

A Dangerous Law

By Thomas F. Eagleton

WASHINGTON—Congress's recent override of President Nixon's war powers veto has been acclaimed as an "historic recapture" of the Congressional prerogative to declare war. But the opposite is true. After struggling for three years to re-establish its primacy in the war-making area, Congress has now legally relegated itself—unconstitutionally, in my opinion—to the secondary role it has sadly and mistakenly accepted in the contemporary era.

According to the new law, a President must come to Congress only *after* American forces are committed to battle. Despite disclaimers contained in the legislation that the constitutional schema is left undisturbed, the recently enacted formula allows up to ninety days of unilateral Presidential war-making before any specific Congressional consent is required.

Under a "Purpose and Policy" section, which has no statutory effect, the bill states that the President's war powers "are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by an attack on the United States . . . or its armed forces." That is acceptable language, but it is legally meaningless; it is, to use a White House term, inoperative. Lest this escape the President's attention, the conferees have stated in their managers' report that the operative sections of the bill "are not dependent upon the language" in the "Purpose

and Policy" section. Thus the enacted law completely skirts the constitutional impasse over prior authority that originally inspired war powers legislation.

The President assumes the inherent right to initiate war. By remaining silent about this assertion and attempting only to impose an after-the-fact review, Congress has now provided a legal basis for the President's erroneous claim. Instead of curbing executive power, the bill has dangerously expanded it.

The Constitution says "Congress shall declare war," not "Congress shall stop war." The legislative branch is simply not constituted to act as a brake after the flag has been committed.

It will now take a majority vote to stop a Presidentially initiated war. But even during the long years of our most unpopular conflict, how many times did cut-off amendments muster even a simple majority? Nine years later and only after the troops came home was Congress willing to act to stop the Indochina war. And even then, the end came by compromise, on the President's terms.

If Congress is going to revitalize the war powers clauses of the Constitution it must spell out those emergency powers which adhere to the President by reason of his status as Commander in Chief. We must either ratify or reject previous court decisions which have recognized his limited unilateral authority to repel attacks upon the nation, its forces and its citizens abroad. And, in all other cases, we should

make clear that Congress must authorize involvement in hostilities *before* the flag is committed.

When the President vetoed the War Powers Resolution he mistakenly saw limitations on his power where in reality the opportunity for expansion exists. The 90-day clause, which was cited in the veto message as restricting executive action, will no doubt soon be transformed into the 90-day battle plan.

We cannot ignore the Constitution, even to deal with those who refuse to be guided by it. The war powers resolution is a dangerous law, and it should be amended before it is used to undermine the intent of that great document.

It has been reported that the Administration is reviewing the war powers resolution to determine whether it can be used as legal authorization for a resumption of U.S. military involvement in Indochina. I do not believe that it can. Public Law 93-126 contains a provision stating that no funds can be expended for combat activity in Indochina "unless specifically authorized hereafter by the Congress." The war powers resolution, while a blank check for all other areas of the world, cannot be construed as specific authorization to resume bombing in Indochina within the meaning of the public law.

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