

Approved For Release 2010/01/06 : CIA-RDP88-01070R000301400003-9

*No upcoming
Programs*

Approved For Release 2010/01/06 : CIA-RDP88-01070R000301400003-9

Subject: The War Powers Act
and the Constitution (full text)

Moderators: Fred Friendly
and Bruno Schmidt, Dean of
the Columbia Law School.

Panelists: Gen. Brent Scowcroft, lawyer,
Archibald Cox, Philip Buchen, former
Counsel to Pres. Ford, former Pres.

Gerald Ford, Justice Potter
Stewart, Adm. Bobby Inman,
former Sec. of State Edmund
Muskie, Sen. Orrin Hatch,
Rep. John Brademas, ~~author~~, Tom
Wicker, ~~columnist~~, Sen. Christopher Dodd,
Rep. Barbara ~~Michaels~~
Mikulski, ~~author~~, Ben Wattenberg,
~~reporter~~, Laurence Barnett, Judge J.
Clifford Wallace, Judge Arlin
Adams

RADIO TV REPORTS, INC.

4701 WILLARD AVENUE, CHEVY CHASE, MARYLAND 20815 (301) 656-4068

FOR PUBLIC AFFAIRS STAFF

PROGRAM Constitution: That Delicate Balance STATION WETA-TV
PBS Network

DATE September 25, 1984 10:00 P.M. CITY Washington, D.C.

SUBJECT The War Powers Act and the Constitution

FRED FRIENDLY: From the birthplace of the United States Constitution in Philadelphia, "The War Powers Act and the Constitution." Can the President commit American troops without permission from Congress?

REP. BARBARA MIKULSKI: There are 500 advisers. What are they doing there? Where are they doing it? Are they in airplanes? Are they in helicopters? Are they on the ground?

GERALD FORD: Presidents just don't get on their horse and go charging with covert aid, or anything else, to make a point or two.

SENATOR CHRISTOPHER DODD: Putting soldiers or military personnel in that kind of situation mandates, mandates, the Constitution mandates that Congress be involved.

BENNO SCHMIDT: General Scowcroft?

GENERAL BRENT SCOWCROFT: I think that's clearly wrong. The President is the commander-in-chief of the armed forces. If that does not include the right to deploy those forces, then it has no meaning.

ARCHIBALD COX: That begs the question. The question is, what are his powers as commander-in-chief? The question is, do those powers include the power to wage war? Apparently not.

SCHMIDT: What would be your advice if a court ordered him to follow the War Powers Act?

PHILIP BUCHEN: I'd say, "Forget it. Keep your troops there."

OFFICES IN: WASHINGTON D.C. • NEW YORK • LOS ANGELES • CHICAGO • DETROIT • AND OTHER PRINCIPAL CITIES

2

FORD: They either ought to face up to it, one way or the other, either approve it or disapprove it.

FRIENDLY: The most awesome power a nation holds is its decision to make war.

Justice Stewart, when the framers sat down in this room to write this Constitution, what was the process they devised for this nation to make war?

JUSTICE POTTER STEWART: The Constitution provides only one route by which the nation gets into war, and that is if war is declared by the Congress of the United States. At the same time, they wrote a Constitution which makes the President of the United States the commander-in-chief of the armed forces. And they did so at a time of sailing ships, and the tempo was a lot slower.

FRIENDLY: Sailing ships and gunpowder.

JUSTICE STEWART: That's correct.

FRIENDLY: So today the power of the presidency is far greater in war than it's ever been before.

JUSTICE STEWART: Well, it's far greater in every way than it's ever been before, than the drafters of the Constitution ever dreamed of. I think it's very clear that they thought of the presidency as a relatively weak element of the government, of the new federal government that they were creating. And the President's role was simply to carry out the will of Congress.

FRIENDLY: Thank you, Justice Stewart.

Decisions about getting in and out of war have plagued every President since George Washington.

Now let's begin the case. Moderator Bemo Schmidt, Dean of the Columbia Law School, sets up a hypothetical covert military operation which ultimately triggers the War Powers Act.

SCHMIDT: Admiral Inman, as the Director of the Central Intelligence Agency, you have been increasingly concerned with two neighboring countries in Central America, and you have good reason to think that one of them, Sierra Madres, is assisting some guerrillas operating in a neighboring country, El Dorado. Now, there's a large group of exiles from Sierra Madres who are living in El Dorado, and some of them approach your agency and ask for help from the United States, ultimately with the aim of bringing down the new government of Sierra Madres. How do you decide whether the United States will assist those exiles?

ADMIRAL BOBBY INMAN: The Director of Central Intelligence only in the rarest opportunities would be the one to go forward and recommend the program to be undertaken. Usually, while he's been reporting the difficulties, the Secretary of State's been trying to execute the diplomacy to deal with them, trying to get some established relationship. And the point comes ultimately when the word comes back from State to the President that that diplomacy isn't working.

That's where the discussion would begin, I believe, and not with one right at the outset of, "Gee, there are a group of people who would like to overthrow a government. I think they're great. Why don't we move in there and try to support them.

SCHMIDT: Secretary Muskie, if Admiral Inman is right, then do you think some nondiplomatic approaches to this problem, some covert approaches, assistance to the exiles might be warranted?

EDMUND MUSKIE: My feeling on this area of the world, in Central America, is that it is so unstable and volatile an area, by definition, that it is very difficult to pursue clear-cut American objectives, national security interests by the kind of off-the-cuff, casual kind of involvement in the purposes of a dissident guerrilla group in one of these countries.

SCHMIDT: General Scowcroft, is covert action really an available policy option for the government, given the degree of openness that prevails in an open society?

GENERAL SCOWCROFT: If it is successful -- and that is, if it does not become public and an issue of public debate -- it has the advantage that the United States overt presence as an actor is concealed, and that sometimes facilitates our interest and the resolution of the issue, if the United States is not perceived as a primary actor.

SCHMIDT: Concealed from whom?

GENERAL SCOWCROFT: Concealed from the world at large, plausibly deniable. In other words, the impression that the dissidents, that this is a locally-generated insurrection, rather than the great power, the United States, applying pressure on a small power. Psychologically, you have an advantage in using covert action.

SCHMIDT: Mr. President, if you've heard the opinions of your advisers, do you see anything that's built into our constitutional process that limits your hand in deciding to follow a policy of covert assistance?

FORD: I haven't seen any President, regardless of

political affiliation, who precipitously wants to thrust the United States into a quagmire where, for substantive or political reasons, our country might get in trouble. Presidents just don't get on their horse and go charging with covert aid, or anything else, to make a point or two.

Now, I suspect that if you look upon covert aid as a specific tool of the implementation of a well-thought-out foreign policy decision that relates to the national security of the United States, you can justify covert action. But you have to go through that process.

SCHMIDT: How many -- Mr. President, just as a guess, how many persons in the Executive Branch now -- we'll leave Congress to one side for the moment. How many persons within the Executive Branch would be informed about a measure such as this?

FORD: Certainly the members of the National Security Council would know. And that depends upon the President, anywhere from, what, six to 12, or thereabouts, depending on how many staff people are present. That is the hard core, other than the people who would be developing the covert aid plan and who would be the responsible parties in the implementation, if it were approved.

SCHMIDT: Right.

Admiral Inman, what's your guess? How many people?

ADMIRAL INMAN: Probably a minimum of 30 in the Executive Branch, not counting those who would be charged with carrying out the operation later. You have, both by law and by executive order, a requirement now that the President actually reach a finding. To prepare that finding, there will be a gathering of representatives from State, Justice, Defense, the embassy.

MAN: What does this have to do with Justice?

ADMIRAL INMAN: The Attorney General must rule that it is in fact within the law.

SCHMIDT: Now, Mr. President, how much are your policy options limited by the difficulty of keeping this kind of matter confidential?

FORD: Well, one of the major justifications for covert action is that it will not be in the public domain. If you start out with the assumption that, for one reason or another, it's going to be out on the table and in every newspaper, forget it.

Now, several years ago, as Congress became more deeply

involved, they established intelligence committees and other committees, beside Armed Services and Appropriations, began to pick and to look and expose and publish information about intelligence activity. The press didn't even have to work hard to get highly classified, need-to-know information. It was just like out there in the marketplace.

It's gotten better. May I correct? They've finally admitted their wickedness and straightened out their problems.

[Laughter]

SCHMIDT: Senator Hatch, you're on the Hill. Is the President right that the proliferation of information about covert operations now makes it, it sounds to me, very difficult, at least, if not close to impossible?

SENATOR ORRIN HATCH: Well, a lot of members on the Hill learn their intelligence information from the New York Times and from the Washington Post, because it does get out. And there's no question about it, it's very difficult to contain. And I think part of the problem is that it has been broadened quite a bit. On the other hand, I'm not so sure that's necessarily bad.

SCHMIDT: Admiral Inman?

ADMIRAL INMAN: Where there is a broad bipartisan policy consensus that it is in the interest of the country, there are no leaks. It does not become a matter of public discussion or public record.

SENATOR HATCH: Can I add something to that? I think there are very few areas today that are as volatile as the covert operation area. And there is a propensity on the part of members of Congress to substitute themselves for the Executive Branch and to make decisions that only the President and these top people may have all the -- access to all the accessible information, or all the important and pertinent information.

SCHMIDT: Representative Brademas, do you share the Senator's view that...

JOHN BRADEMAS: No, I don't.

SCHMIDT: ...the President has the facts, that he has the responsibility?

BRADEMAS: No, I don't, for several reasons. First of all, I'd been in Congress long enough to have remembered the greata triumph of the CIA in the Bay of Pigs, and therefore I'd be somewhat skeptical about the judgments that have been come to

6

by some of the President's advisers.

SCHMIDT: So you approach his judgment with no presumption that he knows more...

BRADEMAS: That is correct.

SCHMIDT: ...or that he knows better?

BRADEMAS: That is correct. Because I would remember Vietnam, I would remember Chile, I would remember Marcos in the Philippines, I would remember a number of positions taken. I'd be willing to listen, but I would not implicitly, instantly jump to the judgment that the President was right, because the record of the last 20-25 years was a very uneven one.

SCHMIDT: Senator Hatch?

SENATOR HATCH: What I think is wrong is for members of Congress, who have limited time and limited information until they are on those committees or do have the information, I find it reprehensible for them to substitute themselves for the President, who has the information, and to make these decisions ahead of the time when they should make them, without making the good steps that...

SCHMIDT: And their ultimate power, Senator, is to go to the press?

SENATOR HATCH: I think the ultimate power is to go to your colleagues. I think the ultimate power is to go to the President. I think the ultimate power is to work through your Intelligence Committees. If that doesn't work, and you feel strongly about it, there are a number of other things...

BRADEMAS: I just want to make the point -- and I do agree that the President and his counselors are going to have to have a crucial judgment here -- that we saw in the Iranian hostage crisis where the American President was negotiating over a period of many months with the governmental leaders of that country rather than with the religious leaders of the country, who held the de facto power, that the Executive Branch of the government is not always up on the facts.

SCHMIDT: General Scowcroft?

GENERAL SCOWCROFT: I think what we've seen is a real dilemma. In many cases, covert action is the most effective, easiest way to accomplish foreign policy objectives. But it is only effective if it remains covert. The broader you can go in the Legislative Branch, the more support, perhaps, you can get

for an action. And yet, the broader you spread it, the more chances you are that you will defeat the very purpose, which is to keep it covert. It's a very serious problem.

SCHMIDT: Mr. Wicker, you hear the description of the dilemma that General Scowcroft has put his finger on. Is it, in your view, just a pragmatic policy dilemma, or does it suggest that there is something fundamentally inconsistent about covert action and our system of government?

TOM WICKER: I think it does suggest that. And I think there is an essentially fundamental conflict within an open system like ours, and it goes to the interesting phrase that General Scowcroft used, that it needs plausible deniability. That's just a very nice way -- with apologies, General, that's a nver nice way to say you need to be able to lie your way out of it.

I'm simply saying that if a government is going to engage in covert activities, then it has taken upon itself the inherent necessity that to keep those activities covert, it's going to have to lie and lie and lie again to its public. And I think that there is a corrosive effect in that that is not good in an open society, quite aside from the political difficulties that it will get you into on specific cases.

SCHMIDT: Senator Dodd, do you share Mr. Wicker's general feeling that the process really is inconsistent, the constitutional process, in a general sense, is just inconsistent with this kind of policy?

SENATOR CHRISTOPHER DODD: Totally, absolutely. We forget that in this very hall a group of people sat down and decided that the system wasn't necessarily to be efficient. That was the purpose they gathered together. And they also decided that our means were our ends. How we did things was what we set this government up for. And if you begin a process which denies that, in effect, which says that the end is the end, in effect, it doesn't make any difference how you get there, then we have totally aborted the process that was started here.

MAN: But there are occasions when the United States may need recourse to the possibility of covert action in order to protect its interests.

SENATOR DODD: Well, I'll tell you, you go back and let's look in the last 25 or 30 years where covert activity has been used, and I'll show you in almost every single case where it's caused us far more difficulties than it's resolved. You can begin in Guatemala in '54, the Bay of Pigs, the Allende case in Chile, certainly in Nicaragua we're seeing it, the attempts to

assassinate Castro. We've got ourselves into trouble time after time after time because we utilized this vehicle.

If our case is just, if we're correct, if the logic is sound, if it makes sense to overthrow the government of Sierra Madres, then we ought to have the courage to come before the Congress of the United States and say, "We want your help to do this. We're going to train ten thousand troops. And let's go down and do it." If your cause isn't just, then I think proceeding this way is just looking for trouble. You're fighting the wrong battle and you're going to create more problems for our country than you can imagine.

FORD: You have cited, from your point of view, what appear to be failures in the execution of covert activities, and therefore you make the case that covert activity, period, is not a good tool for our government. We've had some obvious failures. But this is not a juvenile operation. This is the big leagues, the big leagues. And it involves, at least some people think, the national security of the United States. And you have to take some risks. You have to gamble a little bit. And when you add up all the successes and all the failures through five or six Presidents, maybe more, I happen to believe the scorecard's pretty good. And I don't think that scorecard has been enhanced by a lot of public disclosure about what was going on only when the mistakes were made or the judgments were wrong.

SCHMIDT: Representative Mikulski, can Congress provide an adequate oversight function if you or the vast majority of the members are left in the dark?

REP. MIKULSKI: First of all, all members of Congress have a national security clearance. The people who sit on the Permanent Select Committee on Intelligence exercise that on a day-to-day basis. They don't walk around with little memos, talking about it. But if I wanted to go to that committee and go through the files or hearings that they've had, I would have access to it.

SCHMIDT: Now, what do you do if you strongly disapprove of this policy? How can Congress work its will over the President on a matter of this kind?

REP. MIKULSKI: Then I would have to prerogatives, one a legislative one, through the appropriations, or through the budget process. Not meaning the budget reconciliation, but really to cut off funds for covert aid. The other would be public opinion.

I do share the feelings of my colleague from Utah that you really just shouldn't go running to the press like a leaky

sieve on those matters of national security and when you could be jeopardizing the lives of a lot of Americans and a lot of innocent people.

SCHMIDT: All we're talking about is a covert assistance program to a group of exiles now. In fact, we're talking about a program that has not yet been instituted.

REP. MIKULSKI: I wouldn't try to kill it through the press. We would ask the Speaker of the House to go to the President and let him know, number one, we knew about it; number two, we didn't like it; and number three, we were prepared to fight it, and let's end it before it got to that point.

FRIENDLY: Justice Stewart, now we're going to talk about the War Powers Act. In the context of the Congress declaring war and the President executing it, what does the war powers say, and doesn't the War Powers Act muddy the waters?

JUSTICE STEWART: Well, arguably it does, because that War Powers Act, that legislation provides that the President may commit troops abroad, or anywhere, into conflict, but if, after 60 or 90 days, the Congress does nothing, then the troops have to be withdrawn from wherever they've been committed. And the Congress, by joint resolution, can approve the action of the President and approve continuation of the troops where they were.

FRIENDLY: Well, haven't we really turned the whole business of declaring war on its head? The Founding Fathers, in this room, the drafters said Congress will declare war. Now there's almost a permission for the President to get us into battle...

JUSTICE STEWART: Well, the same drafters of the Constitution made the President commander-in-chief. And so there's a built-in conflict right there.

SCHMIDT: Mr. President, may I move along to a different kind of problem in this field of separation of powers, military policy? Suppose you have concluded, on advice from your National Security Adviser and the Secretary of State, others, that a fairly substantial group of American military personnel ought to be dispatched to El Dorado, the ally of the United States that's engaged in this guerrilla insurgency. Let's suppose you think 500 American military advisers. Now, is that a decision that the Constitution gives you the responsibility for making, or does Congress have the last word on it? Who decides on that kind of an issue?

FORD: It would, in the current situation, be a decision of the President of the United States. Congress could -- and, if

10

it was controversial, would -- have a means of acting for or against the decision.

The way it would be done is that on the appropriation bill, either for the Department of Defense or for the foreign aid or for the State Department, one or the other, it would simply say, "None of the funds appropriated herein can be utilized for the training of military forces in El Dorado." In other words, they could even broaden it on the appropriations bill. They could say, "None of the funds appropriated in this appropriation bill, or any other, can be utilized for this purpose."

SCHMIDT: Is that an unconstitutional interference with your power over foreign policy, with your power as commander-in-chief?

FORD: No. No, I think that's a very constitutional, proper decision of the Congress, because Congress is given the authority to raise money for the Army of the United States. And therefore Congress, if they have the power to raise it, have the power to take it away or not make it available.

SCHMIDT: But until Congress takes some step, through the appropriation process, affirmatively to disapprove, you think you have the power.

FORD: I do, under the terms, as I understood, when you laid out the question: no hostilities, no imminence of war, etcetera.

SCHMIDT: Senator Dodd, supposing a fairly large number of advisers are sent to El Dorado and some U.S. advisers are shot and killed. At that point, do you think the President can still make -- does he still have the constitutional authority, on his own, to commit the United States to that military enterprise without first getting the approval of Congress?

SENATOR DODD: No, I believe he must get the approval of Congress. The Constitution mandates it.

SCHMIDT: But at what point? Did he need it before he sent them there in the first place?

SENATOR DODD: Well, I would have argued he did. Again, I presume in the El Dorado we know, of course, you've got a guerrilla war going on, right? So we're sending down 400 military people into a hostile environment. That's for sure.

Now, it seems to me at that particular juncture that you'd be hard pressed to argue that the Constitution doesn't demand that the shared power and the shared responsibility of the legislative and Executive Branch be invoked and that Congress

11

should be brought into that decision-making process. It clearly has to be brought in.

SCHMIDT: Are his hands tied, then, before Congress acts?

SENATOR DODD: I don't think they're tied. I think it's a question of doing what the Constitution mandates: come to Congress.

SCHMIDT: Which is what?

SENATOR DODD: Putting soldiers, military personnel in that kind of situation mandates, the Constitution mandates the Congress be involved.

SCHMIDT: General Scowcroft?

GENERAL SCOWCROFT: I think that's clearly wrong. The President is the commander-in-chief of the armed forces. If that does not include the right to deploy those forces, then it has no meaning.

FORD: The Congress has the specific authority to declare war. And this is a different circumstance from that mandated policy that was given to the Congress by the drafters of the Constitution. If they want to declare war, then that's a different ballgame.

SCHMIDT: Senator Muskie, where do you stand on this debate between President Ford and Senator Dodd?

MUSKIE: Well, the question, in my judgment, is not that the Constitution requires it, but that given the purpose of the War Power Act, that it might be wise to report the action taken. Now, there would be a debate as to whether or not the War Powers Act requires it and whether, if it requires it, it's constitutional.

SCHMIDT: Mr. President, you'd have no difficulty reporting that. You probably would have reported it in any event, War Powers Act or not.

FORD: Well, in five instances during my time in the White House, we had situations arise where some people could have argued that the War Powers Act was applicable. Now, we never admitted that the War Powers Act was involved. But we did go thorough what Senator Muskie says, a full consultation, disclosure, the whole ball of wax.

SCHMIDT: But suppose Congress is in recess or it's Easter?

12

FORD: In one of the instances in my Administration, we made a massive effort to go through the notification and consultative process. We found three or four members in Greece, three or four members in the People's Republic of China. We had a very difficult time finding the members of Congress who were away from the nation's capital for understandable and very proper reasons.

SCHMIDT: Senator Muskie, I want to move to the part of the act, though, that seems to me to have real bite in this sort of situation, and that is what happened if Congress does nothing. The act assumes, or provides that in that situation the President has to withdraw the troops after a 60-day period.

MUSKIE: Only if the troops have been introduced into a situation where hostilities are imminent. It's only in that imminent hostilities language that the 60-day...

SCHMIDT: Do you agree with Senator Dodd that this is the introduction of American troops into hostilities, when advisers are sent into a hot guerrilla war setting?

MUSKIE: Well, this is the first time the word hot has been used. I mean there's no question but that in our history Presidents have used their powers as commander-in-chief to deploy troops in what might be described as war-threatening situations. And that is where -- it is in that kind of a situation that the constitutionality of the War Powers Resolution, I think, is most sharply focused, the constitutional question. And a war-threatening situation can ripen, obviously, into an actual war, a situation requiring the President and the Congress to decide whether or not we are involved in war, ought to be or ought not to be.

But on the other hand, introducing troops into that kind of a situation from time to time is a way of avoiding war or deterring war. And Presidents have done that.

SCHMIDT: Representative Mikulski, are you with Senator Dodd or the President about whether this is hostility?

REP. MIKULSKI: I'm with Senator Dodd. And it's the whole issue of imminent hostilities. There are 500 advisers. What are they doing there? Where are they doing it? Are they in airplanes? Are they in helicopters? Are they on the ground? And if someone is shooting at El Dorado military, and we're standing right side-by-side with walkie-talkies advising them how to fight, it's pretty darn sure that somebody's going to be shot, already somebody's been shot. And in my mind, our troops have been in a hostile environment and in imminent danger.

SCHMIDT: So you think in this circumstance if Congress

does nothing, the President has to bring them home after 60 days?

REP. MIKULSKI: Well, the War Powers Act is not automatically triggered by the opinions of Senator Dodd and myself. The President has to trigger the War Powers Act, unless I try to take him to court.

FORD: Let's assume for the purpose of argument that the War Powers Act is applicable in this situation. Let's assume that. I can understand that Congress then has one of two options which are very forthright, very proper, if you assume the law is constitutional and it's applicable.

Number one, they can approve the troops being there and can authorize their extension. That's one of them. Or they can, by a majority vote, force the President to withdraw.

What I don't understand, and I think it's totally indefensible, is the lack of courage by the provision that says if nothing is done by the Congress, then Congress orders the President to withdraw the forces. Now, that's a lack of, I think, intestinal fortitude. They either ought to face up to it one way or the other, either approve it or disapprove it. And for them to say, "Well, we'll sit back in our cozy way and do nothing and get the same result," I think is inexcusable, indefensible.

SCHMIDT: Representative Brademas, what do you think about what the President has said? Can you tie his hands by inaction? That's really the question.

BRADEMAS: Yes, I think we can. There is a presumption on the part of the President here, obviously, that his action is correct. But there is built into the statute a degree of skepticism, obviously; otherwise, the constraints represented by the War Powers Resolution would not have been written in.

Now, it's my understanding -- and here I yield to the lawyers here -- that the possibility that Congress can exercise a veto on the President's action by passing a joint resolution, a two-house resolution requiring that troops be withdrawn has been challenged as to its constitutionality.

SCHMIDT: Professor Cox, the Constitution gives Congress the power to declare war, and yet gives the President the power as commander-in-chief and, by implication, the power to govern or to substantially manage our foreign relations. Now, consistent with that pattern, do you agree with the President or Representative Brademas about his power if Congress does nothing?

ARCHIBALD COX: I would think that because the Constitution leaves a large gray area as between the power of Congress

and the power of the President as commander-in-chief, that it could properly be filled by legislation. And I would agree with Representative Brademas that, as a matter of wisdom, it's entirely proper to say we don't continue hostilities, we don't continue to do what's war unless the more representative voice of the American people is followed. And the President, lacking that backing-up, is going to get himself into trouble.

SCHMITT: Mr. Wattenberg, what do you think about the War Powers Act? Do you agree with Mr. Cox?

BEN WATTENBERG: Well, I agree with President Ford. And if I were an adviser to the President and that was going on, I would advise the President to get on the television set and tell the American people what's going on is that since World War II, America's basic geopolitical advantage over the Soviet Union has been that we have not been threatened contiguously and the Soviet Union has. And here is a threat to that benefit. And the Congress is a do-nothing Congress, they're afraid to act on it.

SCHMIDT: But Mr. Wattenberg, let's just stick with the process question.

WATTENBERG: I know, but in the process the President has some immense tools in that process to force that Congress to act positively or negatively.

SCHMIDT: Professor Cox?

COX: Well, I think it needs to be recognized that at some point a line must be drawn beyond which the President can't go in committing us to a war without affirmative action from Congress. Suppose he really says, "I'm going on the radio to declare war on the Soviet Union. The Congress hasn't disapproved this, so I have the power to do that." I would think no President would claim he had quite that power.

Then the question becomes, what is enough of a making war to be something that the President doesn't have power to do except defensively? And it would seem to me that that is the kind of line which has to be worked out in practice and by legislation. And if the War Powers Act attempts to draw that line, it could be drawn in a somewhat different fashion, but it seems to me that it would prevail under the present system, and should prevail as an expression of about where the line should be struck.

SCHMIDT: Mr. Buchen, if you were President Ford's Attorney General here and we're approaching the 60-day cutoff, what's your legal advice to the President if he asks you whether he's bound to withdraw the troops?

15

PHILIP BUCHEN: My advice is that he's not bound to withdraw them. If the President has the authority, under the Constitution, to have sent the troops there in the first place, and the War Powers Act said he did, provided he consulted with them, how can Congress deprive him or alter his constitutional powers by not acting at all? Which is what Professor Cox said and what John Brademas said and what Senator Dodd said. And it doesn't make sense at all.

COX: That's relying on the act for the purpose of getting the President power, and then he's going to cut off the second half of the act when it comes to restricting the President. He can't have it both ways.

BUCHEN: He didn't get his power from this act. But the act said, "We're only confirming power that the President had even if we hadn't passed the statute" -- namely, the power he has under the Constitution.

COX: But I submit you've no business referring to the act when you're relying on the Constitution.

BUCHEN: We don't. All we do is we say we consult with Congress. But we're not saying that we have the authority only because we consulted.

COX: Then the challenge is whether in the absence of the statute he does have any power to commit our troops to a situation of hostility.

BUCHEN: The statute says he does.

COX: And I think the Congressman would say, and I would agree, that he doesn't.

SCHMIDT: Mr. Barrett, on the issue joined between Mr. Buchen and Professor Cox, can Congress, by its inaction...

LAURENCE BARRETT: No.

SCHMIDT: ...in that circumstance tie his hands and force him to bring the troops home after 60 days?

BARRETT: No. I believe it cannot. And I think that by this day the press would have been reporting a great deal about the whole situation. And the nature of its reporting and its choosing sides, so to speak, between the antagonists down in Sierra Madres and El Dorado would have affected the outcome as well. The situation could not conclude purely on the basis of the process, as you realize. It would be a combination of the process and the atmospheric, and the press would have contributed to the atmospheric.

16

But on the War Powers Act question, you're with Mr. Buchen.

BARRETT: No -- yes, I'm with Mr. Buchen, exactly. With the Executive.

SCHMIDT: Mr. Wicker?

WICKER: Personally, I opposed the War Powers Act when it was passed, to the extent that it matters whether a columnist does. Because even though I sympathize with that point of view, as it came out of the war in Vietnam, it seemed to me that that act was going to wind up almost inevitably doing what I believe it precisely has been doing in the current situation in Lebanon, where Congress has given its approval for President Reagan to keep troops there for 18 months, which they would not have done had he asked for that, but they did it because the troops were already there.

And I think when the President acts as commander-in-chief when troops are under fire abroad, what's Congress going to do, tell the President to take them out? I don't think so. They're not likely to do that.

REP. MIKULSKI: Well now, you can't have it both ways, first saying the President saying that he's the commander-in-chief, he can't have 535 Secretaries of Defense, 535 Secretaries of State and 535 Directors of the Central Intelligence Agency. So we passed legislation that gave him the flexibility to exercise his prerogatives as commander-in-chief, and at the same time to act, for example, where American lives are threatened, as in the evacuation in Southeast Asia. But we feel that after -- we want to be kept informed, one, because we have to pay the bill; and then, second, if after 60 days the initial conflict's not over, then you ought to either get out or we need to act affirmatively to extend them. Anything beyond 60 days really, then, constitutes another kind of defense issue.

SCHMIDT: But what recourse, then, is available to you? You've heard the legal advice that Mr. Buchen, as Attorney General, would give the President: Keep the troops in after 60 days. That part of the War Powers Act is not binding on him, is unconstitutional.

REP. MIKULSKI: Again, we would have two tools. One, a joint resolution calling upon the President to remove those advisers; or we would have the other thing, which is the power, through the appropriations process, to stop the funds for the advisers.

SCHMIDT: Now, if both those avenues are closed to you

or there are obstacles...

REP. MIKULSKI: Well, how did they get closed?

SCHMIDT: The majority of your colleagues are not anxious to take a position one way or the other on this matter.

FORD: Well, then Congress has worked its will. If there isn't a majority, under our system of government the Congress has, in effect, under the way we count the votes, agreed with the President.

SCHMIDT: Well, but there's still Professor Cox's point, that we're not supposed to go to war until Congress has affirmatively declared war. And there's been no affirmative support.

Have I...

COX: Yes. Just one further point. The powers of the President as commander-in-chief, that begs the question. The question is, what are his powers as commander-in-chief? Do those powers include the power to wage war? Apparently not. It doesn't add to the argument to say he stands on his powers as commander-in-chief. The question is, what of it?

But the only way, I think, there's any sanction, if the Congress won't cut off appropriations, is for some young man who's sent to Sierra Madres to refuse to go and to bring a suit to the courts.

FORD: May I say I'm pleased that Tom Wicker and I share the same view vis-a-vis the War Powers Act. I believe there are times in our country's history when because the President had the unfettered capability to act promptly, or at least any potential adversaries were apprehensive or fearful that the President of the United States might act that way, peace, peace has been maintained. And when you hamstring the President, when you constrict him, and the opposition or the aggressor knows it, he is likely to be more prone to proceed to start a war. And that's what we don't want.

SCHMIDT: Senator Dodd.

SENATOR DODD: Well, I would just, if you go back and look historically, in the 19th Century most Presidents were very, very respectful of the shared responsibility of Congress in this area. It was really Theodore Roosevelt and then on up to the Gulf of Tonkin where you had really the thrust change dramatically. And I would argue that President Wilson, and certainly President Theodore Roosevelt and others, certainly created a

variety of hostile situations as a result of taking that precipitous action.

President Jefferson, in fact, in 1801, in Tripoli, sought the approval of Congress before he would engage the Barbary pirates.

SCHMIDT: General?

GENERAL SCOWCROFT: It seems to me that the act is self-defeating. The act envisions the President being able to take some limited military actions to clear up a situation. But the 60-day provision gives any enemy notice that if he can hold out that long, he has a chance of being successful. So it seems to me that whatever good is envisioned by the act is negated by the impression it gives to an opponent that if he just holds off, he'll be successful.

SCHMIDT: Senator Hatch, let's suppose that there is no resolution of this debate, the President sticks to his position, he's refused to abide by the War Powers Act. Is it appropriate in that circumstance, do you think, to go to the courts and seek a resolution of this problem?

SENATOR HATCH: This is where the Congress has done nothing but wait for the 60-day expiration?

SCHMIDT: Right.

SENATOR HATCH: I think Mr. Buchen's point comes into effect there. If the Congress has it within its power to act positively, then the Congress, it seems to me, has that obligation to go forward, and there are a number of things the Congress can do. Congress can cut off the appropriations. Congress can cut off the money.

Now, assuming that we did exercise some form of affirmative action to stop what the President is doing, even then, if we go to court, then comes the question of whether the courts will decide this issue at all or whether it will assert the political question doctrine and say that this really is a political question between two separated powers.

SCHMIDT: What's your view of that?

SENATOR HATCH: I personally think the court would assert the political question doctrine.

SCHMIDT: Ought to assert it?

SENATOR HATCH: Well, I think that it ought to because

19

you have two conflicting provisions of the Constitution: Article I, Section 8, which gives the Congress the right and power to declare war and to raise and support armies; and you've got Article II, Section 2, which gives the President the power as commander-in-chief.

And so I think that it's a situation where the Congress's only real power is to assert itself with regard to public opinion and try to politically bring the forces in the country against what the President is doing. And that is a considerable power. And after all, I think that's the way the system should work, rather than have unelected judges come into the process and have them determine these matters in the process and inject themselves into the political process that they really are the least equipped to really resolve.

SCHMIDT: Well, let's see about that.

Judge Wallace, suppose I, as a soldier, seek to challenge the President's power to send me to El Dorado. How should a federal district judge respond to that kind of a judicial challenge to the President's power?

JUDGE J. CLIFFORD WALLACE: Very carefully.

[Laughter]

JUDGE WALLACE: Here we're talking about a separation-of-powers question. And in separation-of-powers questions, the solution is not always the courts. It's frequently being worked out between the other branches. They know the Constitution. They're supposed to work with it.

I'm frank to admit that I would let, have a tendency to let the political process go its own way.

SCHMIDT: The consequence, I take it, is that I, the soldier, I go to El Dorado until Congress finally does something that pulls me out of there.

How do you decide whether to intervene?

JUDGE WALLACE: How you decide to intervene is you look at the Constitution and make a determination as to what your role is in the three separate branches. Now, as I view the Constitution, you've got sort of a conflict. You've got the power that's been delegated specifically to the Congress to declare war. You've got the power that's been delegated specifically to the President to be the chief of the armed services.

SCHMIDT: I'm not sure I -- am I going to El Dorado or not?

20

[Laughter]

SCHMIDT: Judge Adams, what's your reaction?

JUDGE ARLIN ADAMS: Well, I think it is a conventional political question. I feel very sorry for the young man who's going to go into hostilities.

SCHMIDT: Even if the hostilities are reasonably clear?

JUDGE ADAMS: But I'm still not so sure that the courts are the right agency of government to resolve a dispute between the Congress and the Executive. But the rights of many other persons in the United States are deeply involved. I think there's a great deal of power to President Ford's argument that in the past we would have lost many people had the President not been able to act very promptly. And the President is in charge of the foreign policy of the United States, he is the commander-in-chief. It's true he doesn't have the power to declare war. I suspect he may have the power from time to time to make war.

It's a very interesting anecdote to history that the declaration-of-war clause originally was written to make war, and that was changed to declare war. And the very reason for it was that there would be times when the chief executive officer of the country would have to get involved in some hostilities that were not of the nature of a war, so to speak. Sending 500 troops to the Caribbean may be one of those instances.

But I don't think some judge, like myself, appointed for life, without any military qualifications, should make this awesome decision.

SCHMIDT: Mr. President?

FORD: If the courts, the highest court, for example, were to decide that this young man had the right, in this case, you could have a never-ending proliferation were proper young men would be challenging their requirement to serve, and pretty soon you'd have every federal district judge around the country making this political decision. And I just don't think that's the way to run the show.

SCHMIDT: Mr. Buchen, as the President's Attorney General, you advised him that in your view the requirement of the War Powers Act that he withdraw the troops after 60 days is an unconstitutional assertion of power by Congress, it's an arrogation of his proper Executive power. What would be your advice if a court ordered him to follow the War Powers Act?

BUCHEN: I would tell him to keep the troops there,

21

assuming there's every reason to do that. Now, Congress has not said that you can't.

SCHMIDT: That's correct.

BUCHEN: They just haven't acted. And you've only had a court of law say that he has to take the troops out. Right?

SCHMIDT: That's right.

BUCHEN: I'd say, "Forget it. Keep your troops there."

SCHMIDT: So, in the final analysis, the President's power, you believe, is superior not only to at least the inaction of Congress, but also to the action of courts.

BUCHEN: Right.

SCHMIDT: Judge Adams?

JUDGE ADAMS: I would go see my very good friend Phil Buchen and try to persuade him not to take that position. As strongly as I feel that he's right, I don't think we...

BUCHEN: Well, you asked the legal position. Now, whether, politically...

SCHMIDT: Why can't you defy the -- why shouldn't you...

BUCHEN: Because what it does to the system.

JUDGE ADAMS: Yeah. Our whole system of government is predicated on respect of the law and that no one, even the President of the United States, is above the law. The Supreme Court may be wrong, but they're the final arbiter, under our system. And if you challenge that, then you challenge the whole system.

SCHMIDT: Mr. President, I...

BUCHEN: It's a narrow question asked, whether it's illegal. I would agree with Arlen on the overall point of view.

SCHMIDT: But your legal advice would be this is an arrogation of power by the court, an unconstitutional interference with the Executive power, he shouldn't be obliged to abide by it, as a legal matter.

BUCHEN: Right.

SCHMIDT: Mr. President, would you?

22

FORD: Well, as strongly as I believe that the War Powers Act is unconstitutional, impractical, and inhibits the President in maintaining peace, if the court of highest jurisdiction made a decision, as wrong as I think it was, I would, I believe, abide by that decision, even though...

SCHMIDT: What's so special about courts?

FORD: Well...

SCHMIDT: They're not even elected.

FORD: This is the way our system works. And they make their share of mistakes. Don't get me wrong. They have in the past, they will in the future. And this would, in my opinion, be a serious error by the courts to make that decision. But I have every reason not to withdraw the troops, predicated on my strong feeling. But I come down to the bottom line, despite the good advice of my counselor, that a wiser decision would be to abide by the decision, and then maximize my effort to get rid of very bad legislation enacted by the Congress.

FRIENDLY: Justice Stewart, we all grew up mouthing platitudes about the separation of powers. Yet we've just heard Congress going to court to sue the President about the use of American troops. When did that begin?

JUSTICE STEWART: Well, this whole idea of the Congress of the United States being a party to a lawsuit is a very, very strange idea to me, and would have been strange to anybody 25 years ago, when I first came to the Supreme Court of the United States. It would have been unheard of.

FRIENDLY: Supposing John Marshall were sitting here, or Charles Evans Hughes, or your colleague Earl Warren. What would they say?

JUSTICE STEWART: Well, I think they would say it's ridiculous for Congress to be suing the President in a court of law, because Congress can read as well as anybody else, they can read the Constitution of the United States as well as the judges can. And I think that there are some questions that are simply not appropriate for judicial decision, and that this may well be one of them.

FRIENDLY: Supposing it did get to a court and supposing that the court ruled that the War Powers Act should be obeyed. What happens if the President says, "I will not obey that order"?

JUSTICE STEWART: Well, you may be supplying the arguments in favor of the non-justiciability of the question

generally, which is more apt to be solved by political accommodation, not by judicial decision, yes or no, this is invalid or valid.

FRIENDLY: But by a court of public opinion played out between the President and the Congress.

JUSTICE STEWART: A political accommodation, yes, in which public opinion is a very important ingredient.

FRIENDLY: An editor's note. The case of El Dorado was, of course, a hypothetical. But history ran us down. At the end of the seminar we informed President Ford and the other participants of the terrorist bombing that very morning in Lebanon which killed 241 Marines. None of those present had known details of that tragedy, nor of the planned invasion of Grenada two days later.

The debate on war powers goes on, in the Oval Office and the Congress, and we hope in your classrooms and living rooms.