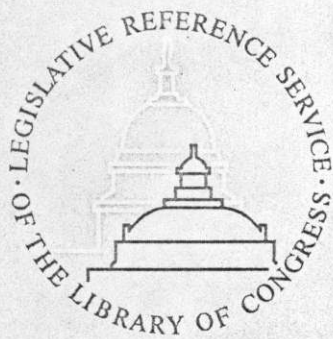


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THE NATIONAL COMMITMENTS RESOLUTION
OF 1969: BACKGROUND AND ISSUES

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THE NATIONAL COMMITMENTS RESOLUTION OF 1969:

BACKGROUND AND ISSUES

Introduction

On a number of occasions since the end of the Second World War, such as the Korean action in 1950, the sending of troops to Europe in 1951, and the introduction of United States combat troops in Vietnam in 1965 and Cambodia in 1970, intensive debate has taken place on the question of whether the President could legally send troops abroad without a Congressional declaration of war or other specific authorization. In addition, the frequent justification of military action in Vietnam on the grounds that it was necessary to fulfill American commitments gave rise to debate on what constitutes a national commitment and how such a commitment is made. The resolution on national commitments introduced in the Senate in 1967 was an effort to clarify both these issues as well as to assert the Senate's determination to carry out its full responsibilities in the making of foreign policy under the Constitution, particularly in the crucial area of getting involved in war. It dealt with how a national commitment should be made, not with what the commitments should be.

As passed by the Senate on June 25, 1969, by a vote of 70 to 16 with 14 not voting, the commitments resolution (S. Res. 85, 91st Cong., 1st sess.) stated:

Whereas accurate definition of the term "national commitment" in recent years has become obscured: Now, therefore, be it

Resolved, That (1) a national commitment for the purpose of this resolution means the use of the Armed Forces of the United States on foreign territory, or a promise to assist a

foreign country, government, or people by the use of the Armed Forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.

The meaning of the resolution and the intention of the Senate in adopting it are illuminated by the legislative history.

Senator J. William Fulbright, Chairman of the Senate Foreign Relations Committee, in introducing the original version of the resolution (S. Res. 151) on July 31, 1967, expressed concern that the role of the Congress and particularly the Senate in making foreign and national security policy had been diminishing since the beginning of the Second World War. He had singled out for prompt attention the question of what constitutes a national commitment because there had been many calls that swift and decisive action involving the use of American forces be undertaken on the basis of alleged commitments, or the executive branch had acted first and then sought to justify its actions on the basis of alleged commitments which sometimes proved to be merely policy statements by a President or a Secretary of State.

The preamble of the original resolution was the same as finally passed but the resolving paragraph did not define a national commitment except to say that one could only be made by affirmative action of the executive and legislative branches through a treaty or other legislative instrumentality

specifically intended to make a commitment. The resolution was referred to the Foreign Relations Committee. This original version, S. Res. 151, stated:

Whereas accurate definition of the term "national commitment" in recent years has become obscured: Now, therefore, be it

Resolved, That it is the sense of the Senate that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the U.S. Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment.

The Committee Report of 1967

After hearings held in August and September 1967, and four executive sessions in which a number of drafts and revisions were considered, the Senate Foreign Relations Committee favorably reported a revised resolution, S. Res. 187, by a vote of 16 to 0. The new resolution defined a commitment to mean the use or promise to a foreign nation to use United States armed forces and stated that with certain specified exceptions the commitment of armed forces to hostilities on foreign territory properly would result from a decision which in addition to executive action required affirmative action by Congress intended to give rise to a commitment. The Committee version, S. Res. 187 stated:

Whereas the executive and legislative branches of the United States Government have joint responsibility and authority to formulate the foreign policy of the United States; and

Whereas the authority to initiate war is vested in Congress by the Constitution: Now, therefore, be it

Resolved, That a commitment for purposes of this resolution means the use of, or promise to a foreign state or people to use, the armed forces of the United States either immediately or upon the happening of certain events, and

That it is the sense of the Senate that, under any circumstances which may arise in the future pertaining to situations in which the United States is not already involved, the commitment of the armed forces of the United States to hostilities on foreign territory for any purpose other than to repel an attack on the United States or to protect United States citizens or property properly will result from a decision made in accordance with constitutional processes, which, in addition to appropriate executive action, require affirmative action by Congress specifically intended to give rise to such commitment.

The purpose of the resolution was understood by the committee to be "an assertion of Congressional responsibility in any decision to initiate war as that responsibility is spelled out in Article I, Section 8, of the Constitution." The report made clear the committee's intention that the resolution apply only to future decisions involving the use or possible use of United States armed forces, and would not alter existing treaties or joint resolutions or other past actions or commitments. Senator Cooper explained in individual views attached to the report that he and others had felt that the original form of the resolution would have seemed to include all forms of economic aid as well as military assistance in the term "national commitment" and that it might also unduly restrict the President in the conduct of foreign relations by seeming to limit the President's authority to enter into executive agreements.^{1/}

Comments of the Committee included that the country had moved far toward the concentration of unchecked power over foreign relations in the national executive, particularly regarding the use of armed forces, and that the Executive Branch had acquired virtual supremacy over the making as well as the conduct of foreign policy. This constitutional imbalance

^{1/} The individual views also presented an amendment which had been proposed by Senator Cooper stating the sense of the Senate that any commitment to deploy armed forces outside the United States for military assistance purposes would require affirmative legislative as well as executive action. The stated purpose of this amendment, which was not adopted, was to prevent the progressive involvement of the United States in a series of events leading to war.

was attributed to the circumstances of American involvement in the unstable postwar world and the chronic crisis which has existed. The alteration of the Constitution by expediency could not be justified, the report stated, and there was no reason a foreign policy could not be both efficient and democratically made. The report stated:

Foreign policy is not an end in itself....We conduct foreign policy for a purpose external to itself, the purpose of securing democratic values in our own country. These values are largely expressed in processes--in the way in which we pass laws, the way in which we administer justice, and the way in which government deals with individuals. The means of a democracy are its ends; when we set aside democratic procedures in making our foreign policy, we are undermining the purpose of that policy. It is always dangerous to sacrifice means to ostensible ends, but when an instrument such as foreign policy is treated as an end in itself, and when the processes by which it is made--whose preservation is the very objective of foreign policy--are then sacrificed to it, it is the end that is being sacrificed to the means. Such a foreign policy is not only inefficient but positively destructive of the purposes it is meant to serve.

For these reasons the committee believes that the restoration of constitutional balance in the making of foreign commitments is not only compatible with the requirements of efficiency but essential to the purposes of democracy. 1/

After reviewing the intent of the framers of the Constitution and the history of the use of armed forces, the report cited the expansion of executive power between 1900 and 1941, its acceleration during the Second World War, and the continuation of the trend in the postwar period "bringing the country to the point at which the real power to commit the country to war is now in the hands of the President."^{2/} The most important single

1/ National Commitments. Sen. Rept. No. 797, 90th Cong., 1st sess., pp. 7-8.

2/ Ibid., p. 13

fact accounting for the transfer of power was attributed to the acquiescence, or at least the failure to challenge, of the Congress. In turn Congressional passivity was attributed to unfamiliarity with the new role of the United States as a world power, an overawe of the cult of executive expertise, and the historical memory of the Versailles Treaty which the Senate had rejected and for which it had continued to do a kind of penance. An ambivalent attitude by Congress toward the war power of the Executive was traced through the North Atlantic Treaty, the attitude toward the Korean action, the troops to Europe resolution, the Formosa, Middle East, and Cuban resolutions and finally the Gulf of Tonkin resolution which "represents the extreme point in the process of constitutional erosion that began in the first years of this century."^{1/}

The committee report concluded that a restoration of the division of war powers specified by the Constitution was both essential to constitutional government and compatible with modern government, rejecting claims that unlimited executive authority over the use of armed forces was justified by history or necessary for speed. The committee recommended that the Congress reassert its constitutional authority over the use of armed forces through the restoration of constitutional procedures which had been permitted to atrophy. It held that declarations of war were not the sole means for authorizing Presidential action, but that joint resolutions were a proper method providing they were precise as to their scope and their period of time and provided they granted authority and not merely

^{1/} Ibid., p. 20.

expressed approval of undefined Presidential action. In future resolutions involving the use of armed force, the committee recommended that Congress should:

- (1) debate the proposed resolution at sufficient length to establish a legislative record showing the intent of Congress;
- (2) use the words authorize or empower or such other language as would leave no doubt that Congress alone had the right to authorize the initiation of war and that, in granting the President authority to use the armed forces, Congress was granting him power that he would not otherwise have;
- (3) state in the resolution as explicitly as possible under the circumstances the kind of military action that was being authorized and the place and purpose of its use; and
- (4) put a time limit on the resolution, thereby assuring Congress the opportunity to review its decision and extend or terminate the President's authority to use military force. 1/

The report expressed strongly the conviction that it was dangerous to have the power of war and peace concentrated in the hands of a single person, particularly in the nuclear age. The report ended:

Already possessing vast powers over our country's foreign relations, the executive, by acquiring the authority to commit the country to war, now exercises something approaching absolute power over the life or death of every living American--to say nothing of millions of other peoples all over the world. There is no human being or group of human beings alive wise and competent enough to be entrusted with such vast power. Plenary powers in the hands of any man or group threaten all other men with tyranny or disaster. Recognizing the impossibility of assuring the wise exercise of power by any one man or institution, the American Constitution divided that power among many men and several

1/ Ibid., p. 26.

institutions and, in so doing, limited the ability of any one to impose tyranny or disaster on the country. The concentration in the hands of the President of virtually unlimited authority over matters of war and peace has all but removed the limits to executive power in the most important single area of our national life. Until they are restored the American people will be threatened with tyranny or disaster. 1/

After the report was filed on November 20, 1967, no further action on the resolution was taken by the 90th Congress, either during the rest of the first session or during the second session in 1968.

1/ Ibid., pp. 26-27.

Senate Action in 1969

In 1969, at the beginning of the 91st Congress, the Committee on Foreign Relations reconsidered the various drafts of the resolution, which had been before it at the previous session and decided to recommend for passage the "simpler, more extensive" resolution as originally introduced by Senator Fulbright. Its primary purpose, the Committee stated, was "an assertion of congressional responsibility in any decision to commit the Armed Forces of the United States to hostilities abroad, be those hostilities immediate, prospective, or hypothetical." As reported by the Committee on April 16, 1969, S. Res. 85 stated:

Whereas accurate definition of the term "national commitment" in recent years has become obscured: Now, therefore, be it

Resolved, That it is the sense of the Senate that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment.

The committee had not held new hearings on the resolution because it believed it had a complete and balanced record, but it had invited the new administration to submit its views. Except for appending the views of the new administration and Minority views by Senator Gale McGee in place of the individual views of Senator Cooper, the committee report issued in 1969 (S. Rept. 91-129) was largely identical with the report issued in 1967 (S. Rept. 90-797).

Like the previous Administration of President Johnson, as indicated in the testimony of Under Secretary of State Nicholas deB. Katzenbach, the Administration of President Nixon opposed the resolution. A letter of

March 10, 1969, from William B. Macomber, Jr., Assistant Secretary of State for Congressional Relations, stated:

The executive branch tends to doubt the usefulness of attempting to fix by resolution precise rules codifying the relationship between the executive and legislative branches in the broad area of national commitments. The great range of actions that might be considered to come within that term and the wide variety of circumstances that might require such actions to be taken indicate the difficulty of compressing into a simple formula the relationship between the executive and legislative branches in this area. In any event, a resolution could not change the constitutional powers of the President.

We recognize and firmly believe that close cooperation between the executive and legislative branches of Government is essential in the area of the Nation's foreign affairs. It will be the policy of this administration to act on the basis of this proposition. We intend to engage in frequent and full consultation with the Congress so that the executive and legislative branches can work in harmony in discharging their respective constitutional responsibilities.

...While it is, of course, for the Senate to decide on the disposition of Senate Resolution 85, the executive branch recommends against its adoption. 1/

The comments of the Department of State on the resolution contended that in this version the scope of the resolution was not clearly defined and might be held to extend to all kinds of commitments the Executive Branch might make with foreign governments, not just the commitment of armed forces.

In his Minority Views, Senator McGee took the position that S. Res. 85 should not be adopted, that its scope was ambiguous and that it appeared to invade areas of responsibility reserved under the Constitution for the President such as the power as Commander in Chief. He concluded:

1/ S. Rept. 91-129, p. 35.

Senate Resolution 85 is not the way to redress the balance of power in the making of foreign policy. Yet, its appealing intent is to try to do just that. It fails in that purpose by not binding the President and by flying in the face of the increasing need to repose the responsibility for critical decisionmaking in a place where it can be exercised quickly in time of crisis and with an opportunity to pin it down in fixing the responsibility for it. Neither of these latter two requirements could be met by simultaneous Senate affirmative action....

Is there, then, a meaningful role for the U.S. Senate in the shaping of foreign policy? The answer, of course, is yes. If the Senate is to succeed in achieving this new role, it, too, must update its procedures in the foreign relations field as well as upgrade its sense of responsibility by focusing more and more on larger and larger questions. The Senate could afford to address itself well in advance of crises to the broad outlines and directions of American policy. This becomes far more constructive as well as influential than in responding principally to crisis situations after the fact....

In the final analysis, then, the Senate through the Foreign Relations Committee should preserve its role in national policy-making by deeds and actions rather than by lamenting its role in a sense-of-the-Senate resolution. 1/

Senate debate on the resolution began on June 19, 1969, and various methods of amending the resolution were suggested. On June 20, Senator Cooper stated that he was considering offering an amendment which, instead of saying only that the accurate definition of national commitments had become obscured, would define a national commitment basically as it had been defined in the Committee revision of 1967 and thus limit the scope of the resolution to national commitments involving the use of armed forces outside the United States.

1/ Ibid., pp. 42-44.

On June 23, Senator Dirksen stated that a substitute resolution would be offered by members of the Foreign Relations Committee which would recognize the joint responsibility between the Senate and the President, define a national commitment, and limit that commitment where hostilities were involved, but would not apply to any situation in which the United States was currently involved and would exclude threats to national security, repelling an attack, and protecting citizens of the United States. The next day the Mundt-Dodd substitute was introduced which was essentially a rewording of S. Res. 187 (the revised Committee version of 1967), with a broadening of the exceptions in which a national commitment might be made without appropriate affirmative legislative action. Whereas S. Res. 187 had excepted repelling an attack on the United States or protecting U.S. citizens or property, the Mundt-Dodd substitute also excluded direct and immediate threats to the national security, stating:

...no national commitment shall be made without appropriate affirmative legislative action, except when such use is to repel an attack on the United States, or to meet a direct and immediate threat to the national security or to protect United States citizens and property.

In the vote on June 25, 1969, the Mundt-Dodd substitute was defeated by a vote of 50 to 36.

The final version came as a result of an amendment which had been agreed upon between Senators Cooper and Fulbright. The amended resolution defined a national commitment as including not only the use of United States Armed

Forces on foreign territory but also the promise to assist a foreign country by the use of armed forces or financial resources, either immediately or upon the happening of certain events. In addition, instead of "a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment," the amended resolution referred to a "treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment" as the means by which the executive and legislative branches could take affirmative action which would result in a commitment.

S. Res. 85 as modified by the agreement between Senator Cooper and Fulbright was passed on June 25, 1969, by a vote of 70 to 16 with 14 not voting. The adopted version stated:

Whereas accurate definition of the term "national commitment" in recent years has become obscured: Now, therefore, be it

Resolved, That (1) a national commitment for the purpose of this resolution means the use of the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the Armed Forces or financial resources of the United States, either immediately or upon the happening of certain events, and (2) it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.

The Constitutional Issue

Underlying the commitments resolution and the problems which inspired it is the Constitutional issue: how does the Constitution assign the responsibilities for making foreign policy, what was the intent of the framers, and how has this been interpreted throughout history?

It is generally recognized that the powers in the field of foreign policy and war were divided between Congress and the President. In regard to Congressional powers in foreign policy, the Constitution states in Article I, Section 8:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States...

To regulate commerce with foreign nations...

To establish an uniform rule of naturalization...

To coin money, regulate the value thereof, and of foreign coin...

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

To declare war...

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a Navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions...

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any Department or officer thereof.

In addition (under Article II, Section 2), the advice and consent of the Senate by a two-thirds majority was required for the making of treaties and appointment of ambassadors and other ministers and consuls.

The chief provisions enumerating the President's powers in the field of foreign affairs are found in Article II, which states:

...The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States;

He shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls...

...he shall receive Ambassadors and other public Ministers; he shall take care that the Laws be faithfully executed....

In addition, the Constitution grants to the President certain general powers which have contributed to shaping his role in foreign policy. Because the executive power is vested in the President, he is in a position to take action in the conduct of foreign relations. Because he is directed to "from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient," the President has a role in initiating legislation as well as approving it.

Practice over the years has tended to expand the role of the President in foreign relations. Some of this expansion has not been and is not now objected to by Congressional critics. For example, the role of the President as the "sole mouthpiece"^{1/} in foreign relations and the organ responsible for the daily conduct of foreign policy has been generally accepted as flowing from the outline of powers in the Constitution. Similarly the duty of the President as Commander in Chief to defend the United States against sudden attack or to protect the lives and property of American citizens abroad in certain situations without necessarily obtaining prior Congressional authorization has been accepted as in accord with the intent of the framers of the Constitution.

On the other hand, some of the expansion of the Presidential role in foreign policy and the use of armed forces which has occurred in the 20th century, particularly since the Second World War, has been criticized as an encroachment on the powers of Congress. Critics contend that the President has assumed a larger share in the making of foreign policy than was intended by the Constitution, and that the Congress has too often been confronted with situations in which the policy was already determined before Congressional advice was sought. In their view the greatest usurpation has occurred in the use of the armed forces in war situations

^{1/} The Constitution of the United States of America, Analysis and Interpretation. Prepared by the Legislative Reference Service, Library of Congress, 88th Congress, Senate Document 29, p. 516.

without proper authorization by Congress when the intent of the framers of the Constitution was to leave the power to make war solely in the hands of Congress.

Defenders of the President's authority in this field are more satisfied that the flexibility permitted by the Constitution in foreign policy is working well. They hold that Congress does play a considerable role in the formulation of foreign policy and point to consultations with Members of Congress and legislative acts which have authorized or supported many of the actions taken by the President. In their view the development of the Constitution through practice and precedents has resulted in the President's having the authority which he has exercised.

The Issue of National Security

The proponents of a broad scope for Presidential action justify their position less on a Constitutional basis, however, than on the practical necessities of conducting foreign policy in the modern world. The world and the role of the United States in the world have undergone a revolutionary change since the adoption of the Constitution, they hold, and a flexible interpretation which permits the United States to respond to the crises of the nuclear age is essential if the country is to survive.

The speed and destructiveness of modern weapons systems have made it more imperative than ever that the President have the ability to act quickly to defend the United States in times of emergency, supporters of enhanced Presidential power contend. Similarly, when the security of the United States is linked so closely with the security of the free world and the free world is confronted with a continuing threat of aggression by non-democratic governments, it is held, the President must be able to act quickly when aggression strikes elsewhere in the world. The decisive and immediate action which may sometimes be required does not always permit prior consultation with Congress or the time consumed by seeking specific Congressional authorization.

Even in less urgent areas of foreign policy the participation of Congress has been made more difficult by the vast increase in United States activities and interests abroad and by the complexities of many foreign policy problems, Presidential supporters emphasize. It requires

the large staff of experts available in the Executive Branch to keep up with the events in other countries on which particular United States policies must be based, and Members of Congress would not be able to keep up with the necessary information, this view implies.

Most of the critics of expanded Presidential power grant that in a real emergency, such as when the United States itself is attacked, the President does need to act immediately and, in the case of an attack by nuclear weapons carried by intercontinental bombers or missiles, would not have the time to consult Congress or secure a declaration of war. However, they also believe that many of the crises proclaimed as emergencies have not demanded immediate action, that in many such cases delayed action would not have hurt anything and might have resulted in a better policy. They believe that Congress has proved that it can act quickly when the occasion demands. The report of the Senate Foreign Relations Committee stated:

First, a useful distinction can be made between speed and haste. In a number of situations in recent years which were characterized as emergencies, American policy would have profited from brief delays to permit deliberation and consultation with the Congress. In the case of the joint resolutions adopted by Congress pertaining to Formosa, the Middle East, Cuba, and the Gulf of Tonkin, not one was a matter of the greatest urgency although that did not in each case seem clear at the time. In the case of the Gulf of Tonkin resolution, a delay of a week or two would have permitted Congress to record its intentions in a legislative record; the retaliatory attacks on the North Vietnamese ports had already been made when the resolution was put before Congress, so that a delay would have had no military consequences.

Second, the committee is well aware that there have been, and may in the future again be, instances of great national emergency such as the Cuban missile crisis when prompt action is essential. In such instances consultation with the Congress is by no means out of the question; Congress has demonstrated on many occasions that it is capable of acting as speedily as the executive. Should the urgency or the need of secrecy be judged

so great, however, as to preclude any form of consultation with Congress, the President, as we have noted, has unchallenged authority to respond to a sudden attack upon the United States. This authority is recognized as nothing less than a duty and it is inconceivable that the Congress would fail to support the President in response to a direct attack on the United States. Finally, should the President find himself confronted with a situation of such complexity and ambiguity as to leave him without guidelines for constitutional action, it would be far better for him to take the action he saw fit without attempting to justify it in advance and leave it to Congress or the courts to evaluate his action in retrospect. A single unconstitutional act, later explained or pronounced unconstitutional, is preferable to an act dressed up in some spurious, precedent-setting claim of legitimacy. 1/

As for claims that foreign policy has become so complex that Congress does not have the information or expertise necessary for its formulation, those in favor of a larger Congressional role point out that they do not wish to participate in the day-to-day conduct of foreign relations or get bogged down in a myriad of details. However, they believe that Members of Congress, as representatives of the people, are equipped to help determine the broad lines of policy and to formulate the goals of foreign policy and should particularly pass on questions which result in the people of the United States being involved in war. The resolution's requirement for affirmative Congressional action on national commitments demonstrates the kind of vital foreign policy decision which proponents believe Congress must participate in making.

1/ National Commitments, Senate Report No. 797, 90th Cong., 1st sess., p. 25.