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William B. Spong Jr.

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## CAN BALANCE BE RESTORED IN THE CONSTITUTIONAL WAR POWERS OF THE PRESIDENT AND CONGRESS?

*William B. Spong, Jr.\**

THE CAMBODIAN incursion of April, 1970, brought forth renewed observations from constitutional scholars, eminent and amateur, that the war-making power of Congress had been eroded and the checks and balances system for the initiation and conduct of hostilities by American troops, as contemplated by the Founding Fathers, rendered almost inoperative. Debates on the National Commitments Resolution<sup>1</sup> and the Cooper-Church Amendments, as well as events following adoption of these measures, appear to sustain such conclusions. How has this happened? What, if anything, can be done to restore some balance in this crucial area of public policy? Should there be an effort by Congress to re-create such balance, particularly in view of the emergency nature of nuclear and conventional conflict and the changing world in which we live?

What follows is an attempt to provide some answer to these questions. There are excellent recent articles available on the constitutional authority of Congress and the President to commit American forces to foreign combat.<sup>2</sup> The scholarship and objectivity in these works is more

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\* United States Senator from Virginia; Member of the Senate Foreign Relations Committee; Lecturer in International Law, College of William and Mary; LL.B., University of Virginia, 1947.

<sup>1</sup> S. Res. 85, 91st Cong., 1st Sess., 115 CONG. REC. 17245 (1969). This enactment provides that a national commitment exists only when evidenced by prior congressional action.

<sup>2</sup> Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR COLLEGE REV. 28 (1969); Reveley, *Presidential War-making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243 (1969); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

appreciated when one considers the present high level of emotion attendant to the United States' prolonged participation in the war in Indochina. The reader will not find herein an in depth treatment of the subject of congressional and presidential war powers. Rather, the purpose of this article is to provide a general background against which to weigh the merits of certain suggestions presently before Congress. Readers should be mindful, as is this writer, that the present struggle between the executive and legislative branches of our government over many facets of foreign policy—commitments, treaties, executive agreements and legislative limitations on the Executive—may not be the ideal backdrop for objectivity from one in the eye of the storm. Nevertheless, the mission here is to review and comment with a view toward determining the advisability of action or legislation in prospective rather than to evoke quarrels over past events and present policy.

### I. THE CONSTITUTION AND WAR POWERS

What did the Founding Fathers intend to be the respective roles of Congress and the President in regard to war-making?

Article I, section 8 of the Constitution gives to Congress power to provide for the common defense; to declare war; to raise and support (for periods of no more than two years at a time) an Army and Navy; to make rules which will regulate and govern the military forces; to provide for calling out the militia to enforce laws, suppress insurrection, and repel invasion.

Article II, section 2 describes the President as "Commander-in-Chief of the Armed Forces as well as the State Militia, when it is called into service for use by the federal government."

As is well known, the original draft submitted to the Constitutional Convention of 1787, consistent with the Articles of Confederation, gave to Congress the power to "make war." James Madison's notes on the debate over this particular clause provide insight into the intent and near unanimity of the framers. In the course of those debates, Charles Pinckney of South Carolina expressed his belief that the Senate would be the ideal depository of the war power inasmuch as each state had an equal interest in the security of the nation, and because the Senate was better ". . . acquainted with foreign affairs, and most capable of proper resolutions."<sup>8</sup>

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<sup>8</sup> MADISON, NOTES OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, at 475-76 (1966).

On the other hand, Pierce Butler, also of South Carolina, believed Senate deliberations to be too slow and cumbersome. He preferred vesting the war power in the President, who "will not make war but when the Nation will support it."<sup>4</sup>

As to the extent of authority the President should possess, Mr. Madison and Mr. Elbridge Gerry of Massachusetts moved to insert "declare" in the place of "make" war, ". . . leaving to the Executive the power to repel sudden attacks."<sup>5</sup> Although this change was objected to as providing the President with the authority to commence war, it was agreed to by a vote of eight to one.<sup>6</sup>

Alexander Hamilton, recognized as perhaps the leading advocate of a strong Presidency, later undertook to explain the role of the President as Commander-in-Chief in *The Federalist*, when he wrote:

In this respect his (the President's) 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.<sup>7</sup>

Later, in 1801, while attacking Jefferson for his timidity against the Barbary pirates, Hamilton wrote:

That instrument has only provided affirmatively, that, "The Congress shall have power to declare war"; the plain meaning of which is, that it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only, *to go to war*. But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary.<sup>8</sup>

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<sup>4</sup> *Id.* at 476.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> THE FEDERALIST No. 69, at 417-18 (C. Rossiter ed. 1961) (A. Hamilton).

<sup>8</sup> THE WORKS OF ALEXANDER HAMILTON 249-50 (H. Lodge ed. 1904).

James Madison, regarded as the father of the Constitution and its most authoritative interpreter, wrote in 1793 of the executive power to make war:

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, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of 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. . . .<sup>9</sup>

Patrick Henry, perhaps the most eloquent of those opposing ratification of the Constitution, was a voice for many who feared assumption by the President of any part of the war-making powers. In the Virginia Convention, Henry presaged with alarm the concept of the President in the field, leading an army into battle.<sup>10</sup>

Thomas Jefferson, evidently assured that the war-making powers of the President had been limited, wrote 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."<sup>11</sup>

A careful reading of the ratification debates and the analysis offered by *The Federalist* leads to certain conclusions. First, the framers drew a distinction between offensive and defensive hostilities. Involvement of the nation in any type of war, other than one of self-defense, was to be solely the responsibility of Congress. If the nation were suddenly attacked or invaded, the President would respond to repel the attack, but Congress would decide the nature of the action to follow—action which should come only after a collective judgment had been made by those directly elected as representatives of the people. Second, the President's only role in the war-making process was, as Commander-in-

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<sup>9</sup> 6 THE WRITINGS OF JAMES MADISON 174 (G. Hunt ed. 1910).

<sup>10</sup> See DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA, CONVENED AT RICHMOND, ON MONDAY THE 2ND DAY OF JUNE 1788 (W. Prentis ed. 1789).

<sup>11</sup> 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed. 1955).

Chief, to direct operations as the executive arm of the Congress. Mindful that a great majority of the colonists had an aversion to standing armies and the power politics of Europe that had allowed sovereigns to go suddenly to war, the framers sought to distinguish between war-conducting and war-making.

Hamilton's criticism of Jefferson's policy toward the Barbary pirates, included in the former's views regarding defensive wars, has been used to justify presidential war-making in later years. But this came ten years after the constitutional debates. There is scant evidence that the Founding Fathers intended to grant any war-making power to the President other than to defend against invasion when Congress was not in session. Nevertheless, in later years the enlarged role of the President as the initiator of foreign policy, an expansion of the concept of the President's defensive powers, the creation of standing armies and a broader interpretation of the Commander-in-Chief clause of the Constitution, have resulted in an inferior role in the war-making process for Congress. This result is contrary to the concept of checks and balances through which the Founding Fathers sought to insure against the growth of disproportionate power in any one of the three branches of government. It is also contrary to public view and expectation that the Constitution assures and requires its elected representatives to have a voice in the initiation of military hostilities abroad.

## II. HISTORICAL BACKGROUND OF AN UNBALANCED WAR POWER

To explore the methods by which balance in the war powers between the legislative and executive branches might be restored, one should review the historical background of how it was lost. To facilitate this review, three stages in the country's history might be identified.<sup>12</sup> The first stage is a period from 1776 until the end of the nineteenth century. Despite many minor involvements in which the President employed force abroad, this period should be regarded as one of collaboration between Congress and the President.

After the years during which the earliest Presidents deferred to Congress in the making of war, acceptance of an "act of war" theory, which allowed the President to deploy military forces so long as they

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<sup>12</sup> SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 1ST SESS., REPORT ON NATIONAL COMMITMENTS (Report No. 91-129) 11-26 (Comm. Print 1969) [hereinafter cited as 1969 SENATE NATIONAL COMMITMENTS REPORT]; Reveley, *Presidential War-making: Constitutional Prerogative or Usurpation?* 55 VA. L. REV. 1243 (1969).

were not used to commit "acts of war," represented a slight move toward presidential power. A review of the many occasions during the nineteenth century when Presidents used force abroad supports a general conclusion that the dividing line between legislative and executive authority was flexible enough for the President to use military force in insignificant circumstances, while preserving the role of Congress in decisions of greater gravity.<sup>13</sup>

The second period, which began with this century, is one during which collaboration between the President and Congress became the exception. Presidents seldom consulted Congress before using military forces abroad. On the other hand, Congress rarely gave evidence of willingness to be other than a negative force in the shaping of foreign policy. During the earliest years of this century Presidents Theodore Roosevelt, Taft, and Wilson used armed forces in many parts of Latin America. These actions were in contravention of the "act of war" theory because they were against sovereign states.

The negative influence of Congress was quite evident during the Wilson and Roosevelt Administrations in the years preceding the two World Wars. This period cannot be called one of either presidential or congressional domination. It is marked for its lack of cooperation between the legislative and executive branches.

The third period, which may or may not be drawing to a close, must be associated with the Cold War and the attendant atmosphere of constant crisis. Until recently, Congress—concerned for national security, unsure of its own role and that of the nation in an era of unsurpassed power and commitment abroad, and undoubtedly sensitive to charges of obstruction<sup>14</sup>—has deferred to the presidential use of military forces abroad with or without legislative authority.

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<sup>13</sup>Russell, *The United States and the Power to Use Military Forces Abroad* 242-43 (1967) (unpublished thesis in Fletcher School of Law and Diplomacy).

<sup>14</sup>Undoubtedly, Congress became sensitive to charges of lack of vision in foreign policy during the Wilson and Franklin Roosevelt Administrations. President Wilson armed merchant vessels in 1917 for defensive purposes after being denied congressional authority by a filibuster. After the war, the Senate rejected membership in the League of Nations.

Also, there is obliged to have been a later realization of the legal and factual gymnastics President Roosevelt was forced to undertake in the years prior to our entry into World War II. The Neutrality Acts of 1935, 1936, and 1937, forced Roosevelt to act unilaterally in 1940 in the exchange of destroyers for bases with Great Britain, to occupy Greenland and Iceland in 1941, and to provide convoys for supplies to Britain. The convoys led to an undeclared naval war in the Atlantic months before Pearl Harbor.

The sending of armed forces to Korea in 1950 by President Truman without congressional authorization or consultation is the first instance of a President claiming an inherent power to act "in the broad interest of American foreign policy."<sup>15</sup> This action was not without its congressional defenders.<sup>16</sup>

Soon after the Korean intervention came President Truman's decision in 1951 to send four additional divisions to Europe as a potential deterrent against Russian aggression. Never had a President committed comparable military forces to an area not in a state of war. Despite lengthy debate in both Houses, President Truman ultimately deployed the troops as he deemed necessary.<sup>17</sup>

Secretary of State Dean Acheson, expressing the view of the Truman Administration, stated in response to congressional inquiry into the President's proposed deployment of troops: "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."<sup>18</sup>

After Korea, there began a decade during which congressional resolutions involving the potential use of military forces abroad were adopted. President Eisenhower, while stating that he had certain inherent powers as Commander-in-Chief to take whatever emergency action was necessary to protect the rights and security of the United States, asked for presidential authority in 1955 to use American armed forces for the protection of Formosa and the Pescadores. The President stated that a suitable congressional resolution would clearly and publicly establish that authority.<sup>19</sup>

Subsequent to the adoption of the Formosa Resolution, the Middle East Resolution of 1957 was adopted during the Eisenhower Administration, the Cuba Resolution of 1962 was adopted during the Kennedy Administration, and the Gulf of Tonkin Resolution of 1964 was adopted during the Johnson Administration. Each of these resolutions, with the

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<sup>15</sup> 23 U.S. DEP'T OF STATE, BULL. No. 578, at 173-77 (1950).

<sup>16</sup> 96 CONG. REC. 9647-49 (1950) (remarks of Senator Douglas).

<sup>17</sup> H.R.J. Res. 9, 82d Cong., 1st Sess. (1951) stipulated that no funds should be appropriated for sending or maintaining troops abroad without the prior consent of Congress. S. Res. 99, 82d Cong., 1st Sess. (1951) concerned the number of troops which the President might send to Europe. See 97 CONG. REC. 3062-104, 3145-94, 3254-83, 3293 (1951).

<sup>18</sup> *Hearings on S. Con. Res. 8 Before the Senate Comms. on Foreign Relations and Armed Services*, 82d Cong., 1st Sess., at 92-93 (1951).

<sup>19</sup> 101 CONG. REC. 601 (1955) (remarks of President Eisenhower).



exception of the one concerning Cuba,<sup>20</sup> is subject to an interpretation that it concedes inherent war initiating powers to the President as Commander-in-Chief. All were adopted in moments of national urgency when the constitutional questions posed were apparently obscured.<sup>21</sup>

Not only did these resolutions, except for the Cuba Resolution, concede inherent war power to the President, but they granted in advance broad and undefined war-making powers. When President Eisenhower, a year after adoption of the Middle East Resolution, ordered 14,000 American troops to Lebanon, no reference was made to the resolution of the previous year. Similarly, in October of 1962 when the Cuban missile crisis occurred, President Kennedy did not refer to the Cuban Resolution for his authority in establishing a naval quarantine. Unlike the other resolutions, the Tonkin enactment has often been cited as authority for extensive and far-reaching military activity. It has also been represented by former Undersecretary of State Nicholas Katzenbach to be "the functional equivalent" to a declaration of war when combined with the SEATO Treaty.<sup>22</sup>

Both Presidents Johnson and Nixon have, however, asserted inherent powers to act in Vietnam without reliance upon the Tonkin Gulf Resolution. The Nixon Administration so advised the Senate Foreign Relations Committee by letter from the State Department.<sup>23</sup> In reviewing the circumstances of the adoption and language of the resolutions, one has these impressions: (1) none of the Presidents of the post World War II years believed the resolutions were essential for them to have power to commit troops abroad without the consent of Congress; (2) the crisis atmosphere that attended consideration of the resolutions probably inhibited any detailed discussion of the constitutional questions

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<sup>20</sup> The original resolution expressed the sense of Congress that the President possessed the authority to deal with Cuba "by whatever means may be necessary, including the use of arms." Senator Richard Russell of Georgia opposed this, stating that the resolution as originally worded made a constitutional assertion that the President had the right to declare war. The resolution as adopted was quite different.

<sup>21</sup> The Gulf of Tonkin Resolution was enacted even though Senator Morse argued eloquently that its passage gave to the President an unconstitutional power—the power to make war without a declaration of war. 110 CONG. REC. 18442-49 (1964) (remarks of Senator Morse).

<sup>22</sup> *Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess., at 82 (1967).

<sup>23</sup> *Hearings on Vietnam Policy Proposals Before the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess., at 175 (1969).

presented; and (3) the spirit of national unity in time of crisis resulted in the adoption by Congress of general words of support that also gave undefined war initiating powers to the President for unlimited periods of time.

President Johnson's view of his war-making power as a constitutional prerogative might best be demonstrated by his sending of American forces into the Dominican Republic on April 28, 1965. Although there was brief consultation with Congress, this was accomplished after the decision had been made,<sup>24</sup> and the troops were dispatched without reference to any congressional act or resolution—as had been done by President Truman in Korea and by President Eisenhower in Lebanon.

Therefore, the evolution of an unbalanced war power unfolds—first, a period of collaboration between Congress and the Executive; then, a period of unilateral presidential action and congressional obstruction from the beginning of this century to World War II and the emergence of the United States as a dominant world power; and, lastly, a period of presidential dominance of the war-making power, exemplified by the “*faits accomplis*” of Korea, Lebanon, Cuba, Vietnam, Dominican Republic, Cambodia, and Laos.

This last period had its beginning with President Truman's unilateral deployment of troops in Korea without formal congressional consent. Although Presidents Truman, Eisenhower, Kennedy, Johnson, and Nixon have sought to give an appearance of consultation or collaboration with hurried crisis meetings and general congressional resolutions, all believed they possessed an inherent power as Commander-in-Chief to deploy armed forces abroad without congressional consent if they deemed it in the national interest. Undoubtedly, all recognized they might receive greater public support with an appearance of collaboration, but were not prepared to show the deference or risk the obstruction that hindered the Wilson and Roosevelt Administrations in the years preceding the two World Wars.

### III. ANALYSIS OF PRESIDENTIAL HEGEMONY IN DECISIONS TO EMPLOY THE ARMED FORCES

#### A. *Few Formal Declarations of War*

At the risk of over-simplification there are several observations that might readily be made at this juncture. First, that a formal declaration

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<sup>24</sup> N.Y. Times, Apr. 29, 1965, § 1, at 1.

of war has rarely preceded the initiation of hostilities by American forces. The United States has only declared war five times in its history.<sup>25</sup> So what is presently in need of definition is whether the Constitution mandates a role for Congress in the making of decisions to commit military forces without a declaration of war.

### B. *Failure of Congress to Adapt*

A second observation is that Congress has played a major role in the demise of its war powers. The Senate Committee on Foreign Relations painfully stated this:

The committee is well aware—and has expressed its awareness several times in these pages—that one of the reasons for the flow of the war power out of the hands of Congress and into the hands of the President has been the failure of Congress to adapt its power over the armed forces to the circumstances of the nuclear age. Tacitly acknowledging a lack of confidence in its ability to make that adaptation, Congress has permitted its war power to be transferred to the hands of an executive which, though less susceptible to self-doubt than the Congress, is no less susceptible to error.<sup>26</sup>

In addition to the uncertainty of the nuclear age and the reaction to congressional negativism of the periods prior to the First and Second World Wars, there is legitimacy to the claim that Congress has often preferred to second guess the President. Former Undersecretary of State Nicholas Katzenbach recently referred to this as Monday morning quarterbacking.<sup>27</sup>

However, there have been occasions during debates on foreign policy resolutions when Senators have voiced constitutional objections to language delegating responsibility for the declaration of war to the President. A consistent prophet of what the resultant effect to the war powers might be should this ominous trend continue, was the late Senator Robert A. Taft. It is somewhat ironic that often Senator Taft

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<sup>25</sup> The five declarations of war involved the War of 1812, the Mexican War, the Spanish-American War, World War I and World War II. There have been approximately 150 other military operations involving our armed forces.

<sup>26</sup> 1969 SENATE NATIONAL COMMITMENTS REPORT, *supra* note 12.

<sup>27</sup> Before the Society of Newspaper Editors in Washington, D. C., on April 16, 1971, Mr. Katzenbach said: "I have a feeling that in the area of foreign affairs the majority of Congress would rather call the signals on Monday morning than on Sunday afternoon."

was in sympathy with the Executive's policy aims, but objected to methods that ignored congressional concurrence. Senator Taft on the subject of the sending of American troops to Iceland by President Franklin Roosevelt in 1941 wrote:

Mr. President, on Monday the President of the United States notified the Senate that forces of the United States Navy had already arrived in Iceland in order to supplement, and eventually to replace, the British forces now stationed there. This action was taken in accordance with an understanding reached by the President with the Prime Minister of Iceland, frankly inspired, however, according to the Prime Minister, by the British Minister to Iceland, who explained to him that British forces in Iceland were required elsewhere, and suggested that he apply to the United States for forces. The Prime Minister stressed the fact that the United States forces must be strong enough to meet every eventuality; and the President promised that the Government of the United States would immediately send troops, apparently including the United States Army as well as the Navy, to supplement, and eventually to replace, the British forces now there. Judging from the various press reports, it is likely that 80,000 American boys are in course of being sent to Iceland 2400 miles from any American territory, and substantially a part of the continent of Europe.

In my opinion, the President has no legal or constitutional right to send American troops to Iceland. It is not an agreeable task for me to question the authority of the President to take any action which he has taken in the name of the Government of the United States; but I believe it would be most unfortunate if the Senate of the United States should acquiesce without protest in acts of the President which might nullify for all time the constitutional authority distinctly reserved to Congress to declare war.

It would be a tremendous stretching of the Constitution to say that without authority from Congress the President of the United States can send hundreds of thousands of American soldiers to Europe when a war is raging over that entire Continent, and the presence of American troops would inevitably lead to war. The President cannot make aggressive war. Neither can he intervene in a war between two other nations, because such intervention, even though it does not immediately involve a physical attack on one of the combatants, is clearly the making of war.

There has been no attack on the United States and no threat of attack. The action of the President is not only beyond the powers

which the Constitution has granted to him, but it is a deliberate violation of his pledge to the American people.<sup>28</sup>

It was Senator Taft who questioned the intervention in Korea by President Truman. Senator Taft wrote:

My conclusion, therefore, is that in the case of Korea, where a war was already under way, we had no right to send troops to a nation, with whom we had no treaty, to defend it against attack by another nation, no matter how unprincipled that aggression might be, unless the whole matter was submitted to Congress and a declaration of war or some other direct authority obtained.<sup>29</sup>

The high-water mark of congressional resistance during the years since World War II was the "Great Debate" of 1951, following an announcement by President Truman in September of 1950 that he intended to send additional ground troops to Europe as part of a NATO buildup. The debate began with a speech by Senator Taft in the Senate on January 5, 1951, and ended in April with the adoption of a resolution approving what had taken place, but calling for "future congressional approval" if more than four divisions should be sent to Europe.<sup>30</sup> Senator Taft viewed adoption of the resolution as a victory.<sup>31</sup> Others saw it as a draw between the President and Congress.<sup>32</sup> The resolution was never tested and the "Great Debate" in retrospect seems hardly more than a pause in the sequence of events from Korea to Cambodia and Laos during which the power of the President to determine, without congressional authority, the necessity for committing military forces abroad has come to be regarded as almost absolute.

### C. *Limited Judicial Guidance*

One might ask what judicial interpretations have been placed upon the war powers of Congress and the President under the Constitution. The Supreme Court has not often taken the opportunity to define or limit the war-making power. There is little disposition by the Court

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<sup>28</sup> R. TAFT, A FOREIGN POLICY FOR AMERICANS 30-31 (1951).

<sup>29</sup> *Id.* at 33.

<sup>30</sup> S. Res. 99, 82d Cong., 1st Sess., 97 CONG. REC. 3282 (1951).

<sup>31</sup> R. TAFT, *supra* note 28, at 36.

<sup>32</sup> HOUSE COMM. ON FOREIGN AFFAIRS, 91ST CONG., 2D SESS., BACKGROUND INFORMATION ON THE USE OF UNITED STATES ARMED FORCES IN FOREIGN COUNTRIES 22 (1970).

to consider "political questions,"<sup>33</sup> and one may safely predict that if balance is to be re-created in the war-making process, it will be without benefit of judicial guidance.

The Supreme Court has denied certiorari in many cases challenging the validity of the war in Vietnam.<sup>34</sup> It left standing a ruling by Chief Justice Burger, then Judge of the Circuit Court of Appeals for the District of Columbia, in which the Court stated:

The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.<sup>35</sup>

There are, however, decisions that should be noted—most of them in the early years of the nation. In *Penballow v. Doane*<sup>36</sup> the Supreme Court suggested that the war power was not dependent upon the specific provisions in the Constitution.

In *Bas v. Tinny*,<sup>37</sup> the Court held that Congress could declare war as a public or perfect war or as a limited or imperfect war, a thought expounded a year later in *Talbot v. Seeman*<sup>38</sup> when Chief Justice John Marshall wrote:

The *whole powers* of war being, by the Constitution of the United States, vested in Congress, the *acts of that body alone* can be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that *Congress may authorize general hostilities*, in which case the general laws of war apply to our situation; or *partial hostilities*, in which case the laws of war, so far as they actually apply to our situation, must be noticed.<sup>39</sup> (Emphasis added.)

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<sup>33</sup> For recent treatments of this subject see Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A.L. REV. 1135 (1970); Note, *The Supreme Court as Arbitrator in the Conflict Between Presidential and Congressional War-making Powers*, 50 BOST. U.L. REV. 78 (1970).

<sup>34</sup> *Mora v. McNamara*, 387 F.2d 862 (D.C. Cir.), cert. denied, 389 U.S. 934 (1967); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967); *Mitchell v. United States*, 369 F.2d 323 (2d Cir. 1966), cert. denied, 386 U.S. 972 (1967).

<sup>35</sup> *Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967).

<sup>36</sup> 3 U.S. (3 Dall.) 54 (1795).

<sup>37</sup> 4 U.S. (4 Dall.) 37 (1800).

<sup>38</sup> 5 U.S. (1 Cranch) 1 (1801).

<sup>39</sup> *Id.* at 28.

In *Little v. Barreme*,<sup>40</sup> the Court held that President John Adams was limited as Commander-in-Chief by the restrictions enforced by Congress. The three cases mentioned above all arose as a result of the undeclared naval war with France. In these opinions, the Court observed that Congress was expected to play the predominant role in the initiation and prosecution of war. The opinions compliment views of the war-making powers as expressed by the writings of the framers of the Constitution.

The few cases concerning the war powers heard in later years have, for the most part, tended to strengthen the hand of the Executive and broaden his powers. A large number of the military actions not involving a formal declaration of war have concerned the protection of the lives and property of citizens of the United States.

In *Durand v. Hollins*,<sup>41</sup> the Court sustained President Pierce's order in 1854 to bombard Greytown, Nicaragua, because of the refusal of local officials to pay reparations for an attack upon the American consul.<sup>42</sup>

In the *Slaughter House Cases*,<sup>43</sup> the Court said in 1873:

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States.<sup>44</sup>

Other cases have sustained the right of the President to use the armed forces abroad for the protection of American lives and property.<sup>45</sup> These precedents probably aided President McKinley in his decision to send troops to China without congressional authorization in the Boxer Rebellion of 1900-1901.

It is of interest that President Eisenhower's justification for sending troops to Lebanon in 1958 was his inherent constitutional power to protect American lives and property,<sup>46</sup> rather than the Middle East

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<sup>40</sup> 6 U.S. (2 Cranch) 170 (1804).

<sup>41</sup> 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

<sup>42</sup> See 7 J. MOORE, A DIGEST OF INTERNATIONAL LAW § 1093, at 112-16, § 1168 (1906).

<sup>43</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>44</sup> *Id.* at 79.

<sup>45</sup> *In re Neagle*, 135 U.S. 1 (1890); *Perrin v. United States*, 4 Ct. Cl. 543 (1868), *aff'd*, 79 U.S. (12 Wall.) 315 (1870).

<sup>46</sup> 104 CONG. REC. 13903-04 (1958) (statement of President Eisenhower).

resolution of 1957.<sup>47</sup> Protection of lives and property was likewise the supposed basis for President Johnson's dispatching of Marines to the Dominican Republic in 1965.<sup>48</sup>

The constitutional power of the Executive to repel sudden attacks without congressional authorization has always been acknowledged. This power to wage defensive war was expanded in *Martin v. Mott*<sup>49</sup> when Justice Story said:

The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. . . . But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of *imminent danger of invasion*. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? . . . We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.<sup>50</sup> (Emphasis added.)

Earlier reference was made to Alexander Hamilton's view of presidential war powers as expressed in 1801.<sup>51</sup> This expanded view of defensive war was reflected in President Polk's initial instructions to General Taylor, authorizing him to attack first in defense as soon as the Mexicans crossed the Rio Grande and to enter Mexican territory in the pursuit of the invaders.

The Hamilton view that once the country is attacked, the President may take action without further authorization from Congress, received approval during the War Between the States when, in *The Prize Cases*,<sup>52</sup> the Supreme Court held valid President Lincoln's proclamation of a blockade of the South. Of the President's powers, the majority opinion said: "He does not initiate the war, but is bound to accept the

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<sup>47</sup> See p. 8 *supra*.

<sup>48</sup> See p. 9 *supra*.

<sup>49</sup> 25 U.S. (12 Wheat.) 19 (1827).

<sup>50</sup> *Id.* at 29-30.

<sup>51</sup> See p. 3 *supra*.

<sup>52</sup> 67 U.S. (2 Black) 635 (1863).



challenge without waiting for any special legislative authority.”<sup>53</sup>

In *United States v. Sweeney*<sup>54</sup> the Supreme Court said that the purpose of the Commander-in-Chief clause “. . . is evidently to vest in the President the supreme command over all the military forces—such supreme and undivided command as would be necessary to the prosecution of a successful war.”<sup>55</sup>

The case most often cited as a restriction upon the President’s war powers is *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>56</sup> Justice Jackson said that the President “has no monopoly of ‘war powers,’ whatever they are.”<sup>57</sup> This decision was prompted by President Truman’s seizure of the steel plants during the Korean War—an action which the Supreme Court held invalid. It should be noted, however, that this case questioned the President’s power over a domestic issue—labor-management relations—rather than the conduct of hostilities or the commitment of troops.<sup>58</sup>

In addition to the Court decisions that recognized an expanded executive power in the protection of American lives and property, and an expanded definition of defensive war, there also emerged a theory of inherent presidential right under the Constitution to protect national interests.<sup>59</sup> This received judicial recognition in the case of *In re Neagle*<sup>60</sup> inasmuch as the Supreme Court ruled that the power of the President to enforce the laws extends to obligations growing out of America’s international relations. But there have been few recent decisions on the constitutional war powers,\* and almost none involving a

<sup>53</sup> *Id.* at 668.

<sup>54</sup> 157 U.S. 281 (1895).

<sup>55</sup> *Id.* at 284.

<sup>56</sup> 343 U.S. 579 (1952).

<sup>57</sup> *Id.* at 644 (Jackson, J., concurring).

<sup>58</sup> Concurring opinions relied upon the fact that several laws concerning labor disputes had been enacted by Congress which had the effect of withholding the power of seizure. 343 U.S. 579, 604-09 (Frankfurter, J., concurring), 655-60 (Burton, J., concurring), 662-65 (Clark, J., concurring).

<sup>59</sup> U.S. CONST. art. II, §§ 1, 3. See also Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1775-77 (1968).

<sup>60</sup> 135 U.S. 1 (1890).

\**Editor’s Note*—This article was completed prior to the publication of the Pentagon Papers by the New York Times and the Washington Post, and the subsequent court test of the injunction obtained by the Government to restrain publication. In the resulting Supreme Court decision of *New York Times Co. v. United States*, 39 U.S.L.W. 4879 (U.S. June 29, 1971), which vacated the injunction, Mr. Justice Douglas, joined by Mr. Justice Black, briefly addressed himself by way of dicta to the balance in war powers dictated by the Constitution:

confrontation between legislation and presidential action. One concludes that what has come to be regarded as an inherent power is more the result of presidential action and congressional acquiescence than judicial blessing.

#### D. *Nuclear Age and the Cold War*

Unquestionably, the nuclear age and the cold war created a climate of emergency that prompted Presidents to take action without congressional concurrence where earlier Executives may have hesitated. Since the time of entry into Korea, Presidents have moved without congressional authorization, and legal precedents have been cited to support their actions.<sup>61</sup> Those who have evoked the Founding Fathers as the constitutional authority for congressional participation in the war-making process have often been brushed aside.<sup>62</sup>

What relevance has an eighteenth century document drafted in the days of sailing vessels and limited cannon range to an age of instant communication, of nuclear warheads and intercontinental missiles? This question is implicit in the minority views on the National Commitments Resolution filed by Senator Gale McGee, who wrote: "The machinery of policy decisions assembled nearly two centuries ago simply has not been able to keep pace with the changing requirements of present-day realities."<sup>63</sup>

Two foreign policy developments of recent years should be noted. One is the increased use of the executive agreement as a method of making foreign commitments without having a treaty ratified by the Senate. This had its genesis with President Franklin Roosevelt's transfer of fifty destroyers to the British, and began the increased use of commitment by executive agreement. Today there are almost four

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The power to wage war is "the power to wage war successfully." See *Hirabayashi v. United States*, 320 U.S. 81, 93. But the war power stems from a declaration of war. The Constitution by Article I, § 8, gives Congress, not the President, power "to declare war." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have. *New York Times Co. v. United States*, U.S. , (1971).

<sup>61</sup> U.S. DEP'T OF STATE, *The Loyalty of United States Participation in the Defense of Vietnam*, 54 DEP'T OF STATE BULL. 474 (1966); Address by William H. Rehnquist, "The President's Constitutional Authority to Order the Attack on the Cambodian Sanctuaries," *Society of International Law*, June 16, 1970; Statement of Secretary of State William P. Rogers, Senate Comm. on Foreign Relations, May 14, 1971.

<sup>62</sup> See note 18 *supra*.

<sup>63</sup> 1969 SENATE NATIONAL COMMITMENTS REPORT, *supra* note 12, at 38.

times as many executive agreements as treaties.<sup>64</sup> Another development was the extensive execution of multilateral treaties and the emergence of the thesis of collective self-defense. During the Truman and Eisenhower Administrations, the United States entered into a series of multilateral and bilateral treaties which sought to encircle and contain the Communist nations.<sup>65</sup> These treaties represented commitments for military assistance all over the world. Although not self-executing, they broadened our commitments to a degree that Presidents had a ready basis for military assistance and, in some instances, for the making of war.<sup>66</sup>

And so, in varying degrees, obsolescence of the formal declaration of war, congressional acquiescence, lack of judicial interpretation of the war powers, and the cold war have all contributed to the atmosphere of a period during which presidential hegemony over the war powers has emerged. Without arguing the merits of troop commitments made by Presidents Truman, Eisenhower, Kennedy, Johnson and Nixon, it can be argued that the public believes there has been far greater congressional participation in the decisions that led to Korea, Lebanon, Vietnam, the Cuban blockade, the Dominican Republic, Cambodia, and Laos, than has actually occurred.<sup>67</sup> If the intent of the Founding Fathers is to be fulfilled and the public's expectations of what the Constitution requires are to be realized, there should be congressional participation in decisions committing the nation to hostilities other than of an emergency nature. How can this be accomplished?

#### IV. CORRECTIVE PROPOSALS ADVANCED BY CONGRESS

##### A. *In General*

Suggestions for re-establishment by Congress of a more influential role in the exercise of war powers may be divided into three categories:

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<sup>64</sup> In 1930, the United States concluded 25 treaties and 9 executive agreements. As of January 1, 1969, the United States had a total of 909 treaties and 3,973 executive agreements.

<sup>65</sup> Those treaties were the Rio Treaty, the North Atlantic Treaty, the ANZUS Treaty, the SEATO Treaty, and bilateral treaties with the Philippines and the Republic of China on Formosa, Korea and Japan.

<sup>66</sup> See note 22 *supra*.

<sup>67</sup> *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1971). Note therein the following testimony and the questions asked the witnesses by the author: Senator Barry Goldwater (April 23, 1971); Mr. George Reedy (April 26, 1971); Secretary of State William Rogers (May 14, 1971).

(a) that future resolutions be deliberated carefully and defined clearly as to the scope of congressional authorization, (b) that there be standard procedures enacted for reporting and consultation between the President and Congress, and (c) that by legislation the circumstances under which the President might initiate hostilities in the absence of a declaration of war be defined by rule.

The broad and undefined nature of the powers granted in past resolutions has been noted herein. Recommendations for consideration of future resolutions have been made by the Senate Committee on Foreign Relations. They are as follows:

(1) Debate the proposed resolution at sufficient length to establish a legislative record showing the intent of Congress;

(2) Use the words "authorize" or "empower" or such other language as will leave no doubt that Congress alone has the right to authorize the initiation of war and that, in granting the President authority to use the Armed Forces, Congress is granting him power that he would not otherwise have;

(3) State in the resolution as explicitly as possible under the circumstances the kind of military action that is being authorized and the place and purpose of its use; and

(4) Put a time limit on the resolution, thereby assuring Congress the opportunity to review its decision and extend or terminate the President's authority to use military force.<sup>68</sup>

There have been numerous proposals for establishing consultation with Congress before forces are deployed. Professor Alfred DeGrazia of New York University proposed that at each session Congress establish a force committee<sup>69</sup> to share with the President the responsibility of determining when armed forces will be used without a declaration of war. Professor Henry Commager recently testified on the war powers before the Senate Committee on Foreign Relations and, among other things, suggested:

... that the Senate meet the argument of emergency, hypothetical as it is, by creating a permanent committee, a quorum of whose members would remain permanently in Washington, with authority to require that the President consult with the Senate or the Congress

<sup>68</sup> 1969 SENATE NATIONAL COMMITMENTS REPORT, *supra* note 12, at 33.

<sup>69</sup> *Hearings on Separation of Powers Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 163-79 (1967).

before taking any action that might involve the Nation in armed conflict. Such a committee could be counted on to respond to a genuine emergency just as promptly as would the President, and counted on, too, to present the case for caution. . . .

that the Senate create a standing committee to consult with the President on all executive agreements, and with authority to designate those of sufficient importance to require submission to the Senate as treaties.<sup>70</sup>

Congressman Frank Horton of New York has introduced legislation that would create a joint committee on national security. This new committee would be designated by Congress as the panel authorized to consult with the President and his national security advisors in situations where congressional powers are involved and where congressional ratification of military actions is required.<sup>71</sup>

Congressman Clement Zablocki of Wisconsin has introduced a resolution which would require the President upon (a) committing military forces to armed conflict, (b) committing military forces equipped for combat, or (c) substantially enlarging military forces already located abroad, to submit a written report to the Speaker of the House and the President of the Senate. The report is to set forth the circumstances necessitating the action; the constitutional, legislative and treaty provisions giving authority for the action; the reasons for not seeking specific prior congressional authorization; the estimated scope of activities and such other information as the President may deem useful to Congress in the fulfillment of its constitutional responsibility.<sup>72</sup>

### *B. Senate Proposals for Restoration of a Balanced War Power*

There are three resolutions and a bill presently before the Senate designed to limit or define the President's constitutional war powers. The bill S. 731 was introduced by Senator Jacob Javits.<sup>73</sup> The three resolutions are S.J. Res. 18, introduced by Senator Robert Taft, Jr.;<sup>74</sup> S.J. Res. 59, introduced by Senator Thomas Eagleton,<sup>75</sup> and S.J. Res. 95, introduced by Senator John Stennis.<sup>76</sup>

<sup>70</sup> *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67, at 17 (March 8, 1971).

<sup>71</sup> *Id.* (April 23, 1971).

<sup>72</sup> H.R.J. Res. 1, 92d Cong., 1st Sess. (1971). *See* appendix 1.

<sup>73</sup> S. 731, 92d Cong., 1st Sess. (1971). *See* appendix 2.

<sup>74</sup> S.J. Res. 18, 92d Cong., 1st Sess. (1971). *See* appendix 3.

<sup>75</sup> S.J. Res. 59, 92d Cong., 1st Sess. (1971). *See* appendix 4.

<sup>76</sup> S.J. Res. 95, 92d Cong., 1st Sess. (1971). *See* appendix 5. Senator Lloyd Bentsen

Should a war powers measure be enacted at this session of Congress, it is likely to be a hybrid of these proposals. If it is the sense of the Senate Foreign Relations Committee that such a measure should be reported, it must be decided whether it is to be in the form of a bill or a resolution. The author is a co-sponsor of the Javits bill, but is unaware of any operative difference between a bill and a joint resolution. Nor is there any difference between their legal force and effect. Each requires the signature of the President, and both are subject to veto by the President.

Each of the four measures defines the circumstances under which the President may or may not commit the armed forces to hostilities. While legislative enactments that seek to interpret the Constitution have traditionally been in the form of a joint resolution rather than a bill, the two forms are now being used interchangeably to the extent that there has ceased to be any operative, or even theoretical, difference between them. Either type of enactment would place the President on notice of the circumstances under which he may expect to be supported by Congress if he initiates hostilities.

The legislation offered by Senators Eagleton, Javits, and Stennis have a common characteristic—a requirement that there be advance congressional authorization for the commitment of the armed forces to hostilities by the President, except in certain designated emergency situations. In any of the defined situations, the President may commit the armed forces to combat for a period not to exceed thirty days unless explicitly authorized by Congress. Senator Taft's resolution, while defining the emergency circumstances under which the President may initiate hostilities without authorization, allows the President to continue using the armed forces until or unless the authorization is terminated by Congress. All four proposals require that the President report to Congress after he has initiated hostilities. All but the Taft resolution require continuing periodic reports. The Taft resolution requires only notification to Congress within twenty-four hours after deployment or commitment to combat.

The Javits bill<sup>77</sup> authorizes the President, in the absence of a declaration of war, to commit the armed forces to hostilities to repel a sudden

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of Texas later introduced a bill similar to the Stennis resolution, and testified on it before the Senate Foreign Relations Committee on July 27, 1971. He delivered his first speech on the Senate floor on his bill on July 28, 1971.

<sup>77</sup> See appendix 2.

attack on the United States or its armed forces, to protect the lives and property of United States' nationals abroad, and to comply with a national commitment resulting exclusively from affirmative action taken by Congress as well as the President. Military hostilities initiated for these purposes would be reported promptly to Congress and could not be sustained beyond thirty days unless authorized by Congress. Congress by joint resolution could terminate hostilities in less than thirty days. The bill also contains provisions for the expedition of committee and floor action on any authorization for the continuation or determination of military hostilities. Finally, the Javits bill would exclude from its operation any hostilities already undertaken prior to enactment.

The Eagleton resolution<sup>78</sup> states that the President may commit the armed forces to hostilities to the extent authorized by Congress through a declaration of war, statute, or joint resolution, but states that authorization may not be inferred from legislative enactments, including appropriations bills, which do not specifically include such authorization. It is also specified that no treaty may be construed as authorizing armed action without future congressional authorization. The resolution further authorizes the President, during any authorized hostilities, to enter, invade or intrude upon neutral countries when in hot pursuit of an enemy or when a clear and present danger exists of an imminent attack on United States armed forces by enemy troops located in the neutral country.

Similar to the Javits bill, the Eagleton resolution authorizes the President, in the absence of advance congressional authorization, to commit the armed forces to hostilities in order to repel an attack on the United States or its armed forces. Also, the President is authorized to remove American citizens from any country in which such citizens are being subjected to an imminent threat to their lives. There is no provision in the Eagleton resolution for the protection of the property of American nationals nor is there authorization for military action to comply with a national commitment.

As in the Javits bill, the Eagleton resolution requires that any hostilities undertaken by the President be promptly reported to Congress and that the question of terminating or continuing the hostilities be decided by Congress within thirty days.

Analogously to the Javits bill, the Eagleton resolution excludes from its authority hostilities commenced prior to its enactment and, also, con-

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<sup>78</sup> See appendix 4.

tains provisions for the expedition of legislative action in committee and on the floor. The Eagleton resolution also requires the President to report periodically to Congress on the status of any authorized hostilities as well as the extended scope and length of such hostilities. The Eagleton resolution offers a definition of the term "hostilities."

The Stennis resolution<sup>79</sup> is similar to the Eagleton resolution in many respects. For instance, it also states that authorization may not be inferred from any provision of law, including appropriations bills, but must be specified. As in the Javits and Eagleton proposals, the Stennis resolution would authorize the President to use the armed forces to repel an attack on the United States or its armed forces. The Stennis resolution would also authorize action to protect the United States or its armed forces against the danger of future attacks, and to prevent or defend the United States against an imminent nuclear attack. As found in the Eagleton resolution, there is also a provision to allow the President to take action to evacuate United States citizens from any country in which their lives were in danger.

The Stennis resolution also requires prompt notification to Congress of any military action undertaken and requires further, with provisions for the expedition of committee and floor action, a decision within thirty days by Congress whether the authorization to use the armed forces would be extended or terminated. During hostilities, the President would be expected to report to Congress at least every six months.

While the Javits and Eagleton proposals simply exclude any hostilities begun prior to enactment, the Stennis resolution specifically excludes the armed conflict in the Republic of South Vietnam and all military activities carried out against North Vietnam or its allies in North Vietnam, Laos, Cambodia or the waters surrounding the Indochina Peninsula. Finally, the Stennis resolution contains a definition of "armed conflict" closely resembling the Eagleton definition of "hostilities."

The Taft resolution<sup>80</sup> states that the armed forces will be committed to combat abroad only with the prior authorization of Congress except in the following circumstances: (1) when the President finds that the territory or armed forces of the United States are under attack or under imminent threat of attack; (2) when he finds that deployment of the armed forces is necessary to fulfill a treaty obligation; or (3) when he finds that deployment is necessary to exercise the inherent right of self-

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<sup>79</sup> See appendix 5.

<sup>80</sup> See appendix 3.



defense. In any of the foregoing circumstances, the Taft resolution authorizes the President to commit the armed forces to combat at his sole discretion, but he must notify Congress within twenty-four hours of any military action.

Congress may terminate the authorization to use the armed forces by concurrent resolution. The Taft resolution contains no provision compelling termination of military action after thirty days unless Congress authorizes its continuation.

Unlike the other proposals which exclude the current war in Indochina, the Taft resolution specifically authorizes the continued deployment of armed forces of the United States for such time, and in such a manner, as the President, as Commander-in-Chief, shall deem necessary and appropriate to accomplish a withdrawal of such armed forces and the assumption by the South Vietnamese Army at the earliest feasible date of responsibility for the defense of the territory of South Vietnam.

Since the Taft resolution includes a statement of policy concerning Indochina, the Foreign Relations Committee will have an opportunity to decide whether war powers legislation is a desirable vehicle for congressional expression of what policy in Indochina is, or should be. Many, including the writer, believe that repeal of the Gulf of Tonkin resolution left a vacuum in which there should be a congressional expression. However, prospects for unemotional consideration of war powers legislation would be enhanced if the legislation is limited to future hostilities. Senators Eagleton, Javits, and Stennis all stated this when introducing their respective proposals.

The delineation of circumstances under which, in the absence of a declaration of war, the President may initiate hostilities must not give or take away powers presently acknowledged under judicial interpretation of the Constitution. The Founding Fathers certainly intended for the President to have authority to repel sudden attacks.<sup>81</sup> Early decisions have sustained the President's right to use the armed forces to protect the lives and property of United States nationals abroad.<sup>82</sup> The power to act in anticipation of imminent attack would appear established under interpretation of the war powers.<sup>83</sup>

It has been argued that adoption of Item A(4) of the Javits bill<sup>84</sup>

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<sup>81</sup> See note 3 *supra*, at 476.

<sup>82</sup> See notes 41-45 *supra*.

<sup>83</sup> See notes 49, 50 *supra*.

<sup>84</sup> See appendix 2.

or paragraph 2 of Part I, of the Taft resolution,<sup>85</sup> stating that the President has power to deploy and commit to hostilities the armed forces to fulfill a treaty obligation, would give the President more constitutional authority than he presently possesses.<sup>86</sup> President Truman relied upon America's obligations under the United Nations Charter to send troops to Korea without congressional authorization. The rather oblique reliance upon the SEATO Treaty as a partial basis for our involvement in Indochina has heretofore been noted.<sup>87</sup>

It is agreed that none of the present multilateral treaties are self-executing.<sup>88</sup> An example of questions presented in consideration of these sections is illustrated by commitments in Europe under the NATO Treaty. Should American forces in Europe be attacked, there is no question that the President is empowered to act. However, should one of the NATO allies be attacked, would the President have power to act without congressional approval under the pending legislation? Does he have that power now? While the answers might vary with particular circumstances, the questions go to the merits of these proposals, as well as the credibility of the United States' present policy of "flexible response" in Western Europe.<sup>89</sup>

The questions also relate to Section 1 of the Eagleton resolution, which reads as follows:

Except as authorized in section 2 or section 3 of this resolution, the President shall not commit the Armed Forces of the United States to hostilities. No treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further Congressional authorization. It is specifically recognized that such treaties as the Charter of the United Nations, the North Atlantic Treaty, and the Southeast Asia Collective Defense Treaty do not authorize or require the President to commit the Armed Forces of the

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<sup>85</sup> See appendix 3.

<sup>86</sup> *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67. See therein Memorandum of Lawyers Comm. on American Policy toward Vietnam.

<sup>87</sup> See note 22 *supra*.

<sup>88</sup> *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67. See therein testimony of Senator Taft, Senator Goldwater and Secretary of State Rogers.

<sup>89</sup> Briefly, the doctrine of "flexible response" anticipates a conventional response by the NATO alliance to a conventional attack upon a NATO nation that would provide at least a period of two to three days for negotiation and determination of the necessity or advisability of using nuclear weapons.

United States to engage in hostilities without a further authorization from both the Senate and the House of Representatives.<sup>90</sup>

While this language would appear constitutionally pure and in accordance with the present view of the State Department that the treaties are not self-executing, NATO obligations raise delicate political and legal questions in considering the war powers proposals. Does the Javits bill give more power to the President than he already has under the Constitution and the *Neagle* decision?<sup>91</sup> Conversely, does the Eagleton resolution take anything away from the President?

Section 2 of the Eagleton resolution and Section 3 of the Stennis resolution each specify that authorization to commit the Armed Forces of the United States to hostilities may not be inferred from legislative enactments, including appropriations bills, which do not specifically authorize the use of such forces in armed conflict. A section of this type should be included if legislation is enacted. Congress is reluctant to raise the issue of authorization in connection with military appropriations. Once the men are in the field, there is the understandable concern that denial of appropriations would deprive the troops of weapons and supplies needed, but approval of appropriations should not imply authorization to deploy or commit military forces unless specifically stated.

The Stennis resolution—Section 2, item (3)—gives the President authority to “prevent or defend against an imminent nuclear attack on the United States by the forces of any foreign government or power, but only if the President has clear and convincing evidence that such an attack is imminent; . . .” Thus, the question of a preemptive nuclear first strike will be considered as part of these proposals. Does the President already have the power to act without authorization by Congress? Does not the type of weaponry involved and the nature of the decision to be made limit the opportunity for seeking authorization? Does the expanded view of the President’s defensive war powers give the President the power to act in anticipatory self-defense?<sup>92</sup> Is this power implicit in Part 1, item (1) of the Taft resolution or Section 2, item (b) of the Eagleton resolution?

Each of the proposals contains a provision requiring prompt notification to Congress of any action taken under the authority spelled out

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<sup>90</sup> See appendix 4.

<sup>91</sup> See notes 59, 60 *supra*.

<sup>92</sup> See notes 49-53 *supra*.

in the bill or resolution. Some require periodic reports to Congress as long as hostilities are in progress. These measures, hopefully, would promote cooperation between the executive and legislative branches. The requirement in the Stennis, Eagleton and Javits proposals that Congress take action within thirty days to authorize or terminate hostilities would assure congressional participation, and place upon Congress the burden of sharing some measure of responsibility for war-making decisions with a lessened opportunity to second guess.

If a hybrid of the Javits, Eagleton, Taft and Stennis proposals is enacted, there should be included a definition of "hostilities" as in the Eagleton resolution or "armed conflict" as in the Stennis resolution, depending upon the term used in the earlier sections.

Perhaps the most compelling arguments heard against legislation which seeks to codify the war powers, are that the problems of war-making do not easily lend themselves to an attempt at generalized prospective codification.<sup>93</sup>

For this reason, legislation enacted should not be drafted to anticipate every conceivable type of military situation in which force could be employed, but define only those war powers which the Constitution grants the President. While many believe the sole objective of war power legislation is to limit the President's powers, it has been suggested that any codification of the President's war powers could result in expanding those powers.<sup>94</sup>

Though constitutional objections have been raised, the weight of opinion is that the proposals are constitutional.<sup>95</sup> Also, it is conceded that should war powers legislation be enacted and result in a confrontation between the President and the Congress, there is little chance of judicial interpretation.<sup>96</sup>

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<sup>93</sup> *Hearings on Congress, the President, and War Powers Before the House Comm. on Foreign Affairs*, 91st. Cong., 2d Sess. (1970). Note therein statements of Dr. Alexander M. Bickel (June 23, 1970) and Dr. W. T. Mallison, Jr. (June 23, 1970). Dr. Bickel later spoke more favorably concerning efforts to codify the war powers, endorsing with reservations the Javits bill. *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67 (March 8, 1971).

<sup>94</sup> *Id.* at 303.

<sup>95</sup> *Id.* at 49-50. See therein statements of Henry S. Commager (March 8, 1971); Richard B. Morris (March 9, 1971); Alfred H. Kelly (March 9, 1971); Alpheus T. Mason (March 25, 1971); Alexander M. Bickel (July 26, 1971); William D. Rogers (July 27, 1971).

<sup>96</sup> *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67. Note therein testimony of Senator Goldwater and John N. Moore.

In preceding paragraphs, the four legislative proposals presently before the Senate Foreign Relations Committee are reviewed. If a resolution, rather than a bill, is to be enacted, the recitals as set forth in the preamble to the Eagleton resolution reflect an accurate summary of the conclusions reached in preparation of this paper. The Javits bill sets forth with clarity, supported by weight of law, the rules by which the President, as Commander-in-Chief, may use the armed forces in military hostilities without a declaration of war with two possible exceptions. First, it is questionable that the protection of American property is of sufficient cause for emergency action. Second, as heretofore noted, there are questions concerning the power of the President to act alone to comply with existing treaty commitments.<sup>97</sup> Any enactment should include provisions of notification and reporting to Congress, and for expedition of congressional authorization or disapproval. Also, any enactment should include sections similar to those in the Stennis and Eagleton resolutions, which: (1) state that authority to use the armed forces is not to be inferred from any provision of law, including appropriations acts, unless specifically authorized; and (2) define the terms "hostilities" or "armed conflict."

The four legislative proposals before the Senate reflect thoughtful consideration of the problems inherent in codification of the war powers. Their introduction has provoked perhaps the most enlightened discussion of constitutional war powers in American history.

Of overriding importance in determining which, if any, of these proposals to enact is whether the enactment would serve long-term national interests. The ultimate objective of any legislative implementation of the Constitution must be protection of the country's well-being, especially when the legislation deals with matters directly affecting national security.

## V. CONCLUSION

It has been suggested that the way for Congress to resume control over the foreign and war policy of the United States is merely to resume

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<sup>97</sup> See notes 86, 88, 89 *supra*. Also, the argument has been advanced that if a President, as Commander-in-Chief, acts to deploy for combat pursuant to a treaty, this action should be reviewed by Congress and either approved or condemned. The theory is that the Senate, by consenting to a treaty, cannot constitutionally bind the House to render an automatic war decision. *Hearings on Congress, the President, and War Powers*, *supra* note 93, at 391.

it—that the balance may be restored by affirmative action.<sup>98</sup> What type of action?

It is probable that there will be legislation enacted by Congress concerning the exercise of war powers. Should war powers legislation not be enacted, however, a desirable alternative would be more consultation with Congress by Presidents before troops are committed or hostilities initiated. Secretary of State Rogers' recent testimony before the Senate Committee on Foreign Relations indicated that this cooperation will be forthcoming. The Secretary expressed a willingness to explore ways of helping Congress reenforce its own information capability on issues involving war and peace. He also acknowledged the need for effective consultation between Congress and the President. It is of interest to note that the Secretary could recall only one instance since the end of the Second World War when Congress has participated in the making of a use of force decision.<sup>99</sup>

One may predict that future resolutions authorizing hostilities will not contain open-ended features, but will follow the suggestions of the National Commitments Report.<sup>100</sup>

There have been several suggestions for special or standing committees for the purpose of immediate and constant consultation with the President on the hostile use of military forces.<sup>101</sup> While these suggestions have appeal, it should be possible for consultation to take place with the leadership and committees of Congress as presently constituted. It will, of course, be necessary for the President to be willing to involve Congress in the decision making process.

During the lengthy war powers hearings held last year in the House, and this year in the Senate, there has been almost unanimous support for a reporting requirement. Should proposals which codify the war powers not receive sufficient support, it is probable that a separate resolution or bill will be enacted requiring presidential reports to Congress spelling out details of any troop commitments.<sup>102</sup> As aforesaid, the overriding consideration in determining the advisability of enacting more complex war powers legislation is long-term national interests. It has been suggested that, in attempting to codify the war powers, Con-

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<sup>98</sup> *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67, at 48 (testimony of Dr. Alexander M. Bickel).

<sup>99</sup> *Id.* (testimony of Secretary of State William Rogers).

<sup>100</sup> See p. 19 *supra*.

<sup>101</sup> See notes 68-70 *supra*.

<sup>102</sup> See appendix 1.

gress may fall into the old trap of trying to deal with the future by legislating the past. Also, one must ask if Congress is capable of acting with the speed, expertise, wisdom, and secrecy required today of decisions involving the war powers.

Much more is involved than a determination of war power prerogatives under the Constitution. It would hardly serve the long-term interests of the nation if any enactment resulted in a return to the congressional negativism and obstruction of the early years of this century. Nor would long-term interests be served if legislation were enacted that lacked credibility. It is doubtful if the public or the President would accept a measure subject to an interpretation that the President could not act to prevent or defend against a nuclear attack if there were clear evidence that such an attack was imminent.

Has the world so changed that the intent of the Founding Fathers is no longer viable? If so, what is our course if we are persuaded that presidential hegemony over the war powers is in the national interest and no legislation is desirable? The Constitution can be amended or the present constitutional quandary can continue, in which neither the intent of the Founding Fathers nor public expectation that elected representatives participate in the war-making process are being realized. Another quarter century of presidential hegemony, assuming the unlikely probability of continued congressional acquiescence would, through usage, make clear and constitutional something diametrically opposed to the intent of the Founding Fathers.

Either a Constitutional amendment spelling out Presidential hegemony or continued Congressional acquiescence is ill-advised. If there was cause in the 18th century to fear concentration of the power to make war in the hands of one man, surely more is at stake today.

The effort must be to reinvest Congress with a role in use of force policy without compromising the ability of the President to act absent Congressional concurrence in emergency situations, including imminent nuclear attack. This would require that Congress have a voice in the deployment of troops.

The probability of war is closely related to the deployment of troops. The decisions of the past thirty years that have resulted in the commitment of United States forces—sometimes to hostilities—have seldom been made with congressional participation. The deployment of troops often increases the chances for conventional war and conventional war increases the prospect for nuclear reliance.

Would the enactment of war powers legislation, similar to the proposals before the Senate, serve the long-term interests of the nation? There are many factors that lead one to conclude that it would, particularly if the possibilities of obstruction and negativism are reduced by a requirement of immediate consideration and action by Congress, and if the legislation is limited to future hostilities. The nation's interests would be served if congressional action initiated a fourth period of war powers history, an era of greater consultation and collaboration between the President and Congress. National unity is desperately needed in the wake of the long and divisive war that has focused so much attention upon this constitutional dilemma. Moreover, the chances of preventing an unnecessary war seem better if the decision to make war is, as the constitutional framers intended, a responsibility to be shared by Congress and the President.

If Congress will enact a war powers measure that takes into account the national security realities of the age in which we live, while at the same time giving effect to the Founding Fathers' intent, and to the public expectation rooted in their intent, that elected representatives participate in war-making decisions, this will restore balance to the war-making process and very probably serve the long-term best interests of the nation.



**Appendix 1**

92D CONGRESS

1ST SESSION

**H. J. RES. 1**

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**IN THE HOUSE OF REPRESENTATIVES**

JANUARY 22, 1971

MR. ZABLOCKI introduced the following joint resolution; which was referred to the Committee on Foreign Affairs

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**JOINT RESOLUTION**

Concerning the war powers of the Congress and the President.

1     *Resolved by the Senate and House of Representatives of the United*  
2     *States of America in Congress assembled, That the Congress reaffirms*  
3     its powers under the Constitution to declare war. The Congress  
4     recognizes that the President in certain extraordinary and emergency  
5     circumstances has the authority to defend the United States and its  
6     citizens without specific prior authorization by the Congress.

7     SEC. 2. It is the sense of Congress that the President should seek  
8     appropriate consultation with the Congress before involving the  
9     Armed Forces of the United States in armed conflict, and should con-  
10    tinue such consultation periodically during such armed conflict.

11    SEC. 3. In any case in which the President without specific prior  
12    authorization by the Congress—

13

14           (1) commits United States military forces to armed conflict;

15           (2) commits military forces equipped for combat to the terri-  
16    tory, airspace, or waters of a foreign nation, except for deploy-  
17    ments which relate solely to supply, repair, or training of United

1 States forces, or for humanitarian or other peaceful purposes; or  
2 (3) substantially enlarges military forces already located in a  
3 foreign nation;

4 the President shall submit promptly to the Speaker of the House of  
5 Representatives and to the President of the Senate a report, in writing,  
6 setting forth—

7

8 (A) the circumstances necessitating his action;

9 (B) the constitutional, legislative, and treaty provisions under  
10 the authority of which he took such action, together with his  
11 reasons for not seeking specific prior congressional authorization;

12 (C) the estimated scope of activities; and

13 (D) such other information as the President may deem useful  
14 to the Congress in the fulfillment of its constitutional responsi-  
15 bilities with respect to committing the Nation to war and to the  
16 use of United States Armed Forces abroad.

17

18 SEC. 4. Nothing in this joint resolution is intended to alter the  
19 constitutional authority of the Congress or of the President, or the  
20 provisions of existing treaties.

## Appendix 2

92D CONGRESS

1ST SESSION

S. 731

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 10 (legislative day, JANUARY 26), 1971

MR. JAVITS introduced the following bill; which was referred to the Com-  
mittee on Foreign Relations

---

**A BILL**

To make rules respecting military hostilities in the absence of a declaration of war.

1     *Be it enacted by the Senate and House of Representatives of the*  
2     *United States of America in Congress assembled,* That use of the  
3     Armed Forces of the United States in military hostilities in the absence  
4     of a declaration of war be governed by the following rules, to be  
5     executed by the President as Commander in Chief:

6

7     A. The Armed Forces of the United States, under the President  
8     as Commander in Chief, may act—

9

10           1. to repel a sudden attack against the United States, its terri-  
11           tories, and possessions;

12           2. to repel an attack against the Armed Forces of the United  
13           States on the high seas or lawfully stationed on foreign territory;

14           3. to protect the lives and property, as may be required, of  
15           United States nationals abroad; and

16           4. to comply with a national commitment resulting exclusively  
17           from affirmative action taken by the executive and legislative  
18           branches of the United States Government through means of a  
19           treaty, convention, or other legislative instrumentality specifically  
20           intended to give effect to such a commitment, where immediate  
21           military hostilities by the Armed Forces of the United States are  
22           required.

23

24     B. The initiation of military hostilities under circumstances described  
25     in paragraph A, in the absence of a declaration of war, shall be re-  
26     ported promptly to the Congress by the President as Commander in  
27     Chief, together with a full account of the circumstances under which  
28     such military hostilities were initiated.

29     C. Such military hostilities, in the absence of a declaration of war,

1 shall not be sustained beyond thirty days from the date of their initi-  
2 ation except as provided in legislation enacted by the Congress to  
3 sustain such hostilities beyond thirty days.

4 D. Authorization to sustain military hostilities in the absence of a  
5 declaration of war, as specified in paragraph (A) of this section may be  
6 terminated prior to the thirty-day period specified in paragraph (C)  
7 of this section by joint resolution of Congress.

8 SEC. 2. (A) Any bill or resolution, authorizing continuance of  
9 military hostilities under paragraph C (section 1) of this Act, or of  
10 termination under paragraph D (section 1) shall, if sponsored or co-  
11 sponsored by one-third of the Members of the House of Congress  
12 in which it originates, be considered reported to the floor of such  
13 House no later than one day following its introduction, unless the  
14 Members of such House otherwise determine by yeas and nays; and  
15 any such bill or resolution referred to a committee after having passed  
16 one House of Congress shall be considered reported from such com-  
17 mittee within one day after it is referred to such committee, unless  
18 the Members of the House referring it to committee shall otherwise  
19 determine by yeas and nays.

20 (B) Any bill or resolution reported pursuant to subsection (A) of  
21 section 2 shall immediately become the pending business of the House  
22 to which it is reported, and shall be voted upon within three days after  
23 such report, unless such House shall otherwise determine by yeas and  
24 nays.

25 SEC. 3. This Act shall not apply to military hostilities already under-  
26 taken before the effective date of this Act.

**Appendix 3**  
 92<sup>d</sup> CONGRESS  
 1ST SESSION  
**S. J. RES. 18**

---

IN THE SENATE OF THE UNITED STATES

JANUARY 27 (legislative day, JANUARY 26), 1971

MR. TAFT introduced the following joint resolution; which was referred to  
 the Committee on Foreign Relations

---

**JOINT RESOLUTION**

To define the principles which shall govern the deployment of the Armed Forces of the United States by the President, to express United States foreign policy objectives in Southeast Asia.

Whereas wide discussion and differences of opinion have arisen among the members of the body politic with respect to the power of the President as Commander in Chief to deploy the Armed Forces of the United States beyond its territorial limits and to commit such Armed Forces to combat, and

Whereas the Congress has, through acquiescence and overt action, sanctioned on numerous occasions the deployment of the Armed Forces of the United States beyond its territorial limits and commitment of such Armed Forces to combat without prior express authorization of a declaration of war by the Congress, and

Whereas in order to eliminate the confusion caused by the previous acquiescence and overt actions by Congress, there is a need for a clear statement of policy by the Congress as to the foreign policy of the United States in Southeast Asia, the deployment of Armed Forces by the President generally, and specifically their deployment in fulfillment of such foreign policy: Now, therefore, be it

1 *Resolved by the Senate and House of Representatives of the United*  
 2 *States of America in Congress assembled,*

3 PART I

4 The deployment and commitment to combat of the Armed Forces

1 of the United States in, within the territorial waters of, or over the  
2 territory or territorial waters of any other nation is authorized and  
3 shall be undertaken only with specific prior authorization of Congress  
4 by law; except that the President, as Commander in Chief, is author-  
5 ized to deploy and commit to combat such Armed Forces at his sole  
6 discretion:

7

8 (1) When he finds that the territory or the Armed Forces of  
9 the United States are under attack or imminent threat of attack;  
10 or

11 (2) When he finds that such deployment is necessary to full-  
12 fill a treaty obligation of the United States not qualified by con-  
13 stitutional or treaty contained limitations of conditions; or

14 (3) When he finds that such deployment is necessary to effect-  
15 uate a declaration of war acted on by the Congress; or

16 (4) When he finds that such deployment is necessary to  
17 exercise the inherent right of self-defense of the Nation or its  
18 nationals pursuant to established principles of international law  
19 or article 51 of the Charter of the United Nations,

20

21 The President shall notify the Congress within twenty-four hours  
22 after any such finding of all action he has taken at his sole discretion  
23 pursuant to any such finding. In the event the Congress is not in  
24 session, then the President shall convene the Congress in an extra-  
25 ordinary session and so notify the Congress within forty-eight hours  
26 after such finding. This authorization shall terminate upon the passage  
27 of a concurrent resolution to that effect by both Houses of Congress.

28

29

## PART II

30

31 The Congress hereby declares that it is the policy of the United  
32 States that each of the several free Southeast and South Asian nations  
should have the primary responsibility for the defense of its own

1 territorial integrity: *Provided, however*, That it is the policy of the  
2 United States where requested and where needed to furnish economic  
3 and military material assistance to such nations whose territorial in-  
4 tegrity is threatened by armed aggression. The Congress specifically  
5 authorizes the continued deployment of the Armed Forces of the  
6 United States in the territorial limits of the Republic of South Viet-  
7 nam for such time and in such manner as the President, as Com-  
8 mander in Chief, shall deem necessary and appropriate to accomplish  
9 a responsible and irreversible withdrawal of such Armed Forces of the  
10 United States and the assumption by the Armed Forces of the Republic  
11 of South Vietnam at the earliest feasible date of the responsibility for  
12 the defense of the territorial integrity of the Republic of South Viet-  
13 nam: *Provided further*, That the Armed Forces of the United States  
14 should not be deployed or committed to combat in Indochina in terri-  
15 tory other than that of the Republic of South Vietnam, except as pro-  
16 vided in part I hereof. This declaration of policy and authorization  
17 shall terminate upon the passage of a concurrent resolution to that  
18 effect by both Houses of Congress.

#### **Appendix 4**

92<sup>D</sup> CONGRESS

1<sup>ST</sup> SESSION

#### **S. J. RES. 59**

---

#### IN THE SENATE OF THE UNITED STATES

MARCH 1 (legislative day, FEBRUARY 17), 1971

Mr. EAGLETON introduced the following joint resolution; which was referred to the Committee on Foreign Relations

---

#### **JOINT RESOLUTION**

Regarding the powers of the Congress and the President to commit the Armed Forces of the United States to hostilities.

Whereas the framers of the Constitution of the United States intended the separation of powers doctrine to apply to the initiation of hostilities as a means for insuring collective judgment, whenever possible, before the Armed Forces of the United States were committed to such hostilities; and

Whereas the power to declare war was assigned to the Congress and this power authorizes the Congress to initiate, define, and limit the scope of hostilities involving the Armed Forces of the United States; and

Whereas the power to make rules regulating and governing the Armed Forces of the United States was assigned to the Congress, and this power authorizes the Congress to enact laws respecting the raising and use of such Armed Forces including their deployment in any foreign country; and

Whereas the power to appropriate moneys to support the Armed Forces of the United States was also assigned to the Congress, and this power authorizes the Congress to allocate funds so as to circumscribe the overall scope of hostilities and the uses of the Armed Forces of the United States; and

Whereas the Commander in Chief and Chief Executive powers were assigned to the President and those powers authorize the President to conduct hostilities initiated by the Congress and to respond to, and repel, attacks on the United States (including its territories and possessions), its Armed Forces, and, under certain circumstances, to rescue endangered citizens of the United States located in foreign countries: Now, therefore, be it

1     *Resolved by the Senate and House of Representatives of the United*  
2     *States of America, in Congress assembled, That:*

3

4     SECTION 1. Except as authorized in section 2 or section 3 of this  
5     resolution, the President shall not commit the Armed Forces of the  
6     United States to hostilities. No treaty previously or hereafter en-  
7     tered into by the United States shall be construed as authorizing or re-  
8     quiring the Armed Forces of the United States to engage in hostilities  
9     without further Congressional authorization. It is specifically recog-  
10    nized that such treaties as the Charter of the United Nations, the  
11    North Atlantic Treaty, and the Southeast Asia Collective Defense



1 Treaty do not authorize or require the President to commit the Armed  
2 Forces of the United States to engage in hostilities without a further  
3 authorization from both the Senate and the House of Representatives.

4 SEC. 2. The President may commit the Armed Forces of the United  
5 States to hostilities to the extent authorized by Congress through a  
6 declaration of war, statute, or joint resolution, but authorization to  
7 commit the Armed Forces of the United States to hostilities may not  
8 be inferred from legislative enactments, including appropriation bills,  
9 which do not specifically include such authorization. The Congress  
10 recognizes that during such authorized hostilities against an enemy  
11 country or enemy forces, the President's powers as Commander in  
12 Chief and Chief Executive provide him with the further authority,  
13 regardless of the limitations contained in the specific declaration of  
14 war or other authorizing statute or resolution, to order the Armed  
15 Forces of the United States to deliberately enter, invade, or intrude  
16 upon the territory or airspace of a country with which the United  
17 States is not then engaged in hostilities:

18  
19 (a) when in hot pursuit of fleeing enemy forces who have  
20 attacked, or engaged in battle with, the Armed Forces of the  
21 United States and then retreated to the territory or airspace of  
22 such country, to the extent necessary to repel such attack or com-  
23 plete such battle, or

24  
25 (b) when a clear and present danger exists of an imminent  
26 attack on the United States or the Armed Forces of the United  
27 States by enemy troops located in such country, to the extent  
28 necessary to eliminate such danger.

29  
30 SEC. 3. In the absence of a governing congressional authorization  
31 described in section 2, the President may commit the Armed Forces  
32 of the United States to hostilities, to the extent reasonably necessary to:

1 (a) repel an attack on the United States by military forces with  
2 whom the United States is not engaged in hostilities at the time of  
3 such attack and to eliminate or reduce the effectiveness of any  
4 future attacks by such military forces which are committing the  
5 attack being repelled; and

6  
7 (b) repel an attack on the Armed Forces of the United States  
8 by military forces with whom the United States is not engaged in  
9 hostilities at the time of such attack and concurrently to eliminate  
10 or reduce any clear and present danger of future attacks by the  
11 military forces which are committing the attack being repelled;  
12 and

13  
14 (c) withdraw citizens of the United States, as rapidly as possi-  
15 ble, from any country in which such citizens, there due to their  
16 own volition and with the express or tacit consent of the govern-  
17 ment of such country, are being subjected to an imminent threat  
18 to their lives, either sponsored by such government or beyond the  
19 power of such government to control: *Provided*, That the Presi-  
20 dent shall make every effort to terminate such a threat without  
21 using the Armed Forces of the United States: *And provided*  
22 *further*, That the President shall, where possible, obtain the con-  
23 sent of the government of such country before using the Armed  
24 Forces of the United States.

25  
26 SEC. 4. The commitment of the Armed Forces of the United States  
27 to hostilities pursuant to section 3 of this resolution shall be reported  
28 promptly by the President to the Congress, together with a full account  
29 of the circumstances under which such hostilities were initiated, the  
30 estimated scope of such hostilities, and the consistency of such hos-  
31 tilities, with the provisions of section 3. The question of continuing or  
32 terminating any such hostilities shall be decided upon by the Congress

1 as soon as possible and not more than thirty days from the day on  
2 which hostilities were initiated, under the following procedures:

3  
4 (a) any bill or resolution, authorizing the continuance or termi-  
5 nation of military hostilities if sponsored or cosponsored by one-  
6 third of the Members of the House of Congress in which it  
7 originates, shall be considered reported to the floor of such House  
8 no later than one day following its introduction, unless the Mem-  
9 bers of such House otherwise determine by yeas and nays; and  
10 any such bill or resolution referred to a committee after having  
11 passed one House of Congress shall be considered reported from  
12 such committee within three days after it is referred to such com-  
13 mittee, unless the Members of the House referring it to committee  
14 shall otherwise determine by yeas and nays; and

15  
16 (b) any bill or resolution reported pursuant to subsection (a)  
17 of this section shall immediately become the pending business of  
18 the House to which it is reported, and shall be voted upon within  
19 three days after such report, unless such House shall otherwise  
20 determine by yeas and nays.

21  
22 SEC. 5. In any case where the Armed Forces of the United States  
23 have been committed to authorized hostilities, the President shall,  
24 while such hostilities are in progress, report to the Congress period-  
25 ically on the status of such hostilities, as well as on the estimated scope  
26 and length of such hostilities.

27  
28 SEC. 6. For purposes of this resolution, the term "hostilities" in-  
29 cludes land, air, or naval actions taken by the Armed Forces of the  
30 United States against other armed forces or the civilian population  
31 of any other nation, the deployment of the Armed Forces of the  
32 United States outside of the United States under circumstances where

1 an imminent involvement in combat activities with other armed forces  
2 is a reasonable possibility, or the assignment of members of the Armed  
3 Forces of the United States to accompany, command, coordinate, or  
4 participate, in the movement of regular or irregular armed forces of  
5 any foreign country when such foreign armed forces are engaged in  
6 any form of combat activities.

7

8 SEC. 7. This resolution shall not apply to hostilities commenced  
9 before the enactment of the resolution.

### Appendix 5

92D CONGRESS

1ST SESSION

S. J. RES. 95

---

IN THE SENATE OF THE UNITED STATES

MAY 11, 1971

Mr. STENNIS introduced the following joint resolution; which was referred  
to the Committee on Foreign Relations

---

#### JOINT RESOLUTION

Relating to the authority of the President to use the Armed Forces of the  
United States in armed conflict.

10 *Resolved by the Senate and House of Representatives of the*  
11 *United States of America in Congress assembled, That except as pro-*  
12 *vided in sections 2 and 3 of this joint resolution, the President may not*  
13 *use the Armed Forces of the United States in any armed conflict.*

14

15 SEC. 2. The President may, in the absence of a specific authoriza-  
16 tion by law as provided in section 3 of this joint resolution, use the  
17 Armed Forces of the United States in conflict to the extent reasonably  
18 necessary—

1 (1) to repel any armed attack on the United States by the forces  
2 of any foreign government or power and to take action that will  
3 protect the United States against future armed attacks by such  
4 foreign government or power;

5  
6 (2) to repel an armed attack on the Armed Forces of the United  
7 States by forces of any foreign government or power and, con-  
8 currently, to protect the Armed Forces of the United States against  
9 any imminent danger of future attacks by the forces of such  
10 foreign government or power;

11  
12 (3) to prevent or defend against an imminent nuclear attack  
13 on the United States by the forces of any foreign government  
14 or power, but only if the President has clear and convincing evi-  
15 dence that such attack is imminent; and

16  
17 (4) to evacuate citizens of the United States from any foreign  
18 country in which they are located when such citizens are in such  
19 country with the express or tacit consent of the government of  
20 such country and their lives are being subjected to an imminent  
21 threat by such government or by persons or forces beyond the  
22 control of such government.

23  
24 SEC. 3. The President is authorized to use the Armed Forces of the  
25 United States in armed conflict pursuant to a declaration of war or  
26 other specific statutory authority, but authority to use the Armed  
27 Forces of the United States in armed conflict shall not be inferred from  
28 any provision of law, including any provision contained in any appro-  
29 priation Act, unless such provision specifically authorizes the use of  
30 such forces in armed conflict.

31  
32 SEC. 4. (a) Whenever the Armed Forces of the United States are

1 used in armed conflict under any of the circumstances described in  
2 section 2 of this joint resolution, the President shall promptly report  
3 that fact to the Congress and shall include in such report a detailed  
4 account of the reasons for so using the Armed Forces of the United  
5 States, his estimate of the scope of the armed conflict, and the justifica-  
6 tion for the use of such forces under section 2 of this joint resolution.  
7 Upon receiving any such report, the Congress shall decide, within  
8 thirty days after the first day on which Armed Forces of the United  
9 States were committed to armed conflict, whether the authority to so  
10 use the Armed Forces shall be extended or terminated. The following  
11 procedures shall be applicable to any such question:

12

13 (1) Any bill or resolution, authorizing the continued use of the  
14 Armed Forces in armed conflict under authority of section 2 of  
15 this joint resolution shall, if cosponsored by one-third or more  
16 of the total number of Members of the House of Congress in  
17 which such bill or resolution originates, be considered reported  
18 to the floor of such House no later than one day following its  
19 introduction; unless the Members of such House determine other-  
20 wise by yeas and nays; and any such bill or resolution referred to  
21 a committee after having passed one House of Congress shall be  
22 considered reported from such committee within one day after it  
23 is referred to such committee, unless the Members of the House  
24 referring it to committee determine otherwise by yeas and nays.

25

26 (2) Any bill or resolution reported pursuant to paragraph (1)  
27 of this subsection shall immediately become the pending business  
28 of the House to which it is reported, and shall be voted upon  
29 within three days after such report, unless such House shall de-  
30 termine otherwise by yeas and nays.

31

32 (b) In no case shall the Armed Forces of the United States be used

1 in any armed conflict under any of the circumstances described in  
2 section 2 of this joint resolution for any period exceeding thirty days  
3 after the first day on which such forces were first engaged in such  
4 conflict unless the Congress has specifically authorized the use of such  
5 Armed Forces in such conflict for a longer period.

6

7     SEC. 5. Whenever Armed Forces of the United States are engaged  
8 in armed conflict in any foreign country, the President shall, so long  
9 as such forces continue to be so engaged, report to the Congress peri-  
10 odically on the status of the armed conflict as well as on the scope and  
11 expected duration of such conflict, but in no event shall he report to  
12 the Congress less often than every six months.

13

14     SEC. 6. The provisions of this joint resolution shall not apply to—

15

16         (1) the armed conflict in the Republic of South Vietnam in  
17 which the Armed Forces of the United States were engaged on  
18 the date of enactment of this joint resolution, or

19

20         (2) military activities carried out against the military forces of  
21 North Vietnam, or against forces allied with North Vietnam, in  
22 North Vietnam, Laos, Cambodia, or the waters surrounding the  
23 Indochina Peninsula, so long as such military activities are directly  
24 related to the conflict referred to in paragraph (1) above.

25

26     SEC. 7. As used in this joint resolution, the term "armed conflict"  
27 includes (1) land, air, and naval actions taken by the Armed Forces of  
28 the United States against the military forces or civilians of any foreign  
29 country or government, (2) the deployment of the Armed Forces of  
30 the United States outside of the United States under circumstances  
31 that present a reasonable possibility of the use of arms against the  
32 military or civilian forces of a foreign country or government, and (3)

1 the assignment of members of the Armed Forces of the United States  
2 to accompany, command, coordinate, or participate in the movement  
3 of regular or irregular military forces of any foreign country or gov-  
4 ernment when such military forces are engaged in any form of combat  
5 activity.



