

The War Powers

By Elizabeth Holtzman

WASHINGTON—I voted against the War Powers Bill of 1973 because its actual effect would be to sanction for 123 days combat operations initiated solely by the President.

After careful study of the Constitution, I have concluded that the President lacks the power to begin or carry on a war without Congressional approval for even one day, except in an emergency to repel an attack on this country. Nor should he have that power.

Article I, Section 8 of the Constitution specifically grants to the Congress the power to declare war as well as to raise armies. Although Article II provides that the executive shall be "Commander in Chief of the Army and Navy," this provision does not diminish the power granted to the Congress under Article I.

The intention of the drafters of the Constitution was very plain. They were aware of the bitter experience under the British in which the King had the sole power to start a war and continue it without anyone's approval. The framers of the Constitution did not want to import the abuses of an absolute monarchy. They therefore decided to split the warmaking powers into two parts.

First was the power to start a war. This they explicitly placed in the hands of the Congress. Second was the power to carry on a war once it was authorized. This was explicitly placed in the hands of the President.

This premise is well-documented in the accounts of the debates at the Constitutional Convention. For example, Messrs. Madison and Wilson both agreed that "executive powers . . . do not include the rights of war and peace." And Mr. Gerry expressed the view that he "never expected to hear in a Republic a motion to empower the executive alone to declare war."

Alexander Hamilton, a strong exponent of a powerful President, said: "It is the peculiar and exclusive province of Congress, when the nation is at peace to change that state into a state of war . . . in other words, it

belongs to Congress only, to go to war."

Subsequent statements also confirm that Congress has the sole right to commence a war, except to repel attack on the United States or possibly other limited defensive circumstances.

Nonetheless, the War Powers Bill of 1973 does not restore to Congress its crucial right over the decision to involve this country in a war. Instead it attempts to restore Congressional prerogatives only after an illegal war has been commenced by the President. Thus, it requires automatic disengagement from military activities after 123 days and permits Congress by concurrent resolution to halt military activities before that time. But even these minimal attempts are not effective.

First, it may well be that Congressional disapproval of a Presidential war would be subject to a veto—and that one-third-plus-one of either house could therefore thwart a peace effort.

Second, even the 123-day limitation on the President's ability to wage war is illusory. It does not consider the fact that in this age of technology the President could launch, without Congressional consent, a nuclear attack that would within hours destroy the earth.

Even in conventional military endeavors, experience demonstrates that allowing a President the right to send American forces into hostilities creates a momentum which is difficult for Congress to overcome. Men are lost in action. Prisoners are taken. And disengagement of troops becomes difficult due to their vulnerability. After the expiration of 123 days, Congress could be placed in a position of having to support the President lest the lives of American fighting men be endangered.

It is crucial to reassert the rights and responsibilities of Congress over the warmaking power in accordance with the Constitution. The way to do it, however, is not implicitly to grant to the President—as this bill does—the power to commence and conduct a war for 123 days in the absence of Congressional approval.

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