

The Great War Powers Debate†

In 1972 the United States Senate passed the Javits war powers bill by the overwhelming majority of 68 to 16. Although it then died in conference, it has been reintroduced this year in identical form as S. 440 with 60 sponsors, and it is once more the subject of Congressional hearings, editorials and public debate.

It permits the President, in the absence of a declaration of war or other explicit congressional authorization, to introduce armed forces into hostilities or potentially hostile situations only to repel an attack against the United States, its territories, possessions, or armed forces abroad; to forestall the direct and imminent threat of such an attack; to retaliate, but only in response to an attack on the United States, its territories or possessions, and not in response to an attack on our armed forces abroad; and to protect citizens and nationals of the United States abroad, but only while evacuating them.

Even these narrowly defined authorities terminate after thirty days unless Congress is physically unable to meet because of an attack on the United States, or unless, and only so long as, continued hostilities are necessary to a prompt disengagement of American forces.

The real import of the Javits bill is perhaps best understood if one studies its possible application in a hypothetical crisis. Suppose, for example, that signals are being received at the National Military Command Center at the Pentagon which indicate that United States missile firing submarines at sea around the world, the mainstay of the strategic deterrent force, are being destroyed one by one in rapid succession by the localized attacks of an identified hostile power.

Hostile forces thus are swiftly eliminating the ability of the United States ever to launch a damaging second strike, leaving it defenseless and hence in a state of acute political vulnerability. The President of the United States, solemnly sworn "to preserve, protect and defend the Constitution of the United States," is advised by the Attorney General that the War Powers Act (Javits bill) makes it uncertain whether he has legal authority to take the necessary and appropriate retaliatory actions to meet the

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obvious threat, inasmuch as the hostile attack is being made against armed forces of the United States located abroad rather than against the United States itself, its territories or possessions. He adds that a retaliatory strike by American bombers, land based missiles and remaining submarine missile forces, which must take place soon, if ever, should be authorized by Congress, which is not in session.

Another hypothetical case illustrates a somewhat different danger of this bill. Assume that hostile units have surrounded American forces garrisoning a friendly foreign city the United States has pledged to defend and have cut off all outside access without a shot being fired. The leaders of these forces have expressly stated in public broadcasts that they have no intention of launching an attack on the city or on any Allied forces located there.

They have made it equally clear, however, that they will not permit appropriate provisioning of the city or of American forces, and that they will fire on the first American soldier who moves to break the blockade. Because there has been no attack and there exists no direct and imminent threat of an attack on American territory or forces, the President is advised that he is precluded by the War Powers Act (Javits bill) from initiating military movements which could result in hostilities.

The matter is therefore quickly submitted to Congress, which is in session. The House of Representatives, after a limited debate affording one hour to each side, approves a broad range of Presidential actions which may be taken to relieve the siege by the overwhelming vote of 397 to 38.

In the Senate, however, a numerically small but vigorous opposition causes the measure to be considered for the full five days permitted by the War Powers Act (Javits bill) and as hope for a quick American response fades the confidence of the city population wanes. The international crisis deepens as a result of the visible inability of the American President ever to provide for the welfare of his own troops.

In the above hypothetical situation, even if the War Powers Act provided only that Congress could by majority vote of either House bring a halt to Presidential action, rather than precluding it in the first place, very serious difficulties would be presented. For example, if the President acted quickly to meet the threat to the city, localized hostilities might well ensue.

A resolution introduced in the House to terminate such action is soundly defeated, by the same lopsided vote of 397 to 38. However, quiet diplomatic efforts to relieve the crisis have dissolved in the heat of publicity surrounding the congressional debate and hopes for peace dim. The Senate then votes 51 to 49 to require the President to terminate hostilities. The result is an abject and unseemly withdrawal and the submission of the city to loss of its freedom.

The number of examples such as these which can be hypothesized is virtually endless. By any rational yardstick they are at least moderately disturbing. The existence of such a political and military crisis is itself a major threat; to be hamstrung in dealing with it in the manner contemplated by the war powers legislation, and the Javits bill in particular, could nurture a crisis into a catastrophe.

The war powers bills rest largely on several fundamental misconceptions. The first of these is that the United States should not become involved in hostilities of any kind, particularly in protracted ones, except on the basis of a declaration of war. This assumption is fundamental to almost all of the proposals for war powers legislation. The first sentence of the Javits bill commences: "In the absence of a declaration of war by Congress . . ."

A declaration of war, however, essentially amounts to an official statement by one country that a state of war exists between it and another country. It gives rise to well-defined rights and consequences under international law, and automatically invokes a wide array of emergency authorities under our domestic legislation. This is a step which has been taken by the Congress only five times in nearly 200 years.¹ All but one declaration of war by the United States has provided that "all the resources of the country are . . . pledged by the Congress of the United States" to "carry on war against the foreign government involved."²

In the twentieth century declarations of war have taken on an implication of dedication to the destruction of the enemy. This implication would in many cases be incompatible with the limitations on use of force contained in the United Nations Charter and in fact declarations of war have been extremely rare in the world in recent decades. Surely Congress does not desire to promote maximum retaliation in every case where a less extreme form of military action by the United States would be appropriate.

In truth a curious footnote to history exists in the fact that on April 11, 1972 the United States Senate by a tally of 78 to 7 (with 15 not voting) voted to table a declaration of war against the Democratic Republic of Viet-Nam which had been proposed as an amendment to the Javits war powers bill.

Congress in fact would be unduly limiting its role in military and foreign affairs were it to restrict itself to the power to declare war. From the legal perspective a declaration of war is just like any other act or resolution of

¹War of 1812—June 18, 1812; 2 Stat. 755 Mexican-American War—May 13, 1846; 9 Stat. 9 Spanish-American War—April 25, 1898; 30 Stat. 364 World War I—April 6, 1917; 40 Stat. 1 World War II—December 8, 1941; 55 Stat. 788.

²Mexican-American War—May 13, 1846; 9 Stat. 9.

Congress. The power to declare war is one of the legislative powers enumerated in Article 1, section 8 of the Constitution.

Declarations of war, like all other acts of Congress, are subject to the provisions of Article 1, section 7 of the Constitution, stating that every bill, order, resolution or vote to which the concurrence of both Houses of Congress may be necessary shall be approved either by the President or by a two-thirds vote of both Houses of Congress overriding a veto. Thus, once war is declared, it cannot constitutionally be undeclared by a vote of less than two-thirds of both Houses unless the President concurs.

Congress has greater flexibility under the general powers of authorization and appropriation, which ordinarily are exercised on an annual basis and, insofar as support of military forces is concerned, constitutionally cannot be exercised less frequently than every two years. Under these powers recurrent positive action by Congress is necessary if the President is to have at his disposal the necessary military instruments for application of his policy.

The advocates of legislation like that proposed by Senator Javits appear to have realized the inherent limitations of reliance on declarations of war, and have actually shifted ground during the course of debate. More recently they have characterized the war powers bill as an attempt to refine implementation of the other constitutional war powers of Congress and the President under the authority of the "necessary and proper" clause.

However, the proponents of this legislation, in attempting to implement the respective war powers of Congress and the President, actually have exceeded the bounds of implementation and have transgressed directly on the underlying constitutional powers.

For example, the Javits bill purports to restrict the President's power to defend even the continental United States by limiting to thirty days the period in which he may engage in hostilities, unless Congress specifically authorizes an extension or is physically unable to meet because of an attack on the United States. Under the Constitution even the states have authority to provide for their own defense when they are actually invaded or are in imminent danger of invasion (Article 1, section 10).

Surely the President can have no less authority than the constituent states of the Union. Indeed, the Federal Government has an unlimited constitutional obligation and authority to defend the states (Article 4, section 4), and the President as Chief Executive and Commander-in-Chief is the officer bearing the responsibility and possessing the authority to ensure that defense. There can hardly be serious doubt but that the limitation on continental defense envisaged by the Javits bill cannot properly be imposed other than by means of a constitutional amendment.

At least one member of the Senate, Senator Inouye, in a speech before the Convention of the National Order of Women Legislators on November 13, 1972,³ suggested that it would be necessary to convoke the constitutional convention to consider a revision of the constitutional scheme of war powers.

The "necessary and proper" clause does not constitute an independent grant of constitutional authority enabling Congress to redefine or reallocate the various constitutionally prescribed war powers. Hamilton made quite clear in the *Federalist* that the "necessary and proper" clause was not intended to limit the principle of the separation of powers, but rather to preclude too narrow a construction of the authority of the Union *vis-a-vis* that of the individual states.

The Supreme Court in *Myers, v. U.S.*, 272 U.S. 52 (1926), substantiated this fundamental precept in ruling that Congress could not constitutionally condition the President's removal power on the concurrence of the Senate. The "necessary and proper" clause does not itself support any legislation which is in conflict with another provision of the Constitution or otherwise violates the separation of powers.

Clearly there are those who would support a constitutional amendment along the lines of the Javits bill, but this would constitute rejection of nearly 200 years of proven constitutional tradition. The Founding Fathers showed great vision in describing and allocating the war powers in general terms, recognizing that it is impossible reliably to foresee and forecast the precise remedy for every conceivable crisis of future ages.

The proposal to change the United States Constitution in this fundamental way reflects the mistaken belief that detailed rules of procedure will necessarily produce correct foreign policy decisions, that legal formalism will ensure wisdom. Flaws in foreign policy are not, however, compelled by the American constitutional structure; nor would they be avoided by its remodeling. They lie instead in the unavoidable imperfection of human decision-making, which in turn arises from the fact that no one is omniscient.

The ultimate misconception of war powers legislation is the belief, contrary to the Shakespearean incantation, that the fault is in our stars and not in ourselves. It is the belief that where men have gone wrong, governmental systems necessarily must be at fault. Perhaps this is understandable in context. No great war has been fought by this country without some attempt to ascertain who and what it was that placed us in such a predicament in the first place.

³6 University of Richmond Law Review 1 (Fall, 1971).

The impulse to inquisition is more intense when the war has not gone well. Perhaps it is too much to expect that Congress should register the thought that it was itself deficient in wisdom to any degree. This is not to suggest that the motivation for war powers legislation is essentially political or peculiarly partisan. It is to acknowledge the existence of a rather predictable manifestation of human nature.

The participants in this great debate over war powers must realize that to the extent they may object to what transpired in Viet-Nam their quarrel is not with the constitutional allocation of war powers, but rather with the respective execution of those powers, and the fundamental institutions whose collective responsibility is the creation of whatever wisdom mortals are able to achieve.

The respective advocates can do justice to this great debate about the Constitution only if the misconceptions noted above are abandoned. This debate fundamentally requires broad reflection on how the national capacity of the United States to devise wise international policy can be enhanced, rather than concentration on means by which policy responses can be inhibited.