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Author(s): W. Stuart Darling and D. Craig Mense

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regression coefficient should be at least twice its standard error.

61. *Inflation and Unemployment* (Washington, D.C.: Congressional Quarterly, 1975), p. 14.
62. Congressional Budget Office, *Growth of Government Spending for Income Assistance:*

A Matter of Choice (Washington, D.C.: U.S. Government Printing Office, 1975), p. 6.

63. *Washington Post*, April 12, 1976, p. A1.
64. *Wall Street Journal*, April 12, 1976, p. 1.
65. *Business Week*, March 22, 1976, p. 116.

RETHINKING THE WAR POWERS ACT

by

W. STUART DARLING and D. CRAIG MENSE

University of Virginia

In the course of the presidential primary campaigns of last winter and spring, both Henry Jackson and Ronald Reagan made some rather disquieting statements regarding the use of American troops abroad. Senator Jackson criticized the Ford Administration for "doing nothing" about the Lebanese crisis, suggesting that the United States should have sent the Marines to Lebanon, if asked by the Lebanese, in order to keep the contending Moslem and Christian factions from "shooting each other up." Governor Reagan created perhaps the biggest flap of his primary campaign by suggesting that United States troops might be sent to Rhodesia to help ensure stability for that troubled country. Implicit in both of these comments is the belief that the President could have acted unilaterally to intervene abroad by the use of the armed forces.

Jackson's and Reagan's statements raise an issue which seems to have been forgotten since the resignation of Richard Nixon, namely the President's discretionary power in the use of troops overseas. Three years have gone by since Congress passed the War Powers Resolution over President Nixon's veto in November of 1973. Since then, there has been growing concern about the alleged decline of American power in the world and our lack of will in the face of adversity, but relatively little discussion about the law that purports to ensure that the United States will never again become involved in another Vietnam. Jimmy Carter has not uttered a single word on the issue, while President Ford has said nothing new since he opposed

the war powers legislation as the Congressional Minority Leader in 1973. This silence would seem to suggest that the war powers law is a matter of little importance. This is not the case. Consider what the law is supposed to do: to put an end to wars initiated and directed by the President without the consent, indeed against the will, of Congress.

In essence, the present war powers law seeks to ensure that American armed forces will not be committed to hostilities by the President without prior congressional authorization except in "emergency" situations. In the event that such an emergency does arise, the President can unilaterally commit forces to combat provided that they must be withdrawn after sixty days unless Congress has enacted a specific authorization endorsing his action. The statute grants the President authority to extend this sixty day period for an additional thirty days if, in his opinion, "unavoidable military necessity" so requires. Thus the President can wage war on his own for ninety days before Congress really enters the picture.

The war powers law and the various bills of similar intent offered in the three year period before its birth created a storm of fierce controversy between the legislative and executive branches, within the Congress itself, and in legal and academic circles. The idea of a war powers law attracted criticism from all directions. Some "liberals" applauded it, others decried it. "Conservatives" were similarly divided. The debate that the war powers controversy incited muted, as perhaps few other issues have, the distinc-

tion between liberal and conservative political labels. The actual law that finally appeared on the books in 1973 was opposed at the eleventh hour, curiously enough, by a strange alliance of "liberals" who thought it gave the President too much power, and "conservatives" felt it deprived him of authority that is rightfully his.

The current election year offers an appropriate time to address the question of the President's power to use the Armed Forces by virtue of his role as Commander-in-Chief and in the conduct of foreign affairs. The present war powers law, together with the whole idea of defining, by statute, the interaction between the executive and legislative branches deserves a thorough analysis as to its practical effects on the nation's foreign policy. On this question there is also a great deal of controversy. Proponents of the war powers law claim that great danger inheres in allowing the President alone to make the decision between war and peace. Not only does this violate the separation of powers principle, they claim, but it also runs the risk of committing the nation to a war that will not receive popular support. The "lessons" of the Vietnam experience are closely in mind to the war powers advocates. They offer war powers legislation as a legal mechanism to ensure that the President does not ignore the will of the people, and that the collective wisdom and judgment of both the President and Congress is applied to all decisions that involve questions of war and peace.

Opponents of the war powers concept cite the vagueness of the Constitution as evidence of the Founding Fathers' prudent realization that the exigencies of diplomacy and foreign policy require flexibility in policy planning and decision-making. A successful foreign policy, they argue, demands that the President enjoy the widest possible latitude in dealing with foreign policy crises. He must have the freedom to deal with rapidly changing situations by the means he considers most appropriate. He must be able to react quickly against all situations which threaten the security of the United States. As we live in the world as it is, and not as we wish it to be, they argue, Congress must not hinder the President's ability to protect the nation by constructing a naive and ill-conceived legalis-

tic formula which puts us at a disadvantage against adversaries who deny themselves nothing in the pursuit of their foreign policy goals. Opponents of the war powers statute consistently refer to the numerous instances (204 at the last count) in American history in which forces have been committed to hostilities by the President without prior authorization from Congress.

These arguments are not new. They rose up again from the miasma of Vietnam, but they have been around for some time. There was another "great debate" over the respective war powers of the President and Congress in January 1951. The issue at hand then was the authority of the President to station American combat divisions in Europe in support of the NATO treaty without the specific approval of Congress. Representative Frederic Coudert (R-N.Y.) offered a joint resolution which claimed that the President could not deploy or station American military forces outside of the United States without the prior authority of Congress. In the Senate, Robert Taft (R-Ohio) made the same argument, and Senator Wherry (R-Neb.) offered a similar resolution. President Truman and Secretary of State Dean Acheson claimed that the President as commander-in-chief could order American forces anywhere to provide for national security. Truman and Acheson maintained the adamant position that Congress could not and should not attempt to interfere with the President's conduct of foreign policy, including the decision to commit American forces to combat short of a congressional declaration of war.¹

Senator Arthur Vandenberg of Michigan, the leading Republican proponent of bipartisanship in foreign policy, supported the Democratic administration's position for the same reasons put forth by the Republican administration in the early 1970s. Vandenberg felt that the President should seek the consent of Congress before making military commitments when "not incompatible with the public interest." However, Vandenberg feared the consequences of handicapping the President in emergency situations. He reasoned that the President "is the commander-in-chief. His constitutional function must not be impaired least it tie our hands behind our backs."²

Professor Edward S. Corwin supported

the Taft-Coudert-Wherry position for reasons that surfaced again twenty years later from Democrats instead of Republicans. Corwin noted that the great majority of the historical precedents of presidential warmaking cited by administration's spokesmen were relatively innocuous punitive actions against bandits and outlaws or weak states which did not pose any conceivable threat to national security. To Corwin and later war powers advocates, these precedents were of a totally different stripe from Truman's actions in the Korean War or the stationing for an indefinite period hundreds of thousands of American troops in Western Europe. Corwin felt that Congress had both the right and the duty to determine where American forces could be deployed.³

"The 'great debate' of 1951 ended by the defeat of both the Coudert and Wherry resolutions. Their defeat owed much to developments then current in American politics. Before the votes were taken, Truman announced that he would not seek reelection in 1952 and Dwight Eisenhower, the Republican nominee, came out in favor of stationing American forces in Europe. However, the basic issue of the powers of the President and Congress over warmaking without a declaration of war were not resolved. They remained dormant until the late 1960s when the Indo-China War became more costly and success more elusive.

Throughout the 1950s and into the 1960s, with only a few exceptions Congress took a passive view of its role in sharing in decisions which involved military commitments abroad. The "liberal" attitude toward Congress' war powers remained what it had been in 1951—Congress must not impede the President's efforts to advance United States interests and provide for the security of the nation. Thus, by 1964, when Congress passed the Gulf of Tonkin Resolution, the President's right to make all military commitments he felt necessary went practically unchallenged. The wording of the Resolution explicitly endorsed this view. It proclaimed that "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." Moreover, the Resolution went on to say that the powers granted to the President were not to expire until "the President shall determine that the peace and security of the area is reasonably assured" or when Congress had, by concurrent resolution, rescinded the Resolution.⁴ The Gulf of Tonkin Resolution passed with only two dissenting votes in the Senate. The House voted unanimously for its passage.

For those who might have questioned the constitutional authority of President Johnson's actions in 1965 and 1966, when American combat operations in Vietnam began to assume massive proportions, administration spokesmen gave reassurance that the President was well within his rights. In March, 1966, in testimony before the Senate Foreign Relations Committee, State Department legal adviser Leonard C. Meeker stated that "There can be no question in present circumstances of the President's authority to commit United States forces to the defense of South Vietnam. The grant of authority to the President in Article II of the Constitution extends to the actions of the United States currently undertaken in Vietnam."⁵ Meeker also reminded the Committee that, in addition to the President's power under Article II there was the SEATO Treaty, the Gulf of Tonkin Resolution, and Congress' approval in May 1965 of \$700 million to meet the mounting expenses of military requirements in Vietnam. President Johnson had stated to Congress when it considered the appropriations bill that "each member of Congress who supports this request is also voting to persist in our efforts to halt Communist aggression in South Vietnam."⁶ In a news conference on August 18, 1967, President Johnson said he did not think that the resolution was necessary to do what he had done and what he was doing in Vietnam.⁷

That the Nixon Administration held a similar view of the President's war power is aptly demonstrated by its commitment of American military forces to Cambodia in 1970 and to Laos in 1971. These actions illustrate the administration's determination to initiate new foreign military actions solely on its own authority.

The Nixon Administration's public state-

ments support the belief that the President has the power to commit the armed forces as he sees fit. In March of 1969, the State Department asserted that "the President has the constitutional power to send U.S. military forces abroad without specific congressional approval."⁸ Similar assumptions of the executive's war-making authority were expressed the following year in a hearing before the Senate Foreign Relations Committee on a proposal to repeal the Formosa, Cuba, Middle East and Tonkin resolutions. At that time the State Department contended that "the Administration is not depending on any of these resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans."⁹ Moreover, the Department asserted that the Tonkin Gulf resolution was not necessary to support the administration's Vietnam policy.

In 1970 the first actual war powers bill was offered in the Senate by Jacob Javits (R-N.Y.). Other war powers bills were introduced in 1971 by Senators Mathias, Eagleton, Pell, Spong, Stennis, and Bentsen. All of these bills contained the key requirement of advance congressional authorization for the commitment of armed forces to hostilities by the President except in certain designated emergencies. In the House, in 1970 Rep. Clement Zablocki (D-Wis.) introduced a joint resolution calling on the President "whenever feasible" to seek prior consultation with Congress before committing forces to hostilities.

Although two years of hearings and debate were still to come, by 1971 the basic outline of the proposed war powers bills had been formed. The Senate favored much stronger legislation. The Senate bills acknowledged the necessity of the President acting without securing prior congressional approval in certain emergency situations. However, the Senate spelled out what these "emergencies" were: (1) responding to or preempting an attack on the United States itself (2) responding to or preempting an attack on United States armed forces stationed abroad (3) and rescuing American citizens abroad from circumstances which endangered their lives. Except under these conditions the President would first have to obtain congressional approval before taking any military

action. The House, on the other hand, allowed the President unilateral emergency power without specifying what would constitute an emergency.

By 1972 it appeared that the Senate would pass a war powers bill. Senate bill S.2956, sponsored by Javits, Thomas Eagleton (D-Mo.), and John Stennis (D-Miss.) contained the codification of emergency power allowing the President to act without the Congress, as described above. This represented an important departure from the liberal conventional wisdom of the post-World War II era which had been that the responsibilities of the United States as a world power demanded a strong President ready and willing to apply armed force when, in his reasoned judgment, circumstances so demanded. Of crucial importance was the provision that, in all instances other than those fitting under the "emergency" category, the President could not introduce American forces to hostilities unless both Houses of Congress had passed measures expressing their consent to the President's proposed plan of armed intervention. To take a hypothetical example, if Iran, a country in which no American combat forces are located, were invaded by another state, including the Soviet Union, the President would have to go before Congress, explain and justify his plans for intervention, and then wait for Congress to give its approval.

The bill included two more innovative and important provisions. The first was that no operation involving the armed forces in hostilities, including those conforming to the "emergency" category, could be continued beyond thirty days unless Congress had enacted "specific legislation" permitting such a continuance. The President was empowered to continue military operations without the specific approval of Congress if he certified "in writing . . . unavoidable military necessity respecting the safety of the Armed Forces in the course of bringing about a prompt disengagement from such hostilities." As Senator Eagleton explained it, 'disengagement' assumes a great interpretive importance—it "includes the strong implication of finality . . . [it] requires a complete divorce from prior policy considerations."¹⁰ In other words, not only would

American forces have to be removed as quickly as their safe extrication permits, but the presidential policy which led to their introduction must also cease.

The bill's sponsors imposed a thirty-day limit because it allowed for presidential flexibility and time for consultation between the President and Congress. Moreover, they reasoned that within thirty days the nature of any emergency action would become clear—whether it remained purely defensive, such as repelling an attack on our forces in South Korea, or, if it became retaliatory, or more offensive such as pursuing North Korean forces beyond the 1953 armistice line. At that point, Eagleton argues, “the decision to go ahead or stop must be made, and that decision must be made by Congress.”¹¹

The second innovation dealt with treaty obligations. After World War II, the United States had forsaken George Washington's famous advice to “beware of entangling alliances.” We became the senior partners in a host of military alliances, including NATO, SEATO, ANZUS, and several others. Each of these alliances obligated the signatories to undertake certain actions “in accordance with their constitutional processes.” However, exactly what the term “constitutional processes” meant was never clarified. It could be taken to mean that the President would merely inform Congress that he was taking action X to fulfill our obligations under treaty Y. The Senate Foreign Relations Committee report claimed that the bill defined the term for the first time.¹² It denied the notion held by many that our treaty commitments were self-executing, that if, for example, a NATO member were attacked we were obligated to respond militarily at once without waiting for Congress' blessing. The bill itself stated that “no treaty in force at the time of the enactment of this Act shall be construed as specific statutory authority for, or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities.” Thus the bill attempted to ensure that no decision involving the use of armed forces in hostilities could be made without congressional participation.

S. 2956 passed the Senate on 13 April, 1972 by 68-16. Nevertheless, it died in the House-Senate Conference in October, 1972, as the two Houses could not resolve the

major differences between their respective war powers bills. The House would agree to nothing more than the undefined “emergency” power envisioned in the Zablocki bill. However, Javits, Eagleton, and Stennis reintroduced their bill in 1973 as S.440.

Hearings were held by the Congress on both S.2956 and S.440. The hearings, as well as the articles which the bills inspired in legal and academic journals, brought forth arguments similar to those made in 1951. Spokesman for the administration warned against the dangers of hamstringing the President with legalistic categorization. They argued that the Founding Fathers, appreciating the unpredictability of international relations, had intentionally left vague the relationship between the executive and legislative branches. In his testimony in June 1971, Secretary of State William Rogers warned that “to circumscribe the President's ability to act in emergency situations—or even to appear to weaken it—would run the grave risk of miscalculation by a potential enemy regarding the ability of the United States to act in a crisis.”¹³

Rogers and other war powers opponents suggested that the Senate bill could undermine world peace and stability, and prolong unnecessarily what hostilities we may enter in the future. Their unpleasant scenario envisioned a conflict in which an aggressor would continue his efforts in the face of military setbacks in the hope that Congress would refuse to endorse the President's policy, thus compelling an American disengagement. Ironically, perhaps, Rogers also cautioned Congress that giving the President a thirty day *carte blanche* to commit forces to enumerated emergency situations could make future Presidents less cautious and possibly more likely to use excessive force to obtain desired ends before the thirty day expiration.¹⁴ Rogers also attacked the provision which called for congressional approval before forces could be dispatched to “situations where imminent involvement in hostilities is clearly indicated by the circumstances.” Rogers argued that hindering the President's ability to calm potentially explosive situations by a show of force would be a serious mistake, and could cause our NATO allies to doubt the “will and credibility” of the United States to deal with crisis

situations.¹⁵ In his testimony in April 1973, State Department Legal Adviser Charles N. Brower echoed the arguments Rogers had made, while cautioning Congress that “detailed rules of procedure will not necessarily produce correct foreign policy decisions. This is the illusion that legal formalism will ensure wisdom.”¹⁶ Administration spokesmen also referred to the numerous incidents in history where American forces were placed into combat by the President without prior congressional approval. Finally, both Rogers and Brower cautioned Congress about its prejudice against undeclared wars initiated by the President. Observing that formal declarations of war have been extremely rare in the twentieth century, they stated that declarations are often undesirable because they connote both domestically and internationally a commitment to total victory that may encourage excessive violence and impede settlement possibilities.¹⁷

In his testimony, Senator Barry Goldwater (R-Ariz.) stated that the President cannot undertake aggressive war on his own, but that his power to commit the nation to war to defend “our country, its people, and its freedoms, whenever and wherever in his judgment a danger exists, imminently or prospectively,” could not be infringed.¹⁸ In his opinion, the Senate bill constituted such a dangerous infringement.

Senator William Fullbright (D-Ark.) criticized the bill from the other side of the fence. He disliked the power it accorded to the President to launch defensive or preemptive operations to “forestall the direct and imminent threat” of an attack on the United States or its armed forces stationed abroad. Fullbright feared especially the ability the President would possess under the Senate bill to launch a nuclear first strike as a “forestalling” measure. In this light he made the curious remark that unlike the People’s Republic of China, the United States had not renounced the use of a nuclear first strike. He felt that Congress must “retain” control over the conventional or nuclear character of any future war.¹⁹

The Foreign Relations Committee summoned noted academic figures to testify at the war powers hearing in addition to interested members of Congress and executive branch officials. The late Professor Alexander

Bickel of the Yale Law School, Professor Raoul Berger of the Harvard Law School, and historians Arthur Schlesinger and Henry Steele Commager were among those to speak in favor of war powers legislation. All four endorsed the constitutionality of the Senate bill, though there were shades of disagreement on the practicability of specific provisions. Commager stated that the kind of military intervention the nation has undertaken since World War II, far from being consistent with historical practice, was “if not wholly unprecedented, clearly a departure from long and deeply rooted tradition.”²⁰ Responding to the administration’s platitude that “you cannot legislate wisdom,” Bickel replied that:

Congress and the President are indeed capable of acting unwisely, singly or together, but hopefully less likely together than singly. At any rate, together they are all we have got. The only assurance there is lies in process; in the duty to explain, justify, and persuade; to define the national interest by evoking it; and thus to act with consent.²¹

Among the scholars to speak out against the bill was former Under Secretary of State Eugene V. Rostow, in 1972 a colleague of Professor Bickel at the Yale Law School. In a widely read article which appeared in the *Texas Law Review*, Rostow endorsed the cardinal points of the Rogers-Brower argument: the need for flexibility, the danger of miscalculation by an adversary, and the diminished credibility of our treaty commitments with the war powers law in effect. Rostow’s argument ran much deeper than the administration’s. He perceived war powers legislation as a hasty reaction to Vietnam and as a symptom not of a desire by Congress to recapture its “lost” constitutional prerogatives, but of a rejection of the basic premises upon which our post-war foreign policy had been predicated. Rostow argued that since 1945, American foreign policy has been guided by the lessons of the 1930s which taught that World War II could have been prevented had the Western powers acted against aggression “firmly, boldly, and above all in good time . . . Today there is an outcry against these ideas . . . There must be a ‘new’ foreign policy that could liberate us from the bur-

dens we have had to bear since 1945.”²² Thus Rostow perceives a form of neo-isolationism as implicit in the war powers concept.

The Senate passed the Javits-Eagleton-Stennis bill in July 1973 by a vote of 72-18. As significant differences persisted between the Senate and House bills, a conference committee met in October to reconcile the two versions. What emerged was quite a bit different from the Senate bill. The thirty day cut-off unless Congress had endorsed the President's action was extended to sixty days, with an additional thirty for reasons of “unavoidable military necessity.” More importantly, however, the emergency conditions under which the President could act prior to congressional approval, which were spelled out in a legally binding section of the Senate bill, were placed under the “Purpose and Policy” section of the conference bill. The conference committee report explained that the Purpose and Policy section was “a statement of the authority of the commander-in-chief respecting the introduction of United States Armed Forces into hostilities.” The Report went on to say “subsequent sections . . . are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill.”²³ This meant that the President would have a ninety-day *carte blanche* to undertake any sort of military operation, even an offensive one, before Congress could compell a disengagement if it disapproved of the President's actions.

Senator Eagleton and other supporters of the Senate bill were shocked and dismayed. By delaying the congressional imprimatur for ninety days, one of the main intentions of the bill was subverted. Eagleton and others felt it crucially important that Congress share in the decision to use force before an actual commitment had been made. Otherwise, Congress must make the very difficult choice, fraught with dilemma, of compelling a withdrawal or evacuation of forces already engaged in hostilities. Eagleton dispaired of Congress ever summoning the will to force an end to ongoing operations, as he observed “Congress had been notoriously incapable of stopping a conflict once the flag has been committed.”²⁴ For these reasons Eagleton voted against the adoption of the conference report, opposing at the eleventh hour legisla-

tion he had helped to draft and guide through the Senate. Most other Senators who had supported the Senate bill chose to accept the new conference committee version even though they shared many of Eagleton's reservations. This was so to a significant, and unfortunate degree because of political events not related to the bill itself. Recall what was happening in October-November 1973: President Nixon, under mounting criticism from all sides because of the revelations of the Watergate Scandal, had recently fired special Watergate prosecutor Archibald Cox in the famous “Saturday Night Massacre.”

Nixon vetoed the conference bill on 24 October for the reasons administration spokesmen had been giving throughout the war powers debate.²⁵ This tended to transfer the issue from the bill's provisions to a question of Congress' capability to stand up to an increasingly discredited President. None of Nixon's vetoes had been overridden by the 93rd Congress in its ten month existence. One Senator told Eagleton after his speech in the Senate against the conference bill—“I heard your argument. I agree with you. I love the Constitution but I hate Nixon more.”²⁶ In the House, the vote to override was very close. Eight House liberals who had formerly opposed the conference bill switched sides to make the override possible. The margin was only four votes above the necessary two-thirds majority. For example, Congresswomen Bella Abzug and Elizabeth Holtzman, both New York Democrats, voted to override the veto in the final seconds before the voting period ended. This would seem to belie the assertion made by many Congressmen that their support of the bill was not influenced by the Watergate scandal. The conference bill was overridden by a margin of thirteen in the Senate and, as Public Law 93-148, on 7 November 1973 it became the law of the land.

Conclusion—What's Needed for a Good War Powers Law

Alexis de Tocqueville, the nineteenth century commentator on American politics, observed that “foreign politics demand scarcely any of those qualities which are peculiar to a democracy; they require, on the contrary, the perfect use of almost all those in which it is deficient.” It is difficult for democracies

to compete in world politics against totalitarian states. Democracies are suspicious of secrecy and, as recent newspaper headlines in the United States attest, not very good at it. Yet successful foreign policies sometimes require secrecy, as well as intimidation, threats, alignments with undemocratic states, and too often, the application of violence to obtain desired ends. Doubtless our foreign policy would improve under an omniscient President whose decisions would not be questioned or impeded by lesser men. The rub is how does one find such a man?; and, if one is discovered, what happens after his passing when a mere mortal might replace him?

If the United States were assured of having an omniscient President for all time, there would be no need for a war powers law. By the same token, if we could be assured of having an omniscient Congress, there would be no need for a commander-in-chief. What we have instead is government by fallible men based on the assumption that power is best left divided.

The separation of powers principle seems to be here to stay. No one during the course of the war powers debate seemed to think it was a bad idea. The nation needs to have a good war powers law; but the present law took one step forward and two steps backward. Certainly, this War Powers bill contains some very valuable ideas. Among these is that it compels the President to consult with Congress before committing forces overseas and to send periodic reports on the status of those forces and the situations in which they are involved. This section requires Congressional consent for any prolonged military action. The provision draws the President into the adversary processes of democracy. It forces him to state his proposal and persuade Congress and the American people to accept it. It is a way of alleviating what George Reedy, special assistant to President Johnson, has called the most important, and least examined, problem of the modern Presidency, which is maintaining contact with reality.²⁷ The President, who is now shielded from adversary politics, would be obliged to engage in public debate.

It also makes clear that our treaty commitments are not self-executing. Apparently this surprised several of our allies and has

caused them to worry aloud about American credibility as a world power. In reality, however, the mere fact that a given nation's signature appears on a treaty proclaiming a military alliance is not what matters. Alliances are based on a shared perception of a common threat. Alliance treaties are little more than verbal expressions of a common view of potential danger. This common perception can change as the danger mellows or if it is mistakenly thought to mellow. In this way treaties can become only "scraps of paper." History offers few examples of nations risking their security for "scraps of paper" that did not represent a much deeper concern than keeping promises. In 1914, Britain went to war ostensibly to honor its treaty commitment to Belgian neutrality, but the fundamental reason was that the British would not accept the jeopardization of their security which a German defeat of France would cause. The NATO treaty will become only a scrap of paper if, for whatever reason, the United States, or the West Europeans, come to feel that Soviet domination of Europe is not something worth fighting about to prevent. The fears that war powers legislation upsets our security treaties are chimerical. In reality it changes nothing as far as NATO, SEATO, or any of the others are concerned.

Nevertheless, the existing statute creates more problems than it solves. As Yale Law Professor Charles L. Black characterized it:

"Presented as a limitation on presidential power, [it] can hardly be read as other than a very nearly explicit authorization of any presidential action whatever, with Congress exercising supervisory power later along, after the commitment has been made."²⁸

The conference committee made a great mistake by its decision not to require prior congressional consent for presidential war-making in other than emergency situations. A situation in which Congress felt compelled to force a withdrawal of forces already engaged in hostilities would be a nightmare for all concerned, not the least of which would be the military personnel, officers and men, doing the actual fighting. This should be avoided if at all possible. The effects on service morale would be lamentable and

frightening. More likely, however, Congress could never steel itself to make such a decision unless a military venture had proved to be utterly calamitous, either on the battlefield or at home, and more likely both. Additionally, if for some reason (albeit an unlikely one) Congress became too zealous in compelling withdrawals after sixty days, the world could bear witness to a succession of American Dunkirks that would be comical if it were not so tragic. Even if Congress fails to appreciate what might be sound reasons for a President's desire to use force, that would be preferable to getting into a war for the right reasons at the wrong time.

Senator Goldwater and others expressed the view that the President must not be deprived of his ability to defend and protect United States lives and interests throughout the world. This is a wise and prudent judgment. It is the price we pay for living in a world where force, and not law, is usually the arbiter of the future. It would be a foolish mistake to deprive the President of the ability to wage a defensive war, as Senator Fullbright seemed to think advisable.

However, there remains the problem of determining what a defensive war is. Nearly all belligerents call their half of any war "defensive"; it's the other side who's waging an aggressive, "offensive" war. Even Hitler claimed his invasion of Poland in 1939 was a defensive war made necessary because Poland was about to attack Germany. In 1848, Congressman Abraham Lincoln addressed himself to this point:

Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you will allow him to do so, whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect . . . If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him, I see no probability of the British invading us but he will say to you be silent: I see it if you don't.²⁹

Section (3) of the Senate bill presented as workable a definition of defensive war as can

likely be written. In that section, the President is empowered to "forestall," or preempt, the "direct and imminent threat" of attacks on the United States itself and on American armed forces abroad without a declaration of war. In the event of attacks on the United States, he may take "retaliatory" actions as well. He may use the armed forces to rescue American citizens abroad, but with provisions that prevent such an operation from being used as a guise to cloak ulterior motives. In any other situation, the President must first secure the approval of Congress before resorting to the use of armed forces.

Congress' record in foreign affairs since the adoption of the present war powers law has not been impressive. The failure of the present bill to involve the Congress in any of the decisionmaking processes surrounding the evacuation from Vietnam or the *Mayaguez* affair illuminates both the weaknesses of the statute and congressional reservations about accepting the constitutional responsibility that they claim the President has usurped. If the codifications which delineate the responsibilities of each of the branches in times of crisis are not written with clarity and are not as all-inclusive as humanly possible, there will always be incidents where the proper relationship between the executive and the legislative branches regarding the handling of the problem is in question. Congress cannot expect to have a strong war powers bill without institutionalizing that relationship as explicitly as possible. If Congress continues to evoke its constitutional authority in as haphazard a manner as it has in the last two years, becoming involved in the Angolan and Cypriot situations but not in the evacuation from Vietnam or the *Mayaguez* affair, Congress will always be subject to charges of meddling in Presidential concerns and the formula for democratic participation in decisions to use force will remain cloudy.

However, a return to the original Senate bill would clarify the situations in which the President's emergency powers do allow him to act unilaterally and would specify the situations in which the President can act only with prior authorization.

Some flexibility would be lost to the President in his conduct of diplomacy. This weakness is inherent in our democracy and

we would be better off recognizing our limitations. Nevertheless, that loss of flexibility would be more than compensated by the gain of a truly democratic dialogue on the issues of foreign policy.

The adoption of such a bill would demonstrate to future Presidents that the judgment to send this nation to war is not his alone and that while unforeseen circumstances may compel him to abandon the rule in favor of an exception, "he should not pretend—as Jefferson, Lincoln and Roosevelt declined to pretend and as Johnson and Nixon have pretended—that the exception is the rule."³⁰

The Senate bill is not perfect, but then we do not claim to know what a perfect war powers law would be. As the spokesmen for the administration pointed out throughout the course of the war powers debate, the world has probably already seen the last formal declaration of war. Future wars will either be conventional wars limited in scope, or total, nuclear wars which could be over within hours, if not minutes. For the former, declarations of war are undesirable; for the latter, impossible. Nevertheless, Congress must have a part beforehand in any decision that involves the armed forces in combat situations. A good war powers law would help to ensure that the President will not commit the nation to policies it will not accept. If the President does perceive real dangers others are too slow to recognize, then his task is to educate them, and not compel them to do what they do not want to do. After all, as Theodore Roosevelt remarked, the Presidency is a "bully pulpit".

NOTES

1. Dean Acheson, *Present at the Creation*, (New York: W. W. Norton & Company, 1969), p. 415.
2. Arthur H. Vandenberg, Jr., ed., *The Private*

Papers of Senator Vandenberg, (Boston: Houghton-Mifflin Company, 1952), p. 568.

3. Edward S. Corwin, "The President's Power," *The President: Roles and Powers*, ed. David E. Haight and Larry D. Johnston (Chicago: Rand McNally & Company, 1965), p. 361.
4. Quoted from Thomas F. Eagleton, *War and Presidential Power*, (New York: Liveright, 1974), pp. 100-101.
5. U.S., *The Department of State Bulletin*, Vol. LIV, No. 1396, 28 March 1966, p. 484.
7. U.S., Congress, Senate, Committee on Foreign Relations, *Report together with Supplemental Views to accompany S.440*, Report No. 220, 93d Congress, 1st Session, 14 June 1973, (hereinafter cited as *Report, S.440*), p. 15.
8. *Report, S.440*, p. 16.
9. *Ibid.*, p. 17.
10. Eagleton, pp. 134-135.
11. *Ibid.*, pp. 130-131.
12. *Report, S.440*, p. 26.
13. *Department of State Bulletin*, Vol. LXIV, No. 1667, 7 June 1971, p. 732.
14. *Department of State Bulletin*, Vol. LXIV, No. 1712, 17 April 1972, p. 580.
15. *Ibid.*
16. *Ibid.*, Vol. LXVIII, No. 1763, 9 April 1973, p. 57.
17. *Department of State Bulletin*. Vol. LXIV, No. 1667, 7 June 1971, p. 732.
18. U.S., Congress, Senate, Committee on Foreign Relations *Hearings, S.440*. 93d Congress, 1st Session, 11 and 12 April, 1973, (Washington: Government Printing Office, 1973), (hereinafter cited as *Hearings, S.440*), p. 118.
19. *Report, S.440*, p. 35.
20. *Ibid.*, p. 14.
21. *Hearings, S.440*, p. 23.
22. Eugene V. Rostow, "Great Cases Make Bad Law: The War Powers Act" *Texas Law Review*, Vol. 50, No. 5, May 1972, p. 25.
23. U.S., Congress, House, Committee on International Relations, Subcommittee on International Security and Scientific Affairs, *The War Powers Resolution*, 94th Congress, 2d Session, January 1976 (Washington: Government Printing Office, 1975), p. 14.
24. Eagleton, p. 203.
25. *Department of State Bulletin*, Vol. LXIX, No. 1796, 26 November 1973, p. 662.
26. Eagleton, p. 220.
27. George E. Reedy, *The Twilight of the Presidency*, (New York: World Publishing Company, 1970), p. 3.
28. Charles L. Black, "The Presidency and Congress," *The Washington and Lee Law Review*, Vol. XXXII, Fall 1975, p. 850.
29. *Quoted from Report, S.440*, p. 29.
30. Arthur S. Schlesinger, Jr., "Congress and the Making of American Foreign Policy," *Foreign Affairs*, Vol. 51, October 1972, p. 113.

BIBLIOGRAPHY

Acheson, Dean

Present at the Creation, New York: W. W. Norton & Company, 1969.

Eagleton, Thomas F.

War and Presidential Power, New York: Liveright, 1974.

Reedy, George E.

The Twilight of the Presidency, New York: World Publishing Company, 1970.

Vandenberg, Arthur H., Jr. ed.

The Private Papers of Senator Vandenberg, Boston: Houghton-Mifflin Company, 1952.

Articles, as specified in citations, from Charles L. Black, *Washington and Lee Law Review*; Edward S. Corwin, *The President: Roles and Powers*, edited by Haight and Johnston; Eugene V. Rostow, *Texas Law Review*; and Arthur Schlesinger, Jr., *Foreign Affairs*.

Government Documents

Department of State Bulletin

United States Congress, House, Committee on Foreign Affairs, Subcommittee on National Security Policy and Scientific Developments, *War Powers: Hearings*, 93d Congress, 1st Session, 7, 8, 13, 14, 15, 20, March 1973.

— Committee on International Relations, Subcommittee on International Security and Scientific Affairs, *The War Powers Resolution*, January 1976, Washington: Government Printing Office, 1975.

United States Congress, Senate, Committee on Foreign Relations, *War Powers: Report on S.440*, No. 220, 93d Congress, 1st Session, 14 June 1973.

— *War Powers Legislation: Hearings on S.440*, 93d Congress, 1st Session, 11 and 12 April 1973, Washington: Government Printing Office, 1973.

— *War Powers: Report on S.2956*, No. 92-606, 92d Congress, 2d Session, 9 February 1972.

— *Documents Relating to the War Power of Congress, The President's Authority as Commander-in-Chief and the War in Indo-China*, 91st Congress, 2d Session, July 1970, Washington: Government Printing Office, 1970.

— *National Commitments: Report on S. Res. 85*, No. 91-129, 91st Congress, 1st Session, 16 August 1969.

— *Separation of Powers: Hearings*, 90th Congress, 1st Session, 19, 20 July; 2 August; 13 and 15 September, 1967, Washington: Government Printing Office, 1967.

THE IMPERIAL PRESIDENCY: THE TUG TOWARD ISOLATION

by

ALAN F. ARCUJ

*Associate Professor of Political Science
Stockton State College*

Introduction: Of Courtiers and Kings

"The president has too much power." The statement has almost become a cliché. Journalists and scholars have often written about the accretion of presidential power. Terms like the imperial presidency and constitutional dictatorship are now part of the vocabulary of American politics.¹ Watergate has given rise to a rich harvest of studies,² some of which touch on the dangers of insulating the president, others with the tyranny of the president's men and still others with the character or personality that a chief executive requires to avoid the pitfalls endemic to White House leadership.

The major thesis of this study is that

despite the radical changes in presidents' personality, character and political style, a pattern of isolation has emerged. The paper focuses on some of the causes and consequences of a regal presidency. The causes have developed over a generation with the growth of presidential power. The consequences have blurred the vision of several presidents and flawed, if not crippled, the formulation of major policies.

George Reedy, former Press Secretary to Lyndon Johnson, was one of the first to sound an alarm.³ He wrote about the president as a monarch, surrounded with all the trappings of royalty: a battery of servants