

After the war, hard task of limiting powers begins

WASHINGTON — President Nixon's order for the Christmas carpet-bombing of Hanoi and Haiphong was perhaps the most imperial military decision in American history, although its purpose was diplomatic. It was not taken during a declared war, or in a domestic emergency such as Lincoln had to deal with, or in general consultation with Congress and the United Nations, as was Harry Truman's decision to defend South Korea, or even with the dubious authorization of the Tonkin Gulf Resolution upon which Lyndon Johnson relied. Nixon's bombing decision apparently was not discussed even with his own joint chiefs of staff.

But it is unlikely that even this horrendous expansion of the so-called "war powers" of the president as commander-in-chief will lead Congress to decisive action to restrict those powers. For the immediate future, Nixon remains an active commander-in-chief, ordering both military operations and peace negotiations; no Congress is likely to take the risky political step of attacking a president's powers in those circumstances, particularly in view of the new bombing halt.

In the era of nuclear-tipped missiles, moreover, the president must retain the power to act decisively and swiftly in response to threats from abroad. This necessity, plus the President's role as commander-in-chief, makes it most difficult to frame a satisfactory device for restricting his ability to make presidential war.

Curtailing President's powers

The so-called War Powers Act now pending, for example, would require a president who had sent the Marines to the Dominican Republic or the B52's to Hanoi to report to Congress within 30 days and to ask for its approval. This would give a president 30 days of war-making license not specified in the Constitution. Worse, it wraps the president in the flag, gives him the initiative as a commander-in-chief who has acted in what he will surely call the national interest, and puts the onus on Congress to declare that he was wrong and ought not to have done it.

Congress will not often be so lionlike—quite the opposite — so the War Powers Act might well become a device for underwriting—not restraining—presidential acts of war. But congressional resolutions of policy, another possible device, have almost no teeth; Nixon, for example, merely shrugs off as not binding on him the Mansfield resolution which declares it national policy that the war in Vietnam should end on a certain date. As for cutting off funds for the war, Nixon has only to veto any bill that might

attempt to do it. After that a two-thirds vote would be required in each house.

The Supreme Court is hardly the answer. If it tried to define presidential war powers, it would undertake to control the "co-equal" executive branch on the most sensitive questions of national policy. If it actually sought to restrict the presidency, it might not be able to enforce its decision; or as now constituted, it might even expand the war powers, or confirm Nixon's view of

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them. In any case, no Supreme Court is likely to stumble into such a political thick-et.

So, as a practical matter there is no handy device, no quick and easy way to restrict presidential war powers. But the first necessary step toward that difficult goal surely is an end to the war in Vietnam. While Nixon is actively functioning as commander-in-chief, while operations proceed, while he can base his actions on the demands of war, while he can clothe his policy in the "national interest," attacking his powers—even, to some extent, his policies—is too much like aiding the enemy; those who do it are even seen to be the enemy by people who consider their president the righteous leader of a peace-loving but mighty nation.

New attitude needed

But once the war — or at least overt American participation in it—is over, Congress will not be in the position of attacking the commander-in-chief in wartime. Then, one useful precedent might be the Cooper-Church amendment of 1970, which prohibits the use of any appropriated funds for committing American "ground combat forces" to Laos, Cambodia or Thailand.

This strong amendment was passed and accepted by Nixon only as part of a Cambodian aid package he desperately wanted, and then only after the Cambodian invasion that produced it had been concluded. In similar circumstances, there might be a chance for an equally strong prohibition against using appropriated funds for renewing at least the ground war—possibly the air war, too—in Indochina.

That would not be the answer to the war powers problem, but it would be a first small step toward what is finally going to be needed—a serious revision in Congress, in the press, in the public they are supposed to serve, of the attitude that in national security affairs, the president knows best.