



1-1-1962

The War-Making Power: Congress vs. the President

Van L. Perkins

Follow this and additional works at: <https://scholarsarchive.byu.edu/byusq>

Recommended Citation

Perkins, Van L. (1962) "The War-Making Power: Congress vs. the President," *BYU Studies Quarterly*. Vol. 4 : Iss. 1 , Article 5.

Available at: <https://scholarsarchive.byu.edu/byusq/vol4/iss1/5>

This Article is brought to you for free and open access by the Journals at BYU ScholarsArchive. It has been accepted for inclusion in *BYU Studies Quarterly* by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.

The War-Making Power: Congress vs. the President

VAN L. PERKINS

On June 25, 1950,¹ North Korean armed forces invaded the Republic of Korea. That nation had been established under the direction of the United Nations, and its government was recognized by the United Nations and the United States as the legal government for the whole of Korea. The invasion was a violation of those provisions of the United Nations Charter intended to prevent aggressive warfare. Some action by the United Nations was inevitable. Less than twenty-four hours after news of the invasion had been received, in response to a request by the United States, the Security Council adopted a resolution which branded the invasion as a "breach of the peace," urged the "immediate cessation of hostilities," and called on North Korea to "withdraw forthwith their armed forces to the thirty-eighth parallel." The Security Council called upon "all members to render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities."²

There is nothing in the resolution, or in the Security Council's discussion of the resolution, to indicate that anyone in-

Mr. Perkins is instructor in history at Brigham Young University.

¹The invasion began at 4:00 A.M., June 25, Korean time, 2:00 P.M., June 24, Washington time. Korea is fourteen hours ahead of the Eastern Time Zone. First official news of the invasion was received in Washington at 9:26 P.M., June 24.

²*New York Times*, June 26, 1950. The action was possible only because Russia was absent from this and subsequent Security Council meetings. Her delegation was boycotting the Council because the Council refused to replace the Nationalist Chinese delegate with a delegation from Red China. The legality of the resolution was challenged by the Russian delegate on the grounds that, according to the U.N. Charter, action could be taken in the Council only "by an affirmative vote of seven members including the concurring votes of the permanent members. . . ." (Chapter V, Article 27, Clause 3.) Since Russia had not participated, she had not cast a concurring vote for the resolution. But precedent had interpreted this clause as conferring a veto, which was valid only if actually exercised.

terpreted the resolution as a request to member nations to supply military assistance to South Korea. Nevertheless, on June 27 President Truman authorized the use of American air and naval forces to support South Korean troops. He also ordered the United States' Seventh Fleet into the Formosan Strait to protect Formosa from possible aggression by the Chinese Communists. In a public statement, Truman justified his action:

The Security Council of the United Nations called upon the invading troops to cease hostilities and to withdraw to the Thirty-eighth Parallel. This they have not done, but on the contrary have pressed the attack. The Security Council called upon all members of the United Nations to render every assistance to the United Nations in the execution of this resolution.

In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support.³

Almost simultaneously the United States was sponsoring a second resolution in the Security Council calling on member nations to "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and restore international peace and security in the area."⁴ Truman's order committing American air and naval forces to combat preceded the adoption of this resolution by almost twelve hours. The Security Council was faced with a *fait accompli*. This may have influenced the Council's decision to adopt the resolution, which simply legalized the action already taken by the United States. Three days later Truman ordered American ground forces into action.⁵ America was at war, no matter what the fray might be called.

The legality of Truman's action is certainly open to question. He had not consulted Congress prior to ordering American forces into combat, although in doing so he was plunging the nation into war. It cannot seriously be maintained that the President was exercising powers granted or even implied by American participation in the United Nations. At the time

³*New York Times*, June 28, 1950.

⁴*New York Times*, June 28, 1950.

⁵*New York Times*, July 1, 1950.

WAR-MAKING POWER: CONGRESS VS. PRESIDENT 27

he acted, the Security Council had not asked for military support for South Korea. Even after the Security Council authorized the use of troops, Truman's action remained a violation of the language, if not the spirit or intent, of the United Nations Participation Act of 1945.⁶ Regardless of the political or military justification for intervention, Truman's action was clearly a violation of the Constitution, which designates Congress as the war-making agency of the American government. But this was only the most recent in a long series of encroachments on the war power of Congress.

The power to declare war, under the Constitution, resides with the Congress, subject only to the limitation that a declaration of war may be vetoed by the President. The President may prevent war, unless two-thirds of both houses of Congress override his veto, but he may not declare war. This grant of power to the Congress is consonant with the power given to that body to provide the instruments of warfare: the power to raise and maintain an army and a navy, and to call forth the militia. But other powers, related to the war power, are granted to the President. He is given the principal responsibility for the conduct of foreign affairs. He may, with the advice

⁶*United States Statutes at Large*, 79th Congress, 1st Session, LIX, 619-621. Section 6 of the statute authorizes the President to negotiate special agreements with the Security Council, subject to approval by Congress, defining the numbers and types of troops to be made available to the Security Council on its call for maintaining international peace and security under Article 43 of the United Nations Charter. These agreements were never negotiated, so that in June, 1950, the President lacked congressional authority to supply American armed forces to the Council. But the act provided further, "The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under Article 42 [i.e. for military action to maintain or restore international peace and security] of said Charter" the armed forces provided for under those agreements. The language of the statute and the debate on the law in Congress make it clear that it was intended that the President should be free to make troops available to the Security Council as needed, without special approval by Congress, once the troops had been provided for by such general agreement or agreements. This sentiment was expressed, for example, by Senator Robert Taft, who had been expected to oppose giving the President that much leeway. "I want to make it clear," said Taft, "that I am wholly in favor of giving authority to the Security Council to use armed force, permitting its use without reference to Congress." *Congressional Record*, 79th Congress, 1st Session, 10966. Had the agreements been negotiated and ratified, as Congress expected them to be, Truman's action would have been authorized, at least under the second resolution of the Security Council. The failure to negotiate agreements, as had been intended, lay with the Security Council. Thus Truman's action was contrary to the express provision of the statute, but in general accord with congressional intent.

and consent of the Senate, make treaties and appoint ambassadors, and he may, without limitation, receive ambassadors and other public ministers. The President is also designated Commander-in-Chief of the army and navy of the United States, and of the militia of the several states when called into the service of the United States.⁷

The Founding Fathers intended that the President should exercise the dominant power in the conduct of foreign affairs, and should command the armed forces provided by Congress, but only Congress should have the power to plunge the nation into war. This is supported by Alexander Hamilton in *The Federalist*. Distinguishing between the powers of the President and those of the British King, Hamilton makes this point concerning the Commander-in-Chief power: "It 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 of which by the Constitution under consideration would appertain to the Legislature."⁸

On one of the rare occasions on which the Supreme Court has considered the power to declare war, it supported the view that Congress and not the President was to exercise primacy in the war-making power. The issue before the Court was not a direct test of the power of the President to make war, in the ordinary sense of a conflict with a foreign nation, but in ruling on the right of the President to take action in the case of rebellion, the Court declared:

By the Constitution, *Congress alone has the power to declare a national or foreign war* The Constitution confers on the President the whole Executive power He is Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several States when called into actual service of the United States. *He has no power to initiate or declare a war* either against a foreign nation or a domestic state

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force

⁷Article I, Sections 7 and 8; Article II, Sections 2 and 3.

⁸Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn., 1961), LXIX, 465.

WAR-MAKING POWER: CONGRESS VS. PRESIDENT 29

by force. *He does not initiate the war*, but is bound to accept the challenge without waiting for any special legislative authority.⁹

Thus the President may not initiate or declare war, but he may commit the nation to war if that action is in response to actual invasion. Such was the constitutional intent.

In practice this has broken down, since the President is in a position to usurp the power of Congress in this area. As the principal agent in the conduct of foreign affairs, the executive can commit the nation to a course of action which may virtually force Congress to declare war. The power to recognize or refuse to recognize nations, to sever diplomatic relations, to enforce or not enforce American claims, and many other similar powers are specifically within the realm of presidential jurisdiction. Any of these may be, by traditional usage, a cause of war. Further as Commander-in-Chief he has the power, if not the legal authority, to order American armed forces anywhere in the world. In so doing, he may actually plunge the nation into war without a congressional declaration, even though such action would be unconstitutional. This is the interpretation which precedent has given the Commander-in-Chief power, rather than the limited power of "first general and admiral" envisioned by Hamilton. William Howard Taft, although he subscribed to a rather limited interpretation of the President's powers, saw this clearly. Writing between his terms as President and Chief Justice, he said:

The President is Commander-in-Chief of the army and navy, and the militia when called into the service of the United States. Under this he can order the army and navy anywhere he will, if the appropriations furnish the means of transportation. Of course the instrumentality which this

⁹*The Prize Cases*, 2 Black, 635, 668 (1863). Italics supplied. The dissenting opinion of four justices, including Chief Justice Taney, is even more emphatic on this point, declaring that *only* the Congress may make war, that even when the President responds to actual invasion it is not a war until declared or recognized by Congress: "But before this insurrection against the established Government can be dealt with on the footing of a civil war . . . it must be recognized or declared by the war-making power of the Government. No power short of this can change the legal status of the Government . . . from that of peace to a state of war There is no difference in this respect between a civil or a public war." (688-9) If this interpretation were accepted, the Korean conflict and other undeclared wars would not be wars, and so there would be no question of constitutionality involved. But if not wars, what are they?

power furnishes, gives the President an opportunity to do things quite beyond his power under the Constitution directly to effect. Under the Constitution, only Congress has the power to declare war, but with the army and the navy, the President can take action such as to involve the country in war and leave Congress no option but to declare it or to recognize its existence.¹⁰

The ability of the President to commit the nation to war in this fashion extends equally to cases of defense and aggression, though the latter would be unconstitutional. Should the President order American forces to move aggressively against another nation, Congress would be faced with a *fait accompli* and would have no alternative consistent with national honor but to acquiesce. Thus the President is well equipped to assume the initiative in the war-making power.

The practice of one hundred and seventy years supports Taft's argument that while the power to declare war formally rests with the Congress, the President is capable of involving the nation in war, leaving Congress little choice but to concur. Between the founding of the nation and our entry into World War I, the United States engaged in three formally declared wars. Two of these, the War of 1812 and the Spanish-American War, were declared in accordance with the constitutional formula. In neither instance did the President so embroil the nation as to commit, or virtually commit, the nation to war in advance of congressional action. In fact, both of those wars came as a result of congressional demand for war. On the other hand the Mexican War was clearly the result of presidential action, which triggered a Mexican response that left Congress with little choice but to declare war. The joint resolution providing for the annexation of Texas had left the boundary between Texas and Mexico undefined. Asserting America's right to the Rio Grande as a boundary, Polk ordered American troops under Zachary Taylor to the Rio Grande. On April 25, 1846, more than a year after the joint resolution for the annexation of Texas had passed

¹⁰William H. Taft, *Our Chief Magistrate and His Powers* (New York, 1916), p. 94. Taft supported the "constitutional theory" of the Presidency, i.e. that Article II enumerates the powers of the executive, and the President must justify all of his actions on the basis of a power enumerated there, or a power that may be clearly implied from an enumerated power.

WAR-MAKING POWER: CONGRESS VS. PRESIDENT 31

Congress, and five months after the formal admission of Texas, but within a few days after Taylor's arrival at the Rio Grande, a small scouting force was attacked by Mexican patrols. Eleven Americans were killed and five wounded. In spite of the fact that the skirmish occurred in disputed territory, Polk urged Congress to declare war, charging: "Mexico has . . . shed American blood upon the American soil." Congress responded by declaring that "a state of war exists between that government [Mexico] and the United States." Polk, not the Congress, had actually initiated the war.¹¹

Even more important than the three declared wars, in the executive usurpation of the war power, were the undeclared wars we engaged in prior to World War I. These were the French Naval War, the Tripolitan and Barbary expeditions, the Philippine insurrection, the China Relief Expedition—better known as the Boxer War—and the military campaigns against Mexico immediately preceding World War I.¹² Generally, these were fought on executive authority, without benefit of a declaration of war, with Congress acquiescing only by making appropriations. Thus, prior to involvement in World War I, the United States had engaged in three formal wars and six additional conflicts which historians classify as wars. Of these nine encounters, only two were undertaken in accordance with the constitutional formula.¹³

The erosion of Congress' war power was virtually completed by American involvement in World Wars I and II. It

¹¹For the War of 1812 see Francis F. Beirne, *The War of 1812* (New York, 1949), pp. 64-95; for the Mexican War see Jesse S. Reeves, *American Diplomacy under Tyler and Polk* (Baltimore, 1907), pp. 162-189, 288-308, cf. Justin H. Smith, *The War with Mexico*, Vol. I (New York, 1919), pp. 82-155, which places most of the responsibility for the war on Mexico; for the Spanish-American War see French E. Chadwick, *The Relations of the United States and Spain: Diplomacy* (New York, 1909), pp. 544-587, cf. Julius W. Pratt, *America's Colonial Experiment* (New York, 1950), pp. 39-54.

¹²Consult any of the standard histories of American foreign relations. See Samuel F. Bemis, *A Diplomatic History of the United States*, Fourth Edition (New York, 1955) for the French Naval and Barbary Wars; A. Whitney Griswold, *The Far Eastern Policy of the United States* (New York, 1938) for the Philippine and Boxer wars; Arthur S. Link, *Woodrow Wilson and the Progressive Era* (New York, 1954) for the Mexican campaigns.

¹³To this list might be added many other instances of presidential use of troops, or tentative commitment to the use of troops, ranging from 1800 through the 1950's. Since most of these did not precipitate fighting, and none of them led to "wars," they may safely be excluded from this discussion.

would distort the facts to say that the President single-handedly led the nation into either of those wars, but in both cases presidential conduct of foreign affairs in the pre-war period created a situation where the question of war or peace was virtually taken out of Congress' hands. A principal cause of World War I was Wilson's stubborn insistence on American neutral rights in the face of German employment of the submarine. His reaction to German sinkings, especially of the *Lusitania* and the *Sussex*, the doctrine of "strict accountability," and especially the issuance of the *Sussex* note, in which he advised Germany that he would sever diplomatic relations if she did not abandon unrestricted submarine warfare, committed the nation to a policy which left the Congress little choice but to declare war when Germany did resume unrestricted submarine warfare.¹⁴ Our involvement in World War II is even more to the point. Under Roosevelt's leadership the nation followed an unneutral course almost from the start. The lend lease program and the "destroyers for bases deal" are evidence of our lack of real neutrality so far as Europe was concerned. In the Far East we responded to the Japanese threat by cancelling our commercial treaty with Japan, placing an embargo on the export of scrap metal and freezing Japanese credits. More than a month before Pearl Harbor the nation stood in a state of "undeclared war."¹⁵

The post-war period brought new problems to further complicate the question. Both our military strategy and our foreign relations became increasingly complex, so that Congress was forced to rely more and more on the judgment of

¹⁴See Link, *Woodrow Wilson*, pp. 145-282. Submarine warfare was not, of course, the only factor involved. The Anglo-American "community of interest" which had developed over a century of peaceful relations, our role as arsenal for the allies, the arming of our merchantmen, the Zimmerman note, and other factors entered in. But none of these alter the basic fact that war was pretty much a foregone conclusion before Wilson sent his war message to Congress.

¹⁵See William L. Langer and S. Everett Gleason, *The Challenge to Isolation* (New York, 1952) and *The Undeclared War* (New York, 1953). Again, this is not an exhaustive list of the causes of the war. The intent here is simply to suggest the role of the President in committing the United States to a course of action which led to war. It should be noted that while some of the actions (lend lease, for example) involved congressional approval, most were executive acts which did not require congressional consultation. Neither Roosevelt nor Wilson, however, was really going contrary to the will of the nation at large.

WAR-MAKING POWER: CONGRESS VS. PRESIDENT 33

specialists in the executive department. Changes in military technology revolutionized traditional concepts. America could no longer rely on her oceanic barriers for protection. The increased responsibility of the United States in world affairs, and the revolution in technology raised the question: "Where is our first line of defense?" Most agreed that it was outside our territorial boundaries. In an address delivered in January, 1950, for example, Secretary of State Dean Acheson tentatively drew our "defensive perimeter" in the Pacific. It included Japan and the Philippines, not American territory, though not Korea or Formosa. He made it clear that the United States would fight if an attack occurred inside the perimeter.¹⁶ Finally our association with the United Nations might create situations where it would be difficult to employ the constitutional formula. The question had been raised early as to whether or not our delegation to the Security Council could commit the armed forces of the United States to police action under United Nations' sponsorship without specific congressional approval. In his famed "fireman analogy" in 1944, Roosevelt indicated that they must be able to do so, that the United Nations would be completely ineffective if delegates had to scurry off on each occasion to secure the approval of their respective governments.

The Korean intervention underlined many of these problems. The legality of Truman's action is open to question, but there is general agreement that intervention was both wise and necessary. North Korea's invasion of the Republic of Korea created a crisis situation. The communization of China had been a serious set back for the free world, which produced a growing feeling of despair. There was serious question concerning both the willingness and the ability of the free world, under American leadership, to halt the onward rush of communism. Korea presented a challenge which could not be avoided if the onrushing tide were to be halted. General Douglas MacArthur expressed this very well in a letter to the House Minority Leader, Joseph W. Martin, Jr.

It seems strangely difficult for some to realize that here in Asia is where the Communist conspirators have elected

¹⁶*New York Times*, January 13, 1950.

to make their play for global conquest, and that we have joined the issue thus raised on the battlefield; that here we fight Europe's war with arms while the diplomats there still fight it with words; that if we lose the war to Communism in Asia the fall of Europe is inevitable, win it and Europe most probably would avoid war and yet preserve freedom.¹⁷

This was the symbolic importance of Korea. If the free world were to effectively resist communism, it must be made clear to all concerned, friend and foe alike, that the free nations were willing to fight to prevent further communist encroachment. In this sense, it might well be argued that Korea was our first line of defense.

But while forceful resistance was necessary, was it also necessary that action be taken without consulting Congress? The answer to this question depends in part on the immediacy of the threat, and the time required for congressional response. There is little doubt that Korea would have been lost had action been delayed. Even with American aid, so promptly supplied, the defenders of South Korea were nearly swept into the sea. What the result of waiting for congressional action would have been, no one knows. The decision to provide air and naval support for South Korea was made on June 27, less than three days after fighting began. Since the invasion occurred on a weekend, it is doubtful that Congress could have convened and taken action in this relatively brief period. But ground forces were not committed until June 30, just short of six days after the invasion. It is entirely possible that Truman could have secured congressional approval of our intervention in that length of time. In any event, he certainly could have sought *ex post facto* ratification of his actions.

Other factors complicated the matter. One was the desire to limit the action as much as possible. There was reason to fear that Russia, and perhaps Red China, might enter the war if the United States intervened. One means of lessening the risk was to avoid the full commitment that would have been implied in a congressional declaration of war, or, for that matter, congressional ratification of the war effort. More important was the relationship between the United States and

¹⁷MacArthur to Martin, March 20, 1951, in *Congressional Record*, 82nd Congress, 1st Session, 3831.

WAR-MAKING POWER: CONGRESS VS. PRESIDENT 35

the United Nations. Truman was striving desperately to make the action against North Korea a United Nations undertaking, rather than a unilateral enterprise by the United States. He was trying to foster the belief, in the United States and in the free world at large, that this was a collective effort to restore the peace. Under these circumstances, a declaration of war by the United States on North Korea, or for that matter congressional ratification of Truman's action, might well have destroyed the effectiveness of the United Nations umbrella under which the United States was operating.

The constitutional problem is pointed up by Truman's action. If it were necessary, or even wise, for him to act without congressional approval, it would indicate that at times the nation's interest would require the President to act without consulting Congress. On the other hand, it is obvious that in most instances the nation will be better served if full congressional deliberation is given, whenever possible, to the question of war or peace as the question arises. The Chinese threat to invade Formosa and the Pescadores late in 1954 and early in 1955 prompted the formulation of a third alternative. To meet the existing threat, President Eisenhower sought congressional approval *in advance* for military action in that area. This was, in reality, a contingent declaration of war.

In a message to Congress on January 24, 1955, the President reviewed the role of Formosa and the Pescadores in the American defense system in the Pacific, and the current threat posed by Communist China in that area.¹⁸ Emphasizing the seriousness of the situation, and the need for immediate action to offset the threat, the President declared,

Clearly this existing and developing situation poses a serious danger to the security of our country and of the entire Pacific area and indeed to the peace of the world
 . . . the situation has become sufficiently critical to impel me, without awaiting action by the United Nations, to ask the Congress to participate now, by specific resolution, in measures designed to improve the prospects for peace. These measures would contemplate the use of the Armed Forces of the United States if necessary to assure the security of Formosa and the Pescadores.

¹⁸*House Documents*, 84th Congress, 1st Session, No. 76, *passim*. All material relating to the President's message is taken from this document.

The President foresaw two possible situations requiring action: (1) air and naval support might be needed in the re-deployment and consolidation of Chinese Nationalist forces, and (2) "we must be alert to any concentration or employment of Chinese Communist forces obviously undertaken to facilitate attack upon Formosa, and be prepared to take appropriate military action." The President was asking permission to engage in "preventive war" should that be necessary. The geographical area involved was not clearly defined. It included Formosa, the Pescadores, and any portion of the surrounding area deemed necessary to the safe-guarding of Formosa.

The President anticipated the argument that the authority requested was already his, and stated his reasons for seeking congressional action.

Authority for some of the actions which might be required would be inherent in the authority of the Commander in Chief. Until Congress can act I would not hesitate, so far as my constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States.

However, a suitable congressional resolution would clearly and publicly establish the authority of the President as Commander in Chief to employ the Armed Forces of the Nation promptly and effectively for the purposes indicated if in his judgment it became necessary. It would make clear the unified and serious intentions of our Government, our Congress, and our people.

The primary reason for consulting Congress was for the propaganda value the resolution would have, not to satisfy the requirements of the Constitution. The intent was to dramatize, in unmistakable terms, American opposition to further communist aggression.

In response to the President's message, identical resolutions were introduced in both houses of Congress. The resolutions took cognizance of the threat to Formosa and the Pescadores, and the importance of those islands to the "vital interests of the United States and all friendly nations in or bordering upon the Pacific," and then resolved:

That the President of the United States be and he hereby is authorized to employ the armed forces of the United

WAR-MAKING POWER: CONGRESS VS. PRESIDENT 37

States as he deems necessary for the specific purpose of securing and protecting Formosa and the Pescadores against armed attack, this authority to include the securing and protection of such related positions and territories of that area now in friendly hands and the taking of such other measures as he judges to be required or appropriate in assuring the defense of Formosa and the Pescadores.

The resolution was to expire when the President determined "that the peace and security of the area is reasonably assured . . . and shall so report to the Congress."¹⁹

The resolution, which simply gave form to the President's recommendations, conferred broad powers on the President in three areas. First, it is relatively indefinite regarding the geographical area to be protected. Second, the power to act "preventively," in the face of a communist build-up which would threaten Formosa, is implied. Third, the expiration of the resolution is at the discretion of the President. The vague and sweeping nature of the resolution, together with the cursory consideration given the proposal, indicates clearly the extent to which Congress has abdicated, and/or the executive has assumed, the war making power.

Consideration was hurried and superficial. In the House the resolution was referred to the Committee on Foreign Affairs, and in the Senate to the Joint Committee on Foreign Relations and Armed Services. The committees met jointly on the afternoon of January 24 and heard testimony from Secretary of State John Foster Dulles and the Chairman of the Joint Chiefs of Staff, Arthur Radford. The hearings were secret, and have not been published, but they were summarized by the chairmen of the committees. They emphasized the indispensability of Formosa and the gravity of the threat. Dulles, particularly, stressed the need for a firm stand to hold Formosa, and to make it clear to the people of Asia that the United States was determined to halt communist advances. The resolution was described as more of a question of "psychology than geography."²⁰

¹⁹*Congressional Record*, 84th Congress, 1st Session, 601.

²⁰*Daily Digest*, 84th Congress, 1st Session, D-21; cf. *New York Times*, January 25, 1955.

The House committee was content. In order to secure early passage, the committee reported the measure, without amendment, and by unanimous vote, the same afternoon. The Senate committee, moving more slowly, heard testimony from the Joint Chiefs of Staff the following day, and reported the resolution on January 26th. Beating down two amendments, both of which were again submitted on the floor, the Senate committee reported the measure without amendment by a vote of 27-2.²¹

The committee reports, which are very similar, gave special attention to four points: the geographical area involved, the role of the United Nations, the opinions of the Joint Chiefs of Staff, and the effect of the resolution on the relative powers of the President and Congress. The last, with which we are primarily concerned, received only limited, and, we may assume from the nature of the witnesses, superficial consideration. The language of the *House Report* embodies the sense of the *Senate Report* as well.

The committee considered the relation of the authority granted by the resolution and the powers assigned to the President by the Constitution. Its conclusion was that the resolution in this form, while making it clear that the people of the United States stand behind the President, does not enter the field of controversy as to the respective limitations of power of the executive and legislative branches.

Language elsewhere in the reports makes it clear that the committees recognized that the resolution conferred on the President the power to act offensively, in the face of communist build-up, as well as defensively in the case of armed attack. There was no question but that the resolution gave the President *carte blanche* to commit the nation to war without further consulting Congress. In view of this, the opinion of the committees that the issue "does not enter the field of controversy as to the respective limitations of power of the executive and legislative branches" is a clear indication of the extent to which the Congress was willing to surrender its war-making power.²²

²¹*Senate Reports*, 84th Congress, 1st Session, No. 13, *passim*.

²²*House Reports*, 84th Congress, 1st Session, No. 4, 4; *Senate Reports*, 84th Congress, 1st Session, No. 13, 7-9.

WAR-MAKING POWER: CONGRESS VS. PRESIDENT 39

Debate in the House was severely restricted. The measure was considered by the Committee of the Whole House on the State of the Union under a closed rule, which allowed only two hours of debate, and banned any except committee sponsored amendments. The rule provided that the question was to be voted on immediately after the committee rose, without intervening action, and only one motion to recommit was to be entertained.²³ Debate on the rule was limited to one hour. Since the debate on the rule was really devoted to discussion of the merits of the resolution, the resolution received a total of three hours of debate, hardly adequate for a measure of such importance. Not even all of that time was used.

The surprising thing about the House debate is that not one member objected to the resolution on the grounds that it gave to the President the authority to decide if, when, and within limits where, war should begin. Action approving the resolution, said Representative Budge, was "in no sense abrogating to the executive the legislative power and the duty under the Constitution to declare war." No one took issue with this statement. On the contrary, a number of Representatives, principally Speaker Rayburn and Majority Leader McCormack, expressed some criticism of the resolution on the grounds that the President already possessed all the power as Commander-in-Chief that the resolution conferred. They were concerned lest the President limit his power to act in future crises by seeking congressional approval in this instance.²⁴

The resolution passed the House by the overwhelming majority of 410-3. Of the three who voted "nay," only one did so because the resolution would permit the executive to plunge the country into war without a formal declaration by Congress, or without consulting Congress further.²⁵ Only one man of the 413 present and voting was alarmed at this far-reaching surrender of congressional power.

²³*House Reports*, 84th Congress, 1st Session, No. 5, *passim*; *Congressional Record*, 84th Congress, 1st Session, 659.

²⁴*Congressional Record*, 84th Congress, 1st Session, 659-680. The Budge quote is at 661, the Rayburn statement referred to is at 672, McCormack's at 659.

²⁵*Congressional Record*, 84th Congress, 1st Session, 680; *New York Times*, January 26, 1955.

Consideration of the measure on the Senate floor, as in the Senate hearings, proceeded at a more leisurely pace than in the House. Debate broke out on January 26th when the resolution was reported, before it was called up for consideration, and continued until January 28th. Debate was sharp, but the constitutional implication of the measure was not a real issue. As we have seen, the report of the committee whitewashed the issue, declaring that the resolution did not enter the field of dispute concerning the limitations of the two branches of government, and this position was generally adhered to in the debate. Only Senator Morse criticized the resolution because it transferred the war-making power to the President. "I do not believe any President should have that power," he declared. "I do not believe Congress should in any way delegate its power to declare war." On the other hand, a number of Senators took the position Rayburn and others had assumed in the House, that the President already possessed the necessary power to act, without special congressional approval. The paradoxical position of many Senators, who were supporting the resolution while maintaining that Congress had the war power, is exemplified by Senator Sparkman. He recognized that if the President used our armed forces in a Formosan crisis it would probably precipitate a major war. At the same time, he continued to maintain that "under the Constitution, only Congress can authorize the making of war by this Government." Not one of the five amendments which were offered expressed any reservation concerning, or any attempt to restrict, the power of the President to plunge the nation into war. The primary issue was simply a question of geographical limitations. The resolution passed by a majority of 85-3.²⁶

In the short space of five days, with minimal consideration, and unchanged from the form in which it had been introduced,²⁷ the resolution was passed, granting the President the authority to take actions which could precipitate a major war. Considering the gravity of the threat, and the need to take preventive action, there is no intent to suggest that the

²⁶*Congressional Record*, 84th Congress, 1st Session, 735-769, 813-852, 920-994. The Morse quote is at 841, Sparkman at 933.

²⁷*United States Statutes at Large*, 84th Congress, 1st Session, LXIX, 7.

WAR-MAKING POWER: CONGRESS VS. PRESIDENT 41

resolution should not have been passed. But the speed with which it was adopted, the lack of concern for the constitutional issues involved, in fact the insistence that the President already had all the powers included in the resolution, indicate the degree to which Congress was unwilling to assume its responsibility.

The Formosa resolution did adhere more closely to constitutional intent than Truman's action in Korea. Congress was, at least, consulted. But as a substitute for the constitutional formula, it leaves much to be desired. The executive department was clearly at the helm. The resolution originated in the executive branch, and the only witnesses heard by the congressional committees were members of the executive department. Further, Congress had only limited choice. Theoretically it would have been possible to defeat the resolution, and at least this was a more likely possibility than failure to support a war already underway, but that would have undermined the President and compromised the United States in world affairs. The alternatives did not really admit a free choice.

Even the "Formosa formula"—a contingent declaration of war—might not always be possible. Two limitations govern its use. First, the government must be able to foresee the threat. Second, the threat must be remote enough to make congressional consultation possible. Both conditions were present in the Formosa situation. Future threats to the peace may arise without providing time to consult Congress.

There are, then, three alternatives available with which we may respond to a threat of war. The most secure, because it provides the most adequate safeguards, is the constitutional formula. It should be used wherever possible in considering the question of war or peace. But it has definite problems and serious limitations, as we have seen. If the Formosan Resolution is an accurate measure of congressional intent, it is obvious that one of the most important of these limitations is the inability, or the unwillingness, of Congress to accept the responsibility involved. There may be times when the constitutional formula simply cannot be used, but those instances must not be multi-

plied by Congress' unwillingness to assume the responsibility which, under the Constitution, clearly resides with that body.

In some cases the contingent declaration of war may have to replace the constitutional formula. At least it gives Congress a role in the decision-making process. It has value as a propaganda device, making our position clear to friend and foe alike, and it commits the people, through their representatives, to the action, and so may lessen criticism at home. But it has definite limitations. Most important, unless Congress seriously assumes its responsibility and carefully considers the proposal, it is little better than not consulting Congress at all.

Finally, there may be instances when neither of the foregoing is possible, when either military necessity or strategic considerations make congressional consultation impossible or unwise. In these instances the Korean approach would seem to be the only alternative. But neither Congress nor the President should permit this approach, which is the simplest to use, to displace the constitutional formula simply because it is more convenient. The President must exercise great care to avoid further usurpation of Congressional power. Even more important, the Congress must willingly accept its responsibility under the Constitution. Only in that fashion can the nation be adequately protected from involvement in a war contrary to the nation's interest.