

PRESIDENTIAL POWERS – HOSTILITIES AND WAR POWERS

*Senate Foreign Relations Committee Report, submitted by James Fulbright
(excerpt, reproduced as an appendix to Hearings before the Committee on Foreign Relations,
United States Senate, Ninety-Fifth Congress, On a Review of the Operation and
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June 14, 1973

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WAR POWERS

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Mr. Fulbright, from the Committee on Foreign Relations,
submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany S. 440]

The Committee on Foreign Relations, to which was referred the bill (S. 440), to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress, having considered the same, reports favorably thereon and recommends that the bill do pass. . . .

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30-DAY AUTHORIZATION PERIOD

Section 5 (along with section 3) is the heart and core of the bill. It is the crucial embodiment of Congressional authority in the war powers field, based on the mandate of Congress enumerated so

comprehensively in article I, section 8 of the Constitution. Section 5 rests squarely and securely on the words, meaning and intent of the Constitution and thus represents, in an historic sense, a restoration of the constitution balance which has been distorted by practices in our history and, climatically, in recent decades.

Section 5 provides that actions taken under the provisions of section 3: “shall not be sustained beyond thirty days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless (1) the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of Armed Forces of the United States engaged pursuant to section 3(1) or 3(2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities; or (2) Congress is physically unable to meet as a result of an armed attack upon the United States; or (3) the continued use of such Armed Forces in such hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.”

Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the President in this age of instantaneous communications and of intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate and duty with respect to the great questions of war and peace.

The choice of thirty days, in a sense, is arbitrary. However, it clearly appears to be an optimal length in time with respect to balancing two vital considerations. First, it is an important objective of this bill to bring the Congress, in the exercise of its constitutional war powers, into any situation involving U.S. forces in hostilities at an early enough moment so that Congress’s actions can be meaningful and decisive in terms of a national decision respecting the carrying on of war. Second, recognizing the need for emergency action, and the crucial need of Congress to act with sufficient deliberation and to act on the basis of full information, thirty days is a time period which strikes a balance enabling Congress to act meaningfully as well as independently.

It should be noted further, that the thirty-day provision can be extended as Congress sees fit – or it can be foreshortened under section 6. The way the bill is constructed, however, the burden for obtaining an extension under section 5 rests on the President. He must obtain specific, affirmative, statutory action by the Congress in this respect. On the other hand, the burden for any effort to foreshorten the thirty-day period rests with the Congress, which would have to pass an act or joint resolution to do so. Any such measures to foreshorten the thirty-day period would have to reckon with the possibility of a Presidential veto, as his signature is required, unless there is sufficient Congressional support to override a veto with a two-thirds majority.

The issue has been raised quite properly, as to what would happen if our forces were still engaged in hot combat at the end of the thirtieth day – and there had been no Congressional extension of the thirty-day time limit. The answer is that, as specified by clause (1), the [page 266] President would not be required or expected to order the troops to lay down their arms.

The President would, however, be under statutory compulsion to begin to disengage in good faith to meet the thirty-day time limit. He would be under the injunction placed upon him by the Constitution, which requires of the President that: “he shall take care that the laws be faithfully executed.”

The wording of Section 5(1) is very specific and tightly drawn. It is to be emphasized that Section 5(1) is in no sense to be construed as a loophole giving the President discretionary authority with respect to the thirty-day disengagement requirement. It is addressed exclusively to the narrow issue of the security of our forces in the process of prompt disengagement. The criterion involved is the security of forces under fire and it does not extend to withdrawal in conformity with some broader strategy or policy objective. No expansion of the thirty-day time frame is conveyed other than a brief period which might be required for the most expeditious disengagement consistent with security of the personnel engaged. Moreover, it requires the President’s certification in writing that any such contingency had arisen from “unavoidable military necessity.”

Section 5(2) provides for suspension of the thirty-day disengagement requirement in the event “Congress is physically unable to meet as a result of an armed attack upon the United States.”

The question has been raised whether there can or should be any time limitation on the President’s emergency authority to repel an attack upon the United States and take the related measures specified in Section 3(1). The bill rejects the hypothesis that the Congress, if it were physically able to meet, might not support fully all necessary measures to repel an attack upon the nation. Refusal to act affirmatively by the Congress within the specified time period respecting emergency action to repel an attack could only indicate the most serious questions about the bona fides of the alleged attack or imminent threat of an attack. In this context, the admonition articulated in 1848 by Abraham Lincoln is most pertinent.

Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you will allow him to do so, whenever he may choose to say he deems it necessary for such purpose – and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect . . . If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, I see no probability of the British invading us but he will say to you be silent; I see it, if you don’t.

Section 5(3) provides for: “the continued use [beyond thirty days] of such armed forces in such hostilities or in such situation [provided it] has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.” It is to be noted that authorization to continue using the Armed Forces is to come in the form of specific statutory action for this purpose. This is to avoid any ambiguities such as possible efforts to construe general appropriations or other such measures as constituting the necessary authorization for “continued use.” Moreover, just as the Congress [*267] under the Constitution is not intended to be under any obligation to declare war against its own better judgment,

so under Section 5(3) of the war powers bill there is no presumption, or obligation, upon the Congress to enact legislation for the continued use of the armed forces, as covered by the bill, except as it is persuaded by the merits of the case presented to it, and consequent to appropriate reflection and due deliberation.

It is further to be noted that any "continued use" which might be authorized by the Congress must be "pursuant to the provisions" of such authorization. The Congress is not faced with an all or nothing situation in considering authorization for "continued use." It can establish new time limits, provisions for further review by the Congress, as well as other limits and stipulations within the ambit of the constitutional powers of the Congress.