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The Power to Make Wars

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By RICHARD B. MORRIS

Prof. Eugene Rostow's recent analysis of the Javits-Stennis war-powers bill constitutes so serious a distortion of American constitutional history and so warped an interpretation of the bill's provisions and likely effects that it should not go unanswered. Nothing in the bill justifies his condemnation of it as a "bold" bid for constitutional supremacy unrivalled "since the impeachment of Andrew Johnson" nor his contention that it is based upon a legal theory which would permit "a plenipotentiary Congress to dominate the Presidency (and the courts) more completely than the House of Commons governs in Great Britain."

This is nonsense. If any branch of the Government has usurped the war-making powers of the Constitution it has been the executive arm and not Congress, with consequences that have proven detrimental to the national interest.

The Constitution is clear on its allocation of the war powers. That document clearly distinguished between declaring war and supporting it on the one hand, and conducting its operations on the other. Article I, section 8 vests in Congress the right to declare war and to raise and support armies, but limits to a maximum of two years the appropriation of money to their use. On the other hand, Article II, section 2 describes the President as Commander in Chief.

Throughout the debates on the drafting of the Constitution and its ratification one finds a deep concern about executive usurpation matched by an equal concern (and remarkable prescience) that the war powers remain lodged in the legislative branch of the Government, wherein they had been previously vested from the start of the American Revolution. At the same time the Founding Fathers made certain that the executive arm which they were in the throes of fashioning was given emergency powers for military defense.

To allay widespread fears that the warmaking powers under the Constitution would subvert republican institu-

tions the authors of The Federalist papers made a point of construing the President's role rather narrowly. The early Presidents used their military powers with caution. Even Washington's authority to issue a proclamation of neutrality seemed moot, James Mad-

ison contending that neutrality was merely the negative side of a declaration of war and required Congressional approval.

It is the undeclared war now being waged in Indochina, not the prospect of passage of the Javits-Stennis bill, which is damaging our prestige and credibility abroad, tragically dividing the American people, and diverting resources from the most urgent tasks of domestic reconstruction. In my considered judgment that bill sets the constitutional balance true. It provides urgently needed clarification of the warmaking powers in the spirit of the drafters and ratifiers of the Constitution without hampering the President in his capacity as Commander in Chief to act in defense of national security.

Professor Rostow and others protest that the Javits-Stennis bill would have inhibited the President in the Cuban missile confrontation. They scrupulously avoid mentioning the misconceived Bay of Pigs invasion or the dubious intervention in Santo Domingo. What the bill seeks to eliminate are brinkmanship and tiltmanship, the bankruptcy of the latter strategy all too evident in our recent posture during the India-Pakistan war.

The fact of the matter is that our disastrous involvement in Indochina did not come as a flashing meteor in the skies but resulted from a state of political erosion in that area going back a quarter of a century. Indubitably during that considerable period of time there must have been some moment when the issue of war or peace could have been put to Congress on a basis more candid and substantial than the Gulf of Tonkin Resolution.

Instead of candid communication between the executive and Congress we have had unparalleled doubletalk, evasion, and concealment. We have seen a phantom undeclared war, which was supposed to contract, continue to escalate, one which was supposed to shorten, spitefully drag on, one which now shrinks on land and expands in the skies.

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