

Benjamin Robert Dore

Senator Wayne Morse  
and War Powers

*Third in a Monograph Series  
Celebrating the  
Wayne Morse Legacy*

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# Preface

## *The Wayne Morse Legacy: A Monograph Series*

“Wayne Morse is our reminder, forever, that one man with unlimited courage can move mountains of apathy and despair.” —*Joseph L. Rauh Jr., attorney, civil rights activist, and former occupant of the Wayne Morse Chair for Law and Politics*

**T**he Wayne Morse Legacy series of monographs is intended to honor the life and work of Senator Wayne L. Morse by examining key policy areas in which he was involved and had an impact. The series is a continuing project of the Wayne Morse Historical Park Corporation and the Wayne Morse Center for Law and Politics at the University of Oregon.

The monographs preserve knowledge of Morse’s colleagues and friends as well as present interpretations by a new generation of scholars. They are not academic or technical works. Rather, the monographs are intended to be original and accessible essays for the general public, students, and scholars. This is in keeping with the Wayne Morse Center’s role as a “citizen academy” that celebrates—through speakers, conferences, and publications—the Morse ideals of intellectual independence and integrity. The Wayne Morse Historical Park Corporation Board aims to help people learn and understand the legacy of Senator Morse and how he gave to others even as he served them.

The members of the corporation board and the center believe that Wayne Morse’s contributions illustrate the Webster definition of history that speaks of “acts, ideas, or events that will or can shape

the course of the future.” These monographs examine how Morse affected education, natural resource policy, foreign affairs, human and civil rights, and labor and industrial relations.

The current monograph is the third of the series and examines Morse’s impact on the continuing debate about the division of war powers between the executive and legislative branches of government. The author is Ben Dore, who graduates from the University of Oregon School of Law in 2010. Dore examines the role of the executive branch in declaring war, from the Vietnam War to the War Powers Resolution of the early 1970s to current proposals for consultation between the two branches. He documents Wayne Morse’s overarching concern that the Constitution requires both the executive and legislative branches of government to be involved in declarations of war. Dore carefully suggests that, although Morse would have approved of the spirit of consultation that the 2009 War Powers Consultation Act expresses, “He likely would have criticized the act for depriving Congress of its constitutional powers.”

We are pleased to present a monograph by a young scholar who examines the Morse legacy and its relevance in today’s world.

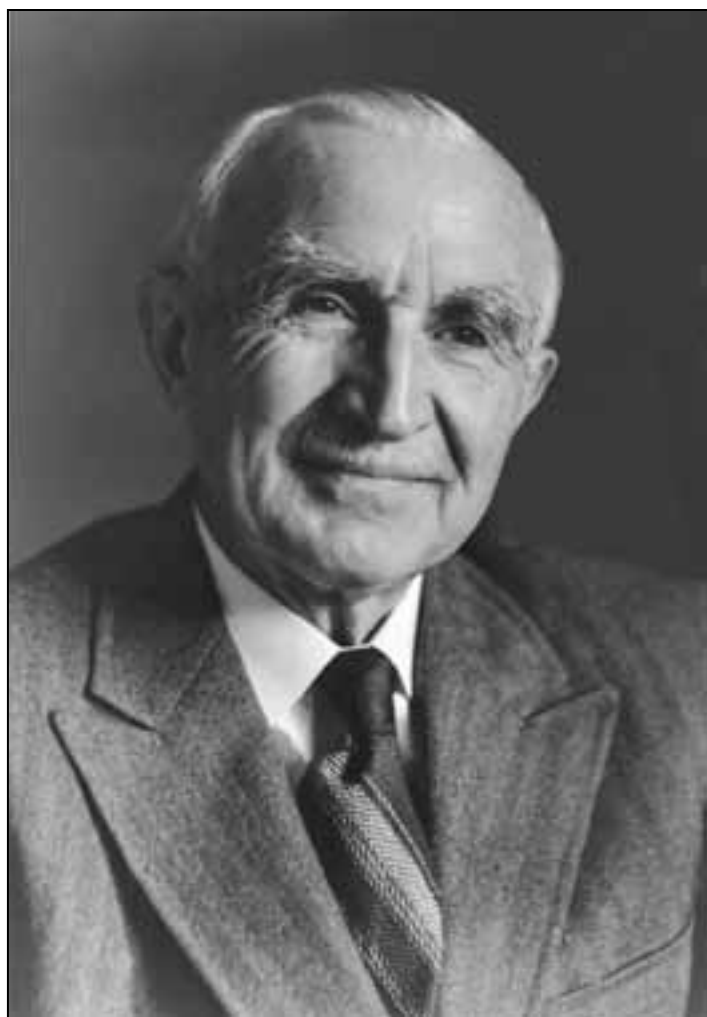
*Laura Olson, President,  
Wayne Morse Historical  
Park Corporation Board*

*Margaret Hallock, Director,  
Wayne Morse Center  
for Law and Politics*



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# About Senator Wayne L. Morse

**A**s a law professor and dean of the University of Oregon School of Law, labor arbitrator, and United States senator, Wayne Morse left a deep legacy of commitment to democratic representation, the rule of law, and intellectual independence to the University of Oregon, the State of Oregon, and to the nation and its the people.

During Wayne Morse's twenty-four-year tenure in the Senate, from 1944 to 1968, he was a leader on a wide range of issues, including the antiwar movement, education, civil rights, and international law. He is perhaps best remembered for his historic stance as one of two senators who opposed the Gulf of Tonkin Resolution, which initiated U.S. military intervention in Vietnam.

Wayne Morse took his first law professorship at the University of Oregon School of Law and became the dean within nine months. At thirty, he was the youngest dean of any American Bar Association-accredited law school in the country. He resigned from the University of Oregon when his practice as a labor arbitrator consumed his time and energy.

Morse's mission as an arbitrator was to uphold what he saw as the sanctity of the contract, the rule of law in the field of labor relations. Deeply committed to fairness and justice, he was popular both with unions and employers. He later served on the National War Labor Board before being elected to the U.S. Senate.

When President Eisenhower adopted Taft's economic policies favoring big business in the early 1950s, Senator Morse left the Republican Party and became an Independent. His reason was succinct: "Principle above politics." Morse joined the Democratic Party in 1955, but two years later he voted against Senate Majority Leader Lyndon B. Johnson's watered-down civil rights bill, calling it an "unconscionable compromise." And when John F. Kennedy supported the Landrum-Griffin Act, which weakened unions' legal protections in the name of rooting out organized crime, Senator Morse became so outraged that he ran against Kennedy in the 1960 presidential primaries.

Morse held the liberal conviction that the purpose of democratic politics is not to amass wealth, but rather to enable the country's true wealth—its people—to flourish. In Morse's own words: "If you want to understand my political philosophy, here's the basic tenet: I think the job of a U.S. senator is to seek to translate into legislation values that promote the welfare of people. Because . . . the keystone of the Constitution is the general welfare clause, and the wealth of America is its people, not its materialism."





## Author and Acknowledgements

**B**enjamin Dore is a law student at the University of Oregon, class of 2010. He holds a bachelor's degree in history from Connecticut College and a master's degree in history from Northeastern University. His master's thesis examined the evolution of the myth of the American West and the role that myth has played in American political history. Ben grew up in Holden, Massachusetts, and followed his wife to Oregon and the University of Oregon School of Law.

Ben would like to thank his wonderful wife for her support. Margaret Hallock of the Wayne Morse Center for Law and Politics and members of the Wayne Morse Historical Park Corporation Board provided feedback and support during the project. The University of Oregon Knight Library Special Collections staff was especially helpful during the research phase of the project.



# Senator Wayne Morse and War Powers

## *Introduction*

*I am satisfied that history will render a final verdict in opposition to the joint resolution introduced today.<sup>1</sup>*

**S**enator Wayne Morse spoke these prophetic words in the U.S. Senate chamber on August 5, 1964, two days before the Senate would approve the Gulf of Tonkin Resolution and begin the escalation of U.S. involvement in Vietnam.

President Lyndon B. Johnson had asked Congress for a resolution of support for the use of military force against North Vietnam following two reported attacks by North Vietnam on U.S. vessels in the Gulf of Tonkin.<sup>2</sup> In the Senate Foreign Relations Committee and on the floor of the Senate, Wayne Morse questioned the administration's account of these events; he argued that the U.S. was hardly an innocent party. Prior to the incident, Morse noted, U.S. Navy vessels were patrolling offshore as South Vietnam bombed islands off the coast of North Vietnam. Morse thought that the U.S. vessels were standing guard,<sup>3</sup> and that the United States was somewhat of a provocateur.

Despite Morse's protests, the resolution passed the Senate on August 7, 1964, with only two senators, Morse and Ernest Gruening (D) of Alaska, dissenting. It gave congressional approval and support for the "president, as commander in chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression" in Southeast Asia.<sup>4</sup>

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1      Remarks of Senator Wayne Morse, United States Senate, August 5, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

2      Stanley Karnow, *Vietnam: A History* (New York: Viking Press, 1983), 371. (Now most historians, and even former secretary of state Robert S. McNamara, agree that a second attack almost certainly did not occur.)

3      Remarks of Senator Wayne Morse, United States Senate, August 5, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

4      Joint Resolution of Congress H.J. RES 1145, August 7, 1964.

Morse pointed out the danger of providing the president such open-ended power:

The resolution . . . gave the president a blank check to use force in Asia. As a legal statement it means little; but it was sought and given as a political backstop. On two other occasions, similar resolutions authorizing a president to use armed force in given areas led right straight to war. One was with Mexico in 1846 and a second was with Spain in 1898. Those resolutions, like the current one, were supposed to prevent war by warning our adversary of our intentions. But both had to be followed by declarations of war.<sup>5</sup>

Morse argued that extending such power to the president was both dangerous and unconstitutional. Wayne Morse consistently advocated for congressional involvement, on behalf of the people, in U.S. foreign policy, as expressed in this 1964 *Meet the Press* interview:

Wayne Morse: What I'm saying is, under our constitution, all the president is, is the administrator of the peoples' foreign policy. Those are his prerogatives, and I am pleading that the American people be given the facts about our foreign policy. . . .

Peter Lisagor: You know the American people cannot formulate and execute foreign policy.

Wayne Morse: Why do you say that? Why, you're a man of little faith in democracy if you make that kind of a statement. I have complete faith in the ability of the American people to follow the facts if you'll give them. My charge against my government is we're not giving the American people the facts.<sup>6</sup>

One of Senator Morse's most enduring legacies is his dissent on the Vietnam War and his advocacy for representative government and adherence to the balance of power among the three branches speci-

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5 Remarks by Senator Wayne Morse, Denver Forum, December 11, 1964. Wayne L. Morse Papers, Series O, Box 17, Knight Library, University of Oregon.

6 As shown in *The Last Angry Man, the Story of America's Most Controversial Senator*, produced by Christopher Houser and Robert Millis, Squareddeal Productions, 1999. (May 1964)

fied in the U.S. Constitution. Wayne Morse believed in the power of the law and the importance of multilateral engagement. His dissent against the Vietnam War focused on the United States' failure to adhere to the Constitution and to international law. In the hundreds of speeches concerning Vietnam that he delivered in the U.S. Senate and to audiences around the country, Morse called for the resumption of the rule of law and the use of diplomacy rather than military might.

Although Senator Morse was not able to stop the escalation of the war in Vietnam during his time in the Senate, his constant dissent likely helped bring an earlier end to the war. He influenced many of his colleagues to change their position on Vietnam, most notably Senator J. William Fulbright, then chairman of the Senate Foreign Relations Committee, on which Morse served. Morse was also instrumental in keeping the debate alive, which not only influenced his colleagues but also affected public opinion, which ultimately turned against the war.

Morse's call for a greater check on the power of the executive to wage war formed the basis of the War Powers Act of 1973, authorized by Congress. Recently, in response to the ensuing debate over the War Powers Act and the war in Iraq, two former secretaries of state, James Baker and Warren Christopher, recommended to Congress that the War Powers Act should be repealed and replaced with the War Powers Consultation Act to increase consultation between the executive and Congress on matters of war.

This paper examines the legacy of Senator Morse in the war powers debate. Morse based his dissent against the Vietnam War on domestic and international law. Fundamentally, he believed that the U.S. presence in Vietnam was unconstitutional. In addition, he argued that it violated international law, particularly the Geneva Accords of 1954, the Southeast Asia Collective Defense Treaty (SEATO), and the United Nations charter.

### *The Great Dissenter*

[Peaceful methods of dissent] should be used by an American people that wishes to abide by the rule of law. They should be used by people who believe that their government should itself abide by the Constitution of the United States, which permits war to be pursued only upon a declaration of war by Congress, and by a people who believe

that the United States must take the lead in furthering, not destroying, the rule of law in relations among nations.<sup>7</sup>

Wayne Morse believed in the power and importance of dissent—a free and open dialogue, he argued, would serve as “a bulwark against the mistakes on the part of the government as much as they were a protection for the personal freedom of individuals.”<sup>8</sup> “It is for this reason that our infant states adopted the Bill of Rights. . . . They were meant to serve as a guarantee of public freedom to dissent. . . .”<sup>9</sup> He felt it especially important to speak out “when there is a military action, or the nation is otherwise at peril, [because this] is precisely the time when our government needs the best advice and the fullest discussion it can get.”<sup>10</sup> It is at these times, however, that governments tend to clamp down on dissent, labeling dissenters as unpatriotic.

Morse ignored efforts to silence dissent and advocated peaceful, nonviolent protest—political debate, open public forums, and the ballot box—because “these are means of protest and dissent that cannot be squelched by federal police power.”<sup>11</sup> He spoke out against lawless protests and the use of civil disobedience as highly ineffective; these allowed government officials to “tag all dissent as lawless, reckless, and bordering on sedition . . . [and to] spread disrepute to the whole idea of dissent. . . .”<sup>12</sup> As the war progressed, responsible dissent became even more important. By 1966 the “president ha[d] stopped talking about negotiations in Vietnam; he ha[d] stopped talking about peace; he ha[d] little to say about possible elections there. . . . [There is] nothing to suggest any plan or intention in the administration to bring about an early end to the war.”<sup>13</sup> Therefore,

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7 Remarks of Senator Wayne Morse, United States Senate, October 19, 1965. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

8 Remarks of Senator Wayne Morse, Reed College, Portland, Oregon, March 26, 1967. Wayne L. Morse Papers, Series O, Box 20, Knight Library, University of Oregon.

9 Ibid.

10 Ibid.

11 Remarks of Senator Wayne Morse, United States Senate, October 19, 1965. Wayne L. Morse Papers, Series O, Box 17, Knight Library, University of Oregon.

12 Ibid.

13 Remarks of Senator Wayne Morse, Willamette Democratic Society,

the American people must exercise their constitutional right and “demand that the war in Vietnam be stopped.”<sup>14</sup> Morse himself embraced this constitutional right and spoke out against the war in Congress and around the country.

Morse first questioned the premise that the United States did not act explicitly in its self-interest. President Eisenhower had first committed aid to Vietnam on the condition that it undertake political, social, and economic reforms. No such reforms occurred, even though President Kennedy later increased pressure on Vietnam, yet the United States remained. After hearing this policy justification for years, Morse said there “is a lack of will to reform among those in power. . . . [W]e have poured money in and men for fourteen years without requiring any reform because it was our own national interest we thought we had to protect. . . . We have to stop pretending that self-help is a condition of our war in Vietnam. . . . They have not helped themselves, and we have not left.”<sup>15</sup> In an earlier speech, he argued that this policy has “eliminated local responsibility for the war, for everyone in South Vietnam is put on notice that Americans will stay and take over whether the South Vietnamese want to continue the fighting or not.”<sup>16</sup>

Morse compared U.S. efforts in Vietnam to Reconstruction in the antebellum South. In both cases the actions of the U.S. government were deeply resented, but these efforts were even more resented in Vietnam, where we were viewed as foreigners of a different race, religion, history, and culture.<sup>17</sup> As a result, Morse called the Eisenhower-Kennedy policy a

total failure. It has not saved the area from communism, nor from war. Its fruits today are 1) the unifying of the large

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May 18, 1966. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

14 Ibid.

15 From the Office of Senator Wayne Morse, for release October 16, 1968. Wayne L. Morse Papers, Series O, Box 22, Knight Library, University of Oregon.

16 Remarks of Senator Wayne Morse, Portland Rosary Club, May 31, 1966. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

17 Remarks of Senator Wayne Morse, Mississippi Junior Chamber of Commerce, March 11, 1967. Wayne L. Morse Papers, Series O, Box 20, Knight Library, University of Oregon.

noncommunist nations of Asia-India, Japan, Pakistan, Indonesia *against* the United States; 2) the exposure of the United States as the only foreign power engaging in the war in Vietnam, and a white power at that; 3) the revelation that the overwhelming force of the United States is ineffective . . . .<sup>18</sup>

The Johnson administration later cited containment of communism as an additional reason for U.S. involvement in Vietnam. Containment, it was said, would benefit not only the security interests of the U.S., but also those of the world, including Vietnam and its neighbors. Morse questioned this: “The real powers of Asia—China, India, Pakistan, Indonesia—none have supported the U.S. in Vietnam. If we are fighting to save Asia from communism, then why aren’t these nations helping us?”<sup>19</sup> He suggested that U.S. self-interest was a more likely reason for U.S. intervention. The 1967 elections in Vietnam, supervised by the U.S., provided, according to Morse, “good evidence of where our real interest lies. We say it is democratic. But it is democratic in exactly the same way every communist election is democratic. All candidates are screened by the ‘party’ and those who do not pass the test of devotion to its causes are not permitted to run at all.”<sup>20</sup> Rather, Morse pointed out that the interests of the United States lay in preventing the spread of an ideology that was viewed as antithetical and installing a pro-U.S. government.

Having received congressional authorization in 1964, the Johnson administration began bombing missions in North Vietnam, arguing that sustained bombing of the industrial and economic centers of North Vietnam would halt its support of insurgents in the South.<sup>21</sup> Yet, as Morse noted, a spokesman for the Johnson administration

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18 Remarks of Senator Wayne Morse, St. Mary’s University, San Antonio, Texas, May 15, 1965. Wayne L. Morse Papers, Series O, Box 17, Knight Library, University of Oregon.

19 Remarks of Senator Wayne Morse, Congregation of Beth Shalom, Pittsburgh, Pennsylvania, September 12, 1965. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

20 Remarks of Senator Wayne Morse, Coos Bay Lions Club, September 1, 1967. Wayne L. Morse Papers, Series O, Box 20, Knight Library, University of Oregon.

21 *The Pentagon Papers: The Defense Department History of United States Decision-Making on Vietnam, Volume 3* (Senator Gravel Edition) (Boston: Beacon Press, 1971), 106.



called the conflict a civil war and said nothing was to be gained from bombing the North. Morse quoted a White Paper describing U.S. policy in early 1965 that estimated that 10 to 20 percent of Vietcong and 10 percent of the weapons came from outside the South.<sup>22</sup> Morse said that, for the bombing to be successful, it “requires North Vietnam to stop aiding the rebels, it requires the Vietcong to collapse as a result, and it requires stability to emerge in South Vietnam.”<sup>23</sup> This was not the likely result; as Morse saw it, the U.S. policy would not weaken the Vietcong and would likely strengthen the communist opposition.

Morse argued that U.S. policy would also likely bring the communist nations of Asia closer together and increase the number of communist sympathizers. “The whole object of the war effort is to contain China and to keep the other nations of Asia from falling into her sphere. But the use of military means to reach that end is destroying the end itself . . . by driving into opposition the countries we claim we are saving.”<sup>24</sup>

Morse also recognized that a large share of the blame for the failure of the United States’ Vietnam policy lay with Congress. Had Congress carried out their constitutional responsibilities in a conscientious manner, the war may have been prevented. Morse also wanted to move away from unilateral action to a multilateral approach that would bring the conflict back within the boundaries of international law. The solution for Morse was a return to the rule of law and the cooperation of all nations within a legal framework. The first step would be to reassert the primacy of the Constitution.

### *An Unconstitutional War and a Dangerous Precedent*

In the last twenty years we have actively collaborated in our own decline. We have delegated away to the executive branch too many of the foreign policy duties which were delegated to *us* by the people of the United States.<sup>25</sup>

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22 Remarks of Senator Wayne Morse, Johns Hopkins University, Baltimore, Maryland, March 15, 1965. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

23 Ibid.

24 Ibid.

25 Remarks of Senator Wayne Morse, United States Senate, January 1, 1966. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

So spoke Senator Morse before the U.S. Senate in January of 1966. The framers of the Constitution established a system of checks and balances to create a division of power that would be less prone to abuse. Having identified the executive as the branch most likely to pursue war, the founders expressly granted the power to declare war to Congress, the branch closest to the people. Article I, Section 8 conferred upon Congress the power to declare war, “raise and support armies,” and “provide and maintain a navy.” As an additional check, Article I, Section 9 granted Congress the power to control the appropriation of taxpayer money so that it could deny funding for an unpopular or unconstitutional military conflict. Balanced against these congressional powers is the president’s power as commander in chief. The president also has the constitutional power to immediately defend the United States in the case of an attack, but anything beyond that immediate response must go through Congress. An ongoing legal debate continues as to exactly how this power is divided, and this issue is developed more fully later in this paper. Some argue that the power to initiate war is the sole province of the executive; others argue that power belongs to Congress alone.

In 1950, during the height of the cold war, President Harry Truman sent American military personnel to Korea after having received authorization from only the United Nations. Truman’s action set the precedent, still followed today, that a president could commit American troops to military action without congressional approval. It is interesting that Senator Morse came to Truman’s defense on the question of the constitutionality of this unilateral action, pointing to the Supreme Court opinion in *U.S. v. Curtiss-Wright*. The Supreme Court held that the president’s plenary powers included a discretionary power in the field of foreign policy that was not dependent on congressional approval. In citing this opinion, Morse stated that the case supported “a discretionary power which [he] believe[d] [was] inherent in the president of the United States in the field of foreign affairs.”<sup>26</sup> Morse would not be so kind to President Eisenhower or President Johnson.

The Truman precedent was followed in 1955 and again in 1957 with the Formosa Resolution and the Middle East Resolution, respectively. These provided President Eisenhower, according to Morse, a predated or undated declaration of war. They were unconstitutional in Morse’s view because they transferred Congress’s constitutional

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26 Quoted in J. Richard Piper, *Ideologies and Institutions* (Rowman and Littlefield Publishers, Inc., 1997), 145.

power to declare war to the president, so that “the president, and he alone, would make the decision as to what course of action would be followed under the resolution.”<sup>27</sup> Morse believed that Congress’ constitutional power did not end with a declaration of war, but that Congress also had the power to oversee and, to some extent, direct the way in which war was conducted.

Morse made the same arguments regarding the 1964 Gulf of Tonkin Resolution that granted the president, as commander in chief, the power “to take all necessary steps, including the use of armed force . . . [and] the resolution shall expire when the president shall determine that the peace and security of the area is reasonably secured.”<sup>28</sup> Morse criticized the breadth of the Gulf of Tonkin resolution:

[The resolution] does not say [the President] is limited in regard to the sending of ground forces. It does not limit that authority. That is why I have called it a predated declaration of war, in clear violation of Article I, Section 8 of the Constitution, which vests the power to declare war in the Congress, and not in the president.

What is proposed is to authorize the president of the United States, without a declaration of war, to commit acts of war.

[The resolution] does not say “excluding the use of the Army.” It does not say “including the use of the Navy.” It does not say “including the use of the Air Force.” It says “including the use of the armed force.” That is all branches of the military establishment, and nuclear as well as conventional weapons. . . . Mr. President, it is as broad as the military establishment.<sup>29</sup>

In granting such broad powers to the president, Congress, in Morse’s view, abdicated its constitutional responsibilities in two ways. It transferred to the president its constitutional power to

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27 Remarks of Senator Wayne Morse, United States Senate, August 6, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

28 Joint Resolution of Congress, H.J. RES 1145, August 7, 1964.

29 Remarks of Senator Wayne Morse, United States Senate, August 6, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

declare war, and it failed to serve as a check to the power of the executive as it continued to pass appropriation bills for the war.

Constitutional scholars continue to debate what, exactly, constitutes a declaration of war. Morse's reading of the Constitution was literal—a declaration of war is a highly specific act that would leave little discretion to the executive. Morse argues:

War cannot be declared speculatively; war cannot be declared *in futuro* under Article I, Section 8 of the Constitution. War cannot be declared to meet hypothetical situations yet to arise. . . . War is declared in relation to existing operative facts of the moment of the call for a declaration of war.<sup>30</sup>

Morse believed that the Gulf of Tonkin Resolution, like the Formosa and Middle East resolutions, provided the president too much discretion and too much authority. He also objected that the Tonkin Gulf Resolution would grant the president the authority “to prevent further aggression.” Of that phrase, he said:

That is when the whole realm of judgment upon the part of the president of the United States comes into play. That is when we substitute the president for Article I, Section 8 of the Constitution. That is when we say to the president, ‘You can go beyond acts of immediate self-defense of the Republic. You do not have to come to Congress, as Franklin Roosevelt did after Pearl Harbor, and ask for a declaration of war. You can proceed in the exercise of your judgment to prevent further aggression.’

Morse contended that this concentration of power substitutes the judgment of the president and his advisors for the judgment of 535 representatives of the people.

Second, according to Morse, Congress abdicated its constitutional responsibility to serve as a check to the power of the executive by continuing to pass appropriation bills for the war in Vietnam. In each of the fiscal years 1965 through 1969, the Johnson and Nixon administrations requested congressional approval of supplemental appropriation bills for operations in Southeast Asia, above the amount provided in the regular defense appropriation bills. Each re-

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30 Remarks of Senator Wayne Morse, United States Senate, August 7, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

quest represented an opportunity for Congress to check the power of the executive by denying the appropriations needed to fund the war. Morse noted:

It is an elementary principle of constitutional law that the executive branch of government cannot spend taxpayer's money in the field of foreign policy, or for any other purpose except when the appropriations are passed by law by Congress.

Article I, Section 9 of the Constitution reads, "No money shall be drawn from the treasury but in consequence of appropriations made by law. . . ."

These legal requirements under our constitutional system give Congress a check and voice in determining American foreign policy."<sup>31</sup>

In 1965, President Johnson asked Congress to pass a supplemental appropriation bill even though he claimed that he had the legal authority to transfer the necessary funds himself. He went to Congress once again in order to demonstrate congressional support of the war. Morse argued, "This is not a routine appropriation. For each member of Congress who supports this request is also voting to persist in our war effort. . . . Each is saying that Congress and the president stand united before the world. . . ."<sup>32</sup>

The roundabout way of gaining congressional support and the lack of an explicit declaration of war made it easier to hide the extent and actual facts of the war from the American public. An explicit declaration of war, as Morse wanted, would lay all of the facts before the American public. Morse said that President Johnson wanted to avoid such a declaration "because obviously he knows that the American people do not want [the war]. A formal statement of that kind would bring outcries and objections from the American people. So the president sought an affirmation from Congress of what he was doing in

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31 Remarks of Senator Wayne Morse, United States Senate, August 5, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

32 *Quoted in* Remarks of Senator Wayne Morse, United States Senate, May 5, 1965. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

Asia without actually asking for a declaration of war.”<sup>33</sup>

### *A Violation of International Law*

I believe the only hope for the establishment of a permanent peace in the world is to practice our oft-repeated American professing that we believe in the substitution of the rule of law for the jungle law of military force as a means of settling disputes which threaten the peace of the world.<sup>34</sup>

During the Vietnam conflict, the United States violated not only its own constitution but also international law and treaties. Specifically, in Morse’s view, U.S. actions in Vietnam violated the terms of the Geneva Accords of 1954, the terms of the SEATO treaty, and the United Nations charter. What was particularly exasperating for Morse was that the United States pointed to these very treaties as justifications for the war even as they were violating the terms of each. Further, the violations were committed by unilateral action. Our actions violated specific terms of the agreements as well as the spirit of multilateralism with which the agreements were conceived. Morse recognized that such actions also discouraged future international cooperation and buoyed the groups the actions initially sought to suppress.

### *The 1954 Geneva Accords*

We say that one of our objectives is the enforcement of the 1954 [Geneva] agreement. . . . Why we believe we have a right to enforce by force an international agreement to which we were not a party has never been explained.<sup>35</sup>

In 1954 the Geneva Accords ended French occupation of Indochina by establishing the independent sovereignty of Vietnam. The accords established a demilitarized zone and called for an end to all foreign involvement and troop occupation. An International Control Commission (ICC) was established to monitor violations of the accords.

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33 Report to Oregon, May 5, 1965. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

34 Remarks of Senator Wayne Morse, United States Senate, August 5, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

35 Ibid.

The thrust of Morse's criticism regarding the Geneva Accords was that the U.S. was not a party to the agreement and therefore had no right to claim to be acting under its terms. Shortly before the conference in Geneva, the U.S. decided to back Ngo Dinh Diem to head the government of South Vietnam. The United States could not sign the accords and immediately violate the terms by providing aid to Diem; so the United States chose not to sign. As its official reason, the U.S. cited the fact that it was not a belligerent. Morse took exception to this: "[T]he notion that the United States could finance much of the French war effort and then decline to sign the settlement on the ground that we were not a belligerent . . . is one of the great hypocrisies of our policy in Vietnam."<sup>36</sup>

### *The Southeast Asia Treaty Organization (SEATO)*

We are using SEATO not as a collective commitment among interested and affected parties, but as an American hunting license to do what we choose to do in Vietnam.<sup>37</sup>

In 1954, the United States, France, Great Britain, New Zealand, Australia, the Philippines, Thailand and Pakistan formed SEATO to prevent the spread of communism in the region, specifically in South Vietnam (which was a protocol state under the treaty). The treaty called for the member nations to come to the collective defense of any member nation that was threatened. However, any action on behalf of SEATO required unanimous agreement, which made the treaty ineffective given the general lack of interest of other nations in Vietnam. Despite the requirement of unanimity, the United States attempted to justify its unilateral actions in Vietnam as being sanctioned by the SEATO treaty. Secretary of State Dean Rusk made two statements that exposed the contradiction. In 1964, during congressional hearings on the Gulf of Tonkin Resolution, before the resolution was passed and its legality could be questioned, Rusk said of Vietnam, "We are not acting specifically under the SEATO treaty." However, two years later, before the same committee he said, "It is this fundamental SEATO

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36 Remarks of Senator Wayne Morse, Mississippi Junior Chamber of Commerce, March 11, 1967. Wayne L. Morse Papers, Series O, Box 20, Knight Library, University of Oregon.

37 Remarks of Senator Wayne Morse, University of Notre Dame, March 30, 1966. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

obligation that has, from the outset, guided our actions in Vietnam.”<sup>38</sup>

Despite Rusk’s claims, the SEATO treaty, as Morse noted, created no obligation on the part of the United States. The SEATO treaty clearly required unanimous agreement, and without it there was no obligation. Of the eight member nations, only Australia committed any troops, a token force of sixty or seventy men. Morse commented, “[T]hat is a measure of how our SEATO allies feel about fighting in Vietnam.”<sup>39</sup> In addition, France and Pakistan made clear their opposition to any commitment in Vietnam.

U.S. leaders fueled Morse’s criticism by citing different sections of the treaty for justification of its activities at different times. First, they cited Paragraph 2 of Article IV, requiring the parties to consult as to the course of action that should be taken if one of the parties was threatened in any way other than an armed attack. But this was only an obligation for consultation, Morse contended, “[h]ence, under Paragraph 2 there is no commitment to take action vis-à-vis Vietnam.”<sup>40</sup> By 1966 the U.S. had changed the justification, deciding that South Vietnam had come under “armed attack,” in which case each party was called upon to “act to meet the common danger” but that any “measures taken under this paragraph shall be reported to the Security Council of the United Nations.” There was no recognized common danger, nor did the United States report anything to the U.N. Security Council. Morse remarked, “[I]t is astonishing to me that the administration is leading this country into full-scale war without ever identifying the nature and language of the commitment they claim to be following.”<sup>41</sup>

### *The United Nations*

There is no hope for permanent peace in the world until  
all the nations . . . are willing to establish a system of in-

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38 Quoted in Austin, Anthony. *The President’s War*. (New York: J.B. Lippincott Company, 1971), 141.

39 Remarks of Senator Wayne Morse, Denver Forum, December 11, 1964. Wayne L. Morse Papers, Series O, Box 17, Knight Library, University of Oregon.

40 Remarks of Senator Wayne Morse, Boston University, February 10, 1966. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

41 Ibid.



ternational justice through law, to the procedures of which will be submitted each and every international dispute that threatens the peace of the world . . . for a final and binding determination, to be enforced by an international organization, such as the United Nations.<sup>42</sup>

In 1945 the United Nations replaced the beleaguered League of Nations and set out to help maintain international peace through the promotion of cooperation and international law. Though viewed as more effective than its predecessor, the United Nations was often ignored by the United States during the Vietnam War era. Morse said:

[T]he very assumption that someday, sometime, somehow, and under some other circumstances, the United States will seek U.N. action is an admission that the issue is really one of U.N. jurisdiction. What they are saying is only that they do not think that to adhere now to the U.N. Charter would serve American interests. . . . This amounts to saying that any treaty obligation that does not serve our national interest is just a scrap of paper.<sup>43</sup>

Morse contended that the United States' use of force violated the "territorial integrity" of North Vietnam that is protected under Article 2, Section 4 of the U.N. Charter. The U.S. did not seek a diplomatic solution as mandated by Article 33, nor was the dispute referred to the Security Council per Article 37. The U.S. attempted to justify its violations by stating that North Vietnam violated the charter first. Morse would have none of that, stating, "Whoever fights a war without first taking the matter to the United Nations is in violation of the charter, whether that party started the fighting or not. We cannot hide behind the alibi that the other violated the agreement first. . . ."<sup>44</sup>

Morse also criticized the U.N. and the international community for failing to fulfill their obligations under the charter. Under Article 34, the Security Council was empowered to investigate any international dispute, and any member of the U.N. could bring a dispute before the

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42 Remarks of Senator Wayne Morse, United States Senate, August 5, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

43 Ibid.

44 Remarks of Senator Wayne Morse, United States Senate, March 4, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

Security Council for a determination. Morse felt that “the only hope for peace in Asia is that all nations that signed the United Nations Charter will join in taking jurisdiction over this incipient war.”<sup>45</sup> But the U.N. failed to exercise either of these two powers, and the U.N. and the international community in general looked on as the United States violated international law. Morse lamented the fact that the secretary general of the U.N., U Thant, expressed grave doubts that the U.N. could do anything to resolve the conflict. Morse said, “The secretary general should have been using his voice and influence to persuade the Security Council to carry out its obligations under the charter.”<sup>46</sup>

Morse realized the war in Vietnam would not bring peace and would severely damage the reputation of the U.S. in the international community. But worse was the potential damage the U.S. actions could have on the U.N. itself. Morse worried, “We are fighting that war in violation of the United Nations Charter, and that is going to breed disrespect for peaceful settlements of disputes among all nations, not the least of them the new nations of the world we are so anxious to influence and guide in the ways and adherence to the rule of law.”<sup>47</sup>

### *Morse’s Legacy: The War Powers Debate*

On January 27, 1973, four years after Wayne Morse’s last day as a senator and more than fifteen years after the U.S. entered Vietnam, the Paris Peace Accords finally brought the Vietnam War to an end. Fifteen years of U.S. military involvement in Vietnam cost the United States billions of dollars, the lives of tens of thousands of young men and women, and the respect of U.S. citizens and the international community. Many later adopted the view of Wayne Morse: the executive branch had become too powerful and the Congress too weak with respect to war powers.

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45 Remarks of Senator Wayne Morse, United States Senate, February 18, 1965. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

46 Remarks of Senator Wayne Morse, United States Senate, August 7, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

47 Remarks of Senator Wayne Morse, United States Senate, October 19, 1965. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

In 1973 Congress passed the War Powers Resolution (WPR), which expressed Morse's most fundamental belief that Congress's constitutional power to check the executive's ability to wage war must be restored. The resolution required the president to notify Congress before the initiation of any military action, set limits on how long military troops could be deployed without congressional authorization, and required the president to report to Congress regarding the scope and nature of the conflict.

In the debate on war powers, Morse was a clear subscriber to the view that any war powers exercised by the executive are subordinate to those exercised by Congress. Congressional war powers are granted by Article I, Section 8 of the Constitution. In language that Morse argued was not in the least bit ambiguous, Congress is granted the power "to declare war, grant letters of marque and reprisal . . . to raise and support armies . . . [and] to provide and maintain a navy." The argument that Congress was vested with the power to initiate war is supported by the assertion that the Constitution expresses a clear rejection of the British model, in which war powers were vested in the monarch.<sup>48</sup> Vesting these powers in Congress instead reflected James Madison's concern "that the executive is the branch of power most interested in war, and most prone to it."<sup>49</sup> James Wilson, in words echoed by Morse, cited below, stated that this system "will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress."<sup>50</sup>

Morse's ideas are clearly present in the stated purpose of the WPR. Section 2(a) states, "It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the president will apply to the introduction of United States Armed Forces into hostilities. . . ."<sup>51</sup> Morse recognized how vital this collective judgment was to the maintenance of the balance of power: "The

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48 Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1647 (2000).

49 Letter from James Madison to Thomas Jefferson (April 2, 1798), in Gaillard Hunt, ed., *The Writings of James Madison*, Vol. 6, 311, 312 (G. P. Putnam's Sons 1906).

50 Jonathon Eliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 528 (Lippincott 1836).

51 H.J. Res. 542, 93rd Congress (1973).

founding fathers created the Senate . . . to take the long-range view of actions. . . .”<sup>52</sup> The WPR attempted to ensure that the decision to go to war did not rest with one person. To further promote this goal, the WPR also states that the Constitution granted Congress “the power to make all laws necessary and proper to carry out its powers and all other powers vested by the Constitution. . . .”<sup>53</sup> This means that the president cannot exercise his power as commander in chief without congressional approval; or in Morse’s words, “the president [cannot] make war at his discretion.”<sup>54</sup> As Morse noted and the WPR states, the president is free to exercise some discretion only in response to a national emergency created by an attack on the United States.<sup>55</sup> Beyond that, the president is required by section 5(b) to consult with Congress before engaging the United States in military conflict and to report to Congress regarding the status of any ongoing conflict. Once the president met this requirement, unless Congress declared war or authorized the use of force within sixty days, the president would be required to terminate any use of the United States Armed Forces.<sup>56</sup> This section contains no requirement that Congress take any affirmative steps to end a conflict; rather, congressional inaction would, after sixty days, force an end to any conflict.

Critics of the resolution argue that the president may initiate war without congressional approval and that Congress has no veto power over a president’s decision. These critics condemn the WPR as an unconstitutional appropriation of presidential war powers, which they argue extends beyond the power to respond to a national emergency.<sup>57</sup> Proponents of this argument cite as a starting point Article II, Section 2 of the Constitution that names the president as commander

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52 Remarks of Senator Wayne Morse, United States Senate, January, 29, 1966. Wayne L. Morse Papers, Series O, Box 18, Knight Library, University of Oregon.

53 H.J. Res. 542, 93rd Congress (1973).

54 Remarks of Senator Wayne Morse, United States Senate, March 4, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

55 See H.J. Res. 542, 93rd Congress (1973); Remarks of Senator Wayne Morse, United States Senate, August 7, 1964. Wayne L. Morse Papers, Series O, Box 15, Knight Library, University of Oregon.

56 H.J. Res. 542, § 5(b), 93rd Congress (1973).

57 See Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 864-66 (1972).

in chief of the Army and Navy. They argue that the framers explicitly adopted the British model, a model that was supported by the leading thinkers of the time. Under the British system, the monarch had the power to initiate war while Parliament's control over the purse provided them an effective check.<sup>58</sup> The United States' Constitution created a similar system, goes the argument: Article II, Section 2 gave the president the power to initiate war, while Article I, Section 9 provided Congress power over appropriations. Finally, within this system, the power to declare war means merely the power to recognize a change in the legal status—from peace to war—between the United States and the country against which war is being waged.<sup>59</sup> The power to declare war does not confer upon Congress a power to authorize or initiate war.<sup>60</sup>

The War Powers Resolution proved to be ineffective and has never been invoked. But its purpose has been resurrected. In response to the war in Iraq, two former secretaries of state, Warren Christopher and James Baker, proposed the War Powers Consultation Act of 2009. The act would require increased cooperation between Congress and the executive regarding matters of war. In an attempt to address the attacks on the constitutionality of the WPR, the WPCA walks a finer line between the two sides of the debate. This is clear in its stated purpose: “To describe a constructive and practical way in which the judgment of both the president and Congress can be brought to bear when deciding whether the United States should be engaged in significant armed conflict. This act is not meant to define, circumscribe, or enhance the constitutional power of either [branch].”<sup>61</sup> Like its predecessor, the focus of the WPCA is on consultation and reporting. In the case of a significant armed conflict, defined as any conflict expected to last more than one week, the president need not obtain the consent of Congress, but must consult Congress before ordering deployment of troops.<sup>62</sup> Under the WPCA, if Congress disapproves of any action initiated by the president, a joint resolution must be introduced into both Houses. Before the joint resolution becomes binding

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58 John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1649 (2002).

59 *Id.*

60 *Id.*

61 Proposed War Powers Consultation Act of 2009, *available at* miller-center.org/policy/commissions/warpowers.

62 *Id.* at 4(B).

law, it must be presented to and signed by the president or Congress must override a presidential veto.<sup>63</sup> Congress must take this affirmative step before hostilities will be brought to an end.

Although Morse would have approved of the spirit of consultation that the WPCA expresses, he would likely have criticized the act for depriving Congress of its constitutional powers. Although the proposal requires the president to consult Congress prior to ordering U.S. troops into significant conflicts, it is the president, not Congress, who ultimately has the power to commit troops to war. Furthermore, the WPCA would allow the president to avoid even the minor consultation requirement as it applies only to significant armed conflicts and need not be followed if there is a “need for secrecy or other emergent circumstances precludes consultation. . . .”<sup>64</sup> It is left to the president’s discretion to determine when the need for secrecy is sufficient to preclude consultation. In such cases, the president must consult Congress within three days of initiating the significant armed conflict. But, as history has shown, once war has begun, Congress has great difficulty bringing that war to an end. If Congress wishes to end a war under the proposal, a joint resolution must be introduced and signed by the president. Otherwise, a resolution seeking an end to the war must be approved by the required two-thirds vote to override a presidential veto.

The 1973 War Powers Resolution was spawned by the lessons of the Vietnam War and the dissent of Senator Wayne Morse, and his advocacy for a congressional role in war powers lives on in the current debate

Because Wayne Morse was knowledgeable both as a constitutional lawyer and as a U.S. senator, he knew the importance of words and the danger of using words carelessly. Senator Morse demonstrated the value of dissent based on careful analysis and reasoning, and this is part of his legacy to all of us.

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63 *Id.* at 5(A-C).

64 *Id.* at 4(C)



