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War Powers and Congress

DANTE FASCELL*†

Thanks very much. I must say that one of the things that we in Congress hoped to accomplish with the War Powers Resolution has taken place very nicely in law schools around the country: Debate. Now if we could just forget the law for the moment and get down to the real issue—the American people making up their minds about what they want to do one way or the other about presidential unilateral action leading or likely to lead to hostilities—that would help also. This certainly was my purpose. I did not intend, as a sponsor of the resolution, to draft something that would start a constitutional debate. But that's not bad. Debate is excellent. I was not, however, interested in setting the stage for a court test. I was hoping to spur public debate.

Now with the President, however, having done all these “illegal acts,” I ask, what are you going to do about it? The Supreme Court can state that impeachment is a congressional prerogative, but that doesn't solve the problem. It takes the American people to make that decision. We had one whale of a time impeaching Nixon. I want to tell you that was not easy, with or without attorneys general—and I think there has been a marked improvement in that regard by the way [referring to Mr. Walter Dellinger, Assistant Attorney General of the United States for the Office of Legal Counsel]. We have gone from the worst to the best, so we are slowly making improvements in this country.

The discussion today was excellent. Very scholarly, very legal. And Professor Ely's book, which I read with great enjoyment, was so thorough that it almost left me confused. I wondered why in the world we are even talking about war powers. Then I remembered that is what we in Congress wanted people to do. Of course the best place to talk about these powers in the scholarly sense is in law schools and with professors from every law school around the country taking sides and making arguments the best they can.

Everyone says that Congress has the sole power to declare war. First, we must decide just exactly what that means and how we express it? Well, I made the statement during the debate on the Vietnam resolu-

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† This piece is an edited version of extemporaneous remarks that Congressman Fascell delivered in response to the other presenters at the symposium.

tion that the resolution gave the President all the authority he needs. That was a *political* statement, not a *legal* statement, but I adopted this character in the argument of a legal statement. Had we in Congress intended to declare war, we would have used the formal words: "We, the people of the United States, do hereby declare war." We would have put the name of the country in there if we could have decided who it was we were fighting. We were not sure if it was the Chinese, the Russians, Ho Chi Min, Cambodia or Laos. So in order not to get into that kind of political debate, or the legal tangle that was involved, we just did it the other way. We did not mention the country and we did not say "we do hereby declare war." We just said, in effect, "Mr. President, you go ahead and do whatever you want and this is the authorization to do it." Is that sufficient? I don't know. From a legal standpoint I could make a case that it is not. On the other hand, from a political standpoint, from where I stood and what I had to vote on, I thought it made a good case.

Do we have to use the formal language in every case? Do we have to say, "We, the people of the United States do hereby declare war"? In a formal sense, I think that is what the Constitution means, because we are involving our own people in a life and death struggle. The Framers of the Constitution did not know anything about atom bombs, but they had those questionable cases that were on the edge, cases where the President exercised authority down through the years and did not bother to ask anybody or explain it to anybody. So, starting with the Barbary pirates, the President went after them and that was it. The American people accepted it. They did not impeach him or lynch him. And it continued that way and as time went on the President's authority grew increasingly more powerful, in the sense that people accepted the President's decision. Also there was a growing reluctance on the part of the Congress politically to get involved in the fight. The Supreme Court wanted to be a long way from both of those issues. Frankly, I think they ought to be. I never supported or wrote the War Powers Resolution or worked on its ultimate framework with the idea that the Supreme Court would make these tough constitutional decisions. I think that is ridiculous. The Court has a great responsibility to maintain the Constitution and its integrity, but the Supreme Court cannot impeach a President, and enforcement is the ultimate power.

So, enforcement—impeachment—is a political decision. You could ask, "Wouldn't you be better off if an impeachment were predicated on sound legal principle based on a decision of the Supreme Court of the United States?" But let's turn that around. Suppose the Supreme Court decided there was a constitutional violation or some other violation of the law, and said the president should be impeached—that would

be great, except only Congress has the power to impeach. Now suppose you cannot get the votes in Congress. Then what? A revolution? A breakdown in the legal system? An inability of the court to enforce its order? Leaving the question to the judiciary, frankly, would be unworkable.

So, along comes politics again. You cannot separate law and politics; it is impossible in my judgment. Maybe I am not as good a lawyer as a politician, but I do not think you can separate the two. To respond to those who ask if where Mr. Dellinger stands on the issue depends on where he sits,¹ I say it doesn't make any difference. Mr. Dellinger, you are doing the best job you can to carry out whatever the administration wants. If you can do it in a legal sense, fine. If you can find an interpretation that allows you to wiggle out of it, you are going to do it. Otherwise you cannot do your job. And you do not want to be faced with the ridiculous proposition, "I cannot do it just that way so I will quit." Lawyers are paid to find legal answers around a problem. I have no trouble with that. I do not see why anybody would have any trouble with it, frankly, whether they are colleagues in academia or professional writers. It just makes common sense to me. That is why the administration has a lawyer.

Let me raise another question. Does the President's policy become permanent, so that even when he is not President, the policy is still in effect? I suppose somewhere there is a brilliant legal discussion on the subject. I have never heard or read about that discussion, so I am free to make my own judgment on it. I think that would be a crazy situation, where the President who is newly elected accepts the policy that was laid down by a former President because he does not expressly change it. And I suppose there are a thousand examples. I do not know if that is a good policy. Frankly, I am not sure it even works politically. And yet it has been used by Presidents who say, "that is the policy of the country." If a president expressly states that, I can buy it. But to be silent and say that the policy continues, notwithstanding the fact that the President who made the policy is dead, I find a little difficult to accept.

But it enters into this whole issue because you obviously have those cases on the use of force that do not fall into the category of "We, the people of the United States, do hereby declare war against somebody." These are the cases where we just go blow their brains out. We do not ask anybody. That is the reason, by the way, that I joined the war pow-

1. Some have asked whether Walter Dellinger would have espoused different views as a law professor than he does as Assistant Attorney General, and thus "where he stands depends on where he sits." For Mr. Dellinger's response, see his contribution to this symposium, in 50 U. MIAMI L. REV. 107 (1995).

ers fight in the Congress. I cannot take credit as the originator because there were too many bills over too long a period of time, as I recall. But certainly we were anxious to raise the issue.

When the United States went into Cambodia, we were told this was hot pursuit of the enemy and we were going to find their headquarters. Of course, we found nothing. It raised the legal issue for me, as well as the political issue of determining how far Nixon was going to go. He could have gone to India on that theory, or to any other place he wanted to go. You can go anywhere on the theory of hot pursuit. How about the commitment of forces who are in danger of imminent hostility? I do not even like that phrase, but we had to settle for it. Say the President, as Commander in Chief, orders one airplane to fly over the territory of a country with whom we had not declared war and that country takes a dim view of the whole proposition, so it rolls out all its guns and blows our airplane out of the sky. Is that a war? Is that imminent hostility? It does not involve a lot of people. Only one pilot is dead. The "hot pursuit" theory is a sneaky way out of the argument as far as I am concerned.

I do not think the issue has anything to do with numbers of people. It has to do with the position that we, the people of the United States, take with regard to our own international relations. We cannot say that just because it is only one poor fellow that it is not a war. You cannot say that you must have 5000 to 6000 people killed before it becomes imminent hostility. I think what we were really trying to do with war powers, at least what I was trying to do, was to see if we couldn't get the kind of partnership the Founding Fathers envisioned in the Constitution, of communication between the Congress and the President. Especially where it involved the use of force against other people.

Communication, believe me, is very difficult. The two political parties hardly say good morning to each other. Even within the parties we hardly say good morning to each other. There are 535 principals in Congress; there is no such thing as "a body" in that sense. We are all individuals, we all run, we all get elected, and we all have our responsibilities. Of course, there is an overriding national responsibility, but the primary responsibility, as far as the individual is concerned, is to get back there to do what he enjoys doing in public service. That means you have to get reelected, so you better do what your people want. (And when one of my colleagues voted, despite his district, against the gun law, he went down the drain.)

Parties have their purpose. I am a strong believer in a two-party system. I am not a multi-party person at all. I say all of this to point out the nature of our own people. We are all partisan in a sense. We make

up our minds whether something is right or wrong without reading legal briefs. That is a fact of life, and it goes to the heart of democracy. There are no magic solutions to all the problems in this country. Congress cannot solve them, by the way—and neither can a President. We can make a good effort and try to improve matters, and I think that the Congress and various Presidents, both Republican and Democrat, have improved some things. But only the American people run the country. We are the only ones who can solve the problems. If we do not have a consensus that people are willing to abide by, Congress can pass all the laws in the world and it will not change a thing. I do not have to get into specific cases to demonstrate the nature of the statement I am making here with respect to the views of the people—politics, if that's what you want to call it—being involved in everything, including constitutional issues. Congress will not, and really cannot do anything about it. And if Congress does, the law will get repealed. If Congress puts something into effect, the people will not accept it or they will change their minds later.

So when we went into Cambodia on the theory of hot pursuit, I said that it was not worth arguing about whether we turned our heads, closed our eyes, and gave assent by not being negative to the President. He decided it was common sense to go after the enemy, whether it was the Barbary pirates or somebody else. Besides that, from a practical standpoint, the President felt he had to do it. There were no constitutional issues raised, and that exception to Congress declaring war grew. That is one of things we are arguing about today, although there is more to it than that.

It is not just about the exceptions and approving exceptions and saying to the President, "You have to come to the Congress on these kind of cases and you have to tell us, otherwise you are going to have to take the troops back in 60 days, etc." No, we were not talking *only* about that. But, in a sense, yes we were. We wanted that provision, but the basic thing we wanted was discussion. Well, how do you get that discussion? If the President does not want discussion, then that is it, friend. You do not get it. Some will argue that the President cannot go to the Congress because they will say everything to everybody including all the secrets and we will lose the war. So communication becomes very distorted and difficult. You cannot write a legal brief on that issue, I guarantee you.

We were called in, for example, on the Libya bombing. We went down to the Old Executive Building and there was an admiral there. We were sitting there, Republicans and Democrats, asking the normal questions: What are we doing here? Why are we doing this? How many

airplanes? How many men? What are you talking about? We told him nobody had authorized armed hostilities against Libya despite Quadafi's support for terrorists, but the U.S. had sent planes anyway. Finally somebody, I don't know whether it was Senator Nunn or me or both of us, raised the constitutional question of congressional determination. The administration spokesman said, "we can certainly stop this. I will get on the phone right now and call the planes back." But the planes were already on the way. Somebody looked at his clock and told us that the planes were past the point of no return. The admiral agreed. We just sat there. We were absolutely stunned. We had nothing to say about it. There was no prior communication. The President could not tell us, even though the whole world would know about it. People might know, but that is the trouble with democracy—it's not perfect.

Lebanon was different. We worked like dogs with the President on Lebanon and finally got a resolution which purportedly was pursuant to the War Powers Resolution. With the agreement of the President, we got an "authorization" for the use of armed forces for a limited period of time. United States policy in Lebanon did not work out too well. A lot of people were killed. But at least we made an effort to resolve or help resolve the constitutional issues about Congress being involved in the decision—even if it is a bad one. At least we were involved and we could say that we had discussions and tremendous debate.

We did not have anything like that kind of discussion on an investigative matter in which I was involved. I did the investigation on my concerns and I could not find out what in the world the U.S. was doing. And after all of the investigation, it turned out that the congressional committee could not get any of the needed documents. It seems you cannot ever get any documents out of an executive unless they are redacted to the point where you do not recognize anything. Then the administration says that it communicated with Congress. But I guarantee you that no one can make sense of a redacted statement that comes out of the National Security Council.

Now I want to use a personal reference just to highlight the problem of why all this debate has ensued and why it is so important for the debate to continue beyond law schools and the courts. We went to a lot of White House meetings on Iraq. I thought it was very clever and wise of the President to have those meetings. And at every meeting he would say that, as Commander in Chief, he had the authority to send U.S. armed forces anywhere he wanted; to do whatever he wanted. And we would say at every meeting that he did not, that the Constitution says only Congress can declare war. So, we would have this kind of discus-

sion week after week and we thought in Congress that we had finally won. But instead we got drafted into it.

Actually, President Bush was being very clever in the way he got Congress involved and made Congress part of the decisionmaking process. He made it appear as if he was not about to consult us one way or the other. So we literally begged him, "Mr. President, you must have Congressional action here. You have to go to the American people." And he did, and I think regardless of your views on that operation, at least from the legal standpoint and the political standpoint, the right thing was done. You can legitimately argue whether the war was good policy, but the concept of making the Constitution work was very important to us. It provided a legal basis for the President's action. But, that raises all these side issues, like the "sense of the Congress." That term does not mean anything unless you are the President and you are looking to get more money out of Congress, or you do not want to start a big nasty fight for some reason. So the President has Congress pass a Congressional resolution, which is a formal message to the President that theoretically is supposed to start things moving a little bit.

How about a joint resolution of Congress? Anything that is enacted as a legislative act, I do not care what the title of it is, it works. Can Congress authorize war in an appropriation bill as Mr. Dellinger suggests? Frankly, I do not think so. I think that would be extending the Constitution beyond its limit. I think it is a stretch to think that Congress can authorize a President to go to war because Congress provides the money in an appropriation bill to go to war without specifically authorizing the President to go to war. It has been done though. And so, Congress goes for this gimmick, by writing things like that into the defense appropriation bill or other bills.

We do anything except go on the record and say "we do hereby declare war" or authorize the President to use armed forces. And then somebody comes along and asks why we provided him with the money. Well, we provided the money for a lot of reasons. We could tell the President to go to war with no money, then he could use previously appropriated money. Presidents have done that. The point I am making is that there are all kinds of political decisions involved in this legal argument. And the standards are all subject to interpretation. Take the phrase "imminent hostilities." What does that mean? In thirty minutes or two days? If the President withdraws all the troops out of Panama and Grenada within the time limits of the War Powers Resolution, did he comply with the law? He says the law is unconstitutional and he is not doing anything pursuant to that resolution but nevertheless he does it. Now has he complied? We frankly do not care in Congress. As long as

he gave us the report, as long as we had prior communication, as long as we were part of the decision—as distasteful as we might find it—that is what we wanted.

So, all of these things led to this discussion, which I find particularly useful this year and I must say, the fact that the Assistant Attorney General is involved in this is outstanding. We ought to have all the government lawyers involved in this discussion and we ought to broaden it outside of the law community. I liked Professor Ely's presentation. Very scholarly, very thorough, the best of any discussion I have ever read. I even liked some of the changes he proposes. The one thing I still am really hesitant about is pushing the Supreme Court to make a decision on the issue. I am not sure that is what we want or need.

I think that leaving the Constitution the way it is, leaving what the Founding Fathers had in mind, is the reality of the politics of this whole issue. What we really want is the communication necessary to the American people to let them choose their position and let their representatives and the President of the United States know it. I do not mean that the law should be disregarded, attenuated or diminished in any way.

I think you have to pay full attention to the Constitution and exactly what the Founding Fathers had in mind. Since I was not there—although some people think I was—I really cannot give you the answer to that. But we can all make good arguments. We, the lawyers, can provide a framework for sensible debate and discussion of these issues, especially when there are no clear-cut definitions that are possible or intended. I do not think we could write a law that would be that specific.

So, when things are open to interpretation of one kind or another, do we want to let the Supreme Court decide, or should we all get involved. I like the debate myself. My whole purpose in getting into the war powers fight was simply to have the debate I knew would start principally among lawyers. And then the political parties got into it, and then pretty soon we got the people involved. All that debate is helpful to a determination of how the U.S. goes to war or enters hostilities.