been raised quite properly, as to what would happen if our forces were still engaged in hot combat at the end of the thirtieth day—and there had been no Congressional extension of the thirty-day time limit. The answer is that, as specified by clause (1), the

President would not be required or expected to order the troops to lay down their arms.

The President would, however, be under statutory compulsion to begin to disengage in good faith to meet the thirty-day time limit. He would be under the injunction placed upon him by the Constitution, which requires of the President that: "he shall take care that the laws be faithfully executed."

The wording of Section 5(1) is very specific and tightly drawn. It is to be emphasized that Section 5(1) is in no sense to be construed as a loophole giving the President discretionary authority with respect to the thirty-day disengagement requirement. It is addressed exclusively to the narrow issue of the security of our forces in the process of prompt disengagement. The criterion involved is the security of forces under fire and it does not extend to withdrawal in conformity with some broader strategy or policy objective. No expansion of the thirty-day time frame is conveyed other than a brief period which might be required for the most expeditious disengagement consistent with security of the personnel engaged. Moreover, it requires the President's certification in writing that any such contingency had arisen from "unavoidable military necessity."

Section 5(2) provides for suspension of the thirty-day disengagement requirement in the event "Congress is physically unable to meet as a result of an armed attack upon the United States."

The question has been raised whether there can or should be any time limitation on the President's emergency authority to repel an attack upon the United States and take the related measures specified in Section 3(1). The bill rejects the hypothesis that the Congress, if it were physically able to meet, might not support fully all necessary measures to repel an attack upon the nation. Refusal to act affirmatively by the Congress within the specified time period respecting emergency action to repel an attack could only indicate the most serious questions about the bona fides of the alleged attack or imminent threat of an attack. In this context, the admonition articulated in 1848 by Abraham Lincoln is most pertinent.

Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you will allow him to do so, whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect . . . If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, I see no probability of the British invading us but he will say to you be silent; I see it, if you don't.

Section 5(3) provides for: "the continued use [beyond thirty days] of such armed forces in such hostilities or in such situation [provided it] has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof." It is to be noted that authorization to continue using the Armed Forces is to come in the form of specific statutory action for this purpose. This is to avoid any ambiguities such as possible efforts to construe general appropriations or other such measures as constituting the necessary authorization for "continued use." Moreover, just as the Congress

under the Constitution is not intended to be under any obligation to declare war against its own better judgment, so under Section 5(3) of the war powers bill there is no presumption, or obligation, upon the Congress to enact legislation for the continued use of the armed forces, as covered by the bill, except as it is persuaded by the merits of the case presented to it, and consequent to appropriate reflection and due deliberation.

It is further to be noted that any "continued use" which might be authorized by the Congress must be "pursuant to the provisions" of such authorization. The Congress is not faced with an all or nothing situation in considering authorization for "continued use." It can establish new time limits, provisions for further review by the Congress, as well as other limits and stipulations within the ambit of the constitutional powers of the Congress.

TERMINATION PRIOR TO 30 DAYS

Section 6 provides that the Congress can, through statutory action, foreshorten the thirty-day provisions of Section 5. In such instances, the President is protected by his veto power regarding the basic thirty-day emergency period specified to him with respect to the authorities contained in section 3. Clearly, effective Congressional action under section 6 would be likely in extraordinary circumstances wherein two-thirds of both Houses of Congress were convinced that the President had acted against the national interest or with great improvidence. Just as the burden of proof lies with the President to persuade that his use of the armed forces under section 3 merits prolongation in the national interest beyond thirty days, the burden of proof, in effect, lies with the Congress to foreshorten the thirty-day period.

PRIORITY CONSIDERATION

Section 7 establishes procedures to assure priority action in Congress to consider legislation to extend under section 5, or to foreshorten under section 6, the thirty-day time limit. The provisions of section 7 are, thus, a safeguard against the possibility that Congressional action with respect to such measures could be obstructed or relayed through a filibuster or committee pigeonholing. Section 7 also provides that the respective Houses of Congress can modify the priority consideration provisions by majority vote. In this way, provision is made for a majority of either House to determine by yeas and nays an alternative procedure—for instance, directing a committee to hold hearings and report back by a certain date. Section 7 is shaped so as to assure that control of the consideration of legislation to extend or foreshorten the thirty-day period is in the hands of the majority and that a minority cannot obstruct the will of the majority in this respect through procedural means. It should be noted that requests for statutory authorization under section 3(4) do not qualify for the priority consideration provisions of section 7 as explained above.

SEPARABILITY CLAUSE

Section 8 contains a standard separability clause which simply provides that if any provisions of the bill should be held invalid, this would not effect the validity of the rest of the bill.

NOT EX POST FACTO

Section 9 has two parts. The first part makes clear that the bill is not ex post facto legislation respecting the Vietnam war. The second part makes clear that the provision of section 3(4) would not require, for instance, the withdrawal of U.S. military personnel from NATO command headquarters in the event that forces of other NATO nations became engaged in hostilities unrelated to NATO, or in hostilities in which the introduction of U.S. forces were not authorized under section 3(1), 3(2), or 3(3) of this Act or by other specific statutory action of the Congress. However, in the absence of specific statutory authorization members of the U.S. armed forces pursuant to section 3(4) could not by reason of the NATO Treaty "command, coordinate, participate in the movement of, or accompany" the regular or irregular forces of a NATO country engaged in hostilities.

The "high-level military commands" referred to in this section are understood to be those of NATO, the North American Air Defense command (NORAD) and the United Nations command in Korea (UNC).

The overall purposes of the War Powers Act are to codify the "emergency" powers of the Commander-in-Chief, in the absence of a declaration of war, to introduce the armed forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and, very importantly, to establish a methodology to assure that Congress is not foreclosed by the practice of undeclared war from exercising its constitutional responsibilities respecting the awesome decision of putting the nation at war.

SUPPLEMENTAL VIEWS OF J. W. FULBRIGHT

Although the intent of the bill herewith reported is unexceptionable, it seems to me that the bill could be improved in several respects.

The first problem lies with Section 3, which catalogues the various conditions under which the President would be permitted to make emergency use of the armed forces. These conditions, in my view, go too far in the direction of executive prerogative, especially in allowing the President to take action not only to "repel an armed attack" but also to "forestall the direct and imminent threat of such an attack" on the United States or its armed forces abroad. The danger here is that these provisions could be construed as sanctioning a pre-emptive, or first strike, attack solely on the President's own judgment. Should the President initiate such a pre-emptive attack, the thirty-day limitation provided for in Sections 5 and 6 of the bill might prove to be ineffective, or indeed irrelevant, as a Congressional check on the President—all the more for the fact, which will be elaborated later that the 30-day limit on Presidential discretion is by no means absolute. The provisions authorizing the President to "forestall the direct and imminent threat" of an attack could also be used to justify actions such as the Cambodian intervention of 1970 and the Laos intervention of 1971, both of which were explained as being necessary to forestall attacks on American forces.

In their memorandum on war powers legislation the Lawyers Committee on American Policy Toward Vietnam reminded the Foreign Relations Committee that the classical language used to describe the basic power of the Commander-in-Chief to engage in hostilities in the absence of Congressional authorization is as follows: "to repel a sudden attack against the United States, its territories and possessions." This language is much more restrictive than that contained in paragraphs 1 and 2 of Section 3 of the Committee bill, which, in their extensiveness, may have the unintended effect of giving away more power than they withhold. In the view of the Lawyers Committee, the extension of the President's power to use the armed forces to "forestall" an attack before it takes place may well go beyond the President's constitutional authority. Besides a "sudden attack" on United States territory, the only other circumstances identified by the Lawyers Committee as warranting unauthorized Presidential use of the Armed Forces are an attack on the armed forces of the United States stationed outside of the country and an imminent threat to the lives of American citizens abroad, the latter of which would justify only a brief military operation for purposes of evacuation.

The bill appears to me to deal satisfactorily in paragraph (3) of Section 3 with the matter of protecting the lives of Americans abroad; it goes too far in paragraphs (1) and (2), however, in allowing of discretionary Presidential action to "forestall the direct and imminent threat" of an attack on the territory or armed forces of the United States.

Rather than spell out what amounts to Presidential discretion to mount a pre-emptive attack, I am inclined toward a simple abbreviated provision allowing of emergency use of the armed forces by the President. Alternately, there may be merit in simply abstaining from the attempt to codify the President's emergency powers, which is the approach of Congressman Zablocki's bill, H.J. Res. 542, favorably reported by the House Foreign Affairs Committee on June 7. In practice, it is exceedingly difficult, as the Committee has found, to draw up a list of emergency conditions for Presidential use of the armed forces which does not become so long and extensive a catalogue as to constitute a *de facto* grant of expanded Presidential authority. The list of conditions spelled out in Section 3 of the bill is, in my opinion, about as precise and comprehensive a list as can be devised, and its purpose, I fully recognize, is not to expand Presidential power but to restrict it to the categories listed. Nevertheless, I am apprehensive that the very comprehensiveness and precision of the contingencies listed in Section 3 may be drawn upon by future Presidents to explain or justify military initiatives which would otherwise be difficult to explain or justify. A future President might, for instance, cite "secret" or "classified" data to justify almost any conceivable foreign military initiative as essential to "forestall the direct and imminent threat" of an attack on the United States or its armed forces abroad.

For these reasons I am much inclined either to say nothing about the President's emergency powers as in the Zablocki bill, or to include a simple substitute for paragraphs (1), (2) and (3) of Section 3 of the Committee bill, in which it would simply be recognized that the President, under certain emergency conditions, may find it absolutely essential to use the armed forces without or prior to Congressional authorization. This approach too has its dangers, allowing as it would of irresponsible or extravagant interpretation, but at least it would place the burden of accountability squarely upon the President, where it belongs, and it would also of course be restricted by the thirty-day limitation specified in Sections 5 and 6 of the bill.

Under the language of paragraphs (1), (2) and (3) of Section 3 of the bill the executive could cite fairly specific authority for the widest possible range of military initiatives. Under the simpler, more general approach I propose, the President would remain free to act but without the prop of specific authorization; he would have to act entirely on his own responsibility, with no advance assurance of Congressional support. A prudent and conscientious President, under these circumstances, would hesitate to take action that he did not feel confident he could defend to the Congress. He would remain accountable to Congress for his action to a greater extent than he would if he had specific authorizing language to fall back upon. Congress, for its part, would retain its uncompromised right to pass judgment upon any military initiative taken without its advance approval. Confronted with the need to explain and win approval for any use of the armed forces on the specific merits of the case at hand, a wise President would think carefully before acting; he might even go so far as to consult with members of Congress as well as with his personal advisers before committing the armed forces to emergency action. For these reasons, it appears to me that a general, unspecified authority for making emergency use of the armed forces, though superficially a broad grant

of power, would in practice be more restrictive and inhibiting than the specific grants of emergency power spelled out in paragraphs (1), (2) and (3) of Section 3 of the bill. Alternately, the same objective could be achieved by simply leaving out any attempt to codify the President's emergency powers, which is the approach of the House Committee bill.

A related consideration, called to the attention of the Committee by the Federation of American Scientists, is the danger of a President, on his own authority, escalating conventional hostilities into a nuclear war. The United States has not, like the People's Republic of China, announced that it will never make first use of nuclear weapons. Accordingly, the Federation of American Scientists proposes that Congress require the President to secure its consent before using nuclear weapons except in response to their use or irrevocable launch by an adversary. So enormous is the significance of nuclear war that the conversion of any conventional conflict into a nuclear conflict cannot realistically be considered a mere change of tactics in a continuing conflict. In effect, the introduction of nuclear weapons would constitute the beginning of a whole new war. This being the case, I concur wholly with the Federation of American Scientists that Congress must retain control over the conventional or nuclear character of a war.

Paragraph 4 of Section 3 of the Committee bill, spelling out the conditions for use of the Armed Forces "pursuant to specific statutory authorization," seems to me to be well and carefully drafted in its present form. I recommend its retention in Section 3 revised along one or the other of the lines suggested above. One feasible approach is that of the Zablocki bill, although that will not take account of the matter of first use of nuclear weapons. Another possible approach is the substitution of the following for the introductory clause and first three paragraphs of Section 3 of the Committee bill (page 2, line 22, through page 4, line 3) :

Section 3. In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be employed by the President only—

(1) to respond to any act or situation that endangers the United States, its territories or possessions, or its citizens or nationals when the necessity to respond to such act or situation in his judgment constitutes a national emergency of such a nature as does not permit advance congressional authorization to employ such forces; but, except in response to a nuclear attack or to an irrevocable launch of nuclear weapons, the President may not use nuclear weapons without the prior, explicit authorization of the Congress; or.

A most serious problem arises in connection with Section 5, which specifies a 30-day limitation for emergency use of the armed forces by the President. Under the Committee bill, this limitation allows of an exception which might in practice prove to be a loophole so gaping as to nullify the 30-day limitation entirely. The Committee bill states that the emergency use of the armed forces by the President may be sustained beyond the 30-day period, with or without Congressional authorization, if the President determines that "unavoidable military necessity respecting the safety of the armed forces" requires their con-

tinued use for purposes of "bringing about a prompt disengagement" from hostilities. In this connection, it will be recalled that President Nixon prolonged the Vietnam war for four years under the excuse of "unavoidable military necessity respecting the safety of the armed forces." This escape clause could reduce to meaninglessness the entire provision limiting the President's emergency power to 30 days. The approach taken by the House bill is in this respect much superior inasmuch as it allows of no such escape clause. Section 4 (b) of the bill approved by the House Foreign Affairs Committee states simply that, within the 120-day emergency period specified in the House bill, "the President shall terminate any commitment and remove any enlargement of United States armed forces . . . unless the Congress enacts a declaration of war or a specific authorization for the use of United States armed forces." Although I greatly prefer the 30-day emergency period of the Senate Foreign Relation Committee's bill to the 120 day emergency period of the House bill, the latter nonetheless provides more effectively for Congressional authority to decide whether or not any given military action may be continued beyond the emergency period.

Another, similar problem arises in connection with Section 6 of the Committee bill, under which Congress could require the termination of military action within the 30-day emergency period only by act or joint resolution, which of course would be subject to veto by the President. In addition, Section 6 of the Committee bill, like Section 5, makes a complete exception to the Congressional termination power in any case where the President judges that "unavoidable military necessity respecting the safety of the armed forces" requires their continued use in the course of bringing about a "prompt disengagement" from hostilities. The requirement of Presidential signature for an act of termination, combined with the exception of "unavoidable military necessity," reduce to meaninglessness the ostensible power to Congress to terminate hostilities within the 30-day emergency period. The approach taken by the Zablocki bill in this respect, as in the case of military action beyond the initial emergency period, seems much superior. Section 4(c) of Zablocki bill would authorize Congress to require the President to terminate military action within the emergency period simply by concurrent resolution. Since a concurrent resolution does not require the signature of the President, this approach would eliminate the possibility of Presidential veto of a Congressional act of termination. Furthermore, in the matter of terminating military action within the emergency period as well as allowing it to continue beyond the emergency period, the Zablocki bill contains no such gaping escape hole as the "unavoidable military necessity" spelled out in Section 5 and 6 of the Senate Committee bill. The Zablocki bill, therefore, provides not only for Congressional authority to decide whether military action will be sustained beyond the emergency period; it also provides more effectively for Congressional authority to terminate military action within the emergency period.

Still another problem arises with respect to Section 9 of the Senate Committee bill, which states that the bill would "not apply to hostilities in which the armed forces of the United States are involved on the effective date of this Act." The effect of this provision would be the exemptions of the lingering war in Indochina from the application

of the bill. As formulated, Section 9 of the Committee bill can even be read as giving negative or implicit sanction to the continuation of the war in Indochina. My own view is that the current bombing of Cambodia is unconstitutional as well as unwise, and this view seems now to represent a consensus in Congress, which may soon result in a legislative cutoff of the bombing. I would not wish, however, even by indirection, to have it suggested in a major piece of legislation that this war warrants exemption from rules of legality which would be applied to future wars. As the Committee Report correctly points out, the war powers bill is not an attempt to alter the Constitution but a reassertion and codification of the war powers provisions of the Constitution. To exempt any war from the bill's provisions is, in effect, to exempt it from the Constitution. In order to deal with this problem I recommend that the language exempting the Indochina conflict—this act “shall not apply to hostilities in which the armed forces of the United States are involved on the effective date of this Act”—be deleted from Section 9 of the Committee bill, making the Senate bill equivalent to the Zablocki bill, which states simply that the legislation “shall take effect on the date of its enactment.” In addition, I recommend, most strongly, the inclusion in the bill of a provision equivalent to Section 9 of the bill reported by the House Foreign Affairs Committee, which states that “All commitments of United States armed forces to hostilities existing on the date of the enactment of this act shall be subject to the provisions hereof. . . .” The inclusion of such language would remove all doubt of the applicability of Congress's war power to the current hostilities in Indochina as well as to future possible wars.

A most important problem, closely related to the war powers, is the question of authority to deploy the armed forces outside of the United States in the absence of hostilities or the imminent threat of hostilities. In the section above entitled “Explanation of the bill” it is stated that “this legislation would not inhibit the President's capacity to deploy the armed forces, i.e., to move elements of the fleet in international waters.” Professor Raoul Berger commented in his testimony before the Foreign Relations Committee on war powers: “Unless Congress establishes control over deployment by statute requiring Congressional authorization, the President will in the future as in the past station the armed forces in hot spots that invite attack, for example, the destroyer Maddox in the Tonkin Gulf. Once such an attack occurs, retaliation becomes almost impossible to resist.”¹ I am reminded in this connection of a memorandum written in 1968 by General Wheeler, then Chairman of the Joint Chiefs of Staff, regarding the deployment of American forces in Spain in the absence of a security treaty: “By the presence of the United States forces in Spain the United States gives Spain a far more visible and credible security guarantee than any written document.” Both experience and logic show that, to the extent the President controls deployment of the armed forces, he also has the *de facto* power of initiating war.

Either in connection with the war powers bill, or through separate legislation, it would seem appropriate, indeed urgent, to affirm by law the authority of Congress to regulate the deployment of the armed

¹ “War Powers Legislation.” *Hearings Before the Committee on Foreign Relations, U.S. Senate, 93rd Congress, 1st Session.* (Washington: U.S. Govt. Printing Office, 1973), p. 17.

forces in the absence of hostilities or their imminent threat. Such authority derives directly from the Constitution, which specifies Congress's power to "make rules for the government and regulation of the land and naval forces." In addition, the general power of appropriation necessarily carries with it the power to specify how appropriated moneys shall and shall not be spent. Moreover, the authority of Congress to regulate the deployment of the armed forces in peacetime is scarcely separable from the war power itself, inasmuch as the power to deploy the armed forces is also the power to precipitate hostilities or—to take the language of the war powers bill—to create "situations where imminent involvement in hostilities is clearly indicated. . . ." In the words of a Congressional Research Service memorandum on the subject, dated May 24, 1973, "Almost every substantive aspect of the armed forces is an appropriate subject for regulation by the Congress; and, since the President is entirely dependent on the Congress for the forces he commands, it follows that Congress can control, directly or indirectly, the objectives for which these forces are used, at least during times of peace."

J. W. FULBRIGHT.



