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Legislating War Powers

Is it possible to draft legislation that will restore to Congress a meaningful role in war-making without crippling the United States in its international relations? Foes of the war-powers bill say it is not. Their strongest argument is that our responsibilities as a super-power in a chaotic world are so complex that the President must have a free hand in using our military forces without the restraint of legal formalities.

A few years ago that view was widely held. It commands less support today, not only because the perils of presidential wars have been so graphically demonstrated, but also because patient and understanding legislators have devised a bill that gives promise of restoring the constitutional balance without excessive rigidity. Chief credit for the bill goes to Senator Jacob Javits, but it now has 60 sponsors in the Senate.

In its present form S. 440 is a composite worked out largely by Senators Javits, John Stennis and Thomas Eagle-

This is the third of three articles by Merlo J. Pusey, former associate editor of The Washington Post and author of "The Way We Go to War." The first two articles appeared on Monday and Tuesday in this space.

ton and their staffs. Senators Robert Taft and Lloyd Bentsen, who had introduced war-powers bills of their own, joined the trio for the sake of consolidating support behind a single measure. The Foreign Relations Committee held extensive hearings, and the Senate passed the bill in April, 1972, by a vote of 68 to 16.

The measure failed to become law last year because the House passed the much weaker Zablocki bill and there was time for only one meeting of the conference committee before Congress adjourned. New hearings have already been held on the House side this year, however, and new Senate hearings are scheduled for today and tomorrow. Representative Clement J. Zablocki has substantially strengthened his bill, and the prospect that a useful measure will be sent to the White House has notably improved.

It is worthy of note that these are not partisan bills designed to embarrass the President. The Republican and Democratic sponsors have worked closely together with the commendable objective of reasserting the constitutional authority of Congress and of preventing presidential wars. Both the majority and minority leaders of the Senate are co-sponsors of the Javits-

Stennis-Eagleton bill. It likewise has wide support among both liberals and conservatives.

Care has been taken to avoid any encroachment on the President's constitutional powers. By way of codifying the law, which Congress has a right and duty to do under the "necessary and proper" clause of the Constitution, the bill spells out the circumstances under which the armed forces could be used without a declaration of war. The President could repel an attack on the United States territory or its armed forces stationed outside of the country. He could retaliate against such attacks, and he could act to "forestall the direct and imminent threat of such an attack." He could use military force to protect the evacuation of American citizens abroad if their lives were in imminent danger, and of course he could act under any specific congressional authorization such as the Middle-East resolution.

The later provision does not, of course, imply that Congress might again give the President blank checks in regard to using military force, as it did in passing the Tonkin Gulf resolution. The bill specifically provides that the right to use the armed forces in hostilities shall not be inferred from any resolution unless such action is specifically authorized. Specific congressional authorization is also required for the assignment of any part of our military to the armed forces of another country that is at war or in imminent danger of being involved in hostilities.

To minimize controversy, the bill leaves undisturbed the three so-called

area resolutions now on the books—authorizing the use of armed forces in Formosa, the Mideast and Cuba, if the President finds it necessary. It is anticipated, however, that one of the first actions of the President under the bill would be to review these situations and go to Congress with fresh recommendation.

One of the most delicate problems sponsors of the bill had to deal with was its effect on NATO. The NATO treaty provides that an attack upon one of its members shall be regarded as an attack upon all of them. If it is to remain effective, the unified NATO commands must be able to respond to attacks in Europe at the discretion of the President (and other NATO executive authorities) without waiting for legislative action. The Foreign Relations Committee report interprets the bill, however, as meaning that "no treaty, existing or future, may be construed as authorizing use of the armed forces without implementing legislation." This seems to say that any military action by American forces in defense of an ally in NATO would have to be approved by Congress.

The debate in the Senate makes clear that no such crippling of NATO is intended. The President could respond to an attack upon a NATO country if American forces stationed there were involved or if he deemed the attack to be also aimed at the United States. Such action would not necessarily mean full-scale war any more than a presidential response to an attack upon the United States would. In either case follow-up action by Congress would be necessary if a war had to be fought.

Congress has a legitimate interest in preventing use of the NATO treaty as a substitute for a declaration of war. A treaty ratified only by the Senate cannot nullify the war power which belongs to both houses. In reasserting its war power, however, Congress should be careful to avoid casting any doubt upon the right of the President to speak for the United States in authorizing immediate NATO action in case of an emergency. The language of the

report on this point needs to be clarified.

The heart and core of the bill are Sections 4 and 5. Section 4 would require the President to report promptly to Congress whenever he might take emergency military action under the terms of the bill. Section 5 would forbid him to continue the hostilities thus begun for more than 30 days without congressional approval, unless Congress had been put out of operation by an armed attack. In any circumstances, however, the military could continue to fight while disengaging from the unauthorized hostilities.

In case of an outrageous abuse of presidential power to make war Congress could, by a two-thirds vote (overriding a veto), tell the President to stop in less than 30 days. And of course Congress could always extend the 30-day period by legislative action. Accelerated procedures are laid down to make certain that Congress would not be hamstrung by filibustering or other dilatory tactics. While the 30-day cut-off is necessarily arbitrary, it would allow time for reports and deliberation, and it would force Congress to act before a military build-up like that in Vietnam could take place.

The effect of the bill would be to put the President on notice that he could not undertake a military venture without explaining to Congress his action and his aims and his claim of authority. That alone would be a powerful restraint upon dubious hostilities that would not bear scrutiny or win popular support. Even more important, the bill would almost compel Congress to face the issue and to assume responsibility for the course to be taken.

Congress itself has been shamefully negligent in relinquishing into the hands of the President all but absolute control over the fate of the nation. Now it is attempting by cool and rational legislation to redress the balance and to assume its rightful place as the national policy-making body. Every American has a vested interest in the success of this undertaking, even though the details of the bills under consideration are still open to debate, clarification and improvement.