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On April 11, 1972, the Senate of the United States passed and sent to the House Senate Bill 2956.[1] It is described as "a bill to

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1. S.2956, 92nd Cong., 2nd Sess. (1972). Section 3, on which this note will concentrate, is as follows:

EMERGENCY USE OF THE ARMED FORCES

In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—

(1) to repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;

(2) to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;

(3) to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country; or

(4) pursuant to specific statutory authorization, but authority to introduce the Armed Forces of the United States in hostilities or in any such situation shall not be inferred (A) from any pro-

make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress," and titled "The War Powers Act."

In *Mora v. McNamara*,[2] Mr. Justice Stewart, commenting on the constitutional issues raised by the Vietnam war and the Tonkin Bay Resolution, stated "These are large and deeply troubling questions."[3] They are large because they involve fundamental concepts in the separation of powers between the Legislative and Executive Branches pertaining to the use of our armed forces, the implications of which affect most aspects of our foreign policy. They are troubling because not only does the Constitution offer, at best, only the briefest of express guidance in the matter, but judicial interpretations in opinions to date have not clearly defined the independent war powers of the Executive.

The applicable constitutional provisions bearing both directly and indirectly on the problem are as follows:

1. Congressional authority. Article I.
   Section 8. The Congress shall have the power:
   - Cl. 1. To provide for the Common Defense.
   - Cl. 11. To declare war, grant Letters of Marque and Reprisal and to make Rules concerning Captures on Land and Water.
   - Cl. 12. To raise and support Armies, but no appropriation for that use shall be for a longer term than two years.
   - Cl. 13. To provide and maintain a Navy.
   - Cl. 14. To make rules for the Government and Regulation of the land and naval Forces.
   - Cl. 18. To make all Laws which shall be necessary and proper for carrying into Execution the

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vision of law hereafter enacted, including any provision contained in any appropriation Act, unless such provision specifically exempts the introduction of such Armed Forces from compliance with the provisions of this Act, or (B) from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the provisions of this Act. Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such Armed Forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities. No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities or in any such situation, within the meaning of this clause (4); and no provision of law in force at the time of the enactment of this Act shall be so construed unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in any such situation.

2. 389 U.S. 934 (1967) (Stewart, J. dissenting from denial of certiorari).

3. *Id.* at 935.

foregoing Powers and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof.

2. Executive Authority. Article II.
   Section 1, Cl. 1. The executive power shall be vested in a President.
   Section 2, Cl. 1. The President shall be Commander in Chief of the Army and Navy of the United States.
   Cl. 2. He shall have Power, by and with the advice and Consent of the Senate, to make Treaties, provide two-thirds of the Senators present concur; and he shall nominate and by and with the Advice and Consent of the Senate, shall appoint Amassadors, . . . consuls . . . .
   Section 3, . . . he shall take care that the Laws be faithfully executed. . .

From these enumerated powers in Article II is derived the President's constitutional authority to conduct the foreign relations of the United States.

The central controversy in the Senate Committee hearings on the bill surrounded the extent of Congress' authority, flowing from its power to declare war, as opposed to the extent of the President's authority, emanating from his triple role as Chief Executive of an independent branch of government, as Commander in Chief of the Armed Forces, and as the official who conducts the foreign relations of the United States.

In regard to the President's role as Commander-in-Chief, it is clear from the intent of the drafters of the Constitution that the President was not to have the power to initiate hostilities, as the King of England at that time enjoyed. Congress alone was to have such power under its authority "to declare war."[4] However, the actual exercise of such express constitutional authority by Congress has never been limited to a ritual of formally "declaring war." The existence of such a literal interpretive requirement was rejected by the Supreme Court within a decade of the founding of the nation. In *The Eliza*,[5] the Court drew a distinction between "solemn wars," that is those declared by Congress, and "imperfect wars" where a declaration of war by Congress is lacking, describing the then recent United States naval hostilities with France

4. I RECORDS OF THE FEDERAL CONVENTION OF 1787, 319.
5. 4 U.S. (4 Dall.) 37 (1800).

as an "imperfect war." The Court then concluded that this lesser type of war is authorized by the Constitution "[*a*]*s far as congress tolerated and authorized the war* on our part, so far may we proceed in hostile operations."[6]

Such authorization of hostilities by Congress need not be express, nor need it be before the commencement of hostilities. Historically, the President has acted initially more often without than with the prior express consent of Congress.[7] It would be misleading, however, to interpret the passive Congressional and active Presidential practice of the past as indicating a war-initiating power in the President which is coextensive with, and which exists separate from, that of Congress. Recently, the United States District Court for the Western District of Virginia correctly interpreted the flexible historical practice of both President and Congress as follows:

> Given the intricate nature of international relations and contemporary diplomacy, there is a myriad of conceivable reasons why Congress might undertake a course of action which sanctions and implements executive action but which falls short of a formal declaration of war. For example, treaty rights may or may not be involved on a formal declaration of war. And the question of whether congressional authorization to carry on certain hostilities has in fact been given is not readily answerable in terms of any particular provisions of the constitution. Rather as noted hereinbefore that document provides Congress with an array of powers which it may exercise to sanction or restrain executive action (power to raise and support armies, the power over appropriations, the power to legislate in foreign affairs, and the power to impeach.)[8]

Another Federal District Court made similar observations, stressing the historical Presidential initiative, but coupled it with some form of Congressional ratification:

> While Congress has not formally declared war with respect to military action in Viet Nam, nor did it in Korea, it has given its whole hearted approval to the action of the President by appropriations and other implementing legislation. The President, as Commander in Chief, has always exercised the power to begin hostilities; viewed realistically, most of our wars have been in full course before Congress has gotten around to a formal declaration.[9]

The War Powers Bill dramatically reverses the flexibility with which Congress, historically, has exercised its constitutional power to authorize hostilities. No longer will its consent be given implicitly or after the fact. There is, however, no constitutional

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6. *Id.* at 45 (Patterson, J.) (emphasis supplied).
7. *See* testimony of Secretary of State Rogers, *Hearings Before the Senate Committee on Foreign Relations on War Powers Legislation,* 92nd Cong., 1st Sess., 489-92, May 14, 1971 [hereinafter cited as *Hearings*].
8. Davi v. Laird, 318 F. Supp. 478, 481 (W.D. Va. 1970).
9. United States v. Mitchell, 246 F. Supp. 874, 898 (D. Conn. 1965).

objection to the specific express formula in the bill. Congress, pursuant to article I, section 8, clause 18, may impose upon itself such a legislative requirement when it feels that such legislation is necessary and proper in the exercise of its constitutional authority "to declare war." It is a question of operational policy, not of constitutional law.

The flexible historical practice had the advantage of meeting the then current national and international needs of the United States without over-responding by requiring a full dress debate in Congress every time the President used the Armed Forces. The danger, however, was that the President might assume that he possessed greater independent authority to initiate hostilities in a wider range of circumstances than he actually had. Also, as a consequence of this congressional flexibility, the actual scope of independent Presidential authority in the use of the Armed Forces remained indistinct, the courts tending to "find" prior Congressional authorization or subsequent ratification for most Presidential actions. The proposed legislation will bring into sharp focus the real extent of the President's independent role in war making. It is a relatively simple matter to point to two areas where the President has constitutional authority to employ the armed forces, although the exact limits of his authority in these areas in direct opposition to Congressional legislation is not certain.

The President's independent constitutional role lies in the two main areas of repelling attacks in emergencies and of waging, as Commander in Chief, hostilities authorized in some fashion by Congress. As for his emergency powers it has been said:

> Unquestionably the President can start the gun at home or abroad to meet force with force; he is not only authorized but bound to do so.[10]

The proposed bill, in Subsections (1) (2) and (3) of Section 3, recognizes this independent Presidential authority in emergencies. However, if these three subsections are considered by Congress to be a complete, exhaustive enumeration of the President's constitutional emergency power to commit the armed forces, they are of doubtful constitutional validity.[11] For example, Section 3(1),

10. *Id.* at 898, citing the Supreme Court in *The Prize Cases,* 67 U.S. 635, 668 (1862).

11. *Report 92-606 of the Senate Committee on Foreign Affairs on Bill 2956,* Feb. 9, 1972, states that the committee feels that Section 3 makes ample provision for the President's constitutional emergency powers. [Hereinafter cited as *Report 92-606*].

providing only for the defense of United States territory, does not encompass a sudden attack by an enemy upon the territory of a foreign ally, the occupation of whose territory would be a direct threat to the territory of the United States. Obvious examples would be attacks on Canada, Mexico or the Bahamas. The Court in the *Mitchell* case acknowledged the existence of this broader territorial view of the emergency power of the President to repell attacks:

> And under our established concept of international dependence and foreign commitments, this power [of the Commander in Chief to meet force with force] must extend to repelling attacks upon our allies *which threaten our own security.*[12]

A second example, outside the enumerated emergency powers in the bill, is humanitarian intervention to save non-American nationals. Such a contingency is not provided for in Section 3(3), which limits itself only to American citizens. The United States Air Force cooperated with Belgium in the rescue of Belgian nationals in the Congo in the 1960's. The United States Navy saved many North Vietnamese fleeing to the South as Viet Minh forces occupied areas around Haiphong as the French withdrew in 1954.

These two illustrations merely indicate that future emergency events demanding Executive use of the armed forces will, in all probability, not stay within the three categories listed in the bill.

The provision, also in Section 3, forbidding the President to introduce armed forces in "situations where imminent involvement in hostilities is clearly indicated" without the prior express consent of Congress touches areas of show-of-force where the President himself does not know the exact reaction of the group against whom such force is shown. For examples from the recent past there are the Berlin confrontations, the dispatch of a United States warship to the East Pakistan coast during the 1971 Pakistan war with India, the dispatch of a war ship from the United States East Coast to the Middle East when Jordan was threatened by tanks from Syria, and the Cuban missile crisis. These examples could be interpreted as requiring prior express congressional assent under Section 3 of the proposed War Powers Act. It would have been better, therefore, had the Senate deleted the phrase "or in situations where imminent involvement in hostilities is clearly indicated by the circumstances" and left the sudden dispatch of troops to the President in the exercise either of his emergency power or of his authority as Commander in Chief in the movement of troops in peace time.

Leaving the sphere of the President's powers in emergencies, as outlined in Section 3(1)(2)(3), and turning to Section 3(4), two

12. United States v. Mitchell, 246 F. Supp. 874, 898 (D. Conn. 1965) (emphasis supplied).

separate Constitutional problems are encountered. The first deals with the constitutional authority of the President to wage a war which has been authorized by Congress. After the hearings on the War Powers Bill it was concluded by the Foreign Relations Committee that under Section 3(4) the President would have been required to get specific Congressional statutory authorization to strike at the North Vietnamese forces in Laos and Cambodia operating against South Vietnam, even if authority had been given by Congress to defend South Vietnam from North Vietnamese attacks.[13] This conclusion was disputed by Professor Moore, a witness at the Hearings, who thought that it easily could be considered a part of the waging of the war already in progress.[14] The latter opinion would appear to be a reasonable Constitutional interpretation of Presidential authority to wage war under the facts surrounding the incursion. The questionable interpretation by the Senate Committee of Section 3(4) is not, however, required from the express wording of the Section. This subsection addresses itself only to the initiating of hostilities and not to the control of hostilities already in progress.

The second Constitutional problem in Section 3(4) is the ability of Congress to authorize, in advance, the President to initiate hostilities when he considers the time and events appropriate. If such delegation of discretion to the President is not circumscribed by Congress it could be an improper delegation to the President of Congress' authority to "declare war." This view was emphasized by Professor Bickel, a witness before the Foreign Relations Committee[15] and was one of the questions concerning the Tonkin Gulf Resolution which was so "troubling" to Justice Stewart in *Mora v. McNamara.*[16] Therefore, to avoid the problem in practice, the "specific statutory authority" granted the President should be specific both as to length of time, place and circumstances.

The last comment on Section 3(4) is directed to the prohibition against the use of United States military advisors where the foreign troops they are accompanying are about to go into "hostilities." This is the furthest extension of control in the bill by the Senate of the President as Commander in Chief. Such "hostilities" could be sporadic local police actions against small bands of subversives. This is an obvious attempt of the authors of the bill

13. *Report 92-606, supra* note 11, at 18.
14. John Norton Moore, School of Law, University of Virginia, whose referenced testimony is in *Hearings, supra* note 7, at 481.
15. *Hearings, supra* note 7, at 562-63.
16. 389 U.S. 934 (1967).

to prevent, in peace time, possible United States involvement in a future war similar to Vietnam, rather than the exercise of Congressional authority to initiate hostilities.

The remarks of Senator Fulbright pertaining to criticism of President Truman's dispatch of troops to Europe in 1951 correctly, it is felt, states the Constitutional authority of the President in his command of the armed forces:

> Congress has the right and power to raise the Armed Forces, but the President has the responsibility for the command of these forces. If in the exercise of his best judgment the defense of this country requires the sending of troops to Europe, he has the power and the duty to do so. Congress, of course, can refuse to appropriate the money for the troops but that is a decision for which Congress must take the responsibility. In the long run the decisions on strategy are best left to the Executive. That is the plain intent of our constitutional system. It would be dangerous for our future welfare to change the underlying principle simply because a strong minority or even a majority of the Congress may lack the confidence in the wisdom of the Executive in some particular instance such as the present one.[17]

The constitutional difficulties with the bill are not, as mentioned before, its requirement for express Congressional consent before hostilities. That is a question of Congressional policy. Rather, constitutional problems are created by the apparent limits on the President's emergency powers contained in Sections 3(1) (2) and (3) and on his powers as Commander in Chief to send troops abroad under certain dangerous circumstances in Section 3 and as advisors in Section 3(4).

17. 97 CONG. REC. 520 (1951).