

Capital's Constitutional Problem: Does Power to Make

By MAX FRANKEL

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WASHINGTON, May 14—The students who have left the campus to lobby in the Congress this week obviously thought they were leaving academics for politics, but they are caught up now in one of the most difficult intellectual problems of American constitutional law: the power to make war.

News Analysis

Aggrieved by the policies of two successive presidents, the opponents of the war contend that "the system" can be saved only if Congress responds to public sentiment and reasserts its constitutional prerogatives. They want the Congress to use its last real power—the power of the purse—to limit the ways in which the President may spend military funds, limiting at once his right to remain in Cambodia and perhaps, in due time, even in Vietnam itself. For the moment, this is a

political problem, an effort to give the antiwar movement a sense that one arm of Government is being responsive, to censure President Nixon for moving into Cambodia without the consent of Congress and to create a legal or at least psychological barrier that would make it difficult for the President to intensify the war in other ways.

Nixon's Deeper Problem

But Mr. Nixon is resisting the move, and for more than tactical reasons. He sees a deeper problem of presidential prerogatives in a tense and dangerous world, where the requirements of technology and secrecy and paramilitary ventures make consultation with Congress difficult and where his freedom to act militarily bears directly on the strength of his diplomacy.

Like most Presidents in this century, Mr. Nixon approaches the constitutional issue as a loose constructionist. Pleading emergency, or collective security, or the defense of American

lives or property or simply the rights and duties of making foreign policy and being Commander in Chief, the two Roosevelts, Woodrow Wilson, Harry Truman, Dwight Eisenhower, John Kennedy, Lyndon Johnson and Richard Nixon have all moved American troops into action or across national frontiers with only the faintest nod toward Congressional sentiment.

They have, in fact, believed that they alone could determine how and when to risk battle, leaving Congress its constitutional right to "declare" war only in the clear and present dangers posed by attacks in World Wars I and II.

In the last 20 years alone there have been presidential moves not only into Korea, Lebanon, Cuba, Vietnam and the Dominican Republic, but also through distant naval operations, undercover plots, military advisory programs and aerial over-flights most of which risked conflict without any chance of Congressional review.

But it was not always thus. The founding fathers, fearing a monarch's imposition of war as the greatest oppression of all, clearly intended Congress to hold the power to initiate hostilities. The early American Presidents honored that intent, even in periods of crisis and foreign provocation.

The American presidency was then held to possess the right and duty to defend the nation, but not to risk or start a war. To make sure, the Constitution explicitly insisted that Congress limit all military appropriations to two years.

Gradually, through the 19th century, Presidents began to stretch the Constitution to their policies or convenience, sending troops into Latin countries in "hot pursuit" or to protect lives, claiming at first to be "neutral" in the politics of the invaded country but pursuing what could only charitably be called diplomacy by gun.

Congress was sometimes enthusiastic, but sometimes reluc-

War Belong to President or Congress?

tant. Though it declared war on Mexico in 1846, after the war had begun, it later censured President James Polk for waging war unconstitutionally, as well as unwisely. After World War II, the Congress added to the war-making prerogatives claimed by the White House, readily passing resolutions and treaties and military aid programs that could be read as sanction for major war, and have been so read in Vietnam.

Up to the Voters

Thus by the time President Nixon decided to move into Cambodia he felt no need of any legal justification except the broad statement that he was acting to defend the lives of American troops. He not only ignored but also affronted many in Congress by insisting that this was an issue only between him and the voters, arguing as before that if they did not like his foreign policy they would deal with him in 1972.

As a group of distinguished

lawyers who oppose the Cambodia decision observe in a brief inserted yesterday in The Congressional Record, Mr. Nixon's move "is not without historical precedent and not without justification under a broad interpretation of the collective security theory."

"However, the real question," they add, "is whether the balance has shifted too far in favor of the Executive." Any intervention is risky and unpredictable, they contend, and even a limited risk of war should be put to Congress.

Even if the Congress were to forbid the use of military appropriations for action in Cambodia after July 1, as now proposed in the Senate, there would really be no way to en-

force the edict on the President short of impeachment. The current efforts, therefore, are essentially political in purpose: to restrain the Executive and to force it to confide in the Congress in the future.

And even if the Congress were to reassert, in the bluntest terms, a constitutional right to pass on every action involving a risk of war, it is poorly equipped to monitor the Pentagon or the Budget Bureau to assure its will.

But the pendulum of sentiment here has visibly swung away from the all-powerful Executive and the effort to channel antiwar protest into political action is posing the question in its most difficult, unconstitutional form.