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BOOK REVIEW

WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? By W. Taylor Reveley III. University of Virginia Press, Charlottesville, Va., 1981, pp. ix, 394, \$15.95.

*Reviewed by William B. Spong, Jr.**

Periodically in American history, bold international moves by a strong President or prolonged involvement in an unpopular war have prompted national debate over the respective war powers of Congress and the President. America's failure to terminate successfully the war in Indochina triggered the most intense of the war powers debates.¹ After numerous efforts to ensure a congressional voice in decisions to commit American troops into hostile situations overseas, Congress passed the War Powers Resolution of 1973² and enacted it into law over a presidential veto. Made possible by the political fallout surrounding the Vietnam and Watergate controversies, the Resolution sought to provide a procedural framework within which the nation would exercise its war powers. Unfortunately, many consider the final product essentially ambiguous, rendering it little more than an unloved stepchild to the already laconic war powers provisions contained in our Constitution.

Eighteen years after passage of the Tonkin Gulf Resolution and nearly

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¹ Another series of debates challenging the constitutional war powers of the President took place in reaction to pre-Pearl Harbor actions taken by President Franklin Roosevelt in 1940, when he unilaterally exchanged destroyers for bases with Great Britain, and in 1941, when he sent American troops to Greenland and Iceland and provided armed convoys for shipping supplies to Britain.

Roosevelt's actions provided precedents for President Truman to send armed forces to Korea in 1950 without congressional authorization or consultation. In 1951, President Truman sent four additional divisions to Europe as a deterrent to Russian aggression. Both actions prompted prolonged debate in the Senate, led by Senator Robert A. Taft. Taft questioned, on constitutional grounds, the sending of troops to Korea and Europe, as he had done a decade earlier when Roosevelt sent troops to Iceland.

² Pub. L. No. 93-148, 87 Stat. 555 (codified as amended at 50 U.S.C. §§ 1541-1548 (1976 & Supp. IV 1980)).

a decade since the evacuation of Saigon, Taylor Reveley, in a thoughtful, often incisive work, has made a significant contribution to the body of scholarly literature concerning constitutional war powers. Reveley's book is more than an historical or legal summary. His searching analysis reevaluates the War Powers Resolution itself and recommends an allocation of constitutional warmaking powers that "involves less control for Congress than the Constitutional Fathers expected, but also less control for the President than most Executives in this century and a number before have actually exercised."³

Reveley is no newcomer among those who ponder the war powers.⁴ He has long realized that "argument over the allocation of war powers conjures up two of our most cherished political bugbears: the fear that American democracy will perish, choked by presidential tyranny, and the obverse dread that it will smother amid congressional indecision and parochialism."⁵ Mindful of such divergent fears, Reveley examines the text of the Constitution's war powers provisions, the purposes of the framers and ratifiers, evolving beliefs about what the Constitution requires, and the various allocations of control over war powers that have emerged in actual practice. Reveley pays proper respect to the text of the Constitution, but goes beyond its literal language by delving into the relatively unexplored oral and written debates among the framers and at the 1787-88 ratifying conventions. His exhaustive review of those early years leads Reveley to conclude that the framers and ratifiers intended Congress, not the President, to have the preeminent role in warmaking. Nearly two hundred years of historical precedent show, however, that the founding fathers' intent has not often been realized.

In the years since ratification, the nation has seen a rising presidential sway over basic decisions involving war and peace. A graph charting this rise would show an uneven but cumulative progression toward presidential hegemony, reaching local peaks under the administrations of Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, and finally Johnson and Nixon. Strong presidents have taken advantage of textual uncertainties in the Constitution and thus, through usage, have contributed to an evolving view of executive power and the role of the Commander-in-Chief that is today quite expansive.

The retreat before executive hegemony has not been steady. As Reveley notes, "there have been many instances in which the legislators *have* con-

³ W. Reveley, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* 204 (1981).

⁴ See Reveley, *Constitutional Allocation of the War Powers Between the President and Congress: 1787-1788*, 15 *Va. J. Int'l L.* 73 (1974); Reveley, *Presidential War-making: Constitutional Prerogative or Usurpation?*, 55 *Va. L. Rev.* 1243 (1969).

⁵ W. Reveley, *supra* note 3, at 8.

trolled American policy or participated as the President's equal in shaping it."⁶ For the most part, however, Congress has accepted presidential policy and acquiesced in presidential initiatives. Reveley nonetheless observes an ever-present capacity in Congress to rebound from such bouts of relative impotence. This resilience is seen most dramatically when Congress splits with the President over basic issues of foreign policy and cries of executive usurpation rise from the floors of the House and Senate. Once the current crisis has passed, however, Congress has traditionally retired to await the next controversy without establishing lasting mechanisms through which it might exercise an active, rather than a merely reactive, voice in the nation's warmaking decisions. In general, the decibel level of congressional protest over nonparticipation in use-of-force decisions has been in inverse relation to the success of the particular military initiative under challenge.

Reveley's work does not make light reading. In the midst of his careful, multi-factored analysis, all but the most serious scholar will yearn for an occasional anecdote about a founding father, a president, or a congressman to demonstrate the human factors that have so often played a part in the nation's decisions to seek war or peace. Reveley, a practicing attorney, is true to his brief, however, and refuses to divert his reader with levity. His analysis moves purposefully forward with close attention to those factors that most economically develop his thesis.

The key to Reveley's reasoning is found in the discussion in which he outlines the long-term ends sought by the constitutional fathers as they divided authority over war and peace. These ends included promoting the national defense, hindering the use of military force for domestic tyranny, obtaining democratic control over policy, permitting prompt emergency action, and ensuring an American capacity to move toward war or peace rapidly and in secrecy whenever necessary.⁷ The incompatibility among these goals is evident; democratic control, for example, cannot simultaneously be given equal weight with speed and secrecy.

Reveley considers that some of these ends are executive prerogatives, while others are legislative. Generally, executive ends—such as the need for emergency action—permit the President to be favored in the initial stages of use-of-force decisions. Legislative ends—such as ensuring democratic control over policy—come into play at later stages in a crisis when the need for national consensus on basic decisions of war and peace becomes paramount. His analysis thus grants the President more freedom of action than the framers and ratifiers probably intended, yet gives Congress an important counterbalancing role as well. Reveley believes that

⁶ *Id.* at 121 (emphasis in original).

⁷ *Id.* at 72, 175-81.

such a balance is consistent with the important ends sought by the framers and ratifiers. Only by staggering executive and legislative prerogatives over time can they be harmonized among themselves and made to work in the real world.

After reviewing Reveley's suggested division of constitutional war powers, one must ask whether it complements or undercuts the provisions of the War Powers Resolution of 1973. Reveley's own conclusion is that the Resolution, though flawed, does give Congress the potential to play a substantial role in basic decisions of war and peace; this role is consistent with his belief that the executive and legislative branches share responsibility for this area of constitutional activity. Briefly stated, the Resolution permits the President to act in emergency military situations without prior congressional approval. Under certain circumstances, the President is required to consult with the Congress. Whenever the President introduces troops into situations where hostilities are imminent or already under way, or into foreign territory while equipped for combat, or as reinforcements in substantial numbers, he must submit a report to Congress within forty-eight hours. If the President submits the report because he has introduced troops into a combat situation, then a period of sixty days begins to run. During that period, Congress has several options. It may either direct the President to end hostilities by passing a concurrent resolution within sixty days, declare war, or authorize continued hostilities. If Congress takes no action and the sixty-day period expires, however, then hostilities must cease and the troops must be withdrawn.

During the Senate debates, supporters of the Resolution in its final form hailed it as an historic recapture of congressional authority,⁸ while others in Congress criticized it as an historic surrender to executive power.⁹ Louis Henkin viewed the Resolution as "important only as a promise for new attitudes for the future."¹⁰ Reveley is a bit more bullish, stating that the Resolution's enactment was a necessary initial thrust to arrest the gravitational pull toward executive hegemony in American warmaking.¹¹ He observes, however, that Congress has done little since enactment to sustain this thrust, and cites as evidence Congress' failure to implement the terms for evacuating American troops from Vietnam, even though President Ford had specifically requested congressional guidance on this point.¹² Reveley points to further examples of congressional passivity that occurred in the wake of President Nixon's failure to report

⁸ See, e.g., 119 Cong. Rec. 36,189 (1973) (statement of Sen. Javits).

⁹ See, e.g., *id.* (statement of Sen. Eagleton).

¹⁰ Henkin, "A More Effective System" for Foreign Relations: The Constitutional Framework, 61 Va. L. Rev. 751, 774 (1975).

¹¹ W. Reveley, *supra* note 3, at 261.

¹² *Id.* at 249-53.

during the 1974 Cyprus crisis and President Ford's and Carter's inadequate reports and lack of prior consultation during the various crises in their administrations.¹³

Reveley is at his best when examining the Resolution, dispassionately probing its weaknesses with the skill of a surgeon. While he finds constitutional support for war powers legislation, he questions the value of some of the Resolution's specific provisions. He observes, for example, that despite congressional concern over prior consultation, the Resolution actually requires consultation only if the President intends to introduce troops into hostilities or situations in which hostile engagement is imminent. The mere deployment of troops, even if equipped for combat, is thus not covered under the Resolution's consultations section. Nor does the report which the President must file with Congress following the introduction of American troops overseas trigger the sixty-day period for congressional approval, unless hostilities exist or appear likely. The result has been that, under the Resolution, presidents have consulted and reported as they have seen fit; compliance has been, at best, restrained.

President Nixon's veto message took particular exception to those provisions of the Resolution that would terminate the President's use of military forces whenever Congress took no action within the sixty-day period or directed withdrawal by concurrent resolution. Reveley agrees that the Constitution does not empower Congress to halt an ongoing executive initiative by mere inaction,¹⁴ and he sees no good purpose served by the sixty-day limit. Nonetheless, it is unlikely that Congress could withstand the pressure generated by its failure to act or that those opposing the intervention would restrict themselves to mere inactivity, if little or no genuine support existed for the President's action. Nor is it likely that a President, as Commander-in-Chief, would or could allow hostilities to be terminated if military forces were still engaged. Nevertheless, the Resolution does require such termination and thus provides critics with reason to question its underlying soundness and constitutionality. Reveley does regard as sound, however, the provision that Congress may end presidential initiatives by adopting a veto-proof concurrent resolution.¹⁵

Although he criticizes the Resolution's flaws and Congress' unwillingness to enforce the procedures spelled out in it, Reveley emphasizes that the legislation retains "potent bite." He believes that Presidents will continue to report under the Resolution and that consultation, though hurried, will occur.¹⁶ Under his view, the framers and ratifiers intended Con-

¹³ *Id.* at 248-49, 253-54, 259-61.

¹⁴ *Id.* at 191-92.

¹⁵ *Id.* at 197-98, 236.

¹⁶ President Reagan's actions to date suggest that he intends to follow the pattern of

gress to play a substantial role in warmaking decisions, but that role has diminished in the face of rising presidential dominance brought on by changing times, strong presidents, and congressional acquiescence. Reveley believes in the underlying wisdom of the ends sought by the framers and ratifiers, and that those purposes are just as responsive to national needs today as they were in the early days of our republic. If arranged in staggered priority over time, these purposes offer the best hope for constitutional compliance and national consensus. Under Reveley's analysis, the War Powers Resolution, despite its defects, could be a practical vehicle for institutionalizing the framers' and ratifiers' purposes, provided that its consultation and reporting sections are properly implemented.

Reveley also finds the War Powers Resolution preferable to any of the other alternatives available to Congress. Congress enacted the Resolution as an alternative to using its power of the purse to control military adventures by the executive. Reveley dismisses this latter option as unworkable, noting that "[c]utting off funds is a drastic remedy not easily adopted even in extreme circumstances and one rarely conducive to thorough debate about policy."¹⁷

Leading opponents of the Resolution have also championed a constitutional amendment as the best method for dividing warmaking powers.¹⁸ Reveley observes, however, that a war powers amendment would lack ready political appeal. Moreover, it would be unwise to attempt formal amendment even if adoption were a realistic possibility. In his words, "the new, detailed prose of a thorough job would measurably tarnish the

earlier administrations in regard to the Resolution's requirements. That pattern has involved a failure to report at all in some circumstances or the filing of reports indicating that no hostilities are imminent in other circumstances. This latter ploy allows the President to avoid the consultation requirement and the running of the 60-day period under § 4(a)(1) of the Resolution.

President Reagan made no report to Congress when the supply of arms and advisors for El Salvador was increased. See Suhcomm. on Int'l Sec. and Scientific Affairs of the House Comm. on Foreign Affairs, 97th Cong., 1st Sess., *The War Powers Resolution: Relevant Documents, Correspondence, Reports 50-54* (Comm. Print 1981). He did report to Congress on March 19, 1982, when U.S. forces entered the Sinai as part of a multinational peacekeeping force. However, the report emphasized that "[n]o hostilities are occurring in the area and we have no expectation of hostilities." Communication from the President of the United States, Participation of the United States in the MFO Force Deployed in the Sinai, H.R. Doc. No. 158, 97th Cong., 2d Sess. 2 (1982). Similar reports have been filed more recently in relation to the introduction of Marines into Lebanon during August and September 1982. See Zablocki, *Reagan Is Skirting the War Powers Act*, *Washington Post*, Oct. 3, 1982, at B7, col. 2. See also *Washington Post*, Aug. 26, 1982, at A25, col. 1.

¹⁷ W. Reveley, *supra* note 3, at 226-27.

¹⁸ See, e.g., 121 Cong. Rec. 13,557 (1975) (statement of Sen. Goldwater).

Constitution as a symbol of national continuity."¹⁹

Finally, Reveley finds judicial review an unlikely solution to the division of constitutional war powers. He bases this finding on the courts' traditional reluctance to intervene in disputes between Congress and the President. He notes that "[t]he real obstacle has been the tendency of lower federal courts to find war-power questions political and the Supreme Court's refusal to hear such cases, relying on its discretionary jurisdiction."²⁰ Reveley examines the political question doctrine and concludes that, although caution is suggested, the criteria traditionally applied by the courts under the doctrine do not compel absolute avoidance.²¹ Reveley, in fact, urges the Supreme Court to take a case in order to fulfill its traditional duty to "say what the law is."²²

As a practical matter, then, political activity is more likely to restrain presidential warmaking than either constitutional amendment or judicial opinion. Although Reveley supports congressional prerogatives in war-powers decisionmaking, he has little patience for Congress' inability to exercise its prerogatives effectively. Nevertheless, it is to Congress that Reveley ultimately turns as the last hope for reversing the current presidential primacy over war- and peace-making.²³

Alexander Bickel once observed that the way for Congress to resume control over American foreign policy is to resume.²⁴ Reveley outlines the affirmative steps he believes are necessary for a return to constitutional balance but not to congressional control. Advocates of presidential power argue, however, that the structure of Congress is inherently too diffuse to permit that body's effective participation in modern warmaking decisions, that the President has difficulty in determining with whom in Congress to consult, and that the fiefdoms inherent in the congressional committee system make it almost impossible to involve Congress deeply in any crisis management situation.

To meet these objections, Reveley suggests amending the War Powers Resolution to tighten its reporting and consultation sections. Such a move would demonstrate a new resolve on the part of Congress to exercise its proper role in the constitutional war powers scheme. In addition, Reveley proposes the establishment of a joint committee to include the leadership

¹⁹ W. Reveley, *supra* note 3, at 206.

²⁰ *Id.* at 353 n.1.

²¹ *Id.* at 209.

²² *Id.* at 217 (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974)).

²³ *Id.* at 218.

²⁴ Congress, the President, and the War Powers: Hearings Before the Subcomm. on Nat'l Sec. Policy and Scientific Developments of the House Comm. on Foreign Affairs, 91st Cong., 2d Sess. 48 (1970).

of the House and Senate.²⁵ This committee would serve as the group with whom the President would consult and to whom he would report under the provisions of the War Powers Resolution. Such a crisis committee would solve much of the executive dilemma about consultation and reporting. Furthermore, it would meet congressional complaints that it is the President and not the Congress who now determines with whom he shall consult. Yet the idea of a joint war-and-peace committee is not new,²⁶ and such proposals have often broken down because of disagreements over which members and how many would be selected for membership.²⁷

Despite the merit of these proposals, it is unlikely that Congress will gather the resolve to enact them in the absence of another prolonged military adventure that goes sour. Even the most ardent proponents of the original Resolution have had difficulty sustaining sufficient interest beyond minor protests in recent years to augur well for the prospects of statutory amendment.²⁸ Reveley suggests, however, that resuscitation of

²⁵ W. Reveley, *supra* note 3, at 221.

²⁶ See *id.* at 355 n.20. The most faithful advocate of a joint committee was Senator Hubert Humphrey, who championed the idea with constancy until his death. See, e.g., *Congress and Foreign Policy: Hearings Before the Special Subcomm. on Investigations of the House Comm. on International Relations, 94th Cong., 2d Sess. 169-72 (1976)*. In 1975, the Murphy Commission proposed a Joint Committee on National Security in its final report. See Commission on the Organization of the Government for the Conduct of Foreign Policy 17, 207-10 (1975). The suggestion was scathingly dismissed in the appended comments of Senator Mike Mansfield, then Senate Majority Leader. See *id.* at 230-31.

Congressman Clement Zablocki, Chairman of the House Committee on International Relations and a member of the Murphy Commission, tried unsuccessfully to have a Joint Committee on National Security created. Chairman Zablocki has been the most persistent of the original war powers sponsors in insisting on prior presidential consultation. See, e.g., *Subcomm. on Int'l Sec. and Scientific Affairs of the House Comm. on Foreign Affairs, 97th Cong., 1st Sess., The War Powers Resolution: Relevant Documents, Correspondence, Reports 50 (Comm. Print 1981)*.

²⁷ In 1977, a subcommittee of the House Committee on International Relations dismissed a similar proposal:

A joint committee, composed of the leadership of Congress and the senior members of the several committees concerned generally with foreign policy would be both unwieldy in size and too demanding on those who would compose its membership. It would also be incapable of solving some of the major impediments to effective congressional participation in foreign policy, such as the lack of meaningful, prior consultation, attitudinal constraints, and disparate and overlapping committee jurisdictions. *Staff of Special Subcomm. on Investigations of the House Comm. on International Relations, 94th Cong., 2d Sess., Congress and Foreign Policy 21 (Comm. Print 1977)*.

²⁸ See W. Reveley, *supra* note 3, at 249, 256-61, 367 n.69. For an excellent chronological review of compliance patterns under the War Powers Resolution that covers American military involvement during withdrawal from Indochina, the *Mayaguez* incident, the 1976 Lebanon crisis, the Korean tree-cutting incident, the Zaire airlift, the Iranian hostage rescue attempt, and recent events in El Salvador, see J. Sullivan, *The War Powers Resolution: A*

congressional prerogatives in this area might well begin, even short of actual statutory amendment. Such a strategy would require vigilant oversight and continuing, early demands for participation whenever the potential for American military involvement overseas arises. There are signs that some members recognize this need.²⁹

Even if some of Reveley's proposals are unlikely to reach fruition, his book offers fresh insights into the decades-old debate on the proper constitutional division of war powers. Much of this insight stems from the author's perspective as a detached observer of American constitutional and military history. Reveley is neither a Senator Javits expounding on legislative success nor a Senator Eagleton bemoaning the pitfalls of legislative failure. Nor is he a blind advocate stretching to sustain some preconceived notion of how war powers should be allocated through selective citations of historical incident and legal precedent.

Many readers will lack the patience to relate Reveley's formulations to a complex subject. Others may fail to appreciate the admirable work he has done in dissecting the War Powers Resolution and fitting it into a suggested system for constitutional warmaking that is essentially consistent with both the founding fathers' underlying purposes and the exigencies of modern warfare. Yet even the casual reader will benefit from the legal, historical, and logical framework within which Reveley views the traditional constitutional debate in this area, the War Powers Resolution itself, and the oft-discarded suggestion for a joint national security committee of the Congress.

Few neutrals express opinions on the most effective allocation of constitutional war powers. Reveley is a rare exception. Those apostles of congressional prerogative, who believe that history can be rolled back to a narrow construction of the Constitution despite nearly two hundred years of custom and usage, will probably disagree with Reveley's suggested priorities favoring presidential prerogatives in emergency situations. Likewise, supporters of executive dominance, who fail to appreciate the public fear of one-person warmaking—a fear rooted in the Constitution—may look with disfavor on Reveley's middle-of-the-road approach. Yet if mem-

Special Study of the Committee on Foreign Affairs 179-254 (Comm. Print 1982).

²⁹ See, e.g., W. Reveley, *supra* note 3, at 306-07 (setting forth letter from Senators Javits and Church to Secretary of State Vance requesting consultations on contemplated usage of American troops during the then ongoing Iranian hostage crisis). See also S.J. Res. 100, 97th Cong., 1st Sess., 127 Cong. Rec. S11,336-37 (daily ed. Oct. 7, 1981) (reaffirming War Powers Resolution in connection with deployment of U.S. troops as part of multinational peacekeeping force in the Sinai); 126 Cong. Rec. S9092 (daily ed. July 1, 1980) (statement of Sen. Exon) (introducing amendment reaffirming the War Powers Resolution in conjunction with passage of the military procurement bill authorizing funds for a Rapid Deployment Force).

bers of Congress believe, as Reveley does, that the founding fathers intended Congress to participate in war- and peace-making decisions, and that such participation is wise, then there is hope that the membership will heed the wisdom of Senator Stennis, an early sponsor of the War Powers Resolution. Speaking in support of a 1980 amendment reaffirming that Resolution, the Senator admonished his colleagues to keep bright the plow of congressional prerogative by tilling the soil regularly. Otherwise, he warned, the plow might fall, rusty and tarnished, into disuse.³⁰ Reveley tells us with compelling logic that it is in the country's long-term interest to keep that plow bright and shiny, and that both Congress and the President share the arrows and the olive branch.

³⁰ 126 Cong. Rec. S9090 (daily ed. July 1, 1980) (statement of Sen. Stennis).