

## THE AUGUST 15 COMPROMISE AND THE WAR POWERS OF CONGRESS

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On June 29, 1973, one of the most serious constitutional confrontations between Congress and the President in our nation's history came to an end. A compromise agreement was reached—Congress would allow the President to bomb in Cambodia until August 15, if the President would agree not to veto a fund cut-off which would go into effect on that date.<sup>1</sup>

The compromise agreement was acclaimed as the only reasonable solution to a pending constitutional crisis for without it the Government would have been without funds in the new fiscal year. Many said that by its action Congress had won back its war powers.<sup>2</sup>

As the author of the amendment which placed the President in the position of having to compromise on June 29, I was naturally pleased when, on August 15, our long involvement in Indochina finally came to an end. But I cannot agree that Congress is ready to assume its constitutional role in the war-making area. The compromise demonstrated to me, even more clearly than the years of congressional silence during the Vietnam experience, the extent to which congressional awareness of its own war-making responsibilities had been eroded.

Little would be accomplished legislatively without negotiation and compromise. But in the war-making area the Constitution is unyielding in its specificity. It gives Congress the exclusive power to authorize war. My view is that that power cannot be compromised.

On June 29 Congress had not yet authorized our combat activity in Cambodia. It was clear that neither the American people nor Congress wanted a continuation of the bombing. But before that legislative day was over, Congress would authorize a forty-five day war in Indochina.

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1. Pub. L. No. 93-52, 87 Stat. 130 (1973 U.S. CODE CONG. & AD. NEWS 1764).

2. *See, e.g.*, Washington Post, July 3, 1973, § A, at 16, col. 1, which stated as follows:

This is the very power that Congress has been struggling to save for years. It is the principle at the heart of pending war-power legislation . . . [C]ongress has finally—and terribly belatedly—acquired its constitutionally appropriate share of the war-making power.

That war is over now. The additional bombing was unsuccessful in forcing the other side to negotiate. Americans were lost and thousands of Cambodians died. The forty-five day war will probably only be a footnote in the military history of the United States.

But we should not easily dismiss the lessons of the congressional action which transformed unconstitutional combat activity into authorized war. An analysis of the events which led to the compromise of June 29 may well shed some light on the factors which inhibit a restoration of balance between Congress and the President.

During the month of May both Houses of Congress acted decisively in passing my amendment to the Second Supplemental Appropriations Bill calling for an absolute cut-off of funds for combat activities in Cambodia and Laos.<sup>3</sup> This bill was vetoed by the President on June 27,<sup>4</sup> but at the same time the Eagleton Amendment was being added to even more vital legislation, and it continued to command solid majorities.

On June 27 the Senate adopted my amendment on the Debt Ceiling Bill,<sup>5</sup> and on June 26 the House placed it on the Continuing Resolution,<sup>6</sup> the bill which allows government agencies to operate for a designated period of time into the next fiscal year without specific appropriations. As a practical political matter, I did not believe, despite White House statements to the contrary, that the President, already undergoing one crisis as a result of Watergate, would have risked precipitating another crisis just to gain the right to bomb for a few more weeks. If he vetoed these vital measures the result would be fiscal and governmental chaos.

As a purely legal matter, I felt that Congress had to perform its constitutional duty without regard for presidential threats of a veto. We had an obligation to appropriate money to permit the Government to run, and we were doing that. We also had a duty either to authorize war or to deny that authorization. Recent court decisions<sup>7</sup> and Administration statements<sup>8</sup> had made it abundantly clear that the failure to specifically deny the use of funds for the bombing would have been interpreted as legal and political acquiescence in the policy. We could not longer refuse to face the issue.

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3. 119 CONG. REC. 3598 (daily ed. May, 10 1973) (House); 119 CONG. REC. 10128 (daily ed. May 31, 1973) (Senate). The amendment was originally offered in the House by Rep. Long of Maryland. 119 CONG. REC. 3593 (daily ed. May 10, 1973).

4. 119 CONG. REC. 5486-87 (daily ed. June 27, 1973).

5. 119 CONG. REC. 12173 (daily ed. June 27, 1973).

6. 119 CONG. REC. 5373 (daily ed. June 26, 1973).

7. See, e.g., *Sarnoff v. Connally*, 457 F.2d 809 (9th Cir.), cert. denied, 409 U.S. 929 (1972); *Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972), aff'd, 411 U.S. 911 (1973).

8. See, e.g., *Hearings on H.R. 7447 Before the Senate Comm. on Appropriations*, 93d Cong., 1st Sess., at 1982 (1973) (testimony of then Secretary of Defense Richardson).

The long hours of debate over our involvement in Indochina had brought us finally to the point, at the end of the fiscal year, where Congress was prepared to end it. And as Congressmen and Senators considered their positions in May and June, the legal questions raised by the President's unilateral activity weighed as heavily in their deliberations as did the fear that America would become reinvolved in yet another war in Southeast Asia.

The express authority of the President to wage war in Indochina had expired, in my opinion, with the repeal of the Gulf of Tonkin Resolution on July 10, 1970.<sup>9</sup> Following that date, the President based his legal justification for our continued presence in Indochina on his responsibility to protect American forces in the process of withdrawal. By any reasonable standard, this responsibility should have been fulfilled in a period of months, not years. Nevertheless, President Nixon, unchecked by Congress, utilized his alleged power to prolong the "withdrawal" until he had satisfied a policy goal which had never been approved.

On March 28, 1973, when all American combat forces left South Vietnam, the last semblance of legal authority for unilateral Presidential war-making in Southeast Asia disappeared. Yet, despite the President's announcement that "the longest and most difficult war in our history"<sup>10</sup> was over, we continued to conduct air operations over both Cambodia and Laos.

For many weeks these operations were conducted with no serious effort on the part of the Administration to demonstrate legality. On April 30, 1973, a full month after the total withdrawal of our forces, the State Department submitted a memorandum entitled "Presidential Authority to Continue U.S. Air Combat Operations in Cambodia."<sup>11</sup> This memorandum cited Article 20 of the Paris Agreement<sup>12</sup> which, in general terms, required the withdrawal of all foreign armed forces from Laos and Cambodia, as the principle justification for our combat activity.

Article 20 was nothing more than an ambiguous policy statement. It was the least specific part of the Paris agreement for obvious reasons—the parties to the conflict in Laos and Cambodia were not signatories to the Agreement. It contained no deadlines, and it included no enforcement or arbitration devices to assure compliance. But these shortcomings would not deter the Administration from citing continued North Vietnamese presence in Cambodia as a legal justification for continued American presence in that country. The State Department memorandum made an effort to perform this impossible legal feat by stating,

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9. S. Con. Res. 64, 91st Cong., 2d Sess. (1970).

10. President's Address to the Nation, March 29, 1973. N.Y. Times, March 30, 1973, § 1, at 16, col. 6.

11. 119 CONG. REC. 3465–67 (daily ed. May 9, 1973).

12. *Id.* at 3466.

[U]nilateral cessation of our United States air combat activity in Cambodia without the removal of North Vietnamese forces from that country would undermine the central achievement of the January Agreement as surely as would have a failure by the United States to insist on the inclusion in the Agreement of Article 20 requiring North Vietnamese withdrawal from Laos and Cambodia. The President's powers under Article II of the Constitution are adequate to prevent such a self-defeating result.<sup>13</sup>

But the transition from what may be good policy (though I never felt it was) to what is good law is not so easily made. If the policy of unilaterally attempting to enforce the Paris Agreement was acceptable under prevailing political standards, the methods employed to pursue that purpose clearly did not meet the criterion of constitutionality. In the absence of congressional authorization, our combat activities in Cambodia were clearly illegal.

No one branch of government may push the exercise of its constitutional authority to the limit where it effectively preempts another branch from exercising its own powers. Yet, in claiming inherent powers to conduct combat operations over Cambodia and Laos, the President was clearly preventing Congress from exercising its war powers under article I, section 8 of the Constitution. The State Department simply ignored this fundamental constitutional principle. In doing so the Department based its case on a self-defined obligation on the part of the Commander in Chief to uphold an executive agreement<sup>14</sup>—an agreement which did not have the force of law.

It has been said that the architects of the Vietnam policy, in all their rationality, had constructed the world's most beautiful edifice on a bog.<sup>15</sup> If this analogy is accurate then it can be said that the last Administration to conduct combat operations in Indochina had presented a legal justification for those operations which resembled a shanty constructed on quicksand.

The inherent powers of the Commander in Chief were meaningless without the necessity to protect American troops. And the need to enforce the Paris Agreement, while possibly an acceptable policy goal, carried no legal weight.

But despite the obvious absence of legal grounds, the President did have power. He had the power to order the military to bomb. Congress, on the other hand, could do nothing, short of legislating an absolute cut-off, to reclaim its powers, since the courts refused to rule on what they considered a political question. Never before in our history had the delicate fabric of the Constitution been stretched so thin. The "twilight zone" that Justice Jackson

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13. *Id.*

14. 119 CONG. REC. 3465 (daily ed. May 9, 1973).

15. D. HALBERSTAM, *THE BEST AND THE BRIGHTEST* 652 (1972).

described as separating the respective war powers of Congress and the President had become more nebulous than ever.<sup>16</sup>

Those who drafted our Constitution understood that by fashioning a system of concurrent authority they had sowed the seed for possible conflict. Even the most pessimistic of their number could not have imagined the extent of the conflict between President Nixon and the 93d Congress in the spring of 1973.

That legal conflict centered on an action already begun by the President without congressional consent. The founders recognized the problem of Congress being faced with a *fait accompli*, but they were confident that Congress had the power to deal with such a situation. It was Hamilton who wrote,

The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions.<sup>17</sup>

In short, Congress could not ultimately be forbidden to circumscribe antecedent Presidential action. In 1973 Congress was forced to use a rather extreme remedy, the power of the purse, but it was also dealing with an extreme case.

Such confrontations should not occur within our system. Where reason and respect for the Constitution prevail there is simply no necessity for conflict. Nowhere in the Constitution did the framers make more of an effort to force the legislative and executive branches to share responsibility for policy-making than in the provisions which deal with the power to go to war. In those sections, they strove to set up a procedure under which neither branch of the federal government could make war without the aid of the other—a procedure which would strike a delicate balance between legislative primacy and executive efficiency.

Most issues are dealt with by the Constitution through one reference. The waging of war and the responsibility for military are treated at various places.

Article I, section 8, gives the Congress power to “declare War,” grant “Letters of Marque,” order “Reprisal,” “raise and support Armies”—for no more than two years at a time—“provide and maintain a Navy,” make rules which will regulate and govern the military forces, and provide for organizing the Militia and calling it up so that insurrections can be suppressed and invasions repelled.

Article I, section 10, forbids the states, without congressional consent, from keeping military forces in time of peace and from engaging “in War,

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16. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson J., concurring).

17. 7 WORKS OF ALEXANDER HAMILTON (J. Hamilton ed. 1851).

unless actually invaded, or in such imminent Danger as will not admit of delay.”

Article II, section 2 makes the President “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States.”

Article IV, section 4, provides that the central government shall guarantee “a Republican Form of Government” to every state and “shall protect each of them against Invasion.”

These provisions of the Constitution were not devised to provide exact answers to every question which might arise regarding the use of American troops or the appropriate responses to acts of hostility or war by foreign nations. They were devised so that Congress, the Chief Executive, and the states would have a framework within which they could cooperate in the protection of the nation from external harm. Going to war was intended to be an orderly process in which reason and caution would be given full play before conflict began, and in which reason and caution would be used once hostilities had commenced. It was the hope that every effort would be made to prevent war through chance or mistake, and that rules of prudence and countervailing power would strengthen the forces of rationality. The framework for ensuring these goals was relatively simple.

First, they drew a crucial distinction between offensive and defensive hostilities. If the United States were attacked, the President would respond. As Commander in Chief he would repel the attack. If an individual state was militarily challenged, even it would possess a right to fight back. Thus the states could maintain militia that would be available for duty if hostilities arose. For its part, Congress could provide the President with a small standing Army and Navy so that he could fulfill his duty as defender of the nation’s integrity, although such a course was frowned upon. In addition, Congress was authorized to establish procedures under which the President might nationalize state militia rapidly, so that he might effectively respond to any foreign attack.

Secondly, in cases where defensive action needed to be supplemented or replaced by offensive action, Congress should give its concurrence before any final decision was made. There was little concern that time might be lost in the process. To the framers, the judgment of the entire nation, acting through its elected representatives, would have to be sought once the issue was no longer that of repelling attacking forces. Thus whether simple reprisals or complex military operations or all-out war were involved, the Congress was to sanction these actions before they started.

Thirdly, the President’s role would be to direct military operations. In deciding day-to-day tactics, Congress would play no part. This decision of the draftsmen of the Constitution was made clear when they decided to change the term “make war”—which might imply the concept of Congress conducting

hostilities and which had been in an earlier draft of the document—to “declare war,” which carried with it the connotation of Congress initiating hostilities.

Concomitantly, the role of the President as Commander in Chief was clarified by both the delegates to the Constitutional Convention and by Madison, Hamilton, and Jay, authors of *The Federalist Papers*.<sup>18</sup> Their records make clear that surprise was shown at that Convention when the possibility was raised of giving the President power to make decisions which might lead to offensive military action. As one delegate commented, he “[N]ever expected to hear in a republic, a motion to empower the Executive alone to declare war.”<sup>19</sup> It should be added that *no* such motion ever carried. As Hamilton noted in a slightly different context,

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.<sup>20</sup>

Thus it would appear that the title “Commander in Chief” did not carry with it war-initiating powers. In the words of *The Federalist Papers*, the role of Commander in Chief

would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.<sup>21</sup>

It must be stressed that this statement was addressed to the basic question of the President as *policymaker* on matters of war or peace. When Hamilton later turned his attention to the Commander in Chief’s power over day to day military affairs, he set forth a far different position. Once hostilities had begun, the President was to have wide discretion. For once war had been declared,

[The] direction of . . . [it] most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.<sup>22</sup>

18. THE FEDERALIST (E. Bourne ed. 1942).

19. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (rev. ed 1937) (remarks of Eldridge Gary).

20. THE FEDERALIST NO. 75, at 82 (E. Bourne ed. 1942) (A. Hamilton).

21. *Id.* NO. 69, at 42.

22. *Id.* NO. 74, at 77.

Fourthly, the start of hostilities was not to mark the end of congressional responsibility. For while Congress was not to make particular tactical decisions, it would not surrender its wider policy prerogatives. At the least, the changeover from defensive to offensive action would have to be sanctioned by the legislature. Similarly, decisions resulting in major changes in tactics—changes which might bring new opponents into a war, for example—would be an appropriate subject for congressional concern. At the same time, the Founding Fathers were realistic enough to anticipate that a strong-willed President exercising his power as Commander in Chief might be very reluctant to return to Congress for approval, or even counsel, once hostilities had begun. In effect, powerful Presidents would naturally interpret policy decisions as tactical decisions. The response of the Founding Fathers to this dilemma was to give the Congress full power over the expenditure of funds for the military and to insist that the Congress review military appropriations at least every two years. As *The Federalist Papers* note,

[T]he whole power of raising armies was lodged in the LEGISLATURE . . . [subject to] an important qualification . . . which forbids the appropriation of money for the support of an army for any longer period than two years—a precaution which, upon a nearer view of it, will appear to be a great and real security against the keeping up of troops without evident necessity.<sup>23</sup>

It thus appears that the framers of the Constitution, having debated every contingency they could imagine, did face the possibility that a Congress might someday be forced to deal with a strong and militant President whose course it might wish to deflect. They dealt with that possibility by giving Congress enough power to check a President whose military objectives far outdistanced or were contrary to those of the legislative branch.

As clear as the division of the war-making responsibilities appeared in the early experience of our nation, that division has become muddled by expediency in modern times. The latest example of that expediency—the August 15 compromise agreement—may well have been worth the sacrifice of Congress's war-making role that I believe it entailed. It did, after all, end the war. But it should be more apparent now than ever that Congress will not exercise its war powers unless legislation is enacted clearly reaffirming that Congress alone must bear the responsibility for authorizing the commitment of American forces to hostile action.

House and Senate versions of war powers statutes are currently being carefully scrutinized by a conference committee. I am a principal author of the Senate bill<sup>24</sup> which differs from the House bill<sup>25</sup> mainly in that it carefully defines the emergency powers of the President.

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23. *Id.* No. 24, at 159.

24. S. 440, 93d Cong., 1st Sess. (1973).



Legislation enacted by Congress in this vital area must establish clearly defined and legally binding parameters for unilateral Presidential action.<sup>26</sup> If we fail to delineate the proper limits of power in terms that are readily understandable, then we invite the President to continue to define that power as he sees fit. The President, Congress, the courts, and the American people must understand the legitimate role of the Commander in Chief. And they must understand that that role does not include taking unilateral military action when there is no emergency threat to the United States, its forces, or its citizens.

Whereas the Senate bill carefully delineates the emergency responsibilities of the President, the House bill simply requires him to notify congress when the Armed Forces are used in the absence of specific authorization. Referring to this approach in testimony before the House of Foreign Affairs Committee, noted constitutional scholar Professor Alexander Bickel said,

[I]t is difficult for me to see a reporting requirement that is not prefaced somewhere with an attempt to state the legal position because if you don't so preface it, you fall into what seems to be to be the fault of this one. . . . [referring to the House bill].

If you don't have anything prefacing a reporting section that says, "Here, this is our view of where your authority ends and where ours begins," you necessarily fall into that pitfall because you assume that there is legal authority out there beyond the Constitution.<sup>27</sup>

Should the President exercise his emergency powers, the struggle between him and Congress will be for public support. If the sole issue of the public debate which ensues is the President's policy, then contemporary experience shows that the President will inevitably win his battle. To check this tendency I am hopeful that the Senate conferees will insist on codification in the negotiations with the House. The more simple and easy to understand

25. H.R. 317, 93d Cong., 1st Sess. (1973).

26. On October 10, 1973 Senator Eagleton opposed the Conference Report of the War Powers Bill (H.J. Res 542). The compromise bill followed the approach used by the House in that it contained no legally binding definition of the President's emergency powers. Speaking on the floor of the Senate, Senator Eagleton said,

I must reluctantly conclude that in the absence of an operative and effective definition of Presidential authority the effect of this bill would be to permit the President to nullify Congress' obligation to declare war before we commit forces. Whether or not the mechanism included in this bill to stop the President after the fact is more efficient than present remedies available to us, we cannot delegate our responsibility to authorize offensive war before it begins.

119 CONG. REC. 18993 (daily ed. Oct. 10, 1973) (H.J. Res. 542 was enacted into law as the War Powers Act of 1973 by override of a presidential veto by both houses of Congress on Nov. 7, 1973).

27. *Hearings on H.R. 317 Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess., at 195-96 (1973).

signposts that Congress can hold up for public inspection, the more likely it will be that Congress can prevent a President from usurping its powers and the more likely it will be that Congress can stop him if he acts illegally.

No matter how tightly the Commander in Chief's emergency role is circumscribed, however, abuse of that role remains possible. Even if Presidents executed the provisions of the War Powers Bill in good faith, it would still be possible for them to use the discretion they retained as Commander in Chief to move our nation from a defensive conflict to an offensive one. Whether this occurred inadvertently or not, Congress must possess the legislative mechanism that would enable it to protect its own prerogatives.

Some have argued that the power of the purse would, in itself, be sufficient to protect Congress' right to declare war.<sup>28</sup> In other words, if the President entered an offensive war without the consent of Congress, we could then cut off funds for that war and thus impose our will as we did on June 29.

The only practical way Congress can use its power of the purse, however, is to cut off funds for a particular conflict in a bill which affects the operation of government far beyond the money expended for the conflict. Such action would, of course, encourage a veto if the President felt strongly about his position, as President Nixon did in June. If we were forced to depend solely upon such an absolute mechanism, we would constantly be going to the brink of governmental crisis in order to effectuate our constitutional prerogatives. Far more flexibility than that was built into the Constitution, and the bills passed by both the House and the Senate offer an alternative to the type of crisis situation with which we were recently faced over the issue of Cambodian bombing.<sup>29</sup>

To impose the will of Congress these bills establish a quantitative parameter for unilateral executive action by requiring congressional approval within a set period—the Senate bill calls for 30 days,<sup>30</sup> the House bill 120 days<sup>31</sup>—if he wishes to continue his action. If such approval is not forthcoming, then the emergency action must be terminated automatically—the only exception being that the President would have the right to protect our forces in the process of disengagement (defined as immediate evacuation).

Adoption of the enforcement criteria contained in either the House or the Senate bill will provide a constant warning not to give away the fundamental power of Congress even in a period of crisis. When members of Congress are statutorily obligated to uphold their responsibility, I expect that they will be

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28. See, e.g., Goldwater, *President's Ability to Protect America's Freedoms—The Warmaking Power*, 1971 LAW & SOC. ORDER 423.

29. S. 440, 93d Cong., 1st Sess. (1973); H.R. 317, 93d Cong., 1st Sess. (1973).

30. S. 440, 93d Cong., 1st Sess. (1973).

31. H.R. 317, 93d Cong., 1st Sess. (1973).

very leery of either delegating it away too soon or allowing it to be abused by improper Presidential action.

If, therefore, Congress feels a longer period is needed to consider the President's request, it can extend the authorization period for as long as it wants without ever losing control of the decision to declare offensive war. If, on the other hand, the President has clearly and blatantly abused his emergency authority, Congress may act to stop him immediately, even before the statutory period is completed. Because this flexibility exists in both bills, I feel that a compromise over the time period will be easily attainable.

It is painfully ironic that a war begun at presidential initiative and waged with passive congressional consent should be ended in the fashion it was. In our great satisfaction at finally extricating ourselves from the quagmire of Indochina, Congress and the nation should not ignore the institutional breakdown our tragic experience exposed. The President's most recent claim of power—a broader claim than ever before—and Congress' willingness to compromise its most awesome constitutional responsibility, should argue strongly for the most carefully worded and tightly drawn war powers bill possible.<sup>32</sup> The President must be made to recognize the strict limits of his legitimate power, and Congress must be made aware that its responsibility cannot be compromised.

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32. The War Powers Act of 1973, H.J. Res. 542 (Nov. 7, 1973) is inadequate. See note 26 *supra*.

