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Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary. . . This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us.¹

Abraham Lincoln

Despite this warning by Abraham Lincoln and his interpretation of the Constitution, the President has assumed a preeminent position in the commitment of United States troops abroad. The purpose of this article is to examine the nature and context of recent military actions, to examine the current legislation restraining Presidential power to commit troops, and to discuss the strategic, political and constitutional implications of this legislation.

American history is replete with examples of executive deployment without the consent of Congress, such as the action in Korea in 1950 taken by President Truman.² Since the end of World War II, Congress has exercised a dominant influence in only one decision to intervene with armed force. This sole instance of participation came in 1954 when apprehensions and doubts in Congress led President Eisenhower to abandon a plan for involvement in Indochina.³ Since 1954, decision-making in the area of armed intervention has been characterized by Presidential dominance and Congressional reluctance to assert its powers.⁴

¹. 2 WRITINGS OF ABRAHAM LINCOLN 52 (Lapsitz ed. 1905).
³. See J. ROBINSON, CONGRESS AND FOREIGN POLICYMAKING 54 (1962), for an analysis of the degree of Congressional participation in foreign and defense policy decisions.
⁴. For a summary of the steady growth of Presidential power, see SENATE COMM. ON FOREIGN RELATIONS, 91st Cong., 2d Sess., REPORT ON NATIONAL COMMITMENTS TO ACCOMPANY S. RES. 85 (1969).
In May of 1954, a small CIA-organized and -equipped force invaded Guatemala which was then ruled by a left wing junta. On July 14-15, 1958, President Eisenhower landed 14,000 Marines in Lebanon to restore order and protect the government reportedly under siege by Syrian Communists. President Kennedy planned the Bay of Pigs invasion of Cuba in April, 1961, and later that year positioned eight ships carrying 1800 Marines just outside Santo Domingo Harbor in support of the revolt led by General Echacarría. Troops were again sent to the Dominican Republic in 1965 when civil war erupted.

American involvement in Indochina has occasioned continuous reinforcement and expansion of United States troop commitments. In 1962, President Kennedy began sending increased military assistance and substantial numbers of military advisors to Vietnam. Troop buildup continued under President Johnson and by 1968 the level had exceeded 450,000. Under President Nixon, American ground troops invaded Cambodia in 1970 and in 1971 the Air Force began strike operations in Laos. It is also contended that ground troops have conducted combat operations in Thailand and Laos.

The present situation has resulted more from Congressional abdication of its responsibility than Presidential usurpation of power. Congress has been content to take a back seat in defense policy decisions. It has created its own agencies independent of the executive and isolated from the channels of information upon which defense and national security decisions are based. In addition to isolating itself from information, Congress has isolated itself from the decision-making process by sweeping delegations of authority to the President. This unwillingness to take an active role is largely the result of three factors.

5. See R. Schneider, Communism in Guatemala 311 (1959), for a general discussion of the success of the American involvement in Guatemala.

6. The claim of Communist infiltration has been hotly disputed. Senator Fulbright has questioned whether there was any Communist involvement, and the Eisenhower administration produced no evidence that there was. See R. Barnet, Intervention and Revolution 132 (1968).

7. For an interesting account of the decision-making by the Kennedy administration that led up to the Bay of Pigs and Dominican Republic invasions, see A. Schlesinger, A Thousand Days 132, 276 (1965).

8. While all the actions described since 1954 took place without the prior consent of Congress, only Presidents Johnson and Nixon claimed to possess such power in the absence of an emergency. See Schlesinger, See If You Can Fix Any Limit To His Power, N.Y. Times, Jan. 7, 1973 (Magazine) at 12.

9. See infra note 17 and accompanying text.

10. See T. Lowi, Hearings on the Congress, the President, and the War Powers before the Subcommittee on National Security and Scientific Developments of the House Committee on Foreign Affairs, 91st Cong., 2d Sess. 286 (1970) (hereinafter referred to as 1970 War Powers Hearings). Congress has also allowed the President to make more and more important commitments via the executive agreement. See Matthews, The Constitutional Power of the President to Conclude International Agreements, 64 Yale L.J. 345 (1955).
First, members of Congress have felt they should defer to Presidentiat expertise in foreign relations. Not only do Congressional leaders feel the Executive has superior information, but they also think he is in a better position to take decisive action in the context of the cold war. This also explains the development of a bipartisan foreign policy, with Congressional leaders of both parties supporting Presidential initiatives.11

A second reason for Presidential ascendancy is the consensus that developed concerning United States responsibility abroad. Although the 1970's have evidenced a breakdown of this consensus, it existed for most of the period since World War II and removed any political incentive from opposing Presidential leadership.12

Thirdly, the President's facility for speedy reaction has placed him in the forefront of what can be considered an era of crisis. The last decade has been characterized by emergencies which have left the Congress in a position only to "reflect, review, advise, grant or withhold consent."13

The situation was recently summarized by Senator Muskie: "It suffices here to say that, as matters now stand, the Congress exercises no more than a marginal influence on decisions as to whether the nation will be committed to war."14

CHECKS ON PRESIDENTIAL WARMAKING

The Appropriations Process

The Constitution clearly places the authority for appropriating money in the Congress.15 Critics of recent proposals for controlling Presidential warmaking argue that the appropriations power insures Congressional participation. Although the power is specifically granted, the realities of military intervention have denied a Congressional role. Troop deployment is crisis oriented in most cases, and

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12. Id. at 348.
13. See J.W. Fulbright, The Arrogance of Power 45 (1966). Alexis de Tocqueville observed long ago: "War does not always give democratic societies over to military government, but it must invariably and immeasurably increase the powers of the civil government; it must almost automatically concentrate the direction of all men and the control of all things in the hands of government. If that does not lead to despotism by sudden violence, it leads men gently in that direction by their habits.
15. "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7.
appropriations are thus sought after hostilities have already begun. Once the President has committed troops, Congressional alternatives are reduced and pressure is great to "support our boys in the field."\textsuperscript{16}

The President is not obliged to seek specific appropriations from Congress. He may employ contingency funds or previously appropriated money that was never spent. By the time Congress considers the situation, the action may be complete. Nor are all appropriations reviewed by Congress. This is true particularly of secretly conducted CIA operations which often involve a large commitment of men and materials.

Senator Fulbright has described American action in Laos:

[The CIA undertook to create and did create its own advisors and directors and army that I think at one point reached about 36,000 men. That fact was carefully kept from the Congress and from the public. . . We did not find out about Laos until it had been going on for two or three years; after the damage has been done, after the commitments, the loss of life, the expenditure of money has taken effect.\textsuperscript{17}]

Thus, the appropriations process has not been a viable check on Presidential warmaking.

\textit{The Concurrent Resolution}

A concurrent resolution is a resolution passed by both houses of Congress to veto, terminate, approve of, or compel action by the Executive.\textsuperscript{18} Congress has used the concurrent resolution to express its support of Presidential actions in Formosa, the Middle East, Cuba and Vietnam. However, this device has not proven to be an effective check on the President. First, it expresses only Congressional opinion and when opposed by the President, it carries little if any practical weight.\textsuperscript{19}

Secondly, for the concurrent resolution to guarantee any voice at all in troop deployment decisions, Congress must have access to critical intelligence information. Recent history, however, demonstrates an executive monopoly of information through prohibitive classifications and the deliberate misleading of Congress. Misrepresentation of the nature

\textsuperscript{16} A blatant example of the Presidential \textit{fait accompli} occurred during Theodore Roosevelt's administration when a fleet was sent half way across the world and then funds were requested to bring it home. \textit{See Rogers, World Policing and the Constitution} 83-84 (1945).

\textsuperscript{17} 119 CONG. REC. S 14192 (daily ed. July 20, 1973).

\textsuperscript{18} See Giannane, \textit{The Control of Federal Administration By Congressional Resolutions and Committees}, 66 HARV. L. REV. 569 (1953).

\textsuperscript{19} For a thorough discussion of the constitutional weight of the concurrent resolution, see Giannane, \textit{The Control of Federal Administration By Congressional Resolutions and Committees}, 66 HARV. L. REV. 569 (1953).
and extent of North Vietnamese attacks on U.S. vessels was instrumental in the adoption of the Gulf of Tonkin Resolution.\textsuperscript{20} The most recent example of misleading information was the report of U.S. bombing raids over Cambodia.\textsuperscript{21}

Another problem with the concurrent resolution is its inexact nature. As Representative Jonathan Bingham put it, "[S]uccessive Presidents have shown themselves quite capable of interpreting Congressional prescriptions to suit their own needs and justify their actions."\textsuperscript{22} Consequently, vague wording has been converted into a rubber stamp for executive action.\textsuperscript{23}

**Public Opinion**

Since the President is elected by popular vote, it has been suggested that public opinion influences executive warmaking. However, a careful analysis of public opinion exposes several frailties in this position.

First, the consensus which removed political incentive from Congres-

\textsuperscript{21} Pentagon officials recently placed the cost of these secret raids at $1.5 billion. \textit{Time}, Aug. 13, 1973, at 7.
\textsuperscript{22} Hearings on War Power Legislation before the Subcomm. on National Security Policy and Scientific Development of the House Comm. on Foreign Affairs, 92d Cong., 1st Sess. 13 (1971) [Hereinafter cited as \textit{1971 War Powers Hearings}].
\textsuperscript{23} E.g., The Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964):

\begin{quote}
Whereas naval units of the Communist regime in Vietnam in violation of the principles of the Charter of the United Nations and of international law, have deliberately and repeatedly attacked United States naval vessels lawfully present in international waters, and have thereby created a serious threat to international peace; and

Whereas these attacks are part of a deliberate and systematic campaign of aggression that the Communist regime in North Vietnam has been waging against its neighbors and the nations joined with them in the collective defense of their freedom; and

Whereas the United States is assisting the peoples of southeast Asia to protect their freedom and has no territorial, military or political ambitions in that area, but desires only that these people should be left in peace to work out their own destinies in their own way: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.*

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and Charter of the United Nations and in accordance with the obligations of the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

Sec. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.
sional oppositon to Presidential initiatives, has led to popular support of his leadership. This has resulted from several factors including the complexity of the issues involved, their distance from the everyday experience of the ordinary citizen, and the powerful influence which the President exerts in the shaping of opinion on foreign policy.

Secondly, public opinion tends to be supportive in foreign affairs. Since the President is the representative of the United States to other countries, most people feel he must be supported regardless of the action taken. This is demonstrated by the backing enjoyed by President Kennedy after the agreed disaster at the Bay of Pigs.

Even if the public were capable of forming an independent and objective opinion on foreign affairs, it still lacks the ability to express an opinion with sufficient clarity to carry a political punch. Professor Landecker argues that opinion polls fluctuate too greatly to be heeded, and the partisan politics during Presidential elections preclude a meaningful post-election evaluation of what was decided, or even the response on one issue as distinguished from the others.

It is doubtful whether many Presidents would heed even a clearly articulated mandate, especially during a second term. The clearest example of this attitude has been revealed by President Nixon who has declined to expose himself to the press on even the most important issues since the 1972 elections and who has stated consistently that public opinion must stand with him in foreign affairs.

The Watergate hearings have demonstrated a clear disregard for dissent on foreign policy questions and some witnesses have even testified to attempts to crush such dissent.

Judicial Action

Many people have turned to the courts in an effort to check executive use of armed force which they believed exceeded his constitutional authority. However, the courts decided early in our history to refrain from pronouncements on questions more properly handled by the political branches. This is what has become known as the political question doctrine. Unfortunately for the sake of clarity, relations with for-

24. See text accompanying supra note 12.
25. The American Institute of Public Opinion Polls found support for Kennedy’s Presidency was higher after the Bay of Pigs fiasco than during the period two weeks prior to the event. See T. Lowi, 1971 War Powers Hearings 115.
27. See Schlesinger, supra note 8, at 28-30.
eign countries was one of the earliest questions categorized as political. In Foster v. Neilson, Chief Justice Marshall observed:

The judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established.

Although litigants have argued the unconstitutionality of Presidential action in the absence of a declaration of war, the question, like that of foreign relations in general, has been considered non-justiciable. As Judge Wyzanski stated, "[T]he distinction between a declaration of war and a cooperative action by the legislature and executive with respect to military activities in foreign countries is the very essence of what is meant by a political question."

The District Court for the Eastern District of New York has found the troop deployment issue justiciable but has held that Congress has given its authorization for intervention in Vietnam. Most recently, in Holtzman v. Schlesinger, this court found the President's Cambodian policy "unauthorized and unlawful" and permanently enjoined any further use of American military force in or over Cambodia. Here, the power to declare war was held to be a judicially manageable standard and Congressional appropriations explicitly forbidding military support of Cambodia were held to discount any pretense of Congressional authorization. Nevertheless, Justice Marshall issued a stay of the injunction allowing the bombing to continue to the August 15 deadline agreed to by the President.

29. 27 U.S. (2 Pet.) 253 (1829).
30. id. at 307. The specific criteria of a political question were set out in Baker v. Carr, 369 U.S. 186, 217 (1962):
   It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
33. 42 U.S.L.W. 1017 (July 31, 1973).
34. The Second Circuit Court of Appeals ordered a stay of the district court injunction until argument on August 13, two days before the August 15 deadline. Never-
Thus, judicial action has been a fruitless route in attempts to constrain the President by reservists,\textsuperscript{35} draft resisters,\textsuperscript{36} citizens,\textsuperscript{37} and law professors,\textsuperscript{38} as well as troops deployed in such actions.\textsuperscript{39} These cases demonstrate the truth of Warren Burger's statement for the District of Columbia Circuit Court in \textit{Luftig v. McNamara}\textsuperscript{40} when he wrote: "[R]esort to the courts is futile in addition to being wasteful of judicial time, for which there are urgent legitimate demands."\textsuperscript{41}

**LEGISLATIVE PROPOSALS**

The Cambodian incursion of 1970, which resulted in a widespread reaction against Presidential war-making power, renewed Congressional interest in establishing effective checks on this power.\textsuperscript{42} Several proposals have been made since then. Early in 1971, Representative Zablocki proposed H.J. Res. 1 calling for Congressional reaffirmation of its powers under the Constitution to declare war, without providing any meaningful process by which to do so.

This legislation recommended that the President seek Congressional advice,\textsuperscript{43} but only required the President to submit a written report describing the circumstances and scope after he had committed forces or enlarged a commitment. H.J. Res. 1 passed the House by a voice vote but could not be reconciled with a much tougher Senate bill, S. 2956.

\textsuperscript{35} McArthur v. Clifford, 393 U.S. 1002 (1968).
\textsuperscript{36} Ashton v. United States, 404 F.2d 95 (8th Cir. 1968), cert. denied, 394 U.S 960 (1969); and United States v. Mitchell, 369 F.2d 323 (2d Cir. 1966), cert. denied, 386 U.S. 972 (1967).
\textsuperscript{37} Kalish v. United States, 411 F.2d 606 (9th Cir. 1969).
\textsuperscript{39} See supra note 26; and Foster v. Nielson, 27 U.S. (2 Pet.) 253 (1829).
\textsuperscript{40} 373 F.2d 664 (D.C. Cir. 1967).
\textsuperscript{41} Contra is Justice Douglas' dissent in Massachusetts v. Laird, 400 U.S. 886 (1970), in which he examines each of the criteria in Baker v. Carr, 369 U.S. 186, 217 (1962), and argues that none are present in cases in which soldiers are seeking relief from orders deploying them to Vietnam.
\textsuperscript{42} C. Brower, \textit{DEP'T STATE BULL.}, April 9, 1973, at 434.
\textsuperscript{43} Many members of Congress reject the possibility of informal consultation. Senator Fulbright recounts such informal consultation which occurred in 1961 when he overheard the plans for the Bay of Pigs invasion while hitching a ride to Florida in the President's jet. Once he confronted the President, his opinion was asked, and then promptly disregarded. He advised against such an action. See J.W. FULBRIGHT, supra note 13, at 48.
S. 2956 was passed on April 13, 1972, and with minor revisions contained the same provisions as S. 731, passed a year earlier and S. 440, passed on July 20, 1973. Section 3 of the bill delineates four specific situations in which armed forces may be introduced without a declaration of war by Congress:

1. To repel an attack on the United States, its territories or possessions, and to retaliate in such event, or forestall the threat of attack.
2. To repel an attack on U.S. armed forces or forestall such an attack.
3. To protect evacuating citizens or nationals of the United States on the high seas or in any country in which they are present by consent and in imminent threat.
4. To deploy troops pursuant to specific statutory authority not to be inferred from existing or future laws or treaties unless specifically granted.

The remainder of the bill requires the President to submit reports when action pursuant to Section 3 is taken and requires termination of such action after 30 days unless U.S. forces would be thus endangered or continued action has been authorized by Congress. Additionally, S. 440 provides for the immediate reporting of proposed authorizations to the floor of Congress and requires voting within three days.

The Senate considered many alternative proposals and suggestions in the form of bills and amendments. Senator Taft proposed an open termination by concurrent resolution in S.J. Res. 18. Senator Fulbright has suggested that Congressional authorization be required for the use of nuclear weapons in a first strike capacity. Senator Dominick has argued for continuing Presidential discretion in intelligence gathering activities. However, these variations were unable to muster sufficient support.

The House moved much closer to the Senate view of war powers legislation by adopting H.J. Res. 542 on July 18, 1973, by a vote of
Section 3 requires the President to report within 72 hours as to the circumstances, authority, scope and cost for any commitment of troops outside the United States or enlargement of forces already committed. Section 4 provides for automatic termination of any such action after 120 days unless specific authorization has been granted by Congress. Unlike S. 440, which requires early termination by joint resolution necessitating passage by the President, H.J. Res. 542 permits termination at any time by concurrent resolution, and provides for a priority procedure. Both bills are very careful not to allow an inference of Congressional authorization from present or future laws or treaties.

After five long conference meetings, House and Senate conferees reached a compromise on October 3, 1973. The decline in the prestige of the Presidency occasioned by the Watergate disclosures and court actions surely gave impetus to the compromise. The Senate adopted the conference committee report, H. Rept. No. 93-547, on October 10, 1973, by a vote of 75-20. The House passed the bill October 12, 1973, by a vote of 238-123.

The avowed purpose of H. Rept. No. 93-547, as stated in Section 2, is

[T]o fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces in hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such actions.

The compromise resolution contains much of the original wording of S. 440 and H.J. Res. 542. The reporting provisions which were similar in both bills have been retained. However, a report is required within 48 hours of the introduction of United States forces in a hostility as contained in the House resolution, and no attempt is made

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51. The priority procedure of H.J. Res. 542 found in Sec. 5 requires the Foreign Relations Committee of each house to report a bill for specific authorization not later than 30 days before the expiration of the 120-day period. This bill immediately becomes the pending business and must be voted on within three legislative days. Any bill passed in one house must be considered by the other not later than 13 days before the expiration of the 120-day period.
53. Chicago Sun Times, Oct. 4, 1973, at 12, col. 8, published the results of a Gallup poll released the morning of the compromise showing only a 32% approval of Nixon's handling of the Presidency, which represents a 33% drop since the 1972 elections.
to define when the President has authority to intervene as in the Senate resolution.

An automatic termination after 60 days was finally accepted, although an automatic 30-day extension is provided by Section 5(b)(3) in the event of an unavoidable military necessity. Early termination may take place by concurrent resolution as contained in the House resolution, requiring no Presidential approval.

Priority procedures were adjusted to the 60-day termination period. Section 7 provides for consideration by the Committee on Foreign Affairs of the House and the Committee on Foreign Relations of the Senate and their reporting to the respective bodies of Congress within fifteen calendar days. Any concurrent resolution so reported becomes the pending business and must be voted on in three calendar days.

Unlike S. 440 and H.J. Res. 542, the compromise resolution provides for divided time on the floor of the Senate between proponents and opponents of any concurrent resolution and lays the ground rules for an expeditious referral to a conference committee in the case of differences. In addition, Section 8(c) specifically includes the deployment of advisory forces in the resolution. In Section 8(a), the compromise also disallows any inference of Congressional authority from any present or future law or treaty. The compromise was passed over President Nixon's veto on November 6, 1973 and is now law.

**Political and Strategic Considerations**

**Workability of a Time Limit**

Many opponents of the war powers legislation seriously question the workability of a specific time limit, such as 60 days. They suggest such specificity places Congress in a dilemma. Either it acts with an incomplete assessment of the situation which precludes a meaningful

56. Sections 8(a)(1) and (2) provide:

   Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

   (1) from any provision of law (whether or not in effect before the date of the enactment of this resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

   (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.
choice, or it refuses to act and thereby ends an action which might have been necessary.\textsuperscript{57}

Senator Javits, author of the Senate bill, has answered such criticism by analyzing the time limit in terms of balancing two vital considerations.

First, it is an important objective of this bill to bring the Congress, in the exercise of its Constitutional war powers into any situation involving United States forces in hostilities at an early enough moment so that Congress' actions can be meaningful and decisive respecting the carrying on of war. Second, recognizing the need for emergency action, and the crucial need of Congress to act with sufficient deliberation and to act on the basis of full information, a specific time period strikes a balance. . . \textsuperscript{58}

The specific time limit represents a balance which attempts to enable Congress to act meaningfully, while at the same time, act independently. Nor do the specific time limits appear to be an all or nothing requirement. Congress can extend the time period while it investigates, or if convinced before the termination date that a particular action should be ended, it can do so by concurrent resolution.

A specific time limit also poses a problem in terms of actual disengagement from hostilities. First, the procedure is unclear as to when the period actually begins or at what time disengagement must be completed.\textsuperscript{59} Secondly, when Congress does require termination, either by lapse of the required period or positive action, safe disengagement may be an impossibility even after the 30-day extension for this purpose in Section 5(b)(3). Thus, a problem similar to that of appropriations could develop where Congress would be forced to “support the boys in the field.”\textsuperscript{60}

Some critics suggest that the 1973 war powers legislation suffers from the obvious intention of preventing another Vietnam.\textsuperscript{61} In that regard, the specific time limitation may well prevent a steady escalation over a period of time as in Vietnam. However, it could encourage

\begin{itemize}
\item\textsuperscript{59} Section 5(b)(2) of the compromise resolution provides for an extension of time by Congress and 5(b)(3) allows an automatic 30-day extension “if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the continued safety of United States Armed Forces requires the continued use of such armed forces.”
\item\textsuperscript{60} This problem is compounded by the fact that the President as Commander in Chief has unilateral control of the conduct of hostilities, and seemingly must decide if disengagement is “safe.” Nor is it likely that Congress will attempt to intervene in the conduct of hostilities. One need only recall the suffering of American soldiers at Valley Forge to see the problems in such a course. See T. Frothingham, Washington, Commander in Chief 234 (1930).
\item\textsuperscript{61} See generally Schlesinger, supra note 8.
\end{itemize}
an aggressive President to go all out to achieve a military victory within
the termination period.62 Nevertheless, such a situation could be pre-
vented by a concurrent resolution for early termination, assuming the
President had complied with the reporting provisions and Congress was
aware of his conduct.

Decision-Making

The systematic inclusion of Congress in the overall decision-making
process such as contemplated by the compromise resolution raises cer-
tain issues. In the context of crisis reaction, can Congress deliberate
with the speed and secrecy considered essential for troop deployment
decisions?

Reaction speed is a concept which has not received a great deal
of analysis, with discussion consisting of mere assertion.63 This rhe-
toric has failed particularly in relation to counter-insurgency action,
the framework of modern interventions. In fact, the politics in under-
developed countries such as Vietnam strongly suggest the undesirabil-
ity of any intervention. The decisive factor in political upheaval is
popular support64 since support is needed for the victory of either
side,65 and it cannot be achieved by military action.

As Senator Fulbright has written, “America’s interests are better
served by supporting nationalism than opposing communism.”66 Even
if intervention becomes necessary, the situation does not require the
immediacy which has been demanded by Presidents. This has been
true in disturbances where the protection of American lives and prop-
erty has been the rationale for intervention.67 It has further been ar-
gued that Congress can act swiftly, and the priority procedures in the
compromise resolution evidence a concern for expediency.68

Likewise, the need for secrecy has been overstated. First, the Pen-
tagon Papers disclosure proved the Presidency is not an infallible re-

63. Nicholas deB. Katzenbach, former Under Secretary of Defense, typified the
rhetoric when he stated, “[T]he source of an effective foreign policy is Presidential
power. His is the sole authority to communicate formally with foreign nations, to
negotiate treaties, to command the Armed Forces of the United States. His is a re-
sponsibility born of the need for speed and decisiveness in an emergency.” Hearings
before the Senate Comm. on Foreign Relations on S. Res. 151, 91st Cong., 1st Sess. 71
64. This axiom became painfully clear in Vietnam when American casualties be-
came ten times as great as those of guerrillas more closely identified with the popula-
tion. See generally H. KISSINGER, PROBLEMS OF NATIONAL SECURITY (1965).
65. For the classic presentation of nationalism and its effects, see H. Kohn, THE
IDEA OF NATIONALISM: A STUDY IN ITS ORIGINS AND BACKGROUND (1944).
67. See supra note 20.
68. See text accompanying supra note 54.
pose for classified information. Second, it must also be recognized that much of the information commonly considered strategic is printed in the daily papers.69

Finally, it appears that the United States is moving into a period of more open conduct of foreign affairs, at least in the near future. The Nixon administration, rocked by Watergate, seems to be serious about changing its secretive style as evidenced by the appointment of its secret negotiator, Henry Kissinger, to Secretary of State.70

Any decision-making process requires the presentation of alternatives. As Morton Halperin observed, “A President must have the information and analysis of options which the bureaucracies provide in order to anticipate problems and make educated choices.”71 Unfortunately, in recent years the executive bureaucracy has been less than adequate in this respect.72 This has resulted from the elimination of policy options by high level advisors independently of the President.73

Thus, Congress can make an important contribution, as James MacGregor Burns put it, “to pose alternatives, probe relentlessly, publicize constantly and examine and debate implications.”74 Additionally, Congress can supply a continuity which the President simply cannot, due to the turnover of administrative staffs and the removal of Presidential records and correspondence following each administration.75

On balance, the contributions which Congress can make to the overall decision-making process seem to outweigh the losses in speed and secrecy.

Collective Security Agreements (Mutual Defense Treaties)

Doubts have been raised concerning the status of treaties under the 1973 War Powers Legislation. Critics have suggested that limitation on the President's power with respect to “self-executing treaties” would destroy our system of collective security.76 A self-executing treaty

71. See M. Halperin, FOREIGN AFFAIRS, Jan., 1972, at 310.
73. Another decision-making problem which has recently arisen is the inability of advisors to confront the President with alternatives that are personally distasteful to him. As Arthur Schlesinger queried, “Where are Mssrs. Hickel, Romney and Peterson? Who in President Nixon's cabinet will talk back to him—assuming they could get past the palace jannissaries and into the oval office? The fate of those who have tried to talk back in the past is doubtless instructive.” Supra note 8, at 12.
74. 1970 War Powers Hearings 84.
76. See B. Goldwater, supra note 60, at S 13861.
would be one which requires no further action to trigger United States duties as defined therein.

First, Section 8(b) of the compromise resolution provides:

Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of the United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

This provision specifically allows the coordination of strategy with commanders of allied nations.

Secondly, as regards troop deployment, there seems to be no authority for the contention that treaties are self-executing. In fact, the opposite seems to be the case. The Senate Foreign Relations Committee report, recommending the approval of NATO, clearly stated:

The treaty in no way affects the basic division of authority between the President and the Congress as defined in the Constitution. In no way does it alter the constitutional relationship between them. In particular, it does not increase, decrease, or change the power of the President as commander-in-chief of the armed forces or impair the full authority of Congress to declare war.77

Likewise, when SEATO was organized, Secretary Dulles interpreted the provisions as requiring affirmative Congressional action to authorize military force.78 Most of the collective security arrangements in which the United States participates also specify that military forces must be committed in accord with each nation's constitutional processes.79

Critics believe that legislative restraint on self-execution will reduce the credibility of the United States in the protection of its allies. It has been argued that a lack of credibility would result in a dangerous proliferation of nuclear weapons.80 However, the nuclear credibility of the United States has long ago disintegrated. With the Soviet Union not only capable of destroying Europe but also the United States, it

77. Senate Executive Report No. 8, 81st Cong., 1st Sess. 18 (1949).
79. E.g., Security Treaty between Australia, New Zealand and the United States (ANZUS) Art. IV:
   Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and security and declares that it would act to meet the common danger in accordance with its constitutional processes.
80. B. Goldwater, supra note 60, at S 13861.
is extremely doubtful that the United States would sacrifice its cities for its allies.\textsuperscript{81}

Thus, with the underlying assumption of collective security nullified, one must wonder if such agreements need be considered at all. Even conventional forces and defenses are under sovereign national control until released by their respective governments,\textsuperscript{82} and thus pose no problem to war powers legislation.

Detente rather than collective armament is the emphasis in international relations. This has resulted in a shift in emphasis in international goals. As Ernst B. Haas observed: “Economics and economic blocs are more important than many military and ideological groupings. This trend is well under way and rolls on whether willed by the United States or not.”\textsuperscript{83}

The doubts raised by the war powers legislation concerning collective security agreements seem to carry little practical weight.

\textit{Flexibility}

With the President responsible for a large range of activities in foreign affairs, critics of recent legislation stress the need for flexibility.\textsuperscript{84} Such comments are particularly directed toward the need to make shows of force for diplomatic purposes. John Norton Morton believes the legislation will prevent humanitarian intervention such as in the Congo as well as U.N. and OAS peacekeeping missions.\textsuperscript{85} In addition, former Secretary Rogers emphasizes the need to back up our rights by actions such as those in Berlin, and the flexibility to move units such as the 6th Fleet in connection with the Middle East situation.\textsuperscript{86}

Proponents of the bills do not foresee such inflexibility. The President as Commander in Chief would still be responsible for the conduct of military affairs and be able to deploy units and move naval elements in international waters.\textsuperscript{87} Likewise, peacekeeping operations fall within the scope of 8(b) which permits such actions.\textsuperscript{88}

\textsuperscript{81} See Osgood, \textit{Alliances and American Foreign Policy} 54 (1968).
\textsuperscript{82} Id. at 50.
\textsuperscript{84} See generally W. Rogers, \textit{Dept State Bull.}, June 7, 1971, at 721.
\textsuperscript{85} 1971 War Powers Hearings 103.
\textsuperscript{86} See supra note 82, at 721.
\textsuperscript{87} J. Javits, supra note 56, at S 13869. However, it seems such action would be prohibited under 8(c) if there existed an imminent threat that such forces would become engaged.
\textsuperscript{88} See text accompanying supra note 74.
Overview

In evaluating the overall impact of the compromise resolution on the warmaking process, two transcending factors must be considered. First, the legislation cannot achieve its purposes unless Congress is able to obtain objective information. One of the largest impediments to Congressional participation in the Vietnam decisions was the lack of independent information. To that extent, the effectiveness of this legislation depends either on Presidential cooperation or aggressive Congressional investigation.

Secondly, the act incorporates the philosophy that a national commitment of military forces requires the affirmative action of Congress. This philosophy of commitment is a radical departure from the past and requires either action before the President, or a willingness to override his decision in full view of the world. Such an orientation would present a divided front but seems to be the only effective position.

CONSTITUTIONAL CONSIDERATIONS

Specific delineation of a power which has been exercised by both the executive and legislative branches is fraught with constitutional problems. The final word on such legislation in relation to the Constitution will ultimately come from the Supreme Court. Already, there is a great deal of controversy.

Textual Arguments

The sponsors and proponents of the compromise resolution rely on Art. I, Sec. 8, which gives Congress exclusive power to “declare war,” “raise and support armies,” “provide and maintain a Navy,” and “make rules for the Government and Regulation of the land and naval forces.” In addition, they see the President’s power in this area as ministerial and without authority to initiate.

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91. Such divided statements by two branches of government present a specific problem which John Locke warned must be avoided: “It is almost impracticable to place the force of the commonwealth in distinct and not subordinate hands, or that the executive and federative power should be placed in persons that might act separately, whereby the force of the public would be under different commands, which would be apt some time or other to cause disorder and ruin.” II Two Treatises on Civil Government 384 (P. Laslett ed. 1967).
93. Id.
Advocates of unilateral Presidential authority look to several provisions of the Constitution. First, Art. II, Sec. 1 states, “The executive Power shall be vested in a President of the United States of America.” Many have read the power to commit troops into the “executive Power.” Secondly, Art. II, Sec. 2 provides “The President shall be Commander in Chief of the Army and Navy of the United States.” Thirdly, Sec. 3 charges the President to “take care that the laws be faithfully executed” which when read broadly, it is suggested, incorporates the troop deployment power. Finally, it has been argued that these stated powers in some way add up to an aggregate executive power allowing the President to make military commitments.  

**Intent of the Framers**

Examination of the debates and letters of the Founding Fathers does not provide any conclusive answer to a modern meaning of these provisions. However, it does tend to establish certain facts. The philosophers from whom the Framers borrowed the concept of a separation of powers placed the “power to make peace and war” in the hands of the Executive. Nevertheless, with the drafting of the Articles of Confederation the power to declare war was placed in the legislature.

This decision was based on the colonial British experiences. All too often the colonies had been drawn into the King’s wars, and the Framers sought to withdraw such discretion from a single man. It was the deliberate design of the drafters to give Congress more power over warmaking than Parliament had possessed. However, constitutional delegates such as Mason argued for some executive authority in warmaking to insure that the sword and the purse not be exclusively in the same hands.

Further authority for the inclusion of some Presidential powers is found in the change of an early draft of the Constitution from “make war” to “declare war” in Art. I, Sec. 8. However, this change seems to have been designed to give the President authority to repel sudden attacks. James Madison’s notes on the convention report “Mr. Madison and Mr. Gerry moved to insert ‘declare’ striking out ‘make’ war leaving to the executive the power to repel sudden attacks.”

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99. For the debate centering around the warmaking power, see M. Farrand, II Records of the Federal Convention 319 (1911).
100. Id. at 318.
Although the President was intended to exercise certain warmaking powers, it is highly unlikely that he was given authority to initiate military action. In a letter to Madison in 1789, Thomas Jefferson wrote, "We have already given in example an 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."\textsuperscript{101}

Even Alexander Hamilton, the leading advocate of a strong Executive, wrote:

The President is to be Commander in Chief of the Army and Navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces as first general and admiral of the confederacy, while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.\textsuperscript{102}

Although the warmaking power was intended to be a shared power, it does not seem to have been intended to be shared in quite the same manner as history has allocated it.\textsuperscript{103}

\textit{Case Law}

Unlike the statements of the Framers, language in certain court opinions suggests the existence of unilateral executive power. First, Presidential power to deploy troops has been recognized in at least two contexts. The President may act in the event of insurrection or direct attack. The Court was very clear in the \textit{Prize Cases},\textsuperscript{104} in which President Lincoln's power to meet the Confederate rebellion without a specific declaration of war was upheld:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for special authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be unilateral.\textsuperscript{105}

Likewise, it seems the President has the authority to protect Ameri-
can lives and property abroad. In *Durand v. Hollins*, the court denied recovery for damages inflicted by a U.S. naval officer protecting citizens and their property in Nicaragua. Presidential authorization for the action was upheld, the court stating: "[F]or the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President."

Some decisional authority seems to suggest powers beyond these limited circumstances. The leading case is *United States v. Curtiss Wright Export Corp.*, in which the issue was the constitutionality of Congress' delegation to the President of the power to prohibit the sale of arms and munitions to countries engaged in the armed conflict in Chaco. In sweeping language for the majority, Justice Sutherland recognized that the power in foreign affairs was one of the concomitants of nationality and not one which needed to be granted in the Constitution. The opinion went on to suggest that the President possesses inherent powers in foreign affairs:

It is important to bear in mind that we are dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus a very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations.

However, *Curtiss Wright* did not involve the deployment of troops and was in accord with a delegation of authority rather than contrary. The importance of Congressional authorization was discussed by Justice Jackson in his concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, where President Truman used the war power as the basis for seizing the nation's steel mills during the Korean War. He observed:

1. When the President acts in accord with the express or implied consent of Congress, his authority is at its peak for he then possesses both his powers and those which Congress can delegate.
2. When he acts without Congressional consent he can act only upon his independent authority. The validity of such actions will depend on the circumstances of the situation and "contemporary imponderables" rather than on legal theory.113

3. When the President takes measures contrary to the will of Congress, his power is at its lowest, and will be validated by the courts only by properly disabling Congress from any action on the subject.114

Justice Jackson's reasoning, if taken in the converse, would seem to suggest that the validity of the 1973 War Powers Legislation may depend on the Court's upholding the disabling of the President from military commitment in any permanent sense. There are a few old cases in which dicta supporting such a conclusion is found.115

These cases involved the capture of enemy privateers in the 1798 naval war with France. In each, the holding seems to center on the specific power of Congress "to make Rules concerning Captures on Land and Water,"116 and all were decided before the enunciation of the political question doctrine.117 Nevertheless, the Court did find the President's war power insufficient to permit seizure of steel mills during the Korean War118 and to place prior restraint on the publication of the Pentagon Papers.119

A telling argument against the constitutional validity of the war powers legislation has been proposed by William Rehnquist.120 He suggests that in areas of concurrent power, the President and the legislature should be left to find their own compromise based on the needs at hand, and not a specific delineation of authority. Such delineation runs contrary to the flexibility intended by the Framers and may render the Constitution unadaptable to future problems.

Finally, proponents of Presidential power argue from what might
be called construction by acquiescence. They contend that Congressional silence during a long line of military actions has established the power to commit troops in the Executive. There is judicial support for such a position. In *Myers v. United States*, involving the Presidential power to appoint and remove administrative officials, the Court stated,

This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our constitution were actively participating in public affairs, acquiesced in for a long term of years fixes the construction to be given its provisions.\(^1\)

In *United States v. Midwest Oil Co.*, the Court allowed the President to continue to exercise his power to withdraw public lands in view of the continued practice, known by and acquiesced in by Congress. Despite such authority, the fact remains that acquiescence cannot transfer authority specifically reserved to another branch. Thus, the fact "that an unconstitutional action has been taken before, surely does not render that same action any less unconstitutional at a later date."\(^2\)

**CONFRONTATION**

War powers legislation inherently contains a confrontation with the President. Prior to the adoption of S. 440 and H.J. Res. 542, President Nixon made his opposition clear:

As the House begins consideration of H.J. Res. 542, the war powers bill, I want you to know of my strong opposition to the measure.

I am unalterably opposed to and must veto any bill containing the dangerous and unconstitutional restrictions found in sections 4(b) and 4(c) of this bill.\(^3\)

The compromise resolution contains even greater restraints than the earlier House version.

Thus, the Presidential veto was no surprise. It came on October 121. 272 U.S. 52 (1926).

122. *Id.* at 175. The Court recognized other considerations such as "the nature of the question, attitude of the executive and judicial branches of the government, as well as the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded." 272 U.S. at 170-71.

123. 236 U.S. 459 (1915).


24, 1973. Although the compromise passed the respective chambers by large majorities, it did not appear a two-thirds majority could be obtained in the House. Nevertheless, the House was able to override the veto by a vote of 284-135, four over the necessary number, and the Senate followed suit by a vote of 75-18. The vote was largely a reflection of President Nixon’s growing Watergate troubles and concern about United States involvement in the latest Middle East hostilities.

The override, however, does not end the confrontation. The President may ignore the legislation in hopes of obtaining judicial invalidation. In such a case, the Congress appears to be without enforcement power. Impeachment would be ludicrous in a time of real emergency. Additionally, statements by at least one of the Nixon appointees to the Supreme Court suggests little chance of judicial approval.

These factors may well suggest that war powers restraints will ultimately have to take the form of a constitutional amendment to ever be implemented.

CONCLUSION

The long involvement in Indochina has taught the United States many lessons, among them, the unpredictable nature of military involvements. One need only recall the assurances of Secretary Robert McNamara and General Maxwell Taylor that the United States would be out of Vietnam in 1965.

By the beginning of 1973 when withdrawal of U.S. forces finally began, the United States had lost more than 46,000 men, millions of dollars had been spent, and the economy was burdened by the resulting inflation and measures taken in an attempt to control it. Nor does the larger picture reveal the suffering of the wounded which still continues and the disruption of life by absence and death. The continued escalation changed the entire scope of U.S. involvement. It is doubtful that either President Kennedy or Johnson would have intervened had he foreseen the ultimate result.

129. See supra note 96. Additionally at 628, Mr. Rehnquist stated that “one need not approach anything like the outer limits of the President’s power, as defined by judicial decision and historical practice in order to conclude that it supports the action President Nixon took in Cambodia.
130. Facing the Brink 207 (E. Weintraub and C. Bartlett ed. 1967).
132. See F. Armbruster, Can We Win in Vietnam 168 (1968).
In any decision, the risks must be weighed against the gains. When the decision is one to commit troops, the gains are conjectural, but the risks are impossible to evaluate.\textsuperscript{133} When such an open-ended step is taken, it seems that both of the political branches should make the final decision. The 1973 War Powers Legislation evidences a Congressional determination to reassert its rightful place in that process. However, it appears doubtful that such legislation will survive judicial scrutiny. Nevertheless, such predictions provide no solution to the controversy. Concrete conclusions are seldom drawn in political matters and the recent passage of the legislation over President Nixon's veto may be significant in another light. As Alexander Bickel pointed out, "If Congress expresses the determination to function in the future and especially if it acts now on specific issues, Presidents will understand and will in the future not fail to resort to Congress."\textsuperscript{134} The effect which this legislation will have on Presidential attitudes is mere speculation, but the 1973 War Powers Legislation clearly expresses Congress' determination.

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\textsuperscript{133} See A. Yarmolinsky, \textit{United States Military Power and Foreign Policy} 16 (1967).
\textsuperscript{134} 1970 War Powers Hearings 45.