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# Presidential Power and Aggression Abroad:

## A Constitutional Dilemma

by William W. Schwarzer and Robert R. Wood • of the California Bar (San Francisco)

■ Although the constitutional power to declare war is vested in Congress, congressional declarations have had surprisingly little to do in the past with committing our Armed Forces to actions that look and sound very much like war. The President is the Commander in Chief of the Army and Navy, and most of the hostilities we have engaged in have actually begun before any formal action of the legislative branch.

■ If Russian troops should suddenly invade Norway, the universal question would be: What will America do? All members of NATO, including Norway, have received the solemn pledge of the United States that an attack on one would be regarded as an attack on all. Each member of NATO vowed to assist the nation attacked by taking forthwith such action as it deemed necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.<sup>1</sup>

What action does American governmental machinery permit in such an event? Normally the President is the one to decide what military measures are necessary. Suppose he decides that the safety of America depends upon immediate military action to prevent strategic Norwegian bases from falling into Russian hands. Suppose he decides that the safety of America depends on instant massive retaliation. Still, crisis or not, he must consider a further problem: What does the Constitution authorize the President to do under the circumstances? Oddly enough, this vital

question of constitutional law is fraught with such doubt and difficulty that the foremost legal authorities reach opposite conclusions.

This problem—the constitutional power of the President to send troops into action abroad—may confront us anywhere, anytime in our troubled world. It has arisen in the past, as in the Boxer Rebellion of 1900, but was not seriously debated until after President Truman had sent our troops to fight the North Koreans. The issue of the debate, of course, was whether the President should have waited to let Congress vote on what measures were to be taken against the North Koreans, who meanwhile were sweeping southward.

The great constitutional question stems from the division of the war power by the Founding Fathers between Congress and the President. The framers of the Constitution, with the hated prerogatives of George III in mind, did not want the new republic's Chief Executive to possess the grave power of choosing between war and peace. Congress, instead, would "declare" war and the Presi-

dent was made Commander in Chief of the Army and Navy to act as the nation's first general and admiral. Thomas Jefferson thought that "we have already given . . . one effectual check to the dog of war, by transferring the power of letting him loose . . . from those who are to spend to those who are to pay".<sup>2</sup>

Originally the framers had given Congress the power to "make" war. But even in 1787, war could come too fast for Congress to act to defend the nation, and a change was made to give Congress the power to "declare" war in order to remove any doubts that the President could "make" war in defense of the nation.<sup>3</sup> In the twenty-third of *The Federalist* papers, Alexander Hamilton justified this change by maintaining that the circumstances that endangered the safety of nations were infinite and no constitutional shackles could wisely be imposed on the President's power of defense; that it was impossible to foresee the extent and variety of means that would be necessary to insure adequate defense in the future. Hamilton's authoritative interpretation of the Constitution demonstrates the great foresight and

1. The North Atlantic Treaty, Article V, 63 Stat. pt. 2, page 2244.

2. Quoted in Warren, *The Making of the Constitution* (1928), 48: note 1.

3. 2 Farrand, *Records of the Federal Convention of 1787* (1911), 318.

statesmanship of our Founding Fathers.<sup>4</sup>

But the Founding Fathers could not foresee supersonic aircraft and hydrogen bombs which today raise the momentous constitutional question: When is American resistance to aggression abroad "war" which Congress must declare and when is it "defense" which the President may undertake? An attack on Hawaii clearly permits the President to plunge the nation into all-out mobilization and to commit its Armed Forces to action. But what about an attack on Canada, or on Cuba, or on Indo-China or on Norway? Are these, too, the ramparts of our defense?

An attack on any of these nations would confront the United States with a national emergency but the degree of its seriousness would vary with each case. Who is to decide the question of degree, the question whether the emergency is serious enough to justify presidential action? The United States Supreme Court in the Steel Seizure case held that the President may not enlarge his powers at the expense of Congress by simply deciding that a national emergency exists.<sup>5</sup> When President Polk seemed to do just that by dispatching American troops into Mexico, Abraham Lincoln scoffed:<sup>6</sup>

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."

It may be significant that when Lincoln later assumed the awful responsibility of defending the nation, he thought it necessary to assume unprecedented—even dictatorial—powers for the first three months following the fall of Fort Sumter.

In deciding what to do in the event of an attack on a country such as Norway, the President must examine with deep insight this nation's history and its principles of government. It is our thesis that these will provide constitutional means for tak-

ing military action when sudden swift aggression makes it imperative.

A survey of American wars shows, surprisingly, that congressional declarations of war have had little or nothing to do with committing this nation's Armed Forces. Only the War of 1812 followed congressional debate culminating in a declaration of war. In every other instance Congress followed presidential leadership by declaring war or supporting undeclared war such as the naval war against France in 1798, the Barbary wars in 1801 and 1815, the Mexican hostilities from 1914 to 1916, and the Korean war. Although a declaration of war has a major legal significance in our relations with enemy nations and as a basis for emergency legislation, it has had little to do with "letting loose the dog of war".<sup>7</sup>

Over a hundred times the President has sent American forces abroad into action too limited to be called war.<sup>8</sup> In Latin-America, the Philippines, Japan, China, Russia and other countries these forces have been used to guard American lives and property. At times the President has acted similarly to enforce international obligations or to protect the intangible interests of the United States. The occupation of Haiti, the assumption of control over the Canal Zone, President Monroe's declaration of the Western Hemisphere's territorial integrity, the destroyers-for-bases deal—all were examples of how Presidents have unilaterally committed American military force in the interest of national security as they saw it.

It is also relevant here that the

Constitution makes the President the Chief Executive, the chief enforcement officer of the nation's laws. This presidential function affects our problem in two ways. In the first place we have since the end of World War II built a formidable network of collective security treaties covering most of the free world. The outstanding example is the North Atlantic Treaty in which the signatory powers "agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all".<sup>9</sup> While the Senate in ratifying this treaty did not intend to relinquish the congressional power to declare war—even if it could have done so—this treaty certainly imposes a legal obligation on the President in the event of an armed attack on a member nation. Being the law of the land, it would require him to enforce it by such action as the Constitution authorizes. Secondly there exists today something in the nature of an international common law by which aggressive war is made illegal. Over a period of centuries the collective morality of the peoples of the world has crystallized into such legal forms as the Kellogg-Briand Pact outlawing war and the recent trials of war criminals. There is increasing recognition today of a civilized nation's duty to act as a citizen policeman in defending society against aggressive war. This principle has found expression in the Charter and the conduct of the United Nations.<sup>10</sup>

The President's role cannot, of course, be conclusively defined by international law and the course of history. Neither the development of

4. For a recent statement, see Mr. Justice Jackson, concurring, in *Youngstown Sheet & Tube Co., et al. v. Sawyer*, 343 U.S. 579, 645 (1952); see also *id.* at page 659.

5. *Youngstown Sheet & Tube Co., et al. v. Sawyer*, 343 U.S. 579 (1952).

6. Quoted in Taft, *A Foreign Policy for Americans* (1951), 29.

7. A concise survey of Congress' use of its power to declare war is found in Rogers, *World Policing and the Constitution* (1945), 45-55.

8. Rogers, *supra*, cites 148 instances; 76 instances are listed in Offutt, *The Protection of Citizens Abroad by the Armed Forces of the United States* (1928). The difference seems due to different criteria of selection.

9. The North Atlantic Treaty, Article V, 63 Stat. pt. 2, page 2244.

10. A discussion of the status of war in modern international law is found in Jessup, "Force Under a Modern Law", 25 *Foreign Affairs* 90 (October, 1946). The Senate Committee on Foreign Affairs and the House Committee on Foreign Relations, in approving the United Nations Participation Act of 1945, both stated that American participation in international policing under Article 43 of the U.N. Charter would not be "war" in the constitutional sense which requires a declaration by Congress. Sen. Rep. No. 717, page 8, and H. R. Rep. No. 1383, page 8, 79th Cong., 1st Sess. (1945). An authoritative contrary view is expressed in Borchard, "The Charter and the Constitution," 39 *Am. J. Intl. L.* 767 (1945).

international morality nor the assumption of international obligations can alter the distribution of power in American government. Neither the jetplane, the atom bomb nor the peril of friends abroad is capable of amending our Constitution. Yet the essential truth remains that the Constitution was not drafted as a statute to deal with the problems of Hamilton's and Jefferson's day but as an enduring charter of government.

The system of government bequeathed to us is, like all democratic institutions, a compromise. The Founding Fathers divided the power to conduct our foreign affairs, in peace as in war, between Congress and the President. Since that day, the demands of responsible democratic government have had to be adjusted to the moment's needs for prompt and resolute action. The accumulated experience of history has therefore put a gloss on the constitutional framework.<sup>11</sup> Unilateral presidential action within certain spheres has become a part of constitutional government. Even in the legislative branch power and responsibility have crystallized in committees and chairmen.

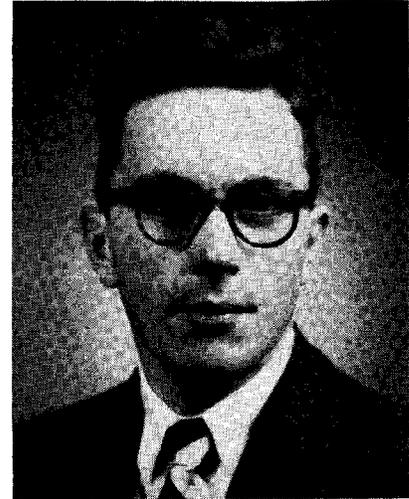
What would a President, confronted with a sudden attack on a friendly nation abroad, face when he turns to Congress for authority to take action? Even if a majority were willing to follow his leadership and accept his judgment based on information and experience not immediately available to Congress, there would undoubtedly be an intelligent and powerful minority that should and would be heard. The probable debate between representatives from rural and interior constituencies and those from areas more responsive to events abroad might cost strategic days and hours.

Against the delays of congressional debate must be weighed the organization, the skill and the information of the executive branch which make it peculiarly qualified to act when quick action is needed. But presidential power to act depends on the existence of a sufficiently grave emer-



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gency and, as we have seen, it is not within his power to determine that such an emergency exists.

Yet it is clear that the President, sworn to defend the nation and the Constitution, cannot refuse to act when national security is threatened.<sup>12</sup> An attack on New York would raise no question respecting his constitutional powers. An attack on Canada or Cuba would raise very little question. An attack on a European ally would have this in common with an attack on or near this country—it would impose on the President the same duty to exercise his best judgment on the matter of the defense of this country. The President, after all, is elected as much for his ability to exercise his judgment and make decisions for the nation as for his ability to carry out the mandate of Congress. If his judgment dictates that the safety of the country is threatened and that quick action is needed to eventually save American lives, it is his duty to take appropriate action immediately whether the attack is against American territory or not.

Many times in our early history, the President or his executive officers

have had to act in the best interests of the nation when there was no time to go to Congress for authority.<sup>13</sup> The ultimate legality of their conduct depended on eventual congressional approval but this did not diminish their duty to act when circumstances demanded action. Jefferson's purchase of the Louisiana territory is an example. A firm believer in a weak executive, he nevertheless felt that it was his duty to secure to the American people the immeasurable benefits accruing from the purchase regardless of his doubts respecting his power to act.<sup>14</sup> Congress subsequently approved his action and history vindicated his judgment. There are other occasions on which executive officers have had to act promptly to spend money, dis-

11. See Mr. Justice Frankfurter, concurring, in *Youngstown Sheet & Tube Co., et al. v. Sawyer*, 343 U.S. 579, 610 (1952).

12. See *The Prize Cases*, 67 U.S. 635, 668 (1862). (The Court states, however, that the President does not have the power to "initiate" war).

13. See Wilmerding, "The President and the Law", 67 *Pol. Sci. Q.* 321 (September, 1952).

14. Interesting examples of Jefferson's thinking in connection with the President's power and duty to act in emergencies are found in Franklin, "War Powers of the President: An Historical Justification of Mr. Roosevelt's Message of September 7, 1942", 17 *Tulane L. Rev.* 217, 231-240 (1942).

tribute supplies or suspend habeas corpus and ask congressional approval only afterward.

When the President's duty to act in the defense of the best interests of the country as they appear to him is viewed in the light of the historic development of his office and of the international obligations which the nation has assumed, some of the doubts surrounding his power to resist aggression abroad disappear. If imperious circumstances demand action, it is not the President's duty to refuse to act while awaiting specific authority from Congress. Aware of the electorate's confidence in his judgment, he must proceed to exer-

cise it in the realization that Congress must eventually be asked to supply the authority which he may lack at the time he takes the action he considers imperative. Faced with an attack on Norway, for example, the President may well conclude, especially in view of the Senate's recognition of Norway's strategic importance by the North Atlantic Treaty, that immediate military intervention is imperative. An attack on other countries with whom we may have different ties or none at all may equally lead him to determine that immediate intervention by our Armed Forces is needed, and he must

then act accordingly and submit his decision to Congress as soon as time permits. Congress retains the ultimate power to overrule the President's decision by withholding funds or by refusing to declare war. Admittedly it would not be easy for Congress to extricate the country from a war in progress but this risk is outweighed by the dangers of inaction in time of peril. And even if Congress should fail to back a President's decision, he will have been no more delinquent in the performance of his constitutional duty than if he had permitted the nation to be thrown into mortal peril by refusing to take action.

## National Conference of Bar Presidents

■ The seventh meeting of the National Conference of Bar Presidents was held at the Atlanta Biltmore Hotel, Atlanta, Georgia, on Sunday, March 7, 1954. Considering the geographical location of Atlanta, the meeting was unusually well attended. The total registration was ninety-four—representing fifty bar associations and thirty-two states. We were pleased to have two representatives who traveled all the way from Hawaii.

Confined as we were to a one-day session, our program was rather congested and unfortunately little time was left for question-box periods and general discussion. We were addressed by several bar presidents who discussed "Significant Undertakings and Accomplishments of Our Bar Association". These were Glenn R. Jack, President of the Oregon State Bar, Edward A. Dutton, President of the Georgia Bar Association, Edward T. Curry, President of the New Jersey State Bar Association, G. Ellis Gable, President of the Oklahoma Bar Association, Gabriel Hoffenberg, Past President of the Beverly Hills Bar Association, California, Timothy I. McKnight, President of the Illinois State Bar Association, Bettin Stalling, President of the Federal Bar Association and Stanley B. Balbach, Vice Chairman of the Junior

Bar Conference of the American Bar Association.

Perhaps the highlight of the Conference was a television show entitled, "The Law Says", put on by the Atlanta Bar Association and the Lawyers Club of Atlanta. This was a departure from the talks we have had on public relations and showed public relations in action.

We were welcomed by an interesting talk by A. Walton Noll, President of the Atlanta Bar Association. We received not only the Southern hospitality which he promised us, but Southern hospitality at its best.

In addition to committee reports, we were addressed by William J. Jameson, President of the American Bar Association; Sidney B. Pfeifer, of Buffalo, New York, President of the Erie County Bar Association; Jo V. Morgan, Judge of Municipal Court, Washington, D. C.; Ross L. Malone, Jr., of Roswell, New Mexico, member of the Board of Governors of the American Bar Association; Joseph B. Miller, chairman of the National Conference of Bar Secretaries; Harry Gershenson, of St. Louis, Missouri, Chairman of the American Bar Association's Section of Bar Activities; Glenn R. Winters, Executive Secretary of The American Judicature Society; E. Smythe Gambrell, Chairman of the American Bar Association's Committee on Regional Meet-

ings; and Allen L. Oliver, Chairman of the Association's Committee on Unemployment and Social Security.

There still seems to be some confusion as to who are members of and who may attend the Conference. I quote from my letter of October 21, 1953: "The Conference is composed of the President of the American Bar Association, the Presidents, Presidents-elect, Vice Presidents, and officers of all state and local bar associations which are represented in the House of Delegates of the American Bar Association and the Presidents of all other local bar associations in the United States as associate members. The past presidents of these associations are also members and constitute a most valued alumni."

Perhaps the most important meeting which this Conference has yet held will be held at the time of the Annual Meeting of the American Bar Association in Chicago on August 16-20, 1954. At that time the new American Bar Center will be dedicated. There will be a meeting of the Conference Council on Saturday morning, August 14. Our alert Vice Chairman, Archibald M. Mull, Jr., of Sacramento, California, will be in charge of the program for the August meeting.

ARTHUR VD. CHAMBERLAIN  
*Secretary*

Rochester, New York