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# WAR POWERS LEGISLATION

## HEARINGS

BEFORE THE

## COMMITTEE ON FOREIGN RELATIONS
## UNITED STATES SENATE

NINETY-SECOND CONGRESS

FIRST SESSION

ON

## S. 731, S.J. Res. 18 and S.J. Res. 59

MARCH 8, 9, 24, AND 25, APRIL 23 AND 26, MAY 14, JULY 26 AND 27
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# FOREWORD

On March 8, 1971, the Committee on Foreign Relations began its hearings on S. 731, Senate Joint Resolution 18, and Senate Joint Resolution 59, concerning the division of war powers between Congress and the President. During the course of the hearings the following legislation, which can be found in the body of the printed hearings and the appendix thereto, was introduced and referred to the Committee on Foreign Relations:

S. 1880, by Mr. Bentsen, on May 17, 1971,

Senate Joint Resolution 95, by Mr. Stennis, on May 11, 1971, and

House Joint Resolution 1, by Mr. Zablocki, January 22, 1971, which passed the House by a voice vote on August 2, 1971, and was referred to the Committee on Foreign Relations on August 3, 1971.

After the committee's hearings had concluded, S. 731 was reintroduced as S. 2956, which bill is the source of the bill reported with amendments by the committee. The text of S. 2956 follows:

[S. 2956, 92d Cong., first sess.]

A BILL To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SHORT TITLE

SECTION 1. This Act may be cited as the "War Powers Act of 1971".

PURPOSE AND POLICY

SEC. 2. It is the purpose of this Act 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 initiation of hostilities involving the Armed Forces of the United States, and to the continuation of such hostilities. Under article I, section 8, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also "all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." At the same time, the Act is not intended to encroach upon the recognized powers of the President, as Commander in Chief, to conduct hostilities authorized by the Congress, to respond to attacks or the imminent threat of attacks upon the United States, including its territories and possessions, to respond to attacks or the imminent threat of attacks against the Armed Forces of the United States, and, under proper circumstances, to rescue endangered citizens of the United States located in foreign countries.

EMERGENCY USE OF THE ARMED FORCES

SEC. 3. In the absence of a declaration of war by the Congress, the Armed Forces of the United States shall be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—

(a) to repel an attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;

(b) to repel an attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;

(c) to protect while evacuating citizens of the United States, as rapidly as possible, from any country in which such citizens, there with the express or tacit consent of the government of such country, are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control: *Provided*, That the President shall make every effort to terminate such a threat without using the Armed Forces of the United States: *And provided further*, That the President shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States; or

(d) pursuant to specific statutory authorization, but authority to use the Armed Forces of the United States in hostilities shall not be inferred from any Treaty or provision of law, including any provision contained in any appropriation act, unless such Treaty or provision specifically authorizes the use of such Armed Forces in hostilities and exempts the use of such Armed Forces from compliance with the provisions of this Act. Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such forces are engaged, or there exists an imminent threat that such forces will become engaged, in military hostilities. No Treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the use of the Armed Forces of the United States in hostilities, within the meaning of this section.

REPORTS

SEC. 4. The use of the Armed Forces of the United States in hostilities pursuant to section 3 of this Act shall be reported promptly in writing by the President to the Speaker of the House of Representatives and the President of the Senate, together with a full account of the circumstances under which such hostilities were initiated, the estimated scope of such hostilities, and the consistency of such hostilities with the provisions of section 3. Whenever Armed Forces of the United States are engaged in hostilities outside of the United States, its territories and possessions, the President shall, so long as such forces continue to be engaged in such hostilities, report to the Congress periodically on the status of such hostilities as well as the scope and expected duration of such hostilities, but in no event shall he report to the Congress less often than every six months.

THIRTY-DAY AUTHORIZATION PERIOD

SEC. 5. Hostilities commenced pursuant to section 3 of this Act shall not be sustained beyond thirty days from the date of their initiation except as provided in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.

TERMINATION WITHIN THIRTY-DAY PERIOD

SEC. 6. Hostilities commenced pursuant to section 3 of this Act may be terminated prior to the thirty-day period specified in section 5 by statute or joint resolution of Congress.

CONGRESSIONAL PRIORITY PROVISIONS

SEC. 7. (a) Any bill or resolution, authorizing the continuation of hostilities under subsection (a), (b), or (c) of section 3 of this Act, or the termination of hostilities under section 6 of this Act shall, if sponsored or cosponsored by one-third of the Members of the House of Congress in which it is introduced,

be considered reported to the floor of such House no later than one day following its introduction unless the Members of such House otherwise determine by yeas and nays; any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported to the floor of the House referring it to committee within one day after it is so referred, unless the Members of the House referring it to committee shall otherwise determine by yeas and nays.

(b) Any bill or resolution reported to the floor pursuant to subsection (a) shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after it has been reported, unless such House shall otherwise determine by yeas and nays.

EFFECTIVE DATE

SEC. 8. This Act shall take effect on the date of its enactment but shall not apply to hostilities in which the Armed Forces of the United States are involved on the effective date of this Act.

J. W. FULBRIGHT.

# CONTENTS


| Statements by: | Page |
|---|---|
| Ball, George, Lehman Bros. International, New York, N.Y. | 619 |
| Bentsen, Hon. Lloyd M., U.S. Senator from Texas | 595 |
| Bickel, Alexander M., professor of law, Yale University | 549 |
| Bundy, McGeorge, president, Ford Foundation | 420 |
| Chiles, Hon. Lawton, U.S. Senator from Florida | 765 |
| Commager, Henry Steele, professor of history, Amherst College | 7 |
| Eagleton, Hon. Thomas F., U.S. Senator from Missouri | 193, 599 |
| Findley, Hon. Paul, Representative in Congress from the 20th Congressional District of Illinois | 336 |
| Goldberg, Arthur J., Esq., former U.S. Ambassador to the United Nations | 768 |
| Goldwater, Hon. Barry, U.S. Senator from Arizona | 347 |
| Horton, Hon. Frank, Representative in Congress from the State of New York | 401 |
| Javits, Hon. Jacob K., U.S. Senator from New York | 126 |
| Kelly, Alfred H., professor of history, Wayne State University | 85 |
| Mason, Alpheus T., professor of political science, Princeton University | 251 |
| Mathias, Hon. Charles McC., Jr., U.S. Senator from Maryland | 333 |
| Moore, John Norton, professor, School of Law, University of Virginia | 460 |
| Morris, Richard B., professor of history, Columbia University | 75 |
| Pell, Hon. Claiborne, U.S. Senator from Rhode Island | 124 |
| Reedy, George | 434 |
| Rogers, William D., Arnold & Porter, Washington, D.C. | 642 |
| Rogers, Hon. William P., Secretary of State | 485 |
| Spong, Hon. William B., Jr., U.S. Senator from Virginia | 657 |
| Stennis, Hon. John, U.S. Senator from Mississippi | 706 |
| Taft, Hon. Robert, Jr., U.S. Senator from Ohio | 260 |
| Insertions for the record: | |
| Text of S. 2956, 92d Congress, first session | III |
| Text of S. 731, 92d Congress, first session | 2 |
| Text of Senate Joint Resolution 18, 92d Congress, first session | 3 |
| Text of Senate Joint Resolution 59, 92d Congress, first session | 4 |
| Prepared Statement of Prof. Henry Steele Commager | 18 |
| Gen. George Washington's Commission as Commander in Chief | 29 |
| "American Foreign Policy in the 20th Century under an 18th-Century Constitution," article by Senator J. W. Fulbright, The Cornell Law Quarterly, volume 47, fall, 1961, No. 1 | 46 |
| "Does the President Have Too Much Power?" article by Henry Steele Commager, from the Congressional Record, April 2, 1951 | 62 |
| "S. 731—Introduction of a Bill to Regulate Undeclared War." Remarks by Senator Jacob K. Javits, from the Congressional Record, February 10, 1971 | 130 |
| "Who Makes War?" address by Senator Jacob K. Javits, from the Congressional Record, December 16, 1970 | 135 |
| "A Brief on S. 731, To Make Rules Respecting Military Hostilities in the Absence of a Declaration of War," from the Congressional Record, March 5, 1971 | 138 |
| Letters To Senator Jacob K. Javits in support of S. 731 | 147 |
| Letter to Thomas Jefferson, from James Madison, dated April 2, 1798 | 154 |
| Record of debate in House of Representatives, 1798, concerning relations with France | 157 |

Page

Excerpt from Madison notes on debates of Constitutional Convention concerning treaty making powers ..... 192
Colloquy between Senator Dole and Senator Thomas Eagleton concerning repeal of the Gulf of Tonkin Resolution, from the Congressional Record, June 23, 1970 ..... 204
Speech of Senator Thomas F. Eagleton, delivered before Legal Action Fund for Peace, Columbia Men's Faculty Club, New York, N.Y. ..... 232
Instances under proposed legislation where President can act without specific authorizing congressional action by both Houses, chart ..... 235
Possible revision of section 2 of Senate Journal Resolution 59 ..... 236
"The Place of the President and Congress in Foreign Policy," chapter 2 of "A Foreign Policy for Americans," by the late Senator Robert A. Taft ..... 261
"International Law and Military Operations Against Insurgents in Neutral Territory," note from Columbia Law Review, volume 68, 1968 ..... 275
Major U.S. armed actions overseas, with relevant congressional action, 1789–1970 ..... 298
Letter and enclosed memorandum to Hon. Robert Taft from David M. Abshire, Assistant Secretary of State for Congressional Relations, dated March 23, 1971, concerning treaties requiring immediate armed assistance by the United States ..... 330
"The Troops and Senator Taft," editorial from the Lorain Journal, Lorain, Ohio, February 28, 1971 ..... 333
Prepared statement of Senator Charles McC. Mathias, Jr ..... 335
Prepared statement by Representative Paul Findley (R–Ill.), A member of the House Foreign Affairs Committee ..... 340
Chronological list of 153 military actions taken by the United States abroad without a declaration of war ..... 359
Five U.S. military actions taken under a declaration of war ..... 375
Thirty-one military operations for broad strategic purposes ..... 375
Fifty-six hostile operations involving actual gunfire or imminent threat of warfare ..... 377
Sixty-four military operations lasting more than 30 days ..... 378
Sixty-five military actions taken by the United States outside the Western Hemisphere ..... 378
Sixty-three military operations arguably initiated under prior legislative authority (no declarations of war) ..... 379
Membership of proposed Joint Committee on National Security ..... 407
Speech of Hon. Frank Horton of New York, from the Congressional Record, April 6, 1971, including text of H.R. 7290 ..... 407
Prepared statement of Mr. George E. Reedy ..... 444
Increase in quantity of nuclear weapons in Europe during 1967 ..... 534
History of U.S. forces levels in Europe ..... 538
Statement and questions of Senator Gale McGee for Secretary of State Rogers ..... 544
Statement by Secretary of State Rogers in reply to written questions of Senator McGee ..... 546
Text of S. 1880, 92d Congress, first session ..... 593
Prepared statement of Hon. George W. Ball ..... 626
"Nixon Versus Constitution in War Powers Debate," article by Irving Brant, the Washington Post, July 4, 1971 ..... 638
Prepared statement of William D. Rogers ..... 647
Text of Senate Joint Resolution 95, 92d Congress, first session ..... 655
"Can Balance Be Restored in the Constitutional War Powers of the President and Congress"?, article by Hon. William B. Spong, Jr., volume 6, No. 1, University of Richmond Law Review, fall, 1971 ..... 658
Statement of Senator Cooper concerning question raised by Senator Stennis during 1954 debates on the Korean security treaty, from the Congressional Record December 8, 1970 ..... 717
Statement by Senator John Stennis concerning Senate Joint Resolution 95, from the Congressional Record, May 11, 1971 ..... 754

Letter to Senator John C. Stennis from Senator Jacob K. Javits, dated November 17, 1971, enclosing draft text of "War Powers Act of 1971" ---------- Page 763
Letter to Senator Jacob K. Javits from Senator John C. Stennis, dated November 24, 1971---------- 765

Appendix:

Statement submitted by Hon. Jonathan B. Bingham, Member of the House of Representatives from New York---------- 795
Letter to Senator J. W . Fulbright from Prof. Richard B. Lillich, University of Virginia, School of Law, dated June 10, 1971---------- 796
Letter to Hon. Thomas F. Eagleton from Prof. Richard B. Morris, Columbia University in the city of New York, department of history, dated April 6, 1971---------- 797
Statement of Leon Friedman, special counsel, American Civil Liberties Union, on Senate Joint Resolution 95---------- 799
Letter and enclosed Resolution No. 499 to Senator J. W. Fulbright from Herald E. Stringer, director, National Legislative Commission, The American Legion---------- 811
"Congress and the War Power," paper by Louis Fisher, Congressional Research Service, the Library of Congress---------- 812
Statement of Lawyers Committee on American Policy Towards Vietnam sent to members of the Senate Committee on Foreign Relations, February 18, 1971---------- 821
Statement of Lawyers Committee on American Policy Towards Vietnam sent to Members of the House of Representatives and the Senate ---------- 812
Letter to Senator J. W. Fulbright from Joseph H. Crown, cochairman, Lawyer's Committee on American Policy Towards Vietnam dated May 18, 1971, concerning Senate Joint Resolution 95---------- 826
Letter to Dr. Carl Marcy, Chief of Staff, Senate Committee on Foreign Relations, from Joseph H. Crown, cochairman, Lawyers Committee on American Policy Towards Vietnam, dated March 12, 1971, enclosing article by Assistant Attorney General William H. Rehnquist, entitled "The President and Cambodia," and a critique thereof---- 826
Memorandum of Lawyers Committee on American Policy Toward Vietnam on war powers legislation and draft resolution---------- 855
Text of Senate Joint Resolution regarding the use of the Armed Forces of the United States in hostilities in the absence of a declaration of war by the Congress, proposed by Senator John Sherman Cooper to accompany S. 731 or to be incorporated in S. 731 as a separate section- 861
Text of House Joint Resolution 1, 92d Congress, first session-------- 862
Summary Index ---------- 863

# WAR POWERS LEGISLATION

MONDAY, MARCH 8, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN REALTIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10 a.m., in room 4221, New Senate Office Building, Senator J. W. Fulbright (chairman) presiding.

Present: Senators Fulbright, Pell, McGee, Spong, Aiken, Case, Cooper, and Javits.

Also present: Senator Saxbe of Ohio and Representative Schwengel of Iowa.

The CHAIRMAN. The committee will come to order.

## OPENING STATEMENT

In 1969 the Senate, by a vote of 70 to 16 adopted the national commitments resolution expressing the Senate's judgment that a foreign commitment—especially a commitment to war—could only be valid under our Constitution if it were the result of affirmative action taken by both the executive and legislative branches of our Government. Since that time Members of both Houses of Congress have been considering practical means of implementing the national commitments resolution. Sustained and serious thought has been given to problems relating to the war power—problems having to do with the intent of the Constitution, the responsibilities of Congress, the growth of Presidential power, and the need for restoring constitutional balance in the wake of two major undeclared wars in the last 20 years. has occured.

In the last year or so a number of legislative proposals have been made for purposes of clarifying and defining the proper division of the war power between Congress and the President. Since it is beyond question that Congress alone has the constitutional authority to initiate full-scale war, most of these proposals have undertaken to define the exceptional, specific conditions under which the President might be permitted to commit the Armed Forces to hostilities in the absence of advance authorization by Congress.

Several of these proposals are now before the Foreign Relations Committee; they are the occasion for the public hearings which we begin today. It is our hope and expectation that the distinguished historians who will address the committee today and tomorrow will provide us with guidance not only on the provisions of the bills under consideration but on the broad historical and constitutional questions which underlie this prospective legislation.

The question of war—its initiation, management, and termination—cannot be examined in a democratic society in the same way that we examine such problems as education, health, welfare, or labor-management relations. All these involve activities which are a natural part of the life of a democratic society. In dealing with war, on the other hand, we are concerned with an activity which is itself anathema to democracy. We are dealing with an activity which is inherently destructive of democratic values. In a recent letter to the editor of the New York Times, the President of Stanford University pointed out that:

> In any war, a democratic polity incurs certain inescapable damage. War by its nature requires secrecy; democracy thrives on full disclosure. War causes people in authority not only to withhold the truth upon occasion; it tempts them to twist and distort it.

And as Alexis de Tocqueville warned us over a century ago:

> All those who seek to destroy the freedom of the democratic nations must know that war is the surest and shortest means to accomplish this. That is the very first axiom of their science.

We would probably all agree that a country permanently at war—even the United States of America—must eventually cease to be a democracy. In the long run peace is our only reliable defense against tyranny. In the meantime, however, our country is at war, and we are confronted with the exceedingly difficult task of maintaining democratic controls over the most antidemocratic activity known to man. That is the prcblem before the committee; that is the problem which we herewith submit to our witnesses.

The witness today, who has provided the committee with wisdom and insight before, is Dr. Henry Commager, one of the most distinguished professors of history in this country and presently professor at Amherst College.

Tomorrow we will hear Richard B. Morris, professor of history at Columbia University, and Alfred H. Kelly, professor of history at Wayne State University.

(S. 731, S.J. Res. 18 and S.J. Res. 59 follow:)

[S. 731, 92d Cong. first sess.] [1]

A BILL to make rules respecting military hostilities in the absence of a declaration of war

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That use of the Armed Forces of the United States in military hostilities in the absence of a declaration of war be governed by the following rules, to be executed by the President as Commander in Chief:

A. The Armed Forces of the United States, under the President as Commander in Chief, may act—

1. to repel a sudden attack against the United States, its territories, and possessions;

2. to repel an attack against the Armed Forces of the United States on the high seas or lawfully stationed on foreign territory;

3. to protect the lives and property, as may be required, of United States nationals abroad; and

4. to comply with a national commitment resulting exclusively from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment, where immediate military hostilities by the Armed Forces of the United States are required.

[1] Senators Javits, Mathias, Pell, Spong, Packwood, Bayh, Williams, and Weicker.

B. The initiation of military hostilities under circumstances described in paragraph A, in the absence of a declaration of war, shall be reported promptly to the Congress by the President as Commander in Chief, together with a full account of the circumstances under which such military hostilities were initiated.

C. Such military hostilities, in the absence of a declaration of war, shall not be sustained beyond thirty days from the date of their initiation except as provided in legislation enacted by the Congress to sustain such hostilities beyond thirty days.

D. Authorization to sustain military hostilities in the absence of a declaration of war, as specified in paragraph (A) of this section may be terminated prior to the thirty-day period specified in paragraph (C) of this section by joint resolution of Congress.

SEC. 2. (A) Any bill or resolution, authorizing continuance of military hostilities under paragraph C (section 1) of this Act, or of termination under paragraph D (section 1) shall, if sponsored or cosponsored by one-third of the Members of the House of Congress in which it originates, be considered reported to the floor of such House no later than one day following its introduction, unless the Members of such House otherwise determine by yeas and nays; and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such committee within one day after it is referred to such committee, unless the Members of the House referring it to committee shall otherwise determine by yeas and nays.

(B) Any bill or resolution reported pursuant to subsection (A) of section 2 shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall otherwise determine by yeas and nays.

SEC. 3. This Act shall not apply to military hostilities already undertaken before the effective date of this Act.

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[S.J. Res. 18, 92d Cong., first sess.] [2]

JOINT RESOLUTION to define the principles which shall govern the deployment of the Armed Forces of the United States by the President, to express United States foreign policy objectives in Southeast Asia

Whereas wide discussion and differences of opinion have arisen among the members of the body politic with respect to the power of the President as Commander in Chief to deploy the Armed Forces of the United States beyond its territorial limits and to commit such Armed Forces to combat, and

Whereas the Congress has, through acquiescence and overt action, sanctioned on numerous occasions the deployment of the Armed Forces of the United States beyond its territorial limits and commitment of such Armed Forces to combat without prior express authorization or a declaration of war by the Congress, and

Whereas in order to eliminate the confusion caused by the previous acquiscence and overt actions by Congress, there is a need for a clear statement of policy by the Congress as to the foreign policy of the United States in Southeast Asia, the deployment of Armed Forces by the President generally, and specifically their deployment in fulfillment of such foreign policy: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

PART I

The deployment and commitment to combat of the Armed Forces of the United States in, within the territorial waters of, or over the territory or territorial waters of any other nation is authorized and shall be undertaken only with specific prior authorization of Congress by law; except that the President, as Commander in Chief, is authorized to deploy and commit to combat such Armed Forces at his sole discretion:

(1) When he finds that the territory or the Armed Forces of the United States are under attack or imminent threat of attack; or

(2) When he finds that such deployment is necessary to fulfill a treaty obligation of the United States not qualified by constitutional or treaty contained limitations of conditions; or

(3) When he finds that such deployment is necessary to effectuate a declaration of war acted on by the Congress; or

---

[2] Mr. Taft.

(4) When he finds that such deployment is necessary to exercise the inherent right of self-defense of the Nation or its nationals pursuant to established principles of international law or article 51 of the Charter of the United Nations,

The President shall notify the Congress within twenty-four hours after any such finding of all action he has taken at his sole discretion pursuant to any such finding. In the event the Congress is not in session, then the President shall convene the Congress in an extraordinary session and so notify the Congress within forty-eight hours after such finding. This authorization shall terminate upon the passage of a concurrent resolution to that effect by both Houses of Congress.

PART II

The Congress hereby declares that it is the policy of the United States that each of the several free Southeast and South Asian nations should have the primary responsibility for the defense of its own territorial integrity: *Provided, however*, That it is the policy of the United States where requested and where needed to furnish economic and military material assistance to such nations whose territorial integrity is threatened by armed aggression. The Congress specifically authorizes the continued deployment of the Armed Forces of the United States in the territorial limits of the Republic of South Vietnam for such time and in such manner as the President, as Commander in Chief, shall deem necessary and appropriate to accomplish a responsible and irreversible withdrawal of such Armed Forces of the United States and the assumption by the Armed Forces of the Republic of South Vietnam at the earliest feasible date of the responsibility for the defense of the territorial integrity of the Republic of South Vietnam: *Provided further*, That the Armed Forces of the United States should not be deployed or committed to combat in Indochina in territory other than that of the Republic of South Vietnam, except as provided in part I hereof. This declaration of policy and authorization shall terminate upon the passage of a concurrent resolution to that effect by both Houses of Congress.

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[S.J. Res. 59, 92d Cong., first sess.] [3]

JOINT RESOLUTION regarding the powers of the Congress and the President to commit the Armed Forces of the United States to hostilities

Whereas the framers of the Constitution of the United States intended the separation of powers doctrine to apply to the initiation of hostilities as a means for insuring collective judgment, whenever possible, before the Armed Forces of the United States were committed to such hostilities; and

Whereas the power to declare war was assigned to the Congress and this power authorizes the Congress to initiate, define, and limit the scope of hostilities involving the Armed Forces of the United States; and

Whereas the power to make rules regulating and governing the Armed Forces of the United States was assigned to the Congress, and this power authorizes the Congress to enact laws respecting the raising and use of such Armed Forces including their deployment in any foreign country; and

Whereas the power to appropriate moneys to support the Armed Forces of the United States was also assigned to the Congress, and this power authorizes the Congress to allocate funds so as to circumscribe the overall scope of hostilities and the uses of the Armed Forces of the United States; and

Whereas the Commander in Chief and Chief Executive powers were assigned to the President and these powers authorize the President to conduct hostilities initiated by the Congress and to respond to, and repel, attacks on the United States (including its territories and possessions), its Armed Forces, and, under certain circumstances, to rescue endangered citizens of the United States located in foreign countries; Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled*, That:

SECTION. 1. Except as authorized in section 2 or section 3 of this resolution, the President shall not commit the Armed Forces of the United States to hostilities. No treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further Congressional authorization. It is specifi-

[3] Mr. Eagleton.

cally recognized that such treaties as the Charter of the United Nations, the North Atlantic Treaty, and the Southeast Asia Collective Defense Treaty do not authorize or require the President to commit the Armed Forces of the United States to engage in hostilities without a further authorization from both the Senate and the House of Representatives.

SEC. 2. The President may commit the Armed Forces of the United States to hostilities to the extent authorized by Congress through a declaration of war, statute, or joint resolution, but authorization to commit the Armed Forces of the United States to hostilities may not be inferred from legislative enactments, including appropriation bills, which do not specifically include such authorization. The Congress recognizes that during such authorized hostilities against an enemy country or enemy forces, the President's powers as Commander in Chief and Chief Executive provide him with the further authority, regardless of the limitations contained in the specific declaration of war or other authorizing statute or resolution, to order the Armed Forces of the United States to deliberately enter, invade, or intrude upon the territory or airspace of a country with which the United States is not then engaged in hostilities:

(a) when in hot pursuit of fleeing enemy forces who have attacked, or engaged in battle with, the Armed Forces of the United States and then retreated to the territory or airspace of such country, to the extent necessary to repel such attack or complete such battle, or

(b) when a clear and present danger exists of an imminent attack on the United States or the Armed Forces of the United States by enemy troops located in such country, to the extent necessary to eliminate such danger.

SEC. 3. In the absence of a governing congressional authorization described in section 2, the President may commit the Armed Forces of the United States to hostilities, to the extent reasonably necessary to:

(a) repel an attack on the United States by military forces with whom the United States is not engaged in hostilities at the time of such attack and to eliminate or reduce the effectiveness of any future attacks by such military forces which are committing the attack being repelled; and

(b) repel an attack on the Armed Forces of the United States by military forces with whom the United States is not engaged in hostilities at the time of such attack and concurrently to eliminate or reduce any clear and present danger of future attacks by the military forces which are committing the attack being repelled; and

(c) withdraw citizens of the United States, as rapidly as possible, from any country in which such citizens, there due to their own volition and with the express or tacit consent of the government of such country, are being subjected to an imminent threat to their lives, either sponsored by such government or beyond the power of such government to control: *Provided*, That the President shall make every effort to terminate such a threat without using the Armed Forces of the United States: *And provided further*, That the President shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States.

SEC. 4. The commitment of the Armed Forces of the United States to hostilities pursuant to section 3 of this resolution shall be reported promptly by the President to the Congress, together with a full account of the circumstances under which such hostilities were initiated, the estimated scope of such hostilities, and the consistency of such hostilities, with the provisions of section 3. The question of continuing or terminating any such hostilities shall be decided upon by the Congress as soon as possible and not more than thirty days from the day on which hostilities were initiated, under the following procedures:

(a) any bill or resolution, authorizing the continuance or termination of military hostilities if sponsored or cosponsored by one-third of the Members of the House of Congress in which it originates, shall be considered reported to the floor of such House no later than one day following its introduction, unless the Members of such House otherwise determine by yeas and nays: and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such committee within three days after it is referred to such committee, unless the Members of the House referring it to committee shall otherwise determine by yeas and nays; and

(b) any bill or resolution reported pursuant to subsection (a) of this section shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall otherwise determine by yeas and nays.

SEC. 5. In any case where the Armed Forces of the United States have been committed to authorized hostilities, the President shall, while such hostilities are in progress, report to the Congress periodically on the status of such hostilities, as well as on the estimated scope and length of such hostilities.

SEC. 6. For purposes of this resolution, the term "hostilities" includes land, air, or naval actions taken by the Armed Forces of the United States against other armed forces or the civilian population of any other nation, the deployment of the Armed Forces of the United States outside of the United States under circumstances where an imminent involvement in combat activities with other armed forces is a reasonable possibility, or the assignment of members of the Armed Forces of the United States to accompany, command, coordinate, or participate, in the movement of regular or irregular armed forces of any foreign country when such foreign armed forces are engaged in any form of combat activities.

SEC. 7. This resolution shall not apply to hostilities commenced before the enactment of the resolution.

The CHAIRMAN. We are very pleased that the very distinguished Senator from New York, who introduced the first piece of legislation on this subject, is with us. He set a pattern which has been followed by a number of our other colleagues, evidencing the deep interest that the Senators and the country have in this subject.

Dr. Commager, we are very pleased to have you. I believe you have a prepared statement for the record.

The Senator from New York.

STATEMENT BY SENATOR JAVITS IN SUPPORT OF S. 731

Senator JAVITS. May I have about 2 minutes? I thank the Chair very much for his reference to me. I am pleased that other members have followed a pattern established by my bill and I am proud to have introduced the bill which is the focus of all this discussion and of these hearings.

I think it will be a landmark in our history. This question, until burned into the consciousness of the country by the tragedy of the war in Vietnam, had not been the subject of too much debate and no real effort toward resolution in the Congress. I think we are approaching a landmark in the relations between the Congress and the President over the delineation of the war powers.

The concept embodied in S. 731, which I have the honor to sponsor with Senators Mathias, Pell, and Spong—giving it a completely bipartisan character—was developed by members of my staff, especially by Peter Lakeland, who is my foreign policy assistant. Also, Frank Cummings, Gene Mittleman, Charles Warren and Keith Jones on my staff made a contribution.

Recent history has shown us that we have no real statutory guidelines as to when the President can commit American forces to hostilities in undeclared warfare. Strong Presidents have taken the power and used it, and Congress has not said them nay in any effective or statutory way.

The effort to use the appropriations power as a means of either tempering or stopping the President's authority has been found unsatisfactory. This method must, perforce, be applied after the fact. It is so confused by concepts of loyalty to our men actually fighting in the field that it really has been shown not to be an effective instrument. Moreover, in addition to its *ex post facto* defects, I have been concerned over the implication that, in relying on its appropriation power, Con-

gress might be conceding its own war powers in article I, section 8 of the Constitution.

My bill would not apply to Vietnam, but it will avoid future Vietnams. As it has been often said in a famous aphorism, those who do not learn from history are condemned to repeat it. That is what my bill makes an effort to avoid.

I was anxious to begin these hearings with an examination of the early history of our country and the Constitution because there is so much in that period which is relevant to our concerns today, and so much to be learned. It is a great neglected area of instruction.

I believe we are dealing here with an original question which has not been clearly defined. I don't think there is any question about our legislative authority under the "necessary and proper" clause of the Constitution to enact a statute defining the rules and procedures to be followed. That is what my bill does.

Mr. Chairman, I consider it a signal honor to have Professor Commager with us. He is a very eminent authority in the field. He will be followed by other very distinguished historians and constitutional authorities. This is as it should be because this is really an original question of the highest constitutional significance with which we are dealing.

On subsequent occasions we will hear from Senators and Congressmen deeply concerned with this problem, as well as experts and specialists on the modern period. Very importantly, we will of course be hearing the Administration's position. In this regard, I hope very much that Secretary Rogers will do this in person because of the great significance of the questions under consideration.

The CHAIRMAN. Dr. Commager, will you proceed please, sir, in your own way.

## STATEMENT OF HENRY STEELE COMMAGER, PROFESSOR OF HISTORY, AMHERST COLLEGE

Dr. COMMAGER. Mr. Chairman, and gentlemen, I addressed myself in the paper, which you have before you, to the historical, constitutional, and legal antecedents of this problem. In it I have canvassed some of the attitudes of those who fought the Revolution and who, as Senator Javits has made clear, described and limited the authority of the Commander in Chief, General Washington, something of the attitude written into the Articles of Confederation, and a great deal of the debates in the Constitutional Convention and thereafter.

I am, however, aware that Professor Morris proposes to deal with this in great detail and I have no doubt that Professor Kelly will do the same thing. I shall not, therefore, read this publicly but turn rather to some of the larger considerations, and some of the subsequent historical developments and experience with the problem of Presidential warmaking.

### PAST PRESIDENTIAL INTERVENTIONS

It is true that in the course of time, especially in the 19th and 20th century Presidents have repeatedly—the exact number is difficult to determine, but something like 100 or 110—used the military power to intervene outside the United States. It is not, I think, sufficiently

appreciated that these interventions have nevertheless been of a limited character, with one or two exceptions, and that they have not provided precedents to the enterprises, the undertakings, which we have experienced in the past decade.

In almost every instance in the 19th century and in most of the first half of the 20th, Presidential intervention was confined to the Western Hemisphere and even to contiguous territory or our Mare Nostrum, the Caribbean; President McKinley's astonishing participation in the Boxer Expedition came, with a symbolic appropriateness, in the year 1900. Yet even Franklin Roosevelt's executive agreements with Britain for a destroyer-bases exchange and with Denmark for the temporary occupation of Iceland and Greenland, which pushed the permissible to the farthest extreme, could be held, not implausibly, to be a legitimate part of hemispheric defense. It is only in the last 20 years or so that Presidents appear to have thrown caution and even constitutional scruples to the wind, as it were, and ventured, on their own authority, into military operations that were in fact acts of war, that were on a large scale—in all the previous interventions, some 95 percent lasted less than 7 days—that were in distant parts of the globe and that constituted "commitments" whose vindication threatened the integrity of our political and constitutional system.

### DEPARTURE FROM TRADITION OF NONINTERVENTION

It is not, I think, sufficiently appreciated that the kind of intervention we have witnessed in the past quarter century is, if not wholly unprecedented, clearly a departure from a long and deeply rooted tradition. Since the Neutrality Proclamation of 1793 that tradition has been one of nonintervention, not intervention, outside the Western Hemisphere. Washington and his Cabinet refused to intervene in the wars between France and her enemies even though the United States was far more deeply committed to come to the aid of France by the terms of the Treaty of Alliance of 1778 than she was to intervene in Vietnam by the terms of the SEATO Treaty. Notwithstanding almost universal sympathy for the peoples of Latin America who sought to throw off Spanish misrule, we did not intervene militarily in that conflict for their independence. The ideas of "manifest destiny" and "young America" dictated support to people everywhere struggling to throw off ancient tryrannies, but no President intervened militarily in the Greek struggle for independence from Turkey, the Italian uprisings against Austria, the Hungarian Revolution of 1848, or other internal revolutions of that fateful year. Nor did the United States intervene in Garibaldi's fight for Italian independence, the many Irish uprisings against Britain, in Ireland and even in Canada—very close to home, that—or even, *mirabile dictu*, the 10-year war of the Cubans against their Spanish overlords from 1868 to 1878. Nor, in more modern times, did Presidents see fit to intervene on behalf of Jewish victims of pogroms, Turkish genocide against Armenians, Franco's overthrow of the Loyalist regime in Spain. Whether such abstention was always wise is a question we need not raise here.

The point here is that in none of these situations did the Executive think it proper, or legal, to use his powers as Commander in Chief or as chief organ of foreign relations to commit the United States to

military intervention in distant lands. With the sole exception of McKinley's unnecessary participation in the Boxer Expedition, that concept of executive powers belongs to the past quarter century. And if it should be asked why the United States should refrain from intervention in the internal struggles of other nations, even when her sympathies are deeply involved and her interests enlisted, it is perhaps sufficient to say that few of us would be prepared to endorse a principle which would have justified the intervention of Britain and France in the American Civil War—on behalf of the Confederacy of course—and that in international law you cannot really have it both ways.

## NEW INGREDIENTS IN EXECUTIVE USE OF WAR POWER

Clearly the present crisis is a continuation of a long series of crises stretching from Washington's proclamation of neutrality to Truman's use of military and naval force in Korea and our current involvement in Southeast Asia. There are however new ingredients in the executive use of the war power which make earlier precedents, if not irrelevant then far from conclusive, and which greatly enhance the threat to the integrity of our constitutional system and to the peace of the world. Let me deal briefly with these:

First, our current presidential commitments—and if we cannot curb these, our future as well—are global rather than, as with Lincoln, domestic or, as with Monroe, Polk, Theodore Roosevelt and Wilson, hemispheric. They are not to be justified by invoking the Monroe Doctrine or its accumulated corollaries: They are justified rather by new doctrines such as that of "vital interest" or by the "Nixon doctrine" of shared responsibility. Of both of these doctrines it can be said that their most conspicuous feature is the fog which enshrouds them.

Second, the unlimited power of the Executive in foreign relations is no longer justified as an emergency power, but asserted to be a normal and almost routine exercise of executive authority. Lincoln pushed his authority to the outward limits of what was constitutionally permissible, but confessed, with characteristic humility, that the emergency required him to do what he did, and asked Congress to give retroactive sanction to his acts. No such humility characterizes what we may call the Johnson-Nixon theory of executive authority. Thus President Johnson asserted that he did not need the authority of the Tonkin Gulf Resolution to justify his bombardment of North Vietnam, for he already had that. Thus President Nixon's Assistant Attorney General asserted that the President's authority to invade Cambodia, "must be conceded by even those who read executive authority narrowly."

We may ask: Why must it be? Certainly not because of the persuasive character of the arguments advanced by this distinguished counsel, for that character is wanting.

Third, the new commitments are not, as generally in the past, *ad hoc* and even fortuitous, but calculated and ideological. Thus we do not drop bombs on Vietnam or Laos because "American blood has been shed on American soil"—Polk's excuse in Mexico and Texas; nor does the President respond to an imperative like the attack on Fort Sumter or even to U-boat warfare; nor do recent Presidents presume to act—like President Truman—in response to a United Nation Secu-

rity Council decision. Now Presidents act to "contain communism" or to protect "vital interests" 9,000 miles away, or to fulfill "commitments" that are somehow never made clear and that other nations pledged to their fulfillment quite as solemnly as we are by their signature to the SEATO Treaty, notably Great Britain, France, and Pakistan, do not think require military intervention.

They do so by programs which are by their very nature open-ended and permanent. Thus Secretary Rusk's assertion in 1966 that "no would-be aggressor should suppose that the absence of a defense treaty, congressional declaration, or U.S. military presence, grants immunity to aggression"; the key words, for our purposes, are "absence of treaty" and "absence of congressional declaration." For this left only the alternative of the application of the Executive power, unilaterally in the international arena, unilaterally in the U.S. constitutional arena as well.

Fourth, we are a charter member of the United Nations whose function it is to settle international disputes peacefully yet Presidential declarations of what they are prepared to do around the globe blatantly bypass the United Nations and the International Court of Justice, and thus add to the undermining of our own constitutional obligations and of the United Nations.

Fifth, as power corrupts, the possession of great power encourages and even creates conditions in which it seems imperative to use it, and the concentration of that power increases the risks of misuse and thus of corruption. We had one example of that as early as 1846 when what began as a simple vindication of a boundary line ended up as a war in which we tore Mexico in two.

### NEW SITUATION CONCERNING ARMED FORCES AND ARMAMENTS

Now the original assumption of our Constitution framers, that the President could not engage in war on his own, was greatly strengthened by the elementary fact that he could not if he wanted to because there were no armies or navies with which to war. At the time of the ratification of the U.S. Constitution the U.S. Army consisted of 719 officers and men, not a formidable force for military adventures. The situation did not change perceptibly over the years. Our Armed Forces increased to some 20,000 by 1840, to 28,000 on the eve of the Civil War, and to 38,000 by 1890. Even in 1915, with the world locked in mortal combat, the Armed Forces of the United States were less than 175,000. With the worst will in the world, therefore, there was little Presidents could do with these forces—little that would involve us in the kind of embroilments in which we now find ourselves.

Now we are in a wholly new situation. Not only do we keep some 3 million men under arms at all times—since 1951 the number has rarely fallen below that—but we have the greatest and most formidable armaments that any nation ever commanded. What this means is quite simply that while in the past Presidents could not involve the Nation, or the world, very deeply in war without congressional approval, now they can, and do.

The symbol of our new power is the nuclear weapon. Doubtless the threat of nuclear war goes far to justify giving the Executive whatever discretion is necessary to secure survival in the face of

attack. Correspondingly our possession of the most formidable nuclear armaments places upon us a graver responsibility, graver than we have had to observe in the past. We should, therefore, make it our first objective to minimize the risk of a nuclear showdown. This we are not doing. Our invasion of Vietnam, Cambodia, Laos, is a temptation, indeed almost a challenge, to China to come into the war, as she came into the war in Korea; such a confrontation conjures up the spectre of a nuclear war. As for chemical and biological warfare, it is notorious that we have used and are still using chemical defoliant and that only a public outcry and congressional protest brought some modification of the use of chemicals and the adoption of new policies for the disposition of nerve gases.

### COMPLICATIONS OF NEW TERMINOLOGY

These are new ingredients within the matrix of the presidential power, and they change the constitutional mix, for the Constitution, after all, is not static but dynamic. The problem is complicated by a new terminology: the obsolescence of older terms which once had clear legal meaning, and the emergence of new terms, some of them (like "combat" meaning only ground troops, or "protective reaction") designed to deceive. Thus it is conceded that the President has authority to "repel" attacks, but the term has been drained of meaning—certainly of the meaning that a Madison or a Jefferson read into it.

When we launch invasions of Cambodia and Laos not to defeat the enemy or to conquer territory but to enable us to "withdraw," anything can be called a protective reaction. Besides, it is a truism now that all wars are defensive. Hitler claimed that his assaults on Denmark and Norway were "defensive" and I need not remind this committee that the Tonkin Bay resolution is phrased in this vocabulary. It declares, you will remember, that the Congress approves and supports the determination of the President "to repel armed attack against the forces of the United States and to prevent further aggression." This is perhaps as good an example as any of the "aggressions" against the United States which the President is now called upon to resist.

Or there is the relatively new concept of "vital interests." In 1967 the Congress authorized President Eisenhower to protect the "vital interests" of the United States in the Middle East. It is, however, not without interest that President Eisenhower modified that authorization, and justified the dispatch of 14,000 marines to Lebanon, on the principle of "protecting American lives"—very old fashioned of him, no doubt. What after all is a vital interest? Who, or what branch of the Government is authorized to define it and to determine when it needs protection? The parallel between the vital interest in international law and the police power in municipal comes to mind, but the police power is always subject to review by the courts. What comparable check is there on the misuse of presidential power on behalf of what he may consider vital interests?

It is not only concepts like offensive and defensive war, or territorial waters, or vital interests, that have been drained of their historic meaning. Even the constitutional concept of a declaration of war has been hopelessly impaired by the Presidential interpretation of the

Tonkin Bay resolution. Thus, in testimony to this committee, Under Secretary Katzenbach in 1967 formally asserted the Tonkin Bay resolution, together with the SEATO Treaty, constituted a "functional equivalent to a declaration of war"—thus neatly combining an original contribution to international law with a repeal of an important provision of the Constitution.

Senator CASE. Whom were you quoting then?

Dr. COMMAGER. Mr. Nicholas Katzenbach, who called the Tonkin Bay resolution the functional equivalent of a declaration of war.

### GROWING ROLE OF EXECUTIVE AGREEMENT

There is a final consideration which seems to me of vital importance: I need not enlarge upon it because it was in considerable part the subject of Senate Resolution 85, and some of its implications were elaborately discussed at that time. I mean of course the growing role of the executive agreement as a method for bypassing the requirements of treatymaking. Unknown to article II of the Constitution, the executive agreement emerged early as a useful method of disposing of routine business that did not rise to the dignity of a treaty. Until very recent times it was customarily used only for such routine business—tariff agreements, postal conventions, patent arrangements, and so forth, and the great majority of executive agreements were negotiated in pursuance of congressional authorization. As late as 1930, the United States concluded 25 treaties and only nine executive agreements.

But in 1968 it concluded 16 treaties and 266 executive agreements. As of January 1, 1969, the United States had a total of 909 treaties and 3,973 executive agreements. And while the great majority of these were still concerned with routine matters, a substantial number of them dealt with problems which in the past had been considered proper subjects of the treatymaking power. Well might the distinguished Senator from Arkansas say at that time that:

> During the course of years the Senate has allowed an imbalance to arise within our governmental structure and, by a process of erosion and by a process of acceptance of executive action, some of the most significant powers of the Senate have been lost. The traditional distinction between the treaty as the appropriate means of making significant political commitments and the executive department as the appropriate instrument for routine, nonpolitical arrangements, has substantially broken down.

It cannot be said that this development came without warning. Let me remind you that the legal counselor to the Department of State, Mr. Hackworth, noted as late as 1940 that:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties.

Alas, that is no longer true.

That same year, 1940, Attorney General Jackson—later Justice of the Supreme Court—spelled out with his customary clarity the limits of the use of executive agreements in foreign affairs:

> The President's power over foreign relations, while delicate, plenary and exclusive, is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the Congress. Such presidential arrangements are customarily submitted for ratification . . . of the Senate before the future legislative power of the country is committed.

And he made a distinction between what was proper and what was improper, which is very relevant to our current problem: He said, speaking of the destroyer-bases deal:

> The transaction now proposed, represents only an exchange with no statutory requirement for the embodiment thereof in any treaty and involving no promises or undertakings by the United States that might raise the question of the propriety of incorporation in a treaty.

It is superfluous to point out that the use of executive agreements in such areas as joint use of airbases and joint defense of them in Spain repudiates these carefully drawn limitations by Mr. Hackworth and by Justice Jackson. For these and similar agreements do, in fact, carry promises and undertakings of future action. They are properly the subject for treaties; they are not properly the subject of executive agreements.

It is impossible to escape the conclusion that the executive is whittling away the constitutional authority of the Congress in the momentous arena of treatymaking as it is whittling away its constitutional authority in the realm of warmaking.

### CONSTITUTIONAL AND LEGAL ASPECTS

I am reluctant to concentrate, as I have heretofore done, on the constitutional and legal aspects of this great problem of the power to commit this Nation to war. One of the dangers of our American system, against which we must be constantly alert, is the temptation to evaluate great questions of public policy not so much on their merits as on their legality. It is one price we pay for judicial review; that as we tend to equate what is unconstitutional with what is pernicious, so we tend to equate what has a claim to constitutional correctness as thereby sound. These things are not always the same.

Besides, however we may balance the constitutional and legal arguments on the Presidential power, it is highly improbable that those who have already made up their minds on the wisdom or the error of our involvement in Indochina are going to be persuaded or dissuaded by purely legal arguments. Each of us can, I think, say of the arguments of our critics and our opponents what Finley Peter Dunne said of the arguments of corporation lawyers, that "what looks like a stone wall to a layman is a triumphant arch to a corporation lawyer."

Great questions of constitutional law are great not because they are complicated legal or technical questions, but because they embody issues of high policy, of public good, of morality. We must consider the problem of the Presidential authority to make war not merely in the light of constitutional precedents but in the light of wisdom and justice. Other witnesses will, I am confident, speak to this affluent subject.

### CONSIDERATIONS OF HISTORICAL EXPERIENCE

Let me turn from the legal and constitutional considerations to those of historical experience, experience not just as precedents, but in the famous words of Lord Bolingbroke, as "Philosophy teaching by examples."

In 1967, Under Secretary Katzenbach assured this committee that "History has surely vindicated the wisdom of the flexibility of the

conduct of our foreign affairs." Two years later the distinguished Senator from Wyoming, Senator McGee, stated, in his minority report on Senate Resolution 85, that, "The decisionmaking process may be reduced by events to a single day, or even hours. On more than one occasion the time allotted by crisis incidents to those who must make the decisions has been less than the time it would take to assemble a quorum of the Congress."

We must face squarely the issues raised by Mr. Katzenbach and Senator McGee: That after all history has vindicated the use of the Presidential powers in the realm of warmaking and that time has been and is of the essence. Has history in fact vindicated the use of Armed Forces by Presidents? Have Presidents been well advised—again in the light of history—to bypass Congress in using American Armed Forces overseas? Would consultation with the Congress, would even second thoughts, have made a difference detrimental to national, or world, interests?

I shall not rehearse for you the long list of episodes here, but comment on them in passing. Was it really of vital importance that General Jackson pursue the Seminoles into Spanish Florida and hang Arbuthnot and Ambrister? Would the fate of Texas have been different had Polk consulted the Congress before launching a war? Had he done so, he might have escaped the name which has clung to him through history—"Polk, the Mendacious." Was it really essential to bombard Greytown on the Mosquito Coast in 1854—would we do that now? Grant himself learned what a mistake it was to send troops to the Dominican Republic in 1869 for a Senate, perhaps more strong-minded than some later Senates, refused to back him up or allow him to go through with his plans for annexation. Was McKinley wise to commit 5,000 troops to the invasion of China in 1900 and would we do this today in a comparable situation? Our commitment to the provisions of the Constitution of the Organization of American States is perhaps sufficient commentary on the wisdom of our many military interventions in the Caribbean, and President Wilson's resort to the ABC (Argentina, Brazil and Chile) Conference in 1915—which rescued us from an ugly situation in Mexico—is sufficient commentary on the wisdom of the Pershing expedition into Mexico. Once again we may ask, would we do this now? The hapless Jacob Adams was sentenced to 20 years in jail (this was in 1919) for distributing leaflets criticizing the Archangel and Siberian Expeditions. At the time he had only the consolation of being the occasion for one of the greatest of all Justice Holmes' opinions.

If he were living now he might have the dubious consolation of knowing that almost everyone agrees with his argument that it was unwise to launch the Siberian and Archangel expeditions. Certainly we have paid a high price in the long term enmity of the Soviet for that particular folly. Clearly a strong case can be made out for Franklin Roosevelt's destroyer-bases exchange and for extending protection to Greenland and Iceland, but is it conceivable that the Congress would have denied him the right to carry through these programs at the time?

If we turn to the many examples of presidential warmaking in the past 20 years we are, I submit, impressed by the fact that in almost every instance the Congress was actually in session and available for

consultation: thus the Korean intervention, the landing of troops in Lebanon, the Bay of Pigs, the occupation of the Dominican Republic by President Johnson, and the successive series of forays into Vietnam, Cambodia and Laos.

I have, to be sure, omitted consideration of Lincoln's use of the executive power to meet the crisis of secession. Whether Lincoln was wise not to call the Congress into session for 4 months is still debated; perhaps it can be said that the use of executive authority to put down a domestice insurrection rests on somewhat stronger constitutional arguments than those used to justify the use of force against China in 1900 or Vietnam in 1964.

### STANDARD OF CONDUCT IN USE OF PRESIDENTIAL FORCE

There is one further observation that is, I think, relevant and may be instructive. Almost every instance of the use of presidential force in the past has been against small, backward, and distraught peoples; just the situation today. Call the role of the victims of presidential application of force in the past: Spanish Florida in 1819; Honduras in 1854; Santo Domingo, Nicaragua, Panama, Haiti, Guatemala; a China torn by civil war in 1900; a Mexico distraught by civil war in 1913; a Russia in 1919 and a Vietnam in the 1960's riven by war. It is a sobering fact that Presidents do not thus rush in with the weapons of war to bring Britain, France, Italy, Russia, or Japan to heel. Would we have bombarded Southampton to collect a debt? Would we have sent an expedition into Rome to protect Americans against a threat from a Fascist Government? Would we have precipitated war with Britain over a boundary dispute in Maine? Would we land marines in France if customs collectors did not behave themselves? Would we bomb Siberia—or Korea—for years if shots were fired—without any hits—at an American vessel? And does it really comport with the honor and dignity of a great nation to indulge its chief executive in one standard of conduct for the strong and another for the weak?

### EMERGENCY SITUATIONS

I confess that I do not think this record justifies Mr. Katzenbach's rosy view of the use of presidential authority in this arena of foreign affairs, nor do I find a single instance that bears out Senator McGee's assertion that:

> On more than one occasion the time allotted by crisis . . . has been less than the time it would take to assemble a quorum of the Congress.

Whether such a situation might arise in the future we do not have to determine here. For Senator Javits' bill, S. 731, makes ample provision for such an emergency by specifically authorizing the President to act "to repel a sudden attack against the United States" or "against the Armed Forces of the United States" when "lawfully stationed on foreign territory."

### AMBIGUITIES IN SENATE RESOLUTION 85 AND S. 731

In his minority report on Senate Resolution 85 limiting the power of the President to make national commitments on his own, the Senator from Wyoming speaks of Senate Resolution 85 "capabilities of

mischiefmaking." I have no doubt that the same argument will be brought against S. 731; it is the argument almost invariably used against any proposal to limit the Executive power. That Senate Resolution 85 and S. 731 contain ambiguities cannot be denied. If we were to reject every constitutional provision, every guaranty of rights, every law that was ambiguous we should have to settle for anarchy. Prof. Thomas Reed Powell of Harvard Law School used to advise his students on constitutional law not to read the Constitution as "it tended to confuse the mind." Indeed it does. The Honorable Senator does not, I presume, reject "commerce among the several States," "the general welfare," "the establishment of religion," or "due process of law," because these phrases forever elude final precision. St. Matthew's reference to "blind guides who strain at a gnat and swallow a camel" is, I think, a fitting description of those who find quite acceptable the constitutional provision that "the executive power shall be vested in a president" but find the carefully drawn and precise language of Senate Resolution 85 and S. 731 dangerously vague.

### CONCLUSIONS FROM EXPERIENCE

"Reason may mislead us. Experience must be our guide" said James Madison at the Constitutional Convention. By "reason" he meant theory or doctrine. Experience must indeed be our guide, and on the basis of a century and three-quarters of experience, confirmed by a quarter century of intensive modern experience, we can say with, I think, some confidence that:

1. With the exception of the Civil War—a very special case—and perhaps of the Korean War where the President responded to the decision of the Security Council—there are no instances in our history where the use of warmaking powers by the Executive without authority of Congress was clearly and incontrovertibly required by the nature of the emergency which the Nation faced, but that on the contrary in almost every instance the long run interests of the Nation would have been better promoted by consultation and delay.

2. That great principles of government are not to be decided on the basis of the argumentum ad horrendum—by conjuring up hypothetical dangers and insisting that the structure and operations of government must be based on the chance of these rather than on experience. It was to this kind of argument that Thomas Jefferson said, "Shake not your raw head and bloody bones at me."

3. But that if such an emergency were to arise, it is amply provided for by the provisions of Senator Javits' bill.

### SPECIFIC RECOMMENDATIONS

Let me conclude with some specific recommendations. What Justice Jackson said in the steel seizure case in 1952 is relevant now as then:

> We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

First, needless to say, I endorse Senate Resolution 85 which the Senate adopted in June 1969 by an overwhelming majority, but which has so far been ineffective, and the proposed Senate 731.

Second, I suggest that the Senate meet the argument of emergency, hypothetical as it is, by creating a permanent committee, a quorum of whose members would remain permanently in Washington, with authority to require that the President consult with the Senate or the whole Congress before taking any action that might involve the Nation in armed conflict. Such a committee could be counted on to respond to a genuine emergency just as promptly as would the President, and would be counted on, too, to present the case for caution.

Third, I suggest that the Senate create a standing committee to consult with the President on all executive agreements, and with authority to designate those of sufficient importance to require submission to the Senate as treaties.

Fourth, I suggest that the Congress reinvigorate the power of the purse, that power which, as James Madison said, "may be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people," and that it use with more particularity than in the past the power to limit the place and the manner of the introduction of American arms and armed forces.

### U.S. ABUSE OF POWER

One final observation, and I conclude.

The problems that confront us cannot be solved by debates over precedents, by appeals to constitutional probity, or by confronting presidential power with congressional. These may mitigate but will not resolve our crisis. For all of these gestures address themselves to symptoms rather than to the fundamental disease. That disease is the psychology of the cold war; that disease is our obsession with power; that disease is our assumption that the great problems that glare upon us so hideously from every corner of the horizon can be solved by force.

Abuse of power by Presidents is a reflection, and perhaps a consequence, of abuse of power by the American people and Nation. For two decades now we have misused our prodigious power. We misused our economic power, not least in associating economic with military assistance, and in imposing economic sanctions against nations who did not see eye to eye with us about trade with our "enemies." We misused our political power by trying to force neutrals onto our side in the cold war, and by bringing pressure on the nations of Latin America to support our short-sighted policy of excluding China from the United Nations—surely the most egregious blunder in the history of modern diplomacy.

We misused our political power by planting the CIA in some 60 countries to carry on what we chose to regard as National Defense but what was in the eyes of its victims the work of subversion. We misused our military power in forcing our weapons on scores of nations throughout the globe, maintaining military alliances like NATO and SEATO and imposing our will upon these where we were able. We misused our international power by flouting the sovereign rights of neighboring nations like Cuba and Guatemala and the Dominican Republic and violating our obligations under the OAS Treaty and the United Nations. And we are even now engaged in a monstrous misuse of power in waging war on a distant people that does not ac-

cept our ideology, or our determination of its future. Is it any wonder that against this almost lurid background, Presidents misuse their power?

As we have greater power than any other nation, so we should display greater moderation in using it, greater humility in justifying it, and greater magnanimity in withholding it. We display neither moderation nor humility nor magnanimity, but that arrogance of power which your chairman has so somberly deplored.

In the long run, the abuse of the executive power cannot be divorced from the abuse of national power. If we subvert world order and threaten world peace, we must inevitably subvert and threaten our own political institutions first. This we are in process of doing.

Thank you, Mr. Chairman.

(Dr. Commager's full statement follows:)

PREPARED STATEMENT OF PROF. HENRY STEELE COMMAGER

In the historic steel seizure case of 1952 Justice Jackson said that "what is at stake is the equilibrium of our constitutional system." Now, after twenty years marked by repeated, and almost routine, invasions by the executive of the war making powers assigned by the constitution to Congress, we can see that more is at stake even than the constitutional principle of the separation of powers. At stake is the fate of the age-long effort of men to fix effective limits on government; at stake the reconciliation of the claims of freedom and of security; at stake the fateful issue of peace or war, an issue fateful not for the American people alone, nor alone for the stricken peoples of Southeast Asia, but for the whole of mankind.

Your chairman has asked me to address myself primarily to the constitutional and historical aspects of the proposal which the distinguished Senator from New York has submitted to your consideration S. 731. This is not the first time this committee has considered proposals of this nature, proposals designed to reassert and vindicate the constitutional role of the Senate in the war making and treaty making powers, and to curb the pretentions of the executive in those areas. Your concern—and that of many Americans—is not hard to understand. Five times in the past 10 years presidents have mounted major military interventions in foreign nations without prior consultation with the Congress: The Bay of Pigs, the invasion of the Dominican Republic, the attacks on North Vietnam, Cambodia, and Laos. None of these now appear to have represented a genuine emergency; none were in response to attacks upon the United States which implacably required immediate military reaction. None therefore appear to meet the requirements for the exercise of war powers by the President formulated by the makers of the constitution.

The constitution, as written in 1787 and as developed over a century and three quarters is of course a product of history, not the conclusion of a syllogism, and any consideration of the war powers must be rooted in history rather than in theory, and it is chiefly to history that I address myself. In this I shall be brief, for I am conscious that in your past campaigns you have marched over this terrain until you are familiar with every foot of it.

There is—as your own committee said four years ago—no ambiguity about the intent of the framers of the constitution. They proposed to make it impossible for a "ruler" to plunge the nation into war. In the old world monarchs had "the sole prerogative of making war and peace"—the phrase is from Blackstone Commentaries—and the founding fathers were determined that no American executive would have the power of a George III or a Frederick The Great. . . . "To that end, too," your committee continued, "they provided a pretty rigid separation of powers." This too was something new in history, for while philosophers of the old world recognized a "balance" of powers, none had imagined the kind of functional separation which Americans established in their state and their national constitutions. Separation of powers, as Justice Brandeis observed in a now classic obiter dicta "was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy" (Myers v. U.S. 272 U.S. at 293.)

Experience under the articles of confederation throws only a flickering light on our problem, for there was in fact no proper executive in the confederation. It was inevitable therefore that the articles of confederation assigned to the congress, "The sole and exclusive right and power to determining on peace and war."—A good phrase that—"Determining on war;" a pity we did not retain it. . . . Something is to be drawn from the relation of Congress to the Commander-in-Chief—a subject which the Dist. Senator from New York has explored in his speech on S. 731, and which I need not therefore rehearse here: suffice it to note—as casting some light on the meaning that the constitution makers infused into the phrase, that Washington's commission required him "punctually to observe and follow such orders and directions from time to time as he shall receive from this and future Congresses" because—we can assert this with confidence—everyone, including Washington himself took for granted the supremacy of the civil over the military power and took for granted that the term Commander-In-Chief described not another Louis XIV or Frederick or George, but Washington. How revealing that even Hamilton, always ardent for power, provided in his famous draft constitution that the President was to be Commander in Chief and "to have the direction of war *when authorized or begun*" (note in another version of speech) "The direction of war *when commenced*" (I Farrand 292 and III Farrand 624). This limited view of the powers of the C in C persisted almost down to our own time: as late as 1940 Atty. Gen. Robert Jackson could inform the President that "happily there has been little occasion in our history for the interpretation of the powers of the President as Commander in Chief of the Army and Navy," and he added that he did not base on that phrase justification for the destroyer-bases agreement.

The constitution makers proposed to assign to the Legislature the power to declare war, e.g. to decide on war, and to the executive the power to make or conduct or direct the war. This is inescapably clear from the all-too-brief discussion of these words and phrases in the convention; it is sufficient to note here what is familiar enough: that the shift in terms from "make" to "declare" was designed to preserve to "the executive the power to repel sudden attacks": Sherman wanted to nail that down: The President should be able to repel *and not to commence war*, "and as for the always cautious George Mason of Virginia "he was against giving the power of war to the executive because he was not to be trusted with it. . . . He was for clogging not for facilitating the making of war."

Hamilton took it upon himself to explain the Presidential powers in the Federalist papers. In no. 69 he wrote that the authority of the President as C in C "would amount to nothing more than the Supreme Command and direction of the military and naval forces, as First General and Admiral of the Confederacy" in no. 74 he returned to the point "the direction of war," he wrote, "implies the direction of the common strength, and the power of directing and employing the common strength forms an essential part of the executive authority." No. 75 is a bit more sweeping:

> "The history of human conduct" he wrote, "does not warrant that exalted opinion of human virtue which would make it wise in a Nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."

And a decade later—even as he argued the propriety of Presidential response to the threat of the barbary corsairs, he once again indicated the accepted limits of executive power in this realm. For it is the peculiar and exclusive province of Congress, when the Nation is at peace, to change that to a state of war . . . in other words *it belongs to Congress only to go to war.*

But it is Madison, not Hamilton, who has a just claim to be considered not only the Father of the Constitution but its most authoritative interpreter. Writing as Helvidius, in 1793, he addressed himself to precisely this problem of executive power to make war:

> Every just view that can be taken of this subject admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the Constitution, that the power to declare war including the power of judging the causes of war, is *fully and exclusively vested in the Legislature*, that the executive has no right in any case, to decide the question whether there is or is not cause for declaring war, that the right of convening and informing Congress whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite or proper (Hunt, ed. VI, 174),

and he added an observation which we may take to heart today: "In no part of the Constitution is more wisdom to be found than in the clause which confides the question of war or peace to the Legislature and not to the Executive department."

I cannot pursue this matter in the detail it deserves, but it is fair to say that those statesmen who were closest to the Constitution makers—the statesmen of the generation of the founding fathers and their successors, seemed all but unanimous in this interpretation of the war powers. Here is Jefferson reporting to Congress on the decision to defend American ships against barbary corsairs. "The bravery exhibited by our citizens on that element (the sea) will be a testimony to the world that it is not the want of that virtue which makes us seek their peace, but a conscientious desire to direct the energies of our Nation to the multiplication of the human race, or to its destruction" and he adds—"unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated. The Legislature will doubtless consider whether by authorizing measures of defense also, they will place our force on an equal footing."

Or here is John Quincy Adams, surely one of the most learned of constitutional lawyers, speaking to the problem of dealing with a threat from the Holy alliance—a threat surely more serious than the alleged threat from China in our own time . . . .

> With respect to the question, in what manner the Government of the U.S. intends to resist on its part any interference of the Holy alliance for the purpose of subjugating the New Republics . . . you understand that by the Constitution of the U.S. the ultimate decision of this question belongs to the Legislative department of the Government.

Or Daniel Webster—who knew something of the Constitution and believed in the Presidential power—writing in 1851, as Secretary of State, on the proposal to intervene in Hawaii:

> In the first place I have to say that the war-making power in this Government rests entirely with Congress, and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws. By these no power is given to the executive to oppose an attack by one independent Nation on the possession of another . . . . If this interference be an act of hostile force, it is not within the Constitutional power of the President.

And finally consider how Secretary of State Lewis Cass disposed of proposal that the U.S. intervene in China over a century ago: "This proposition" he wrote in 1857 to Lord Napier, "looking to a participation by the United States in the existing hostilities against China makes it proper to remind Your Lordship that, under the Constitution of the United States, the executive branch of this Government is not the war-making power. The exercise of that great attribute of sovereignty is vested in Congress, and the President has no authority to order aggressive hostilities to be undertaken."

Needless to say, Presidential conduct did not always correspond with Presidential principles, and the correspondence grew—I shall not say more tenuous but more fortuitous—with the passing of time. It is not necessary for me to detail here the many examples of executive use or abuse of war powers. In 1818, President Monroe authorized General Jackson to engage in "Hot pursuit" of the Seminole Indians into Spanish Florida: Always eager to smite the enemy Jackson showed perhaps excessive zeal, captured Spanish Forts, and hanged Arbruthnot and Ambrister, two British subjects. In 1845 President Polk ordered General Scott to occupy the disputed land between the Nueces and the Rio Grande; when the Mexicans advanced into the territory he engaged in battle—purely on Presidential authority. "American blood has been shed on American soil" Polk announced and only then asked for Congressional authority to fight. Polk earned the name "Polk the mendacious" but public opinion rejoiced in the fruits of the war. In 1854 Pres. Pierce authorized the bombardment of the city of Greytown, on the Mosquito Coast, and that act of quasi war rested exclusively on Presidential fiat. President Lincoln, as all know, raised armies, launched campaigns, declared a blockade and suspended the Writ of Habeas Corpus all on his own: More clearly than other executives who invoked the war powers, he was able to fall back upon the Constitutional obligation to see that the laws were faithfully executed, and we are still debating the thorny question whether the Civil War was a war within the meaning of the Constitution or not: certainly there was no declaration of war nor treaty of peace nor was there a "Foreign" enemy.

Grant's escapade in Santo Domingo in 1869 is notorious—and was embarrassing. McKinley launched an expeditionary force of 5,000 men into China—part of the Boxer Expedition—without bothering to obtain Congressional approval. Theodore Roosevelt's interventions in the Caribbean—as those, later, of Taft, Wilson, and Coolidge—were mostly without benefit of Congressional authorization. Wilson ordered the bombardment of Vera Cruz on his own, and so too the invasion of Mexico in pursuit of the elusive Pancho Villa, though here he went through the form of getting approval from Pres. Carranza of Mexico—an approval that speedily changed to disapproval.

It is all pretty impressive when summed up in this fashion. But it is relevant to note that in almost every instance in the 19th century, and in most in the first half of the 20th Presidential intervention was confined to the western hemisphere and even to contiguous territory of our *Mare Nostrum*, the Caribbean. President McKinley's astonishing participation in the Boxer Expedition came, with a symbolic appropriateness, in the year 1900. Yet even Franklin Roosevelt's executive agreements with Britain for a Destroyer—Bases exchange and with Denmark for the occupation of Iceland and Greenland, which pushed what was permissable to the furthest extreme, could be held, not implausibly, to be a legitimate part of hemispheric defense. It is only in the last twenty years or so that Presidents appear to have thrown caution and even constitutional scruples to the wind, as it were, and ventured, on their own authority, into military operations that were in fact acts of war, that were on a large scale, that were in distant parts of the Globe, and that constituted "commitments" whose vindication threatened the integrity of our political and constitutional system.

It is not, I think, sufficiently realized that the kind of intervention we have witnessed in the past quarter century is, if not wholly unprecedented, clearly a departure from a long and deeply-rooted tradition. Since the neutrality Proclamation of 1793 that tradition has been one of non-intervention, not intervention, Washington, and his cabinet, refused to intervene in the wars between France and her enemies even though the United States was far more deeply "committed" to come to the aid of France by the terms of the Treaty of Alliance of 1778, than she was to intervene in Viet Nam by the terms of the Seato Treaty. Nothwithstanding almost universal sympathy for the people of Latin America who sought to throw off Spanish rule, we did not intervene militarily in that conflict. The ideas of "manifest destiny" and "young America" dictated support to peoples everywhere struggling to throw off ancient tyrannies, but no President intervened militarily in the Greek struggle for independence from Turkey, the Italian uprisings against Austria, the Hungarian Revolution of 1948, or other internal revolutions of that fateful year, Garibaldi's fight for Italian independence, the many Irish uprisings against Britain, in Ireland and even in Canada—close to home, that—or even, Mirabile Dictu, the ten year war of the Cubans against their Spanish Overlords from 1868–78. Nor, in modern times, did Presidents see fit to intervene on behalf of Jewish victims of pogroms, Turkish genocide against Armenians, Franco's overthrow of the Loyalist Regime in Spain. Whether such abstention was always wise is a question we need not raise here. The point here is that in none of these situations did the executive think it proper, or legal, to use his powers as Commander in Chief or as Chief organ of Foreign relations to commit the United States to military intervention in distant lands. With the sole exception of McKinley's unnecessary participation in the Boxer Expedition, that concept of executive powers belong to the past quarter century. And if it should be asked why the United States should refrain from intervention in the internal struggles of other nations, even when her sympathies are deeply involved and her interests enlisted, it is perhaps sufficient to say that few of us would be prepared to endorse a principle which would have justified the intervention of Britain and France in the American Civil War—on behalf of the Confederacy of course—and that in international law you cannot really have it both ways.

Clearly the present crisis is a continuation of a long series of crises stretching from Washington's Proclamation of Neutrality to Truman's use of military and naval force in Korea and our current involvement in Southeast Asia. There are however new ingredients in the executive use of the war power which make earlier precedents if not irrevelant then far from conclusive and which greatly enhance the threat to the integrity of our constitutional system and to the peace of the world. Let me deal briefly with these:

First, our current presidential commitments—and if we cannot curb these, our future as well—are global rather than, as with Lincoln, domestic or, as with Monroe, Polk, Roosevelt and Wilson, hemispheric. They are not to be justified by

invoking the Monroe Doctrine or its accumulated corollaries: they are justified rather by new doctrines such as that of "Vital Interest" or by the "Nixon Doctrine" of shared responsibility. Of both it can be said that their most conspicuous feature is the fog which enshrouds them.

Second, the unlimited power of the executive in foreign relations is no longer justified as an emergency power, but asserted to be a normal and almost routine exercise of executive authority. Lincoln pushed his authority to the outward limits of what was constitutionally permissible, but confessed, with characteristic humility that the emergency required him to do what he did, and asked Congress to give retroactive sanction to his acts. No such humility characterizes what we may call the Johnson-Nixon Theory of Executive Authority. Thus President Johnson asserted that he did not need the authority of the Tonkin Gulf Resolution to justify his bombardment of North Vietnam, for he already had that: thus President Nixon's Asst. Attorney General asserted that the President's authority to invade Cambodia "*must* be conceded by even those who read executive authority narrowly" (June 16, 1970). Why must it be? Certainly not because of the persuasive character of the arguments advanced by this distinguished counsel, for that character is wanting.

Third, the new commitments are not, as generally in the past, Ad Hoc and even fortuitous, but calculated and ideological. Thus we do not drop bombs on Vietnam or Laos because "American blood has been shed on American soil"—Polk's excuse, nor does the President respond to an imperative like the attack on Fort Sumter or even to U-boat warfare: nor do recent presidents presume to act—like President Truman—in response to a United Nations decision. Now presidents act to "contain communism" or to protect "vital interests 9000 miles away, or to fulfill "commitments" that are somehow never made clear and that other nations pledged to them just as solemnly somehow do not think require military fulfillment. (e.g. the SEATO "commitments" which bind Britain, France, Pakistan, etc.)—and they do so by programs which are by their very nature open-ended and tenacious. Thus Secretary Rusk's assertion in 1966 that "no would-be aggressor should suppose that the absence of a defense treaty, congressional declaration, or United States Military presence, grants immunity to aggression;" the key words, for our purposes, are "Absence of Treaty" and "Absence of Congressional Declaration." For this left only the alternative of the application of the executive power, unilaterally in the international arena, unilaterally in the U.S. Constitutional arena too.

Fourth, we are a charter member of the United Nations whose function it is to settle international disputes peacefully yet Presidential Declarations of what they are prepared to do around the globe, blatantly by-pass the U.N. and The International Court of Justice and thus add to the undermining of our own Constitution the undermining of the United Nations.

Fifth, as power corrupts, the possession of great power encourages and even creates conditions in which it seems imperitative to use it, and the concentration of that power vastly increases the risks of misuse. We had one example of that as early as 1846: what began as a simple vindication of a boundary line ended up as a war in which we tore Mexico in two.

Now the original assumption of our constitution framers, that presidents could not engage in war on their own, was greatly strengthened by the elementary fact that he could not if he wanted to because there were no armies or navies with which to war. At the time of the ratification of the U.S. Constitution the United States Army consisted of 719 officers and men, not a formidable force for military adventures. The situation did not change perceptibly over the years. Our armed forces increased to some 20,000 by 1840, to 28,000 on the eve of The Civil War and to 38,000 by 1890. Even in 1915, with the world locked in mortal combat, the armed forces of the United States were less than 175,000. With the worst will, there was little that presidents could do with these forces—little that would involve us in the kind of embroilments in which we now find ourselves.

Now we have a wholly new situation. Not only do we keep some three million men under arms at all times—since 1951 the number has rarely fallen below that—but we have the greatest and most formidable armaments that any nation ever commanded. What this means is quite simply that while in the past presidents could not involve the nation, or the world, very deeply in war without congressional approval, now they can—and do.

The symbol of our new power is the nuclear weapon. Doubtless the threat of nuclear war goes far to justify giving the executive whatever discretion is necessary to secure survival in the face of attack. Correspondingly our possession of the most formidable nuclear armaments places upon us a graver responsibility than

we had to observe in the past. We should therefore make it our first objective to minimize the risk of a nuclear showdown. This we are not doing. Our invasion of Vietnam, Cambodia, Laos is a temptation, almost a challenge, to China to come into the war as she came into the war in Korea; such a confrontation conjures up the spectre of a nuclear war. As for chemical and biological warfare it is notorious that we have used and are still using chemical defoliant and that only a public outcry and congressional protest brought some modification of the use of chemicals and the adoption of new policies for the disposition of nerve gases.

These are new ingredients within the matrix of The Presidential power, and they change the constitutional mix, for the constitution, after all, is not static but dynamic. The problem is complicated by a new terminology: the obsolescence of older terms which once had clear legal meaning, and the emergence of new terms, some of them (like "combat" meaning only ground troops, or "protective reaction") some of them designed to deceive. Thus it is conceded that the President has authority to "repel" attacks, but the term has been drained of meaning—drained of the meaning that a Madison or a Jefferson read into it. When we launch invasions of Cambodia and Laos not to defeat, the enemy or to conquer territory but to enable us to withdraw, anything can be called a protective reaction. Besides, it is a truism now that all wars are defensive. Hitler claimed that his assaults on Denmark and Norway were "defensive" and I need not remind this committee that the Tonkin Bay Resolution is phrased in this vocabulary, and no wonder, it was drafted in the White House. It declares, you will remember, that the Congress approves and supports the determination of the President "to repel armed attack against the forces of the United States and to prevent further aggression." This is as good an example as any of the "aggressions" against the United States which the President is called upon to resist!

Or there is the relatively new concept of "Vital Interests," in 1967 the Congress authorized President Eisenhower to protect the "Vital Interests" of the United States in the Middle East: it is not without interest that President Eisenhower modified that authorization and justified the dispatch of 14,000 marines to Lebanon on the principle of protecting American "lives:"—very old fashioned of him. What after all is a vital interest? Who, or what branch of the government is authorized to define it and to determine when it needs protection? The parallel between the vital interest in international law and the police power in municipal comes to mind, but the police power is always subject to review by the courts: what comparable check is there on the misuse of presidential power on behalf of what he may consider vital interests?

It is not only concepts like offensive and defensive war, or territorial waters, or vital interests, that have been drained of their historic meaning. Even the constitutional concept of a Declaration of war has been hopelessly impaired by the Presidential interpretation of the Tonkin Bay Resolution. Thus in testimony to this committee in 1967 formally asserted that the Tonkin Bay Resolution, together with the SEATO treaty, constituted a "functional declaration of war"—thus combining an original contribution to international law with a repeal of an important provision of the constitution.

There is a final consideration which seems to me of vital importance: I shall not enlarge upon it because it was in considerable part the subject of senate resolution 85, and some of its implications were elaborately discussed at that time. I mean of course the growing role of the executive agreement as a method for by-passing the requirements of treaty-making. Unknown to article II of the Constitution, they emerged early as a useful method of disposing of routine business that did not rise to the dignity of a treaty. Until very recent times it was customarily used only for such routine business—tariff agreements, postal conventions, patent arrangements, and so forth, and the great majority of them were negotiated in pursuance of congressional authorization. As late as 1930 the United States concluded 25 treaties and only nine executive agreements. But in 1968 it concluded 16 treaties and 266 executive agreements. As of January 1, 1969 the U.S. had a total of 909 treaties and 3973 executive agreements. And while the great majority of these were still concerned with routine matters, a substantial number of them dealt with problems which in the past had been considered proper subjects of the treaty making power. Well might the distinguished senator from Arkansas say at that time during the course of years . . . the senate has allowed an imbalance to arise within our governmental structure and, by a process of erosion and by a process of acceptance of executive action, some of the most significant powers of the senate have been lost. . . . the traditional distinction between the treaty as the appropriate means of making significant political commitments and the executive department as the appro-

priate instrument for routine, non-political arrangements, has substantially broken down.

It cannot be said that this development came without warning. As far back as 1907 the solicitor for the Department of State informed the Swedish authorities that "to the Executive Department of the government is confined the general authority over foreign intercourse and, as *a necessary incident to such authority* the executive possess a *large and undefined* power to enter into compacts and agreements *relating to almost* topic *properly subject to international negotiation.* (V Jackworth, 342) and in 1940 Mr. Hackworth himself asserted that "from the point of view of international law, treaties and executive agreements are alike in that both *constitute equally binding obligations upon the nation.*" (ibid 398) He did however add a caution that has been forgotten by recent administrations—that "international agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character, usually take the form of treaties." No longer.

In 1940 Attorney General Jackson—later Justice of the Supreme Court—spelled out with customary clarity the permissible and impermissible limits of the use of executive agreements in foreign affairs:

> The President's power over foreign relations, while delicate, plenary and exclusive, is not unlimited. Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in the congress. Such presidential arrangements are customarily submitted for ratification . . . of the senate before the future legislative power of the country is committed.

And he made a distinction between what was proper and what was improper relevant to the current scene:

> The transaction now proposed represents only an exchange with no statutory requirement for the embodiment thereof in any treaty and *involving no promises or undertakings* by the United States that might raise the question of the propriety of incorporation in a treaty (Hackworth V, 407)

It is superfluous to point out that the use of executive agreements in such areas as joint use of air bases and joint defense of them in Spain, repudiates these carefully drawn limitations. For these, and similar agreements, do "carry promises and undertakings of future action. "They are" properly the subject for treaties: they are not properly the subject of executive agreements. It is impossible to escape the conclusion that the executive is whittling away the constitutional authority of the congress in the momentous arena of treaty-making as it is whittling away its constitutional authority in the realm of war making.

I am reluctant to concentrate, as I have heretofore done, on the constitutional and legal aspects of this great problem of the power to commit this nation to war. One of the dangers of our American system, against which we must be constantly alert, is the temptation to evaluate great questions of public policy not so much on their merits as on their legality. It is one price we pay for judicial review, and all that that implies, that as we tend to equate what is unconstitutional with what is pernicious, so we tend to equate what has a claim to constitutional correctness as thereby sound. These things are not always the same.

Besides, however we may balance the constitutional and legal arguments on the presidential power, it is highly improbable that those who have already made up their minds on the wisdom or the error of our involvement in Indochina are going to be persuaded or dissuaded by legal arguments. Those familiar with the arguments of state department spokesmen, witnesses before senate committees, law professors and others learned in the law, know how easy it is to construct impressive monuments out of the disjecta membra of legal precedents and judicial citations: each of us can say of the arguments of our critics and opponents what Finley Peter Dunne said of the arguments of corporation lawyers, that "what looks like a stonewall to a layman is a triumphant arch to a corporation lawyer."

Great questions of constitutional law are great not because they are complicated legal or technical questions, but because they embody issues of high policy, of public good, of morality. We must consider the problem of the presidential authority to make war not merely in the light of constitutional precedents but in the light of wisdom and justice. Other witnesses will, I am confident, speak to this affluent subject.

Let us then turn from the legal and constitutional considerations to more persuasive considerations—considerations, perhaps, of historical experience, of experience not as precedents but as—in the famous words of Lord Bolingbroke—"Philosophy teaching by examples."

In 1967 Undersecretary Nicholas Katzenbach assured this committee that "History has surely vindicated the wisdom of the flexibility of the conduct of our foreign affairs." Two years later the distinguished senator from Wyoming stated, in his minority report on S. 85, that "The decision making process may be reduced by events to a single day, or even hours. On more than one occasion the time allotted by crisis incidents to those who must make the decisions has been less than the time it would take to assemble a quorum of the congress."

We must face squarely the issues raised by Mr. Katzenbach and Senator McGee: that after all history has vindicated the use of the presidential powers in the realm of war making and that time has been and is of the essence. Has history in fact vindicated the use of armed forces by presidents? Have presidents been well advised—again in the light of history—to by-pass congress in using American armed forces overseas? Would consultation with the congress, would even second-thoughts, have made a difference detrimental to national, or world, interests?

I shall not rehearse for you the long list of episodes here but comment on them in passing. Was it really of vital importance that General Jackson pursue the Seminoles and hang Arbuthnot and Ambrister?

Would the fate of Texas have been different had Polk consulted the Congress before launching a war: had he done so he might have escaped the name which has clung to him through history—"Polk the Mendacious". Was it really essential to bombard Greytown in 1854—would we do that now? Grant himself learned what a mistake it was to send troops to the Dominican Republic for a senate, perhaps more strong minded than some later senates, refused to back him up or allow him to go through with his plans for annexation. Was McKinley wise to commit 5000 troops to the invasion of China in 1900 and would we do this today in a comparable situation? Our commitment to the provisions of the constitution of the Organization of American States is perhaps sufficient commentary on the wisdom of our many military interventions in the Caribbean, and President Wilson's resort to the ABC Conference—which rescued us from an ugly situation in Mexico—sufficient commentary on the wisdom of the Pershing expedition into Mexico. Once again we may ask, would we do this now? The hapless Abrams was sentenced to jail for distributing leaflets criticizing the Archangel and Siberian Expeditions: at the time he had only the consolation of being the occasion for one of the greatest of all Justice Holmes's opinions. If he were living now he might have the dubious consolation of knowing that almost everyne agrees with his argument: certainly we have paid a high price in the lng-range enmity of the Soviet for that particular folly. Clearly a strong case can be made out for FDR's destroyer bases exchange and for extending protection to Greenland and Iceland, but is it conceivable that the congress would have denied him the right to carry through these programs?

If we turn to the many examples of presidential war making in the past twenty years we are, I submit, impressed by the fact that in almost every instance the congress was actually in session and available for consultation: thus the Korean intervention, the landing of troops in Lebanon, the Bay of Pigs, the Occupation of the Dominican Republic by President Johnson, and the successive series of forays into Vietnam, Cambodia and Laos.

I have, to be sure, omitted consideration of Lincoln's use of the Executive Power to meet the crisis of secession. Whether Lincoln was wise not to call the congress into session for four months is still debated: perhaps it can be said that the use of executive authority to put down a domestic insurrection rests on somewhat stronger constitutional arguments than those used to justify the use of force against China in 1900 or Vietnam in 1964.

There is one further observation that is relevant and may be instructive. Almost every instance of the use of presidential force in the past has been against small, backward, and distraught peoples: the situation today. Call the role of the victims of presidential application of force in the past: Spanish Florida, Honduras, Santo Domingo, Nicaragua, Panama, Haiti, Guatemala, a China torn by civil war, a Mexico distraught by civil war, a Russia and a Vietnam riven by war, it is a sobering fact that presidents do not thus rush in with the weapons of war to bring Britain, France, Italy, Russia, or Japan to heel. Would we have bombarded Southampton to collect a debt? Would we have sent an expedition into Rome to protect Americans against a threat from a fascist government? Would we have precipitated a war with Britain over a boundary dispute in Maine? Would we land marines in France if customs collectors did not behave themselves? Would we bomb Siberia for years if shots were fired—without any hits—at an American vessel? And does it really comport with the honor and

dignity of a great nation to indulge its Chief Executive in one standard of conduct for the strong and another for the weak?

I confess that I do not think this record justifies Mr. Katzenbach's rosy view of the use of presidential authority in this arena of foreign affairs, nor do I find a single instance that bears out Senator McGee's assertion that "On more than one occasion the time allotted by crisis. . . . has been less than the time it would take to assemble a quorum of the congress."

Whether such a situation might arise in the future we do not have to determine. For Senator Javits' bill S. 721 makes ample provision for such an emergency by specifically authorizing the president to act "to repel a sudden attack against the United States" or "against the Armed Forces of the United States" when "*lawfully* stationed on foreign territory."

In his minority report on Sen. 85 limiting the power of the president to make national commitments on his own, the senator from Wyoming speaks of S. 85's "capabilities of mischief making." I have no doubt that the same argument will be brought against S. 731; it is the argument almost invariably used against any proposal to limit the Executive Power. That S. 85 and S. 731 contain ambiguities cannot be denied. If we were to reject every constitutional provision, every guaranty of rights, every law that was ambiguous we should have to settle for anarchy. The distinguished Professor Thomas Reed Powell of Harvard Law School used to advise his students not to read the constitution as "it tended to confuse the mind". Indeed it does. The honorable senator does not, I presume, reject "commerce among the several states" "the general welfare" "the establishment of religion" because these phrases forever elude final precision. St. Matthew's reference to "blind guides who strain at a gnat and swallow a camel" is a fitting description of those who find quite acceptable the constitutional provision that "the executive power shall be vested in a president" but find the carefully drawn and precise language of S. 85 and S. 731 dangerously vague.

"Reason may mislead us. Experience must be our guide" said James Madison at the constitutional convention. By "reason" he meant theory or doctrine. Experience must indeed be our guide, and on the basis of a century and three quarters of experience, confirmed by a quarter century of intensive modern experience, we can say with some confidence that:

1. With the exception of the Civil War—a special case—and perhaps of the Korean War where the President responded to the decision of the Security Council—there are no instances in our history where the use of war making powers by the Executive without authority of congress was clearly and incontrovertibly required by the nature of the emergency which the nation faced but that on the contrary in almost every instance the long run interests of the nation would have been better promoted by consultation and delay.

2. That great principles of government are not to be decided on the basis of the argumentum ad horrendum—by conjuring up hypothetical dangers and insisting that the structure and operations of government must be based on the chance of these rather than on experience. It was to this kind of argument that Thomas Jefferson said, "Shake not your raw-head and bloody-bones at me." 3. But that if such an emergency were to arise, it is amply provided for by the provisions of senate 731.

Let me conclude with some specific recommendations.

What Justice Jackson said in the steel seizure case is relevant now as then: "We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."

First, needless to say I endorse Senate 85 which the Senate adopted in June 1969 by an overwhelming majority, but which has so far been ineffective, and the proposed Senate 731.

Second, I suggest that the Senate meet the argument of emergency, hypothetical as it is, by creating a permanent committee, a quorum of whose members would remain permanently in Washington, with authority to require that the President consult with the Senate or the Congress before taking any action that might involve the Nation in armed conflict. Such a committee could be counted on to respond to a genuine emergency just as promptly as would the President, and counted on, too, to present the case for caution.

Third, I suggest that the Senate create a standing committee to consult with the President on all executive agreements, and with authority to designate those of sufficient importance to require submission to the Senate as treaties.

Fourth, I suggest that the Congress reinvigorate the power of the purse, that power which, as James Madison said, "May be regarded as the most complete and effectual weapon with which any Constitution can arm the immediate representatives of the people," and that it use with more particularity than in the past the power to limit the place and the manner of the introduction of American arms and armed forces.

One final observation, and I conclude.

The problems that confront us cannot be solved by debates over precedents, by appeals to constitutional probity, or by confronting Presidential power with Congressional: These may mitigate but will not resolve our crisis. For all of these gestures address themselves to symptoms rather than to the fundamental disease. That disease is the psychology of the cold war: that disease is our obsession with power; that disease is our assumption that the great problems that glare upon us so hideously from ever corner of the horizon can be solved by force.

Abuse of power by Presidents is a reflection, and perhaps a consequence, of abuse of power by the American people and nation. For two decades now we have misused our prodigious power. We misused our economic power, not least in associating economic with military assistance, and in imposing economic sanctions against Nations who did not see eye to eye with us about trade with our "enemies." We misused our political power by trying to force neutrals onto our side in the cold war by bringing pressure on the Nations of Latin America to support our shortsighted policy of excluding China from the United Nations—surely the most egregious blunder in the history of modern diplomacy. We misused our political power by planting the CIA in some sixty countries to carry on what we chose to regard as National Defense but what was in the eyes of its victims the work of subversion. We misused our military power in forcing our weapons on scores of Nations throughout the globe, maintaining military alliances like NATO and SEATO and imposing our will upon these where we were able. We misused our international power by flouting the sovereign rights of neighboring Nations like Cuba and Guatemala and the Dominican Republic and violating our obligations under the OAS Treaty and the United Nations. And we are even now engaged in a monstrous misuse of power in waging war on a distant people that does not accept our ideology, or our determination of its future. Is it any wonder that against this almost lurid background, Presidents misuse their power?

As we have greater power than any other Nation, so we should display greater moderation in using it, greater humility in justifying it, and greater magnanimity in withholding it. We display neither moderation nor humility nor magnanimity, but that arrogance of power which your chairman has so eloquently deplored.

In the long run the abuse of the executive power cannot be divorced from the abuse of national power. If we subvert world order and threaten world peace, we must inevitably subvert and threaten our own political institutions first. This we are in process of doing.

The CHAIRMAN. Thank you, Dr. Commager.

With the committee's permission I would like to yield first to the principal sponsors of the bill. Would the Senator from New York care to begin?

COMMENDATION OF THE WITNESS

Senator JAVITS. I thank the Chair very much, and I appreciate this opportunity to commence the questioning. I thank Professor Commager for his testimony and for his support.

I share with him the deep conviction that this may well put us on a path which will be infinitely more beneficial to mankind than the path we have been on. The past 30 years has not been all bad. We have done much good and I don't think the world could have recovered after World War II without our exercise of power. But it is the genius of our people that we are engaged in self-review openly and publicly, and Professor Commager's analysis this morning, which I have read in advance, is tremendously impressive. He obviously feels very deeply on this subject, as I do. It should be very helpful to our country.

ADEQUACY OF TERM "MILITARY HOSTILITIES"

I was very interested, Professor Commager, in your commendation of the drafting of the bill, and I would like to ask you this fundamental question. The bill does not endeavor to spell out a definition of the words "military hostilities" but adopts them as words of basic understanding.

The bill, indeed, seeks to proceed in the kind of language which accepts a whole body of experience and precedent without endeavoring specifically to define it.

Would you help us by telling us whether you feel the words "military hostilities" are broad enough to include hostilities of such imminence as to be military hostilities as well as to include the concept of appreciable hostilities? Obviously, if somebody fires a pistol at an American marine sentry in Moscow, that isn't military hostilities. Do you consider the use of those words sufficient to characterize matters of appreciable moment commiting the United States to a policy of military action?

Dr. COMMAGER. Senator, I find it very difficult to make any suggestion which would look to a closed definition. I will have to fall back on a general attitude, for in these matters there is peril in trying to be too exact in definitions. Something must be left to the judgment, the intelligence, the wisdom, of those in command of the Congress, and of the President as well; on the whole, we have done pretty well with such terms as "due process of law" which are gradually spelled out by experience.

In a broad way I think it difficult to achieve a terminology which could conceivably anticipate all of the emergencies that might arise, for emergencies have a habit of being unprecedented and, I think, the term you use is adequate for the circumstances.

Senator JAVITS. Thank you.

Dr. COMMAGER. Also, if it were not, future Congresses can pass other resolutions dealing with it.

ORIGINALITY OF STATUTORY DIVISION OF WAR POWERS

Senator JAVITS. Do you feel that this is an original question as to the statutory division of the war powers of the Congress and the President? Do we have, other than the commitments resolution, which is not a statute, any statutory action that you know of on this subject?

Dr. COMMAGER. I know of no statutory, sir. I know of a long series of precedents, some of which I presented dating back to Jefferson, Hamilton, Madison, Webster, Cass, John Quincy Adams and others, either as President or as Secretary of State, all indicating their understanding of the separation of powers, the distinction between Presidential authority and legislative authority in this arena, and almost all supporting the original notion that the determination of war; that is, the power to begin a war, is lodged very clearly in the legislative branch, and the power to fight a war, to make the war, is lodged in the Executive.

There are, as far as I know, no previous statutory efforts to deal with this problem.

DEFINITION OF "COMMANDER IN CHIEF"

Senator JAVITS. Do you think that it is proper to go back, because it is going back, a long time, so early in our history as the original Commander in Chief commission issued to General Washington in order to help understand what was meant in the Constitution by the words "Commander in Chief." Do you believe it relevant——

Dr. COMMAGER. Yes.

Senator JAVITS. Do you believe it relevant to our legislating to draw on that definition as then given, in our legislative base?

Dr. COMMAGER. As part of the law I don't know. It is already in your statement, as an interpretation of the law, a kind of gloss upon your bill rather than a part of the bill. I am reluctant to clutter up legislative acts with particular definitions of that kind.

I think it is very important that you have established this fact in the introduction of your bill and in the statement of what is understood by limitations upon the Commander in Chief—the requirement that he fulfill in all respects the orders and commands of Congress.

Senator JAVITS. Mr. Chairman, I ask unanimous consent that the original commission to General Washington as Commander in Chief dated Philadelphia, June 19, 1775, granted to him by the Continental Congress, be made part of the record.

The CHAIRMAN. Without objection so ordered.

(The information referred to follows:)

GENERAL WASHINGTON'S COMMISSION AS COMMANDER-IN-CHIEF

COMMISSION AS COMMANDER-IN-CHIEF

IN CONGRESS

The delegates of the United Colonies of New-Hampshire, Massachusetts bay, Rhode Island, Connecticut, New-York, New Jersey, Pennsylvania, New Castle, Kent & Sussex on Delaware, Maryland, Virginia, North Carolina and South Carolina

To GEORGE WASHINGTON Esquire

We reposing especial trust and confidence in your patriotism, conduct and fidelity Do by these presents constitute and appoint you to be General and Commander in Chief of the Army of the United Colonies and of all the forces raised or to be raised by them and of all others who shall voluntary offer their service and join the said army for the defence of American Liberty and for repelling every hostile invasion thereof. AND you are hereby vested with full power and authority to act as you shall think for the good and welfare of the service.

And we do hereby strictly charge and require all officers and soldiers under your command to be obedient to your orders & diligent in the exercise of their several duties.

And we do also enjoin and require you to be careful in executing the great trust reposed in you, by causing strict discipline and order to be observed in the army and that the soldiers are duly exercised and provided with all convenient necessaries.

And you are to regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress of the said United Colonies or a committee of Congress for that purpose appointed.

THIS COMMISSION to continue in force until revoked by this or a future Congress.

By order of the Congress

Dated, Philadelphia June 19th, 1775.

JOHN HANCOCK, *President*

Attest CHAS. THOMSON *Secr.*

STATUTORY PROCEDURE VERSUS COVERING RESOLUTIONS

Senator JAVITS. Mr. Chairman, I shall be very brief from this point on.

One basic question interested me very greatly, Professor Commager. I cited it in putting it into the bill and I think it would be very helpful to us if you could give us your view. Much has been made of the Gulf of Tonkin Resolution, the Middle East Resolution with respect to Lebanon, the *ex post facto* ratification, to use a lawyer's term, of our action in Santo Domingo, and similar covering provisions to cover the implication that, well, the President really didn't usurp any power or take power because of Congress inaction.

Do you feel that we have a better chance of regularizing the relationship between the President and Legislature and, therefore, a greater control over war with an orderly statutory procedure like this one, than we have had with the ad hoc covering resolution in the absence of a declaration of war?

Dr. COMMAGER. Yes, sir, most decidedly. As I pointed out, Mr. Eisenhower did not rely entirely on that resolution. The Tonkin Bay Resolution was, if I may use the term, something of a put-up job; at least the Senate was not fully aware of all the circumstances of the attack on U.S.S. *Maddox* at that time; in a broad way, I think retroactive justifications are undesirable and also raise interesting questions of legal validity. A mere retroactive resolution would not in itself be a bar against the charge of unconstitutional conduct, for a resolution does not have that form and Congress cannot make constitutional by resolution what is not constitutional.

So I deplore, on the whole, this tendency.

Senator JAVITS. So that the flaw in that route would be both substantive as well as legal?

Dr. COMMAGER. Yes, they are wanting in real substance and—I won't say illegal—but of dubious relevance to the law.

CONSULTATION AND CONSENT

Senator JAVITS. My last question, Professor Commager, relates to this question of advise and consent. You have recommended certain techniques by which the Congress could be consulted with respect to war on a continuing basis. But do you consider consultation to be the equivalent of consent or do you feel that we must require, as my bill does, statutory authority for consent and consent given in accordance with the statute in the interests of our country?

Dr. COMMAGER. Certainly the requirement of advise and consent to treaties is constitutional. It is impossible to advise and consent to a treaty without passing an act ratifying a treaty, sending it on to the President for ultimate ratification, and what has happened over the years, Senator, as you all well know, is that the term "advise" has been afflicted with a kind of paralysis, that it has been drained of meaning and only consent is left, and consent is often assumed implicity rather than required explicitly.

I should like to see some mechanism set up for more effective advice than now exists, and I did propose some second-hand advice, as it were, from committees who might be authorized to speak for the Senate in certain emergencies.

Senator JAVITS. But this advice and this consultation cannot be established in lieu of the exercise of the statutory authority of the Congress, to vest the President with the authority to make war in undeclared war situations.

Dr. COMMAGER. Not under the Constitution as it has heretofore been interpreted with respect to the conduct of foreign affairs.

CONSTITUTIONALITY AND EFFECTIVENESS OF S. 731

Senator JAVITS. Do you feel that S. 731 is, in your judgment, a completely constitutional exercise of the powers of the Congress and the President to make a law which will be binding and relevant to the utilization of the war powers under the Constitution?

Dr. COMMAGER. It is constitutional. Whether the President will believe himself bound by it is a question which remains. As you will remember, President Johnson asserted he was not bound by previous resolutions, and the position of the legal adviser to the President and to the State Department has consistently been—rather oddly expressed—that no resolutions of Congress can in any way limit the constitutional authority of the President, which means that he himself will largely be the man who determines the constitutional authority of the President.

I think, to make this into a larger question than the one you raised, Mr. Senator, what we have here is a situation which cannot, in the nature of things, be resolved by even the strongest Senate resolutions in the face of, shall I say, contumaciousness from the executive branch; that indeed, until we get at what is causing this conflict between the two branches in the realm of foreign policy there will be no ultimately satisfactory solution of the problem. It is not, I think, fortuitous that in the last 20 or so years every major assertion of executive authority in the warmaking field has come in connection with the cold war, and it is my own feeling that until there is some amelioration of the cold war situation, until there is some thaw here, the conflict between the two branches will continue.

Senator JAVITS. But the best chance we have, would you agree, Professor Commager, is by the enactment of a statute before the events in accordance with the way in which the Constitution directs laws to be enacted.

Dr. COMMAGER. I do not see what else the Senate can do and the Congress can do. It can, of course, deal with appropriation after the events, but not before, or it can use the appropriation power in advance—what has been proposed and to some extent what has been done with respect to Cambodia and Laos. These are the two most effective methods.

Senator JAVITS. But a President who denies a statute duly enacted into law makes himself liable to even greater penalties than the loss of appropriations; does he not?

Dr. COMMAGER. Yes, in theory, sir. In theory he does. I suspect the liability will not be so much to the threat of impeachment as the threat of defeat.

The threat of impeachment has not been a very effective threat.

Senator JAVITS. I don't invoke that. I only invoke the fact that this is the most solemn thing we can do, to declare the purpose, and the

President who defies that will be running infinitely greater risks, would he not, than to defy the resolutions and the informal procedures which we have heretofore engaged in in these matters?

Dr. COMMAGER. Somewhat greater risk, yes, sir. And so far as the use of appropriation powers there are so many ways, as we now know from the experience of appropriations for foreign military aid, of juggling around budgetary commitments in one way or another. It is not at all clear that the use of these appropriations are at all effective.

Senator JAVITS. So your recommendation of this bill is based on those grounds?

Dr. COMMAGER. Certainly.

Senator JAVITS. I thank you. I thank the Chair.

The CHAIRMAN. I yield to the other cosponsor of the bill, Senator Spong.

COMMENDATION OF THE WITNESS

Senator SPONG. I thank the chairman.

Professor Commager, I commend you for your statement. It covers very well the expansion of executive power, both as to the warmaking process and through the use of the executive agreement.

FORMAL DECLARATIONS OF WAR HAVE BEEN AFTER THE FACT

Implicit in your statement is that Congress has not heeded Justice Jackson. It has not prevented power from slipping through its fingers.

In the five instances in which the United States has declared war formally, Congress did so more or less after the fact.

I would like you to comment on this quote from James McGregor Burns that, "The power of Congress to make a declaration of war has become hardly more than a formality."

Dr. COMMAGER. That, sir, is true, not so much because of changes in the constitutional setup as because in almost every instance a declaration of war occurred after an attack was launched.

The Mexican war, as you know, was in a way declared by a joint resolution rather than by an open declaration of war, rather a curious way to get about it. The one clear case where we took the initiative, if it can indeed be said that, was 1917. Mr. Wilson argued that there was indeed an attack by the U-boats on the United States, an argument which was, of course, subject to dispute and there, you will remember, Senator, there was a very considerable congressional debate. A handful of Congressmen refused to go along with the declaration. It cannot be said that that was after the fact.

In World War II it was, of course, after the fact. There was no declaration of war in the case of Korea. So I am not sure that that observation, true enough, has a great deal of bearing on the constitutional question. It rather bears on the historical situation.

EXECUTIVE POWER UNDER SECTION A, ITEM 4 OF S. 731

Senator SPONG. You have indicated to Senator Javits, in response to one of his last questions, that you think as a constitutional principle Congress has the power to pass a bill similar to this. I might say that I have, from the time the bill was introduced, commended the Senator

from New York and have agreed with him from the time of the Cooper-Church debate that something of this nature was needed.

I am a cosponsor, but I ask this question perhaps as a devil's advocate: In section (a) of the bill, Senator Javits has outlined the occasions under which the President may act. I quote No. 4:

> To comply with a national commitment resulting exclusively from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment, where immediate military hostilities by the Armed Forces of the United States are required.

In your judgment, does that give the Executive sufficient power to meet situations where a certain amount of secret preparedness might be necessary?

Dr. COMMAGER. Sir, my tendency always is, as I indicated, to judge these in the light of experience rather than in the light of hypotheses. It is easy to imagine circumstances where this would not be adequate.

So far, as far as I know, these circumstances have not, in fact, arisen, and I suspect if they do arise, no act of Congress, indeed no part of the Constitution, would be strong enough to impose itself between the instantaneous reaction of a President to enable the country to survive, and these justifications.

But looking back on the claims made for instant Presidential action in the past 20 or 25 years, I see no instance, as I tried to make clear, where it was not possible either to consult with the Congress or to delay and take whatever legal action was necessary to get congressional support.

### PRESIDENTIAL AUTHORITY UNDER SECTION A, ITEM 4 OF S. 731

Senator JAVITS. Would the Senator yield for a clarifying question at this point?

Is it not a fact, Professor Commager, that this particular provision in item 4, which Senator Spong has read confirms in the President an authority which he may not necessarily have, and that this is consistent with the need for meeting modern conditions. So many of these treaty commitments and other commitments, as defined by Senator Fulbright's commitments resolution, are coupled with the requirement that action should be taken "in accordance with the constitutional process of the United States." That has always left the President's power up in the air.

Now by enacting procedures, including a limited discretionary period of time within which he can exercise it, are we not confirming in him, setting the question? Many of the young people on campuses have claimed this is not only an immoral but an illegal war for the reason that the President had not such authority. Now wouldn't we be actually doing a positive thing as well as a negative thing in terms of our control, congressional control, by confirming this authority in the President?

Dr. COMMAGER. I am not quite certain of the thrust of that question, Senator Javits.

My immediate inclination was to agree with you. But so many potentialities are implicit in this that it is very difficult for us to know precisely what it does confirm that is now in doubt.

I do not myself share the attitude of some of the young that this can be called an illegal war except by standards they do not raise, namely the question whether our binding commitments to the United Nations are of such a nature as to throw some doubt on the propriety or the legality of this conflict.

I am inclined to think, and I believe most of the distinguished members of this committee will agree with me, that the Congress has by frequent pieces of legislation from Tonkin Bay on, met the requirements laid down in the prize cases of recognition of the fact of war and that the claim of legality, as I tried to say in my paper, is one which may mislead us.

The question is not so much of technical legality where there will always be two sides where no one group will give into the other on the basis of precedents. We should look rather away from the technical question of legality to the larger question of the nature of our constitutional system, what it was designed to be, how it best operates, how it will best operate, the obligations of the United States not only to our own people and our own Constitution but the the rest of the world. These were matters that concerned almost exclusively the United States in the 18th and 19th century; the world was not deeply affected by what we did or indeed by what mistakes we made.

Now any error we make may have mortal consequences to people throughout the globe and, therefore, the question of legality should not be the one of primary concern.

Senator JAVITS. Thank you.

Senator SPONG. I dare say, Senator Javits, with regard to section 4, we are going to hear opinions that it doesn't give enough power and it gives too much power.

Senator JAVITS. Exactly right.

### IMPOSING RESTRICTIONS VERSUS PRINCIPLE OF AUTHORIZATION

Senator SPONG. Professor, what is your opinion of the wisdom and propriety of imposing restrictions on the conduct of hostilities, as was done through the Cooper-Church amendment, as distinguished from insisting on the principle of authorization?

Dr. COMMAGER. I much prefer the principle of authorization. The restrictions tend to be ineffective. As it worked out in Cooper-Church the restriction of combat troops which, I believe, was the legal term used, has not prevented the flying of some—I think I read in the Times this morning, some 1,500—bomber sorties in the last 2 weeks into Laos. It has not prevented what is, in effect, an invasion, what is in effect offensive action. Indeed, it has lent itself, it seems to me, to the kind of subterfuge which does indeed deceive public opinion, and therefore, may have lulled the public to a sense of, I shall not say security, but apathy which is in itself dangerous.

It is quite clear, I think, gentlemen, that if by any chance the Cubans should launch an invasion into Florida to discourage those engaged in various filibustering exhibitions, and Russian planes should fly 500 sorties a day over Florida and Russian ships and guns and tanks should be involved, we would regard that as offensive action, indeed, as an invasion; we cannot pretend it is not offensive action and not an invasion by using doubletalk words like "combat."

But my suspicion of such proposals is rooted in the fact that you can always so interpret the words of a resolution as to permit something else and that they are not in fact very effective, I think, for the Laotians and the Cambodians. The fact that our ground troops are not there hasn't made a great deal of difference; they have suffered just as much; the suffering comes from air bombardment.

### SECTION 1 OF SENATE JOINT RESOLUTION 59

Senator SPONG. Senator Eagleton has just introduced a resolution in which he incorporates S. 731.

Dr. COMMAGER. Yes, sir.

Senator SPONG. And also suggests as his section 1, and I quote: "No treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further congressional authorization."

Would you care to comment on that? It relates to your exchange with me.

Dr. COMMAGER. I think it is later qualified by recognition of the danger of an atomic or other attacks of that kind, and with that qualification, it seems to me, to bear out the congressional provisions required of a declaration of war by the Congress as originally understood by the Members of that Convention and as interpreted by such men as Madison and Hamilton. So I find it acceptable and harmonious with the Constitution.

Senator SPONG. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Aiken.

Senator AIKEN. Dr. Commager, you know we have three pieces of legislation before us. They are the Javits bill, the Taft resolution, and the Eagleton resolution. All apparently seek the same general objective, but differ in detail.

### AUTHORITY TO PROTECT U.S. LIVES AND PROPERTY ABROAD

For instance, in the Javits bill, you will find paragraph No. 3 on page 2 which, if connected with the (a) of page 1, will read as follows:

"The Armed Forces of the United States under the President as Commander in Chief may act * * * to protect the lives and property, as may be required, of U.S. nationals abroad;"

Do you consider that authority necessary in the bill or does the President have full power under the Constitution?

Dr. COMMAGER. I do not know, Senator Aiken, whether even under the Constitution the President has full power to use Armed Forces to protect property abroad. As I understand the Drago doctrine, that notion has been at least questioned if not repudiated. We subscribe to the Drago doctrine and we would not now normally use Armed Forces to protect property. We would not do today, bombard Greytown, as we did in 1854. I would not myself include the term "property."

Senator AIKEN. Do you think that this wording could be construed to include investments by Americans abroad?

Dr. COMMAGER. I should hope not. If it were we would be at war with the Middle Eastern countries.

Senator AIKEN. I hope not, too.

Dr. COMMAGER. It might be so construed, although I cannot imagine any Executive so bereft of his senses that he is prepared to use the war power to protect our oil interests either in Mexico or the Middle East or other countries.

Senator AIKEN. Oil comes to mind first.

Dr. COMMAGER. Yes.

Senator AIKEN. We are getting into the realm of international corporations and international economics. Suppose that an international corporation had an establishment in some foreign country and 49 percent of its stock was owned by Americans. Do you think that this sentence could be construed to cover the 49 percent or where would the American investment or the American-owned property begin?

Dr. COMMAGER. Yes, precisely.

Senator AIKEN. Wouldn't that depend on the person who interpreted it?

Dr. COMMAGER. I think, Senator, these questions might be raised for Senator Javits to clarify. My own feeling is that the term "property" is expendable here. What is involved in protection of lives is another matter.

As I said just in passing while we did send 5,000 soldiers into China in 1900 to protect American lives in Peking, we did not send that number into Paris to protect them at the time of the riots some 2 or 3 years ago. Now, as in the past, we use this power to protect lives in a very discriminating fashion—discriminating against the weak powers and in favor of the stong ones.

Senator AIKEN. The reason I ask that question is that I find no such direct authority in either of the other bills, although there is authority in one or both of them for using an American military force to bring Americans out of a country where they may be working or where they may have investments.

Dr. COMMAGER. Yes.

Senator AIKEN. I think the Congress has a pretty good example of that one.

Dr. COMMAGER. I have not, Senator, had time to study the Eagleton bill which I received just today.

Senator AIKEN. I will have to say that I have not either, but I noticed there is a difference there. We won't go any further on that because we don't have the answers.

I have a couple of other questions and then I will be through.

### AUTHORITY TO COMMIT U.S. ARMED FORCES UNDER U.N. OBLIGATION

Hardly anyone questioned President Truman's action in committing the Armed Forces in Korea in 1950. Was our obligation under the U.N. Charter such as to authorize the President to take the action he took without authorization by Congress?

One of the few members of Congress who did question Truman's action was Senator Watkins of Utah who said at the time that, if he were President, he ". . . would have sent a message to the Congress of the United States setting forth the situation and asking for authority to go ahead and do whatever was necessary to protect the situ-

ation." Was Senator Watkins correct or was President Truman acting within his legitimate powers?

Under any of this proposed legislation could we be committed by an international political organization, such as the United Nations, of which we are a member? Could the President use that?

Dr. COMMAGER. I did touch on that in my statement, noting that the Congress was, in fact, in session, that nothing was to prevent Mr. Truman from turning to Congress to receive authority. I think for that time, and for the future, the situation would have been much better and clearer had the President done so.

There was no doubt whatsoever that he would have received the necessary authority in that crisis, and I think there is a very interesting but unresolved question whether the President can act on his own without congressional authority pursuant to a resolution of the Security Council.

My own conclusion is that while we have no legal precedent except Mr. Truman's on this, that it is highly doubtful whether this is sufficient constitutional authority for the commitment of American armed forces abroad; and that aside from legality it is much wiser and much better if he did, in fact, consult the Congress, even with authority from the United Nations or other international bodies.

Senator AIKEN. You would also say it would be questionable then whether the United Nations could commit us——

Dr. COMMAGER. Very questionable.

Senator AIKEN (continuing). to war even if the President said they were right.

Dr. COMMAGER. Indeed, I think that has been so held in other fields. A mere commitment by treaty does not necessarily apply without congressional action.

### WOULD PRESIDENT VETO THIS TYPE LEGISLATION?

Senator AIKEN. Yes. Don't be surprised if this committee reports some proposed legislation to the Senate and to the Congress. But assuming that legislation with the general objective of these three pieces, which may be changed in detail or wording, and probably will be before being reported out, is passed, would you expect any President to veto legislation of this type if it were passed? Would he be justified in doing so?

Dr. COMMAGER. I should not expect a veto of a bill of this kind. After all, there is no veto of the bill repealing the Tonkin Bay resolution. The President would not, I think, be justified in doing so, for the veto power should be used with great caution. But whether he would find himself required by this bill, whether, let us say, the last two Presidents would change their conduct in the light of this bill is a question that I suppose you can only speculate on, Senator.

Senator AIKEN. You feel that any President in the future might perhaps fall back on the old method of interpretation?

Dr. COMMAGER. He might, sir; yes. It has happened. But resolution bills of this kind have a cumulative effect, and the Cooper-Church resolution and Senate Resolution 85 and others have a cumulative effect.

Senator AIKEN. We have so many instances where interpretation has proved to be more powerful than legislation.

Dr. COMMAGER. Yes.

Senator AIKEN. That is all, Mr. Chairman.

The CHAIRMAN. The Senator from Wyoming.

Senator MCGEE. Thank you, Mr. Chairman.

COMMENDATION OF THE WITNESS

First, I want to salute my good friend, Henry Steele Commager, this morning. I am a bit humble to sit before him again. I look upon him from the point of view of a student at a professor of stimulating seminars in the history of our country.

Senator AIKEN. If the Senator will yield. I look upon him as a half constituent.

Senator MCGEE. That phrase might be taken negatively. You ought to say a full constituent. [Laughter.]

But it is a treat to be here, and I just mentioned to the chairman that Dr. Commager is one of those refreshing historians who never grows old, and I think you reflect that here this morning, sir.

VACUUM SITUATION IN NUCLEAR AGE

The question that brings us here, however, I think, is the culmination of the dialog in the Senate, the colloquies, on Senate Resolution 85. That makes this a successful morning and the occasion of this series of studies and examinations of Presidential power and the power of the Senate much more meaningful.

I felt for a long time that we were spending more time than the circumstances warranted in trying to figure out who did what to whom in order that we could hang a bell on somebody rather than coming to grips with the reality that brings us here; namely, that in this day and age, in the nuclear age, we really found ourselves in a vacuum situation.

The Constitution didn't envisage the 1950's and 1960's and couldn't have addressed themselves to those problems. We have had to live with them; and, I think, this bill, with some constructive solutions at the end, may begin to address itself now to the updating of the age-old question of Executive power.

IMPLICATIONS OF UNDECLARED WARS

Would you care to comment on the implications of the circumstances of undeclared wars in these times? Hasn't this really complicated our question a good bit from the good old days when people were honorable and declared wars?

Dr. COMMAGER. Enormously, sir. There practically are no declarations of war any more. It is quite true there are not. Mr. Hitler did not declare war except against the United States, and the declaration of war has suffered from what Cleveland called innocuous desuetude.

The real problem, though, is not so much an undeclared war as of unauthorized use of war power. I do not think we should confuse these two things, Mr. Senator. The declaration of war is something which clearly involves both branches of the Government. The use of

the war power, with or without a declaration, which amounts to much the same thing as your question itself indicates, has been carried on by one branch of the Government; and the problem that confronts us is how to restore not so much the technical authority of the Senate over declarations of war, as the principle of the Founding Fathers and, I believe, of our history, that the representatives of the people must be involved in warmaking and the decisions on war as much as the executive branch. And the great problem is to make some provision for this while, at the same time, taking care for the welfare and the survival of the Nation. It is to that point that I was addressing myself as you entered, Senator, and the question of whether, in fact, looking over the past quarter century there has been time for consultation or there has been time for second thoughts. I did not find any instance where there was not time for consultation with the Senate or where the delay of a few days or a few weeks or perhaps a permanent delay, which I would have preferred in many instances, might not have been more satisfactory.

Senator McGee. Are you separating now consultation from a full-blown Senate debate on, let's say, a declaration of war?

Dr. Commager. I made that separation, Mr. Senator, because I did propose in certain circumstances the creation of a permanent committee, which could consult, of the Senate.

Senator McGee. Yes, I noticed that in your final proposal but in your generalizations just now are you separating those two?

Dr. Commager. I should support some formal reference to the Congress. I used the word consultation very deliberately in a broad sense to take care of all these agencies, but the preferred situation is clearly that of turning to the Senate for authority and to the House for appropriations and for authority, and I could think of no instance in modern times when it would not have been possible, and I think in looking back, desirable.

I don't think the emergency in Santo Domingo, for example, or the emergency at the Bay of Pigs or even the emergency in Vietnam, and so forth, was of such a nature as to preclude the possibility of such formal consultation.

### CONSULTATION CONCERNING LIMITED ACTIONS

Senator McGee. There are those who argue rather tellingly, I think, those who are equally fine students of constitutional powers and constitutional history, that we are living in an age perhaps when never again can a war be declared unless it is the last war, whatever that may be. But it still may be necessary to wage limited actions, and this is where we fall in what I describe as the vacuum area under the original constitutional background.

Dr. Commager. You are quite right.

Senator McGee. You would disagree with that.

Dr. Commager. I would not. But I do not see that that affects the situation of consultation with or support in a formal fashion from the Congress. I cannot think of wars of that kind that would not have given time and opportunity for such reference to the Congress.

Now, it is too obvious an observation to emphasize, we can always

hypothesize situations that might arise; I do not think as a general rule we should legislate on the basis of these hypotheses.

I remember quite clearly, as you may not since you are a very distinguished young Senator, Mr. McGee, the great debate over the Bricker amendment.

The Bricker amendment was supported by the argumentum *ad horrendum*. Those who supported it conjured up an incredible number of awful things that might arise if we did not provide against them in advance.

That argument is, I think, fatal to the maintenance of government altogether. Under the Constitution as it now stands the President could veto every bill; under the Constitution as it now stands the Congress could fail to make any appropriations; the whole thing could collapse.

We cannot provide for all contingencies and I think we must base ourselves (1) on precedent in the past; and (2) on the likelihood. I cannot conceive a situation of undeclared war which would not provide time, either for consulting the Congress formally or for consulting such committee as I propose, which could in an emergency speak for the Congress.

In the event, needless to say, of an atomic attack all constitutional and legal questions would disappear. That, of course, is taken care of by this bill and all bills which have come before you.

Senator McGee. I am flattered by your reference to my youth, sir. But I must report for the record that when the Bricker amendment was at its peak in the consideration in the Congress, and I think it was around what, 1952, 1953.

Senator Cooper. It was 1954.

Senator McGee. It was in the fifties. But in any case, I was lecturing vigorously against it in a town called Marion, Ohio, at a dinner group, when into the back of the room walked Senator Bricker. He was home visiting his constituents, and saw there was a meeting there and he wanted to come in and say hello to the people. I was caught in that particular bind.

I did not change my position opposing it, but he was always very gracious, and said this was not his night to make a speech. So I am not unmindful of your analogy there with respect to the Bricker amendment.

### INTENT OF EXECUTIVE ACTIONS IN RECENT YEARS

But, let me go back to the point you were pursuing, sir.

Would you agree with another generalization on these recent years that many of the actions originally taken by an Executive, and usually with some consultation that is not——

Dr. Commager. Not formal; informal.

Senator McGee. Not debate, but consultation——

Dr. Commager. Yes.

Senator McGee (continuing). were taken not with the intent at that time of war, that is war in the old-fashioned sense, but that one of these positions eventually would lead to the next, and that to the next, and that this likewise creates one of those vague areas where we really had no guidelines of any meaningful sort unless we had our personal convictions about the wisdom of such a decision at that time.

But I think that ought to be ruled out here. It is a question that the steps were taken, and taken conscientiously and, I think, by a succession of Presidents, none of whom were conspiring to do in the Congress, to get the country into war or to louse up anything else in the world. But the events of the time led into the embarrassing circumstances that everybody is now so wise about in hindsight.

Dr. COMMAGER. You are entirely right, Mr. Senator. I have consistently rejected the conspiracy theory, the devil theory, or any of these theories that it is profitless to pursue in these matters.

I do remind you, although I need not since you have been a professor of American history, that this is not a new situation; that Jefferson embarked on a series of acts which involved us in a war with England; that, in a sense, the 10 to 12 years' efforts to annex Texas and annex Mexican lands involved us in a war with Mexico; that a whole series of events culminating in the secession of the Southern States and the seizure of various forts and arsenals by the South, and so forth, led up to Fort Sumter, and the situation in which we found ourselves in April of 1861, and that for years from 1895 to 1898 we were more and more involved in the crisis of the struggle for Cuban independence, and there was ample power and time there for consultation, but we drifted in closer and closer until the *Maine* exploded.

The same situation was true in World War I and World War II. This is a development we should by now be amply familiar with, and if it has a moral lesson, it is this: that once involvements start they have a way of getting bigger and of springing surprises on you. The concern for Cuba ends up with the explosion of the *Maine*. The explosion of the *Maine*, Senator, is, in a sense, symbolic. There will always be a *Maine* to explode. There will always be a *Maddox* to get fired at. There will almost always be something of that kind to occur, and wise statesmen anticipate that and, therefore, take action well in advance of these occurrences to prevent them, if possible, to consult where consultation is necessary.

### PENCHANT FOR FOCUSSING ON THE PAST

Senator MCGEE. The concern when I filed my minority report on Senate Resolution 85—and I must admit it was a very minority report—was really to try to focus on where we ought to go rather than quite so much on where we had been.

We seem to have a penchant in our country's history for spending a great deal of time in oratory in preventing the last war.

Dr. COMMAGER. Quite right, or in fighting the last war, sir.

Senator MCGEE. We spent that time on World War II; we have spent it now on the Vietnamese crisis.

My youth in college was spent preventing World War I, and the submarine warfare, and the war with the Kaiser, and so on, and each time while we were obsessed with that, the new one sneaked up from the other direction. Hitler caught half of the country, at least, by surprise in spite of the warnings. I mean the country was badly divided until the Japanese delivered us by attacking Pearl Harbor. That reunited the ranks.

In modern days, I do not think we will ever again enjoy that kind of luxury. What it means now is that we are now, in my judgment,

constructively trying to lay out some thoughtful lines of procedure between the Executive and the Legislature that will be in the best interests of the Republic.

CONGRESSIONAL SUPPORT AT TIME OF TONKIN GULF

I think it is even open to question whether if we would have had a request for a declaration of war in Vietnam, for instance, in August of 1964, at the time of Tonkin Gulf, that it would have been rejected.

Dr. COMMAGER. I agree with you.

Senator MCGEE. I think it likely it would have been ratified, given the mood of that particular moment.

Dr. COMMAGER. It might very well be.

Senator MCGEE. And thus, had we followed the old-fashioned procedures under the Constitution, it would have produced no different result. But no one can say with certainty that that would have been the case.

But the support of the resolution, however one wants to hindsight it now, was rather substantial in the Congress, as I recall.

Dr. COMMAGER. I believe only three dissenting votes.

Senator MCGEE. Two or three. So again that suggests that the old procedure was not even relevant to the thing that concerns us here. The completely changed circumstances and the completely changed momentum of events does affect us now.

CONSULTATION CONCERNING DECISIONS IN MOMENTS OF CRISIS

You single out in your statement my generalization in my minority report that there might even be times when a quick decision is necessary even before you could assemble a quorum of the Congress.

May I submit, sir, that you ought to try getting a quorum of the Congress sometime. It is not altogether easy.

Second, I think there is enough uncertainty or enough division of honorable judgment over the crisis moments in Santo Domingo, however lousy the thing may have turned out in the minds of others. And certainly at the time of Korea, even though there was consultation. We could also include the time of the decision in Lebanon or the time the Marines were first sent to Thailand up the Mekong River back in 1962, that did not lead to war.

But the kind of a decision that had to be made in the moment of crisis that could have led to a war and thus might have become the focus of our committee's concern would not lend itself to long debate. This is simply saying, it seems to me, that there is a change in the timing of things that does not afford us the comfortable luxury of considering these things in the Congress in our traditional independent ways in that regard.

Dr. COMMAGER. What you say is, of course, true, Mr. Senator.

FAILURE TO GIVE FULL INFORMATION TO PUBLIC AND CONGRESS

It makes me regret that I omitted one section which I had proposed to put into this report, which seemed a bit irrelevant but now is, I think, relevant, one that would throw some light on the question of the

vote that would have happened in the Congress on Vietnam, throw some light on the situation in Santo Domingo and elsewhere. That is the failure of the Executive—again, I think not a failure on the basis of immorality—to give full information to the public and to the Congress; the aura of secrecy that hangs around so much of the conduct of foreign relations so that the Senate was not, in fact, fully informed. I appeal to the distinguished gentlemen here that the true situation at the time of the Tonkin Bay attack was not revealed to the Congress or to the public.

The Congress was not fully and accurately informed of the situation in Santo Domingo. The 1,500 or so bodies that were supposed to be lying in the streets turned out to be, I think, a total of three or four. And so forth, and so forth, in crisis after crisis.

What is, I think, called for both in this area and in the area of the executive agreement—need I observe that the agreement with Franco over the defense of Spanish air bases has been modified by secret memorandums on two occasions, neither of which, to the best of my knowledge, had been submitted to the Congress or to this committee. I am open to correction on this matter. But, as I read the evidence, the testimony, the secret memorandums were not available to you.

If the executive branch is going to conduct foreign relations under cover of secrecy, it is, of course, quite likely that it can obtain from the Congress what it asks for at a time of alleged emergency.

What is needed here, and what is to the interest of all, is a far fuller disclosure of the facts of the case and an opportunity to inquire into all of the papers.

I find in I. F. Stone things I do not even find in the New York Times. Perhaps we need more I. F. Stones around to disclose things that otherwise are missed.

I think that such disclosure, with open debate, would not, in fact, endanger the safety or security of the United States. I have never believed that secrecy was an important ingredient in security. Indeed, on the contrary, I think if everything we knew were made available to any potential enemies total confusion would result, and no action could conceivably take place for 2 or 3 years while they were digesting our information.

But, quite aside from that, you cannot change one move on the chessboard without changing all the others.

Had the Senate been in possession of everything we now know about the situation in Southeast Asia in 1964, I think it is highly questionable whether they would have passed the Tonkin resolution, and highly doubtful whether you could have gotten a sufficient vote for a declaration of war.

### DECISIONMAKING WITHOUT ADVANTAGE OF HISTORICAL HINDSIGHT

Senator McGee. I think you make a very good point there and, if I may extend that point just a little, part of our problem is that you must reach that point in decisionmaking where you do not have the advantage of historical hindsight. That is, if you could wait in August 1964, if you could have waited in December 1941, if you could have waited in April 1917, until you had the advantage of 4 or 5 years of

history, you might have made a different decision. But history is not that kind to us.

Sometimes an event, given its immediate setting, seems to require a decision. Now, there are those in our profession, both now deceased, bless them—Charlie Tansill and Charles A. Beard—who believed that the decision to proceed against Hitler was a grievous one, in deep error, and they became wiser on it as time passed, and said had there been more time there would have been no American involvement in that particular case. I think they are wrong.

But my point is we are now judging an event beyond the time that we might have had to make the decision. When you are on the spot, when you are a President, when you are a Foreign Relations Committee, when you are a Senator, there are conceivably those circumstances where you have to do the best you can with everything that is known. I think that was true of Tonkin Gulf at the time.

I do not think that a great many things were known then, but I think the bulk of what was known became the basis for an overwhelming decision, even though many rued it later.

### TIME FOR FULLER DEBATE IN EMERGENCY CASES SUGGESTED

Dr. COMMAGER. Mr. Senator, in this I do not agree with you. I think you loaded the dice when you said 4 or 5 years. I think 2 or 3 weeks would be sufficient in every one of these cases. Consider the three instances you cited. April 1917, we had had a couple of years of debate and discussion; August 1964, nothing would have happened if we had discussed it for 6 months. We might have stayed out then; and looking back now we can see that there was no emergency threatening the safety or security of the United States from the so-called attack on the *U.S.S. Maddox*. We would have stood firm even if the Vietcong had hit the *Maddox*, which no shots actually did.

December 1941 is a different situation. We were then attacked, and that situation is not relevant. Everyone agrees that when we are attacked we must respond, and all of the resolutions take care of that emergency.

I think, therefore, in every one of the cases I can think of nothing that would have endangered in any way the welfare or safety or security of this country had there been time for a fuller debate.

### U.S. ENTRY INTO WORLD WAR II

Senator MCGEE. I should have omitted the actual Japanese attack. Mr. Roosevelt thought, as President, that, whatever else, Hitler had to be confronted. As everyone recalls, there was a very serious split in the country.

Dr. COMMAGER. Yes. He was quite right.

Senator MCGEE. Without the Japanese attack on Pearl Harbor, which was quite unrelated to the threat of Mr. Hitler, there still would have been a difficult time of a declaration of war, and my point is that hindsight would have made that possible.

Dr. COMMAGER. I was in entire agreement. I was a member of the White Committee for pushing us into closer relations with the allies.

Looking back at it, I do not think we would not have gone to war in

1941 had it not been for the egregious folly of the Japanese. We might have drifted along for another year by which time Britain would have been conquered.

Senator McGee. I think Roosevelt's feeling was that he feared another situation like James Madison in 1812, and he was proceeding to war, as he was preparing to do. I think his story, as Sam Bemis put it, was, "Roosevelt tricked us into war." There were some devious steps, as Tansill said—

Dr. Commager. I do not trust either Mr. Tansill or Mr. Beard.

Senator McGee. But they were great in the profession and were distinguished American historians, even though they had another point of view which I did not share either.

Dr. Commager. Nor did I.

CONSIDERATION OF FUTURE RATHER THAN PAST SUGGESTED

Senator McGee. The last point to mention here, I think, is that I am hopeful as we approach this legislation that we do not let the sting of recent events, the sting of our own hindsight memories about it, cause us to overreact as we now seek to sketch out guidelines for the future.

I think what you have just said makes a very real point for those of us on the committee; namely, that we ought to be publicly, on television, in a hearing room, or on the floor of the Senate, spelling out where we go from here. We ought to spend a great deal more time than we do considering what we do with mainland China. This decision is not going to go away. We should have formulated a policy long ago.

We have spent too much time preventing the Vietnam war when the next crisis is likely not to be the same at all. One of the mistakes we made in Vietnam was that we assumed it was another Korea.

Dr. Commager. Yes.

Senator McGee. We addressed ourselves to the things we learned in Korea, and they were all really unrelated lessons. So I think that the net result of these hearings is all good, all positive, in terms of what they are addresed to. I hope that we do come up with some wise answers.

I still have serious misgivings in my own mind now as to whether a free and open society can meet the test of these times and in world leadership. I am not sure. I think we must, and I know somebody wise enough will find a way. But I am not as sure as I once was that we can, and this leads me to serious misgivings.

Dr. Commager. May I make two or three brief comments on what you just said, and they will be made quickly.

One mistake we made, as to China, was to presume it was Mexico in 1914, and to think we could base recognition on morality as President Wilson did with the Huerta government in Mexico. We should have learned a lesson in that matter.

The second observation is the danger of conjuring up hypothetical dangers, which is not new. I am very familiar with this technique because I was deeply involved in the struggle against the misuse of loyalty tests and loyalty legislation and security clearance from President Truman on, especially in the McCarthy period.

The whole of that body of legislation and of congressional intervention was based on the assumption that there might be treasonable activities, that there was a Communist conspiracy, that all sorts of subversive things might happen, and that these could somehow be dealt with by taking prior action of making absolutely sure of loyalty and of security.

Looking back on that chapter, I think almost everyone will agree that the policies then adopted were unwise, and that they proved deeply misguided, and that you cannot, in fact, by anticipating dangers, guard against them in specific ways of this kind.

I think we must assume that future history will not totally confound and confuse us; and that there will be the intelligence and the judgment to respond to such crises as arise; but that the response should be consistent with the traditions of our own character and our own political history.

Nations cannot, in fact, divorce themselves from their past; our character is one, our history is one, which is based on the assumption of congressional participation in the great decisions that spell life and death for the Nation, and that determine the future of history. That has worked reasonably well in the past where it has been observed. It has not worked very well where it has not been observed. It is for this reason that I would like to return to what I regard as a great tradition of the conduct of politics and of foreign policy.

Senator McGee. Thank you, sir.

ARTICLE IN 1961 CORNELL LAW REVIEW

I would ask, Mr. Chairman, perhaps it would be appropriate to include in the record one of the documents that I have referred to before because it relates to this problem, even though, perhaps, the chairman has strong disagreement with it. That is the chairman's article in the Cornell Law Review for 1961 in November. Because it was written in a different time, it is somewhat unfair because many things have happened in the decade of the sixties. Nonetheless, it was a real think piece and, I think, its contents belong in the dialog and in what this committee will be weighing. Some relevant questions were raised about the change of the pace in the nuclear age and the requirements that it made. I think the conclusion then was that we might reluctantly have to turn to more Executive power, but to try to curtail it in ways or at least watch over it in ways that we had not yet fully spelled out at the legislative branch. I think the positive side of the article will merit consideration here, if that is permissible.

The Chairman. I have no objection. Without objection, so ordered.

(The information referred to, follows:)

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American Foreign Policy in the 20th Century Under an 18th-Century Constitution*

(By J. William Fulbright)

In a world beset by unparalleled forces of revolution and upheaval, we Americans are confronted with the painful and urgent duty of re-examining the func-

* This article was delivered as the sixth Robert S. Stevens Lecture at Cornell University on May 5, 1961.

tional adequacy of some of our most hallowed and hitherto unquestioned institutions. The question we face is whether our basic constitutional machinery, admirably suited to the needs of a remote agrarian republic in the 18th century, is adequate for the formulation and conduct of the foreign policy of a 20th-century nation, pre-eminent in political and military power and burdened with all the enormous responsibilities that accompany such power.

I raise this question with a feeling of sadness and more than a touch of historical nostalgia. The delicate structure of federal decentralization, and of checks and balances on the national level, have served this heterogeneous nation well in its internal life, restraining us from hasty and ill-conceived actions and protecting us from the tyranny of both individual men and fervent majorities. Except for the tragic Civil War of a century ago, we have had a remarkably successful history. The system has proven durable and has served as a framework within which we have been able to provide a good life for most of our people.

I emphasize that this system has served us well in our *internal* life, and if our life as a nation were essentially domestic and not irrevocably linked to the life of the other peoples on this planet, no questions would have to be raised. At least since 1917, however, and for perhaps a good deal longer, our internal and external affairs have become increasingly interwoven; meanwhile, the ability of this nation to preserve the value system which constitutes the core of our national interest has come to depend principally upon our ability to cope with world-wide revolutionary forces.

The dynamic forces of the 20th century—communism, fascism, aggressive nationalism, and the explosive awakening of long quiescent peoples—are growing more and more unmanageable under the procedures of leisurely deliberation which are built into our constitutional system. To cope with these forces we must be able to act quickly and decisively on the one hand, and persistently and patiently on the other. We must make decisions which are painful and some which do violence to our fundamental values. We must do these things if we are to survive in a world that obstinately refuses to conduct its affairs under Anglo-Saxon rules of measured and orderly procedure.

My question, then, is whether we have any choice but to modify, and perhaps overhaul, the 18th-century procedures that govern the formulation and conduct of American foreign policy. More specifically, I wonder whether the time has not arrived, or indeed already passed, when we must give the Executive a measure of power in the conduct of our foreign affairs that we have hitherto jealously withheld.

The source of an effective foreign policy under our system is Presidential power. This proposition, valid in our own time, is certain to become more, rather than less, compelling in the decades ahead. The pre-eminence of Presidential leadership overrides the most logical and ingenious administrative and organizational schemes. The essence of our "policy-making machinery" and of the "decision-making process"—concepts of current vogue in the academic world—is the President himself who is neither a machine nor a process, but a living human being whose effectiveness is principally a function of his own knowledge, wisdom, vision, and authority. It is not within our powers to confer wisdom or perception on the Presidential person. It *is* within our power to grant or deny him authority. It is my contention that for the existing requirements of American foreign policy we have hobbled the President by too niggardly a grant of power.

Our institutional arrangements for foreign affairs were drafted in the late 18th century by men who assumed that these affairs would be few and insignificant. The Founding Fathers considered, for instance, that the Department of State would quite possibly wither away from disuse. Nonetheless, these men, deeply imbued with the philosophy that no man is beyond the corrupting influences of power, carefully restricted the authority of the President by the prerogatives of "advice and consent" vested in the Senate, and by the still broader limitations of the legislative process as a whole. As foreign policy has become increasingly merged with domestic policy, and as its conduct has increasingly involved the expenditure of vast sums, Congressional authority, particularly that of the House of Representatives, has been accordingly enhanced. It is exceedingly difficult—if not impossible—to devise unified policies oriented to a clear and definite conception of the national interest through a system in which power and responsibility for foreign policy are "shared and overlapping." Policies thus evolved are likely to be ill-co-ordinated, short-ranged, and often unsuccessful, while the responsibility for failure is placed squarely on the President, neither "shared" nor "overlapping." As President Kennedy said

recently: "Success has many fathers; failure is an orphan." He might have added that every President finds himself the involuntary proprietor of a vast, unruly orphanage.

The President already enjoys far greater authority in foreign affairs than in domestic policy, but it is still authority that falls short of his responsibilities. The President, according to the Supreme Court in *United States v. Curtiss-Wright Export Corp.*,[1] is vested with "delicate, plenary, and exclusive powers" in the conduct of foreign affairs. While it is not for me to query the juridical basis of this dictum, I do not think that it is accurate in fact.

The pre-eminent responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs "which the Constitution does not vest elsewhere in clear terms." He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation's power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus. As Commander-in-Chief of the armed forces, the President has full responsibility, which cannot be shared, for military decisions in a world in which the difference between safety and cataclysm can be a matter of hours or even minutes. The President is the symbol of the nation to the external world, the leader of a vast alliance of free nations, and the prime mover in shaping a national consensus on foreign policy. It is important to note, however, that while this responsibility is indeed very broad, his authority is often infringed upon or thwarted in practice by unauthorized persons.

Each new President, on taking office, inherits a complete foreign policy in being, with roots as far back in the past as Washington's Farewell Address and the Monroe Doctrine. He must preserve, implement, and—in our own time—frequently reshape these broad lines of policy, taking care not to violate the deep psychological bases of our "national character," or what Walt Rostow calls the "national style."

The President's power is informally but effectively checked by the workings—or, more precisely, the non-workings—of the sprawling administrative apparatus of government, with its complex subdivisions and overlapping jurisdictions. The Department of State, it is estimated, participates in a vast number of interdepartmental committees dealing with problems of foreign policy. The road between a Presidential directive and its practical implementation is long and tortuous. The complexity and seemingly built-in inertia of the bureaucracy make it much easier and much safer on the operative level to continue time-honored routines than to embark upon new initiatives. It is much easier and much safer to pursue policies which proved to be successful ten years ago, but which have been made obsolete by recent events, than to try to meet recent events by novel and perhaps risky policy changes.

In a statement before the Senate Committee on Foreign Relations in 1959, Professor Hans J. Morgenthau summed up the situation in these words:

"The executive branch of the government is constituted in such a way, particularly with regard to the conduct of foreign policy, as to make it virtually impossible to pursue consistently a dynamic foreign policy which takes the initiative away from the enemy and which is mobile enough to answer effectively sudden challenges which may confront us."

Calling for drastic simplification of the processes of bureaucracy, Professor Morgenthau declared:

"I think it is not by accident that Mr. Dulles to a great extent disregarded the institutional processes of foreign policy formulation and reached many important decisions without reference to them. It is the only thing he could have done when he was confronted with a task which required immediate decision."

The principal subordinate of the President in the foreign policy process is, of course, the Secretary of State. The Office of the Secretary of State, unlike its counterpart in most parliamenary democracies, is scarcely defined in institutional terms. The Secretary is the creature of the President, with as extensive or restricted powers as the President may choose to give him. The President can take his counsel from whomsoever he chooses. President Wilson, for example, relied heavily on Colonel House, who held no official position, and virtually ignored Secretary Lansing, whom he neither liked nor trusted. President Roosevelt relied little on Secretary Hull and was in great measure "his own Secretary of State." Under President Eisenhower, on the other hand, Secretary Dulles seemed at

times to be exercising those "delicate, plenary, and exclusive powers" which are supposed to be vested in the President.

The lack of clear institutionalization in the office of the Secretary of State, as well as the absence of a continuing corps of high-level professionals in the Department of State, in sufficient numbers and quality, *add* a most deplorable element of disorder and amateurism to the inherent defects of an overly complex bureaucracy.

The overriding problem of inadequate Presidential authority in foreign affairs, however, derives not from the internal relationships within the executive branch, but from the "checks and balances" of Congressional authority in foreign relations. While Congress has many powers under the Constitution, having to do with foreign affairs, these powers do not enable the Congress to initiate or shape foreign policy, but to implement, modify, or thwart the proposals of the President. These powers, moreover, are widely dispersed within Congress, distributed among autonomous committees each under a chairman who owes little if anything in the way of political obligation to the President.

Besides the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs, the principal centers of foreign policy power in Congress are the Armed Services and Appropriations Committees in each House. The Appropriation Committees are particularly sensitive to the preservation of their prerogatives against executive incursions, with the result that it is all but impossible to secure funds on a long-range basis. The Mutual Program, one of the keystones of our foreign policy, is put in jeopardy annually by the lengthy ritual of hearings, debates, and amendments to the President's proposals. The Secretary of State and other high officials are obliged to expend prodigious amounts of time and energy in shepherding their programs through the glacial legislative process. For any given program, an Administration spokesman must usually appear four times before Congressional units, before the authorizing Committees of each House and then before the two Appropriations Committees.

The appropriations process in Congress, moreover, is governed by a basically faulty attitude. The central consideration is invariably *money* rather than *policy*. The annual debate on foreign aid is focused on the single question: How much money ought we to spend? Instead the truly vital question should be: What kind of policy ought we to have? It is policy that should be determined first, and this determination should provide us with the rationale by which it is decided how much we ought to spend. As Professor Morgenthau said when he testified before the Senate Committee on Foreign Relations in 1959:

"If you ask me how much money we ought to spend, I couldn't tell you. I would say we ought to spend sufficient money to keep India going. This might be twice as much as we are willing to appropriate or half as much. I wouldn't know. . . ."

These difficulties are further compounded by the premium which our political system places on localism and parochialism.. Foreign policy is scarcely ever the crucial factor in the election of Congressmen. The rise of a successful politician to power in the United States bespeaks an impressive measure of skill in two areas: the ability to satisfy the domestic needs and desires of a substantial portion of our citizenry, and the ability to manipulate political machinery with shrewdness and deftness. At no point in his rise to powerful office does the typically successful politician find it imperative to school himself in the requirements and problems of foreign policy. Indeed his preoccupation with local matters and with political machinery is virtually *bound* to prevent him from acquiring any breadth or depth of knowledge in the field of foreign affairs.

With their excessively parochial orientation, Congressmen are acutely sensitive to the influence of private pressure and to the excesses and inadequacies of a public opinion that is all too often ignorant of the needs, the dangers, and the opportunities in our foreign relations. Walter Lippmann, as astute an observer of the political process as we have in American journalism, contends that public opinion consistently lags a generation behind in its attitudes and assessments of international relations. The tyranny of public opinion, says Lippmann, imposes upon our policy-makers a "compulsion to make mistakes." The poet Yeats was not wholly wrong when he laid down this harsh pronouncement on public opinion: "The best lack all conviction—the worst are filled with passionate intensity."

These views may be overstated, but they are not wholly without merit, and I point to them in order to stress the point that public opinion must be educated and led if it is to bolster a wise and effective foreign policy. Only the President can provide the guidance that is necessary, while legislators display a dstressing

tendency to adhere to the dictates of public opinion, or at least to its vocal and organized segments.

I return now to my basic question: Are our formal political institutions basically inadequate for the requirements of our foreign policy? Harlan Cleveland, former Dean of the Maxwell School of Citizenship and Public Affairs at Syracuse and now Assistant Secretary of State for International Organization Affairs, stated the problem succinctly when he commented: "We know in our hearts that we are in the world for keeps, yet we are still tackling twenty-year problems with five-year plans staffed with two-year personnel with one-year appropriations."

And there is wisdom for the present in Abraham Lincoln's words:

"The dogmas of the quiet past are inadequate for the stormy present. The occasion is piled high with difficulty and we must rise with the occasion. As our case is new, so we must think anew and act *anew*. We must disenthrall ourselves and then we shall save our country."

The question I put, without presuming to offer solutions, is whether in the face of the harsh necessities of the 1960's we can afford the luxury of 18th century procedures of measured deliberation. It is highly unlikely that we can successfully execute a long-range program for the taming, or containing, of today's aggressive and revolutionary forces by continuing to leave vast and vital decision-making powers in the hands of a decentralized, independent-minded, and largely parochial-minded body of legislators. The Congress, as Woodrow Wilson put it, is a "disintegrated ministry," a jealous center of power with a built-in antagonism for the Executive.

I have no objection to this arrangement in its own terms, and I wish that the conditions of tranquility in which this system flourished were still in existence. They are not, however, and I submit that the price of democratic survival in a world of aggressive totalitarianism is to give up some of the democratic luxuries of the past. We should do so with no illusions as to the reasons for its necessity. It is distasteful and dangerous to vest the executive with powers unchecked and unbalanced. My question is whether we have any choice but to do so.

Another aspect of the question of the appropriateness of our institutional structure for the effective formulation and conduct of our foreign policy is the dual role which the President of the United States is compelled to fill. He is both head of state and head of government, both King and Prime Minister. If he fails to fulfill the requirements of either of these roles with skill and success, he seriously jeopardizes his effectiveness in the other. President Truman was in many respects a forceful and imaginative head of government, but his failure to make his own person a living symbol of the unity and dignity of the nation contributed to the unbridled partisanship of the early fifties which did grave damage to both his foreign and domestic policies. President Eisenhower, on the other hand, was an exemplary head of state, a virtual personification of the American ideal, but his failure to exercise the *full* measure of his powers and duties as "Prime Minister" was the cause of basic failures and omissions in our foreign policy. President Roosevelt was relieved, because of his physical afflictions, from some of the ceremonial duties required of other Presidents, with the result that he was probably a more effective head of government for this very reason.

Perhaps it is too much to ask one man to formulate and execute national policy, both foreign and domestic, and at the same time to preside benignly over the opening of the baseball season, to present an award to the outstanding boy scout of the year, to crown a beauty queen, and to participate enthusiastically in every ceremonial aspect of our national life.

In neither the parliamentary nor totalitarian systems of government is the Executive called upon to exercise this dual function. While the President's time is consumed and his efforts diluted by innumerable diversions of ceremony, such world leaders as Macmillan and Khrushchev and Mao Tse-tung are able to focus the full weight of their formidable talents and energy on the charting of national policy. I believe we should find some way to relieve the President of the burdens and diversions of ceremony. I do not know exactly how, or even whether this can be done, but I submit that we should try to devise some means of divorcing the duties of the King from those of the Prime Minister.

Let me consider briefly some of the contrasting techniques of policy formation utilized by both friendly and hostile foreign powers.

The outstanding characteristic of the British parliamentary system, by contrast with our own, is the single line of power and responsibility for the initiative, execution, and control of national policy that runs from the Prime Minister

and the Party leadership through the Cabinet and Parliament. With a disciplined party majority in the House of Commons, a British Prime Minister can count upon solid legislative support in virtually all aspects of policy. The Cabinet itself is collectively responsible to Parliament and must give regular accounts of its stewardship through weekly "question hours."

Besides the immense advantages of unified control and responsibility, the Prime Minister is free of the burdens of ceremony and ritual, which are admirably borne by the Queen. The Prime Minister need not take even the time to deliver his own "state of the union message." The Queen performs this service in her annual "Speech from the Throne."

The Prime Minister has final responsibility for the formulation and conduct of British foreign policy, and, unlike the President, he has commensurate authority.

In comparing the powers of the Prime Minister and the President of the United States, the President would appear to have two advantages. He has, first of all, a fixed term of office, no matter how unpopular he may be with Congress or with the voters, he has the constitutional right to retain his office and exercise its powers until the next quadrennial election. The second *apparent* advantage is that the President is supreme within his Cabinet, which has no constitutional status and need not be consulted at all by the President.

Both of these advantages lose a good deal in practice. While the Prime Minister is technically subject to a Parliamentary expression of "no confidence," any Prime Minister who enters office with a safe party majority is, to all intents and purposes, as sure of his five years in office as the President is of his four. And if the Prime Minister is more restricted by the views of his Cabinet colleagues, he is nonetheless usually in a position to exercise preponderant influence in Cabinet deliberations. The Prime Minister's most significant advantage over the President is the extent of his control over Parliament, which, far from being a co-equal partner, is for legislative purposes virtually an assembly under his control.

British foreign policy on the operational level has two distinct advantages over its American counterpart: a Foreign Secretary who occupies an institutionally defined and constitutionally sanctioned office and a professionalized Foreign Office with built-in procedures for continuity of administration regardless of changes of government.

While the American Secretary of State is directly responsible to the President and to no one else, serves only at his pleasure, and may be overridden by the President at any time, the British Foreign Secretary is usually a major political figure in his own right with a long experience and thorough knowledge of the Parliament, ranking high in his party, and being constitutionally responsible to the Cabinet and Parliament as well as to the Prime Minister. The power exercised by the Secretary of State essentially depends on the personality and will of the President. No British Foreign Secretary, on the other hand, has been or could be relegated to quite the ignominy that Lansing suffered under Wilson, or could exercise such great authority as did John Foster Dulles. There are, of course, variations. Anthony Eden played a decidedly secondary role under Churchill, much as Hull did under Roosevelt, but the office and position of Foreign Secretary remain relatively stable.

A change of Administrations in the United States is accompanied by a radical re-staffing of the top policy positions in the Department of State. The result is a periodical infusion of officials often inexperienced in the exercise of governmental power and responsibility. In Britain, on the other hand, a high degree of administrative continuity and professionalism is assured by the existence of a Permanent Under-Secretary of State for Foreign Affairs, who serves as the head of the corps of permanent officials, including the Foreign Service, and who holds office regardless of changes of government. The Permanent Under-Secretary is always at the right hand of a new Foreign Secretary to advise him in the intricacies and prospects of current issues and in the assembling of information and documentation, and to caution him against courses of action which might depart from historic policies or lead the nation into unwarranted or dangerous commitments.

By contrast with Great Britain, the United States suffers from chronic amateurism among the men who bear the chief burdens of decision-making and foreign policy execution. Many of our policy makers have acquired wisdom and vision in the conduct of foreign affairs, but it has all too often been by on-the-job training. Under present circumstances, the conduct of our foreign policy re-

quires an infusion of rigorous professionalism. The trials and errors of untried leaders were of little moment to the affairs of an isolated republic in the 19th century. In the mid-twentieth century, the errors and vacillations of amateurism can quite readily lead to irretrievable, indeed cataclysmic, disasters.

Further light may be thrown on the inadequacies of American foreign policy procedures by an attempt to penetrate the Alice-in-Wonderland facade of Communist institutions with a view to locating the true centers of power in Moscow and Peking.

While the elaborate structure of Soviet "institutions" is replete with checks and obstacles, by contrast with which the American Constitution is a monument of efficiency, these inconveniences are evaded by the simple and effective expedient of overriding institutional obstacles wherever they interfere with the dictates of policy, which is practically everywhere.

The institutions of the state in both the Soviet Union and Communist China are subordinate at all levels to the parallel institutions of the Communist Party, which in turn are subordinate to the will and dynamic personal interaction of a few powerful men exercising undefined and virtually unlimited powers.

The centralization of power in the Presidium of the Communist Party is the overriding characteristic of the Soviet system. Such policy decisions as are deemed appropriate are reported to the representative organs of the Party and state, either for information and propaganda purposes or for the formality of automatic approval. The Presidium in fact is a self-perpetuating body of individuals who, though nominally "elected" by the Central Committee, hold their positions by virtue of their administrative ability, their prowess in the internal political struggles and intrigues of the Kremlin, and their loyalty to the current dictator.

The operations of the Presidium, unlike those of a Western Cabinet, must be understood almost entirely in personal rather than institutional terms. The overriding objective in the shaping of policy, both foreign and domestic, is to get the job done, and if machinery or legal red tape poses obstruction, it is ignored or overridden.

From his vantage point at the apex of both party and government hierarchies, reinforced by his unmeasurable personal authority, Khrushchev exercises virtually unrestricted control of Soviet foreign policy. He does not rule in the high-handed fashion of Stalin, being by nature gregarious, extroverted, and garrulous, and he appears to have delegated substantial authority to trusted subordinates. Mikoyan, for example, is Khrushchev's closest adviser in foreign affairs. In addition to his pre-eminent political power in a totally centralized system, Khrushchev has also proclaimed himself to be chief of state, a ceremonial dignity which he finds convenient in his visits to foreign countries.

One would suppose that these all-encompassing powers and duties would impose upon Khrushchev a far heavier burden of detail and ceremony than those which afflict the President of the United States, but such is not the case. For reasons which are not wholly clear, Khrushchev finds ample time to reflect at leisure on the goals and means of Soviet policy. Walter Lippmann reports that during his recent Soviet visit, he was received by Khrushchev for an interview that lasted eight hours, during which time the Chairman was troubled by no interruptions and appeared to be completely relaxed and free from the distractions which plague our high officials.

The evidence is thus impressive that while the Soviet leader has virtually unlimited authority to act vigorously and decisively, to change courses with dispatch, and to focus the vast resources of the Soviet Union on any objective which he deems pre-eminent; he also has the time and the temperament that allow him to think and talk at length and to chart long-range policy goals.

What is true of the Soviet Union and Khrushchev appears to be even more true of Communist China and Mao Tse-tung. Like its Soviet counterpart, the Chinese Communist Party has absorbed the elaborate institutions of state, and pre-eminent power is lodged in the Party Politburo, the equivalent of the Soviet Party Presidium. Within the Politburo there is a standing committee composed of the highest ranking members of the larger body. The leadership of this inner core consists of Mao Tse-tung, First Secretary of the Party, Liu Shao-chi, Chairman of the Republic, and Chou En-lai, Premier of the Government. These three men, and especially Mao, hold in their hands the real nucleus of power in Communist China.

Mao feels that his all-important position in policy formulation requires freedom from administration and ceremonial tasks. In 1959 he gave up the office

of Chairman of the Republic and he now holds no position in government, allowing himself ample time for the consideration and reflective thinking that he regards as the essential prerequisite to sound policy formulation. In recent years he has apparently made very little attempt to intervene in matters of detail and has for the most part left the execution of programs to his trusted subordinates.

Confronted with adversaries who are thus able to focus unrestrained personal power and vast resources on the advancement of a grand design that, if realized. will mean the destruction of free institutions in the United States and throughout the world, the President of the United States is obliged to organize and lead the defense of the free world through the use of institutions and processes that were designed for a radically different world of almost two centuries ago. I do not contend that we should abandon these institutions, for their preservation constitutes the very core of our national interest. Nor do I offer at this juncture a blueprint for the overhaul of our national policy machinery. I do contend, however—very urgently—that the American people and their leaders must give prompt and serious thought to the need for major changes in the cumbersome procedures of our foreign policy formulation.

As the leader of a beleaguered community of free nations, the United States is under the most pressing compulsion to form wise and farsighted policies, oriented to a clearly conceived concept of the national interest and implemented by carefully devised and firmly co-ordinated specific lines of action. The essence of this compulsion is the conferral of greatly increased authority on the President, coupled with relief from many of his ceremonial duties. The President alone can act to mobilize our power and resources toward the realization of clearly defined objectives and to wean the American people and their representatives from the luxuries of parochialism and self-indulgence that they can no longer afford. The enhancement of Presidential power is, as I have said, a disagreeable and dangerous prospect. It is seen to be a compelling necessity, however, when set against the alternative of immobility, which can only lead to consequences immeasurably more disagreeable and dangerous.

Even in the 1830's, De Tocqueville was able to say:

"Foreign politics demand scarcely any of those qualities which a democracy possesses; and they require, on the contrary, the perfect use of almost all those faculties in which it is deficient . . . a democracy is unable to regulate the details of an important undertaking, to persevere in a design, and to work out its execution in the presence of serious obstacles. It cannot combine its measures with secrecy, and it will not await their consequences with patience. These are qualities which more especially belong to an individual, or to an aristocracy."

The CHAIRMAN. Have you finished?

Senator MCGEE. Yes.

The CHAIRMAN. Senator Case.

PROBLEMS OF DEMOCRACY CONFRONTED BY DICTATORSHIP

Senator CASE. It has been my privilege recently to read an advance copy of Richard Dudman's book describing his experiences as captive of the enemy for 40 days in Cambodia. One of the little vignettes in it comes when he asks one of his captors about Mao's maxim that guerrillas are like fish swimming in the sea.

He wanted to invoke some reaction as to the attitude of his captors toward China. He concludes, however, that one should never try to match proverbs with an Asian after his captor has replied, "Yes, but without the fish the sea is useless."

I bring this up because it seems to me it is stretching a point as to the kind of conflict that we face in the world, not necessarily a new thought but the conflict between a dictatorship and an open society.

Obviously, this revolutionary, this guerrilla, believes in a dictatorship. The very essence of the revolution, although the young people of this country do not recognize it, is that it is an elite operation justified to themselves only, and involving not always explicitly like this,

an enormous contempt for the people—"Without the fish the sea is useless."

Now, the reason I bring it up, of course, is to again put to you the problem a democracy has in relationships in a world in which it is confronted by a dictatorship, and a dictatorship that is moving. It is on the go; it is restless. How can our established forms meet this problem? And this is involved in what we are talking about here in many ways, both in the matter of actual action and in the matter of, I will not say threatened action, but statements as to what we will do in certain cases for the protection of those friendly to us who want protection against aggression, and as statements to the aggressors themselves. I wish you would comment on that.

Dr. COMMAGER. There are a number of things that occur to me as you speak and, if I may, I shall take them almost in reverse order. As far as protection against aggression, it is quite clear that the United States cannot and, indeed, would not, attempt to protect against aggression everywhere on the globe.

We did not go into the Congo, Biafra, Nigeria, India, Indonesia, or other places. We cannot in the nature of things be the peacekeeper of the globe. That is what the United Nations is for, and as long as these dangers exist——

Senator CASE. It is what it is for, but what it is completely impossible to do.

Dr. COMMAGER. Impossible is a dangerous word, sir. We have not ourselves contributed very much to making it possible, and I would like to see an important shift in foreign policy where much more of our energies and our money went into the support of the United Nations to enable it to take on many of the responsibilities which no single nation is able to fulfill.

The second observation to make here is, I think, that while it is true that dictatorships exist in China and Russia and, indeed, in other Communist countries, it is probably true they always have. Before they became Communist, these countries were ruled by an elite which had contempt for the people. It is highly improbable that we can change that any more than revolution has changed it. A strong, slow evolution may change it; outside forces cannot change these things.

The third point is that one of the grave dangers, and you, sir, I think have touched on this yourself on various occasions, one of the grave dangers of an attempt on our part to protect every nation from aggression, or to resist dictatorship everywhere, is that it almost inevitably takes a military turn, and that we then find ourselves involved in precisely the things we are trying to prevent others from being involved in.

We find ourselves turning into a military society, a society dominated, as your chairman has recently observed, by the Pentagon and the Pentagon propaganda machine, by military expenditures. We become a society deeply conscious of, indeed selfconscious about, questions of security and loyalty, turning into a kind of a democratic replica of the militarized societies of the Communist world. If, in the process of protecting, let us say, South Vietnam against what we imagine to be Communist aggression—whether it is or not remains to be seen—we ourselves turn into a different kind of society and aban-

don or repudiate our traditions of individualism and freedom and democracy, that will come at a very high price.

Senator CASE. I appreciate that very much, Dr. Commager, and thank you. But I do want to press you a little bit further here.

U.S. ENTRY INTO WORLD WAR II

You were a member of the committee to get us into World War II and just, I think, in the last few minutes, you mentioned your apprehension that if it had not been for the accidental stupidity of the Japanese we might not have gotten into war for another year, and perhaps Britain would have gone down the drain. Would you have thought that was a better thing than what happened?

Dr. COMMAGER. Oh, no, sir.

Senator CASE. You have not changed your mind about that.

Dr. COMMAGER. I think it was absolutely essential that we enter World War II.

Senator CASE. Why didn't we enter it before?

Dr. COMMAGER. Why didn't we enter before? Because public opinion was not prepared for it. As you remember, Mr. Roosevelt's trial balloon in Chicago, his quarantine speech of 1937, was a miserable failure. Mr. Roosevelt could not rally the country to an appreciation of the grave danger that confronted us. I think that danger was twofold: A direct danger that if Hitler would conquer Europe and move into Latin America, and an indirect danger to the whole of civilization as we know it.

DIFFERENCE IN U.S. RELATIONSHIP TO EUROPEAN AND ASIATIC WORLDS

I am equally persuaded, Mr. Senator, that our relationship to the European world and our relationship to the Asiatic world are different, not only quantitatively but qualitatively. We are indeed not only a European nation, we are the only European nation in the world. All other nations are what they are; they are German, Spanish, Italian, and so forth. We, and we alone, are European. Even the blacks among us are Europeanized. Our whole civilization, indeed our fate, I think, is inextricably tied up with the survival of the things that have flourished from ancient Greece and Rome and England into our own day.

I see no such relationship with Asia. We are not an Asian nation. I do not think we can ever be or that we will ever understand Asia and display wisdom as an Asian power. I, therefore, have no misgivings whatsoever about my concern for coming to the aid of Britain and France in 1940 and 1941, but I have the deepest misgivings, which are confirmed by every day's news, at our involvement in Asia.

Senator CASE. I do not at all—I am not doing this except for the purpose of the discussion, as you know.

Dr. COMMAGER. Yes, sir; I appreciate that.

CONSTITUTIONAL PROPRIETY OF CONSULTING CONGRESS

Senator CASE. I happen to agree with your view about the NATO business and everything else. But are you, in effect, then saying that we should have a different constitutional process in dealing with Eu-

rope and European involvement and activity, and that which govern our actions or nonactions?

Dr. COMMAGER. No, sir; clearly not.

Senator CASE. Make that a little clearer because this——

Dr. COMMAGER. You did not put this in the form of a constitutional question but a larger question of policy, and as a question of policy, I think, the distinction is quite clear.

After all, Mr. Roosevelt did consult continually with the Congress. The two dubious instances which I did cite, the destroyer-bases deal and the occupation of Greenland and Iceland were carried through, at least in theory, as part of hemispheric defense which could be subsumed under the interpretation of the Monroe Doctrine.

They were also carried through in time when it was pretty clear that war was coming, and that there was grave danger of a real military threat to the United States.

My own feeling is that Roosevelt would have been well-advised to have consulted the Congress on both occasions. I do not think he would have found very serious objection. After all, the destroyer-bases deal was the best bargain we ever got and, as far as the other, there would be very little objection.

So I do not see any need to modify this belief in the constitutional propriety of consulting the Senate in the light of history.

Senator CASE. And this goes for the whole gamut, that is to say, not just a formal declaration or refraining from——

Dr. COMMAGER. Right.

Senator CASE. But also stationing troops abroad. That is another point.

Dr. COMMAGER. Stationing troops in Greenland and Iceland was by arrangement with Denmark, and might be subsumed, with some plausibility, as part of the hemispheric defense and was so justified by the President.

I think it would have been wise of him to consult Congress on this matter, but it has somewhat better justification than sending troops to Vietnam had or has.

### DISABILITY OF DEMOCRACIES DEALING WITH DICTATORSHIPS IS NOT INTOLERABLE

Senator CASE. Then you do not feel that democracies are under a disability that is intolerable in dealing with the dictatorships in this area?

Dr. COMMAGER. Yes, sir; that democracy is under some disability is the price you pay for democracy. But, after all, it was the democracies that survived in the 1939 to 1945 war rather than the dictatorships, so something is to be said for the democratic capacity for survival.

Senator CASE. In that particular area.

Dr. COMMAGER. Just as Justice Brandeis said in that very famous opinion in *Myers* v. *U.S.* (1926)—the separation of powers was not designed to achieve efficiency. It was designed to protect the liberties and the rights of our people.

Democracy is to some extent always at a disadvantage. It pays a price for the protection of freedom, the openness of the democratic

processes, that dictatorships do not pay. Heretofore, we have been willing to pay that price, and it has not, I think, been too high.

Senator CASE. I think it is terribly important that we develop this just as fully as necessary and I will take 1 or 2 minutes, Mr. Chairman, if I may, on this question.

POSSIBILITY AND DESIRABILITY OF DECLARATION OF WAR

Now, will the people ever vote to go to war? You can say, of course, that is not the question. Congress passes, deals with the legislation, but would a fully informed people ever go to war? I wonder about this. We did not in World War II. We were pushed into it. We endured unbelievable humiliations under President Wilson's leadership in World War I, as it seemed, at least to those of us on the eastern seaboard. The German-American population in the middle of the country did not feel quite the same way about it, and this I can understand. But can we possibly react in time? And related to this, if you will, and then I will let you go and, Mr. Chairman, and the committee, too, is this whole question, is it desirable to have a declaration of war giving rise to the stirring up of the country of a war spirit and everything that goes with it; get it over with, get everything in, go all the way, defeat the enemy, which is incompatible with a situation in which probably all-out wars would be disastrous for civilization.

Dr. COMMAGER. Yes. I do not think it is desirable at this time to have a declaration of war.

Senator CASE. I do not mean just on this, but as far ahead as we can see.

Dr. COMMAGER. As far ahead? I do not wish to commit myself that far ahead. I am not for a declaration of war with the legalized war powers that would inevitably ensue in our war with Asia. I am not sure that people can see the necessity of war from time to time. Perhaps they are too eager to see that, as they would have been in 1898, when there was enormous populous pressure that pushed the President into war with Spain. I do think that had there been some way of consulting the people in 1917, Mr. Wilson would have succeeded in getting an endorsement. I am not sure that would have been true in 1914, however.

NEED FOR INDIRECT METHOD OF REPUBLICANISM

I do not know, once again, whether that is the crux of the matter. What you need is not so much direct democracy as the indirect method of republicanism which is what the Founding Fathers were concerned with.

The system was, of course, a democratic system, but it was not that of a series of referendums—now almost impossible to conduct—but a method of filtering public will through the Congress, which is our method as a democracy. I think that can be relied on, if you have full information.

It can be relied upon, if the Members of the Congress know what is going on and what the commitments are, if they know what the Pentagon is doing, if they know what the State Department is doing, if they know what the President has committed the Nation to. I have

confidence in the effectiveness of this system which has not, I think, failed us in the past.

Senator CASE. Thank you very much. I appreciate your plug for this matter of increased information, in which I have also been very deeply interested.

Dr. COMMAGER. Thank you, sir.

### EXECUTIVE BRANCH UNWILLINGNESS TO CONSULT WITH CONGRESS

The CHAIRMAN. I would like to pursue the question the Senator from New Jersey has asked you, Dr. Commager. It seems to me that the impact of the war, and especially of television, has caused many people, especially in the executive branch, to sort of give up on democracy. They accept the leadership of Executive and feel that the Congress in some way is inadequate to the responsibilities. I remember some of Dean Acheson's statements in the early 1950's and more recently, Mr. Katzenbach's, that they really do not wish to consult with Congress.

The Executive is not really interested in the views of the 100 Senators or the 435 Congressmen, and if they are not, if they reject the idea that there is any contribution to be made by the Congress, it is very difficult under our system to make them seek it.

Dr. COMMAGER. Very true.

The CHAIRMAN. I thought the question of the Senator from New Jersey suggested that there is a growing feeling in some way that we are inadequate to the existing challenge of the modern day. I do not quite accept this.

I think the real trouble that we have gotten into is because the Executive was unwilling to consult with the Congress. It is the other way around. I think we would be much more effective in meeting the challenges of dictatorship if there were consultation.

I mean the idea that we are told that the war in Vietnam is necessary. Some of our leading Senators say this is necessary for the security of the country. This is a matter of political judgment. It seems to me there is nothing that can undermine the security of the country more disastrously than what we are doing because, as a matter of purely political judgment or security judgment, it seems to me, this and the previous Administration would have benefited very greatly by the refinement of the issues involved by a debate and discussion on the part of Congress.

But there is a loss of confidence, it seems to me, in the very procedure of participation by the Congress.

Dr. COMMAGER. Yes, sir; we had, as it were, Senator, a dry run of this in the Filipino War of 1900–02. Some of you will remember the great poet, William Vaughn Moody, who protested ceaselessly against that war and one of the lines that he wrote comes to mind in the light of the current war. Speaking of "A soldier fallen in the Philippines" he wrote:

> Let him never dream that his bullet's scream went wide of its island mark,
> Home to the heart of his darling land where she stumbled and sinned in the dark.

I think this is what we discovered in wars of this kind, that it is our own constitutional system and our own democracy that is the

sufferer, not that of other peoples to the same extent. They suffer material damage; we suffer political and moral damage, perhaps of an irretrievable character.

That the constitutional system we have had in the past is adequate to the exigencies of international politics, seems to me abundantly clear from the past. It is when branches of it, for one reason or another, abandon or repudiate the teachings of the past that we get into these difficulties.

The most remarkable thing about our constitutional system is its resiliency, the ability of the American people to use it for felt necessities of constitutional government. Something is to be said, therefore, for the broad terminology of the Constitution rather than for too precise definitions.

I think that is true in all matters of life. I do not, myself, feel that the present disaster in which we now find ourselves is evidence of the breakdown of our system, but of the violation of our system.

The CHAIRMAN. That is what I wanted you to make clear. The fact that Congress was not consulted, as you say not informed really, seems to me one of the greatest contributing causes for the mistaken judgments that were followed. I was reminded of Mr. Reedy's analysis of this, but I will call on Senator Cooper.

Senator COOPER. Thank you, Mr. Chairman. It is late and I won't take too much time.

REQUEST TO TESTIFY

I think, after listening to this most important testimony and to the questions, at some point I will ask if I myself might testify and give my own views.

The CHAIRMAN. You will be welcome.

Senator COOPER. Thank you.

COMMENDATION OF SENATOR JAVITS

I think Senator Javits has presented to the Senate and Congress one of the most challenging interpretations of the Constitution. I won't say that it is unique, but it is the most forceful suggestion I have heard since this debate upon the powers of the Congress and the President on war-making powers has been going on; that the Constitution itself, in prescribing the powers of the Congress provides that the Congress can make rules and regulations for our land and Naval Forces, including their use in hostilities.

If that interpretation is correct, it obviates the Constitutional provision that a statute cannot override the Constitution, because Senator Javits places his authority in a provision of the Constitution as opposed to a statutory provision. He is always innovative and I congratulate and admire him.

CHANGE OF MIND CONCERNING WARMAKING POWERS

We are indebted to you, Dr. Commager, for your scholarly statement. The main subject of this hearing is, first, to consider the war-making powers of the President and Congress. That is correct; is it not?

I think it is impossible to consider this question, as your statement has shown, particularly in its last four or five pages directed to policy, without considering it in the context of the Indochina war. All of us have been concerned about this war, and it has caused all of us to give study to the warmaking powers provided by the Constitution. I think most of us, at least I have, have changed our minds in recent years about the scope of the respective congressional powers and the President's powers with regard to the warmaking power. You have, too, sir.

I have read your statements in the past, and I would say that you have changed your mind very considerably. Would you agree with that?

Dr. COMMAGER. No, sir; not very considerably.

Senator COOPER. I think it is important that we put the question as carefully and in as balanced a way as possible because to a lot of people—including most of us here—who have not thought about this question very deeply in the past are now trying hard to understand this vital issue. I know a lot of the young people in the country are concerned about it, and properly so. For this reason, I do not think we ought to give the impression that the Executive alone is responsible for everything that has occurred. You pointed out that practically every President, beginning with Jackson on through Polk——

Dr. COMMAGER. Monroe.

Senator COOPER. Practically every President, except as you said in your statement, the weak Presidents, have claimed this authority to act when they thought the security of the United States was threatened.

Dr. COMMAGER. Yes.

Senator COOPER. There has been a questioning of the Presidential powers with regard to warmaking at times by the Members of the Congress and Senate. It has, on the whole, not been successful. But since World War II, I think you will agree, the President's warmaking powers have been questioned continuously by the Senate. You are aware of the 42 treaties we have with every country in the world.

Dr. COMMAGER. Yes.

Senator COOPER. Hearings were held on each of those treaties as they arose. In all of those hearings efforts were made to prevent the sending of troops to foreign countries, without the authority of Congress. All of these efforts were defeated.

Dr. COMMAGER. Yes.

Senator COOPER. You will remember the "great debate" when the issue of sending of troops to Europe was of great concern. The Congress then provided that only two divisions could be sent, although the Administration in fact sent seven divisions. I would say that since the Tonkin Bay resolution there has been an almost continuous debate going on in the Congress. This debate has been the most rigorous and the toughest that has been held on the warmaking power in the history of this country. Would you agree with that?

Dr. COMMAGER. Yes, sir.

Senator COOPER. As a result of the war and the cumulative experience of the last 20 years, we have all changed our minds somewhat. I would like to state my own position even though I should be questioning you. I do not think there is any situation other than a nuclear

attack, or an attack by a power capable of threatening our security that does not permit time to come to Congress for a decision. Would you agree?

Dr. COMMAGER. Yes, sir. I not only agree with that, I tried to make that clear by item after item recorded in the past. I know of no instance.

CONSTITUTIONAL PROCESSES UNDER TREATIES

Senator COOPER. Along with the dangerous situations you have discussed in your article, brilliant as it is, you have not discussed one inherent in our treaties. We have got to go to their assistance, to the assistance of all our treaty parties, in some 42 countries, in case of aggression.

Dr. COMMAGER. Yes.

Senator COOPER. We promise in the treaties that we will go to their assistance. But we say by "constitutional processes." How do you define constitutional processes?

Dr. COMMAGER. We define it by going to the Congress. No treaty can commit the Congress to do specific things. This is the difficulty with the SEATO Treaty—as I pointed out, possibly before you came in, Senator Cooper. The SEATO agreement required us to consult and take appropriate action. Secretary Dulles in explaining that made quite clear that consultation would involve congressional approval or disapproval.

It is equally important to note, as I did, that neither Great Britain nor France, nor Pakistan, nor other signatory nations, have so interpreted that treaty as to require them to take military action. We are the only one who has done so. So that a treaty must be followed by legislation that decides any particular policy.

Senator COOPER. Do you agree in the cases of those treaties——

Dr. COMMAGER. They must be followed up by congressional decisions.

Senator COOPER. By approval, not just consultation.

Dr. COMMAGER. By approval, not just consultation.

CONSTITUTIONAL PROCESSES UNDER U.N. CHARTER

Senator COOPER. The terms of these treaties describe a procedure, written in the Charter of the United Nations that is, in case of aggression countries would exercise their constitutional processes.

Dr. COMMAGER. Yes, sir.

Senator COOPER. I did not think you were very clear about this when you were talking about Korea. We all supported the action of President Truman sending troops to Korea, and I did, too. But did you consider the constitutional process in the charter means coming to Congress?

Dr. COMMAGER. I did not quite hear that, Senator.

Senator COOPER. Do you consider that the phrase constitutional processes, which are the words used in the Charter of the United Nations, in the case of the United States, means that the Executive comes to the Congress of the United States for approval before we enter into war?

Dr. COMMAGER. I think so quite clearly. The charter, after all, is a treaty and a treaty obligation, but it cannot bind the internal processes that the Constitution requires us to take.

SENDING U. S. TROOPS ABROAD

Senator COOPER. Many scholars, and you are one of them, have pointed out that the most likely way to become involved in a war is through the sending of our troops abroad. It was thoroughly debated in Congress in 1951. I was not here then as a Senator. But I appeared as a witness in support of the Administration. To show you that I have changed my views I testified that I thought the President had that power. I do not believe so now. The sending of large forces abroad as we did in Vietnam proves what happens when large forces are sent abroad. They are fired upon and gradually we become involved in war.

Would you say from your long experience and study, that the sending of considerable forces abroad, forces that could not be withdrawn quickly, even where the purpose is clearly limited to training, requires the authority of the Congress?

Dr. COMMAGER. Entirely, sir. It is worth remembering that of the some 100 or 110 instances where the Presidents have done that, at least 95 percent of them involved hemispheric forays and lasted less than 7 days.

My own feeling is that even Mr. Johnson's commitment to Santo Domingo was, if not a clear violation of the Constitution, at least pushing it to extremes which are most unfortunate.

I think it is very dangerous to allow the President to, in effect, commit us to a war from which we cannot withdraw, because the war-making power is lodged and was intended to be lodged in the Congress.

CONGRESS HAS MADE PROGRESS

Senator COOPER. I am going to close by saying that I believe Congress has made progress by debating and studying the question of the respective war powers of the President and the Congress, and understanding has been enlarged in the Senate and the House, by the process of amendments and resolutions and proposals such as Senator Javits and Senator Spong are now presenting. Because of the experience of the Indochina war and the study and debate required by the problems created by that war we have changed our minds a great deal, as you have changed your mind. If you do not object, I ask to place in the record at this time a statement of Dr. Henry Steele Commager, which was placed in the record of both the Senate and the House during the debate on the sending of the troops to Europe, and the subject is, "Does the President Have Too Much Power?" That is the question inherent to the debate that now goes on in Washington.

Dr. COMMAGER. What was the date of that, Mr. Senator?

Senator COOPER. It was placed in the Congressional Record by the late Senator Lehman on April 2, 1951. Well, I will let the record speak for itself.

The CHAIRMAN. Without objection, it will be placed in the record.

(The information referred to follows:)

[From the Congressional Record of Apr. 2, 1951]

APRIL 2, 1951.

Mr. LEHMAN. Mr. President, I ask unanimous consent to have inserted at this point in the Record an article entitled "Does the President Have Too Much Power? written by Henry Steele Commager.

(There being no objection, the article was ordered to be printed in the Record, as follows:)

DOES THE PRESIDENT HAVE TOO MUCH POWER?—THAT IS THE QUESTION INHERENT IN THE DEBATE THAT NOW GOES ON IN WASHINGTON

(By Henry Steele Commager)

It is a familiar experience to miss the forest for the trees. There is reason to suppose that the American people are now going through this experience. So intense is our interest in the day-by-day controversies that blaze in our newspapers and clamor on the air that we are scarcely aware of the larger issues involved in those controversies. To the journalist what is important in Washington may be the RFC investigation one day, the WHEERY resolution another, price controls a third, and the latest MCCARTHY burlesque act a fourth. The future historian of the Truman administration, however, may well single out the attack upon the Executive power as the most significant of all postwar developments in the domestic field.

The twenty-second amendment is a case in point. That amendment introduced a far-reaching change in our constitutional system, but perhaps the most remarkable thing about it was that it took the country so completely by surprise. No one, apparently, knew what was happening, least of all the people who woke up one morning to discover that they had struck a blow at democracy—and themselves—by denying the next generation the right to do what they themselves had done in 1940 and 1944.

The ratification of the two-term amendment is one of three major assualts upon the Executive power that have come to a head in this last year. The other two are the attempt to limit the power of the President as Commander in Chief of the Armed Forces of the Nation, and the attempt to hamstring Presidential control of foreign relations. Each of these is dangerous. Taken together they constitute an invasion of the Executive power which, if persisted in, may result in the substitution for our Presidential system of a hybrid of the parliamentary and the presidential systems.

That this result would be neither unanticipated nor unwelcome in certain circles is clear from Representative Coudert's resolution calling for a constitutional amendment which would require the President to resign in the face of a vote of no-confidence. Whatever may be the relative merits of the presidential and the parliamentary systems—a question which we need not consider here—no one familiar with our Constitution or our history can suppose that the one can be grafted onto the other without changes that would be fateful and might be fatal.

This is not the first time that the presidential system has been threatened by congressional usurpation. This happened once before, in the Presidency of the luckless Andrew Johnson; then, too, the assault came from the Republican Party—a party which has for the most part favored a strong Executive. That earlier attack, like the present one, was inspired not by a theoretical preference for the parliamentary over the presidential system, but by hostility to a particular President and considerations of partisan advantage. Historical analogies are always a bit dangerous, but it is relevant to note that that earlier attack upon the Executive power misfired, and that the policies which it was designed to facilitate—radical reconstruction—likewise misfired. Historical prophesies, too, are a bit dangerous, but it is fairly safe to predict that 80 years from now the present attack upon the Presidential power will seem as misguided and pernicious as the congressional attack upon Johnson seems to us today.

There is another feature of this attack, too, that must command our attention and excite our concern. That is its doctrinaire character. It proceeds not out of real but out of imagined dangers. It is rooted not in experience but in fears. For the limitation on the Executive power—with a corresponding expansion of the legislative power—finds no justification in our history. To the generation of Thomas Jefferson and Thomas Paine history taught that Executive power was always dangerous, but the history of democracy teaches a different moral. Call the roll of the "strong" Presidents—those who have used the Executive power boldly—Washington, Jefferson, Jackson, Polk, Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt. None of these Presidents threatened democracy or impaired the constitutional system. It is, on the contrary, the "weak" Presidents—men like Fillmore and Buchanan—and Harding—who bring democracy into disrepute and expose the Constitution to grave perils.

There is, in fact, no basis in our own history for the distrust of the Executive authority. Nor is there any sound basis for the fear, the meddling, or the limitations that are explicit in the three current assaults upon the Executive power. Certainly there has been no correlation between length of Presidential service and danger to democracy or to the Constitution. The American people have on the whole acted wisely in reelecting Presidents; they have never reelected a dangerous man and only once—in 1872—a weak man. And the only referendum that the American people ever held on a third term was an overwhelming endorsement of that innovation—an endorsement confirmed—4 years later.

In this constitutional crisis it is important that we recur to basic principles of our constitutional order, and to our experience with these principles over a period of a century and a half. These are actually two sides of the same shield, for our Constitution consists not only of the document drafted in 1787 but of the additions to it over 150 years of practice.

Let us look first to the principle involved in the Twenty-second Amendment. Why does this amendment violate sound constitutional principles? It violates sound principles because it writes into the Constitution a quantitative rather than a qualitative limit on popular authority. It writes into the Constitution a limitation not on authority itself but on the degree of authority already granted. It limits not the arena in which democracy may function but the way in which democracy functions in that arena.

This takes, perhaps, a bit of explanation. The wise men who drew up our Constitutions, State and Federal, feared government. They feared, especially that government might invade areas in which government had no standing and no right. There were certain things, so this generation held, that no government could do. Government could not "deprive men of life, liberty or happiness" without due process of law; it could not impair the right of men to worship as they pleased, or the right of free speech or free press, of petition or of assembly. All these powers were beyond the authority of government altogether, and the Constitution framers saw to it that they were removed from governmental authority either by omitting them from the Constitution proper or by writing safeguards into bills of rights.

But where Government did have authority, properly and logically, it had sufficient authority to do the job. Where power was granted, it was granted in all fullness. Thus the power to wage war is the power to wage war successfully. The power to regulate commerce among the States is the power to regulate the whole of such commerce—and the word "regulate" is broadly interpreted. The power to tax knows no limitations other than those written into the Constitution, and any effort to limit that power quantitatively is unsound in principle. In short, the Constitution acknowledges qualitative limitations on the powers of Government, but few quantitative ones except those of a purely mechanical nature.

Now apply this principle to the election of a President. Once grant that the American people (through the rubber-stamp electoral college) have the authority to elect a President, it follows that they have authority to elect him as often as they choose. Granted they may make a mistake—but they may make a mistake in their original choice, for that matter, and presumably they have a better chance of avoiding a mistake the second time than the first, the third time than the second. If the Constitution is to be designed to prevent people from making mistakes, it might as logically start with Congress, for on any fair comparison Americans have made more mistakes with their Congressmen than with their Presidents.

Let us look to the second major assault upon the Executive power—the attempt to limit the power of the President as Commander in Chief of the Armed Forces. Specfically this assault has centered upon the right of the President to commit American forces to danger points outside the boundaries of the United States without prior congressional authorization.

I have recently dicussed the strictly constitutional issues involved in this controversy in the Times Magazine and made clear that the overwhelming weight of authority supports Presidential discretion in this field. Congress can, to be sure, limit Presidential power here by the simple expedient of refusing appropriations. But no comfort is to be drawn from the argument. For that matter, Congress could, in effect, abolish the Presidency and the Supreme Court by refusing to vote the necessary appropriations; no one would defend the constitutionality of such conduct.

But the issue is of course, more than one of constitutionality; it is one of power. We must beware of the common fallacy that because a thing is constitutional it is necessarily sound; we must guard against the comparable fallacy that if anyone can raise any hypothetical constitutional objection to a policy it is necessarily unsound. Preoccupation with the abstract constitutional issue and with the particular issue of sending a certain number of divisions to Western Europe has served to confuse the principle involved in the question.

That principle is one of Presidential power and Presidential duty. The President is Commander in Chief of the Army and the Navy, and he is under oath to "preserve, protect and defend" the Constiution—and by implication the Nation. It should be clear that these general powers and obligations apply with equal force to the disposition of all the Armed Forces of the Nation. If he does not have authority to send land forces to points of danger, neither does he have authority to send the Navy or the Air Force to points of danger outside the boundaries of the Nation, for his constitutional authority in the one arena is precisely the same as in the others.

Those who deny the President the right to send land forces to such places as are essential to the defense of the Nation, by logical implication deny his power to order the Navy to the waters around Formosa or the Air Force to air stations in the Mediterranean and the Middle East.

There are some further considerations that have not received sufficient attention in this discussion—a discussion which has centered overmuch on the constitutional question. There is, for example, the consideration that insistence upon specific authorization from Congress may serve to deprive the Executive of effective bargaining power in negotiations with the Kremlin, or of influence in negotiation with our associates. There is the consideration that if Congress ties the President's hands in the matter it, in effect, invites aggression whenever it is not available to untie them. A generation ago this consideration would not have been alarming, for in an emergency Congress can convene speedily and act with dispatch. But modern blitz warfare does not wait upon congressional reconvenings.

Theory may mislead us; experience must be our guide. Has the Presidential power in this arena served us well or ill? Have Presidents, in fact, been more war-minded than Congresses, or have they been more mistaken in their understanding of international crises? What shall we say of Jefferson's undeclared war on the Barbary pirates; of Lincoln's personal conduct of the war for the Union from April to July 1861; of Theodore Roosevelt's intervention in the Venezuela crisis and in the Caribbean; of Wilson's determination to arm American merchantmen? Were the Presidents wrong in these and other ventures, and was Congress in the right? But these questions may be academic. Clearly it is not the remote past that concerns Congress now, but the immediate past.

Though Truman is the ostensible object of attack, Franklin Roosevelt is the real object of attack. It is his foreign policy that is under fire; it is his decision to trade destroyers for island bases, to land troops in Iceland and Greenland, to order the Navy to shoot on sight—that is the issue in the minds of most of those Congressmen who are pressing for limitations on the Presidential power. Who, now, looking back upon those critical months of 1940 and 1941, would repudiate the Presidential decisions—who but unregenerate isolationists of the Chicago Tribune school?

The personal and almost petty form of the third attack upon the Executive power should not conceal from us the significance of the issues involved. This is, of course, the Republican demand that "Acheson must go." It is not a little curious that those most vociferous in their hostility to communism should thus center their attack upon the man who has done more than any other to stop communism, but it is not the merits of the debate that concern us but the principles.

On the one hand are long-established traditions of Presidential control over the Cabinet and of the President as the sole organ of the Government in the conduct of foreign relations; on the other hand is the oft-refuted notion that Congress may dictate membership in the President's Cabinet, and the new and original notion that a minority party should control the Government.

It is difficult to know whether to be more astonished at the effrontery of congressional claims or at their folly. It is, to be sure, the effrontery that is most ostentatious, for the Republican Party, defeated in every presidential election for 20 years, and in every congressional election but one, is acting as if it actually

won the election of 1950. But it is the folly that is most serious. For if successful in their attack upon the Secretary of State, the Republicans may do irreparable harm to the presidential system. They may succeed in destroying Presidential control over his Cabinet and Presidential control over foreign relations.

Let us look briefly at what is involved here. The Cabinet is a product of our unwritten Constitution—and a very important part. It is made up, traditionally, of heads of departments; these are selected, in the first instance, by the President, report to him, and are subject to dismissal by him. He may consult with them—but is not legally bound to do so. He may prefer to consult with others—a kitchen cabinet or a brain trust—and is not answerable to Congress for this preference. The relationship between the President and his Cabinet is, in other words, personal and intimate. Whatever the precise nature of that relationship, the nice balance of personality and power, one thing is clear: the President must be in control.

This has been the theory of our Government since the second Washington administration, and during most of that time it has been the practice as well. Now and then strong Cabinets—or individual Cabinet members—have tried, to dominate weak Presidents. Sometimes—as in Lincoln's case—they have tried to dominate strong Presidents, and come a cropper. Students will recall how Andrew Jackson asserted his command over the Secretary of the Treasury, how the luckless Tyler defied Webster and his colleagues, how Woodrow Wilson fired Lansing because he thought that Secretary had usurped Executive power.

If the principle of Presidential control of the Cabinet is sound generally—as it is—that principle is crucial where the Department of State is concerned. For the President is the sole organ of the Government in the conduct of our foreign relations. This was made clear at the beginning of our history when Washington announced the neutrality proclamation on his own; it has been confirmed by a century and a half of subsequent experience. If there is, then, one part of the Cabinet where Presidential control must be complete, it is the State Department. Adams recognized this when he dismissed Pickering for disloyalty; Lincoln recognized this when he put Seward firmly in his place; Wilson recognized it when he forced the resignation of Bryan and dismissed Lansing.

The claim now advanced by certain Senators that they can force the President to oust Secretary Acheson—and by implication dictate presidential appointment of his successor—is a claim which, if sustained, would reverse 150 years of practice and precedent and make all but impossible the effective conduct of our foreign relations. It is a claim without precedent in our history, without basis in law, and without foundation in logic. Like the insistence upon limiting popular will in presidential elections and upon qualifyng the power of the President in the realm of national defense, it is a product neither of necessity, of reason, nor of statesmanship, but of partisanship, confusion, and folly.

What is at stake in all this is nothing less than the integrity of our constitutional system. Those who are now so assiduously engaged in undermining that system are not aware of what they are doing. They would doubtless claim the most exalted motives—and we must give them the benefit of the doubt on this. To a public rightly disturbed by revelations of confusion, incompetence and chicanery in the executive departments, they appear engaged in a laudable effort to check the unwise exercise of Presidential power.

But more is at stake here than appears on the surface. What the critics and enemies of Presidential power are doing is clear enough. They are engaged in substituting for the Presidential system a bastard product of presidential and parliamentary, with the disadvantages of neither. If they succeed they will impair and may destroy the constitutional fabric of the Republic.

### HOW CAN CONGRESS "REQUIRE" EXECUTIVE BRANCH?

The CHAIRMAN. Dr. Commager, I have one or two other things. The hour is getting late, but you made a right interesting suggestion about a special committee, as I understood it, to examine proposed treaties or executive agreements for the purpose of advising the Executive as to whether or not it should be submitted as a treaty.

Dr. COMMAGER. I believe I used the word "required."

The CHAIRMAN. Require them to.

Dr. COMMAGER. Advise and require that he submit those which, in his opinion, involved those involving major commitments of foreign policy.

The CHAIRMAN. Recently, this committee in no uncertain terms, both verbally and, I believe, in writing, in meetings with the Secretary of State and others from the executive branch were as positive as we could be that the recent agreement with Spain on bases should be submitted as a treaty.

How do we make the Executive do this? You say require. How do we require him to consult in this fashion?

Dr. COMMAGER. Yes. I have here "with authority to designate those of sufficient importance to require submission to the Senate as treaties."

I do not know how you force a President to do these things. I think the power here of publicity, the power of the members of the Senate committee to report to the Senate that the President proposes to do certain things that are of major importance, and refuses to submit them to the Senate, would be so great that a President would hesitate very seriously in going against it.

The CHAIRMAN. I thought, personally—and I think my colleagues shared it—that this was a classic case, involving troops abroad, and commitments which we believe are very far reaching, where it should be a treaty and he refused to do it.

### FINAL SANCTION ON CONSULTATIONS IS POLITICAL

Then we are constantly confronted with this question that you have already discussed in a very effective way. The final sanction on these consultations is really polititcal. You do not have much confidence in the process of impeachment in any case.

Dr. COMMAGER. No.

The CHAIRMAN. It is political. That is, if he defies the Congress and if the Congress still retains the respect of the people, then he is taking a great political risk. But it reminds me again of what I said a moment ago. Under the, I think, very serious impact of television, a single man, speaking for an Administration, has a tremendous advantage against 435 or 100, none of whom can speak for that body. No one can speak for the Congress. By its nature it is a group of men with different views. While we have made some efforts in having a majority leader and a minority leader, neither in the eyes of the public nor actually do they speak for the full Congress. And television is a so much more effective method of communication than ever existed before and has engaged so much of our attention. I must say that I am not very optimistic about the political impact because it is not too difficult on a national scale to discredit the Congress, to make it appear as always dragging its feet, not cooperating, and being slow in action. I think it ought to be slow in action on these important matters because they require consideration.

A present debate is going on on the floor of the Senate, and the Senate itself is divided on the question of whether or not the Senate should retain rules which allow it to debate or should accept rules more nearly those of the House, where under a rules committee they can get action immediately.

One of our leading Senators said the main purpose of the Senate is to act, whereas some of us think it is to deliberate and to consider and to seek a wise decision. So there is no agreement even on a matter of whether the Senate should retain its traditional capacity to contest a matter with the Executive. This is what is discouraging me, or at least it makes me find it very difficult to know how to make effective these principles which you have outlined, such as the treaty power and the war power.

I agree completely with your attitude that it is a good thing to have the participation of the Congress.

HOW CAN CONGRESS IMPLEMENT S. 731?

I wonder if you would care to give me your views about this question. Assuming we pass this bill, and assuming we have this, what do we do about it with an Executive who has no real confidence in the legislature and does not wish to consult with it?

Dr. COMMAGER. I am not as pessimistic as you are, Mr. Chairman, about this matter. Presidential argument is not guaranteed to win support. Sometimes it works the other way, even when on television, and I think it is interesting to remember that Mr. Johnson, who was one of the most effective of all Presidents on television, and who used that medium whenever he saw fit, nevertheless was forced to acknowledge that he could not carry through his program and retired from the race.

Public opinion can, in fact, be rallied by Senators and other public leaders, and the medium of television does not invariably work on behalf of the Executive. But it normally does so.

Senator CASE. Mr. Chairman, may I break in? Is it not true that in the case of President Johnson the people were not aroused by his usurption of power vis-a-vis Congress, but because they thought his policies made no sense at all?

Dr. COMMAGER. I am not sure these two things can be separate, Senator Case. I think you are quite right in that the people cannot be expected to understand somewhat technical questions like the distinct division of authority between Congress and the Executive. But the kind of President who would ignore that distinction may also be the kind of President who ignores other and more publicly comprehensible things as Mr. Johnson, I fear, did, so that the situation is not, I think, desperate.

I do not think we should underestimate the ability of the American people to understand, if not the technical questions, at least the implications of what Presidents do and the implications of what those who oppose them do or wish to do. And it is by no means clear to me that a President will always have the upper hand because he has television and publicity. This may be self-defeating.

HOW CAN CONGRESS OBTAIN NEEDED INFORMATION FROM EXECUTIVE?

The CHAIRMAN. I am very glad to have a word of encouragement from you. I like to inspire a word of optimism from a man of your great experience. But you stated that we need information if we are to exercise any influence upon a course of events. In the two most

recent examples of this, both in Cambodia and Laos, I do not know whether any individual member had been advised, but this committee was not told of this at all. I am quite certain because we had representatives of the Executive before the committee a very short time, 2 or 3 days, before. We were kept in the dark of what the purposes are today.

One reads the almost daily threats of the South Vietnamese to invade North Vietnam. Mr. Ky and Mr. Thieu have made it quite clear in their statements that they intend to, but the Administration certainly does not confide in this committee. The President confides more generously to foreign correspondents, such as Mr. Worsthorne, as to what his purpose is. How can we exercise any influence when our advice is not sought nor are we even informed of what is the real objective and what they plan to do? I am not speaking now of military arrangements or troops, but the policy and their overall objective.

Dr. COMMAGER. That is a question of such difficulty that I think no one can answer it. How do you persuade or force a President to disclose what the Congress needs to know in order to legislate wisely?

The CHAIRMAN. That is right.

Dr. COMMAGER. That issue came up as early as 1795. I think it was something of a misfortune that the House failed to persuade President Washington to submit papers involving the obligations under the Jay Treaty to the House at that time.

Gallatin, speaking for Jefferson and others, led a losing fight on that issue. Since then there has been no way of forcing the President to do this.

Whether the ingenuity of Senators, of Congressmen can devise some method of persuading Presidents that they should do this it is difficult to know. Perhaps it can be done. I would not despair of your ingenuity, sir, nor of the various weapons that you do have, including in the House the weapon of appropriations, including weapons of withholding approval or of making things difficult for Presidents who will not disclose their information. The British solved that problem, I think, by holding that the King can do no wrong, but his Ministers can, and you can have a vote of no confidence in what is done. A failure to disclose information should lead to a vote of no confidence.

The CHAIRMAN. We cannot have a vote of no confidence.

Dr. COMMAGER. No, we cannot have a vote of no confidence in our system.

The CHAIRMAN. If we could, I think there would be a disclosure.

Senator CASE. You suggested that a few years ago.

Dr. COMMAGER. It is a major difference.

The CHAIRMAN. It is a major difference. I thought Mr. Reedy's recent book tended to the conclusion except he, and I agree, believes it is not a practical, feasible undertaking.

### INFORMATION INVOLVED IN PRESIDENTIAL DECISIONS

There has grown up and we are constantly confronted with the idea that under these modern conditions of sophisticated weapons policymaking is based upon secret information and only the President

has access to knowledge which enables him to make a wise decision. Expertise is the word.

George Reedy, in his book, which, I must say, is extremely revealing as to how the White House works, says:

> On sweeping policy decisions, which are, after all, relatively few, a president makes up his mind on the basis of the same kind of information that is available to the average citizen.

Would you subscribe to that?

Dr. COMMAGER. Oh, certainly. I think one of the great illusions of our time is the notion that quantitative information can be equated with qualitative judgment. Indeed, it may sometimes be the other way around—that a President overwhelmed with a quantity of information may not have time to think. I think it is possible that some recent Presidents have not had time to think and have acted, therefore, on advice from interested parties, let us say, in the Pentagon or elsewhere who have command of information that they insist is of decisive importance.

I think much can be said for the President's not being overwhelmed by interested "information." The kind of information that we all have available is mostly adequate. What he needs is more time to think of the longer term implications of his decisions.

### EFFECT OF WHITE HOUSE ATMOSPHERE ON THE PRESIDENT

The CHAIRMAN. Mr. Reedy almost makes one sympathetic to the state of Presidents. He is speaking generally, although he served President Johnson for many years in both the Senate and in the White House. He contends that the way we have surrounded this modern Presidency by Secret Service and by all sorts of others things, "tends to isolate and to deceive the occupant." That is the President, himself. He says in his book:

> The White House is an institution which dulls the sensitivity of political men and ultimately reduces them to bungling amateurs in their basic craft—the art of politics—

because of the atmosphere that is created by so many sycophantic associates, all of whom are seeking only to please the President. I wondered if you did not think that is a great hazard to this function.

Dr. COMMAGER. It is, sir. These are matters, however, that cannot be changed, I think, by any mechanical devices. It is a matter of a personality and of character.

A man like Lincoln never allowed himself to be overwhelmed by masses of information or advisers.

Some of our later Presidents have allowed themselves to be overwhelmed with advice by interested advisers.

The CHAIRMAN. I do not think I made myself clear. Mr. Reedy described in great detail most persuasively, and I cannot imagine that he is not qualified to know, the sort of regal atmosphere that has been created. They have an enormous staff now.

Dr. COMMAGER. Yes.

The CHAIRMAN. I expect the staff in the White House is 30 or 40 times larger than it was during Lincoln's time.

Dr. COMMAGER. Mr. Kissinger, himself, has a staff of some 60, I believe.

The CHAIRMAN. You are very modest. He has 110. He has a great many career Foreign Service officers from the State Department assigned to his staff. We have made an inquiry about this recently and I believe the figure was 110. There are well over 500 on the staff of the White House itself. The National Security Council staff is the one I referred to as Mr. Kissinger's, which, I think, Mr. Macomber stated the other day, in response to our questions, was 110. This creates a bureaucracy insulating the President from access to the public and, as Mr. Reedy puts it, the President becomes isolated and becomes an amateur in the art of politics.

I think this describes very much what happened to Mr. Johnson because before he went to the White House his antennas were very acutely attuned to the conditions in the Congress and in the country.

I never could describe it as graphically and as persuasively as Mr. Reedy did, but I felt this is what happened to him. He lost touch with what the Congress and the people desired.

EXECUTIVE BRANCH'S ATTITUDE TOWARD CONGRESS

On television we always see Presidents shaking hands with all sorts of people. It gives the illusion that the President is really mixing with people, but he really does not mix with them in the sense of communicating and there is virtually no communication with the Congress. I mean communication now as opposed to going to a reception. I mean a heart-to-heart discussion of a policy. We have almost no discussion even with his ministers. There is none whatever with Mr. Kissinger, as you know, under the Executive privilege. With the Secretary of State it is very limited. This, I think, is not because of any reflection upon the Secretary of State, but there is a feeling that the Congress is meddlesome and that the Congress' judgment is not to be trusted. They are not really interested in the judgment of the 435 Congressmen or the Senators.

This really seems to be what Mr. Reedy reflects there and he is a better authority on what goes on in the White House than I or anybody, I think, on this committee.

It is an attitude. If the attitude is that the Congress has no contribution to make, then I really do not know what you are going to do about it. If you do not believe in the collective wisdom of the Congress—and I do not say individually they are any brighter than anybody else, but collectively, I think, they have something to contribute. I have the feeling that the executive branch is not interested and they do not believe there is anything to contribute.

I think Dean Acheson illustrated this very strongly in his day. He had really no interest whatever in the views of Congress. We were presumed to be incapable of understanding those esoteric subjects upon which he was engaged. I think he made it very clear in a number of public statements.

I do not know what to do about this. I mean it really is a question of attitude.

FUNCTION OF PENDING LEGISLATION

I am for this bill and I am for any of these bills that can bring political pressure or whatever else one likes to call it, but I am not very confident that the passage of them will do anything other than

be a vehicle for education to change the attitudes of people, hopefully of the Executive.

Dr. COMMAGER. That is a very important function, however, Mr. Senator. It is a function which is in one way the function which the Supreme Court plays, not so much making decisions as educating the whole American people to the nature of the constitutional system. To that extent, it is the greatest political educational institution in the world.

Senate hearings and discussions do the same thing, and all of these bills do, and it is this function of education to which we must eventually come in order to achieve political results. I would not despair at all.

The CHAIRMAN. I appreciate very much your coming, Dr. Commager.

Senator COOPER. Mr. Chairman, would you yield for a moment?

The CHAIRMAN. Yes, sir.

### PRESIDENT'S ATTITUDE TOWARD CONGRESS

Senator COOPER. I think the chairman has raised a very important subject on the necessity of information, and I agree we should have had some prior information about both Cambodia and Laos. The chairman knows my regard for him. We have joined together in many, many efforts under his leadership, and I may say somewhat under mine, but I do not agree with his deductions in this case. I think, in fairness I would say this: I do not agree, for example, that, as you say, the President has turned his mind against the Congress. I do not think he believes that it has no function or that we have no authority. I could give many instances outside of the field of foreign relations, but we are discussing foreign relations now, and it is a fact that he has accepted some of the restrictions we have placed upon the power of the Presidency, such as the Cooper-Church-Aiken-Mansfield amendment prohibiting U.S. ground troops in Laos or Thailand.

The CHAIRMAN. I want to make it clear that I was emphasizing Mr. Reedy; I was trying to avoid directing the criticism at the present occupant of the White House. Certainly he has no reason to consult me.

Senator COOPER. I want to make it clear I had no prior information either on any of these subjects.

The CHAIRMAN. This was about the previous President. I think Mr. Reedy makes it quite clear that President Johnson, I should say, rather than the Executive, did not believe that the Congress or this committee had any contribution to make to the wisdom of his most important decisions. He simply felt that the experts, so to speak, with whom he was surrounded. Mr. Rostow, Mr. McNamara, and the Joint Chiefs, were the source of good advice.

He did not really seek, in an attitude of being interested, the collective wisdom of the advice of the committee or the Congress because, I think, he simply did not feel that it was of the same quality as he got from his Secretary of State and the other people there.

I say this simply as following up the idea that Dr. Commager referred to about our traditions. The tradition is, I thought, that the collective judgment of the House and the Senate would tend to be, after thorough debate, more in accord with the interests of the country.

That is, there is a certain inherent wisdom in decisions and observations that are arrived at after thorough debate by a lot of different people coming from different parts of the country, and that there is a genuine, I guess I could say, wisdom in the results after debate.

EXECUTIVE TENDENCY TO REJECT CONGRESSIONAL CONTRIBUTION

They are not infalliable by any means. It always looks as if it is self-serving to say the Congress has a contribution to make, but I think it does. This is what I think all Executives tend to reject, especially in wartime.

I think this is the history of other countries. It is not peculiar to this country. I would like to ask you about this. In nearly every country that has adopted our system as distinguished from a parliamentary system, is it not a fact that nearly all have become dictatorships, that the presidency absorbs all the real power in the government? Isn't that true in many different parts of the world?

Dr. COMMAGER. Well, sir, since World War II of the over 60 new nations, I believe only South Korea and Vietnam, have adopted our system of Presidency; all others have adopted either the parliamentary system or dictatorships of one kind or another.

Our system does not commend itself to the new nations that have come into existence during recent years, partly, I think, because of what happens in the separation of powers which seems to them to be unfortunate. They have not adopted the presidential system; they do not have Presidents; they have not adopted judicial review either.

I do think, Mr. Chairman, there is some faint consolation in recalling that history tends to compensate for things; if only our Presidents would study history. Woodrow Wilson's failure adequately to consult with Congress from 1917 to 1918 was really basically responsible for the defeat of his League of Nations. I think the failure to consult Congress often is a very high price for Presidents to pay for getting their way temporarily. Often they do not get their way permanently, and I should like that to be brought home to Presidents.

The CHAIRMAN. Thank you very much, Dr. Commager. We appreciate your coming. You have been a very interesting beginning in what I hope to be an educational process based upon this legislation.

BUILT-IN PROCEDURES AGAINST CONGRESSIONAL FOOT DRAGGING

Senator JAVITS. Mr. Chairman, could we have just one other question of Professor Commager. You have not been asked about the built-in procedures that seek to insure us against congressional foot dragging or procedural complications nullifying its ability to act.

Have you had a chance to examine those, Professor Commager, and could you tell us whether you feel they are satisfactory?

Dr. COMMAGER. It was once said by Chief Justice Hughes in explaining some Supreme Court decision that the Supreme Court wants to win wars, too. I think Congress wants to save the country, too. I do not think we should anticipate the kind of Congress that would drag

its feet in the face of a grave national danger. I have never known Congress to do that.

I think what we need now is a lot more foot dragging rather than less, confident that in the event of a serious threat to the interests of this country Congress would prove quite as patriotic and quite as intelligent as any Executive, sir.

The CHAIRMAN. I am glad you asked that because it is very relevant to Senate Rule 22 in which the Senator from New York is interested.

The committee is adjourned.

(Whereupon, at 12:50 p.m., the committee adjourned, subject to the call of the Chair.)

# WAR POWERS LEGISLATION

TUESDAY, MARCH 9, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10 a.m., in room 4221, New Senate Office Building, Senator J. W. Fulbright (chairman) presiding.

Present: Senators Fulbright, Pell, McGee, Spong, Case, Cooper, and Javits.

The CHAIRMAN. The committee will come to order.

## OPENING STATEMENT

We are very pleased indeed this morning to have two of our most distinguished professors, Prof. Richard B. Morris, professor of history of Columbia University, and Prof. Alfred H. Kelly, professor of history at Wayne State University.

This hearing is in continuation of our hearings on the proposed legislation relating to the war power of the President and the Congress.

As we know from yesterday's hearing, there are three major pieces of legislation. The first one was introduced by Mr. Javits of New York, with Senators Mathias, Pell, and Spong, S. 731; then the one by Mr. Eagleton, Senate Joint Resolution 59; and then Mr. Taft, Senate Joint Resolution 18.

Professor Morris and Professor Kelly, will you please take seats up in front?

Perhaps we can start with Professor Morris and then hear Professor Kelly. Then we can have questions as appropriate.

You are both very kind to come down and give us the benefit of your testimony.

Will you proceed, Professor Morris?

## STATEMENT OF RICHARD B. MORRIS, PROFESSOR OF HISTORY, COLUMBIA UNIVERSITY

Mr. MORRIS. Yes, Senator Fulbright and members of the committee. Yesterday, my esteemed friend and associate, Henry Commager, took us brilliantly through the whole of American presidential history. I shall then concentrate this morning on the early years of the Republic when the great precedents were shaped.

Repeatedly have the historical and constitutional origins of the warmaking power been subjected to close scrutiny without having any noticeably deterrent effect upon this Nation's proclivity for embarking upon undeclared war. Contrariwise, the last quarter century has

witnessed undeclared wars assuming a shape and dimension of fearsome proportions, and with fearsome results. The undeclared war that is now being waged in Indochina tragically divides the American people, diverts resources from the most urgent tasks of domestic reconstruction, fans the fires of inflation, seriously diminishes our prestige and credibility abroad, and even threatens the constitutional fabric of the Nation, aside from the toll it is exacting in blood and treasure.

I am impelled to support this prudent and well-conceived bill, S. 731, to regulate undeclared wars, not only by the urgency of Congress's acting promptly to define and delineate the warmaking powers under the Constitution, but as an historian of the founding years of the Republic I am especially concerned that so awesome a power should not be exercised in derogation of the letter of the Constitution and in contravention of its spirit.

## EARLY U.S. COMMITMENT TO PEACE

Our Nation's independence was achieved in the first anticolonial war of modern times, but it was at its inception dedicated to peace not war. Only a peaceful climate, it was believed, would guarantee the American people life, liberty, and the pursuit of happiness. The Founding Fathers, along with friends abroad, considered that the American Revolution would, as Tom Paine felicitously phrased it, "form a new era and give a new turn to human affairs." [1] Turn to the reverse side of any dollar bill and you will find engraved thereon the Great Seal of the United States, an everlasting pyramid carrying the date 1776, and underneath, the Latin motto: *Novus Ordo Seclorum*—A new order of the ages is born. Every dollar that we spend abroad, carrying this adaptation of an inspired phrase of Virgil, conveys this message of hope. Silas Deane, Franklin's fellow commissioner in France made the point that for economic reasons, if for no other, it would ever be the interest of Americans "to pursue an inviolable peace with the states of Europe."

Thus, the world would become peaceful because no new war-loving nation would replace the two powers, England and France, that had been expelled in whole or in part from North America. John Adams reassured Europe that the Americans for a long time to come would be too much occupied with building their own nation to "go abroad and trouble other nations." Franklin, who made a number of serious proposals to humanize warfare, expressed the fervent wish that the definitive peace signed with Great Britain in 1783 would be "lasting, and that mankind will at length, as they call themselves reasonable creatures, have reason and sense enough to settle their differences without cutting throats; for in my opinion, there never was a good war or a bad peace." [2] That great French apostle of the enlightenment, the Marquis de Condorcet, in a famous essay, sought to reassure European readers that America would "help to maintain peace in Europe by the force of their example." Condorcet found that, unlike Europe, where peace-loving nations were confined to a few ideologues,

[1] Thomas Paine, "Letter to the Abbé Raynal" (Philadelphia, 1782).
[2] Richard B. Morris, "The Emerging Nations and the American Revolution" (New York, 1970), pp. 51, 52.

such opinions were embraced in America "by a great people," who condemn "any idea of aggressive wars undertaken for aggrandizement or conquest." [3]

### ANTI-MILITARY CAST OF MIND

The commitment to peace was buttressed by an abiding hostility to standing armies, an insistence on maintaining the supremacy of the civil over the military and a deep concern lest the long war of the American Revolution produce an interest group of military personages who would endure as a quasi-hereditary caste. In the Declaration and Resolves, the First Continental Congress denounced the keeping of standing armies in the colonies by the British Government in time of peace without the consent of the legislatures of the respective colonies as "against law," a charge levied against the Crown in the Declaration of Independence.[4] The Virginia Bill of Rights not only asserted that "standing armies in time of peace should be avoided as dangerous to liberty," but insisted on the strict subordination of the military to the civil power "in all cases." [5] Even General Washington paid tribute to this entrenched opposition to standing armies when, in his last circular letter to the States—June 8, 1783—he stressed the importance of placing the militia "upon a regular and respectable footing" in order to set up a proper peace establishment for the United States.[6]

### FEAR OF EXECUTIVE USURPATION

Added to this pervasive antimilitary cast of mind was an abiding fear of executive usurpation, expressed both on the State and the national levels. The State constitutions narrowly defined the powers granted to their Governors, and four States used the term "president" instead of Governor, indicating in fact that the executive authority was shared with a council of state.[7] Even more significant for the exercise of war power, the Continental Congress, both the first and second, designated its chairman as "The President," but that official's duties were largely confined to presiding over the Congress, and he possessed scarcely a shred of executive or administrative functions.[8]

### AUTHORITY OF CONGRESS IN MILITARY AFFAIRS

In practice these fundamental principles profoundly shaped the conduct of the Revolutionary War and the administration of military affairs during the years of the Confederacy. Certain policies and certain decisions taken as early as 1775 were not only to determine the locus of the warmaking power, the control of the army, and the making of the peace, but were to cast a long shadow ahead.

[3] Marquis de Condorcet, "The Influence of the American Revolution in Europe," transcribed by Durand Echeverria, "William and Mary Quarterly," XXV (1968), 99–100.
[4] "Journals of the Continental Congress," edited by Worthington C. Ford (34 vols., Washington, D.C., 1904–1937), I, 63–73. These assertions echoed the resolves drawn up by Samuel Adams and adopted by the town of Boston, Oct. 28, 1772, "Boston Town Records, 1770–77," Boston Record Commissioners, 18th report (1887), pp. 88–108.
[5] W. W. Hening, editor, "The Statutes-at-Large, Being a Collection of All the Laws of Virginia" (13 vols., Philadelphia and New York, 1823), IX, 110.
[6] Worthington C. Ford, "Writings of George Washington" (14 vols., New York, 1891), X, 254–265.
[7] Gordon S. Wood, "Creation of the American Republic" (Chapel Hill, 1969), pp. 132–150; Allan Nevins, "The American States During and After the Revolution, 1775–1789" (New York, 1924), 1924), pp. 117–205.
[8] Edmund C. Burnett, "The Continental Congress" (New York, 1941), p. 34.

When John Adams argued that the issue of war should be one of those areas "sacredly confined" [9] to Congress, his views were adopted both in law and in practice. The Second Continental Congress had the general oversight of the war, appointed a commander-in-chief and other general officers, set up a navy, chose naval officers and kept a tight rein on the purse strings.

While immense discretion was vested in the commission to George Washington, who was given "full power and authority to act" as he should "think for the good and welfare of the service," he was charged not only with regulating his conduct "in every respect" by "the rules and discipline of war," with which he was provided, but enjoined "punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress of the said United Colonies or a committee of Congress for that purpose appointed."

Specific instructions required Washington to make a return to the Congress of all forces, military stores and provisions under his command, as well as the numbers of the British forces in America, enjoined him from disbanding any of the troops he raised "until further direction of this Congress," placed a ceiling on the number of troops he was authorized to recruit—not to exceed "double that of the enemy"—and in the absence of positive instructions for emergencies, required him to consult with his council of war.[10]

Despite the degree of discretion entrusted to the Commander in Chief, Congress kept the control of the war in its own hands. On June 12, 1776, it set up a Board of War and Ordnance, charged with maintaining a register of troops, keeping accounts of military stores, forwarding dispatches of Congress and caring for prisoners of war."[11] Congress still retained supreme warmaking authority, acting now on reports from both the Commander in Chief and the Board of War and Ordnance. The latter was supplanted the following year by a new Board of War, comprising three individuals who were not Members of Congress and, in addition to the powers of the old Board, was authorized to superintend the construction and management of military buildings and to supervise recruiting.

Congress or a committee thereof reserved the right to inspect the proceedings of the new Board.[12] The prestige of the new Board was irreparably damaged by its association in the public mind with a cabal against General Washington, and, as a result, it was reorganized on October 29, 1778, to constitute a mixed commission: three members from outside the ranks of Congress and two from the Members of Congress.[13] Its chief function was to investigate the armies to determine whether the regulations of Congress" were being properly executed,[14] and to the end it remained an agency of the Congress. Even the appearance of executive departments by early 1781,[15] including the creation of a Secretary at War, did not perceptibly diminish the authority of Congress in military affairs.

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[9] John Adams, "Thoughts on Government," in C. F. Adams, edited, "Works of John Adams" (10 vols., Boston, 1850–1856), IV, 193–200.
[10] "Journals of the Continental Congress," II, 96, 97.
[11] Ibid., V. 434.
[12] Ibid., VIII, 365; IX, 818–820.
[13] Ibid., XII, 1076.
[14] Ibid., IX, 818–820.
[15] The Secretary of Marine set up at this time became part of the Department of Finance. See J. B. Sanders, "Evolution of the Executive Departments of the Continental Congress, 1774–89" (Chapel Hill, 1935).

PROVISIONS OF ARTICLES OF CONFEDERATION

Meantime, on March 1, 1781, the Articles of Confederation had gone into effect. Since the articles did not provide for an independent executive branch, "the sole and exclusive right and power of determining peace and war" was vested in Congress—Article IX—except where States were "actually invaded" or being apprised of a resolve of an Indian nation to invade and "the danger" was so imminent as not to admit of a delay till the United States in Congress assembled can be consulted"—Article VI. The States were forbidden to maintain naval or military forces in peacetime "except such number as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade" or "deemed requisite to garrison the forts necessary for the defense of such State."

On the other hand, the States were expected to maintain "a well-regulated and disciplined militia"—Article VI.

Article VIII provided that "all charges of war" and other expenses incurred for the common defense or general warfare, and allowed by the Congress, should be defrayed out of a common treasury.[16]

Despite these explicit restrictions on the power of the States to conduct war and conclude treaties, the States, in direct contravention of the articles, did on occasion, as James Madison lamented at the Constitutional Convention, ignore such limitations. Even during the Revolution there were unauthorized operations by States, as in the case of the ill-starred descent of the Massachusetts army in 1779 on the Penobscot forts and much of the conduct of the early part of the war in the Southern States.[17]

CONCERN OF FRAMERS OF CONSTITUTION REGARDING WAR POWERS

Recognizing, as James Madison later remarked, that to declare war was "one of the most deliberative acts that can be performed," the framers of the Constitution were concerned, first of all, that the war powers would remain lodged in the legislative branch of the Government, wherein they had been previously vested.

They were also concerned that the warmaking proclivities of individual States be drastically curbed, while the executive arm, which they were in the throes of fashioning, be given the kind of emergency powers for military defense which the Secretary at War had never been able to exercise effectually.

Considering the stakes involved, it attests to the degree of unanimity among the Founding Fathers that the clause in the Constitutional draft "to make war" stirred up so little debate. There was some question whether the warmaking power be vested in the entire Congress or just the Senate, Charles Pickney, of South Carolina, favoring the latter as the respository of such power. It is noteworthy that Pierce Butler, his fellow delegate, was the only member of the Convention on record who favored vesting this power in the President. As has frequently been pointed out, Messrs, Madison and Gerry moved to substitute "declare" for "make" war, in order to leave to the Executive "the power to repel sudden attacks."

Significantly, those who spoke to this motion all expressed concern lest the warmaking powers of the President be enlarged. Elbridge

[16] The crucial article was originally adopted after little if any debate. "Journals of the Continental Congress," v. 679.

[17] See Allan Nevins, "The American States," pp. 658, 659.

Gerry declared that he "never expected to hear in a Republic a motion to empower the Executive talons to declare war;" Oliver Ellsworth reminded his fellow delegates that it "should be more easy to get out of war than into it," and George Mason expressed himself as firmly "against giving the power of war to the Executive," on the ground that he was "not safely to be trusted with it." Supporting "declare" instead of "make," Mason asserted that "he was for clogging rather than facilitating war; but for facilitating peace." The motion carried by eight States to one, Ellsworth, being persuaded by the observation of Rufus King that "make" war might be understood to "conduct" it, "which was an Executive function," [18] waived his objections to the change.

The Constitution as finally adopted, in article I, section 8, vests in Congress the right to declare war and to raise and support armies, but limits appropriations of money to their use to a maximum of 2 years. It further empowers Congress to provide and maintain a navy, to make rules for the Government and regulation of the land and naval forces, and to call forth the militia to execute the laws of the Union, suppress insurrections and repel invasion. Article II, section 2, describes the President as Commander in Chief. Thus the Constitution clearly distinguishes between declaring war and supporting it on the one hand and conducting its operations on the other. So far the country was prepared to go in 1787 in entrusting to the Executive a portion of the war powers, but no farther.

The remarks on the floor of the Convention by delegates who were later to oppose the ratification of the Constitution reveal an immense concern on the part of the antifederalists about the assumption by the Executive of any portion of the warmaking powers whatsoever.

In the Virginia Ratifying Convention, Patrick Henry expressed his alarm over the prospect of a "standing army," charged that the Constitution "squints towards monarchy," and raised the spectre of a President "in the field, at the head of his army," prescribing "the terms on which he shall reign master." [19]

### PRESIDENT'S ROLE AS CONSTRUED IN FEDERALIST PAPERS

To allay fears that the warmaking powers under the Constitution would subvert republican institutions, the authors of "The Federalist" papers took pains to construe the President's role rather narrowly. So ardent an advocate of executive energy as Alexander Hamilton felt it expedient to remind his readers in "Federalist" No. 69 that the President as Commander in Chief had far less powers than the King of Great Britain. The latter could not only declare war but could raise and regulate fleets and armies, "all which, by the Constitution under consideration, would appertain to the legislature."

Hamilton, who took a pessimistic view of the springs of human action, was not prepared, in the 75th "Federalist," to place at the "sole disposal" of the President "interests of so delicate and momentous a

[18] "Documents Illustrative of the Formation of the Union" (Washington, D.C., 1927), pp. 561, 562, and note.

[19] "Debates and other Proceedings of the Convention of Virginia, Convened at Richmond, on Monday the 2d day of June 1788, for the purpose of deliberating on the Constitution recommended by the Grand Federal Convention" (3 vols., Petersburg, Pa., 1788–89). Similarly, "Cato" [George Clinton], New York Journal, Nov. 8, 1787; an "Old Whig," Philadelphia Independent Gazetteer, Dec. 4, 1787, in Robert S. Hirschfeld, "The Power of the Presidency" (New York, 1968), pp. 24–29.

kind as those which concern its intercourses with the rest of the world." From these words one could reasonably infer that, regardless of how he may have felt a decade later, when he was second in command of the army, Hamilton would not have been prepared to interpret the President's powers as Commander in Chief as extending beyond the defense against invasion, except for specific legislative sanction and clearly not authorizing the President to embark upon overseas military ventures on his own.

Such an interpretation is reinforced by a reading of the 8th "Federalist," wherein Hamilton seeks to reassure the public that there will be no need for a large standing army, by the 24th "Federalist," in which he reminds his readers that "the whole power of raising armies was lodged in the Legislature, not in the Executive," and wherein he singles out the clauses forbidding appropriations for the support of an army for more than 2 years, thereby preventing the vesting in the executive department of permanent funds for the support of an army—Federalist No. 26—a point which Madison also stresses in the 41st Federalist paper. Finally, it should be added that John Jay, in the 3rd Federalist paper, sought to allay fears that the Federal Government would provoke wars and to remind his readers that States had shown a far greater warlike propensity than the Federal Government, certainly toward the Indians.

Indeed, it is a fair inference from the debates on ratification and from the learned analysis offered by the Federalist papers that the warmaking power of the President was little more than the power to defend against imminent invasion when Congress was not in session. Even Jefferson, who was a critic of some aspects of the Constitution, felt reassured. In a well-known letter to James Madison in 1789, he said, "We have already given in example one effectual check to the dog of war by transferring the power of letting him loose from the Executive to the legislative body, from those who are to spend to those who are to pay." [20]

### PRESIDENT WASHINGTON'S USE OF WARMAKING POWERS

So much for the warmaking powers spelled out in the Constitution. Let us now consider briefly how these powers were executed in practice by the earliest presidents. Fortunate indeed was the country in its early Chief Executives who executed their powers as Commander in Chief with prudence and restraint. As Commander in Chief during the American Revolution, Washington, at the time of the Newburgh address, had demonstrated his abhorrence of the use of military power to coerce the Congress. His disinterested stand has long been cited as a classic example of military restraint and stands as a noble tribute to the republican principle that the civilian arm is supreme over the military.

Two of the occasions in which President Washington used the army or the militia might be considered as authorized by the Constitution. The operations to dislodge Indians from territory awarded the United States by the peace of 1783 could well be considered as repelling invasion. Without consulting Congress, Secretary of War Knox, who

[20] Julian P. Boyd, editor, "The Papers of Thomas Jefferson" (Princeton, 1955), XV, 397.

had the exclusive management of Indian affairs, issued orders to commanding officers to advance against the Indians, and such wars might be considered as having been waged largely on Presidential initiative and direction.[21] Likewise it was Washington, not the Congress, who issued a proclamation calling upon the Whiskey insurrectionaries to disperse, himself furnishing the only example in history of a President taking the field with his troops.[22]

More crucial, perhaps, to the enlargement of the President's warmaking powers was Washington's Proclamation of Neutrality. Its issuance in 1793 provoked a public debate between Alexander Hamilton and James Madison, in which the latter argued that since the execution of such a power might commit the country to a course which would lead to war, it therefore belonged to Congress. In short, a proclamation of neutrality was merely the negative side of a declaration of war. Hamilton, to the contrary, argued that the power to issue such a proclamation inhered in the executive power which the Constitution vested in the President. "If the Legislature have a right to make war on the one hand," Hamilton maintained, "It is, on the other, the duty of the executive to preserve peace till the war is declared." [23]

Supporting neutrality, Chief Justice John Jay charged a grand jury at Richmond, Va., in 1793 that "until war is constitutionally declared, the Nation and all its members must observe and preserve peace." [24]

### PRESIDENT JOHN ADAMS' CONSTRUCTION OF WAR POWERS

Washington managed to avoid war with a major power while his successor, John Adams, was nudged into fighting an undeclared naval war with France largely as a result of the pressure of the warhawks in his own party. Congress authorized the President to instruct the naval commanders to seize any armed French vessels whether in U.S. territorial waters or on the high seas, and there ensued an undeclared war, initiated by Congress at the President's request, a war which the Supreme Court later designated an "imperfect" war as distinguished from a "solemn war," the latter requiring a declaration of Congress.[25]

Not only did President Adams seek to construe his war powers strictly and in accordance with the congressional mandate, but he went so far as in effect to divest himself of his role as Commander in Chief and, with Senate approval, confer it upon George Washington. Had the more extreme members of the President's own party possessed the votes, they would have issued a declaration of war over the President's head, a possibility that also confronted President McKinley in the Spanish-American War. Both occasions posed serious threats that Congress, or a portion thereof, would declare war without a

[21] See Harry M. Ward, "The Department of War, 1781–95" (Pittsburgh, 1962).
[22] See Richard B. Morris, "Great Presidential Decisions" New York, 1969), pp. 21–24.
[23] "Letters of Pacificus: Written in Justification of the President's Proclamation of Neutrality" (Philadelphia, Samuel H. Smith, 1796). For James Madison's first "Helvidius" letter, see Hirschfeld, "Power of the Presidency," pp. 55–61.
[24] "Correspondence and Public Papers of John Jay," edited by Henry P. Johnston (New York, 1891), III, 485.
[25] "Public Statutes at Large of the United States of America" (Boston, 1840), I, 578. A few weeks earlier Congress authorized the commanders of U.S. merchant ships to resist attack from, or seizure by, any French ship and to capture the attacking craft if possible. Ibid., p. 574. *The Eliza*, 4 Dall. (1800) 37. In *Bas* v. *Tingey*, 4 Dall. 43 (1800), Justice Chase used the term "limited, partial war" to describe the quasi-war with France.

recommendation by the President.[26] Instead, President Adams showed admirable restraint, and has provided us with a model for our own day of how to wind down an undeclared war.

Realizing that elements within his own party were seeking to convert an undeclared naval war into an unrestrained expansionist move and receiving informal assurances that France would receive respectfully an American minister plenipotentiary, he named a tripartite commission to go to France and settle outstanding issues between the two nations. As a supporting step, Congress on February 20, 1800, passed an act suspending further enlistments in the Army until the next session of Congress or a declaration of war. That act was followed by a supplementary law authorizing the discharge of officers and men, who had already enlisted, at an early date.

News from Paris seemed so auspicious that on May 14, the last day of the session, President Adams signed the act, thus marking the end of the controversial Provisional Army, which was soon disbanded. At the end of the session, Congress reduced the military appropriation from over $4 million to approximately $3 million. By the next session Congress had stripped the Armed Forces of their offensive armaments and in effect ended the Nation's capacity to carry on the undeclared war.[27]

Finally, a convention was entered into by the two nations under which the quasi-war was brought to a close and the troublesome alliance with France terminated. Historians emphatically support John Adam's own estimate of his courageous decision to dispatch the mission to France as "the most disinterested, the most determined and the most successful of my career." [28]

In short, President Adams, by construing his war powers strictly, by avoiding a call upon Congress for a declaration of war and by securing support of a majority in Congress for a curtailment of military operations, combined with effective Presidential diplomacy, managed to wind down successfully an undeclared war with a major power, a war whose continuance could have been seriously detrimental to this Nation's welfare.

### S. 731 IN CONJUNCTION WITH S. RES. 85

If John Adams were here today I am confident that he would give his wholehearted support to the proposed bill, S. 731, to "make rules respecting military hostilities in the absence of a declaration of war." But to a lifelong student of the early days of the Republic the proposed bill, considered in conjunction with Senate Resolution 85 of the 91st Congress, first session, defining "national commitments," it is calculated to provide those safeguards for the exercise of war-making intended by the drafters and ratifiers of the Constitution without hampering the President in his capacity as Commander in Chief to act in defense of national security. Nor does it inhibit his capacity to operate in an emergency with that dispatch which, as John Jay long ago pointed out in the 64th Federalist paper, is a distinctive attribute of the Presidential power.

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[26] See Stephen G. Kurtz, "The Presidency of John Adams" (Philadelphia, 1957), p. 311; Manning J. Dauer, "The Adams Federalists" (Baltimore, 1953), pp. 168–170, 188. For the Spanish-American War, see Henry F. Graff, "Participatory Foreign Policy," New Leader (Mar. 2, 1970).

[27] See Alexander De Conde, "The Quasi-War" (New York, 1966).

[28] Richard B. Morris, "Great Presidential Decisions," pp. 49–55.

Those who would defend the enormous expansion of the President's warmaking powers make much of the differences between the posture of the United States today and in 1789. That the problems were of far less complexity is a fact readily conceded, but to the Founding Fathers the peril to the young Nation from foreign wars seemed no less grave than it does today. What is amazing to us in retrospect is the modesty of the foreign affairs operation. When in 1788 a committee of Congress investigated the administration of the office of Secretary for Foreign Affairs, a post then held by John Jay, they reported that the Department consisted of two rooms, one for the Secretary and the other for his two clerks—quite a contrast to the farflung bureaucracy which handles similar tasks today.

The Department of State continued as a relatively simple operation under Jay's successor, Thomas Jefferson. In 1790 the chief clerk pointed out that he kept the consular returns in the bottom right-hand drawer of his desk, while foreign proceedings, including ratification and letters to European powers, were stuffed in a left-hand pigeonhole. This is a far cry from the style and scale of operations conducted today by the Department of State, the National Security Council and other agencies of the executive arm.

The argument has repeatedly been made that the relationships governing the warmaking power spelled out in the Constitution and shaped by early precedents were better fitted for the era of the pigeonhole filing system of Secretary of State Jefferson and no longer relevant to the world of electronic data systems and that the position of the United States in the nuclear space age dictates an enlargement of the Presidential powers to respond immediately to threats to our national security. It is my contention that the bill introduced by Senator Javits covers all these contingencies.

The fact is that our most extensive and serious recent involvement overseas did not appear like a flashing meteor in the skies but resulted from a state of political erosion in Indochina which goes back for a quarter of a century. Indubitably during that substantial period of time there must have been some moment when the issue of war or peace could have been put to Congress on a basis more candid and substantial than the Gulf of Tonkin Resolution. Instead, in the absence of candid communication between the Executive and Congress we have seen a phantom undeclared war which is supposed to contract but actually escalates, which is supposed to shorten but spitefully drags on. The 30-day time period provided by the present bill amply safeguards the essential powers of the President for instant response, but assures an opportunity for that sober second thought about the necessity for continuing military operations. It provides that national consensus for going to war so woefully lacking in the present operation.

Lastly, the use of the Executive agreement to bypass the Senate's role in treatymaking may commit the Nation in secrecy to a perilous course—the dread possibility that the framers of the Constitution sought to obviate. This bill, by defining a national commitment to mean one "affirmatively undertaken by Congress and the President," would restore those safeguards prudently inserted into the Constitution by men who were generally agreed that going to war and continuing

at war were too serious and awesome responsibilities to be left to the decision of one man alone.

Thank you.

The CHAIRMAN. Thank you very much, Professor Morris. I think that is an excellent statement.

I wonder, Professor Kelly, if you will give your statement now.

## STATEMENT OF ALFRED H. KELLY, PROFESSOR OF HISTORY, WAYNE STATE UNIVERSITY

Mr. KELLY. Gentlemen of the committee, Senators, a very great deal has been published or uttered on the subject of the Constitution and the war power thereunder, and I am not at all certain that a specialist in American constitutional history can add anything particularly new or profound to the current discussion. But I offer these observations in the hope that they may contain a little something of value.

### WAR POWER AS DEALT WITH BY 1787 CONVENTION

Two things strike a constitutional historian when he considers the war power as the 1787 Convention dealt with the matter. First, the delegates rather carefully isolated and distinguished at least four distinct types of power having to do with the waging of war. First, and most obvious, they lodged in Congress the power to declare, but not to wage, war. This power they granted to the Legislature unconditionally, despite the crumbling of that power that has taken place in the living Constitution in the last 30 years.

Second, they lodged in the President, subject only to senatorial limitations on the appointive power and the indirect limitations of the congressional appropriations provisions, command of the Armed Forces of the United States. Third, they bestowed upon the President, subject to senatorial treaty limitations, an indeterminate prerogative in the conduct of foreign relations, a sweep of prerogative perhaps best described by Hamilton in his 1793 Pacificus papers as resting upon the introductory clause in article II confiding the Executive power to the President, rather than upon a specific enumeration of delegated Executive functions. This view of the foreign policy prerogative has been confirmed by the Supreme Court of the United States in the well-known *Curtiss-Wright* case;[1] it contrasts sharply with the generally limited character or indeed the entire absence of internal executive prerogative, as the *Youngstown* case in 1952 made clear.[2]

Finally, as everyone here knows, the exclusive congressional power to appropriate constitutes a general check upon Executive discretion in the twilight area between foreign policy, military commitment, and war. But the point I wish to make here is that Madison's notes on the Convention made it pretty clear that the Convention associated, and yet distinguished, all four of these functions as they impinge upon the entering upon and conduct of war—an association and distinction that was quite evidently deliberate and which obviously accorded very well with the general notion of checks and balances of that day. The view of the war power taken by the authors of the Federalist papers in general accords very well with this interpretation.

[1] *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).
[2] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).

Less obvious is a second characteristic of the way the Constitution handles the war power—which seems to me to be essential to an understanding of the breakdown of the traditional executive-congressional relationship with respect to that function which has occurred in the last 30 years: the Constitution embodies both a classic rationalistic enlightment and a Republican view of the relationship between peace and war. The Constitution first draws an extremely sharp differentiation between the state of peace, in which the Nation ordinarily finds itself, and the state of war, an extraordinary legal state which can be arrived at only through a specific constitutional process.

To put the matter differently the Constitution treats peace as the normal state of affairs, while it considers war to be abnormal. The Nation, the Constitution implicitly assumes, will normally be at peace; war is a special and extraordinary condition, which brings into operation a whole series of extraordinary constitutional potentialities, i.e., with respect to *habeas corpus*, treason, the right of the States to repel invasion and so on. The Constitution also assumes that the progress of a war itself will move toward specific termination via another well defined constitutional process—that of the treaty power. This view of war, which displaced an older circumstance of the State system under which the distinction between peace and war was blurred and which treated fighting as the normal business of States, had been gaining some ground since its clear formulation by Hugo Grotius early in the 17th century.

### U.S. PATTERN OF BELIEF AND PRACTICE

But what is perhaps more to the point here, this view of war which the Constitution embodies was extraordinarily prescient in that it turned out to fit precisely that American pattern of belief and practice about war which made its appearance with the emerging synthesis between the American constitutional system and political democracy in the course of the 19th century.

For the American people, as time progressed, increasingly embraced the notion that peace was the normal state of affairs for a constitutional democracy. They assumed—and the assumption is already clearly evidenced in Madison's call for war against Great Britain in 1812—that war was so extraordinary, extraconstitutional and antidemocratic a state of affairs as to be justified only when the Nation was put in peril by direct attack.

Further, they assumed, correctly enough, that the Constitution entrusted the reluctant recognition of that extraordinary state of affairs to a formal declaration by the legislative representatives of a whole people. The situation created by the half-war with France in 1798 and the subsequent punitive measures against the Barbary Pirate States I would regard as obsolescent constitutionally at the time they occurred, although it is to be observed that Congress sanctioned the quasi-war with France through the adoption of at least four major legislative measures.

This view of an extremely sharp constitutional distinction between peace and war—which treated peace as normal and war as an abnormal state of affairs, justified only as an act of self-defense, gained ground both in executive and legislative practice and in the popular conception

of the realities involved throughout the course of the 19th and early 20th centuries. Thus the dominant pattern of political belief required President Polk, on the eve of the Mexican War in 1846, to announce that "American blood has been shed on American soil; war exists by act of the Republic of Mexico." Again, in 1898, it was Spain's aggression against Cuba—on our doorstep—which led to intervention and a formal declaration.

In 1917, Wilson, profoundly aware of the imperatives of the American peace-war process, waited for the "overt act" by Germany against American shipping before asking for a declaration of war. And the formal design of war declaration in World War II, arising as it did out of the Pearl Harbor crisis, where the Japanese attack once again satisfied the deepest requirements of American conviction and belief, was constructed in the same fashion. Even the Civil War, by the time of its onset a conflict between two constitutional entities both dedicated to this already traditional concept of the peace-war relationship, began with Confederate attack on Fort Sumter, a development Lincoln had intuitively recognized as essential were the appropriate Northern response of self-defense to be generated. Thus, there was, for more than 150 years of national life, an intimate and harmonious relationship between constitutional provisions, the "living Constitution," and the deepest wellsprings of popular democratic belief.

### U.S. ROLE IN STATE SYSTEM TOGETHER WITH EXISTING TECHNOLOGY

There was another element in this 19th and early 20th century formula: the role the United States occupied in the State system, together with the existing state of technology of the time. The sharp and special constitutional designation of war as a peculiar and abnormal legal state of affairs fitted exactly a world in which the United States, between 1815 and 1940, dwelt in a State system virtually devoid of the ancient hereditary European curse of imminent natural enemies. In the Western Hemisphere, the United States confronted only decaying empires and technologically and politically weak and disorganized States—none of them capable of menacing American security.

As for Europe, the much abused European balance of power system, the existing state of technology in relation to the great ocean barrier, and the quasi-alliance and special understanding which gradually grew up between Britain and America protected the United States from any serious menace. On its part, the United States renounced all power—state pretensions to a role in Europe; as Monroe put it, "with the affairs of Europe, we have no concern. * * *" This state of affairs fitted in precisely with a constitutional system which isolated war as a legal abnormality and with a popular myth which treated war as having a special and extraordinary character to be invoked only under the myth of self-defense—the democratic idea of a *bellum justum.*

### GROWTH OF EXECUTIVE PREROGATIVE

Even in this near-pastoral state of affairs, the steady growth of Executive prerogative in the 19th century brought about, in a number of instances, a certain degree of impingement upon the constitutional

war powers of Congress. The process of American constitutional history, viewed from one possible point of view, is the story with many advances and retreats of the steady expansion of Executive power—prerogative power, if one wishes to put it that way, in spite of what the court has chosen to say about the matter.

The entrance of the Executive upon the area of the declaratory power with respect to war; that is, the lessening of the distinction between "declaring" and "waging" so as to increase Executive discretion and lessen that of the Congress, is no exception to the general rule. Already in 1950, Henry Steel Commager was able to document at least 140 distinct instances of Executive initiative in something like warmaking—that is, the resort by the President in his role as Commander in Chief to the movement of armed forces in such a way as to increase the potential for war as a matter of Executive choice and at the same time to lessen the range of discretionary choice in the exercise of its declaratory powers open to Congress. I do not mean thereby to indicate any acceptance on my part of the too often elucidated argument that there is no difference between the constitutional balance between Congress and the Executive with respect to peace-war discretionary power that existed before 1940 and that which exists today. Such an assumption, in the opinion of this observer, is false.

### UNDERLYING REASONS FOR DISTURBANCE IN CONSTITUTIONAL BALANCE

The underlying reasons for the major disturbance in the constitutional balance in warmaking power between Congress and the Executive which characterize the last 30 years are rather evident to everyone in this room and need no extensive elucidation here. They include the destruction, between 1914 and 1950, of the self-maintaining European balance of power system, together with the concomitant destruction of the ocean barrier, which to paraphrase Walter Lippmann has ceased to be a barrier and has become instead a three- or four-dimensioned highway. Equally evident is the role of atomic weaponry in impinging upon the area of discretionary rational calculation with respect to decisions to pass from peace to war, so that the rationalistic enlightenment assumption of reasonable calculation, embedded as it is in our constitutional system, has been upset and in part thrust into the background. It is in this sense, in part, that the initiation of war, as distinct from the waging of war, has to some extent tended to become an irrational act.

Third, and this is perhaps the most devastating development of all, the emergence of the United States as the principal guardian of a gigantic power sphere in which a constant posture of war-willingness against a series of potential aggressor imperiums has tended to undermine if not destroy entirely the "peace, is normal; war is abnormal" conception both of constitutional life and of the international order as they developed in the 19th century.

### AMERICAN PEOPLE STILL ADHERE TO BELIEFS

The tragedy of a polarized world, in which a geographic power area has to be defended against constant potential incursion or redefinition by other States, is that it creates a state of affairs at odds with the fundamental rationalistic republican and democratic genius of the

American constitutional system. But the American people, it is extremely important to observe, still adhere to the assumption of the "peace is normal; war is abnormal" belief, to their belief in the imperative necessity of maintaining the concept of the democratic *bellum justum* rather than the notion of war for the sake of defining power boundaries, and to their belief in the importance of maintaining the element of rationalistic and discretionary public analysis as a function of decisions as to peace versus war. It is within this frame of reference of belief that the Javits bill is before the committee today.

### IS COMPLEX OF BELIEFS AND CONSTITUTIONAL PRACTICES OBSOLETE?

Is this complex of beliefs and constitutional practices obsolete? Is it simply to be dismissed as a victim of what sociologists sometimes fondly label "cultural lag"? It is certainly a possible argument. An examination of the history of attempts by the Congress, particularly the Senate, since 1950 to protect, defend, and preserve some element of geniune legislative discretion with respect to peace-war decisions yields a distinctly pessimistic conclusion—there has been a slow but steady disintegration, or at least a decline, of the extent of congressional control of that discretion. The record is one of a series of frustrated expressions of good intent, resolutions piled upon congressional resolution in defense of congressional constitutional prerogative, all to no great purpose.

### BREAKS IN CONGRESSIONAL-EXECUTIVE PEACE-WAR RELATIONSHIP

There were two decisive "breaks" in the continuity of peace-war relationship between Executive and the Congress, which tended, when taken together, to damage very badly the traditional balance of power with respect to peace-war decisions between Congress and the Executive.

The first occurred between May of 1940 and December 7, 1941, when President Roosevelt was able to mobilize mass popular support to sanction a series of Executive acts of war—properly described as that when seen in the context of international law—beginning with the destroyer base deal and ending with the convoy system instituted against the "rattlesnakes of the Atlantic" which took from congressional hands the discretionary peace-war decision with respect to the struggle in Europe. This is intended as no criticism of Franklin Roosevelt. On the contrary, the constitutional tragedy lies precisely in the fact, seen in the light of our present knowledge of the historical events involved, that exercise of Presidential prerogative which stretched the limits of the Constitution well beyond the breaking point, as Professor Corwin pointed out at the time, appears to have been necessary to national survival. The Presidential measures were not acts of irresponsible Executive despotism; rather the contrary, although I have always regarded it as doubly tragic that they did on occasion involve some considerable manipulation both of factual and legal realities, a state of affairs which has been known to recur since that time.

The second major "break" in congressional-Executive relations with respect to the war power came in two developments in 1950, both of them in connection with the defense of the newly emergent American

power sphere in Asia and Europe, which the United States now was charged with maintaining and defending. The first was President Truman's decision in June 1950 to intervene militarily against the Communist aggression in South Korea, and thus to take the United States, by an act of Executive discretion alone, into a large-scale war on the continent of Asia. I am aware that the President acted nominally in defense of obligations of the United States to the United Nations, in spite of the fact that the United States had never assigned police forces to the United Nations, nor had it implemented the earlier United Nations Participation Act of 1945.

The second, and closely related circumstance ni point of time and national policy, was the decision of the Truman administration that year to place seven divisions in Germany as a kind of trip wire against potential Soviet aggression.

Now in spite of the argument to the contrary which relies heavily upon the 140 precedents cited earlier, I would contend that from a constitutional point of view this move was entirely unprecendented. Seen from our vantage point now, it constituted a dangerous break in constitutional continuity. For never before had a President moved armed forces of such force, number, and character as to imply total national military commitment outside the confines of the United States or its territorial environs and possessions, let alone overseas into the ancient cockpit of European wars. To compare this situation with President Wilson's landing the Marines at Vera Cruz in 1914, or the first Roosevelt's intervention in Santo Domingo in 1904 is to ignore power relations, war potential, commitment, and geography. Again, the Executive's decision cannot be condemned merely as an act of irresponsible Presidential despotism. The decision, with all its tragic potential, was in a sense necessary. It was in support of the North Atlantic Alliance, for one thing. Furthermore, there was not technically a state of peace in Germany as yet. But it exposed a certain tragic inconsistency between the ancient peace-war balance between Congress and the Executive in the American constitutional system and the exigencies of the decisionmaking process in the marginal area between diplomacy and war inherent in the defense of the new American power system.

### ATTEMPTS TO RECOUP CONGRESSIONAL DISCRETION

It would be too much to label the various senatorial and congressional resolutions since 1950 which represent attempts to recoup the congressional discretion in the war declaratory power as exercises in futility, but they certainly have not succeeded to any important degree in restoring the constitutional balance which existed in the matter before that time. The outcome of the "great debate," staged in the Senate early in 1951 over Presidential versus congressional war power—a debate precipitated by Senator Robert Taft's stern speech denouncing executive "usurpation of power" in "violation of the Constitution and laws of the United States" was a serious defeat for the champions of congressional constitutional war-declaring prerogative. Not only did the President refuse to yield up any acknowledgement of wrong-doing either in Europe or America; what was more significant, the Senate itself finally in effect quietly resigned itself to the adoption of a very weak resolution declaring it to be "the sense

of the Senate" that "in the interests of sound constitutional process—congressional approval should be obtained on any policy requiring the movement of American troops abroad * * *."

The precedents here were decisive. President Eisenhower did gain congressional concurrence in his decision to defend the offshore Chinese islands in 1958. But the Executive-determined military intervention in Lebanon in 1958, the Kennedy moves in 1962 into Thailand and Vietnam, the "Cuban naval quarantine" of that same year—polite terminology for a blockade, a state of affairs described in all textbooks in international law as recognizing the technical existence of a state of war—all were taken without so much as a prior bow toward the congressional war declaring discretion. In the same class was the 1965 intervention in Santo Domingo. And while the Tonkin Gulf Resolution of August 1964 represented a certain recognition of congressional constitutional right, its ultimate effect was to weaken rather than to strengthen congressional prerogative, since the President used what amounted in force to nothing like a full declaration of war to mount a full-scale war in Southeast Asia. And as for the National Commitments Resolution of June 1969, declaring it to be the "Sense of the Senate" that no further overseas military commitments be undertaken without the consent of Congress, not only is it in force disturbingly like the abortive Senate resolution of 1950, to the same general end, but also it has had so far no perceptible effect upon the executive-legislative constitutional balance with respect to war-peace decisions.

CHIEF VALUE OF S. 731

Let me now say a few words in support of the Senate 731, the Javits bill. The measure obviously poses few constitutional problems in the immediate sense, since however unprecedented it is in direct pursuance of the congressional war power. As an attempt to repair, implement and revitalize congressional discretion with respect to the war power, I believe that it expresses the will of the American people, in their longstanding conviction that "peace is normal; war is abnormal"; that for that reason a declaration of war requires some formal national affirmation, usually a democratic affirmation in support of the idea of a *bellum justum*. It is as a reaffirmation of this spirit that the measure, I believe, has its chief value.

PRACTICAL EFFICACY OF S. 731

In terms of the Javits bill's practical efficacy as a means of imposing limits upon Executive discretion in crisis politico-military situations, I am less sure. The measure obviously is no panacea. Conceivably the limits upon emergency military action imposed upon the Executive in the bill might well have given the President pause on the eve of such acts of intervention as those in Lebanon or Santo Domingo, which, it would appear, would fall outside the four categories of authorized Presidential authority to resort to military action.

But it is debatable, both affirmatively and negatively, whether, if the Javits bill had been law at the time, it would have altered seriously the element of Presidential discretion which led President Truman to make his fateful decision to interpose American military force against the Communist invasion of South Korea. There were American defense

forces on the scene in that state, and the President construed American action, correctly or not, as in defense of American obligations under the U.N. covenant. Nor would the bill have had much meaning, beyond its formal applicability, had American ground forces in Germany at any time in the last 20 years been put under massive attack from across the Elbe. It is conceivable, of course, that the bill, if its spirit were carefully observed, would put a certain limitation upon potential American intervention in a Middle East crisis, although it is difficult, in that complex mess, to decide whether the provisions of the bill would be applicable to any of the variety of complex situations that might develop.

The 30-day limitation on Executive acts of war authorized by the general terms of the bill but unsupported by a specific declaration is noble in intent, but again its efficacy, meaning, and applicability might be expected to vary greatly depending upon circumstances. Conceivably, it would be in situations like the Lebanon or Santo Domingo interventions where its limitations might be brought to bear most effectively. But it is scarcely conceivable that the 30-day limitation would have much meaning in a Korean-type situation, or in the swift onset of a general war, where large-scale engagement with enemy ground forces had already occurred. And its irrelevance to a war situation where atomic weaponry had already come into play is too evident for extended comment.

What emerges is that a measure of this kind would not be likely to have any great force and effect in controlling the great crisis situations, upon which the onsets of major wars have turned. The diplomacy, wise or not, which may have brought these situations about, also lies beyond the purview of the bill. In showdown military cases, neither the Executive nor the Congress are as a rule in possession of any very large measure of discretion as to the appropriate decisions, however tragic, which must be taken in the national defense.

On the other hand, the Javits bill, if enacted into law, might well be of some value in limiting Executive policy in those instances where some small scale intervention is contemplated of a kind that presumably lies outside the enabling provisions of the bill. Interventions of this kind, while sometimes justified, have a way of damaging badly the American image as a peace-loving constitutional democracy, while in at least one instance, that in Vietnam, it was a small-scale intervention of this kind which eventually was transformed, by a series of other seemingly secondary decisions, into a large-scale war.

### S. 731 IS A BEGINNING

A measure which does no more than give the Executive pause in such situations will have justified itself. In any event, the Javits bill expresses a belief which seems to me to be cherished rather widely by the American people today, regardless of any immediate opinions they may entertain about the present situation in Vietnam: that the exigencies of modern technology, diplomacy, and power have distorted rather too much the constitutional balance between Congress and the Executive with respect to those fateful decisions involving peace and war. In its attempt to correct that imbalance the Javits bill is at least a beginning.

Thank you, Senator.

The CHAIRMAN. Thank you very much, Professor Kelly.

Following my procedure yesterday, I would like to recognize the Senator from New York.

Senator JAVITS. Thank you very much, Mr. Chairman.

COMMENDATION OF THE WITNESSES

Gentlemen, I thank you very much, Professor Morris and Professor Kelly, for the support which you have given to this bill. You have both divined exactly my purpose, which is to start to restore a balance which your profound historical knowledge has shown us all to have been very greatly disturbed by the events of almost a century, and as both of you have emphasized, particularly in that part of the task which Professor Kelly dealt with, by events of the last 30 years which has caused that balance practically to be obliterated.

BROAD-SCALE WAR BY PRESIDENTIAL ACTION

I doubt that there is anything now that an American President, if he simply wanted to cite precedents, might not feel he can do to plunge us into the broadest scale war without reference to Congress. Would you gentlemen agree on that?

For example, as you have testified, Professor Kelly, the posting of forces on the Rhine, which is pursuant to a treaty and with which I thoroughly agreed, nonetheless has a potentiality, by Executive action alone, of transforming that act of deployment into the broadest scale world war; could it not?

Mr. KELLY. No question about it.

Senator JAVITS. I would like to deal with each of you in turn, being as brief as I can.

PRESIDENTIAL AUTHORITY UNDER S. 731

Professor Morris, in the specified four categories which give the President authority to proceed for a limited period of time, do you find that they are the categories in which tradition and historical practice have demonstrated a degree of relaxation in giving a margin of discretion to the President? Are these four categories which tradition and practice have shown us to be adequate to cover the contingencies in which the President must move more quickly than the Congress and the President can move together?

Mr. MORRIS. Yes, Senator. I feel that these four categories give the President a great deal of elbow room to act in emergencies. All the emergencies I can conceive of, really, are covered by those four categories that the President, it would seem to me, in the interest of national security, should possibly act.

Senator JAVITS. And Professor Kelly, do you see historically that if he sought to act outside those four categories, would you agree with Professor Commager who testified yesterday, that as far as he could see, again, from history and practice, outside those four categories, history dictates that there is always time to seek congressional concurrence?

Mr. KELLY. I would agree with this. I think the four categories are construed as to create a very broad Executive discretion with

respect to fulfillment of formal national obligations, with respect to treaties, with respect to armed forces already posted, with respect to defense and the like.

Pretty much, I would say, it falls back on the old proposition that this kind of Executive discretion is in fulfillment of commitments and, therefore, in a broad sense in fulfillment of the idea of national self defense.

Senator JAVITS. That leads me to another question, Professor Morris, if I may address this to you: That is the statutory, the authority of the President. Is it not a fact that as we stand under the Constitution today, the President, and based upon the very early precedents which you cited so very interestingly, the President does not have unqualified or certainly not clear statutory authority to proceed even in these four cases? For example, is it not a fact that these early Presidents sought to either get out of the situation or to——

Mr. MORRIS. Right.

Senator JAVITS (continuing). or to get the concurrence of Congress, even in cases involving, let's say, an attack on American forces, and American naval forces?

Mr. MORRIS. Not only was that the case with President Adams, but even in the case of President Jefferson, which I did not go into, of course; he did not want to pursue the Tripolitan War, the war against the Barbary pirates, because he felt it would be turning a defensive war into an offensive war and he could not engage in an offensive action without a declaration of war by the Congress, for which he was severely criticized by Hamilton in the end for taking this particular stand. But it seemed to me that this type of action was not considered by the Founding Fathers as legitimately within the powers of the Executive.

Senator JAVITS. Now, Professor Kelly, would you find a parallel in that in the fourth category that is provided in this bill relating to commitments? That, of course, stems back to the commitments resolution of our chairman, in the provision in a number of treaties, I think most of those we have signed in recent times, that we would act "according to our constitutional processes?"

Mr. KELLY. Article V of the North Atlantic Treaty.

Senator JAVITS. Exactly.

That is a prototype. Now, if our "constitutional processes" contain this question to which Professor Morris has testified, by vesting limited power in the President for period of time, are we not confirming him affirmatively in a power which is now in doubt?

Mr. KELLY. I think that is true, Senator. I would put it a little differently and say the bill, in effect, does specifically acknowledge the President's right to do that which probably, in pursuit of treaty commitments the language of the treaty would claim, but since the Congress, by your bill, sir, stands ready to acknowledge this area, I see no great controversy between the Congress and the Executive on this point; nor do I think there would be one of practical operation of this kind of peace-war situation, either.

Senator JAVITS. But at least the practice is then codified and made statutory?

Mr. KELLY. Exactly so.

S. 731 IS CONSTRUCTIVE AND HELPFUL TO EXECUTIVE

Senator JAVITS. And so as the whole bill, really, is only doing that. As you, I think, so very soundly pointed out, this is constructive and helpful to the Executive.

Mr. KELLY. I would regard it as very much so.

Senator JAVITS. The reason that I make this point is that I did not intend, and I am sure that my cosponsors, Senators Mathias, Spong, and Pell, did not intend this bill to be construed as shackling of the President. On the contrary, it was codification, which as I saw it and I believe they saw it, which confirmed in the President his emergency discretionary authority for national defense. I think it is very important that the bill be understood in that way. I am very gratified that to two objective and very informed observers like yourselves the bill did appear in that light.

PROTECTION OF U.S. LIVES AND PROPERTY ABROAD

Yesterday Professor Commager was engaged in questioning about one of these four categories that relates to lives and property of Americans abroad.

Of course, it must first be assumed that the President, even without this bill, would not likely exercise any such protective power. This has been our historical practice as a Nation. You do not send the Army, Navy and Air Force to rescue a fellow who has been arrested for taking pictures on a street in Moscow. No such intention is implied; nor did I have in mind any Executive action to protect or secure American investments or corporate property abroad.

What I was thinking of was the lives of Americans where there was a really appreciable problem, plus the property immediately essential to life, to wit: a home, an automobile, perhaps an embassy, an embassy compound, a U.S. installation, and so on.

Now, could you gentlemen help us from an historic point of view with the way in which, one, is the inclusion of "property" desirable, because it was questioned yesterday; and, two, how can we the better carry out the intent which I have explained? Are we better advised to keep the language of a statute like it is?

Could we hear from you, Professor Morris?

Mr. MORRIS. Senator, I might say it is broad enough to cover both contingencies, because if we are protecting the lives and property of Americans abroad, this clause covers not only an attack on Shepheard's Hotel and Americans in the hotel, but it could be an attack on mining property and the engineers in the property, or an attack on an oil rig or something of this kind.

So I think it is very, very difficult to distinguish and might be unwise to try to pin this down by very, very tight language, because we cannot foresee the contingencies that might develop.

But I can very well see that this could be interpreted in ways other than you have planned.

Senator JAVITS. Professor Kelly?

Mr. KELLY. Well, Senator, my own reaction here is probably a somewhat idealistic one. I like the development that took place in American international relations, its treaty structure and its diplomacy between, let's say, the turn of the century and, let's say, the formula-

tion of the good neighbor policy and a little afterward, as in this period, the United States moved toward the concept of nonintervention, signed a whole series of treaties in which the concept of nonintervention in the diplomatic-military sense against the sovereignty of another State was affirmed as a basic principle of American legal, constitutional and diplomatic procedure.

I read with some sense of—I will not say trepidation or amusement, but with some sense of interested concern on this particular provision which seemed to me, in some sense, to constitute almost an escape clause in your bill. I wonder if the language here could not be defined so as to eliminate the possibility that it could be construed in such a way as to defend the kind of acts of more irresponsible intervention which modern States sometimes do engage in just because they have the power and the impulse and which our country, however well intentioned, has not always managed to avoid.

Senator JAVITS. I sought to qualify in this sense by using the words in the text "as may be necessary," but I am inclined to agree that further work on that particular provision is desirable.

Mr. MORRIS. May I suggest, would it be possible to drop out the words "and property" and say "protect the lives of U.S. nationals abroad"?

Senator JAVITS. I would be inclined toward that on the basis of the testimony of yesterday and today. Also, I am inclined to examine very carefully the suggestions made in the Eagleton resolution which, on the whole, closely parallels my own. I am glad to acknowledge the need for reconstruction of that particular provision which I gather you both agree to?

Mr. KELLY. Yes.

Mr. MORRIS. Yes.

### SHOULD PRESIDENT BE UNWILLING TO SIGN S. 731?

Senator JAVITS. Finally gentlemen, do you see anything in this bill which a President sensible of American freedom should be unwilling to sign? I want to avoid future Vietnams, undeclared wars not rooted in the consent of our people, in the active support of our people—that is probably more accurate than consent. But I did have in mind the idea that this is an instrument that does put constraints on the President. So I ask you whether you see any reason why a President should in the American interest, in the interest of the ability of the President to deal with the problems of the Presidency, refrain from or refuse to engage in a definition of the constitutional authority of both himself and the Congress in warmaking incorporated in the bill such as the one here put forth?

Professor Morris?

Mr. MORRIS. I would think that the President would be happy to look to the Congress for a national consensus of support of an overseas military commitment as distinguished from within areas contiguous to the United States, and that the President would be on much more secure ground in conducting operations, prolonged and specific operations overseas, if he did have that kind of national commitment.

We have the tragic experience of the last decade, where we are having an enormous overseas commitment without a clear mandate,

or with a very, very doubtful congressional mandate. It seems to me this is what should be avoided in the future.

I do not think, myself, that this really hurts the powers of the President, or if it limits the powers of the President, it defines them in a way that I think is an advantage to him as Commander-in-Chief.

Senator JAVITS. Thank you.

Professor Kelly?

Mr. KELLY. I am not sure I know quite how to answer. There are two levels of answers possible. One, the bill does define and does confirm and by implication it does also reaffirm congressional power and it does impose a certain implied limitation by enumeration and therefore exclusion upon Presidential discretion. My guess is that the deepest instinct of the Executive is to resist any attempt to formulate and define limitations on the whole sphere of the prerogative and that you will get an objection in those terms. I would be very surprised, sir, if you did not. I do not think it actually, in any substantive way, in the immediate sense, would limit the action of a President. Its terms are so broad that it merely reaffirms the idea of adequate national commitment.

But I suspect rather strongly that the tendency of the President is going to be, in any given situation, to resist attempts to define and therefore limit the area of discretion with respect to Executive prerogative.

Senator JAVITS. Professor Kelly, my question was, however, should he, based upon your experience and enlightenment as an historian, should he refuse to accept some qualification?

Mr. KELLY. I am in favor of restoring the balance in the direction of Congress, which I think has been damaged. So, viewed in that concept of national interest, my answer would be no.

Senator JAVITS. You do not see anything in terms of the ability of a President to carry out the Presidency which ought to induce him to stand against such a measure?

Mr. KELLY. No, sir, I do not.

Senator JAVITS. Thank you.

The CHAIRMAN. Senator Spong?

Senator SPONG. Thank you, Mr. Chairman.

### COMMENDATION OF WITNESSES

I would like to join Senator Javits in thanking each of you gentlemen for your very fine statements. You have given us an excellent historical background in each instance for the considerations that moved Senator Javits to introduce this bill. I quite agree with Professor Kelly, and I gather that Senator Javits does, that we view this only as a beginning, as an instrument on which we can seek to swing back the pendulum just a little way from what has taken place in the last quarter of a century.

### CONGRESS' CONSTITUTIONAL POWER TO PASS S. 731

I should like to ask you gentlemen whether either of you has any doubts that, as a constitutional principle, Congress has the power to pass a bill similar to this.

Mr. MORRIS. Well, Congress has—Professor Kelly, I think, is probably better qualified to answer this—has defined obligations of the Executive arm; for example, it has required the Secretary of the Treasury to make regular reports and so forth. In other words, it seems to me that there is a long history of Congress exacting a certain measure of Executive accountability in legislation.

This does, of course, get down to the question of checks and balances, definitions of powers in the Government; you do raise a question of how effective legislative action might be in this direction. But my own feeling is that since Congress was given, under the Constitution, the right to declare war, it has the right to pass enabling legislation to indicate just what war is.

Senator SPONG. Do you agree with that?

Mr. KELLY. I do not have any constitutional doubts about it at all. One could observe, I suppose, that historically, it is unprecedented for Congress to define more precisely in pursuance of the war power the extent of that power which it is willing to delegate to the Executive. I do not know of any statute historically that has done that, either a living statute or one in the past; I cannot think of one off hand. In this sense, it is unprecedented. But the expression in the Constitution which defines the war declaring powers of Congress is so clear and unconditional that it gives me no constitutional pause at all to say that Congress can implement that, particularly when it does it in terms of a gesture toward the Executive in terms of depositing a certain trust in terms of implementation and the like.

Senator SPONG. Thank you.

### AUTHORIZATION FOR USE OF ARMED FORCES UNDER TREATIES

If I understand your response to Senator Javits, you agreed that section 4 could be interpreted to substantiate or to confirm certain authorizations with regard to the NATO Treaty that may presently be in doubt. Did I understand your answer, Professor, to say that?

Mr. KELLY. Yes.

Senator SPONG. Are you familiar with the Eagleton resolution? Have you had an opportunity to read it?

Mr. KELLY. I have held it in my hand, but have not studied it carefully.

Senator SPONG. I would read part of section 1 that bears relation to this:

> No treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further congressional authorization.

Would you care to comment on that?

Mr. MORRIS. Is that "no treaty heretofore"?

Senator SPONG. "No treaty previously or hereafter entered into. . . ."

Mr. MORRIS. That raises grave constitutional questions, because a treaty is the supreme law of the land and cannot be changed unilaterally by a congressional act.

Senator SPONG. Do you have any comment?

Mr. KELLY. The first and most obvious thing, I think, is to say that it seems to me generally in pursuit of the prototype language of

article 5 of the North Atlantic Treaty that was cited earlier. In a sense, therefore, it is declaratory of the obvious. I do not think treaties do specifically as such authorize such use; rather, they abstain from authorizing, at least the ones the United States has entered into. So such a declaration, I think, on the part of the Congress, is declaratory rather than anything else.

Obviously, it does not eliminate the potential of a self-defense situation. If you were confronted with a situation, the ultimate catastrophe that we all think of in terms of ground action of a massive Russian move across the Elbe, for example, with several divisions of the American Army immediately being engaged in large-scale fighting and a provision of this type obviously having no controlling force with respect to what happens, the United States would fundamentally be acting in pursuance of its obligations under a whole series of treaties beginning with the North Atlantic Alliance and the Treaty of 1954 and the like, quite aside from a bill of this kind.

But it does seem to me to be affirmative in pursuance of article 5 and prototype provisions.

Senator JAVITS. Would the Senator yield to me?

Senator SPONG. Yes, indeed.

Senator JAVITS. There is a specific difference, though. I want to be frank about this and if you know anything that will reveal any weakness, I want it revealed. It is a critical thing, far beyond pride of authorship.

ELIMINATION OF TRIP WIRE SITUATION

It seems to me your answer makes us keep an army on the Rhine. My provision relieves us of the necessity for keeping them on the Rhine. You need no trip wire. If the President feels that immediate action is necessary in a situation without any trip wire, he can act. I think that is necessary. I do not think the United States should put itself in a position where in order to be able to act, it has to have a trip-wire operation, because then perhaps you are going to face that in Vietnam and other places. Now, if you wish to, I hope you will comment.

I thank the Senator for yielding.

Mr. KELLY. Senator Javits, I am frank to say I had not picked up this point that you have elucidated here because I have not had a chance to study this provision carefully. I suspect that this also is controlled, if you want, ultimately by the congressional appropriations power and by the discretion of the President as Commander-in-Chief in pursuance of various treaty obligations. I would agree that the President should have discretion subject to certain ultimate congressional controls about where the Armed Forces of the United States are to be posted.

I would agree with you also that there ought to be a discretion which enables the President to act in the national interest without regard to whether there has been an actual contact with the military forces of the United States. That is a distinction you are drawing; I cannot argue about it.

Senator JAVITS. I thank my colleague.

IMPOSING RESTRICTIONS ON HOSTILITIES VS. PRINCIPLE OF AUTHORIZATION

Senator SPONG. I asked Professor Commager yesterday to comment on this and I would ask you gentlemen too. What is your opinion of the wisdom and propriety of imposing restrictions on the conduct of hostilities, as was done through the Cooper-Church amendment, as distinguished from insisting on the principle of authorization?

Mr. KELLY. I need some further elucidation to make the distinction, Senator. I wish you would talk for a moment.

Senator SPONG. I hesitate to say what the Cooper-Church amendment was in the presence of Senator Cooper, but it imposed a limitation, if not on how the war should be conducted, certainly on where it should be conducted without further authorization, and also the type of military aid that might be employed in certain geographic areas.

Mr. KELLY. I am with you now.

Senator COOPER. Might I add something there?

Senator SPONG. Yes, sir.

Senator COOPER. I will give you the rationale for the amendment. Thailand is a party to the SEATO treaty. Laos and Cambodia are protocol states. Laos in the Protocol of 1952 was declared a neutral state. Cambodia denounced, and I use that in its legal sense, the protocol and said it would not depend upon the protocol. The rationale for the Cooper-Church-Mansfield-Aiken amendment was that the United States had no obligation by treaty or commitment of any kind to defend Cambodia, Laos or Thailand. Not having such authority, it is incumbent upon the President to come to the Congress for authority if he intends to defend these countries with U.S. forces.

Senator SPONG. Thank you.

Mr. KELLY. May I comment on this, sir?

Senator SPONG. Yes.

Mr. KELLY. I think there are two levels of commentary that are possible upon this. One is on the constitutional and the other is what might be called diplomatic policy. I am decidedly more competent on the former.

It seems to me that the war power as it is set up in the Constitution, indeed the whole constitutional concept itself, implies American membership in the state system, of which the United States was the first state outside Western Europe. The idea of a declaration of war, the very conception of the declaration of war, involves the concept of a declaration directed against another independent state in the state system, or at least an entity capable of conducting public international war; that is of belligerency, if you wish. These are ideas I had at the time of the Cooper-Church amendment. Therefore, it seems to me Congress has a perfect right to delineate, if you want, the limits of a specific military action in pursuance either of *de facto* or *de jure* war. In effect, it is saying that we resolve that a state of war does not exist with such and such a state, that the United States abstains from the entry into a state of war, *de facto* or *de jure*, with respect to such a situation. This seems to me to be constitutionally perfectly in pursuance of the congressional war power. I can see no difficulties here at all. As long as you accept the concept of the state system and

of war as directed against states in that state system and a *de jure* or *de facto* sense.

Diplomatic policy is another matter. I am not an expert particularly on this, although I have taught American foreign policy from time to time. Whether this in all the complex of the Vietnam situation is wise political, military, diplomatic policy is something I really do not feel myself to be an expert on. But I see no constitutional problem at all.

### RELATIVE DESIRABILITY OF AUTHORIZATIONS AND RESTRICTIONS

Senator SPONG. I was not questioning the constitutionality. I was asking if you had any comment on using restrictions and I think Senator Cooper has very well outlined the history that preceded the introduction of the amendment. But in light of recent history, I was questioning whether authorizations which are detailed and very specific perhaps are not more desirable than restrictions?

Mr. KELLY. Well, this is a nice legal, constitutional question. I suppose one could argue generally that authorization by enumeration is, generally speaking, more restrictive than the imposition of restrictions, which, general speaking, as you gentlemen well know, create generalized authorization. That is a basic legal principle, *expressio unius* and so on and so on, that you are all well aware of.

So I suppose as a general proposition, if Congress wishes to assert forcibly the war power and the implementation, what it should do is to authorize, which is the very nature of a declaration of war, rather than restrict. But there may be situations with respect to Cambodia and Laos, for example, which call for specific enumeration. I am sure that is what Senator Cooper would say. And I think in at least the legal sense, he may be right.

Senator CASE. Would the Senator yield?

Senator SPONG. Yes.

### SENATE CHANGE OF COOPER-CHURCH AMENDMENT

Senator CASE. I would like to note that what started out as a quite clear and logical effort on the part of Senator Cooper and his cosponsors was changed by the Senate as a whole when the question of combat ground troops was separated from other kinds of military activity. That change required, I think, an acceptance of a different concept of what the United States would do.

Senator SPONG. Thank you, gentlemen, very much.

Thank you, Mr. Chairman.

### USE OF EXECUTIVE AGREEMENTS

The CHAIRMAN. Professor Morris, a moment ago when we were talking about treaties, you mentioned their being the supreme law of the land and that the bill would not affect them.

There has grown up now a custom on the part of Executives not to make treaties except on trivial matters. Important matters now are executive agreements. What do you think about the development of that practice?

Mr. MORRIS. I was very careful to say a treaty was the supreme law of the land. I think that the instances of stretching of executive

agreements in the areas where they now extend is certainly an expansion of the powers of the Executive which are unjustifiable and unjustified under the Constitution.

The CHAIRMAN. That are what?

Mr. MORRIS. Unjustified, unsupportable under the Constitution.

The CHAIRMAN. What do you think about that, Mr. Kelly?

STATUTE PREVAILS OVER TREATIES

Mr. KELLY. I think it is a long and complex subject, but I would begin with this observation: I do not think Professor Morris meant to say that Congress does not have the statutory power to alter the content of treaties, because it does. They have a double situation.

Mr. MORRIS. I meant that, of course.

Mr. KELLY. It can violate the international obligations which it has assumed through the treaty power, but the elementary rule of constitutional law is that if a statute impinges upon a treaty obligation, the statute is the prevailing law.

The CHAIRMAN. Then the Eagleton provision with regard to existing treaties would be constitutional, in your opinion?

Mr. KELLY. It would indeed be constitutional on that point.

The CHAIRMAN. You would agree on that, too?

Mr. MORRIS. Yes.

AUTHORIZATION TO COMMIT ARMED FORCES TO HOSTILITIES

The CHAIRMAN. The Eagleton resolution also has this language:

* * * authorization to commit the Armed Forces of the United States to hostilities may not be inferred from legislative enactments, including appropriation bills, which do not specifically include such authorization.

What do you think of that provision? Would you comment on it, Professor Morris?

Mr. MORRIS. I suppose that provision is going to have to be very carefully studied. It could be construed as seriously limiting the powers of the President as Commander-in-Chief to use the forces where he feels that they should be used at the proper time to defend national security. But I had not really given this any careful thought.

USE OF APPROPRIATION BILLS AS AUTHORIZATION FOR WAR

The CHAIRMAN. Perhaps I would put it another way. These are general appropriation bills with vast sums which do not say for such and such a war. Do you think appropriation bills which do not specifically authorize any particular use of the Armed Forces, do not specify, are legitimately used as an authorization for the war?

This was used by, specifically, Mr. Rostow. He said that, among other things, this was one of the things that led them to believe they were authorized to do it.

Mr. MORRIS. Of course, I think this is a perversion of the use of appropriation bills. In other words, I think that the Founding Fathers originally, in limiting military appropriations for 2 years, had in mind curbing extensive wars of which they did not approve. That was the whole purpose of it. An appropriation bill which is used in ways other than the legislature wanted, I think, would provide perfectly proper

ground to have specific limitations within the appropriations bill for the——

The CHAIRMAN. It would be proper to have them in it, but if it has none in it, can they be legitimately used to justify a specific war which is not mentioned?

Mr. MORRIS. Well, again, of course, we are not talking about Senator Javits' bill where it was supposed to go back to Congress in 30 days and get a declaration of war, so technically speaking, you could only use appropriations to run military affairs for a 30-day period, in order to obviate this very moot point.

The CHAIRMAN. Do you have any comment to make upon that?

Mr. KELLY. Senator, I would make a couple of rather simple and obvious comments.

In the first place, I think the drawing upon appropriations of a generalized kind with respect to the Armed Forces would, we will interpret this as authorization, if you want, for certain kinds of foreign policy activity of a particular military, diplomatic, political kind, has helped to distort the relationship between the Congress and the President in terms of constitutional balance. I think there is no question about this.

Of course, it is true as a second point that Congress cannot constitutionally abrogate by one bill its substantive legislative discretion. It cannot do this. And if the Congress in a subsequent appropriation bill wanted to say that such and such a provision was for the support of such and such force in such and such an area, regardless of the provision of such a treaty, it would still have the power to do that. And the provision here would amount to an expression of intent. It would not have any force and effect on controlling a subsequent appropriation provision that was so marked.

But I think the general proposition is that very generalized authorization with respect to appropriation cannot properly be construed into, let's say, specific policy authorization unless the language can be interpreted that way.

Senator MCGEE. Would the Senator yield on that point?

The CHAIRMAN. Yes, I yield.

### DISTORTION OF EXECUTIVE-LEGISLATIVE PREROGATIVES THROUGH APPROPRIATIONS

Senator MCGEE. To make sure I am clear on it, Professor Kelly, without doing violence to personalities, we do have, I think, a group of Senators who, in general philosophy, would oppose going very far beyond the 3-mile limit. We would characterize it as isolationism in the old-fashioned sense. But they have supported the President in Southeast Asia because they believe in him as Commander-in-Chief and thus have supported through appropriations that effort.

Is this the point that you are establishing there, that we have distorted and warped this relationship between the prerogatives of the Congress on the one hand and the Executive on the other in this fashion?

Mr. KELLY. Yes, I think so. Let me say something unpleasant. It seems to me that there has been a certain—this is very easy for a person to say who does not have the responsibility—it seems to me that there has been a certain kind of failure to define on the part of

Congress. Congress is, in a sense, trapped and helpless with respect to the imperative of a military appropriation or a series thereto to the situation in Vietnam. The President creates a military role or military activity which obviously calls for an appropriation that goes way beyond what even the farflung American imperium would call for in a peace situation or quasi-peace situation. This, in turn, makes it incumbent upon Congress, unless it wishes to virtually attack the position of American Armed Forces abroad, to appropriate. The President then turns around and labels this kind of appropriation justification for the policies he has embarked on. In a sense, he has an argument.

That seems to me to be obvious.

Somewhere in this process, if the Congress wishes to reassert its traditional control over the discretionary power to make war, it has to reassert control over this appropriations process in relation to this in such a way as not to give the President carte blanche authority. I think that is what I would insist on.

Obviously, it is going to walk on coals of fire when it does this, because it cannot do it in such a way, obviously, as to create a military situation in which the President could pin back on the Congress the responsibility for a military disaster.

Senator CASE. Would the Senator yield here?

Senator MCGEE. Yes.

DIFFICULTY OF REGULATING WHAT APPROPRIATION BILL IS MEANT TO DO

Senator CASE. You are not saying anything unpleasant at all. All I want to point out is the very great difficulty that we are presented with.

Mr. KELLY. It presents a dilemma, it seems to me.

Senator CASE. Yes. The Senate may approve legislation to say no money shall be spent for combat in a particular area. Then it is faced with the negative implication that anything not specifically forbidden is permissible. The result is a terrible snarl. And how far can the Senate go in trying to regulate by legislation specifically what an appropriation bill is meant to do?

I think there is a great deal to be said for this effort to say, as Senator Eagleton attempts to in broad terms, that an appropriation bill shall not be used for anything else except providing money and that no authorization shall be implied from an appropriations act, even though this approach flies in the face of common sense in the absence of recognition of the difficulty of the problem we are dealing with.

Senator JAVITS. In the absence of the acceptance of common sense as a standard of judgment.

Senator CASE. Yes, but I use that term in a rather special way.

Senator JAVITS. I understand.

Senator CASE. In ordinary cases, when you give somebody something, there is implied approval. In general, you will be understood to approve the kind of activities being engaged in.

The CHAIRMAN. Last December, I believe, we had a specific authorization request by the Administration for so much money for Cambodia. The Congress clearly had the right to turn it down. If they had turned it down, at least they would not have had that money.

No doubt, they could have borrowed it from some other fund because they have so much money lying around that they can do with as they please.

This leads me to one or two general questions which do not directly grow out of the constitutional situation. Well, they do, too.

### PRESIDENT AS CHIEF PROTECTOR OF OUR LIBERTIES

There have been two very interesting books. One of the most recent ones was Mr. George Reedy's. Prior to that time, there was one by James MacGregor Burns that was very widely read. This is a quote which, it seems to me, is appropriate in our discussion and then I will comment upon Mr. Reedy's book.

This is from Mr. Burns' book "Presidential Government." He says:

> As a general proposition, the Presidency has become the chief protector of our procedural and substantive liberties; as a general proposition, the stronger we make the Presidency, the more we strengthen democratic procedures and can hope to realize modern, liberal, democratic goals.

Would you comment upon that, Dr. Morris?

Does this appeal to you?

Mr. MORRIS. Well, some people may argue that the Court has been the chief protector of our substantive liberties. Obviously, one could look at this quite differently, it seems to me. I would rather hesitate to accept the role of the President as the chief protector of our liberties unless one is thinking in terms of national security or protection against invasion or subversion. But otherwise, I would be inclined to think of this as a dated remark.

The CHAIRMAN. Since World War II, we have been either in a war or felt that we were threatened with one. It has been an era of crisis. I have been very apprehensive that the democratic system cannot survive the continuation of this atmosphere. Gradually, there has grown already a kind of cult of the Presidency and with the development of both warfare and television, it is going to be a very chancy thing whether or not democratic procedures can continue.

### INSULATION OF THE PRESIDENT AND EROSION OF CONGRESSIONAL POWER

Mr. Reedy's book took a little different approach and I know of no one better qualified to give an inside, personal account of what the nature of the office is. In his description of the Presidency, he says that you create the Executive with all these powers and then surround him with such a regal court that he is insulated from contact with what Mr. Reedy calls reality. So that you have a combination of this tremendous shift of power which you have already described, the erosion of the congressional power and the creation of power to the Executive. Yet at the same time, according to Mr. Reedy, the Executive is being insulated from the political realities of the day, certainly insulated from the Congress. As you mentioned a moment ago, the best example being the treaty process. They have virtually given up the treaty process on important matters.

EXECUTIVE AGREEMENT WITH SPAIN

We get many little treaties dealing with postal affairs and so on. Recently, we had an extraordinary one on the protection of stolen art objects. These are treaties. But when we put troops and take on commitments in Spain, it is an executive agreement.

What does one do about it? Do you have any idea of anything that can be done about this under our system?

Mr. MORRIS. Of course, in the interpretation of executive agreements I suppose this is a matter for the courts.

We used to think of executive agreements as migratory bird treaties and so on. It occurs to me that this is a legitimate issue that actually should come before the courts, the question of whether the President by executive agreement can commit the country to a military course.

The CHAIRMAN. We had requested, I may say most vigorously, that they submit it as a treaty. But they insisted on an executive agreement. The Senate, I think indicated that this should be a treaty and passed a resolution that the executive agreement with Spain should not be treated as other than an executive agreement and that this was not to be construed as a commitment.

I think the language clearly makes it a commitment, whether we call it one or not.

I find myself in a complete state of frustration and confusion, with the feeling that the Executive really has usurped the power. I am unable to find, although I support this bill and I support any bill like it, really the feeling that any of these is very effective unless we can do something far greater about the attitude of the people as a political matter.

Mr. MORRIS. That is right. My thought is that in this S. 731 and in your national commitments resolution, you are trying to talk about national commitments which result exclusively from an affirmative action taken by the executive and legislative branches. And we rule out commitments from executive agreements unless I am reading this bill wrong.

REASSERTING INFLUENCE OF LEGISLATURE

The CHAIRMAN. What is it that can create the power on the part of the Executive to abide by the Constitution, if I may put it that way? Is there anything that could be persuasive on an Executive, any Executive? I am not speaking just of this President. His predecessor and many others were just as uninterested in the congressional role as this one is. Is there any suggestion which would grow out of your vast knowledge of history which would indicate any procedure by which the deterioration of the influence of the legislature could be stopped and we could reassert this influence?

It is my feeling that in all cases where you have the Executive except from the legislature, legislatures have all gone down the drain as a matter of really effective instruments of government.

Would you agree with that?

Mr. KELLY. I think it is historically true that the progression in constitutional and quasi-constitutional States is in favor of the Executive prerogative. That is what I said in my paper and I think it is true.

Mr. MORRIS. I think, if I may say so, that there seems to be one difference between the use of Executive authority and prerogative successfully and unsuccessfully, effectually and ineffectively. I think one would say, for example, in World War I and World War II and even during the American Civil War, the Executive authority, regardless of the constitutional issues, was used with great effectiveness. It seems to me it has been used with much less effectiveness and much less national consensus behind it in the last 15 years.

It seems to me this is the thing that is going to create a greater incentive on the part of the Executive to get more support from Congress, the fact that it is not working.

The CHAIRMAN. Of course, I am obviously biased in the matter, but it strikes me it is very much in our interest to revive the participation of the Congress, not only to keep the country united, but, I think, to furnish some degree of deliberation and wisdom on the part of the decisions of the Executive. These decisions have been made, as Mr. Reedy says—I am very partial to the way he describes it—in a kind of vacuum, isolated from contact with the representatives of the people as in Congress. The role of Congress has been downgraded. I think there is a tendency on the part of most of our media to feel that Congress is ineffectual and it is not decisive. It does not speak with one voice. It does not speak on prime time on Wednesday night. It is always sort of dissipated, a little here and a little there, and it does not seem like a very useful instrument of Government. I do not agree with that; I think the neglect of it is one of the reasons why we are in such difficulties today.

I find myself struggling to find whether all of this is a statement of wishful thinking and of things we would like to come about. But, what is the real substance of it? How can we reestablish a respect on part of the Executive, any Executive, for the constitutional process for the participation of the Congress?

Mr. MORRIS. All I can say as a historian is that if the people of this country had seen the expansion of the Executive powers in the last quarter century, the Constitution never would have been ratified. It is very clear from all of the debates in the ratifying conventions and in the tracts both of the Anti-Federalist and the Federalist papers that every effort was made to reassure the people that you would not have a kind of monarchical type of situation that Mr. Reedy describes and that the President would be merely one of the three arms of the Government and that there would be checks and balances and so forth and people were reassured. But they were concerned, very seriously concerned, about a situation which would take a century or more to develop.

### ATMOSPHERE CREATED AROUND PRESIDENCY

The CHAIRMAN. Of course, Mr. Reedy does not attribute this to the President as an individual so much as to the atmosphere that we have created. He says that the physical and political setup in the White House reduces its occupant to a bumbling amateur in his own profession of politics. Of course, he obviously had President Johnson in mind, because that is the President with whom he was working. He does not mention him. But there is something about what we have done with the office of the Presidency that creates an atmosphere in which the President is the victim really. I think that was the point

of his description. The President became a victim of a condition that has arisen in the White House that insulates him and, as Mr. Reedy says, makes him a bumbling amateur in the art of politics.

This seems to me most serious if, at the same time, we have given him power by the congressional neglect of asserting its own power. Then if we reduce that office itself to an amateur, we really are in difficulty. We do not even have a good and effective Executive if this is true.

MAGNITUDE OF PROBLEMS OF THE PRESIDENCY

Mr. MORRIS. Well, the problems of the Presidency are of a magnitude today that was not contemplated a century and a half ago, and there is nobody who could hold the office of the Executive who could be master of all these problems, and therefore, he should get as much advice as he can in decisionmaking. To that extent, the Constitution does provide machinery for advice and support and I think it might be incumbent upon the Chief Executives, considering the awesome problems that we face and the great complexity of them, to seek more of a national consensus through the Legislature.

The CHAIRMAN. You said in the beginning, that the problems are not all that different and that our Founding Fathers were just as concerned about the danger of their problems.

Mr. MORRIS. I was just thinking of the military problems. I do not think the military threat was any greater than they thought in 1789, leaving out the ICBM's, but in terms of the Presidency today, problems of welfare, pollution, the domestic problems of the Nation, the role of the Federal Government is so incomparably more complex and wide in scope than it was conceived of in early Administrations when it was a very simple operation—this is what I meant.

SOLEMNITY OF S. 731 IF IT BECOMES LAW

Senator JAVITS. Mr. Chairman, may I just observe that if this bill should pass, it becomes law. In that regard, it is even more solemn than a commitment or resolution. Presidents do respect and observe laws. The Constitution explicitly enjoins him to "take care that the laws be faithfully executed."

The CHAIRMAN. Is it more solemn than the Constitution?

Senator JAVITS. No, but it does become law and the Constitution, both these gentlemen have testified, leaves this question we are dealing with somewhat open. Our tradition, our history shows that Presidents do not fly in the face of laws as clear as this one. I would suggest that this would make, Mr. Chairman, a very measurable change in what the Chair very properly is concerned about.

DISPARITY IN INFLUENCE OF LEGISLATIVE AND EXECUTIVE BRANCHES

The CHAIRMAN. I did not mean to raise the question that I was not going to support the bill. I am trying to develop a little aspect of our present situation, of which I think most people are unaware, especially those who have not had the experience of trying to influence the Executive at first hand, as to the disparity now, in the influence of the executive and the legislative. When events are created, such as

I mentioned, with an executive agreement, it does not matter how much we say it is not a commitment. Although I supported S. Res. 469, it still is a commitment in my view if we station those troops there and do all the things they have agreed to do under the executive agreement with Spain. We are committed. This dealing with fancy language does not really alter the case.

I believe Dr. Morris referred to the Virginia Ratifying Convention when Patrick Henry expressed his alarm over the prospect of a standing army and charged that the Constitution squints toward monarchy. Mr. Reedy says it has practically arrived there. Mr. Henry was a great prophet in that connection.

All I was trying to do is elicit from you and to emphasize the fact that I think this disintegration of the legislative process has gone much farther than people realize. There is much smoke around and we make a lot of talk and appear on "Face the Nation," but when it comes to exercise of power, comes to making the decision to go on and on and on in Vietnam or anywhere else—Spain, to keep the troops in Europe. The majority leader has made an effort just to bring some of the troops home. I do not know how many Senators—30 or 40—have joined him. It certainly is not persuasive.

### PASSAGE OF S. 731 OVER VETO DOUBTED

Whether or not we can pass a bill that will make it illegal is quite another matter. I doubt very seriously that you could pass any bill that to any extent restricts the President over a veto. If the Javits' bill passed both Houses and was vetoed, I would doubt seriously that it could be passed over a veto under the attitude that exists today.

We are all worried and the papers are all talking about the shame of the Senate because it requires two-thirds to shut off debate. Yet the President can veto any bill and require two-thirds of both Houses. Nobody says anything about that as being any obstruction to progress or to effective government. This is accepted as his right.

So in substance, I will finish with this feeling that while I favor this bill or such a bill as amended, as it may be, I still am not very optimistic that this is going to bring any great restriction on this or any other President until the Congress can, itself, reassume an attitude that it does have a role to play as the Constitution requires and can and should use the appropriation power, for example. If it had to, it could actually cut off funds to continue to invade country after country if it would do that. But Congress has arrived at an attitude of mind, which is a psychological phenomenon, that we are no longer really significant and that we ought to do what the President says. As Mr. Burns says, the President is the protector of our liberties.

### POWER OF THE PRESIDENT

This is really carrying the cult of the personality or the office that Mr. Khrushchev talked about to an extreme limit. I do not think in Russia any individual since Stalin has the kind of power that our President does. Do you agree with that?

Mr. MORRIS. So far as the analogy with the Russian situation, I agree. I do not think anyone in Russia has the kind of powers that the President has.

The CHAIRMAN. They refer to their Government as a collective leadership. It is at least by the Politburo if not the Central Committee. But we do not even have a committee. As Mr. Truman said, "the buck stops here." It is just one man. President Johnson reminded us in every speech that we had only one President and he made all the decisions and it was none of our business except to support it. That was his real attitude.

Mr. MORRIS. But you still have the power of appropriation.

The CHAIRMAN. But we are so awed that we have lost all our capacity to exert that power, as has been demonstrated recently.

### DOCTRINE OF INHERENT POWER

I thought I should remind you of the practical political side. I agree with everything you said about the Constitution. I think what is going on today is unconstitutional. I do not think there is a scintilla of constitutional support justifying the invasion of Laos. We no longer have even the Tonkin Gulf resolution, and the President said he did not need it. There is some mysterious inherent power if he has respect for law at all. We did not mention the doctrine of inherent power. Do you think that is a source of power to invade and do as he pleases with the Armed Forces? Do you agree with that?

Mr. KELLY. I do not accept the doctrine of inherent power in that term as lying within the President of the United States. I think he has a very large element of prerogative power in foreign policy as Hamilton defined it. I do not think you can escape that, and I do not think we would want to fall back upon an enumerative power of the President with respect to foreign policy. But at the same time, I do not think that prerogative power in foreign policy as the Court defined it in the *United States* v. *Curtiss Wright* case stands immune to the overweening specific limitations of the Constitution itself or of the separation of powers or of the specific areas of congressional delegation. I think that is where part of the trouble has come, that this concept of prerogative power has broken in upon the concept of constitutional limitations.

### PROBLEM OF EXECUTIVE AGREEMENTS

I would like to make a brief remark in this connection about this whole problem of executive agreements that you spoke of. It seems to me that executive agreements are abused and that there is a historically unfortunate fact which perhaps keeps the Senate from reaching out and touching what has become a kind of hot potato. That is nearly 20 years ago, now, the people of the United States had a rather unfortunate experience with the so-called Bricker amendment, which created a kind of atmosphere, if you wish, with respect to both treaties and executive agreements with respect to the relationship between national sovereignty and State sovereignty, which however justified, became associated internally politically in the United States with a sort of isolationist reaction and indeed, with movements against civil rights and civil liberties. This is all very complex. I think that this is so true that since that time, the reaction has been severe enough among, let us say, people who know something about this problem that they have not wanted to look at the fact that there

is still a serious area of abuse with respect to executive agreements. There was an executive agreements provision in the Bricker amendment, if you will remember. It would be perhaps in this respect within the purview of the Senate of the United States and this committee to take another look at the constitutional foundations of this and another look at the prospects with respect to executive agreements and see whether or not the constitutional authority by some process, perhaps amendment, might be reasserted.

The CHAIRMAN. Senator Case?

Senator CASE. Thank you, Mr. Chairman.

Gentlemen, that is an interesting commentary on this matter that you have just brought up, Professor Kelly. And I think it is quite right. I commend you for opening the door on what is, in a sense, a forbidden subject. It should have been opened before.

This brings to mind an incident Senator Bricker related to me about a conversation he had with Senator Morse many years after the debate over the Bricker amendment. Senator Morse apparently told Senator Bricker that he regretted not having originally supported the Bricker amendment. This conversation reflects a recognition that the pattern of sophisticated thinking has somewhat changed, and rightly so.

The same reasoning holds true as far as the Knowland amendment is concerned. As you may remember, this measure would have required the President to make available to the Senate all executive agreements within 60 days of enactment, and it was passed unanimously by the Senate in 1956. I have reintroduced it with the change that the House also be informed.

Well, your contribution and your frankness are most reassuring, not only to all of us here but also as a commentary on the state of American education. It is nice to have an open, frank, unpatterned discussion about a matter of this sort.

I would like just to make a couple of broad points and then ask several questions, which I have been requested to ask by Senator Eagleton and others.

### CREATION OF CONSENSUS

Broadly speaking, what we are really getting around to is consensus; isn't it?

Mr. MORRIS. Yes.

Senator CASE. But I do not think you really mean something the mass of people will support. You are not talking about that. You are talking about something else; are you not? Because we are getting to a point now in which the President, over the heads of Congress, can use television and radio to create a mass support for his view. This is not something the drafters of the Constitution could have foreseen when they drafted the provisions on the war power or the treaty power. Is that not true?

Mr. MORRIS. It is in part true, although I do not think that either the President, the present President or his predecessor, was able to get, even with the use of television, a great mass consensus for the Indochina war. What we have gotten has been a division in the country, a great division.

I am thinking, of course, of a consensus between the Congress and the President?

Senator CASE. Then, you are not talking about popular approval for the President's actions.

Mr. MORRIS. That is right. But I do think the 30-day period gives a chance for a great debate and a great debate is a chance to touch all bases, touch all opinions. There are all these technological issues which were not available before, the control by the President of television, instantaneous communication. But it is not clear to me that the President is necessarily able to shape and control public opinion at all times. If that were the case, the President would remain in office almost indefinitely, which they do not.

Senator CASE. Of course, we have a constitutional amendment that says he shall not. It was very unpopular in academic circles to suggest a two-term limitation; was it not?

Mr. MORRIS. That is right.

Senator CASE. A lot of people have changed their minds about that, I think, and about many other things. The refreshing thing is that men like you admit that some of you go through a process of changing your mind.

Mr. MORRIS. Well, problems change. Life changes. After all, FDR in 1932 was an isolationist. In 1940, he was an interventionist. It seems to me, to avoid rigidity is a test of sanity. The world itself is a very complex place and things we think today we see differently now than 20 years ago.

### DIFFERENCE CONCERNING U.S. RELATIONS WITH EUROPE AND UNDERDEVELOPED COUNTRIES

Senator CASE. And, of course, some of you think differently from others. It seems to me I detected Professor Kelly was in some disagreement with what Dr. Commager was saying yesterday. Dr. Commager thought that NATO was all right and that the President's moving of troops to Europe had been the correct decision. I do not suggest that you think any differently, but your justification for it may be based on different reasoning. I think Professor Commager has a quite different view of the necessities of American survival in respect to our relations with Europe and in respect to underdeveloped nations of the world.

Mr. MORRIS. Well, I do, too. I think there is a difference between Europe and the underdeveloped nations of the world, very definitely.

### ESSENTIAL ISSUE IS DEVELOPING RIGHT POLICY

Senator CASE. So what I am really trying to bring out is that the essential issue is not the division of power as much as getting at the right policy. Is that not correct?

Mr. MORRIS. Yes.

Mr. KELLY. A good deal of what you have talked about is not so much questions of constitutional law or constitutional precedent as it is the development of policies which will, if you want, ultimately restore constitutional balances which lie in the area of policymaking on the part of the Congress and the Senate as much as it does in the area of the redefinition of constitutional right. I think that is—I do not think the core of the problem ultimately is, in a certain sense, constitutional at all except in terms of the living Constitution. The

core of the problem, I think, is political and policymaking in its ultimate sense. That would be true of the whole tremendous power structure that the United States has erected in Europe, for example, especially. It is basically a policy question. The policy that is involved there today is, I think, largely executive, although it rests ultimately upon a treaty structure as well. But obviously, whether or not that power structure needs to be accepted or rejected or examined, it is going to remain what it is unless the Congress of the United States redefines it; otherwise, it is going to be, by derogation of congressional power, it is going to be defined by the Executive.

This gets to be a question of who asserts, who defines and asserts policy. And I do not hear a great deal of talk from Congress about the definition and the assertion of policy in this area, or, for that matter, in any other.

Senator CASE. I agree, and I think we are now getting to the heart of the matter.

I do not think the people give two hoots in hurrah in most cases about whether the President is being put down or Congress is being put down. If anything, they would usually opt to put Congress down and the newspapers also will opt to do it for a number of reasons.

Mr. KELLY. I think that is true.

### EFFORT TO MAKE AND AFFECT POLICY BY USE OF MEDIA

Senator CASE. I generally approve the objectives of this bill. Senator Javits himself has said it is a means of giving a little time to bring matters before the people and to require second thoughts on the part of the President himself while giving Congress the chance to express its points of view. We have been derelict in not having done this more often. But I must confess that far more alarming to me than anything that has happened in the last 10 or 15 years was to hear on television and radio short spot advertisements advocating the United States pursue a particular policy in Vietnam. Now, this kind of effort to make and affect policy by use of the media is a dangerous thing. We have accepted advertising techniques to sell soap, but their use in influencing foreign policy is another matter.

And I wish you would comment about this, since, to me, it is extremely troublesome.

I am not necessarily concerned that the American people are going to be foolishly swayed or taken in by gross oversimplifications, which are unavoidable with advertising techniques. But I am rather afraid that some of us in positions in the Senate, the House, and elsewhere will be intimidated and not exercise the responsibilities that we are supposed to exercise.

I wish you would talk about this. This seems to me far more troublesome than any technical question as between the President and the Congress.

Mr. KELLY. Well, it is a profoundly difficult problem. The Constitution embodies the enlightenment progress. It seems to me you are touching on something fundamental. Our constitutional system is essentially the product of an enlightened age in the technical sense of the word. This depends on the idea of men of reason engaging in closely reasoned analysis. The whole idea of a legislature drawn from people who were presumably, by stature, prestige, wisdom and what

not, representatives of the best lives in the country, coming together in some kind of enlightened, periodic, rational discussion which generated national policy—this is how the whole conception of the idea of a legislature as against executive prerogative historically came from. All one would have to do is turn to a view like Ortega y Gassett's "Revolt of the Masses" to observe that we do not live in an age which generates this kind of process in Congress, if you will pardon my saying so. We do not live in an age in which, generally speaking, the process of policymaking is carried out this way, either on the executive level or in the congressional level. We live in an age of the slogan, the symbol, the mass advertising technique, the generation of leadership through certain sales techniques, and so on and so on, not in an age in which the notion of rationalism in terms of the formulation of policy is ascendant.

I do not think there is any magic cure for this, although I do think the quality of intellect in the U.S. Senate—this sounds like sycophancy—this sounds as though I am making a sycophant's remark.

Senator CASE. I earlier praised you.

Mr. KELLY. But the quality of intellect in the U.S. Senate is well above the level of popular recognition of the Senate in terms of its policy or its rationalistic generating potential at the present time in American government. It is way above that. It is the whole nature of the public opinion generating process which you are at war with here, which favors what the President can do and does not favor what the legislative process can do.

### EFFORTS TO LIMIT USE OF RADIO AND TELEVISION

Senator CASE. There is strong sentiment, which I share, to limit the use of radio and television. Last year Congress passed such a bill, but the President vetoed it. The same question will be again raised this year. I am doubtful about the value of specific efforts to deal with the problems like this. I am not at all sure that certain uses of the media should not be exempted.

Mr. MORRIS. One could legislate time for opposing views on national issues.

### PROBLEM OF SPOT ANNOUNCEMENTS

Senator CASE. The problem is with the spot announcements. Yet, I happen to think that the collective common sense of the people in this country has been excellent.

Mr. KELLY. We would have been done in a long time ago.

Senator CASE. That is right. Nevertheless, I am concerned about this relatively new element in international policy and national affairs. Whether or not I agree with the point of view being advocated by the spot announcements, I feel that this approach tends to cloud our decisionmaking process and the sound collective judgment of the people. I believe we should be considering limiting or eliminating all radio spots and television spots. I do not think this is a restriction on free speech.

Mr. MORRIS. No, I agree.

Senator CASE. Would you comment just briefly on that, both of you?

Mr. MORRIS. It seems to me the FCC can impose a regulation.

Senator CASE. Why should we let the regulatory agency do this?

Mr. MORRIS. That is true. But it would seem to me that one could insist that national issues be discussed not in spot announcements, but with relatively respectable time limits and that available time be given to opposing sides and that there would be a minimum rather than a maximum on time, that issues could not be discussed in less than a certain period of time and so forth. So the emptiness of the case could be rather clear after 10 or 15 minutes, it seems to me. This might possibly cut down the chance for this high pitched salesmanship. This is the possibility. It seems this is certainly within the jurisdiction of the Congress and does not involve any question of evasion of free speech.

We have regulated television and radio in a variety of ways. It seems to me this question of insisting on a full discussion of national issues and limiting spot announcements of this kind would be certainly fair. I think you would have a lot of opposition from the vested interests of radio and television.

Senator CASE. I know that. We have already seen their opposition. Dr. Kelly?

Mr. KELLY. Well, I will start with a generalization and then say I do not know.

Senator CASE. We can all say that.

### RESTORATION OF 18TH CENTURY MARKETPLACE OF IDEAS SUGGESTED

Mr. KELLY. It seems to me it was Adolph Hitler who discovered the fundamental relationship between potential human irrationalism and modern technology and exploited it to the full for the first time. It seems to me it is intrinsic in our society. We all know that we are both rational and irrational animals. It is the potential of technology fundamentally, as it is developed in western society and our society, to exploit the irrational and exploit it at the expense of the rational conduct of which Congress is the national symbol and the only place in terms of public policy where you get a final concourse of the rational process, even though that is also subject to the power process and a partially irrational political process.

But I am a little skeptical that you will solve this process of the formulation of pressure opinion merely by approaching it in that narrow a frame of reference. I would say that the whole thrust of congressional regulation of policy should be toward the notion of restoring the whole 18th century marketplace of ideas, if you want, and that every kind of a piece of technical regulation ought to be looked at, whether it is a question of spot announcements or advertising programs or free time, equal time, and so on. It ought to be looked at in terms of the question of what does it do to the conception of the generation of democratic policy through the marketplace of ideas.

It seems to me the marketplace of ideas is the thing that has suffered and that is ultimately why the Congress has suffered.

Senator CASE. I certainly agree with that. You are just redefining and broadening the things that we were talking about earlier. I accept that. I know Dr. Morris does, too.

Mr. MORRIS. Yes, I do.

PRESSURE TO BE REELECTED

Senator CASE. I think you have stated the issue in a most useful way. You have to realize that all who are engaged in politics, while trying to serve the interests of the people, also feel pressure to be reelected. That is in the individual cases not a matter of cosmic importance. But collectively, it is, I think. It is of enormous importance to each individual.

Senator PELL. It is of cosmic importance to him.

Mr. KELLY. Nobody in his right mind expects the Congress to renounce its own political power base or individual Congressmen to do that or for anybody to view the process of legislation or public policy as some kind of pure abstract rational process. That would be a kind of unreal Utopia that does not have any meaning.

Senator CASE. It is not in the world.

Mr. KELLY. It is not in the world; that is right.

Senator SPONG. Senator Case, if I might say, I think we who do seek public office have done more than our share to contribute to the soap-selling idea with regard to political issues.

Senator CASE. I agree and restrictions on ourselves are absolutely necessary. A great amount of money is spent with the aim of reelecting the incumbent.

Mr. KELLY. It was less than 50 years ago that there were two major scandals touching the Senate of the United States with respect to excessive expenditure. I am thinking of the Newbury primary case in Michigan and then the case of Senator-elect Smith of Illinois a couple of years later. Both of those generated tremendous scandals out of the expenditure of moneys on a level that now would cause the New Yorker to label it the good old days.

Senator CASE. You make me think of times past when, as a law student, I was hired by Senator Wagner to advise him on the Smith case.

Mr. KELLY. I think the scandal on the sum of money involved was $250,000 in a primary.

Senator CASE. There has been inflation since that time. That was a larger amount than it would seem today.

Mr. KELLY. That is true.

Senator CASE. But you were quite right about it. Thank you very much.

RESTRICTING DEPLOYMENT AND LIMITING ACTIVITY OF U.S. TROOPS ABROAD

I have some suggested questions now. Can Congress consistent with the Constitution restrict deployment of troops abroad? I take it you would not question this on constitutional grounds.

Mr. KELLY. I think there is no constitutional problem at all.

Senator CASE. Similarly, Congress can limit the type of activity of American troops abroad.

Mr. MORRIS. I agree.

ARE TREATIES SELF-EXECUTING?

Senator CASE. There is the question of whether a treaty to which this country is a signatory presently in effect would be self-executing from a legal standpoint?

Well, that is rather hard for you to answer because it depends, I suppose, on what the treaty says.

Mr. KELLY. The question of whether treaties are self-executing is a fearfully complicated question, as you know, Senator. This question was generated as a tremendous political issue back in the early 1950's with respect, remember, to the Human Rights Covenant and so on and so on, as well as to the article 55 of the United Nations Covenant. If you will recall the series of cases in the Supreme Court directed to Japanese land ownership in California, the Court said that article 55 was self-executing. Some of the Justices disagreed with that. It is a tremendously complex constitutional question.

Senator COOPER. Will the Senator yield at that point?

Senator CASE. Sure.

Senator COOPER. I do not think that it is quite so difficult. I raised this question yesterday with Mr. Commager. Practically all the treaties we have for defense, collective defense, carry a phrase that each country shall act—including the United States—according to its "constitutional processes." The Charter of the United Nations also contains that phrase. That phrase has been very important, for example, in defining our treaty commitments in Southeast Asia. It has been argued by both administrations that the SEATO Treaty itself gave some authority for the U.S. involvement in hostilities. I now contend, although in the past I have contended otherwise, that I do not believe the President has any authority to take this country into war under the provisions of these treaties without the authority of the Congress under the constitutional process, except in those particular situations which Senator Spong and Senator Javits are trying to work out.

Do you agree with that?

Mr. MORRIS. I would agree.

Senator CASE. The conditions listed by Senator Javits and his cosponsors could exist in the absence of a treaty.

Mr. KELLY. Not open to argument.

Senator CASE. Senator Eagleton has requested that certain questions be asked.

### COMMENDATION OF THE WITNESSES

Senator COOPER. I must go. I just want to say I came here late but I have read your testimony. More important, I have listened to your questions and answers. And I want to say it is one of the most constructive sessions I have attended. I want to say your testimony has been scholarly and straightforward, and it has opened up difficult questions. And I hope you will come back.

Senator CASE. Have you had a chance, either or both of you, to look at the Eagleton resolution?

Mr. MORRIS. I have not really studied the Eagleton resolution. I would rather not pass on it. It would not be fair.

### CRITERIA FOR PRESIDENTIAL POWER IN NUCLEAR WAR

Senator CASE. Perhaps then this question is not appropriate. Senator Eagleton would like to know the criteria each of you have for handling the contingencies, the necessary contingencies, the power a President must have in a nuclear war.

Mr. KELLY. I have not had a chance, Senator, to pass on it carefully in my own thinking. So I do not think it is intelligent to make remarks about it.

Senator CASE. I take it you have not, either.

Mr. MORRIS. I have not, either.

Senator CASE. I take it there is not much you can do. If Senator Eagleton would like your view on this, he will write you.

Mr. MORRIS. I would like to have Senator Eagleton write me and get a copy of the bill.

Senator CASE. I will see that he has that word.

You have dealt with the question of protection of American property in terms of it being a possible justification for Presidential use of military force.

Mr. KELLY. Correct.

Senator CASE. That concludes my questions.

Please go ahead, Senator Pell.

Senator PELL (presiding). Thank you.

I was very struck by the quotation Professor Morris recited from Benjamin Franklin, which I have heard before but had not seen, "There never was a good war or a bad peace." I was trying to recall in my own mind whether it was Clemenceau who said, "Wars are too important to leave to generals."

Mr. KELLY. That is right.

Senator PELL. I guess what you are saying is that wars are too important to leave to the generals or to Executives?

Mr. MORRIS. To leave to one man, whatever you call him to one man.

Senator PELL. It is an extension of that though; right?

### EXECUTIVE AUTHORITY TO DELAY EXCHANGE OF RATIFICATION

I have a technical question in connection with the ratification of treaties. If a treaty is signed by the President or his agent, his Secretary of State, and sent up to us for ratification and we give our advice and consent, is it then in force or can the Executive——

Mr. KELLY. No, sir. It is not in force, if I am not mistaken, both in international law and by the living Constitution until there has been an exchange of ratifications.

Senator PELL. Full deposits of the instruments of ratification?

Mr. KELLY. That is right.

Senator PELL. But moving ahead after the Senate has given its approval, is it not a ministerial act? In other words, has the Executive authority to delay exchanging ratifications indefinitely or not?

Mr. KELLY. The President can—what the Senate does, remember, is advise and consent to ratification. And there are instances when the President has negotiated a treaty and not submitted it. I can think of at least one instance of this, the treaty with Great Britain of 1806. The President can pull a treaty back from the Senate when it is in the process of ratification. This was done with the Hawaiian Treaty of 1894. And theoretically, at least, though I cannot think of a case, the President could say the Senate has advised and consented to the treaty, but I do not give it the final Executive implementation and, therefore, all we have is a piece of advice. I do now know of any instance, offhand, where that has been done. I would not want to say

categorically that it has not been done. I think it would be a very strange state of affairs for a President to submit a treaty, get the advice and consent of a Senate, and then not complete the process of implementation unless, (a) the process of ratification stated conditions which the President did not accept, either by amendment of the text of the treaty or the adding of conditions—the whole Versailles question and so on—or unless the treaty itself had provisions in it, as many treaties do, of course, that it shall not go into effect until it gets such and such a body of ratification. There are all kinds of treaties of that kind.

Senator CASE. Will the Senator yield?

Senator PELL. Yes.

Senator CASE. Most interestingly in regard to this question, we have before us the Geneva Protocol on biological and chemical warfare under which the President has in his communication to us placed a limiting interpretation. There is a movement among some members of the Senate to broaden the protocol. We do not definitely know whether the President would deposit the instrument of ratification if the protocol were so broadened.

Thank you, Senator Pell.

### LACK OF MAJORITY IN CONGRESS TO END WAR

Senator PELL. I was struck by the exchange between the chairman and you with regard to the waning power of the Senate and the Congress as a whole. But I think probably we fail to realize that the fault rests completely with us. People who think as the majority of this committee do, do not really represent the majority in the Congress. Whenever we have had enough of it, we can refuse to authorize the money for these adventures of which we disapprove and the appropriations for them. But I think we lose sight of the fact that we are simply a minority and we think we are a majority. As soon as we are a majority, the war is over. But I think generally speaking, public opinion and the press have ignored that fact and we ourselves sometimes ignore that fact.

Mr. MORRIS. Well, a minority can play a very important part. The British minority in Parliament during the Revolution played a very important part in bringing down the North Ministry.

Senator PELL. But I think we forget we are not a majority. As soon as we are a majority, the war is over. But we are unfortunately not in that position yet.

### LEGALITY OF WAR IN INDOCHINA

In view of the fact that President Nixon has signed a bill that repealed the Tonkin Gulf Resolution, is the present war now being conducted in Indochina a legal or an illegal war?

Mr. MORRIS. Well, it is an undeclared war.

Senator PELL. It is an undeclared war, but can an undeclared war be a legal war?

Mr. MORRIS. Well, we have these cases in the Adams and Jefferson administrations where the Court straddles the issue as to the terms they used. There are two or three different terms that they use as "imperfect" wars, something of that kind, as distinguished from

"solemn" wars. In other words, the courts in the past have upheld, I believe, undeclared wars to be "imperfect" wars, but the word "war" itself, offers all sorts of technical questions insofar as application of all sorts of emergency powers that are involved. If you do not have a war, then there are certain emergency powers that the Chief Executive I assume does not have which he does have if you declare war.

Senator PELL. What you are saying, I assume, is that it is not an illegal war in which we are engaged now, but it is an undeclared war?

Mr. MORRIS. That is right. It is an undeclared war.

### WHEN DOES AN UNDECLARED WAR BECOME ILLEGAL?

Senator PELL. When does an undeclared war become an illegal war? What makes it an illegal war?

Mr. MORRIS. So far as I know, this question has never been ruled on by the Supreme Court and probably never will. But it would seem to me that it becomes an illegal war when you have a negative reaction from the Congress disassociating yourself from the war or when you have an ending of appropriations by the Congress. This is the only way you could make it that. Then the President would be doing an illegal act by spending money which the Congress said can't be spent to continue the operation.

In the undeclared war with France, the Congress cut down the Army; then it cut down the use of naval vessels, passed a series of three or four bills. If the President had acted to continue the war, then it would have been an illegal war. But he exercised great restraint. He did not defy Congress; in fact, he encouraged Congress to wind down the war. But this would be the only case where it would be an illegal war I think, where Congress very definitely, by terms of appropriation or directions as to use of armed forces and so forth, has taken a stand and the President has acted contrary to that.

Senator PELL. In other words, when the majority in Congress put our money where our mouths are and do not vote the funds, and if the President moves ahead, then the war becomes illegal, but not until then?

Mr. MORRIS. I am giving a very, very strict interpretation of these early Supreme Court cases on undeclared wars. Perhaps Professor Kelly would like to amplify that point.

Mr. KELLY I do not know what an illegal as against an undeclared war is.

Senator PELL. Nor do I.

Mr. KELLY. But I hesitate to pontificate on the subject very far.

I would observe that Senator Taft, for example, at the beginning of the so-called great debate, attacked the Korean war as illegal because the President had entered into it without the constitutional sanction of a declaration by Congress or without asking its consent.

On the other hand, though the Supreme Court never ruled on the thing, various State decisions and lower Federal court decisions treated the Korean war as having created various legal consequences that are normally associated with a state of war, though there are some decisions to the contrary; for example, with respect to insurance policy provisions and so on. So I am not sure I know quite what this would be.

The Congress of the United States does not invoke the essential ultimate sanction in the Constitution against the President with respect to this sort of thing. It was invoked only once in our history and it has been so disastrous, to use the Senate as a court to determine constitutionality of executive procedure. It has been done only once and that was a disaster. So the Congress is without a remedy in this kind of definition in the constitutional sense. I should think the question really comes down not to how you draw the distinction but to a practical political matter as to whether you can resort to immediate measures to make your policy position felt in the executive. I take it the great strength of the President's policy has been, wisely or not, that the people who say they categorically oppose the Vietnam war have not been able to muster, let us say, a categorical majority in Congress of a kind that would work through the dilemma of seeming to put the President down in terms of national interest and so on.

Senator PELL. Thank you very much.

Senator Case, do you have any furher questions?

Senator CASE. I think these gentlemen have endured a physical as well as an intellectual experience that ought not to be prolonged. I just want to say I am most grateful. I have enjoyed, in a very real sense, the hearing this morning.

Mr. KELLY. It has been an honor to be here, Senators.

Senator PELL. The meeting will adjourn subject to the call of the Chair.

(Whereupon, at 12:40 p.m., the committee was adjourned subject to the call of the Chair.)

# WAR POWERS LEGISLATION

WEDNESDAY, MARCH 24, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10 a.m., in room 4221, New Senate Office Building, Senator J. W. Fulbright (chairman) presiding.

Present: Senators Fulbright, Sparkman, Pell, Spong, Aiken, Cooper, Javits, and Pearson.

The CHAIRMAN. The committee will come to order.

## OPENING STATEMENT

Today we enter the second phase of hearings on the war power, in which we will hear testimony by the sponsors and cosponsors of war powers legislation. Having heard testimony from three knowledgeable historians on the broad historical and constitutional questions raised by the legislation regarding the war power which are now before the Foreign Relations Committee, we have chosen to focus specifically today and tomorrow on those three pieces of legislation.

The first witness will be the distinguished senior Senator from New York, Senator Javits, sponsor of S. 731, whose stated intent is to make rules respecting military hostilities in the absence of a declaration of war. He will be followed by Senator Eagleton, sponsor of Senate Joint Resolution 59, the joint resolution regarding the powers of the Congress and the President to commit the Armed Forces of the United States to hostilities.

Tomorrow we shall hear from Alpheus T. Mason, professor of history, Princeton University, followed by Senator Taft, Congressman Findley and Senator Mathias.

Senator Javits, we are very pleased to have you this morning on a subject about which I know of no one better qualified to testify than the former attorney general of the State of New York and a long time member of this committee.

Will you proceed, sir.

Senator JAVITS. Thank you very much, Mr. Chairman.

The Chair is very gracious as always.

Mr. Chairman, following my testimony I ask unanimous consent that the statement of Senator Pell prepared for delivery before this committee may be made part of my remarks.

The CHAIRMAN. Without objection so ordered.

Senator JAVITS. And Senator Pell is presiding over another hearing.

Mr. Chairman, Senator Pell has to preside over another hearing. I didn't realize that he would come in and I would gladly yield to him and then comment myself.

The CHAIRMAN. All right, I understand. Senator Pell, you proceed then.

## STATEMENT OF HON. CLAIBORNE PELL, U.S. SENATOR FROM RHODE ISLAND

Senator PELL. I wanted to be here personally to say how glad I am to be cosponsor of this bill and how strongly I believe it is correct. What we are trying to do here is, in my mind, really very simple.

We are trying to bring new life to what we learned about our Government in our high school civics classes when we were all young, everybody in this room. We were taught there were three branches of the Government, the legislative, judicial, and the executive. We knew what each of them did by their name. The judiciary—its job was to judge; the legislative—its job was to establish policy through legislation; and the executive—its job was to execute these policies.

### S. 731

S. 731, Senator Javits' proposal, is an attempt to make sure that in the critical decisions involving warmaking it will indeed be our legislative branch that sets the policy and the executive branch that executes. To make a business analogy what we have here is a board of governors or a board of directors as the legislative branch. It sets policy and the executive branch of our Government, like a principal executive officer of a corporation, executes it. We have strayed from this concept and what Senator Javits seeks to do is to bring us back along the lines of the kind of government we were taught we had.

He has done an excellent job of delineating a path between the rightful prerogatives of the President as Commander in Chief of the Armed Forces and the constitutional obligations of the Congress to determine when and to what extent and duration our Nation and its people shall be committed to making war.

We, who are members of this committee under your leadership, Mr. Chairman, know better perhaps than most from the experiences of the past 6 years the need for legislation of this kind.

This legislation would not apply to military hostilities already under way at the time the legislation became effective. Thus we need not concern ourselves here with the history of the authority for the current U.S. entanglement in the military activities in Southeast Asia. Instructive though that history might be, this legislation looks constructively to the future. It is legislation that should be welcomed by both the executive and legislative branches and I would like to emphasize this bill does not represent an invasion of the executive powers.

It is, instead, legislation that will require Congress to reassume its full responsibility in making those decisions that commit American men and resources to extended conflict.

The dominance of the executive branch in this field has developed only through the quiescence of the Congress. The Congress has had, and continues to have, the authority and power bestowed by the Constitution to halt our involvement in military hostilities, to put the checkreins on warmaking. To a large extent, however, we have not invoked that authority. There has been a tendency on the part of the Congress rather willingly to permit the executive branch to make those decisions and, as a result, require the executive branch to bear the full responsibility for those decisions.

One of the principal advantages of Senator Javits' proposal is not that it would hobble the Executive, for it would not, but it would require the Congress to share with the executive branch the responsibility for decisions that affect both our national security and the personal lives of our citizens.

### EROSION OF CONFIDENCE IN GOVERNMENT

From communications and talks with Americans of all age groups we realize there has been a serious erosion of confidence in Government. It doesn't matter whether it is Democrat or Republican; there is a general revulsion of people toward Government. There is a growing belief that the Government, including the Congress, will not face squarely the problems of the country. This loss of confidence is particularly acute when it involves the questions of our military involvements overseas.

And in approving S. 731 Congress would be saying to the Nation that this institution, made up of the elected representatives of the people, would fulfill its constitutional role. Congress will be saying to the people that when emergencies arise involving the United States in military hostilities, the Congress will face the decisions squarely and promptly, that it will participate in those decisions, as it should, and that we will bear the share of the responsibilities for those decisions.

I think the American people have a right to expect that much from the Congress.

### LACK OF CONGRESSIONAL MAJORITY TO END WAR

I would not leave the impression that negligence or timidity on the part of Congress explains the dominance of the executive in foreign military operation, although I would add here that as you, Mr. Chairman, have brought out, Congress exercises a very real role. I think we should bear in mind here that no matter how much we protest and shout and scream concerning the Vietnam war, whenever a majority of us in the Congress have the will to do so we can stop that war through the purse strings. So far we have not done that.

### CHANGE IN NATURE OF WAR

But returning to this bill a major problem is that the nature of war, technologically, theoretically, and strategically, has changed immensely since the authors of the Constitution spelled out the roles of the executive and legislative branches in warmaking.

This legislation, building upon the commitments resolution adopted by our committee last year, bridges the gap between those constitutional provisions and the new aspects of war, hostilities in the absence of a declaration of war.

I thank my colleague from New York very much for permitting me to say how strongly I endorse his proposal and ask his forgiveness.

The CHAIRMAN. Thank you, Senator Pell.

Senator PELL. Thank you.

The CHAIRMAN. Proceed, Senator Javits.

## STATEMENT OF HON. JACOB K. JAVITS, U.S. SENATOR FROM NEW YORK

Senator JAVITS. Mr. Chairman, I consider this as important an effort as I have personally made in the Congress in all my career here, and in terms of the country absolutely essential to the restoration of the faith of the American people that their system can operate effectively to deal with even so difficult and as complex a problem as undeclared war.

In the opening sessions of these hearings on S. 731, which I have introduced with Senators Mathias, Pell, and Spong—a bill to regulate undeclared war—three distinguished national authorities established the historical and constitutional imperatives for this legislation. In my testimony today I shall draw upon the lessons, themes, and principles of that testimony. But first I will address myself to the present situation— the contemporary imperatives for legislation as embodied in S. 731.

### CONTEMPORARY IMPERATIVES FOR S. 731

Our Nation today is facing perhaps the greatest crisis of its history since 1865—and the Vietnam war is the core of that crisis. The Vietnam war has strained to the breaking point the political, social, and economic fabric of our national life. It has introduced in our Nation a divisiveness and erosion of spirit not seen in this century.

It is essential that we devise a national means to prevent other Vietnams, and no one has a higher stake in this task than the President of the United States.

Soon, I hope, the Secretary of State will testify before us on S. 731, along with the measures suggested by Senators Taft and Eagleton.

Secretary Rogers' testimony could well be a historic turning point for our Nation and for the Nixon administration.

In his February 25, 1971 "State of the World" message, President Nixon stated:

> This Administration must lead the nation through a fundamental transition in foreign policy . . . we are at the end of an era. The postwar order of international relations—the configuration of power that emerged from the Second World War—is gone. With it are gone the conditions which have determined the assumptions and practice of United States foreign policy since 1945.

The President further stated:

> Our experience in the 1960's has underlined the fact that we should not do more abroad than domestic opinion can sustain.

In my judgment, the President is right in his diagnosis; there is urgent need for a fundamental updating of U.S. foreign policy principles and procedures—and especially is this right in recognition of the perils of trying to fight undeclared wars which domestic opinion will not sustain.

### S. 731 IS BASIC NATIONAL LEGISLATION

This is the fundamental rationale for S. 731. My cosponsors and I regard this bill as basic national legislation. It is legislation essential to our security and well being. It is legislation in the interest of the President as well as the Congress. By joining us in support of this legislative approach the Administration would be seizing an oppor-

tunity to transform into creative partnership its embattled relationship with Congress over Vietnam—and it would open an opportunity to clear the turgid and oppressive political atmosphere created in this country by the Vietnam war.

The President on many recent occasions has expressed his fear of what he calls "neo-isolationist" trends. The best way for him to arrest any such trend would be to join in legislation to establish a role for Congress and the people in controlling undeclared wars.

Conversely, opposition to this type of legislation can only exacerbate the situation between the Congress and the President over undeclared wars.

For undeclared wars have been Presidential wars. Such wars—while seeming to have so vastly expanded Presidential power—have in fact done more to undermine the Presidency than any development in modern history.

In his projection of the international security situation in the years ahead, the President placed major emphasis on the importance of conventional forces—the kind of forces which get involved in Vietnam-type wars. In his "State of the World" message in this regard, he stated:

> The change in the strategic situation in recent years profoundly enhances the importance of our general purpose forces . . . General purpose forces, therefore, now play a larger role in deterring attacks than at any time since the nuclear era began.

While we move heaven and earth to avoid a nuclear confrontation, in the decade ahead, and no one can rule it out, the more likely prospect is a continuation—perhaps acceleration—of the brushfire and guerrilla wars of the recent past. Asia, Africa, and Latin America all have the seeds for potential wars of this nature. The great challenge for American statesmanship will be, therefore, to avoid being sucked into the quagmire of another Vietnam.

We became involved in Vietnam incrementally, in an offhand and almost absentminded way. S. 731 would prevent that from happening again because it requires a deliberate, joint national decision taken by the President and the Congress.

Thus far I have emphasized the prudential and restraining aspect of S. 731, for these considerations are now uppermost in our minds. But I know of no Senator who is not keenly aware of the potential dangers to American security and American interests in many parts of the globe. And I know of no Senator who wants a President and Commander in Chief unequipped to safeguard U.S. security and the national interest with vigilance and dispatch.

### AUTHORITY OF PRESIDENT TO ACT IN EMERGENCY

I believe that S. 731 gives the President more authority to do what is necessary and proper in an emergency than he now possesses.

Under S. 731 the President for the first time would have statutory authority to take emergency protective actions in defense of American lives and American interests—in areas where Presidents previously have acted solely on the basis of unilaterally asserted authority which faced many subsequent challenges.

The four categories specified in section A of S. 731 are compiled from historical precedents which have acquired the quasilegal sanction of tradition. It is high time that tradition and practice of this nature be

codified into law. The President will know where he stands. The Congress and the people will know where they stand. And the world will know where America stands.

I take this opportunity to express my conviction that S. 731 fully accommodates the need for Presidential authority to act with flexibility and discretion in emergency situations. I certainly recognize that need and made every effort to see that it was accommodated in the drafting of this legislation.

DELETION OF WORDS "AND PROPERTY" FROM SECTION A(3)

Indeed, I may have gone too far in this regard, for the previous witnesses and several members of the committee have questioned the propriety of authorizing, in section A(3), the use of the Armed Forces "to protect the lives and property" of U.S. nationals abroad. I believe that the words "and property" can probably be deleted when the bill is marked up. Let me make it clear that I did not intend this to be interpreted as authority to intervene militarily on behalf of American business or property interests in the commercial sense. I had intended to authorize the protection "as may be required" of the immediate personal property—such as the house or automobile—of endangered U.S. nationals when such property is integral to their personal safety and survival. I had also intended to authorize the protection of official U.S. Government property and installations such as the American Embassy compound—where U.S. citizens usually are gathered in moments of danger—or U.S. military facilities such as Guantanamo Bay. However, in view of the potential for misinterpretation, I am prepared to delete the words "and property" from section A(3).

CONSTITUTIONALITY OF LEGISLATIVE APPROACH OF S. 731

I wish now to refer back to the testimony of the three previous witnesses—Profs. Henry Steele Commager, Richard B. Morris, and Alfred H. Kelly. That testimony—and the supplement we will hear tomorrow from Prof. Alpheus T. Mason, a preeminent authority on constitutional law and the Supreme Court—established beyond any question the constitutionality of the legislative approach of S. 731. My own research has convinced me of this from the outset. But it was very important and very illuminating to have their testimony on this score. Their testimony of course went far beyond this point. One member of the committee called it a memorable seminar in our national history. A salient point of that seminar was that not only the letter—but preeminently the spirit and intent—of the Constitution cries out for legislation such as S. 731.

We live in an age of undeclared war, which has meant Presidential war. Prolonged engagement in undeclared, Presidential war has created a most dangerous imbalance in our constitutional system of checks and balances. That danger now permeates the political climate beyond the immediate issues of the war *per se*.

The stress of the imbalance has reached proportions where the very credibility and bona fides of our constitutional form of Government has been called into question in the minds of many Americans, particularly younger Americans. They see the unchecked power of a Pres-

ident to prosecute an undeclared war as a barrier to the most fundamental aspirations and ambitions for the Nation they will inherit. Many members of my own generation are also deeply disturbed by the unresponsiveness of our last two Presidents to congressional and public pressures to control war and to give the Nation the means to redirect our national energies and resources to even higher priority issues at home and abroad.

The legislation before us today is a crucial first step in reestablishing the constitutional balance so essential to the survival and proper functioning of our democratic political system.

S. 731 is rooted in the words and the spirit of the Constitution. It uses the clauses of article I, section 8, to restore the balance which has been upset by the historical disenthronement of that power over war which the framers of the Constitution regarded as the keystone of the whole article of congressional power—the exclusive authority of Congress to declare war; the power to change the Nation from a state of peace to a state of war.

The framers of the Constitution took pains to reinforce the central power of Congress to declare war by surrounding it with the power of Congress to raise and maintain the Armed Forces and "to make rules for the Government and regulation" of these forces. The Founding Fathers did not contemplate the existence of anything more than minimal standing armies. Consequently, they did not foresee the possibility of a President/Commander in Chief having the wherewithal at hand to engage in warfare without prior action by Congress—except in emergency defensive actions.

The foresight of the framers is reinforced in the crucial final clause of section 8, article I, which goes beyond the comprehensive and carefully specified war powers reserved to the legislature. That final clause gives to Congress the unequivocal authority:

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

S. 731 will, after almost 200 years, do exactly that in regard to the most decisive power dealt with under the Constitution.

INSERTIONS FOR THE RECORD

Mr. Chairman, to help complete the record being compiled in these historic hearings—a record which I believe will be a major source of information on this topic in years ahead—I ask unanimous consent to have the following material be included as appendixes to my remarks. (A) My remarks of February 10, 1971, introducing S. 731 on the Senate floor; (B) A speech titled, "Who Makes War" which I delivered at Princeton University on December 8, 1970; (C) a legal brief in support of S. 731 which appeared in the Congressional Record of March 5, 1971; (D) letters in support of S. 731 which I have received from Prof. Irving Brant, Prof. Benjamin Wright, Prof. Alexander M. Bickel, Prof. Gordon S. Wood, Prof. Merrill Jensen and Prof. Phillip Jessup; (E) a letter from James Madison to Thomas Jefferson dated April 2, 1798, and record of a debate in the House of Representatives in March 1798 concerning "Relations With France;" (F) an extract from Madison notes on the debates of the Constitutional Convention, concerning treaties of peace, dated September 7, 1787.

Thank you, Mr. Chairman.

The CHAIRMAN. Without objection that will be included.

(The information referred to follows:)

[From the Congressional Record, Feb. 10, 1971]

S. 731—INTRODUCTION OF A BILL TO REGULATE UNDECLARED WAR

Mr. JAVITS. Mr. President, the most compelling lesson of the 1960's for the United States is our need to devise procedures to prevent future undeclared wars as in Vietnam. I believe that an effective statutory remedy is both possible and essential. The guidelines for such legislation can be derived from within the Constitution.

Today, on behalf of myself and Senators Mathias, Pell, and Spong, I am introducing a bill "to make rules respecting military hostilities in the absence of a declaration of war." This bill is a serious effort to meet an important legislative need. After much thought and research, I am convinced that this approach grows directly out of the Constitution itself.

The bill deals with the initiation of hostilities in the absence of a congressional declaration of war. It makes full provision for the need for "emergency" action by specifying four categories, based on historical precedents, in which the President as Commander in Chief can initiate combat hostilities in the absence of a declaration of war.

History has demonstrated that there are situations in which military hostilities must be initiated by the Armed Forces in the absence of a declaration of war. Such cases arise in circumstances which require combat actions but which are not sufficiently serious—or in which contemporary conditions make it undesirable—to enact a declaration of war. Moreover, it has long been recognized that there are circumstances in which there is not sufficient time—or room for movement—for a congressional declaration of war before military hostilities must be undertaken.

In the earliest days of the Republic, the United States became involved in military hostilities short of declared war—that is, the naval war against France in 1798–1800 and President Jefferson's actions against the Barbary Pirates beginning in 1801. In *The Eliza Case*, 4 Dall. 37 (1800), a case arising out of the undeclared naval war with France, the Supreme Court noted:

"Hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons and things."

Throughout the 19th and early 20th centuries, a body of precedents developed concerning limited hostilities in the absence of a congressional declaration of war. These were developed on an ad hoc basis, evolving essentially out of the case-by-case exercise of the discretionary executive authority of the President as Commander in Chief.

I regard my bill as giving ample play to the need of the Commander in Chief to have discretionary as well as emergency authority. At the same time, the bill immediately establishes a role for Congress right from the beginning: First, by requiring the President to report fully and promptly to the Congress as to the circumstances of and the authority for the action he has initiated; second, by requiring the President to terminate in 30 days whatever actions he has initiated under one of the four specified categories, in the absence of a declaration of war, "except as provided in legislation enacted by the Congress to sustain such hostilities beyond 30 days."

The bill further provides that hostilities initiated by the President can be terminated by joint resolution of the Congress in less than the 30 days otherwise allowed. In addition, there is a detailed section which would prevent a filibuster from blocking congressional action.

The period of 30 days is, of course, essentially an arbitrary one. But I think it is just about the right period of time—and it can be shortened or lengthened in particular instances as the Congress might decide. On balance, I feel that a period of 30 days strikes a fair balance between the desirability of full deliberative action by Congress—without impairing the capacity for sudden, or emergency, action by the Commander in Chief, and the requirement of brevity to prevent the Nation from being involved beyond the point of recall before the Congress might otherwise act.

I also wish to make it clear that my bill anticipates full prior consultations between the President and the Congress with respect to developing or deepening crises which might be leading toward the outbreak of armed hostilities. There are many drawbacks in the contemporary world to a declaration of war—because of the far-reaching domestic and international implications of a declaration of war, whether enacted before or after the initiation of combat hostilities.

In developing situations which are not of a sudden nature, I believe it would be good practice for the administration to consult with the Congress and seek a joint resolution outlining the policy which the United States intends to pursue. I would like to see this become normal practice. I am referring here to serious situations which might involve the use or threat of the use of armed force. I am not suggesting that the President should be obliged to seek a resolution from Congress to endorse all of the policies or actions he initiates—only those which move toward the exercise of the war powers.

I ask unanimous consent that the text of my bill be printed in the Record at this point in my remarks.

The PRESIDING OFFICER. The bill will be received and appropriately referred; and, without objection, the bill will be printed in the Record.

The bill (S. 731) to make rules respecting military hostilities in the absence of a declaration of war, introduced by Mr. Javits (for himself and other Senators), was received, read twice by its title, referred to the Committee on Foreign Relations, and ordered to be printed in the Record, as follows:

"S. 731

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That use of theArmed Forces of the United States in military hostilities in the absence of a declaration of war be governed by the following rules, to be executed by the President as Commander-in-Chief:

"A. The Armed Forces of the United States, under the President as Commander-in-Chief, may act

"1. to repel a sudden attack against the United States, its territories, and possessions;

"2. to repel an attack against the Armed Forces of the United States on the high seas or lawfully stationed on foreign territory;

"3. to protect the lives and property, as may be required, of United States nationals abroad; and

"4. to comply with a national commitment resulting exclusively from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislation instrumentality specifically intended to give effect to such a commitment, where immediate military hostilities by the Armed Forces of the United States are required.

"B. The initiation of military hostilities under circumstances described in paragraph A, in the above absence of a declaration of war, shall be reported promptly to the Congress by the President as Commander in Chief, together with a full account of the circumstances under which such military hostilities were initiated.

"C. Such military hostilities, in the absence of a declaration of war, shall not be sustained beyond thirty days from the date of their initiation except as provided in legislation enacted by the Congress to sustain such hostilities beyond thirty days.

"D. Authorization to sustain military hostilities in the absence of a declaration of war, as specified in paragraph (A) of this section may be terminated prior to the thirty-day period specified in paragraph (C) of this section by joint resolution of Congress.

"SEC. 2. (A) Any bill or resolution, authorizing continuance of military hostilities under paragraph C (section 1) of this Act, or of termination under paragraph D (section 1) shall, if sponsored or cosponsored by one-third of the Members of the House of Congress in which it originates, be considered reported to the floor of such House no later than one day following its introduction, unless the Members of such House otherwise determine by yeas and nays; and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such committee within one day after

it is referred to such committee, unless the Members of the House referring it to committee shall otherwise determine by yeas and nays.

"(B) Any bill or resolution reported pursuant to subsection (A) of section 2 shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall otherwise determine by yeas and nays.

"SEC. 3. This Act shall not apply to military hostilities already undertaken before the effective date of this Act."

Mr. JAVITS: Mr. President, exercise of the warpowers under the new Constitution was a subject very much in the minds of the men who gathered in Philadelphia to draft the Constitution in 1787, just 4 years after the Treaty of Paris formally ending the Revolutionary War. Moreover, the "legislative history" contained in records of the proceedings of the Constitutional Congress clarify the intent of the Founding Fathers in those clauses in the Constitution dealing with the war powers which are less detailed and explicit than we might wish today.

The contention over the assignment of the war powers in 1787 was between the Federal Congress and the State legislatures—and not between the Congress and the President/Commander in Chief, as is now the case. At the Constitutional Convention the debate between State versus Federal control of the war power was resolved decisively by the assignment of the war powers to the Federal Congress which are detailed in article I, section 8 of the Constitution. Those powers are:

To declare war;

To raise and support Armies;

To provide and maintain a Navy;

To make rules for the Government and Regulation of the land and Naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the militia, and for governing such Part of them as may be employed in the Service of the United States.

The war powers of the President specified in the Constitution are limited to half a sentence in article II, section 2, which reads as follows:

"The President shall be Commander-in-Chief of the Army and the Navy of the United States, and of the militia of the several States when called into the actual Service of the United States."

Historical necessity, combined with the vigor and ingenuity of many of our Presidents and their supporters, has caused the development of a doctrine which assigns vast—and continuously expanding—"inherent" powers to the Commander in Chief. For all its boldness and ingenuity, this doctrine lacks Constitution foundations.

There was no doubt in the minds of the drafters of the Constitution about who would be the first President of the United States. George Washington was elected unanimously to the office less than 2 years after completion of the Constitutional Convention. Twelve years earlier, in June 1775, the Constitutional Congress had appointed George Washington to be "Commander in Chief" of the colonial forces. Washington held this post as Commander in Chief until his formal resignation and return of his commission in December 1783. He was the only Commander in Chief the United States had ever had when in 1787 the Constitution was drafted and the phrase "Commander in Chief" writted into it.

Clearly, the drafters of the Constitution had the experience of Continental Congress with George Washington in mind when they designated the President as "Commander in Chief" in Article II, section 2. Thus, the "legislative history" of the constitutional concept of a Commander in Chief was the relationship of George Washington as colonial Commander in Chief to the Continental Congress.

That relationship is clearly defined in the Commission as Commander in Chief which was given to Washington on June 19, 1775, and which was formally returned by him to the Continental Congress on December 23, 1783.

I would like to quote the final clause of this Commander in Chief's Commission, because it establishes the relationship of the Congress to the Commander in Chief in unmistakable terms:

"And you are to regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress of the said United Colonies or a committee of Congress for that purpose appointed."

I ask the unanimous consent that the full text of the Commission, together with the rules specified by Congress, be printed at the conclusion of my remarks:

The PRESIDING OFFICER: Without objection, it is so ordered.

(See exhibit 1.)

Mr. JAVITS. Mr. President, this historical background clarifies, and gives added meaning to, those phrases in the Constitution concerning the war powers which are the subject of some contemporary controversy.

Today's proponents of the Commander in Chief "doctrine" make much of the fact that, during the final revision of the Constitution, the power of Congress, "to make war" was changed to the power "to declare war." The issue arose in debate on Friday, August 17, 1787. A question was raised whether the Congress would be properly constituted and positioned to "make war." I would like to quote the relevant portions of the debate as recorded in Madison's authoritative report of "Debates in the Constitutional Convention of 1787".

"Mr. Madison and Mr. Gerry moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks.

"Mr. Sharman thought it stood very well. The Executive should be able to repel and not to commence war. 'Make' better than 'declare' the latter narrowing the power too much.

"Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.

"Mr. Ellsworth. There is a material difference between the power of making war and making peace. It should be more easy to get out of war, than into it. War is a simple and overt declaration. Peace attended with intricate and secret negotiations.

"Mr. Mason was against giving the power of war to the Executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. He preferred 'declare' to 'make.'

"On the motion to insert *declare*—in place of make, it was agreed to."

It is clear that what the Constitutional Convention had in mind in changing the description of Congress power to "make" war, to the power to "declare" war was to make provision for emergency measures of a defensive nature—in the words of Madison, who proposed the change, "leaving to the Executive the power to repel sudden attacks."

Given the extreme suspicion of the executive warmaking power of European kings manifested throughout the constitutional debates, it is probable that the members of the Constitutional Convention also had in mind Washington's continuing difficulties in getting congressional action on his requests, as well as some difficulties over congressional interference in his tactical conduct of the war.

Washington's original commission granted him a broad measure of executive discretion in carrying out the policy decisions of the Congress. Washington's great prudence in exercising that executive discretion no doubt encouraged members of the Constitutional Convention to grant the extra executive discretionary authority, within congressional policy control, which is inherent in the change of Congress power to "make" to "declare" war. However, there is nothing to support the contention that the power of Congress to authorize war was in any way diminished or meant to be diminished by this drafting change.

The Commander in Chief was envisaged by the Founding Fathers as having broad executive discretion in the implementation of the policy decisions of the Congress respecting war. He was further envisaged as having emergency powers of a limited and defensive nature, that is "to repel sudden attacks."

With increasing frequency we hear the contention that the full nature and scope of the Commander in Chief's power is something beyond the authority of the Congress to regulate and define. Some go so far as to assert that the President has the exclusive, unilateral authority to define his own powers as Commander in Chief. Nothing could be further from the text, the spirit or the legislative history of the Constitution.

Washington's Commission as Commander in Chief explicitly established that the Commander in Chief is "punctually to observe and follow such orders and directions from time to time as he shall receive from this or a future Congress." Together with this commission, Washington was given a fairly extensive list of rules and instructions he was to observe in commanding the Armed Forces.

These facts are closely mirrored in the text of the Constitution itself, which enjoins Congress "to make rules for the government and regulation of the land and naval forces"—and which instructs the President that "he shall take care that the laws be faithfully executed."

Lest there be any doubt about the authority of the Congress to define the function of the Commander in Chief, the concluding paragraph of section 8 of article I gives Congress the power "to make all Laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

It is my intention, at an early date, to place in the Record a full legal brief on the Constitutional and legal aspects of the bill I have introduced today.

"EXHIBIT 1.—COMMISSION AS COMMANDER IN CHIEF

"In Congress, the delegate of the United Colonies of New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New-York, New Jersey, Pennsylvania, New Castle, Kent & Sussex on Delaware, Maryland, Virginia, North Carolina and South Carolina.

"To George Washington Esquire, we reposing especial trust and confidence in your patriotism, conduct and fidelity Do by these present constitute and appoint you to be General and Commander in Chief of the Army of the United Colonies and of all the forces raised or to be raised by them and of all others who shall voluntary offer their service and join the said army for the defense of American Liberty and for repelling every hostile invasion thereof. AND you are hereby vested with full power and authority to act as you shall think for the good and welfare of the service.

"And we do hereby strictly charge and require all officers and soldiers under your command to be obedient to your orders & diligent in the exercise of their several duties.

"And we do also enjoin and require you to be careful in executing the great trust reposed in you, by causing strict discipline and order to be observed in the army and that the soldiers are duly exercised and provided with all convenient necessaries.

"And you are to regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress of the said United Colonies or a committee of Congress for that purpose appointed.

"This Commission to continue in force until revoked by this or a future Congress.

"By order of the Congress.

"Dated, Philadelphia June 19th, 1775.

"Attest:

"JOHN HANCOCK,
*"President.*

"CHARLES THOMPSON,
*"Secretary.*

"NOTE.—The Commission and instructions were drawn up by the same committee of Congress, consisting of Richard Henry Lee, Edward Rutledge and John Adams, and appointed 16 June, 1775. The instructions are as follows:—

" 'This Congress having appointed you to be General and Commander-in-chief of the army of the United Colonies, of all the forces raised or to be raised by them, and of all others who shall voluntarily offer their service, and join the said army for the defence of American liberty, and for repelling every hostile invasion thereof, you are to repair with all expedition to the colony of Massachusetts Bay, and take charge of the army of the United Colonies. For your better direction:—

" '1. You are to make a return to us as soon as possible of all forces, which you shall have under your command, together with their military stores and provisions; and also as exact an account as you can obtain of the forces which compose the British army in America.

" '2. You are not to disband any of the men you find raised until further direction from this Congress; and if you shall think their numbers not adequate to the purpose of security, you may recruit them to a number you shall think sufficient, not exceeding double that of the enemy.

" '3. In all cases of vacancy occasioned by the death or removal of a colonel, or other inferior officer, you are by brevet, or warrant under your seal, to appoint another person to fill up such vacancy, until it shall otherwise be ordered by the Provincial Convention, or the Assembly of the colony, from whence are the troops in which such vacancy happens, shall direct otherwise.

"'4. You are to victual, at the Continental expense, all such volunteers as have joined or shall join the united army.

"'5. You shall take every method in your power, consistent with prudence, to destroy or make prisoners of all persons who now are, or who hereafter shall appear in arms against the good people of the United Colonies.

"'6. And whereas all particulars cannot be foreseen, nor positive instructions for such emergencies so beforehand given, but that many things must be left to your prudent and discreet management, as occurrences may arise upon the place, or from time to time fall out, you are, therefore, upon all such accidents, or any occasions that may happen, to use your best circumspection; and, advising with your council of war, to order and dispose of the said army under your command as may be most advantageous for the obtaining of the end for which these forces have been raised, making it your especial care, in discharge of the great trust committed unto you, that the liberties of America receive no detriment.'"

Mr. COOPER. Mr. President, I have had an opportunity to read the bill which has been introduced by the distinguished Senator from New York, and the scholarly argument he makes in its support.

As we know, for years we have been engaged in a debate on Vietnam and Southeast Asia and the constitutional powers of the President and Congress. Although I have not had an opportunity to study the bill carefully, I know the Senator from New York has raised the essential points around which the debate centers.

If his bill can be considered carefully and acted upon it will do a great deal to achieve longer agreement on the war making power and chart a course for the future.

I would like to say again that I am glad the Senator has introduced this legislation in his usual thoughtful, serious, and scholarly way, and I look forward to participating in the debate.

Mr. JAVITS. Mr. President, I know I reflect the feeling of every Member of Congress when I say that to enlist the interest of the distinguished Senator from Kentucky (Mr. Cooper) is very important. I am glad he is interested in this measure. I know he can help in a constructive fashion this potentially historic piece of legislation. I shall look to him very strongly in that regard. I thank him very much for this very gracious intercession.

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[From the Congressional Record, Dec. 16, 1970]

WHO MAKES WAR?—ADDRESS BY SENATOR JAVITS

Mr. FULBRIGHT. Mr. President, I ask unanimous consent to have printed in the RECORD the text of an address by the distinguished Senator from New York (Mr. Javits), a member of the Committee on Foreign Relations, which he delivered at the Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, N.J., on December 8, 1970.

There being no objection, the address was ordered to be printed in the RECORD, as follows:

"WHO MAKES WAR?

"A great Constitutional issue before the nation today concerns the exercise of the nation's war powers. The struggle over the war powers has been somewhat dormant in the past few months, following the spotlight attention it received at the time of the President's Cambodia incursion in May and the historic Senate debate in passing the Cooper-Church amendment. It has been now revived by the latest bombings of North Vietnam, the abortive attempt to rescue prisoners of war by a commando raid, and the President's request for a large military assistance program for Cambodia. The Administration has accompanied its bombing and commando raids on North Vietnam with new assertions about the nature of the President's Commander-in-Chief's powers. In a significant related action, however, the Senate Appropriations Committee last week voted tight new prohibitions on the use of regular Defense Department funds in Cambodia.

"In his testimony before the Senate Foreign Relations Committee on December 1, Defense Secretary Laird maintained the position that the President, as Commander-in-Chief, has the right and the duty to stage rescue forays for prisoners of war held in foreign countries with whom we are not at war in a *de jure* sense—and without any advance consultation with the Congress. If, hypothetically, one of these commando rescue teams should itself become trapped, is it

the implication of Secretary Laird's testimony that the President has the right to send in even bigger rescue forces, until we reach the stage of an invading expeditionary force?

"I have chosen as the title of my remarks this evening the question: 'Who Makes War?'. That question is pertinent in a double sense, for much of the present Constitutional confusion over the delineation of the respective war powers of the Congress and the President dates back to the action of the Constitutional Convention in changing its original draft, which gave Congress the exclusive power 'to make war,' to state that Congress has the exclusive power to 'declare war.' There is no doubt in my mind that the Founding Fathers very clearly intended the phrase 'declare war' to mean 'authorize war' in 1787—an age of declared wars. The lack of verbal clarity in drafting the final revisions of the Constitution has contributed greatly to the present confusion in this age of undeclared wars.

"The main focus of my remarks concerns the legal and constitutional process of how this nation gets into war. The corollary to this—how does the nation get out of war—is an equally pertinent question at this time. On this aspect of the problem, I would like to call your attention to the opinion expressed by the most famous member of the Princeton class of 1771—Mr. James Madison, fourth President of the United States. Madison is widely regarded as the 'Father of the Constitution' and any rereading of the record of the Constitutional Convention of 1787 shows how commandingly his ideas dominated that historic session.

"Although his motion did not carry, I think it is instructive to note that in the debate on Friday, September 7, 1787, Madison moved to authorize two thirds of the Senate to make treaties of peace without the concurrence of the President.

" 'The President', he said, 'would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace.'

"Our experience in Vietnam has shown how much harder it is to get out of that kind of war than it was to get into it. Now, how can effective checks be reestablished with respect to the Presidential initiation of undeclared wars? In this thermonuclear age, it may well be unlikely that we will be faced again with 'declared' wars.

"The area of contention between the Congress and the President over the war powers is centered on the question of 'undeclared' war. Our bitter national experience in Vietnam has brought this issue urgently to center stage. The danger of the war expanding to Cambodia has heightened our anxieties. Congress has learned from experience that it must devise practical new means for exercising, in relation to 'limited' and 'undeclared' wars, the war powers reserved to it in Article I, Section 8 of the Constitution. The essential object is for Congress to devise ways to establish its authority at the outset of military hostilities which, in the absence of a declaration of war, heretofore have left Congress behind at the starting gate. Yet, Congress must assert itself in a manner compatible with the President's exercise of his Constitutional responsibilities as Commander-in-Chief. We have learned that the power of the purse, alone, is not an effective instrumentality for asserting Congressional authority in undeclared wars.

"Our national experience has demonstrated right from the beginning that there are situations in which military hostilities may have to be initiated in the absence of a Congressional declaration of war—such as the undeclared naval war against France in 1798–1800 and President Jefferson's actions against the Barbary Pirates beginning in 1801. Throughout the 19th and early 20th centuries a body of precedents evolved concerning limited hostilities without a declaration of war. This evolved on an ad hoc basis essentially from a case-by-case exercise by the President of his discretionary executive authority as Commander-in-Chief. While our Presidents have shown great vigor and ingenuity in adapting and expanding the Commander-in-Chief function to deal with undeclared war and limited hostilities, the Congress has done little or nothing to adapt its 'declaration of war' power, and its other major Constitutionally-specified war powers to deal with the exigencies of our national history.

"It is clear from the debates of the Constitutional Convention of 1787 that a major objective of the Founding Fathers was to devise a system of government which would prevent the Executive authority from initiating, or involving the nation in, war without the approval of the people as represented in the Congress. The power reserved to Congress to declare war was meant to be the power to authorize war. The Constitution—quite explicitly and in some detail—gives the *policy* war powers to the Congress. It gives to the President the command or

executive authority as Commander-in-Chief, and the Constitution defines the executive capacity of the President to 'take care that the laws be faithfully executed.'

"While a member of Congress, Abraham Lincoln summed up the situation with characteristic succinctness:

" 'The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to go frame the Constitution that no one man should hold the power of bringing oppression upon us.'

"The expectation of the Founding Fathers, on the crucial question of war powers, has not worked out in practice. Congress has under-exercised its powers while the Presidents have developed the Commander-in-Chief function in novel and vastly expanded ways never contemplated in the Constitution. Undoubtedly, there was an historical logic behind this turn of events and even today I know of no Senator who questions the need for vigorous, vigilant and decisive exercise of the Commander-in-Chief function. Our national security requires it.

"But the unilateral expansion of Presidential power in war-making has now reached dangerous limits and could undermine the whole system of checks and balances underpinning our constitutional system of government. The point has been reached where any effort simply to check the further expansion of Presidential war power is regarded by some defenders of the Presidency as an encroachment on the Office of the President. Many advocates of Presidential prerogative in the field of war and foreign policy seem to be arguing that the President's powers as Commander-in-Chief are what the President alone defines them to be.

"The implication that the Presidency is beyond the power of Congress to check in the exercise of war powers raises a constitutional danger. It could leave the nation solely dependent on the good judgment and benign intent of the incumbent President. While we have had a high standard for eminence in the Presidency throughout our history, experience has shown that our liberties require firmer institutional safeguards if they are to survive.

"There has been considerable public note of recent efforts, particularly in the Senate, to reassert the war powers of Congress specified in the Constitution. What has not been noticed is that this reassertion of Congressional authority has been met by a countervailing hardening and intensification of assertions of unilateral and unfettered Presidential prerogative. Our action has stimulated a reaction. The situation is now one of dynamic tension. It is impossible for us to stand still; if we back off we may not be able to preserve even the position we now hold.

"Within this very year it has been asserted in the Senate that the President has the power to acquire foreign bases by executive agreement without reference to Congress; that he has the power to deploy the armed forces abroad without reference to the Congress; that he has the duty to take whatever action he deems necessary to protect the armed forces, wherever deployed, without reference to Congress. Moreover, it has been asserted that pertinent information required by the Senate to exercise its constitutional function of advice and consent can be withheld on 'security' grounds—indeed, although details may be communicated to foreign governments who are not a party to the negotiations in question.

"The situation requires a remedy and I believe there is a simple and effective one within Congress' own reach. What is most needed is new legislation which provides a contemporary delineation of the war powers of Congress and the President and which codifies the rules and procedures to be followed in circumstances where military hostilities are to be initiated in the absence of a Congressional declaration of war.

"I have introduced a bill (S. 3964) to accomplish this objective.

"It specifies four broad categories, derived from historical experience, wherein the President, as Commander-in-Chief, may initiate military action in the absence of a declaration of war. It requires the President to report fully and immediately to the Congress the circumstances and details of the military action he has initiated. His authority to sustain for a longer period the action initiated by the President.

"The four categories in which the President may act are:

"First, to repulse a sudden attack against the United States, its territories and possessions;

"Second, to repulse an attack against the Armed Forces of the United States on the high seas or lawfully stationed on foreign territory;

"Third, to protect the lives and property, as may be required, of U.S. nationals aboard;

"Fourth, to comply with a national commitment affirmatively undertaken by Congress and the President.

"Under my bill, even the 30-day period may be shortened by joint resolution of Congress.

"The bill also contains provisions assuring action can take place in Congress within 30 days avoiding the danger of overly extended debate or filibuster.

"The Senate Foreign Relations Committee is proposing to hold hearings on my bill, and the general subject of the exercise of the nation's war powers, early in the next session of Congress. In this connection, I feel that there is a major role to be played by the great universities. I would like to call upon Princeton, and specifically the Woodrow Wilson School, to make a contribution to the Foreign Relations hearings, I hope other universities will join in also, for this is a question in which universities are uniquely equipped to help out through research and scholarship, and by the direct testimony of academic authorities. I shall be in further contact with Dean Lewis on this matter as soon as the dates of the Foreign Relations Committee hearing have been established."

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[From the Congressional Record, Mar. 5, 1971]

## A Brief on S. 731, To Make Rules Respecting Military Hostilities in the Absence of a Declaration of War

Mr. Javits. Mr. President, I ask unanimous consent that a brief prepared by my staff on S. 731, the war powers bill, and the text of the bill, be printed in the Record.

There being no objection, the brief and bill were ordered to be printed in the Record, as follows:

### "Congressional Authority Over the Decision To Wage War

#### "I. Introduction

"Whether viewed from contemporary or historical perspective, one of the most important and far-reaching questions facing any generation or society concerns the initiation and conduct of war. The physicial, moral and political consequences of any given decision to go to war almost inevitably are enormous; in any particular case many of these consequences, or their magnitude, may be wholly unforeseen and unanticipated. It is unnecessary here to catalog the most obvious hardships of war, the terrible losses of life and expenditures of social capital and energy, except to note that war can and often does entail less tangible but equally profound consequences for a society at large:

"A society's idealism and self-respect may be gained or lost, and its legal and political institutions strengthened or distorted, disrupted or abused;

"The political and moral values of an entire generation may be marked for life.

"Thus, it is not only a nation's political leaders and young men who suffer the penalties or reap the glories of war; an entire people is deeply and permanently affected. It can be said with little exaggeration that the truest measure of the democracy of a society is the extent to which is political institutions permit participation by the people in the determination of whether to wage war. Similiarly, the wisdon of any society may be measured by the extent to which that determination is made thoughtfully, with the best informed and the most democratic representation of the people.

"S. 731, the War Powers Bill, was drafted with these considerations in mind. It is intended to insure that in the future any fateful decision by the government of the United States to wage war, or to engage in military hostilities, will be made by the American people through their duly chosen representatives—both the President and the Congress. The purpose of this memorandum is to demonstrate that the role of the Congress in the decision-making process set forth in the War Powers Bill is fully consistent with the constitutional allocation of powers between Congress and the President.

"II. DESCRIPTION OF THE WAR POWERS BILL

"By enacting the War Powers Bill, Congress would place three related restrictions on the President's ability to involve the Nation in war.

"(1) In the absence of a declaration of war by the Congress, the President would be prohibited from committing armed forces to hostilities, except pursuant to one of the following permissible objectives: to repel a sudden attack against the United States, its territories, and possessions; to repel an attack against the armed forces of the United States on the high seas or lawfully stationed on foreign territory; to protect the lives and property, as may be required, of United States nationals aboard; and to comply with a national commitment resulting exclusively from affirmative action taken by the executive and legislative branches of the United States government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment, where immediate military hostilities by the armed forces of the United States are required. The words 'repel' and 'protect' suggest that defensive action only is contemplated in connection with the first three objectives; as to the fourth objective, compliance with a 'national commitment,' it should be noted that the language defining such a commitment is taken from the National Commitments Resolution, S. Res. 85, which passed the Senate on June 25, 1969, and provides that a national commitment would exist only when evidenced by prior affirmative Congressional action.

"(2) The President would be required to report promptly to Congress the initiation of any military hostilities pursuant to one of the permissible objectives listed above, together with a full account of the circumstances under which military hostilities were initiated.

"(3) The President would be prohibited from continuing military hostilities pursuant to a permissible objective in any undeclared war for more than thirty days—which could be shortened by the Congress—except as provided in legislation specifically enacted by Congress to sustain such hostilities.

"In effect, therefore, the bill would lay down a blanket prohibition of undeclared wars of more than thirty days' duration, subject to the condition subsequent of specific enabling legis'ation. The bill contemplates that such enabling legislation could be an unrestricted grant of authority to the President or could impose definite restrictions on the continuation of hostilities, such as those of time and place and objective.

"The bill would establish a legislative procedure for expediting the consideration of enabling legislation in the event of military hostilties, in order to avoid the obstruction of a filibuster or other delaying tactics. It would also make explicit the right of Congress to terminate authorization of any such military hostilities prior to the expiration of the statutory thirty day period. By its terms, the bill would not apply to any current military hostilities, including the undeclared war in Vietnam.

"Presumably no constitutional diffieulties arise from the requirement that the President report to the Congress on the initiation of military hostilities. Both history and common sense indicate that such a demand is well within the legislative prerogative. The phrase 'initiation of military hostilities' is not strictly defined in the bill, but its meaning should be reasonably determinable in practice. Although any concept such as 'miltary hostilites' necessarily involves some gray areas of uncertainty, any disagreement could be resolved by interpreting the bill as allowing the President to determine and report to the Congress when he decides military hostilities to have been initiated subject, of course, to any prior Congressional determination.

"The constitutional questions which merit investigation are those implicit in the prohibitions against certain military hostilities in the absence of a declaration of war. Roughly speaking, the bill contains two different types of prohibitions: against nondefensive warfare, in the absence of prior Congressional authorization; against the continuation of any warfare beyond thirty days in the absence of specific Congressional authorization. It also contemplates the possible enactment of subsequent legislation which would impose further prohibitions on the continuation of a given undeclared war, either by reducing the thirty day period or by qualifying the extent or manner in which war could be continued. The Constitutional questions may therefore be stated in general terms as follows: (1) Does the Constitution

grant the President authority to disregard a Congressional prohibition against the initiation of nondefensive military hostilites? (2) Does the Constitution grant the President authority to disregard a Congressional prohibition against the continuation of military hostilities? For the reasons discussed below, this memorandum concludes that both questions must be answered in the negative and that, therefore, enactment and enforcement of the War Powers Bill would be fully consistent with the constitutional allocation of war powers between Congress and the President.

"III. THE CONSTITUTIONAL TEXT

"An examination of the text of the Constitution will show that the great powers commonly associated with the federal government, including those over war and military hostilities, are expressly granted to Congress. Article I, Section 8 confers on Congress the major war powers—the powers to provide for the common defense; to declare war; to raise and support an army and navy; to make rules for the government and regulation of the land and naval forces; to provide for calling for the militia to execute federal laws, suppress insurrections and repel invasions; and to provide for organizing, arming, disciplining and governing the militia—and the authority to make all laws necessary and proper to the execution of such powers.

"By contrast, only ministerial functions are assigned to the President. Article II simply provides that the executive power shall be vested in the President and that he shall be Commander in Chief of the army and navy and, when called into service, the militia. Thus it seems clear from the very language of the Constitution that the role of war policy formulation was intended for Congress and that the role of the President was to be the faithful execution of Congressional policy. A review of the history behind the constitutional text strongly supports this conclusion.

"The origin of the clause granting Congress the power to declare war illustrates the intent of the Constitutional Convention with respect to the allocation of war powers. This history is lucidly set forth in Note, 'Congress, the President and the Power to Commit Forces to Combat,' 81 Harv. L. Rev. 1771 (1968), at pp. 1775–1774:

"'An earlier draft by the Committee of Detail gave Congress power to "make" rather than "declare" war. In direct contrast to the power of the British sovereign to initiate war on his own prerogative, the clause was the result of a deliberate decision by the framers to invest the power to embark on war in the body most broadly representative of the people. The clause remained in its original form in the committee drafts several weeks after other foreign relations powers had been transferred from the whole Congress to the Senate and then to the President. When the proposal to substitute "declare" for "make" was introduced, the debates over the issue indicate that the new wording was not intended to shift from the legislative to the executive this general power to engage the country in war. At most, the sole reason for the substitution was to confirm the executive powers "to repel sudden attacks." In all other cases the commitment of the country to a trial of force with another nation was to remain the prerogative of Congress. Both the purpose and intent of Article I, Section 8 are thus more accurately conveyed by construing that clause to give Congress not simply the power formally to "declare," but also the power generally to "initate war." (footnotes omitted)

"There would seem to be little doubt that the Constitutional Convention intended Congress alone to have the right to initiate war (with the proviso that the President should have power to repel sudden attacks which, it should be noted, is one of the permissible objectives described in the War Powers Bill). It is this right to initiate war which is most strongly asserted by the first general prohibition of the War Powers Bill; as a practical matter, the prohibition against continuation of military hostilities beyond thirty days is also an assertion of this right, tempered by a recognition of the desirability of swift executive response in certain necessitous circumstances.

"Some observers have concluded that the right of Congress to initiate war is still exclusive, that the President cannot constitutionally act alone to begin a war; see *e.g.*, 'Indochina: the Constitutional Crisis,' Documents Relating to the War Power of Congress, The President's Authority as Commander-in-Chief and the War in Indochina, Senate Committee on Foreign Relations 73, 74 (91st Cong., 2d Sess. 1970). There is certainly sound historical basis for this view. For

example, it was reported that one member of the Constitutional Convention remarked that he 'never expected to hear in a republic a motion to empower the executive alone to declare war,' Madison, Notes of Debates in the Federal Convention 476 (Ohio University ed. 1966). However, it is important to note that the constitutionality of the War Powers Bill does not depend upon the broad argument that the President has no power to initiate war in the absence of Congressional action; instead, the bill rests upon the easier and narrower proposition that Congress has the right to legislate concerning the initiation of war and the President has no right to contravene such legislation. This proposition would seem to be clearly and authoritatively established by the constitutional text and its origin.

"The history behind the constitutional text also illustrates the intent of the framers as to the separate powers of the President as Commander in Chief and relationship to be maintained between Congress and the President with respect to the conduct, as well as the initiation, of military hostilities. The constitutional concept of a 'Commander in Chief' derives from the experience of the framers with the conduct of the Revolutionary War. In June, 1775, the Continental Congress had appointed George Washington to be Commander in Chief of the colonial forces; he held this post throughout the Revolutionary War. Thus it was the successful relationship of the Continental Congress with General Washington which the framers used as a model when formulating the military powers of the President. The nature of that relationship was firmly expressed in the Commission as Commander in Chief which was granted to Washington on June 19, 1775, the final clause of which insisted upon Congressional control of the war which the Commander in Chief was to prosecute;

"'And you are to regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress of the said United Colonies or a committee of Congress for that purpose appointed.' 2 The Writings of George Washington 482 (Worthington Chauncy Ford ed. 1889).

"The essentially 'command' nature of the office of Commander-in-Chief were stressed by Alexander Hamilton, who said that it 'would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy;' The Federalist No. 69, at 515–16 (J. Hamilton ed 1864). It is clear, therefore, that the position of the Commander in Chief was not viewed as one of independence; rather, it was intended that the conduct and expansion of military hostilities by the President be subject at all times to the directives of Congress. It was certainly not contemplated that the President as Commander in Chief would ever act contrary to the express will of Congress.

"It is possible to summarize the intent of the war powers, as follows: (1) Congress was intended to have final authority over the initiation of military hostilities; to this end it was granted power to declare war and to provide for the common defense. (2) Congress was intended to have final authority over the conduct of military hostilities; to this end it was granted a wide variety of powers relating to the organization, support, regulation and government of the armed forces. (3) The President as Commander in Chief was intended to be the executive arm of Congress, carrying out its policy directives in the prosecution of military hostilities. (4) The President was expected to act on his own initiative to repel sudden military attacks against the United States; however, he was not empowered to act inconsistently with the directives of Congress.

"IV. THE DECIDED CASES

"*A. Nineteenth century*

"There are few Supreme Court decisions bearing upon the range of Congressional war powers and the authority of the President as Commander in Chief. Most of these were handed down in the nineteenth century and involved the legality of certain Presidential actions undertaken during the course of an undeclared war. In its decisions the Supreme Court articulated more clearly and fully the constitutional allocation of war powers between Congress and the President. As will be seen, these decisions are consistent with the statement of constitutional intent set forth above and strongly support the constitutionality of the War Powers Bill.

"The first Supreme Court pronouncements on the allocation of war powers were made in the course of deciding two cases arising out of an undeclared war with France which occurred during the administration of President John Adams. The first of these, *The Eliza*, 4 Dall. 37 (1800), involved a dispute between two private parties over the salvage to be recovered for the recapture of a ship. The Eliza, an American trading ship, had been captured and held by a French privateer before recapture by a public armed American vessel, the Ganges. The commander of the Ganges filed a libel against the Eliza claiming salvage equal to one-half the whole value of ship and cargo. The owner of the Eliza contended that salvage was limited to one-eighth value. Each party based his case on a different federal statute. The general statute relating to salvage had been enacted in 1798 and provided for one-eighth value. A special statute, enacted one year later, permitted salvage of one-half for recapture 'from the enemy.' The issue facing the Court was whether France was 'the enemy' in the absence of any formal declaration of war.

"The Court had no difficulty in holding that a state of war with an enemy could exist in the absence of a formal declaration and that France was in this case 'the enemy.' However, three justices (the Court then being composed of five justices) commented further on the distinctions between declared and undeclared wars and the power of Congress to regulate and control the latter. In doing so, they left no doubt as to the predominance of Congress in the initiation and prosecution of war.

"Justice Washington: 'It may, I believe, be safely laid down, that every contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, . . . and all the members of the nation declaring war are authorized to commit hostilities against all the members of the other, in every place and under every circumstance . . . But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because *those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission.*' at p. 40 (emphasis applied)

"Justice Chase: '*Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in objects, and in time.* If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but *if a partial war is waged, its extent and operation depend on our municipal laws.*' at p. 43 (emphasis supplied)

"Justice Paterson: 'The United States and the French republic are in a qualified state of hostility . . . *As far as Congress tolerated and authorized the war on our part so far may we proceed in hostile operations.*' at p. 45 (emphasis supplied)

"In *The Eliza*, therefore, the Court gave clear expression to the rule that Congress may legislate restrictions on the conduct of an undeclared war. This rule was adopted as the holding in *The Flying Fish*, 2 Cr. 170 (1804), a case which firmly stated that the President as Commander in Chief was subject to the restrictions imposed by Congress. Like *The Eliza*, this case arose out of a naval engagement during the undeclared war with France. Congress had enacted legislation suspending intercourse with France and empowering the President to authorize naval commanders to seize any American ship *bound or sailing* to any French port. President Adams apparently regarded this power inadequate to meet the needs of the moment, for he more broadly directed the seizure of "vessels or cargoes, really American, but covered by Danish or other foreign papers, and *bound to or from* French ports" (emphasis supplied). The Flying Fish, a vessel subsequently determined to be Danish with neutral cargo, was seized while sailing from a French to a neutral port. Lower court proceedings had ordered restoration of vessel and cargo to the Danish owner. The issue remaining for the Supreme Court was whether the owner also had a right to damages for wrongful seizure.

"The Court assumed for purposes of discussion that the Flying Fish could reasonably have been mistaken for an American vessel, but nevertheless held that the seizure was unlawful and that damages should be awarded. The seizure was unlawful because, although made in accordance with the terms of the Presidential directive, it was not within the legislative grant of authority. In other words, the President's conduct of hostilities was held subject to Congressional restraint: even as Commander in Chief the President was neither author-

ized nor permitted to go further than the limits expressly set by Congress. Thus the holding in *The Flying Fish* is directly supportive of the constitutionality of the restrictions imposed or contemplated by the War Powers Bill.

"It is important to observe that the true meaning of this decision is not that the President has no war powers in the absence of a specific legislative grant authority, but that he is limited in the exercise of his war powers by the restrictions imposed by Congress. The Court noted that in the absence of any act of Congress, the President as Commander in Chief might have had sufficient authority, at such a time of military hostilities, to order the seizure of all American ships trading with France; by the same reasoning he presumably would have had the authority to impose and enforce an embargo against neutral trading vessels as well; however, the existence of what the Court viewed as an intentionally prescribed legislative restriction precluded any broader executive action. *This is the constitutional principle upon which the War Powers Bill is based: intentionally prescribed legislative restrictions on the exercise of war powers or the conduct of military hostilities preclude broader executive action.*

"Two other nineteenth century decisions of the Supreme Court concerned the constitutional allocation of war powers. Both dealt with controversies arising from the Civil War. In the *Prize Cases*, 67 U.S. 635 (1863), four merchant ships, two Southern and two foreign, were seized as prizes off the coast of the Confederacy under authority of a Presidential proclamation of embargo. In libels filed by the United States, the primary issue was whether President Lincoln was empowered to institute a blockade prior specific authorization of Congress. Earlier acts of Congress had authorized the President to call out the militia and use the armed forces in the event of foreign invasion or civil insurrection. Viewed narrowly, therefore, the question faced by the Court concerned the extent of Presidential authority to act against the property of noncombatants and neutrals while conducting hostilities under a broad general legislative authorization containing no explicit limitations. Four justices, a minority, argued that the earlier acts of Congress contemplated only militia actions against the insurgents themselves, that war powers over the business and property of noncombatant citizens could not be evoked without prior, specific authorization of Congress. However, the majority upheld the action of the President and offered two alternative grounds for so holding: (1) the blockade was well within the authority granted by the acts of Congress; (2) Congress subsequently expressly ratified the blockade. The Court asknowledged the President's responsibility under the general legislation to 'repel sudden attacks' by nothing, at p. 668, that whereas the President 'has no power to initiate or declare war either against a foreign nation or a domestic state,' when confronted with foreign invasion or domestic rebellion he 'is not only authorized but bound to resist force by force.'

"The most significant aspect of the *Prize Cases* is, for present purposes, the Court's insistence upon Congressional authorization as the basis of Presidential war powers. Such a view necessarily implies that the President has no power to contravene restrictions which Congress may impose. The President as Commander in Chief has wide discretion to act within a broad legislative grant of authority, but he may not act inconsistently with any limitations it may contain.

"Although it has more important constitutional implications *Ex parte Milligan*, 71 U.S. 2 (1866), may also suggest that there were some war powers which the Court was unwilling to extend to the President in the absence of specific legislation. This case arose as a *habeas corpus* proceeding, contesting the legality of a conviction by a military tribunal of a Northern civilian in Indiana during the Civil War. The Court held that such a military trial violated several constitutional guarantees pertaining to trials for felony. However, a strong concurring opinion by Chief Justice Chase argued that Congress, in the exercise of its war powers, could have established martial law under military tribunals in Indiana, upon a legislative determination of a state of insurrection, but that, in the absence of such legislation, the subjection of civilians to military justice was beyond the power of the executive. If nothing more, this view, which was joined in by three other justices, illustrates the preeminence of Congressional over Presidential war powers.

*"B. The 'Steel Seizure' case*

"The only modern Supreme Court decision bearing upon the allocation of war powers between Congress and the President was that in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the famous 'Steel Seizure' case. This case, which resulted in practically as many separate written opinions as there

were justices, nevertheless is fully consistent in reasoning and result with the principles developed in the nineteenth century decisions.

"As is commonly known, the case arose from the national seizure of the nation's major steel mills. President Truman had directed Secretary of Commerce Sawyer to take possession of the mills in order to avert a steel strike which might have hindered prosecution of the Korean War. The steel companies brought suit, requesting preliminary and permanent injunctions restraining enforcement of the executive orders. The issue, of course, was whether the President had constitutional authority to take the contested action. The Court held, six to three, that he did not have such authority.

"In delivering the opinion of the Court, Justice Black took the position that, in the absence of express or fairly implied Congressional authorization, lacking in this case, the seizure of private property was simply not within the power of the President, either in his executive capacity or as Commander in Chief. Justice Douglas was in general agreement with this position. Although consistent with the concept of Presidential war powers as being derivative from Congress, these opinions are perhaps surprising in that they seem to take a narrower view of the President's powers than did the Court in the *Prize Cases*, where seizure was permitted as being within a broad and imprecise legislative grant of authority. At a minimum the opinions of Black and Douglas do not suggest any expansion of the President's basic constitutional powers since the nineteenth century.

"The four other members of the majority took a somewhat different approach to the case. Justices Frankfurter, Jackson, Burton and Clark, in four separate concurring opinions, reviewed the legislative history of the Labor Management Relations Act of 1947 and other relevant legislation and concluded that Congress had intentionally withheld seizure power from the President. In the words of Justice Burton, at p. 657: 'Congress reserved to itself the opportunity to authorize seizure to meet particular emergencies.' In light of this conclusion, the concurring justices found that the President had no authority to act outside the procedures established by Congress for dealing with labor crises.

"They would not necessarily have held that the President would have lacked executive authority to order seizure in the absence of any legislation, but they were agreed that the negative implications of the existing legislation prohibited such executive action.

"These opinions are interesting for their strong affirmation of the principle established by *The Flying Fish:* intentionally prescribed legislative restrictions preclude broader executive action. In fact, Justice Clark cited *The Flying Fish* as the basic judicial pronouncement on the allocation of powers between Congress and the President. The following quotation from Justice Clark, at p. 662, derives directly from *The Flying Fish* and well summarizes the views of the concurring justices:

"'(I)n the absence of . . . action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation . . . [but] where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis.'

"The quotation also well expresses the constitutional foundation of the War Powers Bill. The bill does not assert that the President lacks independent power to initiate military hostilities, plausible as such a proposition may be in light of the intent of the constitutional framers. However, the bill would lay down specific procedures for dealing with the grave crisis of war. Under the Constitution, the President then would be required to follow those procedures.

"V. HISTORICAL EXERCISE OF THE WAR POWERS

"In his concurring opinion in *Youngstown Sheet and Tube*, at p. 610, Justice Frankfurter stressed the role of nonjudicial history in constitutional interpretation in the following words:

"'Deeply imbedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.'

"Perhaps the case most clearly illustrating this proposition is that of *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). That case raised the question of whether the President had authority to withdraw public land from private ac-

quisition. Congress had opened public land for occupation, exploration and purchase, but over a period of eighty years and in more than 250 instances Presidents had temporarily withdrawn land from entry. The Court in essence decided that Congressional acquiescence in the executive practice of withdrawal constituted a gloss on the original statute such that, whatever the status of the initial withdrawals, the President had by 1909 acquired authority to continue the practice as against private party plaintiffs. Of course, the Court did not hold that Congress had lost the power to prohibit withdrawal.

"As was quoted above from Justice Frankfurter, 'Deeply embedded traditional ways of conducting government cannot supplant . . . legislation.' Strictly speaking, therefore, the doctrine of *Midwest Oil* is not relevant to the constitutionality of the War Powers Bill, which would place new Congressional restrictions on the exercise of war powers by the President. However, the case does illustrate the appropriateness of an inquiry into the historical exercise of war powers by the President and Congress.

"A review of the historical development of the war powers establishes two general propositions: (1) over time there has been an expansion of the extent to which Presidents take military action independently of any specific Congressional authorization; (2) no President has asserted the right to initiate or expand military action in a manner contrary to an express Congressional prohibition. This history is conveniently summarized in 'Indochina: the Constitutional Crisis,' Documents Relating to the War Powers of Congress. The President's Authority as Commander in Chief and the War in Indochina, Senate Comm. on Foreign Relations 73, at pp. 75–77 (91st Cong., 2d Sess. 1970):

" '*The executive branch very early recognized the exclusive power of Congress to declare war.*' In the course of a dispute with Spain in 1805, President Jefferson told Congress:

" 'Considering that Congress alone is constitutionally invested with the power of changing our position from peace to war, I have thought it my duty to await their authority before using force in any degree which could be avoided.'

"Similar deference to the sole power of Congress to make any decision to commit the United States to war was voiced by President James Monroe, Secretary of State John Quincy Adams, and Secretary of State Daniel Webster.

"*The Congress itself was jealously aware of its war powers, and on one occasion nearly censured the President for invading it.* In 1846 it had declared, after the fact, that a state of war existed with Mexico. But the debate was bitter and the war unpopular. At the end of the war, the House of Representatives voted its thanks to General Taylor, but amended its resolution to note that he had won 'A war unnecessarily and unconstitutionally begun by the President of the United States.' [This clause was deleted on final passage.] . . .

"*During the nineteenth century, the executive branch frequently recognized the need for congressional authorization even for limited military actions.* In 1857 the Secretary of State refused to send ships to help a British expedition in China, because he lacked congressional authority to do so. The next year President Buchanan pleaded with Congress for authority to protect transit across the isthmus of Panama, but refused to act without it. Nor in 1876 would the State Department use force to help Americans in Mexico, because it felt it lacked the power to do so. . . .

"In the early part of the twentieth century, the executive began to exercise greater discretion in the use of American armed forces abroad. For instance, without specific congressional approval, President Theodore Roosevelt sent American troops into Panama in 1903 and President Wilson sent troops into Mexico in 1916 in pursuit of the Pancho Villa bandits.

"Since 1945, the executive has regularly used military force abroad as a tool of diplomacy. Aside from Indochina, the greatest use of American force was in Korea, where several hundred thousand troops were committed to combat and major casualties were incurred. There was neither a formal declaration of war, nor any other specific congressional sanction for the Korean conflict. (footnotes omitted)

"It is one of the terrible ironies of American history that as war has become more destructive, more costly, less controllable and less humane, the power of decision over war has become increasingly concentrated in the hands of fewer and fewer individuals. This trend of history is not just dangerous; it carries with it the awful portent of finality for millions of human beings. The War Powers Bill would reverse this trend by reinstating the constitutional safeguard

of representative deliberation over the fearsome issues of war. Nothing in our history suggests that Congress lacks the constitutional authority to assert once again its full war powers. Much in our recent history suggests the wisdom and urgency of its doing so.

"Furthermore, recent history also offers precedents for the placing of Congressional restrictions on the President's authority to deploy forces abroad and involve the Nation in war. For example, the Selective Training and Service Act of 1940, 54 Stat. 885, provided at section 3(e) that:

" 'Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the territories and possessions of the United States, including the Philippine Islands.'

"In the course of the current military hostilities in Southeast Asia, Congress has imposed definite geographical limitations on the conduct of the war. The Defense Appropriations Act of 1970, 83 Stat. 469, and also the Defense Appropriations Act of 1971, P.L. 91-668, both contain, at sections 643 and 843, respectively, the restriction that 'none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand.' The constitutionality of these assertions of Congressional authority over the use of American armed forces and the conduct of an undeclared war has not been seriously questioned. The restrictions contemplated by the War Powers Bill would be of a similar nature, only they would be more systematic: they are directed toward institutional reform of national war decision-making and not just at a contemporary military crisis. As such, the War Powers Bill aims at a reinstitution of the historical constitutional war-making processes.

"Since 1945, the United States has entered into many collective security agreements and mutual defense pacts, undertaking thereby a variety of obligations. However, it is clear that none of these obligations is inconsistent with the allocation of decision-making responsibility set forth in the War Powers Bill. For example, the United Nations Charter, art. 43, para. 3, provides that agreements to make armed forces available 'shall be subject to ratification by the signatory states *in accordance with their respective constitutional processes*' (emphasis added). This provision is expressly designed not to interfere with internal constitutional allocations of war-making authority. Similarly, the SEATO treaty requires only that each signatory will 'act to meet the common danger in accordance with its constitutional processes;' Southeast Asia Collective Defense Treaty, Sept. 8, 1954, art. IV, para. 1. Analogous language has been used in each of the mutual defense pacts to which the United States is a party; see Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations (90th Cong. 1st Sess. 1967). A different form of words was employed in the NATO treaty, which requires each party to take 'such action as it deems necessary,' North Atlantic Treaty, Apr. 4, 1949, art. 5., but this language has been widely regarded as permitting each signatory to follow its own constitutional processes in determining what, if any, action might be necessary at any given time; see Cheever and Haviland, American Foreign Policy and the Separation of Powers 128 (1952), and, generally, Note, 'Congress, the President, and the Power to Commit Forces to Combat,' 81 Harv. L. Rev. 1771, 1798-1801 (1968). In short, therefore, history offers no prohibition, some encouragement, and a great deal of incentive for insistence by the Congress upon its constitutional role in the decision to undertake war.

"VI. CONCLUSION

"The purpose of S. 731, the War Powers Bill, is to insure that in the future any final decision by the government of the United States to engage in war will be made by the American people through their duly chosen representatives in Congress—acting in concert with the President. It would do so by prohibiting the initiation of nondefensive war in the absence of prior specific congressional authorization, and by prohibiting the continuation of other military hostilities beyond thirty days in the absence of specific congressional approval. The bill also contemplates the subsequent enactment of legislation determining the extent to which or manner in which particular military hostilities could be continued. The War Powers Bill places constitutionally valid restrictions upon the exercise of executive war powers; the President has no independent authority to contravene such express prohibitions.

"The enumeration of Congressional war powers in the Constitution and the historical origins of the 'declare' and 'Commander in Chief' clauses testify that the constitutional framers intended to grant Congress the primary authority over the initiation of war and responsibility for the formulation of basic guidelines for the conduct of war. The President as executive was to be responsible for the faithful carrying out of the laws passed by Congress; it was intended that the President be bound by the policy decisions of Congress. And the Supreme Court has upheld this intent. In *The Eliza* and *The Flying Fish* the Court gave clear and firm expression to the right of Congress to impose restrictions upon the conduct of undeclared war by the President as Commander in Chief. This right was upheld and enforced in *Youngstown Steel and Tube* even though the restrictions were implied rather than express. Although history has witnessed the development of wars initiated by the President, without specific Congressional authorization, the constitutional right of Congress to make the final decision concerning the initiation of war or the continuation of undeclared wars has not been seriously questioned.

"Congress has the constitutional right to initiate or to prohibit the initiation of war; it has the right to place limits or restrictions on the conduct of undeclared war. Many persons believe that Congress has not been sufficiently vigilant in the exercise of these rights, particularly in the years after World War II. It is appropriate once again to quote from the decision in *Youngstown Sheet and Tube*, this time from the concurring opinion of Justice Jackson, at p. 654:

"'. . . I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that "the tools belong to the man who can use them." We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.'

"Congress can, by enacting the War Powers Bill, restore this nation's constitutional balance with respect to the awesome and consequential decisions of war."

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MARCH 6, 1971.

SENATOR JACOB K. JAVITS,
*Senate Office Building,*
*Washington, D.C.*

DEAR JACOB JAVITS: I have read with great interest and full approval your bill respecting undeclared wars and your accompanying statement. As I am deeply engaged in writing a new book (on impeachments), I cannot enter into a real discussion of it, but none is really needed: the wisdom of it is self-evident and the provisions of the bill are statesmanlike and workable. I suggest the following insertion, or something like it, to take care of a remote contingency:

"E. In the event that such military hostilities, in the absence of a declaration of war, are instituted during a recess of Congress, the President shall summon Congress to meet in special session, to convene not more than ten days after the initiation of such hostilities, and such hostilities shall not be sustained beyond thirty days from the date of their initiation except as provided in legislation enacted by the Congress to sustain such hostilities beyond thirty days."

I suggest that you get hold of Madison's *Writings* and read his letter of April 2, 1798, to Jefferson on President Adams' undeclared war on France. He denies the constitutional right of the President to take actions, without a declaration of war, that tend to deprive Congress of a free choice between declaring war and not doing so.

Did you have an opportunity to place any of my material on the filibuster in the Congressional Record?

Why doesn't anybody suggest that you ought to be the *Democratic* nominee for President? Your activities suggest perpetual youth, and you've certainly got everything else.

Sincerely,

IRVING BRANT.

THE UNIVERSITY OF TEXAS AT AUSTIN,
*Austin, Tex. March 1, 1971.*

SENATOR JACOB K. JAVITS,
*Washington, D.C.*

DEAR SENATOR JAVITS: Thank you for your letter of February 17 and for the copy of your bill to restrain the President from carrying on a prolonged war without action by Congress. I assume that both of us know that, even if the bill passes, a headstrong President can get us deeply involved to the point of facing Congress' action. Nevertheless, I hope that your bill passes (and by a big majority) and I also hope that by some means Congress can bring about a withdrawal of *all* American forces from Indochina by the middle of 1972.

I am in no position to take a holier than anyone stand on this unhappy and, as I now believe, completely wrong war, since I silently went along with the government's policy—that was until the spring of 1967, when I finally came to the conclusion that this was the wrong war in the wrong place. Since then it has become increasingly evident that it is a war we cannot win, any more than we won the War of 1812. If we can get out with a reasonable, or even an unreasonable, degree of dignity and speed, we shall, as I now believe, gain in the esteem of almost every country—and, hopefully, avoid confrontation, or worse, with China.

Sincerely yours,

BENJAMIN F. WRIGHT.

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CENTER FOR ADVANCED STUDY IN THE BEHAVIORAL SCIENCES,
*Stanford, Calif., February 23, 1971.*

HON. JACOB K. JAVITS,
*Committee on Foreign Relations,*
*U.S. Senate, Washington, D.C.*

DEAR SENATOR JAVITS: Thank you for your letter of February 10 and for the enclosed copies of your speech and your bill.

I need not repeat that I believe you are performing a great service in reopening consideration of the crucial problem of the division of the war power and the foreign relations power between Congress and the President. I write now merely to raise a couple of drafting points for your consideration.

Section 1(A) (1) and (2) authorizes the President to act in order to repel a sudden attack against the United States, its territories, and possessions, or against the Armed Forces of the United States on the high seas or in places where they are lawfully stationed. I think in modern times it would also belong to the President to respond to the threat of an attack against the United States or against our forces, in circumstances, one might say by way of a First-Amendment analogy, of clear and present danger, when speed and perhaps secrecy are of the essence. I think the fundamental principle on which the claim to independent Presidential authority as Commander-in-Chief is based in the Constitutional scheme is that the nation must be enabled to react in emergency conditions, when speed is essential and when resort to a deliberative legislative process, however expedited, would make effective reaction impossible or would unduly delay it. And I think that the existence of modern weapons-delivery systems makes it necessary to extend the independent power of the Commander-in-Chief to situations of an imminent threat of attack as well as to situations of an actual attack. I should think the President's position would be that in modern conditions his Constitutional power extends this far, and that Congress cannot infringe it or take it away, and I would agree with that position.

Section 1(A) (4) refers to treaty and like commitments, which, very properly, it defines closely. But in my judgment it can be read to confer more authority on the President than ought to repose in him, or arguably than can Constitutionally be conferred by Congress. The Senate was careful, as I recall it, in ratifying the NATO and SEATO treaties, for example, to indicate that the United States was binding itself to act only in conformance with its Constitutional procedures. That would mean that whether pursuant to a treaty or otherwise, the President could act independently only to repel attacks or the imminent threat of an attack or to protect the lives and property of United States nationals. Now, can the Congress prospectively delegate to him more power? In my judgment, despite *United States* v. *Curtiss-Wright Export Corporation*, which was really quite a limited case, the answer should be no, unless much more detailed standards are set forth in the delegation than most treaties contain or than are contained in Section 1(A) (4) of this bill. See *Kent* v. *Dulles*. I realize that the

delegation is limited in time by the provisions of Subsection (B), but the provision that hostilities must stop after thirty days unless approved by Congress has to be considered as necessarily modified by the power of the Commander-in-Chief to protect his forces if after the commencement of hostilities they continue to be under attack or under the threat of attack following the thirty-day period.

I hope these suggestions may be helpful to you in your consideration of this complex matter.

Faithfully yours,

ALEXANDER M. BICKEL.

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BROWN UNIVERSITY,
DEPARTMENT OF HISTORY,
*Providence, R.I., March 17, 1971.*

Senator JACOB K. JAVITS,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR JAVITS: I have read the text of your bill, S. 731, with great interest. I agree wholeheartedly with your effort and with your scholarly interpretation of the circumstances surrounding the adoption of the Constitution. It seems to me that we are moving, and have been during the past fifty years or so, back toward a conception of "executive" or gubernational authority that was current in Western society before the late 18th or early 19th centuries, that is, that the ruler or monarch, as was usually the case, was "the government" and hence totally responsible for governing the society or relating to foreign powers. This responsibility included the power to declare war and make peace.

The Americans in 1776 aimed to change this conception of "monarchical" government and in their state constitution of 1776 and later on the Federal Constitution broke up these hitherto exclusively "monarchical" powers and gave many of them to the legislatures, and to the Congress, which bodies presumably represented the people in a way the governors and the President did not. In all the state constitutions of 1776 and later in the Federal Constitution the power to declare war among other powers was clearly taken away from the traditional "ruler" and given to "the people" in their representative capacities.

During the greater part of the 20th century this tendency of thinking has been sharply reversed, partly as you and I both know for good causes; and in the process the governors and especially the President have shed whatever "monarchical" connotations their offices still retained and have come to be thought of as in some ways more representative of the people than the legislatures and the Congress. Whatever the justification for such a transformation, there is still the continuing traditional American fear of concentrated power that keeps us from going too far in any one direction.

I think the Congress has every right, and indeed an obligation, to start the pendulum swinging back in the other direction. It's in this context that I interpret your bill and the recent remarks about the Congress's inability to question Mr. Kissinger. If the Congress should not reassert its authority in these vital areas of war and peace, then there is the increasing likelihood of its becoming simply a revenue-voting body for the President's programs.

Sincerely yours,

GORDON S. WOOD,
*Associate Professor.*

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THE UNIVERSITY OF WISCONSIN,
DEPARTMENT OF HISTORY,
*Madison, Wis., March 1, 1971.*

Senator JACOB K. JAVITS,
*U.S. Senate, Washington, D.C.*

DEAR SENATOR JAVITS: Thank you for sending me a copy of your speech of 10 February and of the bill for the regulation of "undeclared war." It is reassuring to learn that there is some sentiment in Congress for reassuming a measure of its constitutional responsibility for the conduct of war and foreign relations.

Congress should have the courage to face the fact that our present predicament arises in part because Congress itself has abdicated its power and responsibility. And the Executive branch, ever since the days of George Washington, has often been willing to exercise powers delegated by the Constitution to the Legislative branch.

The Founding Fathers were concerned with principles whose validity transcends the passage of time, principles as valid today as they were in the Eighteenth Century. Those principles concern the danger of giving unchecked power to any branch of government, to any man or group of men. Most of the Founding Fathers, for example, would have thought it inconceivable that a President should be allowed to commit the Nation to foreign adventures without the consent of two-thirds of the Senate to a treaty to be published for all the citizens to read. That the Senate has permitted Presidents to do so is the Senate's shame and the Nation's loss.

We cannot of course go back to the way the government operated during the first decades after the adoption of the Constitution—if we tried to, the country would collapse. In those days it took a sailing ship four to six weeks to make the voyage from Europe to America, or for that matter, from New Hampshire to Georgia. Today an intercontinental missiie can make the same trip in about as many minutes. The Executive, therefore, must have the power to face the facts of the world today and act far more quickly than Congress could in a case of a sudden—and possibly final—confrontation.

As I understand your bill it is an attempt to restore the balance between the Executive and Legislative branches, in terms of today's realities. Explicitly as well as implicitly, it should also be an assertion that Congress will exercise its duty, as well as its right, under the Constitution, and do so responsibly. If Congress does not do so, it is possible that the Nation might be torn apart, and what would be even worse, more and more of the American people will sink into apathy and despair about the Nation's future. Furthermore, re-establishment of the constitutional balance of power between the various branches of government transcends the issue of the war in Southeast Asia, although it is in the area of our relations with other countries in the small world of today that the greatest immediate danger lies.

As for the bill itself, I would take exception to Section A.3: "to protect the lives and property, as may be required, of United States nationals abroad." It is a loose statement subject to almost unlimited Executive interpretation. Perhaps only a few historians now remember how American military and naval power was used during the early decades of this century in Central America and the Caribbean "to protect American lives and property." Many a book and article was written at the time protesting against the use of public force for private ends but such writers were blithely ignored by Congress and the Executive alike. However, Latin Americans have not forgotten and their memory does much to explain the difficulties in our relations with that part of the world today.

You were kind to mention my work in the history of the period of the origins of the Constitution, although naturally I am curious as to how a busy Senator would know about it. However, I hope to learn much more about the making of the Constitution in the future. Last October I assumed the editorship of the Documentary History of the Ratification of the Constitution and the Bill of Rights, a project which the late Mr. Justice Frankfurter did so much to get started. Once we have, for the first time in nearly 200 years, a full account of the debates over the ratification of the Constitution in the several states, we may be able to speak with more certainty about how Americans then conceived of the Constitution, of the division of power among the various branches of the national government, and of the relationship of that government to the governments of the several states.

I am enclosing (with their permission) the statements of five young men working with me in preparing these fundamental documents for publication. I took the liberty of submitting your letter, your speech, and your bill to them. I asked them three questions. (1) What do you think of the bill; (2) what do you think of the speech; (3) how would you answer the letter? As you can see they do not agree entirely with each other or with me, but I hope that you will find their statements, as I do, serious responses to questions of deepest concern to all of us.

These young men come from all over the country. Two of them are deeply religious. One is a veteran of the war in Southeast Asia. I might add that none of these young men has ever marched in a protest parade or thrown a bomb, and that they all have reasonably short hair.

Sincerely,

MERRILL JENSEN,
*Vilas Research Professor of History.*

[EXHIBIT 1]

COMMENTS BY FIVE ASSISTANTS ON THE RATIFICATION PROJECT

1. The bill: a good attempt to force the President to consult more freely with Congress over the war-making process. One of the most unsettling aspects of American policy in the Indo-China war is the suddenness and unpredictability of the President's actions; any plan that forces the President to deal more openly with Congress is therefore preferable to the existing arrangement.

2. The speech: good analysis of the situation as it existed in 1787, although it has been the precedents established since then which have been of over-riding importance. But since Mr. Javits is, in effect, attempting to restore the balance of 1787, the analysis is useful.

3. Reply: along the lines of point No. 1.

The bill: From our current perspective this is a good bill. It attempts to force the President to work with and through Congress. I am of course very skeptical of its effectiveness. There is little doubt in my mind that (1) Mr. Nixon would allow the bill to pass; or (2) that the open consultation he hopes to establish will come about—there is no way Laird or Rogers will testify in an open, honest and straight-forward manner; witness their earlier testimony to the Senate Foreign Relations Committee.

The speech: I think it is a well thought out speech although I would question the relevance of the "intent of the framers"; with the war power, like every other part of the Constitution, the intent of the framers has been used to justify every position.

Reply: The questions raised by the bill should be dealt with by the Congress. While I doubt if the bill will pass, it has another political purpose—that of reminding Mr. Nixon that the peace movement in this country is neither dead nor controlled by long haired students from the University of Wisconsin.

The bill: It is a move in the right direction. I notice it will not get us out of Southeast Asia (p. 4), nor prevent short movements over the Vietnam border so long as they only last 30 days.

The speech: He should have written you before he made the speech—not after. Although I am sure the Founding Fathers did not intend to give the President the power to make war all by himself, I am not much impressed by the way Javits proves it. His statement that the issue in the Convention was "between the Federal Congress and the State legislatures" does not hold water. The Articles of Confederation gave Congress war and peace powers—even the Anti-federalists would not have taken that away. Javits's assumption that these men were so child-like that they could not think beyond Washington's being President is almost as unlikely as his equating Washington's commission, which was written by the Lee-Adams dominated Congress, with the attitudes of the Federalist dominated Constitutional Convention. He may be making history but he isn't writing it.

The reply: That depends on whether you want to talk about his history or his bill. I would answer as above.

The rules set down by the bill for the President to initiate action are in essence the same as what now exist. All these rules are subject to the interpretation of the Executive. The Executive also has the power to color the picture so as to "force" Congress to agree with his decision in the short run, i.e. the Gulf of Tonkin Resolution.

Senator Javits rightly states that his bill is derived directly from the Constitution. But the President can thwart the intentions of the Constitution very easily. How can this bill make much difference? If the Executive is willing to "disregard" the Constitution, what makes Senator Javits believe that the Executive will be more circumspect in his actions in relation to the proposed bill?

The provision requiring the President to report to Congress after taking action is what has been standard policy throughout our history. It is simply a political safeguard used by the President to go to Congress in the hope of obtaining congressional approval of his actions; thereby also saddling Congress with partial responsibility for the action. Naturally the President weighs his actions in "declaring war" before he so acts. He considers how and if he can obtain Congress's approval.

Senator Javits attempts to make the connection between George Washington's commission and the Constitution's provisions relative to the Executive's powers

in war matters. He does not state, however, that George Washington was merely a servant of Congress, whereas the President, under the Constitution, is an equal with Congress. Thus, the Constitutional Convention may have used the experience of Washington and the Revolution in drafting the war provisions into the new Constitution, but once the Con titution was adopted, the country was in a whole new ball game. The Commander-in-Chief was now an equal of Congress—not a servant relying completely on the good will of Congress to remain in office.

I personally agree with the bill and in the spirit of Senator Javits's speech. Unfortunately, I believe that such a bill, if enacted, will do little to change the power of the Executive in initiating and prolonging a condition of undeclared war. One of the "good" side effects of the Vietnamese war, however, is that it has made Congress, the people, and most importantly, the President, aware of the dangers inherent in U.S. intervention. Therefore, I believe that even without the Javits bill, the Executive will be more circumspect in the future. Thus, I like the bill, but think it nugatory.

Although the Javits bill provides no means of escape from the Vietnam disaster, I believe it is a constructive step toward the re-establishment of a balance of power between the Executive and Legislative branches. The system of checks and balances as envisioned by Adams, Wilson and other early national leaders is sadly in disarray now because past Congresses have been overwhelmed by the power and prestige of the Presidential office. The Javits bill is a long overdue move; a strengthening of Congressional control in war-making can lead to other areas.

The bill: Generally well-drafted, but I question the vagueness of line 16: "shall be reported promptly to the Congress." There should be a maximum time limit inserted here: "within five days" for example. I particularly liked the section of the bill which prevents filibusters.

The speech: Generally good analysis; however, I concur with the caveats of two of my colleagues. Also, the Javits speech impresses on me once again how important our projects will be to the Supreme Court and the Congress. With the basic documents and arguments before them, they can readily see what were the intentions of the framers and their opponents. To my mind, there are few publishing projects as important as this one—the country and its representatives need the answers to many constitutional questions—before it is too late.

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COUNCIL ON FOREIGN RELATIONS, INC.,
*New York, N.Y., March 17, 1971.*

SENATOR JACOB K. JAVITS,
*Senate Office Building,*
*Washington, D.C.*

DEAR JACK: The letter which you sent me on March 2 at my home in Norfolk, Connecticut, has just reached me here after my return from a brief trip. I am complimented by your asking me to comment on your bill (S. 731); I am fully in sympathy with its objective. I have read your Princeton speech and your remarks in the Senate and without delaying for more detailed study of the problem, am venturing to send you these observations.

In my opinion a fundamental difficulty arises from the fact that the concept of "declaration of war" which was current when the Constitution was framed and which indeed found strong support at the Hague Peace Conferences of 1899 and 1907, is now an outmoded concept. I do not think that in these days it is possible to reach a conclusion whether war exists (and there is plenty of legislation on the books which takes effect when war does exist) solely on the basis of the existence or non-existence of a declaration of war. I do not have the citation at hand but there has been adjudication in our federal courts of the question whether a "war" clause in a marine insurance policy or charter party became operative during the Franco-British-Israeli hostilities with Egypt in 1956. Because of my belief about the lack of real legal relevance of the declaration in these times, I would hesitate to tie new legislation so tightly to the "declaration of war" clause of the Constitution. At the same time I of course recognize that this is the principal peg on which Congress hangs its constitutional authority to control the President's "war-making" powers.

Specifically, if the "declaration of war" term must be included, I would suggest the consideration of the following changes in your bill:

In line 4, after "declaration of war" I would insert "or express authority of the Congress".

In line 9 of page 1, you use the word "sudden" but this does not reappear in line 1 on page 2; I would leave it out in line 9.

In "B" I am not sure that under such circumstances (imagine Pearl Harbor) the President could put together a "full account" or that he could be forced to do so.

I wonder whether the term "military hostilities" which is used several times, would be difficult to interpret. If you go back to A 3, you seem to contemplate the traditional type of protection of American lives and property as in the old days in Central American revolutions when we landed a few marines or when President Wilson ordered the seizure of Vera Cruz. The last case might be called "military hostilities" but I am not sure the other—where very often there was no armed resistance by the local forces—would fit under that description.

Another point bothers me: the point is tied to the debate which goes on all the time about the right of self-defense under Article 51 of the Charter of the United Nations. The question is whether in the atomic age you are acting in "self-defense" within the terms of that Article if you anticipate a strike by the enemy on the basis of your intelligence reports. Moreover, if you envisage a nuclear war, assuming that the President and the Congress survive the first strike of the enemy, the procedure your bill suggests would be meaningless. Is there any way in which you could make it plain that you are thinking of the Vietnam type of hostilities? I frankly have no suggestion at the moment.

The procedural provisions in Section 2 seem to me to be excellent and, so far as I am aware, novel. On that point, I note that in C, there is reference to "legislation . . . to *sustain*" such hostilities, while in Section 2 (A) the word is "continuance". The latter word seems to me preferable.

To go back to A. 4, I wonder (but I have not had time to check the documents) how this would work under our NATO agreements. The United States, as I recall, under those agreements acts in accordance with its constitutional requirements, but the champions of the presidency would perhaps say that our constitutional system permits the President to use the armed forces in defense of the nation, and that the whole NATO concept is based on the idea that it rests on a principle of mutual self-defense. I recall that at the time the NATO agreements were concluded we thought Congress would have to act to involve us in military hostilities, but if the Russians start lobbing nuclear bombs into England and they cry for help, must the United States wait even 24 hours before replying with at least tactical nuclear weapons?

I am afraid this is rather a discursive and unhelpful note but I think the problem is vastly important and as I said at the outset, I sympathize fully with the objectives of your bill.

Because of our old friendship, I am sending a copy of this letter to your co-sponsor Claiborne Pell.

I have an office here during the week and mail addressed to me here is apt to reach more readily than that sent to Norfolk.

Sincerely yours,

JUDGE PHILIP C. JESSUP.

(From *The Writings of James Madison*, Vol. VI, Gaillard Hunt, Ed., G. P. Putnam's Sons, New York and London, 1906.)

TO THOMAS JEFFERSON. MAD. MSS.

April 2d, 1798.

DEAR SIR,—Since my last, I am in debt for your two favors of the 15th & 22, the Gazettes of the 3, 6 7 & 8 Ulto, with a regular continuation to the 22d—two statements from the Treasury Department, and Paine's letter to the French people & armies. The President's message [1] is only a further development to the public, of the violent passions, & heretical politics, which have been long privately known to govern him. It is to be hoped however that the H. of Repᵗᵃ will not hastily eccho them. At least it may be expected that before war measures are instituted, they will recollect the principle asserted by 62 vs. 37, in the case of the Treaty, and insist on a full communication of the intelligence on which such measures are recommended. The present is a plainer, if it be not a stronger case, and if there has been sufficient defection to destroy the majority which was then so great & so decided, it is the worst symptom that has yet appeared in our Councils. The constitution supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl. But the Doctrines lately advanced strike at the root of all these provisions, and will deposit the peace of the Country in that Department which the Constitution distrusts as most ready without cause to renounce it. For if the opinion of the P. not the facts & proofs themselves are to sway the judgment of Congress, in declaring war, and if the President in the

[1] Of March 19th.

recess of Congr: create a foreign mission, appt the minister, & negociate a War Treaty, without the possibility of a check even from the Senate, untill the measures present alternatives overruling the freedom of its judgment; if again a Treaty when made obliges the Legis. to declare war contrary to its judgment, and in pursuance of the same doctrine, a law declaring war, imposes a like moral obligation, to grant the requisite supplies until it be formally repealed with the consent of the P. & Senate, it is evident that the people are cheated out of the best ingredients in their Govt, the safeguards of peace which is the greatest of their blessings. I like both your suggestions in the present crisis. Congress ought clearly to prohibit arming, & the P. ought to be brought to declare on what ground he undertook to grant an indirect licence to arm. The first instructions were no otherwise legal than as they were in pursuance of the law of Nations, & consequently in execution of the law of the land. The revocation of the instructions is a virtual change of the law, & consequently a usurpation by the Ex. of a legislative power. It will not avail to say that the law of Nations leaves this point undecided, & that every nation is free to decide it for itself. If this be the case, the regulation being a Legislative not an Executive one, belongs to the former, not the latter Authority; and comes expressly within the power, "to define the law of Nations," given to Congress by the Constitution. I do not expect however that the Constitutional party in the H. of R. is strong eno-

to do what ought to be done in the present instance. Your 2d idea that an adjournment for the purpose of consulting the constituents on the subject of war, is more practicable because it can be effected by that branch alone if it pleases, & because an opposition to such a measure will be more striking to the public eye. The expedient is the more desirable as it will be utterly impossible to call forth the sense of the people generally before the season will be over, especially as the Towns, &c., where there can be most despatch in such an operation are on the wrong side, and it is to be feared that a partial expression of the public voice, may be misconstrued or miscalled, an evidence in favor of the war party. On what do you ground the idea that a decln of war requires ⅔ of the Legislature? The force of your remark however is not diminished by this mistake, for it remains true, that measures are taking or may be taken by the Ex. that will end in war, contrary to the wish of the Body which alone can declare it.

(Record of Debate in House of Representatives, 1798, Concerning "Relations With France")

March 27, 1798

RELATIONS WITH FRANCE

Mr. Baldwin hoped the House would now resolve itself into a Committee of the Whole on the state of the Union.

After a few observations from Mr. Sewall against, and from Mr. Nicholas in favor of going into the business of the Union, the House resolved itself into a Committee of the Whole on that subject. Mr. Dent in the Chair; when the President's Message of the 19th instant having been read,

Mr. Sprigg rose and observed, that every subject which came before the Committee of the Whole on the state of the Union must necessarily be important; but he believed there never was any more so than that which was presented to them by the Message of the President which had been read. Separated as we are from Europe by an immense ocean it were to be wished that we were equally separated from its political concerns, and that we should have to do with them no further than what relates to commerce. This, unhappily, had not been the case, and there now existed painful differences between this country and the French Republic. The Message which had just been read was an evidence of this. In this situation of things, it appeared necessary that the House should declare whether this country was to have peace or war. This was a subject in which the best interests of the Union were deeply concerned, and he hoped the business would be met fully and fairly. The President had informed the House that the present state of things is changed from what it was when he prohibited the arming of merchant vessels, and that therefore he had withdrawn that prohibition. Whether the order formerly issued by the President for this purpose was in conformity to the spirit or letter of the law, was not of importance now to inquire; the effect had been beneficial, and in the same proportion as the prohibition had been beneficial would be the evils of withdrawing it. In order to ascertain the sense of the committee upon what measures may be proper to be taken in the present crisis, he should offer the following resolutions to their consideration:

*Resolved*, That it is the opinion of this committee, that under existing circumstances, it is not expedient for the United States to resort to war against the French Republic.

*Resolved*, &c., That provision ought to be made by law for restricting the arming of merchant vessels, except in cases in which the practice was heretofore permitted.

*Resolved*, &c., That adequate provision shall be made by law for the protection of our seacoast, and for the internal defense of the country.

The first resolution being taken up.

Mr. Harper supposed there would be a unanimous vote on this resolution. He never heard a sentiment contrary to it. He was willing to declare that it was not at present expedient to go to war with any nation.

Mr. Sitgreaves said that, for himself, he could not agree to the proposed resolution. He did not mean, by this disagreement, to express an opinion that, at this moment, it was expedient to go to war with the French Republic; but he thought the formal declaration of the contrary sentiment was highly improper. The present is a period of menace and of danger, of injury and outrage, and whatever might be the expediency of the actual crisis, yet he had no hesitation to avow his belief that the time is not far distant when war must be resorted to, or the national honor and interest be abandoned. The conduct of France was calculated to excite or justify no other expectation; and under such circumstances, with such prospects, he could by no means consent to a formal declaration of non-resistance. Besides, it is contrary to the usual and ordinary course of Legislative proceeding, to pass mere negative resolutions. The power of declaring war being vested in the Congress, so long as the Congress shall forbear to declare war, it is a sufficient expression of their sentiment that such a declaration would be inexpedient: it is the only proper expression of such a sentiment; and it can be no more right to resolve that we will not resort to war, than it would be to pass an act to declare that it would be inexpedient to make a law for the regulation of bankruptcy or any other municipal concern. However desirable, therefore, he admitted unanimity to be, at a time like the present, he found it impossible to agree to the resolution.

Mr. BALDWIN did not agree with the gentleman last up; he thought the resolution proper and free from exception. We were, he said, twenty-three years ago, when we were about beginning the war with Great Britain, in a situation similar to the present; but we were then without many advantages which we now have. We were then without any common tie, except what arose from common interest. No means existed of holding conference together, but nature pointed out the course to be taken, and representatives from different parts of the country were travelling at the same moment to hold council together, and to speak their sentiments. The gentleman who has just taken his seat apprehends war must be the consequence of our present situation.

Mr. B. said this was the first time that the question of declaring war had ever presented itself, and upon which, he believed, there might be a difference of opinion as to the exercise of that power. He did not mean to say wantonly that our Constitution is imperfect; but every society which has a written Constitution must have recourse to it for direction. It would be improper therefore to inquire what agency the Legislature ought to have in the declaring of war; whether it is not proper that all the circumstances relative to such a state should be before them. He did not believe it was intended that this House should merely be the instrument to give the sound of war; the subject seemed to be placed wholly in the hands of the Legislature. This was the understanding of the country when there was no Government in existence, and he believed this was the meaning of the Constitution. The country is now every where agitating this question of peace or war, and he trusted they would not be left to grope their way in the dark on this important question. The President had informed the House that all hopes of a negotiation were at an end. He was willing to take the information as it was given, without going into the Cabinet of the Executive, and to take measures accordingly. But when some persons declare that the present state of things is already a state of war; that the country is going on in it; that the die is cast, and that we have nothing to do but to go on with it as well as we can, if the House does not believe this to be a true position, this resolution ought to be agreed to, which went to say that the House does not consider the present a state of war, but a state of peace.

Mr. OTIS said, if the gentleman who made the motion would consent to use the Constitutional words on this occasion, he apprehended there would be no difference of opinion. He meant that instead of saying "to resort to war," to say "to declare war."

Mr. SPRIGG said, the resolution which he had proposed had not been the work of a moment, and he did not feel disposed to make the alterations proposed.

Mr. OTIS added, then he should propose to strike out the words "resort to," and insert "declare," as he was of opinion with the gentleman from Pennsylvania, (Mr. Sitgreaves), that the only subjects fit for discussion were active measures, and that it was not regular to declare when they would not do a thing.

Mr. PINCKNEY was desirous of settling this motion by the previous question; but he was informed by the Chair that such a motion would not be in order in a Committee of the Whole.

Mr. DAYTON (the Speaker) said, that he hoped his friend from Massachusetts would withdraw the motion he had just offered, in order to make room for one he had to offer, which would render the first resolution more general, more innocent, and yet equally or more efficacious, and would test the sincerity of the advocates of that resolution as to their professed anxiety for the maintenance of peace. Upon Mr. Otis withdrawing his motion, Mr. D. moved to strike out the words "against the French Republic," and declared that although he deemed the whole resolution unnecessary, and considered it as not naturally growing out of the President's Message, which did not call upon us to declare or make war, yet, as it must be the intention of the mover, or of some other member, to follow it up with like declarations in relation to all other nations with whom the United States had any intercourse, provided they acted consistently, he thought it better to make the resolution a general one, even if it should be afterwards negatived. He, for himself, was as ready to say that, under existing circumstances, it was as expedient for the United States to go to war with any other nation as with the French Republic. He saw no reason why that particular Power should be singled out in the manner proposed; and as he was for cultivating peace, not with one only, but with all the nations of the world, he was willing so to declare his disposition, if any declaration was proper on the occasion. It was also to be observed, that it could not with propriety be objected against the amendment that there was no other nation with whom we were in danger of entering into hostility, for the tables of the House had been

loaded with communications relative to the encroachments and unreasonable demands of another country, which had occasioned an apprehension that the United States would be driven to the necessity of a war in order to obtain possession of its own territory. If, therefore, gentlemen were anxious to cultivate harmony with the French only, then the resolution, as first moved, was proper for their adoption; but if the presrvation of peace with all was their real object, then he trusted that the amendment could not with propriety be rejected by those gentlemen who had introduced and advocated a proposition the utility of which, under any modification, he owned for himself he could not discern, although he was willing to render it as unexceptionable as possible before it was decided upon.

Mr. SPRIGG informed the gentleman from New Jersey that the reason why the French Republic was inserted in the resolution was because it was founded on the Message of the President, which related solely to the French Republic. For his part, he was not desirous of war with any Power on earth.

Mr. HARPER seconded the motion of the gentleman from New Jersey, because he thought it would be better in that shape. He had no particular objection to the resolution as proposed, only that he thought it a resolution about nothing; but as it might gratify the mover and some others, he should not object to it. He was not himself disposed for war, but for peace, while peace could be preserved. But he never said, and would not say, that war was the worst thing which could happen to this country; he thought submission to the aggressions of a foreign Power infinitely worse. If gentlemen meant, by agreeing to this resolution, to prevent the country from being put into a state of defence; if they meant by it to effect any entering wedge to submission, he trusted they would find themselves mistaken; for though he believed the true interest of the country lay in peace, yet he was not disposed to recede from any measures which he thought proper through fear of war. Or did gentlemen intend, by this question of peace or war, to enlist the popular prejudices in favor of peace, in order to prevent proper measures being taken for the defence of the country? If this was their view he should be the first to strip off the disguise. He trusted this was not the case, as he saw it connected with another resolution which proposed the taking of measures for the defense of the country. The question at present, said Mr. H., is not a question of war, but of defence; and no two questions are more distinct. If gentlemen confound these two questions, and are determined to take no measures of defence lest they should lead to war, let them say so. He believed, however, the distinction was well understood by the American people.

Mr. GILES believed this the proper time to declare whether the country should remain in peace or go to war. He thought the resolution proper as it stood, because founded on the Message of the President, in which the French Republic is only named. There was a part of that Message, he said, which, in his opinion, amounted to a declaration of war. The President tells the House, "that the situation of things is materially changed since he issued his order to prevent the arming of merchant vessels." As far as he understood the situation of the United States at that time, it was a state of neutrality. If that state is changed, and the present is not a state of neutrality, he wished to know what it is. He knew only of two states, a state of neutrality and a state of war; he knew of no mongrel state between them. Therefore, if the President of the United States could declare war, we are now in war. Believing, however, that Congress had alone the power to declare war, he thought it time to declare what the state of the nation is. He did not know whether the object might not be answered by the resolution being general, as he was and always had been (nothwithstanding insinuations to the contrary) against war with any nation upon the earth. He looked upon it as the greatest calamity which could befal any nation; and whatever may be the phantoms raised in perspective of national honor and glory in such a state, they will, in the end, all prove fallacious. He believed no nation ought to go to war except when attacked; and this kind of war he should be as ready to meet as any one. Mr. G. said, gentlemen were continually speaking of the degraded state of the nation, when their own measures had led to it. [Mr. HARPER denied that he had ever said the nation was in a degraded state.] Mr. G. was not sure that he had said it, but he believed he had frequently heard it. He believed we were in a state which required the utmost vigor; but he thought every measure should be avoided which might involve the country in war. For if we were to go to war with the French at present, he knew not what ever could take place which could produce peace; it must be a war of extermination. Mr. G. did not know that the present question was very important; but believing it strictly conformable to the Message of the President, he should be in favor of it as it stood, and against the amendment.

Mr. NICHOLAS considered this amendment as defeating the resolution. Was there nothing, he asked, which called for a declaration of the kind proposed? Was it not clear to every one that the country was going fast into a state of war, and (in the words of Mr. SITGREAVES) was it not to be expected? Ought not the Legislature, then, (who alone have the power of declaring war,) to determine the state of the country, and say whether they mean to go immediately to war or not? He thought the necessity of the resolution was sufficiently evident, by the motion which had been made to change the words from "resort to war," to declare war; in the one case the mischief was met, whilst the other meant nothing. And if gentlemen were ready to say we were not prepared to declare war, and at the same time were not ready to say it is not expedient to resort to war, it proved that they thought war might be made without being declared. He asked, whether gentlemen did not believe the Executive had taken measures which would lead to war? And that if he were at liberty to act upon a change of circumstances between this country and others, Congress were not brought into a situation in which they had no choice? Many discussions had heretofore taken place on the Constitution, but he had never heard it doubted that Congress had the power over the progress of what led to war, as well as the power of declaring war; but if the President could take the measures which he had taken, with respect to arming merchant vessels, he, and not Congress, had the power of making war. He asked whether, when report went so far as to speak of an alliance, offensive and defensive, with a foreign country, it was not time to come to a declaration on the subject? Suppose such an alliance was formed, would it not be said that Congress are bound to carry it into effect? He knew it would, though he should resist the doctrine. Mr. N. said, he should be as unwilling to submit to any foreign country as the gentleman from South Carolina; but he could not, like that gentleman, say he was not afraid of war. I am, said he, afraid of it. This country affords me all the happiness I can wish or hope for, and I know war will be destructive to it. What was the difference between himself and that gentleman in this respect, he could not tell; it was to him surprising that any gentleman should be without fear as to the mischiefs of war. He was of opinion that the step taken by the President, with respect to merchant vessels, went to declare that we rested our cause on arms, which was not calculated to produce any good effect in our favor. He hoped the amendment would not be agreed to; if it was, he should vote against the resolution itself; and he did not think the gentleman from New Jersey, when he read the Message of the President, could think there was as much danger of a war with any other country as with the French Republic.

Mr. BROOKS agreed with the gentleman who brought forward this resolution, so far as it declares we are not prepared to resort to war. He believed no nation or man who had common understanding could be fond of war. The people of this country have yet the recollection of the fatal effects of the late war. But there are two kinds of war, offensive and defensive. He wished gentlemen to distinguish between them; for though he was ready to declare against offensive war, and to submit to small injuries rather than make defensive war, yet he was not willing to say he should not be ready to defend his country against the attack of any foreign Power whatever. He hoped he should be believed in this declaration, as he had formerly been employed in the defence of it; and if gentlemen meant that though foreign nations attempt to invade our territory, and to reduce us again to the colonies of a foreign Power, they would not repel them, he could not join them in opinion. And though he should vote for the resolution as moved to be amended, he should feel himself at perfect liberty to defend his country in case of attack. He wondered the gentleman from Virginia should object to vote for the resolution, because it was general, as it included the French Republic as well as all other nations.

Mr. RUTLEDGE trusted the sentiments which the gentleman from New York had expressed would govern the committee; and that all were ready to say, that though we value the blessings of peace, yet we are ready to resist insult and injury from whatever quarter they come. He hoped this would be the conduct of this country; and notwithstanding much had been heard about British parties and French parties, that all would unite in this determination. This being his opinion, he should vote for the amendment; and he hoped gentlemen would be satisfied with this declaration, and that no more would be heard of a party in the House in favor of war. Though he meant to vote for the resolution he thought it unnecessary; but in these days of jealousy and suspicion, if he were not to vote for it, he should expect to be told he was in favor of war.

Gentlemen asked whether war is not approaching? And whether the Executive is not hastening it? To the latter question he would answer in the negative; with respect to the other, he could not answer, as it depended on France, and so versatile and uncertain is everything in that country, that no dependence can be had upon it. Mr. R. said, at the last session, when we had no intercourse with France, he thought it necessary we should have it: that intercourse had proved ineffectual; and though he sincerely wished for peace, yet he saw something in the conduct of France which almost precluded the hope.

The gentleman from Virginia had said, that this country had frequently been stated as in a degraded state. He did not recollect to have made the declaration, but this was his opinion. When our national rights had been violated; when our commerce had been depredated; when the vesse's of beligerent Powers, which had sought an asylum in our waters, had been plundered and burnt, he thought it necessary to go into measures of defense. He thought our frigates ought not to have remained at the wharves; that our extensive seacoast, on which is much wealth, should not be unprotected; he thought our seaports, the principal depots of our revenue, ought to have been fortified. He joined his friends in their attempts to have carried these measures, and, when they failed, he could not help thinking his country was in a degraded state, and that she had lost the spirit which animated her in the year 1775. He hoped, however, that now, when France had gone to the lengths which she has gone to, that there would have been only one sentiment as to the propriety of the measures formerly proposed. But though he thought the nation in a degraded state, he was not in favor of war. He believed the citizens of this country were not for it. He believed the Government was averse to war; and that no part of it was more so than the Executive. War would be a loss to this country; and to no individual more than the Executive. He is no warrior, and, consequently, war has no laurels in store for him.

The gentleman from Virginia has spoken of war as having something dazzling in perspective; something which flattered pride and ambition. But did the gentleman suppose that a war with France could be flattering to pride or ambition? It could not; it would be a war of prudence; we must shut ourselves up, and act on the defensive, and say, "when reason returns, when an ebb shall take place in the affairs of France, when her flow of victories shall be over, she will do us justice." In the meantime, we must defend ourse'ves. Mr. R. repeated, that he did not believe any man in that House could wish for war; when he looked around him and saw gentlemen whose wounds are yet sore from former service; when he saw them voting for measures of defense, he could not believe, nor could any believe, that they wished to plunge the country in war. It would sooner be believed that the gentlemen who made the charges were mistaken.

Mr. SEWALL was opposed to the proposition as it now stood, and hoped it would be amended. What effect it would then have, he left those to judge who introduced it. Mr. S. said, he and those who, on all questions of defense, had voted with him, had been endeavoring for some time to go into some measures of that kind; and to determine whether these measures shou'd be confined to our own limits or be extended to the ocean. These measures ought now to be decided upon, as this is a moment in which our commerce is depredated upon in a most unprecedented manner. We are now, said he, called upon to consider the hazards of our situation. [Mr. S. then quoted a part of the President's Message, as to the situation of our affairs in France, and as to the decree which was proposed respecting the taking of English goods on board of neutral vessels, and the carrying of which was declared to make neutral vessels good prizes.] This last regulation, Mr. S. said, was a direct violation of the law of nations, and amounted to a declaration of war on the part of France against this country. But, instead of making any defense, gent'emen call upon the committee to declare we are not disposed to resort to war against the French Republic; so that, after we have been injured and abused, and denied the common rights of humanity, we are not to complain, but make a declaration that we wi'l not go to war. Was, then, he asked, a question of war a card of politeness? Did a nation ever make a declaration that it was not at war? It could not say so, except it were in so degraded a state that it had no rights capable of injury. To say we are not at war was to say no more than it is light when the sun shines; but to call upon the committee to say so at this time, was to degrade the nation from its independence, and be'ow its character. The present state of things, Mr. S. said, ought to be considered as a state of war, not declared by us, but against us, by the French Republic; and if we want spirit to defend ourselves, let us not say so. We may refrain from acting, but let us not

say we receive injuries with thankfulness. But this proposition goes still further. In a moment of public danger, it goes to divide and separate this House from the President of the United States. The gentleman from Virginia had well explained this resolution, when he said it was intended to interrupt the views of the President of the United States. That gentleman considered the Message of the President as a declaration of war, and this resolution was to be in contradiction to it. If this was the sense in which it was to be understood, it was false in point of fact; for the President had neither declared war nor cal'ed upon Congress to declare war; no such sentiment could be found in the Message. To agree to the proposition as it stands, would be to give countenance to the assertion of the French Government, that we are a people divided from our Government; but, taking it with the amendment, he looked upon it as a harm'ess thing. Mr. S. concluded, by saying, that he considered the conduct of France in the light of war. How far we would resent it, was the question; whether offensively or defensively He was in favor of defensive measures, as we are not equal to offensive measures, (he wished to God we were.) It was our weakness, and the division which had appeared in our councils, that had invited these attacks. He trusted they should now unite and repel them.

Mr. GALLATIN said, before the speech of the gentleman who had just sat down, he cou'd not discover what was the meaning of the amendment, to strike out the words "against the French Republic," as, when the House were in a Committee of the Whole on the state of the Union for considering the late Message of the President, the resolution was perfectly consonant. Besides, we have no danger to apprehend from any other Power, since our dispute is settled with Spain. The intention of the amendment was evidently to render the resolution as unmeaning as possible.

Every gentleman who had spoken on this subject, had agreed that war is not a desirab'e object for the United States. He gave them credit for the assertion. But this was not the question; but whether we are prepared to resort to war under existing circumstances. It is a question of fact. Mr. G. took notice of the different modes which had been attempted to defeat the resolution; but though the present amendment was agreed to, he should still vote in favor of the resolution; for it would be effectual, in some degree, as it could only apply to the French nation, though it was not so expressed.

Mr. G. believed the United States had arrived at a crisis at which a stand ought to be made, in which it was necessary for Congress to say whether they will resort to war, or preserve peace. He was led to this conclusion from a review of the conduct of France, and of the late message of the President.

In respect to France, we know, that some time ago, she declared our treaty with her to be at an end; though not in words, the result was to deprive us of the advantages derived from that treaty. In the next place, she dismissed our Minister Plenipotentiary. Under these circumstances, the President called the extraordinary session of Congress, and when met together, after having related the reasons which induced this call, he concluded with saying, "that it was his sincere desire to preserve peace and friendship with all nations, and believing that neither the honor nor the interest of the United States absolutely forbade the repetition of advances for securing these desirable objects, he should not fail to promote and accelerate an accommodation." &c. The President accordingly sent Envoys to France, and the result of the embassy was given to Congress in the last Message, which was now under consideration, in which he says, "the object of the mission cannot be accomplished on terms compatible with the safety, honor, or the essential interests of the nation." The people of the United States are therefore informed, that negotiations are at an end, and that we cannot obtain redress for wrongs, but may expect a continuation of captures, in consequence of the decree which it was supposed was passed, for seizing all neutral vessels with British property, manufactures, or produce, on board. Mr. G. said he differed in opinion from the gentleman last up, that this was a declaration of war. He allowed it would be justifiab'e ground of war for this country, and that, on this account, it was necessary to agree to or reject the present proposition, in order to determine the ground intended to be taken. For, though there may be justifiable cause for war, if it is not our interest to go to war, the resolution will be agreed to.

There was another reason why this resolution ought to be now decided, which arose from the conduct of our Executive. He has declared that a change of circumstances has taken place which has occasioned him to withdraw his order forbidding merchant vessels to arm; which amounts to this, that he now permits vessels of the United States to use means of defence against any attack

which may be made upon them. Mr. G. thought it necessary, therefore, to declare, whether we were to pursue measures of war or peace. Before measures are taken which will lead to war, the House ought to decide whether it is their intention at present to go war.

The gentleman from New York had spoken of the difference between offensive and defensive war. This related to the motives, more than to the manner, of carrying on war; because when war is once entered into, though it may be at first defensive, it cannot remain so. It would be ridiculous, for instance, to say, that our frigates should prevent our vessels from being taken; but that they should not take Frence privateers.

But it was said, if the resolution was agreed to, it would confirm the opinion which had been held that Congress and the Executive were divided in opinion. The gentleman from Massachusetts (Mr. SEWALL) told the House that the question was war or peace; that the conduct of France was a declaration of war, yet as the President had not called upon Congress to go to war, they ought not to declare that it is not expedient to resort to war. But if it be assumed as a principle, which that gentleman asserts, that the conduct of the French is a declaration of war, and the President has told us we are in war, the resolution could not be improper. Or if his other principle be assumed, that the information of the President does not amount to war, then an agreement to the resolution would show that Congress concurred with him in opinion, that it is not proper at present to resort to war. So that in both cases, the resolution is proper.

Mr. G. said he was precluded by the amendment from going into the merits of the resolution. His arguments went to show the propriety of agreeing to it in one way or other. Nor did he mean to take any notice of what had been said about a division of opinion in our councils having invited the insults and injuries which France had committed against this country. If he were to do this, he must have recourse to recrimination, which he did not wish. He wished rather to take a serious view of our present situation, and either meet it by war, or by measures which shall avoid war. On both sides are difficulties; but the difficulties and inconveniences of both ought to be weighed, and the least taken; and, having determined, measures ought to be pursued accordingly. He did not wish to adopt the resolution as proposed to be amended, and then go on and act directly contrary to it. He thought it best to meet the resolution at once, and say whether we are determined on war or peace. If we go to war, we must expect to meet all the expense and evils of such a state; and if we remain at peace, we must, in a certain degree, *submit*. He meant to say, that we must submit to have a number of our vessels taken. But whether we shall have more taken in adopting one course than the other, be left to gentlemen to determine. He thought the submission he had mentioned, very different from the submission which had been spoken of by the gentleman from South Carolina, and others.

Mr. G. concluded, by observing, that the conduct of France must tend to destroy that influence which gentleman had so often complained of as existing in this country. Indeed, he was convinced that at the commencement of her revolution there was a great enthusiasm amongst our citizens in favor of her cause, which naturally arose from their having been engaged in a similar contest; but he believed these feelings had been greatly diminished by her late conduct towards this country. He thought, therefore, that whether we engaged in war, or remained in a state of peace, much need not be apprehended from the influence of France in our councils. The business had come to a mere matter of calculation, as to what course will be best to be taken for the interest and happiness of the country. If he could separate defensive from offensive war at sea, he should be in favor of it; but he could not make the distinction, and therefore he should be in favor of pursuing measures of peace.

Several persons rose, but, being about three o'clock, a motion was made for the committee to rise, which was negative—46 to 44.

Mr. DANA did not conceive that the construction of language given by the gentleman from Pennsylvania, was to be taken as true, without examination. He trusted not. The gentleman stated the question to be peace or war; he could not conceive it to be such. It was unfortunate that, in this important crisis, the House should be engaged, like a set of rhetoricians, in disputing the meaning of words. Indeed, the decision on the present motion, he thought wholly unimportant.

The gentlemen last up had said there was no distinction between offensive and defensive war, and that he was, therefore, opposed to either. Mr. D. thought the distinction clear; offensive war is when an attack is made upon another; and defensive, when a nation has recourse to war, merely for self defence. But there was another state of things which could not have the name of war, which was to

have recourse to measures of defence to be prepared in cases of attack. It was clear, by the law of nations, that to prepare for defence, was not to commit hostility. To say that to take measure of defence, is hostility, was a new definition, and it was the mighty discovery of the gentlemen from Pennsylvania.

Did gentlemen mean that if we should make use of force against law'ess violence, it is war? If not, what did all that had been said amount to? He thought the proposition perfectly nugatory.

But the gentleman said, that his friend from Massachusetts had said, that France had already declared war against us, and that, therefore, we must resort to war. For his part, he did not know what gentlemen meant by resorting to war. If they had adopted terms which had any legal meaning, he could have understood them, but the present might mean everything, or nothing. If it meant anything, it meant taking active measures against France in the first instance. He was not only ready to say he would not consent to do this with respect to France, but with respect to every other nation.

The gentleman from Pennsylvania, and two gent'emen from Virginia, had said, that the Message of the President amounted to a declaration that we were now in war. This idea he thought was stated very incorrectly. They did not seem to have understood the meaning of the language of the President. The state of things which existed at the time orders were issued to prevent the arming of merchant vessels was essentially different from the present; then there was an evident disposition in the owners of the vessels to cruise against a foreign belligerent nation, and the order was issued to prevent attack and plunder; but the desire to arm at present is for the purpose of defence merely, and not to cruise or plunder. There is a law forbidding vessels to arm for the purpose of cruising; but none forbidding merchants to arm in their own defence. This was the fair construction, he believed of the meaning of the President.

Mr. Otis observed, that the opposers of this amendment could assign no better reason for declaring a desire to keep peace with the French Republic, to the exclusion of other nations, than their own construction of the President's last Message, which they considered as directed against that Republic only; but the House having resolved itself into a Committee of the Whole on the state of the Union, the resolution on the table had no greater relation to that Message than to any former Speech or Message, or to the affairs of the Union at large. If it was intended as an answer to the Message, it should be moved in that form; but unless it was in a particular manner connected with it, the pub'ic could not connect it more naturally with this Message, than the Speech delivered at the opening of the session. The House had been heretofore informed, that France was not the only country with which a rupture was to be apprehended. Spain might be considered, until lately, as having actually invaded our territory; and though the presumption at present was, that the causes of contention with that country were removed, yet they were not officially informed of that fact, and without such information it was not less proper to express their desire of maintaining peace with Spain than with other countries. Again, gentlemen had often intimated that a war with France would involve us in a war with the nations in alliance with her. It was therefore inexpedient to show a contempt or indifference for them, by 'eaving them out of our pacific manifesto.

He considered the Message in a different view from many gentlemen. But admitting, for the sake of argument, that the President had declared an opinion upon the facts stated by him, that war was inevitable; gentlemen must consider the fact to be true; if they doubted it, they ought to demand information. How would this resolution then stand? In reply to assurances that negotiation had failed; that our Commissioners were treated with neglect and contempt; that letters of marque and reprisal were issued against our vessels; and that the most hostile appearances were discernible on the part of France; it was proposed to declare, that with them, and them on'y, it was inexpedient to resort to war. Such a proposal would hardly be found in the annals of the most humble and degraded nation.

He disapproved of the resolution, though he should vote for the amendment, and would not, on the present occasion, follow gentlemen who had gone at large into the merits of the resolution. Upon the extent of the defensive measures proposed by gentlemen, his feelings inclined him to enlarge; but this discussion would be more pertinent upon some other question. He would merely hint, that actual invasion might not be the worst ca'amity to this country. He could conceive of a partial invasion of our territory that wou'd be much less injurious, and attended with much less loss than the total ruin of our commerce.

The call for the committee to rise being repeated.

Mr. N. SMITH hoped gentlemen would be satisfied to take the question, which he thought very unimportant. The time consumed in discussing it was, however, important, as other concerns called for attention. He knew there were gentlemen who chose rather to address the people of the United States than to legislate. He thought it better to legislate, than to preach to the peop'e. He looked upon the present resolution as a text from which it was intended to alarm the people with respect to war, and he wished not to indulge gentlemen in their design. He wished the question to be taken for another reason. It was suggested by the gentleman from Virginia, that the Message of the President was considered by the people as a declaration of war, and that reports were in circulation, that a treaty, offensive and defensive, was concluded with Great Britain. After this, he would call the attention of the committee to the resolution, which was, in effect, to say, we must interfere, or war will be brought upon the country. Did not this go to sanction a report which was as false and ma'ignant as even jacobinism could invent? It did; and he hoped, they would not so far sanction the report, as to let the motion lie before them undecided.

Mr. DAYTON hoped the committee would rise. The gentleman last up began with saying the proposition was of no importance; but, before he sat down, showed that he thought differently. Mr. D. thought it was of importance that the committee should come to a right decision upon it, and say whether it ought to be agreed to in general terms, or rejected.

Mr. N. SMITH explained.

Mr. J. WILLIAMS thought the question trifling, and hoped a decision would be had upon it.

Mr. GILES said, the question was a question of peace or war, and yet gentlemen call it trifling. He did not mean to alarm the people of the United States, but he wished them to understand their situation. He acknowledged he was himself much alarmed. Gentlemen were willing to engage in defensive, but not in offensive war; but when war was once begun it would not be in the power of the United States to keep it within the character of defensive war. Indeed the gentlemen from Massachusetts, when he spoke of defensive war, confessed our inability for offensive war, and uttered a prayer to the Supreme Being that we were able to engage offensively; and where, he asked, with such sentiments, is the difference between offensive and defensive war? He could see none; he deprecated war of every kind.

Mr. J. WILLIAMS hoped the question would be taken. As he before stated, he thought it trifling, and the debate upon it only calculated to alarm the people, which seemed to be the object of gentlemen. If the question was not taken before they adjourned, much debate would be had, and much time spent to very little purpose. He thought it very extraordinary, as no one was found to bring forward a resolution to declare war, that a gentleman would introduce a resolution of its being inexpedient so to do. He was persuaded and that this negative mode of proceeding was calculated to draw on a debate, to set the people against the Executive. Time, he said, was precious; they had sat near five months and done but little, much remained to be done, and as all had declared their aversion to a war, the people should be undeceived. He had himself seen gentlemen write upon the late Message of the President, for the purpose of sending to their constituents, "*A war message against France.*"

Mr. MACON wished the gentleman would name who had thus written.

A call of order took place; and a motion was made for the committee to rise, and carried.

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WEDNESDAY, MARCH 28

Mr. MCDOWELL said, a bill from the Senate to authorize the President of the United States to purchase one or more foundries had been referred to a Committee of the Whole, and might be expected shortly to come under consideration. As he had not sufficient information on this subject to enable him to vote understandingly upon the bill, he wished to call upon the proper officer for an account of cannon purchased since the year 1794, in order to ascertain the necessity or propriety of passing the proposed law. He therefore proposed the following resolution to the House:

"*Resolved*, That the President of the United States be requested to cause the proper officer to lay before this House the number of cannon which may have

been purchased for the use of the frigates, the revenue cutters, and fortifications, since the first of January, 1794, with the size of the cannon; and stating what proportion of them were cast within the United States, at what foundries, and an account of the prices paid for each size."

This resolution was agreed to, and Messrs. McDOWELL and W. C. CLAIBORNE appointed a committee to wait upon the President therewith.

Mr. GALLATIN observed, that when the appropriations for the military department were yesterday under consideration, several sums were left blank, for the want of information. He proposed re olutions to the following effect, in order to obtain that information, which were agreed to:

"*Resolved*, That the Secretary of War be directed to lay before this House a statement, in detail, of the expenditure of the money appropriated for the subsistence of the Army, for the Quartermaster's and Indian departments, bounties, defensive protection of the frontiers, and of all contingent expenses in the War Department in the year 1797, from whence result the deficiencies by him stated in his estimate, amounting to the several sums of $114,165 and $50,000; and that he include in the same statement an estimate of the number of rations issued during that year to the Indians at the several posts, &c.

"Also, an estimate of the probable appropriation necessary for the Quartermaster's department for the present year.

"Also, a statement of the several existing contracts made for the subsistence of the Army."

RELATIONS WITH FRANCE

The House again resolved itself into a Committee of the Whole on the state of the Union, when the amendment to the first of Mr. SPRIGG's propositions, as to the inexpediency, under existing circumstances, of resorting to war against the French Republic, being under consideration; which amendment is to strike out the words, "French Republic."

Mr. PINCKNEY rose and said, he was in favor of the amendment, because it tended to make what he thought an improper proposition, in some degree, nugatory; for he believed to agree to the resolution without it, would be prejudicial to the interest and welfare of the country, as he did not think the period had arrived which called for a decision on measures of war or peace. If such a declaration had been necessary, he should have expected it to come from gentlemen in favor of a war, declaring, that it is expendient to go to war, as it was a very uncommon thing to declare we will not do a thing. His strongest reason against coming to this resolution, however, was, that at this period the House had not sufficient information concerning the whole of this business, to enable them to form a correct judgment upon it. The President told the House, indeed, that he had little hope of a favorable termination of the negotiation, but they knew nothing of the train of the negotiation, or of the circumstances attending it. They knew that our Commissioners had not been received; but they had not sufficient information as to the manner in which they had been treated, to enable them to come to the decision proposed.

The gentleman who proposed the resolution, said it was time to come forward and declare whether we will have peace or war. Would to God, said Mr. P., it was in our power, by any such declaration, to avert war, or maintain peace; but he believed this did not depend upon any declaration of ours. In questions of war there were always two parties, one of whom was generally the aggressor, and the other generally passive. In the present case, he considered this country as the passive party, and, therefore, any declaration on our part would have little effect. We know that individuals or nations induced to pursue measures from interest or passion, are not easily diverted from their purpose. If the French are actuated by either of these motives, no declaration of ours will prevent the calamity. Such a proposition would rather accelerate than prevent the evil. If our declarations could have availed, they have not been wanting. From the first period of a misunderstanding between the two countries, declarations have been made deprecating war in general terms, but particularly with that nation. A Minister Plenipotentiary had been sent to explain the views of this Government, and to remove any jealousies which might exist, and to make such specific propositions as were thought necessary; but our Minister was rejected without a hearing. The next measure was, to send special Commissioners, in order to settle our differences and avert the calmity of war. We have, therefore, made sufficient declarations of our pacific intentions. Indeed, he thought too much had been rested on these declarations, as nothing had been done for our defense. When we

looked at our seaports, and saw their defenseless condition, he thought it evident sufficient attention had not been paid to them, knowing that war might, at least, be a possible event.

But the gentleman from Virginia (Mr. GILES) says the affairs of the country are extremely changed, and that this is the time for making a stand, and this opinion he draws from the President's Message. He thought it was well observed yesterday by the gentleman from Connecticut (Mr. DANA) that the change which the President spoke of might relate to the change of disposition in the persons owning merchant vessels as to their views in arming them. Mr. P. thought there was another reason why the declaration did not go the length which had been stated. In the course of a war the conduct of a belligerent Power to neutral nations is apt to change. At the beginning of a war, neutral trade is not so much preyed upon as it afterwards come to be. In the beginning of the present war, we saw no declaration from Denmark and Sweden as to the course they intended to take with respect to their neutral trade; but when spoliations were committed upon it, the Governments of those countries came forward and said: "Affairs are now changed, we think it necessary to convoy our vessels, and to give them the protection to which they are entitled by treaty." This conduct was never looked upon as a cause of war; on the contrary, those countries remain at peace, and are likely to remain so. Therefore a change in defensive measures did not bring the matter to the point which the gentleman from Virginia supposed.

This resolution differed exceedingly from anything which took place when we had a misunderstanding with England in 1794. At that time, when England issued her extraordinary Order of the 4th of November, and our commerce was depredated upon, measures were spoken of for countervailing the injuries which our citizens experienced, but no proposition like the present was produced. We are now aggrieved and injured in a most extraordinary manner, but we say we will not go to war. On a former occasion he had heard of a variety of restrictive regulations, proposed with a view of restraining the injuries committed upon us, and to bring Great Britain to reason; and he did expect something similar would have been proposed on the present occasion, but nothing of the kind had appeared. It was true we had not so great hold of the French nation as of the British, in this respect, but we had some; and he believed measures might be taken which would induce the nation to hear reason. But, instead of this, it was proposed that we shou'd say, we have been injured and aggrieved; but we will not oppose you, we will not go to war with you.

The gentleman from Virginia (Mr. NICHOLAS) seemed to rest the greater part of his arguments upon the power of the House to make war, or to declare peace. Mr. P. agreed that this was Legislative power, and not Executive, and he was for this House exercising that power; but, as he had already stated, they had not at present sufficient information on that subject. But that gentleman seemed to charge the Executive with all the evils of our present situation. Upon this subject he concurred in opinion with the gentleman from Pennsylvania (Mr. GALLATIN) that it was unnecessary to inquire from whence our present situation arose, or to go into recrimination. This could only create heat, and keep up that idea of division which had been industriously spread, and at a time when the Legislature ought to do all in its power to extinguish it. [Mr. NICHOLAS explained. He had said he would not go into an inquiry as to the conduct of this Government with respect to France; but if any measures of ours had produced the breach, they must be those of the Executive, because the Legislature has had nothing to do with them. He would assure the gentleman from South Carolina he should not take the lead in any such inquiry, but keep out of view, as much as possible, past transactions.] Mr. P. was glad to hear this explanation. He himself believed the measures of the Executive had been calculated to promote peace; but it was not necessary to go into that subject.

The gentleman from Pennsylvania (Mr. GALLATIN) had gone further than perhaps the resolution on the table would warrant. He says, the adoption of this resolution will go to prevent the taking of any measures which may, in their tendency, lead to war. If gentlemen meant by this, that it was to prevent any measures being taken for the protection of our commerce, the adoption of the resolution would not only declare that we will not go to war, but that we will not take any measures for the defence of our property. It appeared to him that that gentleman had himself given the best reasons for modifying this resolution, so as to make it as little mischievous as possible. For he had told the committee that France had set at naught her treaty with us; but though they have done

this, said Mr. P., they have endeavored to justify their depredations, by insisting that, according to that treaty, it was necessary for vessels to carry a *role d'equipage*. Mr. P. added, there was another Order of the French Government which was so contrary to right, so cruel in it consequences, so degrading to this country, and so inhuman in its tendency, that he could not avoid noticing it. It was the decree which declares that every American citizen found on board the privateer of an enemy, shall be considered and treated as a pirate. They pretended to found this Order on our treaty with Great Britain; but he wished gentlemen who thought it justifiable, to turn to that treaty, and see whether there was anything there which countenanced so violent a measure. But this is not all, the gentleman from Pennsylvania allowed that a decree had lately been passed which violates all the laws of neutral nations, viz: that if the property, manufactures, or produce, of an enemy be found on board a neutral vessel, it shall be good prize. Our Ministers, also, who were commissioned to conciliate, and even to make concessions, though they had been in Paris three months, cap in hand, had not been able to get a hearing. Under all these grievances, what, said he, are we called upon to do? He should not have been surprised if some one, fired with the injuries we have received, had brought forward a proposition for war. But, instead of this, smarting as we are under injuries, our commerce bleeding at every pore, and our country deeply humiliated, we are declared upon to say: You have done everything to injure, insult, and degrade us, but we have deserved it; we will do nothing to oppose you. Though God and nature have given us power we will not go to war with you, neither on the present occasion, nor on any other, whatever injury you may commit upon us.

Was there anything in our situation, which called for this declaration? He thought not. The gentleman (Mr. GILES) says he would not go to war, except in case of invasion. He apprehended this neither a wise nor a safe policy. He believed it was necessary the calamities of war must be resorted to. If injury upon injury is heaped upon us, we shall be brought into a situation in which it will be necessary to annoy our enemy. He did not say that point was yet come; but it will be necessary, prudent, and wise, to take measures to prevent the enemy coming to our door. Because, if prepared, we should, as on a former occasion, be enabled to intercept any troops which may be sent against us. But he regretted to see so different a spirit animating our citizens now, from that which animated them in our Revo'utionary struggle. We did not then prevent our vessels from arming in self-defence. Though we then deprecated war, we made preparations to meet it, if it should be necessary. Though the extent of the injury was not then so great as at present; when all the usurpation attempted upon us. was a regulation of taxation—a two-penny duty upon tea—yet it caused a ferment and spirit which was effectual at that time, and which spirit, he trusted, was not now extinguished. Indeed. he was convinced. that if gentlemen in favor of the proposition could see our situation in the same light in which he and others saw it, they would be in favor of as strong measures as any of them. The country from whence these gent'emen generally come, had shown its determined opposition to oppression from whatever quarter it came. He wished, therefore, they could see the oppressions of the Government whose conduct he had been reviewing, in the same light which he did.

However humiliating our conduct might be, he repeated, it would have no effect upon that nation. He did not wish to animadvert upon the conduct of any country; but there was one instance of the treatment which the French Republic has exhibited to an independent State, which he could not help noticing. It was in respect to Venice, which would show, that no humiliation, no concession. would avert the calamity which threatens us, if the rulers of the country are determined upon war. If he was not misinformed, the circumstances of the case were as follow: The Venetians were at peace, and endeavoring to pursue a line of neutrality. A tumult arose in one of their towns, and the populace did, in a barbarous and most unjustifiable manner, massacre a number of French soldiers. This was an injury which called for and deserved atonement. A retaliation took place fully commensurate with the crime. The Venetians made every concession in their power. But the French commander was not satisfied, he took vengeance upon them by overturning their Government—a Government which had stood the test of five hundred years. He should have supposed that the French would now have been satisfied; but the matter did not stop here. The Government being overturned, the people were promised a free Government, and an amelioration of their condition. They were proceeding in the establishment of a Government; but, when the treaty came to be made between the French Republic and the

Emperor, he supposed it was thought to be for the interest of that Republic to sacrifice a part of this territory, and to give it up to the Emperor, to take a part to themselves, and to annex another part to the Cisalpine Republic. This was done; and he believed the very part which had committed the offence against the French Government, had been rewarded by being joined to a free Government.

This division of the Venetian territory was not the work of a young officer, elated by victory and conquest, or enraged by the treatment which his soldiers had received. The French Directory had come forward, and by their decree, had applauded the whole conduct of their General in the most unqualified terms, particularly as to Venice and Genoa. He would not take up the time of the committee by citing the conduct of the French towards the latter Republic. The case of Venice was sufficient to show how little was to be expected from a humiliating conduct.

Mr. P. hoped he had shown sufficient reason why this resolution ought not to be agreed to, at least in its original form. He hoped they should go on making defence in the way proposed by a second resolution; and agree to such restrictions, with respect to the arming of merchant vessels, as should seem proper.

Mr. GILES thought the gentleman who had just sat down had been less correct in his statements than he usually was. He would allude particularly to one instance. That gentleman says, whatever aggressions and insults may be heaped upon us the supporters of the resolution will not go to war. The proposition held a directly contrary language. It says: "That, under present circumstances, the United States deem it advisable to remain in a state of peace." [Mr. PINCKNEY said the reason why he had made this remark was, that yesterday the gentleman himself had said, he should not be for going to war, unless the country was invaded. He, therefore, connected the resolution and this declaration together.] Mr. G. said, he still repeated the same thing; that we ought not to resort to war beyond the limits of the United States. But he drew a contrary inference from this, from that which that gentleman had drawn, because he had accompanied the declaration with another, that he was perfectly ready to prepare to that extent for defence. He would explain the grounds of this opinion. Within our own limits we are capable of making something like exertion, and there, he believed, exertions might be made to advantage. Indeed, one of the propositions, which is connected with the present, goes to this purpose, and therefore with what propriety could the gentleman say, he and those who were of his opinion were not for preparing for defence till the enemy is at the door? Nor could he see anything like humiliation in this. Nay, he was convinced, if we carried our preparations for defence beyond our own limits, instead of gaining glory or honor, we shall meet with nothing but disgrace, as we are not prepared to make a defence at sea. Indeed, the moment we get beyond our jurisdictional line, defence will become offence, because there will be no evidence by which it can be ascertained by whom the attack commenced. It would, therefore, be unwise to permit ourselves to be placed in this situation. If any object was to be effected by going out to sea, it must be the protection of our commerce with Great Britain; but it was known that the two acts of the British Parliament which took place in January last, if peace continues, may take that trade in a great measure from us. He did not think, therefore, that this was a sufficient object for which to incur so much risk.

At present, said Mr. G. there is a pretty general opinion in the country (and he thought there was much ground for the opinion) that there is a disposition in a part of this House, and in part of the Government, for war; and he thought it was proper to come to a declaration upon the subject. This would not only have a good effect upon our own citizens, but it would convince European Powers, that though we were preparing for defence, we were not preparing for war.

Mr. G. said, he was not satisfied with the construction which the gentleman from Connecticut (Mr. DANA) had given to that part of the Message which speaks of our situation being changed. He did not believe the President had any reference to the dispositions of the people, but to the state of things generally.

The apprehension of war had already begun to produce disagreeable effects in his part of the country. He had received information that produce had fallen in price, and that the sale was very dull. He was of opinion, therefore, that the proposed declaration, if agreed to, would appease the minds of the people. It was said it would have no good effect upon the Executive Directory. He did not know that it would. But it could have no bad effect; and it might have a good one, for he did not think that body quite so abandoned as some gentlemen thought them.

The gentleman last up had spoken of the partition of Venice. He himself saw it with concern; but where was the difference in crime between the French Republic and the Emperor? Each took a part. But what was all this to the United States? Were they to go to war to avenge this partition? We heard nothing of this kind some years ago, when a partition of Poland took place. For his own part, he wished to leave the Powers of Europe to themselves, and to draw ourselves within our own boundary, where we should be fully equal to our defence against any Power on earth.

Mr. DAYTON (the Speaker) said, that most of the arguments of the gentleman from Virginia, (Mr. GILES,) who spoke last, were most conclusive in favor of the amendment, although it appeared to be his intention to vote against it. That member had deprecated war as the greatest of calamities, and spoke of peace as the first of blessings; and yet all this warmth of declamation in favor of pacific measures had resolved itself into an anxiety to maintain it with one nation only. As to the objection that the amendment was not immediately connected with the Message of the President, Mr. D. remarked that not that communication only, but the "state of the Union" was under consideration, and it was upon this broad ground alone that the resolution could have been introduced, for it did not naturally arise out of the Message, which had not proposed to Congress to declare war, nor to act offensively in any respect.

In attempting to render that resolution, by amendments, less objectionable, he would not be understood as approving it; for, although the sentiment was just, although the position was true, yet nothing could be more idle than to employ ourselves in lengthy discussions of what it might be inexpedient to do, at a time when all sides of the House agreed that we ought to deliberate on what ought to be done for the defense of the country.

How could that committee, acting as they were under the most solemn commission that could be given to a Committee of the whole House, justify their employing their time in going the round of resolutions upon what is inexpedient to be done? This resolution, if agreed to, and a thousand others of the same negative kind, would furnish no ground for legislation; and to legislate, and not to draw up and adopt certain political creeds and doctrines, was the business which they were sent here to perform.

Mr. D. called the attention of gentlemen to the Message of the President, which they had particularly quoted, and asked whether that communication did not call upon Congress to consider what measures were expedient to be adopted for "protecting our sea-faring and commercial citizens, for defending any exposed portions of our territory, for replenishing our arsenals, for establishing foundries and military manufactures, and for providing such efficient revenues as will be necessary to defray extra expenses." He repeated the inquiry, whether these important objects and means of defence were not more proper for their deliberations, and more conformable to their duty as legislators, than the discussion and adoption of the resolution on the table, which amounted to nothing if carried, except to fix censure by strong implication against the first Magistrate of the Union?

If the advocates of the resolution persist in opposition to the amendment, he should be irresistibly led to suppose that not an earnestness to maintain peace, as was professed, but a desire to have it understood that the President was in favor of war, and that he was contemplating actual hostility on the part of this country against the Republic, and that the House of Representatives was putting a veto by this act upon such intention was the real object of those gentlemen.

Mr. D. concluded with saying, that they who loved peace with all the world, must vote for the amendment; but those who regarded it only towards the French Republic would be right in adhering to the original proposition.

Mr. SHEPARD said, the resolution before the committee seemed to carry with it an idea that the Message of the President was a declaration of war, and that this was to destroy its effect, and to prevent them, if war should be necessary, from taking proper measures of defence. He was not for going to war; but for taking every measure to keep out of it. In order to effect this, he wished to prepare for defence, which he considered as the best security against war. He insisted upon our right to do this, regardless of any foreign nation. He would not only fortify our ports, but have armed vessels to defend our coasts, and hold our militia in requisition. He had heard the Message of the President called a declaration of war; but, for his part, all he had heard of war was from gentlemen who are so loudly opposed to it, as if they were the only men in the country who had any value for its peace and happiness. Was any part of this alarm made by men who

fought eight years for the independence of the country? No such thing; they wished the country to remain in peace; but they wished it also to be prepared for war. He was opposed to the resolution; but, if it must pass, he should wish it to pass with the amendment.

Mr. HARPER.—When this resolution was first proposed, it appeared to him to be one of those nugatory measures which might either be agreed to or rejected, without producing any effect; and, until he saw the resistance which was given to the amendment, he remained of the same opinion; but now he found it was to say to the French nation, "you may commit against us injury after injury, and insult after insult, we never will resist you."

If this were not the intention, why resist the amendment? Taking this to be the intention, he should bestow some observations upon it. Gentlemen preached about peace. The cry, "peace, peace," as if we, holding the scale of the world, had the power to preserve it. Do not gentlemen know that peace or war is not in our power? They do know it, and that all in our power is to resist, or submit. Was not the clamor which was heard about peace, in so many words, saying, you must submit, not only to what injuries you have received, but to what you may hereafter receive? Was not every advance, on our part, for an adjustment of differences met with new injuries and new insults? It would not be denied. If peace was all that gentlemen wanted, they would take the resolution in general terms, as proposed to be amended; but their opposing it shows that they have no objection to hostility, if it be not against the French nation—he would not say whose servants they were desirous of being, but against those whom they dread they are afraid to lift up their finger. And this was the spirit of peace which they wished to preserve—a spirit which he deemed vile submission—a spirit which was afraid to complain, and which met every new insult without murmur.

Mr. H. rejoiced that this amendment was made, because it had unmasked the intentions of the mover and supporters of the original proposition. They were now obliged to avow, it is not peace with all the world which we want, but peace with France—a servile and abject submission to one nation; a nation, in behalf of whom they have heretofore been eager of war; for notwithstanding all their cries at present for peace, peace, when there is no peace, they have on a former occasion been equally zealous for war. All their efforts were then used to involve this country in war, upon the side of the French Republic; but now, when measures of resistance are called for—not against France, but to prevent her from wounding her enemy through our sides—their cry is turned from war to peace. This he repeated, and, if they denied it, he would refer to written accounts of their discourses at that time, which would prove that they had sought war against England, and an alliance, offensive and defensive, with the French Republic. At that time, he and those who generally vote with him, desired peace; and it required all their skill and firmness to preserve it, and much obloquy was thrown upon them on account of their exertions. The ground which he and his friends then took, was—let us first try negotiation; if that fail, we will then join you in the war. But these gentlemen were, at that time, all in favor of war measures in the first instance. Whence now this change of spirit? What has become of the spirit of 1794, when it was said to be disgraceful to negotiated, and that it would be base to surrender the independence of our country to a foreign Power? He wished he could see the breasts of gentlemen now glow with the patriotism which then animated them; but, instead of this, what do we see? A spirit of the most abject kind; a spirit that would leave all our property unprotected beyond the limits of our territory, so that our commerce, from which is derived five-sixths of our revenue, is to be abandoned, lest, in defending it, we should give offence to the French Republic.

The committee were now told it would be time enough to prepare for war when an invasion of our country was attempted. And why were they told this? Because such an event is not likely to take place. Gentlemen know that all the hostility which France wished to commit against this country may be done by destroying our commerce. But they are disposed to surrender this part of our rights, rather than resist; and what security had we that, if the country were invaded, these gentlemen would then resist? He apprehended that the same spirit which led them now to submit, would continue to actuate them.

Last year gentlemen were opposed to doing anything which shou'd alter the state of things. If this negotiation, said they, fail, we will then join you in active measures. But now, when that time is come, they tell us we must still sink lower, and become more degraded. We are to be contented, not only to see our ships captured, our property destroyed, our sailors led in chains, our revenue annihilated, but we must see the army of the enemy attempt to land, before we will resist.

Mr. H. said he would bring his proofs, to show that those gentlemen who are now so loud in their calls for peace, were heretofore the supporters of a war system. For this purpose, he adduced Mr. Monroe's view of the conduct of the Executive of the United States, which, he said, was a publication which had met with the most unbounded and enthusiastic applauses from all the party; and he read from it an extract of a letter from Mr. Monroe to our Secretary of State, dated Paris, September 10, 1796, pages 209 and 210 of the book, in which he states it to be his opinion, "that if a suitable attempt be made to engage the aid of the French Government in support of our claims upon England, it may be accomplished; and that to secure success, it will be necessary to take the posts and invade Canada."

Would any man, said Mr. H., who shall read this passage, say that the system of these gentlemen is a peace system? And besides this proposition for taking the posts and invading Canada, the same gentleman proposes an advance to France of five millions of dollars. Yet these are the gentlemen who now are willing to say to France, "We will not fight you; we give you license to do us all the injury you please. You may fit out half a dozen frigates, which will be able to block up our ports; and we give you this notice that you may effect your purpose with little expense, and not prepare a large fleet for the purpose."

The gentleman from Virginia, (Mr. GILES.) whose zeal for keeping this country in an absolutely defenceless state, has surpassed all the zeal he ever before displayed, except that which he had shown on a former occasion for bringing us into war, has told us that peace is the best thing we can have; and that it would be knight-errantry to attempt to defend our property at sea. After our Ministers have been sent off, and a decree passed which must destroy our commerce, and which had been already allowed to be just cause of war, this was the language of that gentleman on the present occasion. To show this gentleman's consistency, and because his language was at that time so spirited, so American, and carried with it so much force and energy, he could not forbear reading an extract from his speech on the 28th of March, 1794, upon Mr. DAYTON's motion to sequestrate British debts. The question was not then whether we should arm for our defence, but whether we should make an attempt at negotiation. The arguments of the gentleman were, it is true, somewhat misplaced, though they were nevertheless patriotic and admirable; and he could not account for the strange contrast of his present sentiments on any other ground than that he believed the true interest of this country was only to be effected by a treaty of alliance with France and war with her enemy. Gentlemen who were on a former occasion in favor of spirited measures in defence of our rights, and were on this occasion the same, are consistent; though their arguments might not altogether be properly timed, yet they were radically right.

Mr. H. then proceeded to read and comment upon Mr. GILES's speech on Mr. DAYTON's motion, contrasting all along the sentiments he then delivered, which were in favor of the most spirited measures against England, with his present opinions with respect to France; in doing which he paid the highest possible encomiums to the talents and style of the gentleman from Virginia.

After finishing this contrast, Mr. H. spoke of the propriety with which his colleague had introduced the account of the treatment which Venice had received from the French Republic. Yet gentlemen had asked whether this was a cause of war for us? The circumstance, they well knew, was introduced merely to show the effect which a tame, submissive conduct was likely to produce; but they had chosen to give it this turn, in order to avoid the point which it contained.

Mr. H. said, he would bring another example to the view of the committee. He meant that of Switzerland. Attempt after attempt had been made by France on the independence of that country. After going a variety of lengths, they effected their purpose of driving from thence that unfortunate class of men, the emigrants, who had been persecuted by those who had usurped all authority in France, and who sought the rights of hospitality amongst them. New aggressions were made; they took possession of a part of the Swiss territory, and displaced their magistrates. Seeing that every submission invited fresh insult, they united, hand in hand, took up arms, and reinstate the magistrates who had been displaced, and resolved to live free or die. What was the consequence of this spirited conduct? The French withdrew from their territory, disavowed the measures of their General, and declared that they desired nothing more than to leave the Swiss in full possession of their rights.

Let us, said Mr. H., take warning by this energetic example of the Swiss. Let us now begin to resist. Let us declare that we wish to preserve peace with all

the world; that we allow that peace is good, but that we believe independence is better; that peace is desirable, but not at any price—and then France will relinquish her aggressions.

At this point the committee rose and had leave to sit again.

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THURSDAY, MARCH 29.

Mr. JOSIAH PARKER presented the petition of the merchants of Norfolk, praying for a lighthouse to be erected on Old Point Comfort, together with a copy of an act of the Legislature of Virginia, ceding two acres of land for the purpose. Referred to the Committee of Commerce and Manufactures.

RELATIONS WITH FRANCE

The House again resolved itself into a Committee of the Whole on the state of the Union, and the amendment to the first resolution moved by Mr. SPRIGG, as to the inexpediency, under existing circumstances, of resorting to war against the French Republic, which amendment is, to strike out the words "French Republic," being under consideration.

Mr. GILES rose. It would be recollected, he said, that yesterday an attack had been made upon him, as indecent in its manner as it was in itself novel and unprecedented. He had been eight years in Congress, but he never before heard so direct and personal an attack. He was pleased, however, that it had been made, and only regretted that his state of health was such as, he feared, would not suffer him to go so fully into a refutation of the charges which had been brought against him as he could wish. He should, however, state such circumstances as would not only disprove the facts alleged against him, but also prove that the reverse of them was true. In doing which, he begged to be corrected if he should misstate anything.

The gentleman from South Carolina (Mr. HARPER) had said "that it had been the object of himself and his associates, but particularly of himself, since the year 1794, to go to war with Great Britain, if possible, and to enter into a treaty of alliance, offensive and defensive, with France." This charge he declared to be entirely void of truth. He knew that slanders of this kind had been circulated in an artful manner through the United States from that time to the present, but he never before heard the charge publicly made. Being made, he would refute it, though it had been the foundation of two long speeches of that gentleman; for, whenever slander assumes an erect front, it is dissipated by the first day of truth which meets it.

He trusted he should prove by a reference to the debate which had already been quoted, and to others, that he had never been in favor of a war with Great Britain; and as to an alliance, offensive and defensive, with France, he never heard such a proposition in private converstation, and it will be allowed that no such proposition was ever publicly made.

The inconsistency of his conduct had been spoken of. The gentleman from South Carolina said it was unaccountable to him how the author of such animated sentiments as were delivered by him, (Mr. G.,) in 1794, could now utter sentiments so groveling and pitiful as those heard from him. He wished the gentleman had selected the passages to which he alluded, as he himself was unconscious of any difference between those which he then delivered and his present sentiments. From the year 1794 to the present period, he had uniformly declared it to be his opinion "that war is justifiable only in case of self-defence."

If boldness of assertion and dogmatism of expression would have availed, the gentleman from South Carolina must have been victorious; but he would beg to turn the attention of the committee to facts. That gentleman had first introduced the book of Mr. Monroe, the sentiments of which, he said, certain gentlemen, by their approbation of it, had adopted as their own. Mr. G. said he had read the book, and had found a great deal to commend in it, and little to condemn. Human nature was liable to err. If the gentleman himself were to review his own political history, he doubted whether it would be found to be always consistent. There might have been errors in Mr. Monroe's Ministry, but he believed they would be found to be as few as ever attended a negotiation which was encompassed with so many difficulties.

What, he asked, was the letter which the gentleman read from his book? It was a letter dated December 5, 1794. This was not a letter from Mr. Monroe to his associates, but to the Secretary of State; and, if any conspiracy was intended, General Washington and his Secretaries must have been the conspirators. He saw nothing more in this letter than a suggestion of what might be done if the Government thought proper. Mr. G. stated the situation of things at that time. In the Autumn of 1794 the President laid before Congress a communication stating that nothing further could be done between this country and Great Britain by way of negotiation, and what remained to be done was left to Congress. There never was so threatening a state of affairs between Great Britain and this country, since the Revolution, as at that period. At the time, therefore, when Mr. Monroe wrote the letter in question, he could not possibly know the state of affairs here, or whether they would come to an amicable settlement, and it was right in him, and it would have been criminal not to have done it, to state what it was likely might be done by France in our favor in case of extremities. He would only add one further remark, as he should have occasion to defend himself more than Mr. Monroe, which was, that he was at least as honorable a character as any of his calumniators; that while he was in France he effected much good, and that since he came away we had experienced much injury. If gentlemen would examine the state of things when he first went to France, what our situation was when he came away, and what it is now, he thought this would appear evident.

The gentleman from South Carolina, doubtless, after examining all the remarks he could find of his, had brought forward a debate which took place in 1794. To follow the gentleman would be a disagreeable task; but as it would serve to elucidate a truth which it was necessary to unfold, he should undertake it, and show that, instead of these remarks being in favor of war, they were founded in the most zealous wish for peace. Mr. G. proceeded to read his remarks on Mr. DAYTON's motion for a sequestration of British debts, which, as the mover would recollect, he said, was a mere arrestation of British debts, which was proposed as a preventive of war, by holding in our hands what was within our power, as a pledge for the good behaviour of that country, in order to preserve peace. Mr. G. stated the situation of things to be different from that which Mr. HARPER had represented it to be, as the Legislature had no knowledge of any negotiation being set on foot with Great Britain at that time. This debate took place on the 28th of March, when they had been informed by the President that nothing further could be done by him, and the negotiation was not heard from until the 19th of April following. A part of the system proposed was an embargo, and another a suspension of intercourse with Great Britain. This bill passed this House, but was negatived in the Senate, by the casting vote of the Vice President, who is now the President of the United States; and if this bill had been carried into a law, the other regulation for arresting the British debts would evidently have been a proper measure.

Mr. G. continued to read a number of extracts from the speeches to illustrate his position, which he interspersed with the following remarks, namely: that instead of being in favor of war, he had always wished that we might keep in peace and unconnected with any foreign Power. He hoped this was at present a pretty unanimous opinion, and that we should not look out for any aid from foreign Powers. He believed the people of the United States were not ready to go to war; if they were, he should consider them as fools; but he was convinced they would never go to war for the sake of a few individuals. No people could wish for a military despotism, and this must be the consequence of a war. He had been charged, he said, with a peculiar enmity against Great Britain; but even after it was known, in 1792, that the treaties of Pilnitz and Pavia were entered into for the starving of France, at a time when the enthusiasm for the cause of France was at its highest pitch in this country, he was willing, on account of a violation of our neutral rights by France, which took place in consequence of those treaties, (as he showed from the debates at that time,) to lay hold of such part of the debt due from this country to that, as should cover the injuries committed. Did this, he asked, look like partiality in favor of one nation more than another?

To confirm what he had said with respect to his continued opposition to war, Mr. G. had next recourse to a debate on the subject of providing a naval armament, against which, he said, he had always voted, as he looked upon the existence of a navy and the discharge of a public debt as incompatible things; for no nation that ever went into the establishment of a navy, ever did or ever

will discharge their public debt; and therefore, though we might experience some evils for want of a navy, we should meet with none so great as the saddling of ourselves, and all posterity, with a debt proportioned to the number of our battleships. When he found the law for building the frigates would pass, he stated it as his consolation that the trees from which the frigates were to be built were still growing, and, as it would of course take much time to get them ready, it would give us a chance of preserving peace. His apprehension at that time was, that if we soon got the frigates to sea we should be involved in the war in favor of France.

Mr. G. next had recourse to the debate on the British Treaty; at which time, he said, the cry of war was resounding from one end of the Union to the other, though, in his opinion, there never was a period when there was less prospect of a war with Great Britain than at that time. After noticing several observations made on that occasion, Mr. G. observed, that yesterday the gentleman from South Carolina said, "what security have we that these gentlemen will go to the extent that they say they are ready to go?" Who, said Mr. G., are "we?" Who is authorized to put that question to an independent citizen of the United States? Had not he, and those with whom he acted, as much at stake as that gentleman and his associates? In many respects he was unwilling to compare himself with that gentleman and his friends; but in this respect he was not afraid to do it. Have that gentleman and his associates a greater claim to patriotism than others? If they have let them show it. Or have they greater domestic inducements to value their happiness in the country? He believed not. He could say for himself that he had never adopted a short way of getting wealth, nor had anything to do with notes and banks; he owed no man anything which he could not pay on demand; he had been placed in a moderate sphere of life, and did not desire wealth. Whence, said he, arises the clamor for hostile measures—for resistance? Not from our independent yeomanry, nor from men who are the most deeply interested in the welfare of our country, or surrounded with domestic comforts, but from men of a different description—from speculators, and men who have few attachments to it.

Mr. G. did not believe that we stood upon such unequivocal ground with respect to France as we formerly stood upon with respect to Great Britain. This had long been his opinion; and though we have heavy complaints to make against France, they were not without just complaints against us, arising principally from the operation of the British Treaty, that fatal instrument to the United States.

Mr. G. read some of the articles of the treaty, and his former remarks thereon, and denied that there was any well-founded apprehension of war at the time it was under discussion. He also noticed the assertion which had frequently been made, of the French Directory receiving lessons from this country, which, he said, was too absurd to be believed.

Though he thought France had just ground of complaint against this country, he did not mean to justify her conduct towards us. He thought she ought to have received our Ministers; and, if they had not agreed, to have taken such measures as they thought proper. But this is supposing our Ministers clothed with sufficient powers; if they were not, there would be some ground of justification for their conduct. The President of the United States is in the possession of information which would satisfy the Congress and the people in this respect, but he has thought proper to withhold it, and therefore he alone is responsible. There was one circumstance, he said, very unaccountable in this business. The President informed the House that he had received certain papers, and says, "I have considered these papers; I have deliberated upon them; I have not sent them to you, but require you to act upon them; I call upon you to take energetic measures, and request you will provide sufficient revenue." The House has been thus obliged to take up the subject in the dark. Is this, said he, a desirable state for the Legislature to be placed in? Is it not rather a degraded state? He thought it was; and when party rage shall subside, and it shall be seen that the Executive is pursuing hostile measures, and keeping back all information from Congress, this conduct would be deemed extraordinary. He was far from saying the Executive had not done what was proper. He could not say so, because he had seen no evidence upon which to form a judgment; but it left a strong impression on his mind that something was not correct, which was the reason the expected papers were not sent.

The first Speech of the present President, he said, contained some sentiments on the subject of the balance of power, which he was far from approving. He

states "that whether the United States will, or not, the Powers of Europe will consider them as constituting a part of the balance of power." Mr. G. did not know whether this was a fact or not, but if it were, he thought we ought not to have submitted to have been so considered without opposition. But the President takes it for granted, and proceeds to act upon it. Knowing the political sentiments of the President, he thought this a dangerous doctrine in his hands. Mr. G. said he never believed there was anything like a real balance of power in Europe; it was a mere imaginary thing, and he thought there could not be a more ridiculous figure drawn than that of a President of the United States attempting to adjust the balance of power in Europe.

Mr. G. quoted a paragraph from the last Speech of the President, speaking of the disadjusted state of Europe, which he thought very improperly applied to France, at a time he did not know whether our Ministers were received or not.

He also referred to what the President says in his late Message with respect to the change of circumstances, which he still thinks he meant apply to a change from neutrality in the country to something like war. And in these circumstances, said he, are the people of the United States to be led on from step to step, until they are irrevocably involved in war? And are the people to be told that this is a trifling question? When all the country is in commotion, and when the people are preparing their petitions for peace, (which he thought very proper,) he was not willing to proceed until the present question was decided.

He would suggest another idea. He had heard a variety of observations from different quarters, that, at a period not very far distant from the present, a more intimate connexion between this country and Great Britian than at present exists is likely to take place. And yet gentlemen we are perpetually crying. What! give up your independence! Do you prefer peace to independence? He would answer, No; for independence he should be ready at all times to make war. But are we, said he, called upon to fight for speculative independence, and, at the same time, willing to commit our real independence to the mercy of another nation? Where, he asked, is the difference between depending upon the French or British nation? Except, indeed, (as he believed was the speculative opinions of some gentlemen,) there was an intention of assimilating the British and American Governments.

Gentlemen talked of newspapers. He would say a word on that subject. There are two papers, said he, printed in this city, which not only breath defensive, but offensive war of the worst kind. One of these papers, he believed, was particularly countenanced by the Government; the other was printed by an infamous scoundrel, a British subject, a paper which he was sorry to find too much countenanced. This paper not only breathes war, but exterminating war. And this paper, issued from a British press, spreads its baneful sentiments throughout the country. He proclaimed this fact and he should think himself a traitor to his country, not to proclaim it.

Mr. G. next noticed the impeachment of W. Blount, late a Senator of the United States. It is known, said he, that the British Minister here actually gave money to an American citizen, paid his passage, and sent him to Europe, to know whether his Court would concur in the plan of an invasion of the Spanish territory, for being engaged in which Mr. Blount has been impeached. Could any one deny the fact? They could not: it had been given in evidence before the committee. There might be many other facts connected with this, but he confined himself to what appeared in evidence. This person, who was sent to England, was the confidential agent of the British Minister here. [Mr. HARPER said that was not true. Mr. GILES called for the reading of Mr. Davy's evidence on the subject of the impeachment, which was read accordingly; when it appeared that the expression there used was confidential person.] Mr. G. believed a confidential person was a confidential agent. He was about to remark that these circumstances had appeared to him to indicate something more than was before the House at present. He could not help recollecting how different was the conduct of this Government towards the Minister of another country, when he had been guilty of misconduct. Was there not an instant demand to his Court to have him recalled? And the demand was proper and right, and he could not account for a contrary conduct in the other case which he had mentioned.

Mr. G. would say a few words as to the effect which the late French decree would be likely to produce upon this country. The committee had been told, by the gentleman from South Carolina, that it would effectually destroy

our revenue. He believed he was mistaken in this. To France and to those nations who may be supposed to be under her influence, we last year exported to the amount of $36,000,000, and to Great Britain $8,000,000; two-thirds of which are re-exported to the countries above mentioned.

Against whom, then are we to arm? Against those who receive $36,000,000 for the protection of the $8,000.000, two-thirds of which are re-exported. How, he asked, would this operate? Would the decree stop the importation of British goods? No, it might lessen them, but would not stop them, as the British would become, in some measure, their own carriers; and, as their vessels paid a higher duty in our ports than our own, it is probable our revenue would not be greatly lessened. It was possible, however, that there might be some abuse of the decree in carrying in into execution.

He was as much opposed to the decree of the Executive Directory as any man, but not so much on account of any loss we shall sustain from it, as from its being an attack upon our neutral rights, which he preferred to money. The British Treaty had authorized two acts that took place in January last, which will transfer the carrying trade from American to British vessels; but those acts will not affect our vessels going to France, Spain, or Holland. He supposed, therefore, that our commerce would not be very materially injured by the French Decree. He did not know but it would even be upon a better footing than at present, as there would be more security for it. At any rate, no rash measures ought to be taken, until we see how the decree is to be executed.

No one could say what farther measures were contemplated by the French Government; but the resolution on the table only went to say, that at this day we are not disposed to resort to war. He wished to make a distinction. It was said by gentlemen that those who are not willing to resort to war are unwilling to prepare for it; he was and always had been willing to put the country in a state of preparation, according to the extent of our means.

The gentleman from South Carolina had yesterday spoken of the great importance of the British fleet. He did not mean now to make any comparison between the fleets of Great Britain and France. With respect to the British fleet, he looked upon it as ruinous to the country, and predicted, that if the present fleet survives two years, the nation sinks. It is impossible it should proceed much farther. Gentlemen may say this has long been foretold; but there never was before a time when this was so evident. What, said he, are the British now supported by? By the body of merchants. The bank is gone, and probably will never recover itself. It is of little consequence whether France invades England or not, England must fall. On the other hand, the population of France is thirty millions; she has the finest country in Europe; her military skill is great, and she is possessed of most of the fortifications of Europe. And are we to engage in the carnage of the human species, at this late day, against that country? He hoped not. Besides, suppose we were to join England in the war, and be successful, would she not have an interest in the destruction of our commerce at the termination of the war? She certainly would; and though she may now see a current in her favor in the United States, and propose measures which may appear flattering, yet her disposition to favor this country would not outlive her interest.

Perhaps gentlemen may say, what will you do if France carries her injuries farther? "I would, said he, draw ourselves within ourselves. I would sooner (though I do not pledge myself to do it) indemnify our commercial citizens than go to war. I am now, and always have been, for war. I am now, and always have been, for peace."

He trusted the gentleman from South Carolina was, by this time, pretty well satified as to the inaccuracy of his statement. Before gentlemen make charges of inconsistency against others, they should be sure that they themselves stand firm in that respect. That gentleman ought to have looked back upon his own conduct in 1792 and 1793. He had been informed that that gentleman was at this time a member of an affiliated society of Jacobins. [Mr. HARPER said it was not true.] He believed, however, all the gentlemen who knew him at that time would do him the credit to say, that he was one of the most eloquent declaimers of that day in favor of the rights of man. But his inconsistency had even appeared within these two days. When the present proposition was first laid on the table, he rejoiced that there was a prospect of all uniting in manifesing a disposition for peace; but the next day he used arguments which went to the destruction of the resolution.

The gentleman from Massachusetts (Gen. SHEPARD) had made a remark which he must notice; it was, that he assumed to dictate to others what was proper to be done. Of this he was not justly chargeable. That gentleman told the committee he was a warrior; he venerated him as such—he was a warrior in a glorious cause; but whilst he venerated him as a soldier, he had to regret the political prejudices under which he labored, which could suffer him to attribute a motive of that kind to him. The gentleman from New York (Mr. BROOKS) had also told the committee he had also been in service in the Revolution. This he did not know before he heard it from the gentleman himself. But he had since been told he was engaged in the honorable and humane employment of clothier to the army. [Mr. BROOKS said, he had the honor of taking up arms in defence of his country, which he carried until he was taken prisoner. He was a prisoner eighteen months, and when he was set at liberty he found his vacancy was not preserved for him. He then served his country in a different line, and he believed in a manner which entitled him to at least as much merit as he had assumed. He believed that providing the army with clothing was an essential part of the service; but (said he, with great warmth,) if the gentleman doubts my being a soldier, I am here to answer him. [A loud cry of order, and Mr. B. sat down.]

Mr. G. said, he had received this information from one of the gentleman's friends. He made the inquiry, because he did not know what services he had performed; and he assured him the information which he had received had tended to raise, rather than sink him in his estimation; but he was not alarmed at being told he was a soldier.

It had been said of the resolution before the committee, that by stating we are not ready to resort to war against the French Republic, that it might be implied we are ready to go to war with some other nation. That this idea might be done away, if gentlemen will permit the words "against the French Republic" to remain. If the mover would give his consent, he should have no objection, to add the words, "or any other nation."

Mr. HARPER hoped, as he had been particularly alluded to by the gentleman who had just sat down, he should not be considered as trespassing on the patience of the committee in an unreasonable manner, if he made a few remarks in reply, though he did not mean to do it generally, as he perceived others had undertaken to do that, whom he was conscious were better able to do it than himself. He was called up merely by the gentleman's personal observations.

In the first place, he was charged with great indecency in bringing forward and commenting upon the gentleman's own speech. He left it to the committee to determine with what propriety this complaint came from a person who has omitted no opportunity of attributing the worst of motives, not only to gentlemen in that House, but to others out of it; neither age, character, nor absence, have preserved gentlemen from his censure; from a person who has always indulged himself in the most violent philippics against the Executive of the United States, and all who concurred in his measures; from a person who, when gentlemen declare they are for peace, says he does not believe them; from a person who has continually charged all those with inconsistency who differed in opinion from him, not by examining their conduct, but by making insinuations against them as to their debts, or to the way in which they may have acquired money, or by following them to their youth, before they became members of this House? He thought the gentleman ought to attend to the old, but just adage, "He who lives in a glass house ought not to be the first to throw stones." If there could be a man more regardless than that gentleman of all the rules of decorum in debate, he had never heard him.

As to the charge of inconsistency in his conduct, it had often been made in private, and as often contradicted; but as it is now brought into public view, he would say a few words on that point.

It was said, that in 1791 and 1792 he was a member of a Jacobin society, and a warm declaimer in favor of the rights of man. What was said respecting his being a member of a Jacobin society, is one of those falsehoods of party, which, though known to be unfounded, is still reported.

The fact, Mr. H. said, was this, which he never concealed: In the year 1791, there were instituted in Charleston, a variety of clubs (there were several before that time;) of many of these, being a young practitioner of the law, and desirous of extending his acquaintance, and procuring business, he was a member. Among these was a society called a Patriotic Society. It was composed of French and American citizens; and he and seven or eight other young practitioners became members, and attended one or two evenings; but, finding it composed of

persons from whose society much improvement could not be expected, they never went afterwards; and so anti-jacobinic was their conduct considered, that they merited and received an expulsion from the society.

As to being a declaimer in favor of the rights of man in 1791 and 1792, he owned he partook of that enthusiasm which at that time raged in America, because he was deceived. He then believed the French had been unjustifiably attacked, but he now found that they were the first assailants. He then believed that the treaties of Pilnitz* and Pavia, of which they had heard so much, were realities; but he now found them contemptible forgeries. With respect to other parts of the French Revolution, he then believed that the principal actors in it were virtuous patriots, but he had since discovered that they were a set of worthless scoundrels and mad-headed enthusiasts, who, in endeavoring to reduce their fallacious schemes to practice, have introduced more calamities into the world than ages of good government will be able to cure.

Mr. H. said, he never was a declaimer in favor of what gentlemen meant by the rights of man. He held them and their author in merited contempt. The pretended factitious rights of man to which gentlemen referred, were the rights of a few noisy demagogues over the rights of the people. Though he always believed this, he did not know it so well, in 1791 and 1792, as he knew it in 1794, and since. And, therefore, he was not a declaimer in favor of what the gentlemen mean by the rights of man, but he was a warm admirer of the French Revolution, when he thought the object was the establishment of the true rights of man; but, since he discovered that this was neither the object nor would it be the effect, instead of viewing that Revolution as a blessing to the world, which he once thought it, he now viewed it as the greatest curse that ever afflicted mankind; as a phial of wrath from Heaven, the bitterest that ever was poured out upon the earth.

There was a certain species of the rights of man of which he had always been the defender, in favor of which his voice would always be heard. He had, in a well-known instance, advocated the rights of his fellow-citizens in the best manner he was able, and in a manner which had obtained for him their thanks and their remembrance. How he conducted that defence was well known to some of his colleagues in that House.

Mr. H. denied that he had been inconsistent with respect to the proposition before the committee. He then noticed what had fallen from Mr. Giles with respect to the decree of the French Directory not being so inimical to his country as it had been supposed to be. Mr. H. charged Mr. G. with being much mistaken in supposing that only the amount of eight millions of dollars was exported to Great Britain and her dominions, or that thirty-six millions of dollars were exported to France, and to countries connected with her. Out of the fifty-one millions exported from this country during last year, it appeared by the statement before them that eight millions five hundred thousand were sent to Great Britain, nine millions to the Hanse towns; to France and her dominions eleven millions. But, he asked, if the gentleman from Virginia knew the reason why this amount to France appeared so large? If not, he would tell him. All the produce shipped for the British West Indies in 1797, was almost constantly cleared out for French ports, in order to avoid the effects of the plundering decrees of the French West Indies, and this was the reason, why six or seven millions appeared under this head, which ought to appear under another. But the gentlemen seemed to suppose that all which did not go to Great Britain went to France, and countries connected with her. At least twenty millions, out of fifty-one millions, went to countries over whom France had no power; and, when to these were added what was sent to Great Britain, and six or seven millions were deducted on the ground he had mentioned, the gentleman would find the balance was not very considerable.

Mr. H. said he should not notice what the gentleman had chose to say respecting the British Minister, except as to the improper manner in which he had called a confidential person a confidential agent of the Minister, and to say that he could not see any analogy between this case and that of the French Minister, who fitted out privateers and levied troops in our country without permission from the President of the United States.

*The speaker here alludes to the paper called "the second treaty of Pilnitz," which he declares to be a forgery. The first treaty of Pilnitz was a mere conditional agreement between the Emperor and the King of Prussia, that if either of them should be attacked by France, they would unite to repel the attack. This treaty they avowed; and when, on the acceptance of the new Constitution by the King of France, better prospects of a peaceable conduct on the part of that nation were entertained, they suspended this treaty by a formal declaration.

The gentleman from Virginia had entered fully, not only into a justification of himself but of his friends. How far he has acquitted himself and them from the weighty charges which he had exhibited, he was not the proper person to judge; he left the public to determine. He must, however, beg leave to correct him in one of his facts. He informed the committee that the letter of Mr. Monroe, which had been quoted, was written in December, 1794, whereas it was dated Paris, September 10, 1795, long after that Minister had been officially informed by our Minister in London, that the British Treaty was concluded and signed; yet this letter recommends the taking of the posts, the invasion of Canada, and the cutting up of the British commerce by privateers. He did not say that this letter was a proof of conspiracy, but of a system of policy which was very contrary to a peace system.

But the gent'eman says, he (Mr. G.) never proposed war against Great Britain. He knew it. The gentleman always spoke of peace, but pursued measures which led to war. He did not speak of war when he recommended sequestrations, confiscations, etc., because he loved peace. He did not talk of war; but, whilst he and his friends opposed measures of defence, they were in favor of every measure which led to war. While they were irritating a nation to war, they opposed the building of the frigates. He could not say what were the views of gentlemen in doing this, but he would say what appearance it had on his mind, when he was far removed from the seat of Government. He thought it seemed as if gentlemen believed it would be well to get to war, and then rely upon their favorite nation for support.

Mr. BROOKS again complained of the insinuation which Mr. GILES had thrown out against him, which he said was not called for by any circumstances under consideration.

Mr. GILES assured him he mentioned the fact alluded to out of no disrespect to him. With respect to the date of Mr. Monroe's letter, he had been deceived by a leaf being folded down at the letter, the date of which he had mentioned. The gentleman had said that he had attributed improper motives to the President of the United States. This he denied. He had said, he took measures which he did not approve, and he hoped a difference of opinion from any man would not be imputed to him as a crime. With respect to the explanation which the gentleman had given of his own conduct, he was glad to hear it. It was to obtain this explanation that he mentioned the reports which he had heard. Mr. G. renewed the assertion, that he and his friends always had been willing to put the nation in a state of defence. As to the frigates, he gloried in his vote against them; but with respect to the use of them, the gentleman was mistaken. They were intended to be sent against the Algerines only.

Mr. S. SMITH said a few words as to the statements which had been made with respect to the amount of our exports to different countries. That made by the gentleman from Virginia was correct, except that some deduction ought to be made from the 36 millions on account of the Hanse towns.

Mr. NICHOLAS made some remarks as to the date of Mr. Monroe's letter. Though the date was as stated by the gentleman from South Carolina, he still maintained that Mr. Monroe could not have known whether or not the Senate had ratified the British Treaty. Mr. N. hoped the committee would rise, and that he should be permitted to show the consequences of a war with France at this time. He said yesterday he should have been willing to have overlooked the past, and to have taken the best mode of getting out of our present situation; but when gentlemen say that all has been done by this Government that could have been done, he should consider it as treason to his country not to show, that the present misunderstanding with the French Republic was founded in our own misconduct. Not that we were wrong in saying we will not bear the treatment of the French since; for though he thought we gave the first offence, yet he was not for bearing the chastisement of any country.

After a few words between Mr. DAYTON and Mr. NICHOLAS, as to the object of the amendment, the committee rose, and the House adjourned.

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FRIDAY, MARCH 30

Mr. OTIS presented a petition from the freeholders and others, of Roxbury, in the State of Massachusetts, stating, that they hear with concern, that liberty is intended to be given to merchants to arm their vessels for self-defence, knowing that masters of vessels consist of a great variety of character; that among them

there are men of violent passions, and that the distance between putting arms into a man's hands and the commencement of hostility may be very short, they deprecate the idea of the peace and happiness of this country being placed on so uncertain a foundation as the pride, caprice, or passion of the master of a merchant vessel. They pray, therefore, that vessels of this description may not be permitted to arm. Referred to the Committee of the Whole on the state of the Union.

Mr. HARPER, from the Committee of Ways and Means, reported a bill making appropriations for the Military Establishment for the year 1798, which was committed for Monday.

The amendments from the Senate to the bill for the relief of refugees from Canada and Nova Scotia, as agreed to by the committee of conference, were agreed to by the House.

RELATIONS WITH FRANCE

Mr. ALLEN observed, that when the President of the United States sent his first Message to the House, announcing the receipt of despatches from our Commissioners in Paris, he stated that it would take some time to decipher the despatches which he had received. Some days afterwards, on the 19th instant, he sent another Message informing the House, "that it was incumbent on him to declare that he saw no ground of expectation that the object of their mission could be accomplished on terms compatible with the safety, honor, or the essential interests of the nation."

It had been observed, in the course of the debate in the Committee of the Whole on the state of the Union, and not in the most candid and proper manner, that the papers received from our Commissioners ought to have been laid before the House, and the President had been charged with withholding them. He supposed gentlemen would have been satisfied, and he was, with the information which the President had already communicated, that our Commissioners are not received, and that France refuses to hear us. But, though he was himself satisfied with the information he had at present, he believed there were many gentlemen in the House who wished for more, because there is a paper printed in this city which is continually insinuating that there is something in these despatches which, if they were made known, would show that the conduct of the Executive has been improper; because he found that paper often speaking the language of gentlemen in this House, and which spoke it, he believed, on this occasion; and because, if this is not true, he wished the people to be undeceived; or if true, that he and those who thought with him, that no such blame existed, might be convinced of their error; he proposed the following resolution, to which he hoped there would be no objection:

*Resolved*, That the President of the United States be requested to communicate to this House the despatches from the Envoys Extraordinary of the United States to the French Republic, mentioned in his Message of the 19th instant, *or such parts thereof as considerations of public safety and interest, in his opinion, may permit.*

Mr. S. SMITH said, he shou'd have no objection to the reso'ution if the latter part of it was struck out. If the President thought it necessary that any part of the correspondence ought to be kept secret, he would, as is usual in such cases, inform the House that this was the case, and the galleries would accordingly be cleared. The communication would then probably be referred to a select committee, and such parts of it published as might appear proper.

Mr. ALLEN observed, that there might be parts of this correspondence which it would not be proper to communicate to this House, even confidentially. If this was not the case, the President could still communicate such part of the correspondence in confidence as he may think proper. He wished to leave the President to act according to his discretion. Without some portion of this discretion being allowed him the Government could not proceed.

Mr. GILES said, no part of the correspondence ought to be kept from Congress. He was not himself satisfied as to the sincerity of the proceedings of the Executive of the United States towards France; he wished, therefore, not only to have the correspondence of our Ministers, but the instructions which were given to them. Mr. G. defended what he had yesterday said about the President and these papers, and hoped if the House cal'ed for the papers at all, they would call for all the papers, and the instructions upon which our Ministers acted.

Mr. LIVINGSTON moved to amend the resolution by striking out all the words after the 19th instant, and insert after the words "this House" "the instructions

to and." This was not a time, Mr. L. said, to stand upon trifling punctilios, which might be proper upon ordinary occasions. They were now called upon to say whether the country should be preserved in peace or go to war; yet the correspondence, which ought to convince the House of the propriety of acting in this or that way, is withheld. How could they say to their constituents, without this information, all has been done that could be done to preserve the country in peace, but war was inevitable? And if war is rushed into headlong, without due consideration, and consequently without ascertaining whether it is just or not, can it be expected that the wishes and aids of the people will be heartily engaged in such a war? They certainly would not.

It would be no answer to say that our negotiation with a foreign Power would by this means be exposed. The communication might be made with closed doors, and no one could suppose anything would be exposed by the members of the Legislature which the good of the country requires to be kept secret. But gentlemen wish this House to repose the strictest confidence in one branch of the Government, at the same time that they say no confidence can be placed in the integrity of this House. [Mr. ALLEN exclaimed, who said it?] Mr. L. replied, that this was a fair inference from what had been said.

The latter part of the resolution proposed to transfer a right to the President which it ought itself to exercise, as to judging of what it was proper to publish in consideration of the public safety and interest. If this power was given to the President, he might withhold such parts of the papers as might prevent a correct judgment being formed upon them. He was not himself disposed to cede to the President the right which he was sent there to exercise for his constituents, of judging of so important a question as a question of peace or war. He could not basely surrender this right. If the papers were called for at all, he hoped the whole would be called for, in order that the House might form that sound and temperate judgment for which the present crisis so loudly calls, and for which the people of the United States so anxiously look. Indeed, to pass the resolution unamended, would, in his opinion, be a shameful dereliction of their rights.

Mr. BAYARD thought the propriety of this call upon the President was extremely doubtful, and as it regarded the instructions given to our Ministers, wholly improper. With respect to the communication of the despatches, it was wholly a matter of Executive discretion to judge whether it would be proper to communicate them or not. He was one of those who had so much confidence in the Executive as to trust to his candor, understanding, and integrity, to determine upon the propriety of what he should send to or withhold from this House. At a time when it is not known that our negotiation with France is closed, it would be extremely imprudent to have the instructions of our Ministers laid before this House; as what was sent here, notwithstanding any vote of secrecy, would not long be kept secret. It would soon be in Europe, and might do us essential injury, by disclosing our ultimatum to France, and by showing it also to the world. It was in vain, Mr. B. said, to suppose that one hundred men could keep a secret for any length of time, however important it might be. To elucidate that assertion, he referred to the divulging the secret of the British Treaty by a Senator.

But the gentleman from Virginia (Mr. GILES) has no confidence in the Government of this country with respect to its negotiation with France; and in order to try the sincerity of the Executive, he wishes for the papers. Does the gentleman by this mean to give the lie to the Executive? Because in his Message he has told the House that he has given power to our Ministers to settle our disputes with the French Republic, and to "make all reasonable concessions." What more does the gentleman wish? Does he wish unreasonable concessions to be made? Surely he does not. Did anything appear in the conduct of the French Directory to show that our Ministers were not possessed of ample powers? No; the Directory never knew anything about their powers, at least so far as any official communications had been received on the subject. There could not, therefore, be any ground upon which the gentleman could rest his suspicions. He hoped, therefore, the amendment would be negatived.

Two or three gentlemen were on the floor together.

The SPEAKER said, the amendment to insert "the instructions to and," would come first under consideration.

Mr. HARPER said, he did not mean at this time to enter into the merits of the present question. It was important, and presented itself in a new light to the House. The original motion he was ready to have voted for; he did not know whether he might not vote for this. But he wished time to consider of it. He therefore moved the further consideration of this question be postponed till Monday.

Mr. ALLEN had no objection to the postponement, except the mover of the amendment would permit it to be amended by a modification of this sort: "Such parts of those communications as were communicated to the French Government."

The question for postponement was put and carried—47 to 41.

The order of the day was then called for.

Mr. ALLEN hoped, since the consideration of his proposition had been postponed, the House would not resolve itself into a Committee of the Whole on the state of the Union until this information was received. The debate of yesterday, he thought, would do no good, as it served only to alarm the public mind; and he expected if the House went into a Committee to-day, the time would be spent as unprofitably.

Mr. BROOKS seconded the motion, as the information called for would certainly throw light upon the subject; and though he had himself sufficient information to enable him to vote upon the question, many gentlemen, in the course of debate, had made a great hue and cry after these papers, he hoped, therefore, they would be called for.

Mr. NICHOLAS always thought it proper to ask for further information on this subject; but as he had been told that when it was received it would be final as to our affairs with France, and tantamount to war, he thought it better decide the question whether we are ready to go to war or not first. He wished this, also, to prevent the consequences which are now taking place from a general impression in the country, from the late Message of the President, that we must be involved in war. In consequence of this persuasion, he had received information that produce has fallen one-fourth in price. He wished, therefore, to come to a vote as soon as possible that should decide the question of peace or war. It was upon this ground that he did not call for the papers, and upon this ground he hoped they should proceed with the business. Delay may give time for measures to be taken which shall stab the peace of the country—which may go beyond the powers of the Legislature to arrest their progress—if the business of the Union was to be suspended until the call was made, and, if it be favorably answered, until the communications are printed. He hoped, therefore, this delay would not take place.

Mr. BALDWIN said, if gentlemen could reconcile it to their own minds to let this important business lie over from day to day, it was more than he could do. He was surprised to find at first some reluctance to go into a Committee of the Whole on the state of the Union; and he was now surprised that there was any reluctance to proceed with the business. He would not indulge suspicions as to motives; but he begged them to believe that he could not help expressing his anxiety at the prospect of any delay in coming to a decision on the question which had already undergone some discussion. He had never seen the affairs of this country on such a dangerous precipice as at present, and not to act, but let things alone, and the country will soon be in war, and then we must defend ourselves as well as we can. At least, this was his view of the matter. But, if the business be pursued at present, though we find France has behaved towards us so as to give us a just ground for war, yet, if we wish to avoid war, this is the time to prevent it. The subject is at present before the House in the way which the President thought proper to place it; and if a call is made for papers, it is well known that he will not be obliged to send them. The information which they had he himself supposes correct, as the President had given it upon his responsibility; he was, therefore, ready to vote upon the question before the Committee of the Whole. He believed there was a disposition in the country for peace, and against the arming of merchant vessels. He believed that by taking pointed and decisive measures, they had on a former occasion kept the country out of war; he hoped they would be able to do it on the present occasion. He should not object to calling for the papers, but wished not to protract the business.

Mr. GORDON was surprised to hear gentlemen say the House was called upon to act upon the opinion of the President; there is certainly something more before the House. He could not account for the opposition made to a postponement except it was, that when the information was obtained gentlemen were apprehensive they could not hold the language they now hold, as almost every gentleman who had spoken upon the subject had complained that sufficient information was not before them. If this information was unnecessary, then the resolution ought to have been negatived at once; but, having been postponed, he thought it would be improper to proceed with the question before the Committee of the Whole until it was received. He saw no reason, therefore, for going into a Committee of the Whole on the state of the Union, except to give the gentleman from Virginia (Mr. NICHOLAS) an opportunity of doing what he has proposed to do,

viz: to show to the world that our Government has acted improperly towards France; but such was his opinion of that gentleman's perseverance, that if he did not get an opportunity of doing this today, he would take another opportunity of doing it, and therefore it was not necessary to go into a committee for the purpose of receiving his speech; and he could not see what else it could be desired, except it was that gentlemen wished still to hold out to the people the idea that there is a considerable part of the House, with the President as their head, for war, though the charge was altogether denied.

But the gentleman from Virginia says, that the late Message of the President has so agitated the public mind that, believing war is approaching, produce has fallen one-fourth in price. If the fact was as stated, he did not believe it had been the Message of the President which had produced it, but the decree of the French Directory, as the Message contained nothing like war. He thought the insinuation injurious to the President, and to those who thought with him, and who were opposed to war, but who nevertheless, will not vote for the resolution before the Committee of the Whole, because they do not feel themselves called upon to decide the question of peace or war at present.

Mr. DANA was against the postponement, not because he thought the Message of the President had caused the fall of produce—because the Message would certainly have had no such effect, had it not been accompanied by a decree of the French Directory, which went to let loose all the French corsairs upon all neutral vessels, and to exclude them from French ports. This, he believed it was, which had produced the effect spoken of. But he did not think, if the resolution before the Committee of the Whole was adopted, that it would raise the price of produce. Indeed, he did not think it would produce any effect. He considered it as an unmeaning thing; and a person voting for it, might with propriety go into every measure proposed for the defence of the country. It was one of those vague propositions upon which gentlemen may say what they please, and he looked upon it as introduced with that view. And since they must submit to hear the speeches of gentlemen upon the occasion, he wished the business to be going on. The gentleman from Virginia told the committee yesterday that he would give them a speech today, wherein he would show that this country had been to blame in respect to France, in which, he doubted not, they should be entertained with many severe philippics against the Executive; all these speeches calculated to raise a clamor in the country, must be submitted to. He wished, therefore, to go from day to day into a Committee of the Whole, until gentlemen had exhausted themselves, and then the business of the nation might be proceeded with.

Mr. BROOKS said, for the same reason which his friend from Connecticut gave for going into the order of the day, he wished to avoid it; because he hoped, if till Monday was given for the gentleman to consider upon the matter, he would give up his speech.

Mr. GALLATIN.—In whatever he had said in the Committee of the Whole on the state of the Union, he had made no allusion to the papers a call for which had been proposed. If he understood the objections urged to going into a Committee of the Whole on the state of the Union, it was, that the House ought to wait until these papers were before them. So far as related to himself, this was unnecessary, for he had not complained of any want on this head. Not because he did not desire to have the information, if it could be obtained, but because he thought it best, under the present situation of the country, first to decide whether we will remain in peace or go to war. For if it had first been determined to call for further information, how did he know that it would be given, or, if given, whether it would not be in a mutilated state, rather than which he would choose to act without it upon the Message of the President alone; and, according to the opinion of the gentleman from Delaware. (Mr. BAYARD,) the House ought not to ask for any papers whatever from the Executive. He thought the information contained in the Message of the President was sufficient to decide the question at present before the Committee of the Whole, as he there states that he has no ground to hope for a happy issue to our mission. This is not matter of opinion; but, coming from the President to the Legislature, is matter of fact; and when he says so, it must be understood that he not willing that any further negotiation should take place; and that all the reasonable concessions having been made that can be made, there is an end of the negotiation. It was true, when these concessions were made known, it was possible that he might differ in opinion from the President as to their reasonableness; but this House has no control over the President in this respect. Therefore, the information which he has given to the House is sufficient for them; and they ought now to say whether they will go to war or remain in peace.

The gentleman from Connecticut (Mr. DANA) has supposed that the resolution before the Committee of the Whole is vague and inexplicit—merely a thing for declamation and speeches, and that it ought, therefore, to be disposed of as soon as possible. He was himself also in favor of getting through with it as soon as possible; but it was extraordinary that the gentleman should complain of its being vague, and yet endeavor to make it more so, by wishing to see it amended as proposed. As to the speeches which had been made upon this occasion, they were not properly produced by the motion before the committee, and could not be charged upon the supporters of it. The only arguments offered in favor of it, (which had been in some degree restrained by the amendment,) were to show that it is not expedient to go to war at this time.

Mr. G. could not see how the information proposed to be called for, could influence the vote on the question before the committee. If any gentleman could show this, he would not object to the postponement. The mover acknowledged he did not want the information for himself; it was only to remove any clamor which might be used in debate, or which might appear in the papers.

It was true, Mr. G. said, however obnoxious the fact might be to some gentlemen, that the Message of the President had produced the effect which had been mentioned; it had upon his mind the effect of a declaration of war. He did not say that it really was so, but the effect produced upon him, was a belief that, if something was not done by the Legislature to prevent it, the consequence would be war. This conviction he felt from the moment the Message was read. He understood the same effect was produced on others. And though he was not certain about the fact of the fall which had been said to have taken place in the price of produce, yet, if it were so, it was not produced by the decree of the Directory, for that accompanied the first Message of the President, and it was the last which had the effect spoken of.

The effect produced by the decree of the Directory, said Mr. G., we know. It can be ascertained by the variation it has produced in the price of insurance. He understood the difference which had been made by that decree in the insurance of vessels from London to this country was five per cent.

Mr. G. though it important that an early decision should be given to the question before the committee, that the people of the United States might know what they had to expect, and in order to remove the idea which everywhere prevails, that we shall be in a war in a very short time. It is upon this idea, said he, that the insurance offices refuse to insure vessels in French ports; not on account of the decree of the Directory, but from the Message of the President; and it was with a view of removing this impression, he believed, that the resolution was laid upon the table.

Mr. LIVINGSTON said there appeared to be two objections to going into a Committee of the Whole on the state of the Union. Some think the proposition before it is of too trifling a nature to consume time; others, that it is of so great magnitude, that they wish to gain further information, and to have time to consider it. The first class of gentlemen, he thought, treated a subject, confessedly of great importance, with too much levity. Gentlemen say you do us wrong when you place the question before the committee in the light of a peace or war question. We have no idea of going to war. This was the language of the gentleman from New Hampshire, (Mr. GORDON,) particularly. Had that gentleman forgotten what had been said by his eloquent friend from Massachusetts, (Mr. SEWALL,) who sits beside him? That gentleman had declared, not that war might be expected, but that war exists! Was it unreasonable, after such a declaration, to come to a resolution which says that it is not expedient to resort to war at this time? He thought the welfare of the country required it. But the gentleman from Massachusetts did not stop here. Though, he said, a defensive war was all he wished for, under our present circumstances, yet he invoked the Supreme Being, and wished we were in a situation to carry on an offensive war. Yes, exclaimed Mr. L., the God of Peace was invoked in favor of war; the God of Mercy was called upon to favor a war of vengeance; and yet gentlemen wished to throw an odium upon those who come forward with a proposition for peace!

Mr. L. said he wished as much as any member for further information, before the House proceeded in active measures; but he was far from being certain that complete information could be obtained. He believed great opposition would be made to the call; in the next place, if called for, he believed the information would not be sent: he supposed this from a former refusal made on the ground of Executive authority. He deprecated the decision; but he believed, as precedent would authorize it, it would be made.

Mr. RUTLEDGE thought gentlemen went much too far on this occasion, in anticipating not only what would be the proceedings of this House, but also of the President. He rose immediately after the gentleman from Georgia, (Mr. BALDWIN.) That gentleman's argument went against a postponement generally, but not against a postponement till Monday. That gentleman was surprised that gentlemen should wish for a postponement; he was one of those who excited his surprise; he was in favor of the postponement of this question because the last had been postponed. He thought the motion for a call of papers ought to have been passed; but not having passed it, he wished it to pass before the House went into committee on the proposition which had undergone some discussion, especially as he did not believe the delay would postpone the final decision upon it. If gentlemen would agree to pass over the first proposition, and go on to the next, which relates to measures for the defence of the country, he should be as ready as them to go into a Committee of the Whole on the state of the Union. He doubted not the gentleman from Virginia was anxious to deliver the speech which he had promised to the committee. [Mr. NICHOLAS informed the gentleman he would hear no speech from him today.] Mr. R. hoped then he would not object to the postponement. The gentleman from Pennsylvania said he wanted no information; nor did he himself want it. He had received a letter from France, which convinced him of the perilous situation in which we stood with that country. He had seen the French decree, and he had seen a Gazette which had informed him that the Message of the Directory was passed unanmiously by the Council of Five Hundred; but he supposed some other gentlemen had not sufficient information, or else it would not have been called for; and surely gentlemen would not call such to vote upon what they deemed to be a question of war or peace, without it.

Gentlemen had said that the Message of the President had produced a belief that we shall be involved in war, and that produce had fallen accordingly. He did not believe the fall was owing to the Message, but that it was the effect of the decree; and asked whether the President would not have been criminal, if he had suffered the despatches to have slept a night upon his table? He certainly would; the communication was indispensable.

Mr. SEWALL was sorry to differ in opinion from his friend from South Carolina. He was himself against the postponement. This difference, he supposed, arose from that gentleman's yielding to the assertion of gentlemen, that the question before the Committee of the Whole is a question of war or peace, which he himself did not. He never considered the question in that light. It comes in as a bar to any measures being taken for the defence of our country, or from getting into business which really concerns the state of the Union. What were the motives of gentlemen for bringing it thus in, he could not tell. The readiness of gentlemen to come to a decision upon the question without further information, proves that they do not consider it as a question of war and peace. It cannot be doubted, that if the Legislature was called upon to declare war against any nation, they would have a right to expect that every fact relative to that nation should be laid before them.

The gentleman from New York, Mr. S. said, had thought fit to allude to him as appealing to the God of Mercy to support us in a vindictive war. Punishment, Mr. S. said, was sometimes the truest mercy; and if the United States could inflict punishment on France, it might be mercy to that country. And could any American citizen consider the sufferings which the French Republic had brought upon our merchants, our seamen, and upon our country generally, without calling upon the God of Mercy to enable us to inflict punishment upon that country? When gentlemen say (and none seem to deny it) that France has given this country just cause of war, will they not say France has given us just cause of vengeance? And is there, said he, a patriot in this House, who acknowledges France has given us just cause of war, and who does not wish to inflict that war upon that country in the severest and fullest manner? It was impossible to prevent the wish. He could not himself forbear making use of the expression with which the gentleman found fault; he could not refrain from calling upon God to enable us to avenge our wrongs.

Gentlemen are perfectly ready, without knowing how our Envoys have been treated, to declare in favor of peace. Mr. S. noticed what had been said about the Message of the President having caused the fall in the price of produce, and called upon gentlemen to point out that part of it which was calculated to produce that effect. This fall of produce, he said, was only one of the consequences arising from the wrongs which France has inflicted on this country. If she had

received our Envoys, no such thing would have happened; and could the President be blamed, because he communicated the enormities of the French Republic to Congress? Certainly he ought not. The whole mischief ought to be ascribed to the offenders.

Mr. J. WILLIAMS was against the postponement. He had always been of opinion that the discussion of the proposition which had engaged the House for some days would have mischievous effects on the country. He wished, instead of discussing this question, they had proceeded to measures which went to placing the country in a state of defence. The reduction of the price of produce he ascribed more to the apprehension of an embargo than anything else, and, the Senate having decided against that measure, he supposed the alarm would cease. He thought it had been the object of gentlemen to alarm the country, and to induce the people to believe that the Executive and a part of this House are in favor of war, and that they only are for peace.

Mr. T. CLAIBORNE said, if the debate continued much longer, the postponement would take place, not from the force of gentlemen's arguments, but from the length of them, as it would soon be time to adjourn.

Mr. R. WILLIAMS moved to adjourn; which was carried.

And the House adjourned till Monday.

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MONDAY, APRIL 2

Mr. VARNUM presented a petition from the inhabitants of Milton, in Massachusetts, stating their alarm at the idea of the peace of the United States being placed in the hands of men who may not be very friendly disposed towards the interests of this country, viz: the masters of merchant vessels, many of whom were formerly British subjects, and who, though they have been naturalized in this country, still retain all their English prejudices against the French, and may exercise them in a manner which may lead us to war, the declaration of which they wish to remain in the power of Congress. They also regret the misunderstanding which at present subsists between this country and France, and trust that every means will be taken to adjust it, without having recourse to war, which must wholly destroy our commerce, and throw the weight of supporting such a state upon the farmers and landed interests. Referred to the Committee of the Whole on the state of the Union.

RELATIONS WITH FRANCE

Mr. ALLEN called up for decision the resolution for certain papers from the United States, (the consideration of which was postponed on Friday until this day), which having been read—Mr. A. said, he would agree to the amendments proposed, provided the mover would allow the same exception to be used that had been proposed on a former occasion, viz: "excepting such parts of said papers as any existing negotiation may render improper to be disclosed."

Mr. NICHOLAS did not think it would be right, in the present situation of things—when we are told by the President that the negotiation with the French Republic is at an end, and that there is no chance of an accommodation taking place between the two countries—to agree to any exception of this kind. Called upon to act in this desperate state of things, he thought it would not be right for any part of the papers which had led to it to be withheld from Congress. The President having thought fit to declare that all negotiation is at an end, and that he is without hope of an accommodation, it could not be thought proper that the Legislature should be called upon to act upon less information than that upon which the President himself had acted. He thought the Constitution must have intended this, when it placed the power of declaring war in their hands; to suppose the contrary, would be to suppose an absurdity. With respect to the probability of any part of the papers interfering with any existing negotiation, he could not conceive that possible; at any rate, he thought it of greater consequence to act rightly in this case, than to have reference to any improbable circumstance of that kind. He hoped the gentleman would agree to withdraw the exception which he had proposed, as to retain it would defeat the call, by making it liable to all the objections which were made to the former exception. Indeed, notwithstanding he wished very much for the information called for, he should vote against the resolution, if the exception was retained. He therefore moved to strike it out.

Mr. ALLEN did not know why the gentleman from Virginia should wish a different form of a resolution from that proposed on a former occasion. He could see no reason but this: he did not believe gentlemen wished to see these papers before the House. When the resolution alluded to was adopted, two years ago, it was not known that any negotiation was on foot; and, though the President had told the House two weeks ago that all negotiation was at an end, it might not be so now. But suppose there was nothing upon which this part of the resolution could act, it could do no harm. He would not, however, give gentlemen an opportunity of voting against the resolution. He would withdraw his amendment; because he believed the President would be authorized to retain such parts of the papers as he may think it improper to communicate; he believed his Constitutional power gave him all the right to do this, and that, therefore, it was immaterial whether the resolution contained any exception, or not.

Mr. S. SMITH called for the yeas and nays, to convince the gentleman of his error with respect to there being no desire for the papers.

Mr. HARTLEY wished the qualification of the resolution had not been withdrawn. He thought it proper. He had also his doubts whether the House could Constitutionally call for the instructions given to our Ministers. Mr. H. moved, therefore, to amend the resolution by re-adding the exception just withdrawn.

Mr. NICHOLAS observed, in reply to the gentleman from Connecticut, that, if our situation with France is changed since the President's last communication, it would be ground for a new Message. But the House could not act upon anything so uncertain; they could act only upon the idea of things being now in the same situation as when the President sent his last Message.

Mr. HARPER said, when this question was brought forward on Friday, he moved the further consideration of it until today. Upon reflecting, however, upon what he thought a Constitutional question, it appeared to him that no such Constitutional question was involved in the present resolution. The present call for papers, he said, stood upon a very different ground from that made when the British Treaty was under consideration: the objections, of course, against that call would not apply in the present case, as the papers now called for were wanted to throw light upon a subject confessedly within the Constitutional powers of the House. He therefore held the call not only to be Constitutional, but expedient. Nor could he see any ground for the amendment: if the House had a Constitutional right to ask for information, they had a right to ask for the whole information, and the President would judge how far he could, with propriety, comply with the call. But, since the House did not know that the communication of any of these papers would be improper, the whole ought to be called for; and, if the President should think it proper to retain a part, he would doubtless give sufficient reasons to the House for doing so. On a former occasion, when it was moved to modify the resolution calling for papers in the way now proposed, the motion was rejected, because it went to alter the principle contended for; and he believed the same reason would lead to a rejection of the present motion.

If he believed there was any Constitutional question in this motion for papers, he should vote against it; but, believing the contrary, he should vote in favor of it—not because he wanted the information, as it was sufficient for him that the President told the House that the negotiation was at an end, and that our Ministers were refused an audience, to induce him to go into every measure of defense proposed, but as other gentlemen wished it, he hoped the resolution would be agreed to without amendment.

The question on the amendment was negatived without a division.

The question then returned upon the resolution, in the following words:

"*Resolved*, That the President of the United States be requested to communicate to this House, the instructions to, and despatches from, the Envoys Extraordinary of the United States to the French Republic, mentioned in the Message of the 19th instant."

Mr. OTIS said, before the question was taken, he would state his intention of voting against the resolution, not from any doubts of the Constitutional right of the House to call for the information, nor from an indisposition to gratify those gentlemen who want the information, but being satisfied in his own mind that the facts stated in the Message are true, and that the Commissioners who were sent to France were empowered, not only to settle our differences, with that counry, but to make reasonable concessions, even where the injury was on their side; and the President having declared it to be his opinion that there is no hope of succes from that mission, he wished for nothing further to convince him of the propriety of going into the different defensive measures proposed.

If he had, indeed, conceived that the question of war or peace was before the House, he might have wished its decision to be delayed until every fact relative to the negotiation had been before them; but, as he did not conceive that any such measure had been started, but only that such defensive measures should be taken as a much less degree of danger than at present existed would authorize, he was not willing to take any share of the responsibility as to the inconveniences and evils which may result from publishing the correspondence in question. If the disclosure should endanger the safety of our Commissioners, or operate as a discouragement to the future free communications of our agents abroad, he should wish to steer clear of any blame on the occasion.

Mr. GALLATIN observed, that the same reasons, or nearly so, which have been mentioned by the gentleman from Massachusetts, as inducing him to vote against the resolution, would induce him (Mr. G.) to vote for it. He had already stated that, viewing the question in the light he did, he did not want further information to enable him to decide upon it. He concluded the statements made by the President is correct; that it is true that there is no hope of accommodation with the French Republic, and that all negotiations is at an end; and, taking this as a ground upon which to act, he was willing to act upon it to the best of his judgment. Mr. G. said, he considered part of the measures proposed, to be measures of war, though gentlemen called them measures of defence; but, when the subject should be gone into, he would prove them to be those of war; and that the measure adopted by the President in relation to arming merchant vessels, is a war measure. On this ground he was ready to vote against any such acts, and in favor of anything which tended to counteract their effect.

But, said Mr. G., if there are gentlemen on this floor who conceive that, in addition to the information which has been given to the House, the despatches will give to them more irritating matter than they have yet had, which may have a tendency to change the opinion of those who, like him, are in favor of peace measures, he had no objection to their being communicated. He did not expect, however, that anything of this kind would change his opinion. The House had had enough of this matter last session, and in the late communications; but, on his mind, these would produce no effects as to the question of peace or war. It is true, as hinted by the gentleman last up, that some inconveniences may arise from the despatches being communicated, as it may prevent diplomatic characters from expressing themselves freely in future; but the President of the United States was not afraid of this, as during the last session he had communicated information of this kind, without being applied to for it. But if, after having examined the despatches, he is convinced it will be highly injurious to the public welfare, or endanger the safety of our Commissioners, or prevent the happy issue of our negotiation, to communicate the information, he will either give it, or state his reasons for withholding it to the House.

The question was then taken, and decided in the affirmative—yeas 65, nays 27, as follows:

YEAS—John Allen, George Baer, junior, Abraham Baldwin, David Bard, Bailey Bartlett, James A. Bayard, Thomas Blount, Richard Brent, David Brooks, Nathan Bryan, Demsey Burges, Samuel J. Cabell, John Chapman, Thomas Claiborne, William Charles Cole Claiborne, John Clopton, William Craik, John Dawson, John Dennis, George Dent, Lucas Elmendorph, William Findley, Nathaniel Freeman, jr., Albert Gallatin, William B. Giles, James Gillespie, Andrew Gregg, William Barry Grove, John A. Hanna, Robert Goodloe Harper, Carter B. Harrison, Jonathan N. Havens, Joseph Heister, David Holmes, Hezekiah L. Hosmer, Walter Jones, Edward Livingston, Matthew Locke, Matthew Lyon, James Machir, Nathaniel Macon, William Matthews, Blair McClenachan, Joseph McDowell, John Milledge, Anthony New, John Nicholas, Josiah Parker, Thomas Pinckney, John Rutledge, jr., Tompson J. Skinner, Samuel Smith, William Smith, Peleg Sprague, Richard Sprigg, jr., Richard Stanford, Thomas Sumter, Abram Trigg, John Trigg, Philip Van Cortlandt, Joseph B. Varnum, Abraham Venable, Peleg Wadsworth, John Williams, and Robert Williams.

NAYS—Stephen Bullock, Joshua Coit, Samuel W. Dana, Abiel Foster, Dwight Foster, Henry Glen, Chauncey Goodrich, Roger Griswold, Thomas Hartley, William Hindman, James H. Imlay, John Wilkes Kittera, Samuel Lyman, Daniel Morgan, Lewis R. Morris, Harrison G. Otis, Isaac Parker, John Reed, Jas. Schurman, Samel Sewall, William Shepard, Thomas Sinnickson, Nathaniel Smith, George Thatcher, Mark Thomson, Thomas Tillinghast, and John E. Van Alen.

Messrs. ALLEN and HANNA were apppointed a committee to wait upon the President with the said resolution.

Mr. KITTERA reported a bill for authorizing certain officers to administer oaths; which was committed for to-morrow.

### DEFENCE OF NEW YORK HARBOR

Mr. SEWALL, from the Committee for the Protection of Commerce and the Defense of the Country, made a report on the memorial of the Chamber of Commerce of New York, on the subject of the insecure state of the harbor of that port. The report states, that Congress had this subject under consideration at the last session, and provided that any State should be authorized to expend any such sum upon their fortifications as they should deem proper, not exceeding the sum of which such State was found indebted to the United States in the settlement of the accounts between the States and the United States. This proposition having been wholly neglected by the State of New York, and no cession having been made of the soil, the committee recommended, after stating that it will be proper to include a sum for purchasing cannon and ammunition for the said fortifications, the following resolution:

"*Resolved*, That a bill be reported to repeal the provision of cession in the act providing for the further defence of the ports and harbors of the United States, and provide in lieu thereof that the fortifications which shall be erected and allowed for by the United States pursuant to that act, shall become the property of the United States; also to provide that any State which shall accept of the proposal made by the said act, and proceed to finish any fortification heretofore commenced, and which by the President of the United States shall be judged of use in the defence of any port or harbor, or in making any additional fortifications, under his direction, shall be allowed, in the manner proposed by the said act, as well for all previous expenditures made since March 20, 1794, as for the expenses which shall be made pursuant to the said proposal, not exceeding the balance in which such State respectively has been found indebted to the United States."

The report was committed to the Committee of the Whole on the state of the Union.

### FOREIGN CONSULS

On motion of Mr. OTIS, the House went into a Committee of the Whole on the bill appropriating a sum of money for defraying expenses incurred by our Consuls and Vice Consuls; and, after filling the sum appropriated with $30,000, the committee rose, and the bill was ordered to be engrossed.

### FRENCH RELATIONS

The House then resolved itself into a Committee of the Whole on the state of the Union; when, after a suggestion from Mr. PINCKNEY, that it would be best to pass over the first resolution and go on to the others; and some observations from Mr. N. SMITH against passing over the first resolution, and in favor of coming to an immediate vote upon it, as being of no consequence, and deciding nothing, a motion was made by Mr. HARPER for the committee to rise, in order that the business might be postponed until the information or an answer from the President on the subject should be received; which was carried, and the committee rose accordingly.

Mr. ALLEN informed the House that the committee appointed to wait upon the President with the resolution which had been agreed to, had performed that service, and he had informed them that he would take the matter under consideration, and to what the public safety should seem to require.

### ORGANIZING THE MILITIA

The order of the day was next called for on the bill for organizing and disciplining the militia of the United States, and the House went into a Committee of the Whole on this subject; when the first section, which provides for the establishment of a select corps, having been read, a motion was made by Mr. VARNUM to strike it out, in order to try the principle of the bill. This motion was advocated by Messrs. VARNUM, NICHOLAS, and W. C. CLAIBORNE; and opposed by Messrs. J. WILLIAMS, MACON, SHEPARD, S. SMITH, HARPER, BROOKS, and DAYTON. No question was taken. The committee had leave to sit again.

TUESDAY, APRIL 3

Mr. HARRISON reported a bill providing compensation for the marshals, clerks, attorneys, jurors, and witnesses, in the Courts of the United States, and for repealing certain parts of acts therein mentioned, and for other purposes; which was committed for to-morrow.

SURVEY OF NORTHWESTERN LANDS

The SPEAKER laid before the House a letter from Rufus Putnam, Surveyor General, stating the difficulty and impractability of running north and south lines, according to the true meridian, in the survey of the Northwestern Territory lands, and suggesting the propriety of repealing that part of the law, and requiring, instead thereof, that all instruments used in the said survey be adjusted to one meridian. Referred to the committee on the subject of Northwestern Territory lands.

MEMORIAL ON PUBLIC AFFAIRS

Mr. GALLATIN presented the following memorial from forty members of the General Assembly of the Commonwealth of Pennsylvania, viz:

*To the Congress of the United States:*

The Memorial of the subscribers, members of the General Assembly of the Commonwealth of Pennsylvania, respectfully sheweth:

That your memorialists, faithfully attentive to the prosperity and happiness of their constituents, cannot contemplate the present crisis in the affairs of the United States, without feeling the strongest solicitude, by every honorable means, to avert the horrors of the war which threatens: and, although they claim no other influence on your deliberations and transactions than that to which they are entitled in common with all their fellow-citizens, they are persuaded that the public confidence reposed in them will at once justify the expression of their sentiments, and insure a liberal interpretation of the motives which actuate them in addressing those sentiments to your honorable body.

That your memorialists will not, on this occasion, take a retrospective view of the events of the American Revolution, in order to awaken a sense of gratitude for former services, nor advert the peculiar character of European war, in order to mitigate the feelings of resentment for recent injuries on the part of France; but regarding only the existing state of their country, its policy, its interests, and its independence, every principle of patriotism impels them, not merely to deprecate a public annunciation of hostilities, but firmly to discountenance every measure which tends to inflame the spirit of animosity, and to dissolve the bond of amity with that Republic.

That, whether your memoralists contemplate the independent resources of the Union, or the aid to be derived from a foreign alliance—the principles of a Republican system, or the means of gratifying the best wish of their constituents—they are alike impressed with the importance of pursuing a conciliatory and pacific course. They perceive, indeed, no glory, no benefit, to be attained for their country, through the medium of a war, that can compensate for the stagnation of commerce, the suspension of agriculture, the effusion of blood, the waste of treasure, the desolation of property, and the depravation of morals, which are its inseparable concomitants; while the issue of the European contest must either leave the United States without an efficient friend, or fatally associate them with the rival of their commerce, and the enemy of Republicanism.

That your memorialists, under these general impressions, submit the subject with great anxiety, but with great deference, to the consideration of your honorable body, trusting that your wisdom, co-operating with the wisdom of other departments of the Government, will be competent to the preservation of peace, without the sacrifice of any essential right, or the violation of any important trust. But, above all, your memorialists earnestly hope, that while the constituted authorities shall deem it unjust or inexpedient to engage in a public war, the neutrality and peace of the nation may not be put at hazard by authorizing private citizens to arm and equip, under any pretence, the vessels of the United States.

William Maclay, M. Leib, Samuel Maclay, P. Muhlenberg, John Moore, Balfer Geehr, Chas. Shoemaker, John Coningham, N. B. Boileau, P. Frailey, David Krause, Isaac Van Horn, Aaron Lyle, Jacob Painter, Abraham Horn, W. Sterrett, Samuel Snyder, Thomas Newhorter, W. Linnard, W. Hoge, Isaac

Weaver, jr., Manuel Eyre, John Smilie, James Harris, John Rea, Wm. Findlay, John Wright, Abraham Hendricks, J. Bonnett, Issac Worrell, Robert Philson, Robert Whitehill, A. Baird, John Hamilton, John Starbird, Christopher Lower, J. Kean, Samuel Dale, J. Brandon, G. Wilson.

Mr. GALLATIN moved that this petition be referred to the Committee of the Whole on the state of the Union.

Mr. ALLEN was stating some objections to the petition on account of its purporting to be from members of the Legislature of Pennsylvania; he thought no more weight was due to this petition than would be due to a petition from forty other individuals; when

A Message was announced from the PRESIDENT OF THE UNITED STATES. It was in the following words:

*Gentlemen of the Senate, and*
*Gentlemen of the House of Representatives:*

In compliance with the request of the House of Representatives, expressed in their resolution of the 2d of this month, I transmit to both Houses the instructions to and despatches from the Envoys Extraordinary of the United States to the French Republic, which were mentioned in my Message of the 10th of March last, omitting only some names, and a few expressions descriptive of the persons.

I request that they may be considered in confidence until the members of Congress are fully possessed of their contests, and shall have had opportunity to deliberate on the consequences of their publication; after which time, I submit them to your wisdom.

JOHN ADAMS.

UNITED STATES, April 3, 1798.

The above Message having been read, the galleries and House were cleared of strangers, and the House was occupied in reading the papers accompanying until past three o'clock, when they adjourned, without making any order respecting them.

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Extract from Madison Notes on Debates of Constitutional Convention Concerning Treaty Making Powers

FRIDAY, SEPTEMBER 7, 1787

TREATY MAKING POWER

Mr. MADISON then moved to authorise a concurrence of two thirds of the Senate to make treaties of peace, without the concurrence of the President.—The President he said would necessarily derive so much power and importance from a state of war that he might be tempted, if authorised, to impede a treaty of peace. Mr. BUTLER 2ded the motion

Mr. GORHAM thought the precaution unnecessary as the means of carrying on the war would not be in the hands of the President, but of the Legislature.

The CHAIRMAN. Since these pieces of legislation deal with the same subject, I wonder whether it wouldn't be more efficient to have Mr. Eagleton testify. Then we could question both of you and get your views together. Is it agreeable to you? Can you stay?

Senator JAVITS. Yes. It is agreeable to me.

COMMENDATION OF SENATE JOINT RESOLUTION 59

Mr. Chairman, may I say this, I consider the Eagleton resolution to be a very creative exercise in the effort to improve upon the framework which I have had the great gratification to author, and I am very hopeful that there are things in that resolution that we will find very useful in the final product.

The CHAIRMAN. Thank you very much.

You may stay right there if you would like.

Senator JAVITS. I may just go next door briefly to the Education Subcommittee meeting, where I am needed for a quorum, Mr. Chair-

man, while Senator Eagleton presents his prepared statement which I have already read.

The CHAIRMAN. All right. Senator Eagleton will you give your statement and then we will proceed to examine both of you at the same time.

Senator EAGLETON. Thank you, Mr. Chairman, and members of the committee.

## STATEMENT OF HON. THOMAS F. EAGLETON, U.S. SENATOR FROM MISSOURI

Senator EAGLETON. Mr. Chairman, I greatly appreciate the opportunity to testify before the Senate Foreign Relations Committee on Senate Joint Resolution 59 regarding the powers of the Congress and the President to commit the Armed Forces of the United States to hostilities.

At the outset let me say that I echo the sentiments as expressed by Senator Javits. I deem this matter to be of singular importance. Senator Javits pointed out that during his long tenure in both the House of Representatives and the Senate he would point to the war powers area and his bill as perhaps the single most important item that he dealt with during his tenure.

I have only been here 2 years but I, too, believe that during that brief period of time the war powers is the single most important area with which I have dealt.

### CONFUSION CONCERNING AUTHORITY FOR U.S. COMMITMENT IN SOUTHEAST ASIA

Today as we poke through the historical debris of the Vietnam era, it is difficult to identify why, and by what authority, the decisions were made which so deeply committed us in Southeast Asia.

Secretary Rusk brought out a something-for-everyone shopping list of Vietnam justifications on January 28, 1966, when conceding that the SEATO treaty was not necessarily self-triggering. He stated:

> I would not want to get into the question of whether—if we were not interested in the commitments, policy, and principle under the Southeast Asia treaty—of whether we have some legal way in order to avoid those commitments. I suppose that one could frame some argument which would make that case. But it would seem to us that the policy, which was discussed and passed upon by the executive and the Senate of that day, is that we are opposed to aggression against these countries in Southeast Asia, the members of the organization as well as the protocol states. In addition to that we have bilateral assistance agreements to South Vietnam. We have had several actions of the Congress. We have had the annual aid appropriations in which the purposes of the aid have been fully set out before the Congress. We have had special resolutions such as the one of August 1964, and we have had the most important policy declarations by successive Presidents with respect to the protection of South Vietnam against Communist aggression.

And recently, new Presidential powers to insure a just peace and facilitate an unspecified withdrawal schedule, have been discovered and engrafted to past executive claims.

Congress remains confused. At the end of a colloquy on repeal of the Tonkin Gulf resolution between Senator Robert Dole and myself

last June, the only thing that was clear was that the authority under which U.S. troops have been engaged and would remain engaged in Vietnam hostilities was unclear. I request that the text of the colloquy be made part of the record at the end of my remarks.

The CHAIRMAN. Without objection, so ordered.

Senator EAGLETON. This confusion is not cited to rekindle debate over what has occurred in the past. Rather, it illustrates that the most significant question to emerge from the Vietnam debate—who decides when and where America goes to war—remains unanswered.

If past Presidential assertions are accepted, or if the confusing barrage of legislative-executive claims and counterclaims regarding the war powers continues without clarification, we will have witnessed a major restructuring of the Constitution. Instead of making the precedent decision of whether or not to authorize hostilities before they begin, Congress will have been left in the position of either ratifying or rejecting presidentially initiated hostilities.

In my view, both constitutional theory and the practical need for confidence in American institutions at home and in the world require that broad theories of unilateral Presidential warmaking authority be rejected.

WHO INITIATES HOSTILITIES?

Now who initiates hostilities?

The 1969 Foreign Relations Committee report on the national commitments resolution stated of the war powers:

> This power was not, like certain others, divided between the executive and legislature; it was conferred upon Congress and Congress alone.

As Senator Javits stated of the guiding principle of both his bill, S. 731, and mine, Senate Joint Resolution 59:

> The enumeration of congressional war powers in the Constitution and the historical origins of the "declare" and "Commander in Chief" clauses testify that the constitutional framers intended Congress to have the primary authority over the initiation of war and responsibility for the formulation of basic guidelines for the conduct of war.

I might parenthetically add, Mr. Chairman, although I don't like labels, if one considers himself to be a strict constructionist of the U.S. Constitution, both the Javits bill and Senate Joint Resolution 59 are the epitome of strict construction drawing as their genesis the constitutional debates and the authorship of Madison, Jefferson, Hamilton, and Jay.

Three learned constitutional historians have agreed with this basic principle in testimony before the committee. Indeed, most members of the committee, and I daresay, a majority of the Senate, are disturbed by the erosion of the congressional war powers.

PROPOSED LEGISLATION TO RESTORE ROLE OF CONGRESS

The question, it seems to me, is not whether something should be done to restore Congress role in the life and death decision of whether to go to war. Rather it is—as Senator Javits, myself, and others ask—what should Congress do?

Currently, four legislative answers have been proposed.

First, there is the Zablocki resolution, House Joint Resolution 1,

introduced in essentially the same form as it passed the House last year. It expresses the sense of Congress that the President should seek appropriate congressional consultations before involving the Armed Forces of the United States in armed conflict and should continue such consultation periodically during such armed conflict. It is a weak and vaguely worded effort that falls far short of clarifying the warmaking power of the Congress and the President.

Senator Taft also has introduced a resolution, Senate Joint Resolution 18, which, while vague as to the future delineation of congressional-executive powers, is meritorious in its attempts to force Congress to face up to its responsibilities in Southeast Asia.

Third, the bill, introduced by Senator Javits last year has been reintroduced this year. As the committee knows, Senator Javits was the first Senator in this field and has done an admirable job of bringing this important issue to the attention of the Senate and the public.

Included at the end of my statement is a chart which illustrates the substantive difference between my proposal, Senate Joint Resolution 59, and the aforementioned vehicles.

Obviously there are some similarities among the Taft, Javits, and Eagleton proposals. All attempts in some way to delineate congressional from Presidential warmaking power.

MAJOR DIFFERENCES BETWEEN SENATE JOINT RESOLUTION 59 AND S. 731

However, since I believe the Javits bill is substantively superior to both the Taft resolution and the Zablocki resolution, I would like to devote the next section of my testimony to several differences between Senate Joint Resolution 59, my proposal, and S. 731, Javits' proposal.

The major differences are:

Senate Joint Resolution 59 recognizes that treaties previously or hereafter entered into by the United States shall not be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further congressional authorization. The Javits bill does not.

Senate Joint Resolution 59 recognizes the President's power to act unilaterally, in certain carefully defined instances, to rescue citizens of the United States who are being subjected to an imminent threat to their lives. It does not include property as does the redraft of the Javits bill and you heard Senator Javits who thought perhaps the property section ought to be deleted from his bill.

Senate Joint Resolution 59 spells out that the President may commit the Armed Forces of the United States to hostilities through a "declaration of war, statute, or joint resolution, but authorization may not be inferred from legislative enactments, including appropriations bills, which do not specifically include such authorizations." The Javits bill limits prior authorization to a declaration of war and does not specifically deal with inferred authorization through appropriations measures.

Senate Joint Resolution 59 defines the term "hostilities" to include "land, air, or naval actions taken by the Armed Forces of the United States against other armed forces or the civilian population of any other nation; the deployment of the Armed Forces of the United States

outside of the United States under circumstances where an imminent involvement in combat activities with other armed forces is of a reasonable possibility; or the assignment of members of the Armed Forces of the United States to accompany, command, coordinate, or participate in the movement of regular or irregular armed forces of any foreign country when such foreign armed forces are engaged in any form of combat activities." In my judgment, the Javits resolution leaves the term "hostilities" somewhat vague.

### CONSTITUTIONAL PROCESSES UNDER TREATIES

The list of treaties now in effect is well known to the members of this committee, as is the requirement incorporated in each that the signatories act "in accordance with their constitutional processes."

The Senate, the only body to act on treaties, does not possess the power to commit the United States to hostilities without the consent of the House. In fact, Madison noted that a possibility of giving the Senate alone the power to declare war was considered—and rejected. Butler of South Carolina reported to his State's legislature, that such a proposal "was objected to as inimical to the genius of the republic," because it would destroy the necessary balance that the constitutional framers were anxious to preserve. It is clear that through the use of the treaty power the Senate and the President cannot legitimately authorize hostilities without the concurrence of the House.

Even if they could, however, none of the treaties currently in force requires an automatic response. Our most strongly worded commitment, the North Atlantic Treaty, states:

> The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them * * * will assist the party or parties so attacked by taking * * * such action as it deems necessary, including the use of armed force * * *.

But even under this language, the United States is not committed to an immediate or automatic response. As the Senate Foreign Relations Committee told the 81st Congress in its report on the NATO treaty:

> Would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack of New York City? In such an event does the treaty give the President the power to take any action without specific congressional authorization which he could not take in the absence of the Treaty? The answer to both of these questions is no.

After rereading murky Presidential assertions on SEATO, it seems prudent rather than redundant to spell out that treaties do not authorize hostilities without further congressional action.

Section 1 of Senate Joint Resolution 59 merely restates what the Constitution and all the treaties to which the United States is a signatory require:

> No treaty previously entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further congressional authorization.

### SECTION A(4) OF S. 731

Section A, subsection 4, of the Javits bill, pertaining to treaties, not only fails to spell this out but, if enacted by both Houses in its present

form, would serve, I believe, as the functional equivalent of a predated—although limited—declaration of war. Under it, the Executive could unilaterally engage the United States in hostilities in Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad-Tobago, Uruguay, Venezuela, Australia, France, New Zealand, Pakistan, the Philippines, Thailand, the United Kingdom, South Vietnam, Norway, Portugal, Greece, Belgium, Canada, Denmark, Iceland, Italy, Luxembourg, the Netherlands, Turkey, the Federal Republic of Germany, South Korea, Taiwan, and Japan, all treaty signatories with the United States.

What is at issue in section A, subsection 4, is whether the President should have unilateral authority to commit U.S. troops to offensive hostilities under our far-reaching network of treaties.

Three early Supreme Court decisions, *Bas* v. *Tingy*, 4 U.S. (4 Dallas) 37 (1800); *Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1 (1801) and *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170 (1804), provide a solid underpinning for drawing the line between offensive and defensive war.

To the court, the whole powers of entering into an offensive war were vested in the Congress alone. Included in these powers was authority to declare either general or narrowly limited hostilities. Presidential authority to take offensive action under the guise of the Commander in Chief power arose only after Congress had acted. Moreover, while the tactics of warfare might require that the President have certain discretionary powers, even these could be narrowed by precedent legislative action.

Under Senate bill 731 and Senate Joint Resolution 59, the President is recognized to have ample authority to fight a defensive war to protect American forces when they are legally stationed in a country with which the United States has a treaty commitment.

However, if the Javits bill becomes law, having passed both Houses of Congress, it will have fulfilled the requirement that Congress act affirmatively before U.S. forces can be committed to offensive operations. While not arguing the constitutionality of such a predated declaration of war at this time, I do question the wisdom of sanctioning such Presidential discretion.

### PROTECTION OF U.S. CITIZENS AND PROPERTY ABROAD

Both Senate bill 731 and Senate Joint Resolution 59 provide for the protection of U.S. citizens abroad, with Senate Joint Resolution 59 providing a much narrower set of guidelines: Limiting withdrawal of U.S. citizens to those being subjected to an imminent threat of their lives and requiring that such withdrawal be as rapid as possible. S. 731 provides no such clarifying provisions and provides not only for the protection of U.S. citizens but of U.S. property as well.

Although there may be occasions when protection of American-owned property abroad is both necessary and in the national interest, the decision to commit the United States to hostilities over tin mines in Bolivia or oil wells in Venezuela belongs with Congress, not the President.

I will not belabor this point since the previous witnesses have spoken to it.

MEANS OF AUTHORIZING OR SUSTAINING HOSTILITIES

Senate Joint Resolution 59 recognizes that Congress can authorize indefinite hostilities, prior to their commencement, through a declaration of war, statute, or joint resolution. As I read the Javits bill, only a declaration of war can serve as legitimate prior authorization to commit U.S. troops to hostilities for more than 30 days without further specific affirmative action. Perhaps the Javits language is better in this regard. It is certainly more restrictive.

One possible amendment to Senate Joint Resolution 59 could incorporate this concept if deemed to be wise in the committee's judgment, and I have attached such language at the end of this statement for the committee's consideration.

However, in my judgment, S. 731 is unclear as to whether appropriations measures can be interpreted as legitimate congressional authorization for the continuance of hostilities. Past administrations have argued, Mr. Chairman, that congressional failure to stop appropriations for the Department of Defense, which pays and supplies troops, some of whom are engaged in ongoing hostilities, is tantamount to congressional sanction of such hostilities.

Senate Joint Resolution 59 takes the position that appropriations bills should be rejected as a means of authorizing or sustaining hostilities. Unless they are, our entire constitutional system of carefully conceived checks and balances is turned on its head. The President will be free to initiate and sustain hostilities unilaterally without a specific restriction enacted by Congress. And Congress will be required to veto such ongoing hostilities by the two-thirds vote necessary to override a Presidential veto rather than authorizing such hostilities to begin with by a majority vote.

DEFINITION OF HOSTILITIES

Should hostilities be defined? Should the continuance of a secret air war or the deployment of U.S. troops to world hot spots or the assignment of U.S. advisers to foreign combat troops in the field require affirmative congressional authorization? I personally believe so.

And by defining hostilities Senate Joint Resolution 59, unlike S. 731, specifies the areas in which affirmative congressional action is necessary. Obviously hostilities include land, air, or naval actions taken by the Armed Forces of the United States against other armed forces or the civilian population of any other nation. But Senate Joint Resolution 59 is more specific. It includes the deployment of U.S. forces outside the United States under circumstances where an imminent involvement in combat activities is a reasonable possibility. It also includes the assignment of U.S. soldiers to "accompany, command, coordinate, or participate in the movement of regular or irregular armed forces of any foreign country when such foreign armed forces are engaged in any form of combat activity."

There is well-founded precedent for such limitations. In the absence of limiting congressional legislation, Presidential power to move Armed Forces of the United States in international waters and to station them on territory of our allies has generally been accepted, except where such action could reasonably be expected to lead to hostilities. Only once has this principle flagrantly been abused. In 1846, after the annexation of Texas, President James Polk ordered American

troops to enter the disputed territory between the Nueces and Rio Grande River. Hostilities immediately broke out and Congress thereafter declared war against Mexico. However, some 18 months later, the House of Representatives concluded that the President had unconstitutionally begun the war and, in effect, Polk was justly censured.

Presidential power to move the Armed Forces of the United States is not, and should not, be viewed as extending to place American men in situations where combat is almost inevitable.

And, as Vietnam has illustrated, limited deployments of U.S. military advisers to countries where combat activities are in progress or could be expected to commence shortly have become increasingly more dangerous in an era when brush-fire wars and guerrilla warfare are becoming even more common.

Senate Joint Resolution 59 specifically requires that both Houses of Congress concur in any Presidential decision to deploy U.S. troops or advisers to trouble spots or combat areas where involvement in hostilities is a reasonable possibility.

I would call to the committee's attention the chart, which indicates the circumstances under which the President could act without specifically authorizing congressional action. (See p. 235.)

ROLE OF COMMANDER IN CHIEF DURING AUTHORIZED HOSTILITIES

Senate Joint Resolution 59 attempts to clarify the role of the President as Commander in Chief during authorized hostilities. This is an admittedly difficult area. There are abundant writings on the Commander-in-Chief power by the authors of The Federalist Papers and in the records of the constitutional convention.

The record is clear that those in attendance at the convention were surprised and dismayed at the suggestion that the President be given power to make decisions which might result in offensive military action.

As one delegate commented, he "never expected to hear in a republic a motion to empower the executive alone to declare war." Centralized decisionmaking on whether or not to go to war was an anathema to the founding fathers. As Hamilton noted:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.

To the framers of the Constitution, the title "Commander in Chief," as described in Federalist Paper No. 69:

> Would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all which by the Constitution under consideration, would appertain to the legislature.

But these statements were directed toward the President as policymaker before the initiation of hostilities. Once hostilities had commenced, according to Hamilton:

> The direction of * * * (war) most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.

During authorized hostilities Congress clearly was not to be involved in making particular tactical decisions. But matters of policy were a different matter. As discussed earlier, a changeover from defensive to offensive action would have to be sanctioned by the Legislature, as would tactical decisions which might bring new opponents into the war. And recognizing the possibility that strong-willed Presidents, exercising their Commander-in-Chief powers, might show great reluctance in returning to Congress for approval of new decisions once hostilities had begun, the Founding Fathers gave the Congress full power over the expenditure of funds for the military insisting that Congress review military appropriations at least every 2 years. As Federalist Paper No. 24 notes

> The whole power of raising armies was lodged in the Legislature * * * (subject to) an important qualification * * * which forbids the appropriations of money for the support of an army for any longer period than 2 years—a precaution which upon a nearer view of it will appear a great and near security against military establishments.

Obviously, it would be far from ideal for Congress to turn on the Commander in Chief once hostilities had begun by using the appropriations power to force him to alter his course. But the Founding Fathers recognized, such action had been taken by English Parliaments against willful Kings and might be necessary for Congresses faced with strong and militant Presidents.

In short, Congress' responsibility did not end with the declaration of hostilities. And the President's power once hostilities were commenced, although somewhat increased, remained limited.

Senate Joint Resolution 59 takes these considerations into account.

First, it deals with the problem of congressional overview by requiring that while authorized hostilities are in progress the President report to the Congress periodically on the status of such hostilities, as well as on the estimated scope and length of such hostilities.

Second, it attempts to deal with the question of executive decisions which could greatly enlarge the scope of authorized hostilities. It recognizes that once authorized hostilities are commenced the President, regardless of the limitations contained in the specific authorizing legislation, can order the U.S. Armed Forces to "enter, invade, or intrude upon the territory or airspace of a country with which the United States is not then engaged in hostilities" when:

(a) In hot pursuit, which this resolution specifically defines, or

(b) When a clear and present danger exists of imminent attack on the United States or its forces.

Mr. Chairman, the 91st Congress debated these points at great length. Most of the debate was inconclusive and unclear, complicated by the lack of any common war power guidelines as well as congressional-executive differences on what the Commander in Chief powers were and what the Gulf of Tonkin resolution represented.

Senate Joint Resolution 59 attempts to deal with the problem in the future when, hopefully, our warmaking processes are well defined and orderly.

OTHER DRAFTING DIFFERENCES

Other differences in drafting may be worth a few words. Senate Joint Resolution 59 attempts to define as precisely as possible the

instances where the President can act unilaterally without congressional authorization. For instance, section 3(b) states that the President has the power, without prior congressional authorization, to:

> Repel an attack on the Armed Forces of the United States by military forces with whom the United States is not engaged in hostilities at the time of such attack and concurrently to eliminate or reduce any clear and present danger of future attacks by the military forces which are committing the attack being repelled.

There are several key and limiting words involved here, for instance the word "concurrently," the phrase "clear and present danger," and the phrase "the military forces which are committing the attack being repelled."

These key words are meant to insure that defensive action remains just that, defensive.

I call these differences in language to the committee's attention.

### OMISSION OF PROVISION CREATING CONGRESSIONAL COMMITTEE

Often omissions are as important as text. Earlier drafts we were working on in-house in my office, contained several differences which I will bring to the committee's attention if I may. One was the provision creating a congressional committee, similar to that suggested by Henry Steele Commager the other day who offered the idea that:

> . . . the Senate meet the argument of emergency, hypothetical as it is, by creating a permanent committee, a quorum of whose members would remain permanently in Washington, with authority to require that the President consult with the Senate or the Congress before taking any action that might involve the Nation in armed conflict. Such a committee could be counted on to respond to a genuine emergency just as promptly as would the President, and counted on, too, to present the case for caution.

However, the guidelines set forth in Senate Joint Resolution 59 seem to me sufficiently broad to cover the argument of emergency. Further, with modern communications and rapid transportation, such a committee would only add hours, at best, to any deliberation.

### DELETION OF SECTION SANCTIONING PREEMPTIVE STRIKE

Now, the very troublesome question of preemptive strike. This is another one that we kicked around, had in it the draft of the resolution, took it out, and it is now out again.

Another section, which sanctioned a preemptive strike to avoid "the clear and present danger of an imminent attack on the United States by military forces with which the United States is not engaged in hostilities at such time to the extent necessary to eliminate such danger," was deleted in the final resolution.

The concept of Presidential power to act preemptively is not new. In fact, the Articles of Confederation contained the first and only explicit grant of power for preemptive strike:

> No state shall engage in any war without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted.

A similar provision was omitted, however, from the U.S. Constitution.

Justice Story again raised the possibility of Presidential powers for preemptive action when he stated in *Martin* v. *Mott*, 25 U.S. (12 Wheat) 19 (1827):

> The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

In the nuclear world of 1971, the stakes are no longer isolated villages subject to attack by Indians. In a sane world dependent on the universal acceptance of mutual deterrence for its survival, a first strike should not be sanctioned. But no one can guarantee that some time, some day, a demented world leader will not attempt an irrational nuclear attack on the United States. This remote, frightening possibility may be reason enough to justify an explicit grant of power to the President to act unilaterally and preemptively.

Perhaps, as Congress attempts to clearly define the war powers of the executive and legislative branch, we should also recognize that in the final analysis all any resolution can expect to achieve is to hold a President legally and politically accountable for his actions. The consequences of a nuclear holocaust make the questions of political and legal responsibility moot.

### EXEMPTION OF CURRENT HOSTILITIES IN INDOCHINA

Finally, Mr. Chairman, the war in Indochina.

And, finally, the most troubling question of all is whether present hostilities can be omitted from consideration. Both Senate Joint Resolution 59 and S. 731 exempt current hostilities from the coverage or scope of the resolutions or bills. This is a well-intentioned attempt to elevate debate from the morass of vitriolic feelings that many of us share over the Indochina war.

But can Congress turn its back on its present responsibilities and hope to maintain credibility in the future? Without the Gulf of Tonkin resolution, the President is conducting hostilities without any congressional authorization. Segments of the Armed Forces of the United States are committed to hostilities in support of:

Laotian forces in Laos,

Cambodian forces in Cambodia,

South Vietnamese forces in Laos, Cambodia, and South Vietnam.

And daily air activity over North Vietnam continues.

Should not the Congress authorize certain actions in Southeast Asia through positive legislation rather than tacitly accepting Presidential claims of broad Commander-in-Chief powers by forbidding specific action through negative legislation?

A previous draft of my own resolution, Senate Joint Resolution 59, provided a 30-day grace period—the period specified in both bills for affirmative congressional action—for all ongoing hostilities. It also contained a provision authorizing hostilities by the Armed Forces of the United States "within the geographical confines of South Vietnam as the President shall determine to be necessary to facilitate the withdrawal of such forces." Such a provision would provide the congressional authorization which is now lacking, but also would require the President to seek congressional approval for the extensive U.S. air war

now in progress throughout Southeast Asia within 30 days of enactment, but I do emphasize and underscore the draft before the committee. Both the Javits bill and the Eagleton resolution specifically exclude current hostilities from both of those drafts.

CONCLUSION

Mr. Chairman, all in all, both House and Senate debate over limiting American participation in Vietnam has fallen far short of clarifying the locus of warmaking authority. The Congress has remained hopelessly divided on a war it will not condone and yet refuses to stop. The actual decisions about the length and breadth of this existing conflict remain almost entirely in the hands of the Commander in Chief.

Some would argue that decades of congressional acquiescence plus our performance during the Vietnam war constitute a persuasive case for formally restructuring the Constitution so as to give the President a broader, more unilateral warmaking authority.

I, for one, would oppose any such formal abdication of congressional authority, as I oppose its further erosion.

To me, the tragic Presidential miscalculations on Vietnam—almost destroying that country while seriously dividing this one—are an even more compelling argument for returning to the principles of collective judgment and deliberation.

We do live in a smaller, more dangerous, and rapidly changing world. But these factors, rather than diminishing the value of collective judgment and collective deliberation, make it all the more important.

While "declarations of war" may be anachronisms, the death, destruction, tragedy, and suffering of war remain ever-present realities. And the consequences of war to a democratic society are no less destructive.

Because I feel strongly that the way we go to war must be clarified, I have introduced Senate Joint Resolution 59 to specify the constitutional application of congressional and executive powers in the warmaking process.

Practically, Senate Joint Resolution 59 is important because it provides political guidelines by which future Congresses can decide how and when to go to war. And by requiring that Congress act affirmatively within 30 days to sustain hostilities in the absence of a specific congressional authorization, Senate Joint Resolution 59 assures that Congress will again be involved, as the Constitution mandates that it be involved, in the life-and-death decisions which face a democracy on the brink of war.

Second, it provides, in the words of the Supreme Court, "judicially discoverable and manageable standards" by which future war can be judged.

Now, Mr. Chairman, I do not claim that Senate Joint Resolution 59 cannot be improved upon and, in fact, suggested some areas of possible improvement. Nor can I claim that it will serve as an absolute guarantee against the occurrence of nonauthorized hostilities in the future. The Indochina war might have occurred even if the guidelines of responsibility had been clearly defined.

And this resolution, or any other resolution, can be violated by a Chief Executive who chooses to do so, no matter how clear and how precise we make its terms.

Furthermore, no resolution can force Congress to act responsibly. It is clear that Presidential decisions shaped the course of the Indochina war and that an indifferent Congress provided little or no restraint on Executive actions. Some politicians will continue to prefer these unclear guidelines, for scapegoats are often popular in politics and the assumption of responsibility often is not.

But these are problems that exist with many of the institutional devices we have developed in an effort to make the Government operate in an orderly fashion. We cannot order good faith; all we can attempt to do is impose clear criteria within which men of good faith can and will operate.

INSERTIONS FOR THE RECORD

Mr. Chairman, I ask that various appendixes be included in the record at the conclusion of my testimony and also a speech which I delivered in New York City on Saturday, June 13, 1970, at the Columbia University Law School, wherein I pointed out some of my thinking on the warmaking powers and the scope of legislation that I was then considering.

Finally, let me say, Mr. Chairman, that S.J. Res. 59 is now cosponsored by Senators Inouye, McGovern, and Montoya.

Thank you.

(The documents referred to follow:)

Appendix A

[From the Congressional Record, June 23, 1970]

Mr. FULBRIGHT. Well, later, in a different part of his statement, the Senator from New Hampshire does refer to the fact, which appears a little later on down on the same page, and I will read it:

"Then one by one, we have had all of these amendments. And I do not doubt that they are worthy amendments. Like Brutus, they are all honorable, but I do so wish that the distinguished Senator from Arkansas who undertook to rebuke and to look down his nose at the poor young Senator from Kansas who dared to offer an amendment on the floor of this body that had not been offered and considered by the Committee on Foreign Relations, were here. As a matter of fact, it had been considered by the great, sanctified Committee on Foreign Relations."

Well, if I looked down my nose, I was not aware of it, but, anyway, the Senator from Kansas is a very eloquent orator, and I noticed he got a number of laughs, which is most unusual. If anyone has talent enough to generate a laugh in times like this, he deserves a "chromo," as my mother used to say, and the Senator from Kansas has brought a talent to this body unequaled by anybody.

But, to set the record straight, I was not complaining that this matter had not had a hearing. It had had a hearing. What I was complaining about was that the Senator had chosen to ignore this body's own constituted committee. That is not comparable to the situation of offering an amendment on the floor to an appropriations or any other bill that has not had a hearing by anybody at all. That is quite a different matter. At least that I think should be kept straight.

Mr. President, I understand that the distinguished Senator from Missouri (Mr. EAGLETON) had, by prearrangement, an understanding with the Senator from Kansas, to whom he wished to put certain questions. I ask unanimous consent that I may yield to the Senator from Missouri without losing my right to the floor, for that purpose.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

The Senator from Missouri.

Mr. EAGLETON. I thank the distinguished Senator from Arkansas for his courtesy. I would like to propound certain questions to the Senator from Kansas, the author and principal sponsor of amendment No. 715.

Mr. STENNIS. Mr. President, will the Senator yield to me for a question?

Mr. EAGLETON. I am pleased to yield.

Mr. STENNIS. Mr. President, I do not object to this procedure, but I came here really to hear the Senator from Arkansas. May I ask him when he expects to resume the floor?

Mr. EAGLETON. Mr. President, I hope the Senator from Mississippi will remain for a few minutes to hear some pearls of wisdom from me.

Mr. STENNIS. I had another, mandatory meeting, and I really should be there, but I will remain for now.

Mr. EAGLETON. Mr. President, I think it would be of interest for the Senate to discover what might follow in the wake of the repeal of the Gulf of Tonkin resolution, which is the gravamen of the Dole Amendment No. 715. Perhaps the best way to get at that would be to propound some questions to the principal author of the amendment (Mr. Dole). If he would be so kind as to respond to these questions, then perhaps we might see a little better down the road where we would be if the amendment were adopted and subsequently enacted by the House and later signed by the President.

First, I would like to ask, in the opinion of the Senator from Kansas, under what authority troops are presently stationed or found in Southeast Asia.

Mr. DOLE. Let me respond with the knowledge gained in the short time I have been in the Senate. The Senator from Missouri and I arrived at the same time.

On July 1, 1964, there were approximately 17,000 troops in Vietnam. At the end of August 1964 there were 18,000 troops in South Vietnam. By June of 1965 there were some 52,000 troops in Vietnam.

It is my understanding that the Johnson administration and the Kennedy administration based their commitment in Vietnam on a number of factors: First, the Southeast Asia Treaty, which was almost unanimously approved by the Senate; second, pledges made of promised support by three successive Presidents of the United States; third, an assistance program that was granted annually beginning in 1965 by a bipartisan majority in both Houses of Congress; fourth, the declaration which we joined our SEATO and ANZUS allied in making; fifth, our ministerial council meetings in 1964 and 1965; and finally, of course, the Gulf of Tonkin resolution itself, which was approved August 10, 1964, by a combined vote of the House of Representatives and the Senate of 514 to 2.

Mr. EAGLETON. I thank the Senator for his recitation of how the Johnson and Kennedy administrations, especially the Johnson administration, may have viewed their authorization to go into Southeast Asia; but my question to the Senator from Kansas, as author of amendment 715, was under what authority is the present President, in the month of June 1970, found in Southeast Asia? What does he consider to be the present authority for the presence of America troops in South Vietnam?

Mr. DOLE. I would suggest that the representation just made would indicate, of course, that they were there in January of 1969, when President Nixon took office. I considered and voted for the Gulf of Tonkin resolution as a Member of the other body and am aware of that resolution. I frankly did not consider it necessary at that time, to become more involved in South Vietnam. It may have been necessary at that time, as the Senator from Arkansas and others pointed out, to give some direction and support to the President of the United States.

That was during a time of escalation, I might say to the Senator from Missouri. The Gulf of Tonkin resolution was an instrument of escalation. It was sort of the "get in" resolution passed by Congress. Now we are in the process of getting out. We are not in the process of escalation at this time, so I do not know quite how to respond to the question of the Senator from Missouri, except to say that now we are now deescalating. We are bringing troops home. The troop level has been reduced by 115,500 men. Another 50,000 reduction has been announced and will be carried out by October 15; and another 100,000 by next May 1. Now we are in a process of disengagement; we are not in a process of escalation. I would point out, the com-

mittee report which accompanied the resolution to the Senate floor in August of 1964, contained the following statement:

"Senate Joint Resolution 189 is patterned quite closely upon precedents afforded by similar resolutions; the Formosa resolution of 1955, the Middle East resolution of 1957, and the Cuba resolution of 1962.

"The phrasing in section 2, 'in accordance with the obligations under the Southeast Asia Collective Defense Treaty' comprehends the understanding in that treaty that the U.S. response in the context of article IV(1) is confined to Communist aggression. It should also be pointed out that U.S. assistance, as comprehended by section 2, will be furnished only on request and only to a signatory or a state covered by the protocol to the SEATO Treaty. The protocol states are Laos, Cambodia, and South Vietnam."

So I say that the Tonkin Gulf resolution was only one in a series of justifications or reasons for commitment in South Vietnam, and that as to its repeal, as stated on March 12, 1970, in a letter from H. D. Torbert, Jr., Acting Assistant Secretary of State for Congressional Relations, addressed to the Honorable J. William Fulbright, chairman of the Committee on Foreign Relations:

"We neither advocate nor oppose congressional action—with reference to the Tonkin Gulf resolution."

The point, I might say, is that this administration has not relied upon the Gulf of Tonkin resolution and does not now rely upon the Gulf of Tonkin resolution. I assume the Senator from Missouri favors repeal of the Gulf of Tonkin resolution, as does the Senator from Kansas. There is no opposition to its repeal from the administration. They are not relying on the Gulf of Tonkin resolution. They have not relied on the Gulf of Tonkin resolution. There has been no escalation by this administration. There has been no escalation in the number of troops nor in the bombing.

That is my response.

Mr. FULBRIGHT. Mr. President, could I interject, just to clarify, this inquiry? The Senator says they do not rely on it. What do they rely on?

Mr. DOLE. I am not certain, but I believe they rely primarily on the fact that, on January 20, 1969, there were 550,000 troops in Southeast Asia, and the President is charged with their protection in the exercise of his authority as Commander in Chief.

I believe the President relies on the facts, and the facts have been cited, and the President is in the process of disengagement, not as rapidly as some would like, but I believe he is relying on the fact that we were there, that when he took the oath of office American troops were there, and that he had a duty as Commander in Chief, which we have discussed at some length in the past several weeks, not only to protect American troops but, in accordance with a plan announced last May, to pursue the success of the Vietnamization program and to bring those troops home.

Mr. EAGLETON. Mr. President, I am not quite certain I fathom what the Senator is saying. If I am doing him an injustice, I am sure he will correct me, but I take it he is saying that one item we can definitely eliminate is the Gulf of Tonkin resolution, that the President of the United States under no circumstances and under no set of facts says he is relying on the Gulf of Tonkin resolution at all; is that correct?

Mr. DOLE. From what I understand of the administration's position, I think that is correct.

Mr. EAGLETON. There are 400,000-plus troops now in South Vietnam, in various stages of demobilization, deescalation, or whatever term is applicable, but there are 400,000-plus troops there. I take it they are there under some authority, either constitutional, statutory, or by treaty. Is that correct?

Mr. DOLE. That is right. Basically it is constitutional authority—the same constitutional authority President Kennedy had, President Truman had, President Eisenhower had, and President Johnson had.

Mr. GOLDWATER. Mr. President, will the Senator yield?

Mr. DOLE. The Senator from Missouri has the floor. Will he yield to the Senator from Arizona?

Mr. EAGLETON. Mr. President, I would like to finish this series of interrogations first, if I may.

May we eliminate, by the process of elimination, some of the others? We have eliminated the Gulf of Tonkin resolution. That is not our authorization for being there.

Mr. DOLE. If I might respond. That may have been used at the time as a justification for having more troops there. At that time, as I recall, we were of course, threatened. The *Turner Joy*, the *Maddox*, and other ships were threatened on the high seas; at least that was the report many of us had. We believed that report, and some of us still believe it. But the Gulf of Tonkin resolution was important because it did give new impetus; it did provide a rallying point for America; and it gave President Johnson an opportunity, which I supported, to increase the number of troops in South Vietnam, with congressional support.

Let me say that President Johnson did consult with the leaders. He consulted with the leaders of the House of Representatives and the Senate after there had already been retaliation, but there was consultation. The Gulf of Tonkin resolution was used quite broadly. I shared some of the apprehension of the Senator from Arkansas with reference to its interpretation, and perhaps some of the abuses, of the Gulf of Tonkin resolution. But we were there, American military personnel were in South Vietnam prior to the Gulf of Tonkin resolution, this is the point I am making, so we do not rely on it for getting out.

Mr. EAGLETON. Mr. President, I am a bit more confused now. I thought I was on the track of clarification.

At the time of the Gulf of Tonkin resolution, which was passed in August 1964, there were in South Vietnam some 20,000-odd troops.

Mr. DOLE. I beg the Senator's pardon.

Mr. EAGLETON. At the time of the Gulf of Tonkin resolution, in August 1964, am I correct that there were some 20,000 troops in South Vietnam?

Mr. DOLE. That is right I mistakenly said earlier 180,000. There were about 18,000.

Mr. FULBRIGHT. 16,000 to 18,000.

Mr. EAGLETON. 18,000 or 20,000 at the time of the Gulf of Tonkin resolution; and there are today in excess of 400,000 troops in South Vietnam—which I admit, of course, is a reduction from the high of 550,000 plus.

But my question again is, does President Nixon, insofar as the Senator knows, rely on the Gulf of Tonkin resolution as has authorization for having more than 400,000 troops in South Vietnam?

Mr. DOLE. Of course, I am not certain what the President may have in mind, but it may be well, at this point, to have printed in the RECORD, if the Senator from Missouri has no objection, a paper entitled "Legality of United States Participation in Defense of Vietnam," prepared by the Department of State, Office of the Legal Adviser, dated March 4, 1966, which covers the very basic questions now being asked. I can recite from that document, but it might be well to have it in the RECORD in full.

Mr. EAGLETON. Mr. President, I ask unanimous consent that it be printed at this point in the RECORD.

There being no objection, the document was ordered to be printed in the RECORD, as follows:

"THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIETNAM

"(This legal memorandum was prepared by Leonard C. Meeker, Legal Adviser of the Department, and was submitted to the Senate Committee on Foreign Relation on March 8.)

"I. THE UNITED STATES AND SOUTH VIET-NAM HAVE THE RIGHT UNDER INTERNATIONAL LAW TO PARTICIPATE IN THE COLLECTIVE DEFENSE OF SOUTH VIET-NAM AGAINST ARMED ATTACK

"In response to requests from the Government of South Viet-Nam, the United States has been assisting that country in defending itself against armed attack from the Communist North. This attack has taken the forms of externally supported subversion, clandestine supply of arms, infiltration of armed personnel, and most recently the sending of regular units of the North Vietnamese army into the South.

"International law has long recognized the right of individual and collective self-defense against armed attack. South Viet-Nam and the United States are engaging in such collective defense consistently with international law and with United States obligations under the United Nations Charter.

*"A. South Viet-Nam is being subjected to armed attack by Communist North Viet-Nam*

"The Geneva accords of 1954 established a demarcation line between North Viet-Nam and South Viet-Nam.[1] They provided for withdrawals of military forces into the respective zones north and south of this line. The accords prohibited the use of either zone for the resumption of hostilities or to 'further an aggressive policy.'

"During the 5 years following the Geneva conference of 1954, the Hanoi regime developed a covert political-military organization in South Viet-Nam based on Communist cadres it had ordered to stay in the South, contrary to the provisions of the Geneva accords. The activities of this covert organization were directed toward the kidnaping and assassination of civilian officials—acts of terrorism that were perpetrated in increasing numbers.

"In the 3-year period from 1959 to 1961, the North Viet-Nam regime infiltrated an estimated 10,000 men into the South. It is estimated that 13,000 additional personnel were infiltrated in 1962, and, by the end of 1964, North Viet-Nam may well have moved over 40,000 armed and unarmed guerrillas into South Viet-Nam.

"The International Control Commission reported in 1962 the findings of its Legal Committee:

" 'There is evidence to show that arms, armed and unarmed personnel, munitions and other supplies have been sent from the Zone in the North to the Zone in the South with the objective of supporting, organizing and carrying out hostile activities, including armed attacks, directed against the Armed Forces and Administration of the Zone in the South.

" 'There is evidence that the PAVN [People's Army of Viet Nam] has allowed the Zone in the North to be used for inciting, encouraging and supporting hostile activities in the Zone in the South, aimed at the overthrow of the Administration in the South.'

"Beginning in 1964, the Communists apparently exhausted their reservoir of Southerner's who had gone North. Since then the greater number of men infiltrated into the South have been native-born North Vietnamese. Most recently, Hanoi has begun to infiltrate elements of the North Vietnamese army in increasingly larger numbers. Today, there is evidence that nine regiments of regular North Vietnamese forces are fighting in organized units in the South.

"In the guerrilla war in Viet-Nam, the external aggression from the North is the critical military element of the insurgency, although it is unacknowledged by North Viet-Nam. In these circumstances, an 'armed attack' is not as easily fixed by date and hour as in the case of traditional warfare. However, the infiltration of thousands of armed men clearly constitutes an 'armed attack' under any reasonable definition. There may be some question as to the exact date at which North Viet-Nam's aggression grew into an 'armed attack,' but there can be no doubt that it had occurred before February 1965.

*"B. International law recognizes the right of individual and collective self-defense against armed attack*

"International law has traditionally recognized the right of self-defense against armed attack. This proposition has been asserted by writers on international law through the several centuries in which the modern law of nations has developed. The proposition has been acted on numerous times by governments throughout modern history. Today the principle of self-defense against armed attacks is universally recognized and accepted."[2]

The Charter of the United Nations, concluded at the end of World War II, imposed on important intention on the use of force by United Nations members. Article 2, paragraph 4, provides:

" 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.'

"In addition, the charter embodied a system of international peacekeeping through the organs of the United Nations. Article 24 summarizes these structural arrangements in stating that the United Nations members:

" 'Confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties

[1] For texts, see *American Foreign Policy, 1950–1955; Basic Documents*, vol. I, Department of State publication 6446, p. 750.

[2] See, *e.g.*, Jessup, *A Modern Law of Nations*, 163 ff. (1948); Oppenheim, *International Law*, 297 ff. (8th ed., Lauterpacht, 1955). And see, generally, Bowett, *Self-Defense in International Law* (1958). [Footnote in original.]

under this responsibility the Security Council acts on their behalf.'

"However, the charter expressly states in article 51 that the remaining provisions of the charter—including the limitation of article 2, paragraph 4, and the creation of United Nations machinery to keep the peace—in no way diminish the inherent right of self-defense against armed attack. Article 51 provides:

" 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

"Thus, article 51 restates and preserves, for member states in the situation covered by the article, a long-recognized principle of international law. The article is a 'saving clause' designed to make clear that no other provision in the charter shall be interpreted to impair the inherent right of self-defense referred to in article 51.

"Three principal objections have been raised against the availability of the right of individual and collective self-defense in the case of Viet-Nam: (1) that this right applies only in the case of an armed attack on a United Nations member; (2) that it does not apply in the case of South Viet-Nam because the latter is not an independent sovereign state; and (3) that collective self-defense may be undertaken only by a regional organization operating under chapter VIII of the United Nations Charter. These objections will now be considered in turn.

"*C. The right of individual and collective defense applies in the case of South Viet-Nam whether or not that country is a member of the United Nations*

"1. *South Viet-Nam enjoys the right of self-defense.*—The argument that the right of self-defense is available only to members of the United Nations mistakes the nature of the right of self-defense and the relationship of the United Nations Charter to international law in this respect. As already shown, the right of self-defense against armed attack is an inherent right under international law. The right is not conferred by the charter, and, indeed, article 51 expressly recognizes that the right is inherent.

"The charter nowhere contains any provision designed to deprive nonmembers of the right of self-defense against armed attack.[3] Article 2, paragraph 6, does charge the United Nations with responsibility for insuring that nonmember states act in accordance with United Nations 'principles so far as may be necessary for the maintenance of international peace and security.' Protection against aggression and self-defense against armed attack are important elements in the whole charter scheme for the maintenance of international peace and security. To deprive nonmembers of their inherent right of self-defense would not accord with the principles of the organization, but would instead be prejudicial to the maintenance of peace. Thus article 2, paragraph 6—and, indeed, the rest of the chapter—should certainly not be construed to nullify or diminish the inherent defensive rights of nonmembers.

"2. *The United States has the right to assist in the defense of South Viet-Nam although the latter is not a United Nations member.*—The cooperation of two or more international entities in the defense of one or both against armed attack is generally referred to as collective self-defense. United States participation in the defense of South Viet-Nam at the latter's request is an example of collective self-defense.

"The United States is entitled to exercise the right of individual or collective self-defense against armed attack, as that right exists in international law, subject only to treaty limitations and obligations undertaken by this country.

[3] While nonmembers, such as South Viet-Nam, have not formally undertaken the obligations of the United Nations Charter as their own treaty obligations, it should be recognized that much of the substantive law of the charter has become part of the general law of nations through a very wide acceptance by nations the world over. This is particularly true of the charter provisions bearing on the use of force. Moreover, in the case of South Viet-Nam, the South Vietnamese Government has expressed its ability and willingness to abide by the charter, in applying for United Nations membership. Thus it seems entirely appropriate to appraise the actions of South Viet-Nam in relation to the legal standards set forth in the United Nations Charter. [Foonote in original.]

"It has been urged that the United States has no right to participate in the collective defense of South Viet-Nam because article 51 of the United Nations Charter speaks only of the situation 'if an armed attack occurs *against a Member of the United Nations*.' This argument is without substance.

"In the first place, article 51 does not impose restrictions or cut down the otherwise available rights of United Nations members. By its own terms, the article preserves an inherent right. It is therefore, necessary to look elsewhere in the charter for any obligation of members restricting their participation in collective defense of an entity that is not a United Nations member.

"Article 2, paragraph 4, is the principal provision of the charter imposing limitations on the use of force by members. It states that they :

" 'Shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

"Action taken in defense against armed attack cannot be characterized as falling within this proscription. The record of the San Francisco conference makes clear that article 2, paragraph 4, was not intended to restrict the right of self-defense against armed attack.[4]

"One will search in vain for any other provision in the charter that would preclude United States participation in the collective defense of a nonmember. The fact that article 51 refers only to armed attack 'against a Member of the United Nations' implies no intention to preclude members from participating in the defense of nonmembers. Any such result would have seriously detrimental consequences for international peace and security and would be inconsistent with the purposes of the United Nations as they are set forth in article 1 of the charter.[5] The right of members to participate in the defense of nonmembers is upheld by leading authorities on international law.[6]

*"D. The right of individual and collective self-defense applies whether or not South Vietnam is regarded as an independent sovereign state*

*"1. South Viet-Nam enjoys the right of self-defense.*—It has been asserted that the conflict in Viet-Nam is "civil strife" in which foreign intervention is forbidden. Those who make this assertion have gone so far as to compare Ho Chi Minh's actions in Viet-Nam with the efforts of President Lincoln to preserve the Union during the American Civil War. Any such characterization is an entire fiction disregarding the actual situation in Viet-Nam. The Hanoi regime is anything but the legitimate government of a unified country in which the South is rebelling against lawful national authority.

"The Geneva accords of 1954 provided for a division of Viet-Nam into two zones at the 17th parallel. Although this line of demarcation was intended to be temporary, it was established by international agreement, which specifically forbade aggression by one zone against the other.

"The Republic of Viet-Nam, in the South has been recognized as a separate international entity by approximately 60 governments the world over. It has been admitted as a member of a number of the specialized agencies of the United Nations. The United Nations General Assembly in 1957 voted to recommend South Viet-Nam for membership in the organization, and its admission was frustrated only by the veto of the Soviet Union in the Security Council.

"In any event there is no warrant for the suggestion that one zone of a temporarily divided state—whether it be Germany, Korea, or Viet-Nam—can be legally overrun by armed forces from the other zone, crossing the internationally recognized line of demarcation between the two. Any such doctrine would subvert the international agreement establishing the line of demarcation, and would pose grave dangers to international peace.

"The action of the United Nations in the Korean conflict of 1950 clearly established the principle that there is no greater license for one zone of a temporarily state to attack the other zone than there is for one state to attack another state.

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[4] See 6 UNICO Documents 459. [Footnote in original.]

[5] In particular, the statement of the first purpose :

To maintain international peace and security, and to that end : to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. . . . [Footnote in original.]

[6] Bowett, *Self-Defense in International Law*, 193–195 (1958) ; Goodhart, "The North Atlantic Treaty of 1949," 79 *Recueil Des Cours*, 183, 202–204 (1951, vol. II), quoted in 5 *Whiteman's Digest of International Law*, 1067–1068 (1965) ; Kelsen, *The Law of the United Nations*, 793 (1950) ; see Stone, *Aggression and World Order*, 44 (1958). [Footnote in original.]

South Viet-Nam has the same right that South Korea had to defend itself and to organize collective defense against an armed attack from the North. A resolution of the Security Council dated June 25, 1950, noted 'with grave concern the armed attack upon the Republic of Korea by forces from North Korea,' and determined 'that this action constitutes a breach of the peace.'

"*2. The United States is entitled to participate in the collective defense of South Viet-Nam whether or not the latter is regarded as an independent sovereign state.*—As stated earlier, South Viet-Nam has been recognized as a separate international entity by approximately 60 governments. It has been admitted to membership in a number of the United Nations specialized agencies and has been excluded from the United Nations Organization only by the Soviet veto.

"There is nothing in the charter to suggest that United Nations members are precluded from participating in the defense of a recognized international entity against armed attack merely because the entity may lack some of the attributes of an independent sovereign state. Any such result would have a destructive effect on the stability of international engagements such as the Geneva accords of 1954 and on internationally agreed lines of demarcation. Such a result, far from being in accord with the charter and the purposes of the United Nations, would undermine them and would create new dangers to international peace and security.

"*E. The United Nations Charter does not limit the right of self-defense to regional organizations*

"Some have argued that collective self-defense may be undertaken only by a regional arrangement or agency operating under chapter VIII of the United Nations Charter. Such an assertion ignores the structure of the charter and the practice followed in the more than 20 years since the founding of the United Nations.

"The basic proposition that rights of self-defense are not impaired by the charter—as expressly stated in article 51—is not conditioned by any charter provision limiting the application of this proposition to collective defense by a regional arrangement or agency. The structure of the charter reinforces this conclusion. Article 51 appears in chapter VII of the charter, entitled 'Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression,' whereas chapter VIII, entitled 'Regional Arrangements,' begins with article 52 and embraces the two following articles. The records of the San Francisco conference show that article 51 was deliberately placed in chapter VII rather than chapter VIII, where it would only have a bearing on the regional system.[7]

"Under article 51, the right of self-defense is available against any armed attack, whether or not the country attacked is a member of a regional arrangement and regardless of the source of the attack. Chapter VIII, on the other hand, deals with relations among members of a regional arrangement or agency, and authorizes regional action as appropriate for dealing with 'local disputes.' This distinction has been recognized ever since the founding of the United Nations in 1945.

"For example, the North Atlantic Treaty has operated as a collective security arrangement, designed to take common measures in preparation against the eventuality of an armed attack for which collective defense under article 51 would be required. Similarly, the Southeast Asia Treaty Organization was designed as a collective defense arrangement under article 51. Secretary of State Dulles emphasized this in his testimony before the Senate Foreign Relations Committee in 1954.

"By contrast, article 1 of the Charter of Bogota (1948), establishing the Organization of American States, expressly declares that the organization is a regional agency within the United Nations. Indeed, chapter VIII of the United Nations Charter was included primarily to take account of the functioning of the inter-American system.

"In sum, there is no basis in the United Nations Charter for contending that the right of self-defense against armed attack is limited to collective defense by a regional organization.

"*F. The United States has fulfilled its obligations to the United Nations*

"A further argument has been made that the members of the United Nations have conferred on United Nations organs—and, in particular, on the Security Council—exclusive power to act against aggression. Again, the express language

[7] UNCIO Documents 288. [Footnote in original.]

of article 51 contradicts that assertion. A victim of armed attack is not required to forgo individual or collective defense of its territory until such time as the United Nations organizes collective action and takes appropriate measures. To the contrary, article 51 clearly states that the right of self-defense may be exercised '*until* the Security Council has taken the measures necessary to maintain international peace and security.'[8]

"As indicated earlier, article 51 is not literally applicable to the Viet-Nam situation since South Viet-Nam is not a member. However, reasoning by analogy from article 51 and adopting its provisions as an appropriate guide for the conduct of members in a case like Viet-Nam, one can only conclude that United States actions are fully in accord with this country's obligations, as a member of the United Nations.

"Article 51 requires that:

" 'Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

"The United States has reported to the Security Council on measures it has taken in countering the Communist aggression in Viet-Nam. In August 1964 the United States asked the Council to consider the situation created by North Vietnamese attacks on United States destroyers in the Tonkin Gulf.[9] The Council thereafter met to debate the question, but adopted no resolutions. Twice in February 1965 the United States sent additional reports to the Security Council on the conflict in Viet-Nam and on the additional measures taken by the United States in the collective defense of South Vietnam.[10] In January 1966 the United States formally submitted the Viet-Nam question to the Security Council for its consideration and introduced a draft resolution calling for discussions looking toward a peaceful settlement on the basis of the Geneva accords.[11]

"At no time has the Council taken any action to restore peace and security in Southeast Asia. The Council has not expressed criticism of United States actions. Indeed, since the United States submission of January 1966, members of the Council have been notably reluctant to proceed with any consideration of the Viet-Nam question.

"The conclusion is clear that the United States has in no way acted to interfere with United Nations consideration of the conflict in Viet-Nam. On the contrary, the United States has requested United Nations consideration, and the Council has not seen fit to act.

*"G. International law does not require a declaration of war as a condition precedent to taking measures of self-defense against armed attack*

"The existence or absence of a formal declaration of war is not a factor in determining whether an international use of force is lawful as a matter of international law. The United Nation's Charter's restrictions focus on the manner and purposes of its use and not on any formalities of announcement.

"It should be noted that a formal declaration of war would not place any obligations on either side in the conflict by which that side would not be bound in any event. The rules of international law concerning the conduct of hostilities in an international armed conflict apply regardless of any declaration of war.

*H. Summary*

"The analysis set forth above shows that South Viet-Nam has the right in present circumstances to defend itself against armed attack from the North and to organize a collective self-defense with the participation of others. In response to requests from South Viet-Nam, the United States has been participating in that defense, both through military action within South Viet-Nam and actions taken directly against the aggressor in North Viet-Nam. This participation by the United States is in conformity with international law and is consistent with our obligations under the Charter of the United Nations.

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[8] An argument has been made by some that the United States, by joining in the collective defense of South Vietnam, has violated the peaceful settlement obligation of article 33 in the charter. This argument overlooks the obvious proposition that a victim of armed aggression is not required to sustain the attack undefended while efforts are made to find a political solution with the aggressor. Article 51 of the charter illustrates this by making perfectly clear that the inherent right of self-defense is impaired by "Nothing in the present Charter," including the provisions of article 33. [Footnote in original.]

[9] For a statement made by U.S. Representative Adlai E. Stevenson in the Security Council on Aug. 5, 1964, see Bulletin of Aug. 24, 1964, p. 272.

[10] For texts, see *ibid.*, Feb. 22, 1965, p. 240, and Mar. 22, 1965, p. 419.

[11] For background and text of draft resolution, see *ibid.*, Feb. 14, 1966, p. 231.

"II. THE UNITED STATES HAS UNDERTAKEN COMMITMENTS TO ASSIST SOUTH VIETNAM IN DEFENDING ITSELF AGAINST COMMUNIST AGGRESSION FROM THE NORTH

"The United States has made commitments and given assurances, in various forms and at different assurances, in various forms and at different times, to assist in the defense of South Viet-Nam.

"*A. The United States gave undertakings at the end of the Geneva Conference in 1954*

"At the time of the signing of the Geneva accords in 1954, President Eisenhower warned 'that any renewal of Communist aggression would be viewed by us as a matter of grave concern,' at the same time giving assurance that the United States would 'not use force to disturb the settlement.' [12] And the formal declaration made by the United States Government at the conclusion of the Geneva conference stated that the United States 'would view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security.' [13]

"*B. The United States undertook an international obligation to defend South Vietnam in the SEATO Treaty*

"Later in 1954 the United States negotiated with a number of other countries and signed the Southeast Asia Collective Defense Treaty.[14] The treaty contains in the first paragraph of article IV the following provision:

" 'Each Party recognizes that agression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.'

"Annexed to the treaty was a protocol stating that:

" 'The Parties to the Southeast Asia Collective Defense Treaty unanimously designated for the purposes of Article IV of the Treaty the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam.'

"Thus, the obligations of article IV, pargraph 1, dealing with the eventuality of armed attack, have from the outset covered the territory of South Viet-Nam. The facts as to the North Vietnamese armed attack against the South have been summarized earlier, in the discussion of the right of self-defense under international law and the Charter of the United Nations. The term 'armed attack' has the same meaning in the SEATO treaty as in the United Nations Charter.

"Article IV, paragraph 1, places an obligation on each party to the SEATO treaty to 'act to meet the common danger in accordance with its constitutional processes' in the event of an armed attack. The treaty does not require a collective determination that an armed attack has occurred in order that the obligation of article IV, paragraph 1, become operative. Nor does the provision require collective decision on actions to be taken to meet the common danger. As Secretary Dulles pointed out when transmitting the treaty to the President, the commitment in article IV, paragraph 1, 'leaves to the judgment of each country the type of action to be taken in the event an armed attack occurs.' [15]

"The treaty was intended to deter armed aggression in Southeast Asia. To that end it created not only a multilateral alliance but also a series of bilateral relationships. The obligations are placed squarely on 'each Party' in the event of armed attack in the treaty area—not upon 'the Parties,' a wording that might have implied a necessity for collective decision. The treaty was intended to give the assurance of United States assistance to any party or protocol state that might suffer a Communist armed attack, regardless of the views or actions of other parties. The fact that the obligations are individual, and may even to some extent differ among the parties to the treaty, is demonstrated by the United States understanding, expressed at the time of signature, that its obligations under article IV, paragraph 1, apply only in the event of *Communist* aggression, whereas the other parties to the treaty were unwilling so to limit their obligations to each other.

"Thus, the United States has a commitment under article IV, paragraph 1, in the event of armed attack, independent of the decision or action of other treaty

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[12] For a statement made by President Eisenhower on June 21, 1954, see *ibid.*, Aug. 2, 1954, p. 163.
[13] For text, see *ibid.*, p. 162.
[14] For text, see *ibid.*, Sept. 20, 1954, p. 303.
[15] For text, see *ibid.*, Nov. 29, 1954, p. 820.

parties. A joint statement issued by Secretary Rusk and Foreign Minister Thanat Khoman of Thailand on March 6, 1962,[16] reflected this understanding:

" 'The Secretary of State assured the Foreign Minister that in the event of such aggression, the United States intends to give full effect to its obligations under the Treaty to act to meet the common danger in accordance with its constitutional processes. The Secretary of State reaffirmed that this obligation of the United States does not depend upon the prior agreement of all other parties to the Treaty, since this Treaty obligation is individual as well as collective.'

"Most of the SEATO countries have stated that they agreed with this interpretation. None has registered objection to it.

"When the Senate Committee on Foreign Relations reported on the Southeast Asia Collective Defense Treaty, it noted that the treaty area was further defined so that the 'Free Territory of Vietnam' was an area 'which, if attacked, would fall under the protection of the instrument.' In its conclusion the committee stated:

" 'The committee is not impervious to the risks which this treaty entails. It fully appreciates that acceptance of these additional obligations commits the United States to a course of action over a vast expanse of the Pacific. Yet these risks are consistent with our own highest interests.'

"The Senate gave its advice and consent to the treaty by a vote of 82 to 1.

"*C. The United States has given additional assurances to the Government of South Viet-Nam*

"The United States has also given a series of additional assurances to the Government of South Viet-Nam. As early as October 1954 President Eisenhower undertook to provide direct assistance to help make South Viet-Nam 'capable of resisting attempted subversion or aggression through military means.' [17] On May 11, 1957, President Eisenhower and President Ngo Dinh Diem of the Republic of South Viet-Nam issued a joint statement [18] which called attention to 'the large build-up of Vietnamese Communist military forces in North Viet-Nam' and stated:

" 'Noting that the Republic of Viet-Nam is covered by Article IV of the Southeast Asia Collective Defense Treaty, President Eisenhower and President Ngo Dinh Diem agreed that aggression or subversion threatening the political independence of the Republic of Viet-Nam would be considered as endangering peace and stability.'

"On August 2, 1961, President Kennedy declared that 'the United States is determined that the Republic of Viet-Nam shall not be lost to the Communists for lack of any support which the United States Government can render.' [19] On December 7 of that year President Diem appealed for additional support. In his reply of December 14, 1961, President Kennedy recalled the United States declaration made at the end of the Geneva conference in 1954, and reaffirmed that the United States was 'prepared to help the Republic of Viet-Nam to protect its people and to preserve its independence.' [20] This assurance has been reaffirmed many times since.

"III. ACTIONS BY THE UNITED STATES AND SOUTH VIET-NAM ARE JUSTIFIED UNDER THE GENEVA ACCORDS OF 1954

"*A. Description of the accords*

"The Geneva accords of 1954 [21] established the date and hour for a cease-fire in Viet-Nam, drew a 'provisional military demarcation line' with a demilitarized zone on both sides, and required an exchange of prisoners and the phased

[16] For text, see *ibid.*, Mar. 26, 1962, p. 498.

[17] For text of a message from President Eisenhower to President Ngo Dinh Diem, see *ibid.*, Nov. 15, 1954, p. 735.

[18] For text, see *ibid.*, May 27, 1957, p. 851.

[19] For text of a joint communique issued by President Kennedy and Vice President Chen Cheng of the Republic of China, see *ibid.*, Aug. 28, 1961, p. 372.

[20] For text of an exchange of messages between President Kennedy and President Diem, see *ibid.*, Jan. 1, 1962, p. 13.

[21] These accords were composed of a bilateral cease-fire agreement between the "Commander-in-Chief of the People's Army of Viet Nam" and the "Commander-in-Chief of the French Union forces in Indo-China," together with a Final Declaration of the Conference, to which France adhered. However, it is to be noted that the South Vietnamese Government was not a signatory of the cease-fire agreement and did not adhere to the Final Declaration. South Viet-Nam entered a series of reservations in a statement to the conference. This statement was noted by the conference, but by decision of the conference chairman it was not included or referred to in the Final Declaration. [Footnote in original.]

regroupment of Viet Minh forces from the south to the north and of French Union forces from the north to the south. The introduction into Viet-Nam of troop reinforcements and new military equipment (except for replacement and repair) was prohibited. The armed forces of each party were required to respect the demilitarized zone and the territory of the other zone. The adherence of either zone to any military alliance, and the use of either zone for the resumption of hostilities or to 'further an aggressive policy,' were prohibited. The International Control Commission was established, composed of India, Canada and Poland, with India as chairman. The task of the Commission was to supervise the proper execution of the provisions of the cease-fire agreement. General elections that would result in reunification were required to be held in July 1956 under the supervision of the ICC.

*"B. North Viet-Nam violated the accords from the beginning*

"From the very beginning, the North Vietnamese violated the 1954 Geneva accords. Communist military forces and supplies were left in the South in violation of the accords. Other Communist guerrillas were moved north for further training and then were infiltrated into the South in violation of the accords.

*"C. The introduction of United States military personnel and equipment was justified*

"The accords prohibited the reinforcement of foreign military forces in Viet-Nam and the introduction of new military equipment, but they allowed replacement of existing military personnel and equipment. Prior to late 1961 South Viet-Nam had received considerable military equipment and supplies from the United States, and the United States had gradually enlarged its Military Assistance Advisory Group to slightly less than 900 men. These actions were reported to the ICC and were justified as replacements for equipment in Viet-Nam in 1954 and for French training and advisory personnel who had been withdrawn after 1954.

"As the Communist aggression intensified during 1961, with increased infiltration and a marked stepping up of Communists terrorism in the South, the United States found it necessary in late 1961 to increase substantially the numbers of our military personnel and the amounts and types of equipment introduced by this country into South Viet-Nam. These increases were justified by the international law principle that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations.[22]

"In accordance with this principle, the systematic violation of the Geneva accords by North Viet-Nam justified South Viet-Nam in suspending compliance with the provision controlling entry of foreign military personnel and military equipment.

*"D. South Viet-Nam was justified in refusing to implement the election provisions of the Geneva accords*

"The Geneva accords contemplated the reunification of the two parts of Viet-Nam. They contained a provision for general elections to be held in July 1956 in order to obtain a 'free expression of the national will.' The accords stated that 'consultations will be held on this subject between the competent representative authorities of the two zones from 20 July 1955 onwards.'

"There may be some question whether South Viet-Nam was bound by these election provisions. As indicated earlier, South Viet-Nam did not sign the cease-fire agreement of 1954, nor did it adhere to the Final Declaration of the Geneva

[22] This principle of law and the circumstances in which it may be invoked are most fully discussed in the Fourth Report on the Law of Treaties by Sir Gerald Fitzmaurice, articles 18, 20 (U.N. doc. A/CN.4/120(1950)) II. Yearbook of the International Law Commission 37 (U.N. doc. A/CN.4/SER.A/1959/Add.1) and in the later report by Sir Humphrey Waldock, article 20 (U.N. doc. A/CN.4/156 and Add. 1–3 (1963)) II Yearbook of the International Law Commission 36 (U.N. doc. A/CN.4/SER.A 1963/Add.1). Among the authorities cited by the fourth report for this proposition are: II Oppenheim, *International Law* 136, 137 (7th ed. Lauterpacht 1955) ; I Rousseau, *Principes généraux du droit international public* 365 (1944) ; II Hyde, *International Law* 1660 et seq. (2d ed. 1947) ; II Guggenheim, *Traité de droit international public* 84, 85 (1935) ; Spiropoulos, *Traité théorique et pratique de droit international public* 289 (1933) ; Verdross, *Völkerrecht*, 329 (1950) ; Hall, *Treatise* 21 (8th ed. Higgins 1924) ; 3 Accioly, *Tratado de Direito International Publico* 82 (1956–57). See also draft articles 42 and 46 of the Law of Treaties by the International Law Commission, contained in the report on the work of its 15th session (General Assembly Official Records, 18th Session, Supplement No. 9(A/5809)). [Footnote in original.]

conference. The South Vietnamese Government at that time gave notice of its objection in particular to the election provisions of the accords.

"However, even on the premise that these provisions were binding on South Viet-Nam, the South Vietnamese Government's failure to engage in consultations in 1955, with a view to holding elections in 1956, involved no breach of obligation. The conditions in North Viet-Nam during that period were such as to make impossible any free and meaningful expression of popular will.

"Some of the facts about conditions in the North were admitted even by the Communist leadership in Hanoi. General Giap, currently Defense Minister of North Viet-Nam, in addressing the Tenth Congress of the North Vietnamese Communist Party in October 1956, publicly acknowledged that the Communist leaders were running a police state where executions, terror, and torture were commonplace. A nationwide election in these circumstances would have been a travesty. No one in the North would have dared to vote except as directed. With a substantial majority of the Vietnamese people living north of the 17th parallel, such an election would have meant turning the country over to the Communists without regard to the will of the people. The South Vietnamese Government realized these facts and quite properly took the position that consultations for elections in 1956 as contemplated by the accords would be a useless formality.[23]

"IV. THE PRESIDENT HAS FULL AUTHORITY TO COMMIT UNITED STATES FORCES IN THE COLLECTIVE DEFENSE OF SOUTH VIETNAM

"There can be no question in present circumstances of the President's authority to commit United States forces to the defense of South Viet-Nam. The grant of authority to the President in article II of the Constitution extends to the actions of the United States currently underaken in Viet-Nam. In fact, however, it is unnecessary to determine whether this grant standing alone is sufficient to authorize the actions taken in Viet-Nam. These actions rest not only on the exercise of Presidential powers under article II but on the SEATO treaty—a treaty advised and consented to by the Senate—and on actions of the Congress, particularly the joint resolution of August 10, 1964. When these sources of authority are taken together—article II of the Constitution, the SEATO treaty, and actions by the Congress—there can be no question of the legality under domestic law of United States actions in Viet-Nam.

"*A. The President's power under Article II of the Constitution extends to the actions currently undertaken in Viet-Nam*

"Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.

"At the Federal Constitutional Convention in 1787, it was originally proposed that Congress have the power 'to make war.' There were objections that legislative proceedings were too slow for this power to be vested in Congress; it was suggested that the Senate might be a better repository. Madison and Gerry then moved to substitute 'to declare war' for 'to make war,' 'leaving to the Executive the power to repel sudden attacks.' It was objected that this might make it too easy for the Executive to involve the nation in war, but the motion carried with but one dissenting vote.

"In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet-Nam would endanger the peace and safety of the United States.

"Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the 'undeclared war' with France (1798–1800). For example, President Truman ordered 250,000 troops to Korea during the Korean war of the early 1950's. President Eisenhower dispatched 14,000 troops to Lebanon in 1958.

[23] In any event, if North Viet-Nam considered there had been a breach of obligation by the South, its remedies lay in discussion with Saigon, perhaps in an appeal to the cochairman of the Geneva conference, or in a reconvening of the conference to consider the situation. Under international law, North Viet-Nam had no right to use force outside its own zone in order to secure its political objectives. [Footnote in original.]

"The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.

*"B. The Southeast Asia Collective Defense Treaty Authorizes the President's Actions*

"Under article VI of the United States Constitution, 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.' Article IV, paragraph 1, of the SEATO treaty establishes as a matter of law that a Communist armed attack against South Viet-Nam endangers the peace and safety of the United States. In this same provision the United States has undertaken a commitment in the SEATO treaty to 'act to meet the common danger in accordance with its constitutional processes' in the event of such an attack.

"Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Viet-Nam is required, and that military measures against the source of Communist aggression in North Viet-Nam are necessary, he is constitutionally empowered to take those measures.

"The SEATO treaty specifies that each party will act 'in accordance with its constitutional processes.'

"It has recently been argued that the use of land forces in Asia is not authorized under the treaty because their use to deter armed attack was not contemplated at the time the treaty was considered by the Senate. Secretary Dulles testified at that time that we did not intend to establish (1) a land army in Southeast Asia capable of deterring Communist aggression, or (2) an integrated headquarters and military organization like that of NATO; instead, the United States would rely on 'mobile striking power' against the sources of aggression. However, the treaty obligation in article IV, paragraph 1, to meet the common danger in the event of armed aggression, is not limited to particular modes of military action. What constitutes an adequate deterrent or an appropriate response, in terms of military strategy, may change; but the essence of our commitment to act to meet the common danger, as necessary at the time of an armed aggression, remains. In 1954 the forecast of military judgment might have been against the use of substantial United States ground forces in Viet-Nam. But that does not preclude the President from reaching a different military judgment in different circumstance, 12 years later.

*"C. The joint resolution of Congress of August 10, 1964, authorizes United States participation in the collective defense of South Viet-Nam*

"As stated earlier, the legality of United States participation in the defense of South Viet-Nam does not rest only on the constitutional power of the President under article II—or indeed on that power taken in conjunction with the SEATO treaty. In addition, the Congress has acted in unmistakable fashion to approve and authorize United States actions in Viet-Nam.

"Following the North Vietnamese attacks in the Gulf of Tonkin against United States destroyers, Congress adopted, by a Senate vote of 88–2 and a House vote of 416–0, a joint resolution containing a series of important declarations and provisions of law.[24]

"Section 1 resolved that 'the Congress approves and supports the determination of 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.' Thus, the Congress gave its sanction to specific actions by the President to repel attacks against United States naval vessels in the Gulf of Tonkin and elsewhere in the western Pacific. Congress further approved the taking of 'all necessary measures . . . to prevent further aggression.' This authorization extended to those measures the President might consider necessary to ward off further attacks and to prevent further aggression by North Viet-Nam in Southeast Asia.

"The joint resolution then went on to provide in section 2:

" 'The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the

[24] For text, see BULLETIN of Aug. 24, 1964, p. 263.

United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.'

"Section 2 thus constitutes an authorization to the President, in his discretion, to act—using armed force if he determines that is required—to assist South Viet-Nam at its request in defense of its freedom. The identification of South Viet-Nam through the reference to 'protocol state' in this section is unmistakable, and the grant of authority 'as the President determines' is unequivocal.

"It has been suggested that the legislative history of the joint resolution shows an intention to limit United States assistance to South Viet-Nam to aid, advice, and training. This suggestion is based on an amendment offered from the floor by Senator [Gaylord] Nelson which would have added the following to the text:

" 'The Congress also approves and supports the efforts of the President to bring the problem of peace in Southeast Asia to the Security Council of the United Nations, and the President's declaration that the United States, seeking no extension of the present military conflict, will respond to provocation in a manner that is "limited and fitting."

" 'Our continuing policy is to limit our role to the provision of aid, training assistance, and military advice, and it is the sense of Congress that, except when provoked to a greater response, we should continue to attempt to avoid a direct military involvement in the Southwest Asian conflict.' [25]

"Senator [J. W.] Fulbright, who had reported the joint resolution from the Foreign Relations Committee, spoke on the amendment as follows:

" 'It states fairly accurately what the President has said would be our policy, and what I stated my understanding was as to our policy; also what other Senators have stated. In other words, it states that our response should be appropriate and limited to the provocation, which the Senator states as 'respond to provocation in a manner that is limited and fitting," and so forth. We do not wish any political or military bases there. We are not seeking to gain a colony. We seek to insure the capacity of these people to develop along the lines of their own desires, independent of domination by communism.'

" 'The Senator has put into his amendment a statement of policy that is unobjectionable. However, I cannot accept the amendment under the circumstances. I do not believe it is contrary to the joint resolution, but it is an enlargement. I am informed that the House is now voting on this resolution. The House joint resolution is about to be presented to us. I cannot accept the amendment and go to conference with it, and thus take responsibility for delaying matters.'

" 'I do not object to it as a statement of policy. I believe it is an accurate reflection of what I believe is the President's policy, judging from his own statements. That does not mean that as a practical matter I can accept the amendment. It would delay matters to do so. It would cause confusion and require a conference, and present us with all the other difficulties that are involved in this kind of legislative action. I regret that I cannot do it, even though I do not at all disagree with the amendment as a general statement of policy.' [26]

"Senator Nelson's amendment related the degree and kind of U.S. response in Viet-Nam to 'provocation' on the other side; the response should be 'limited and fitting.' The greater the provocation, the stronger are the measures that may be characterized as 'limited and fitting.' Bombing of North Vietnamese naval bases was a 'limited and fitting' response to the attacks on U.S. destroyers in August 1964, and the subsequent actions taken by the United States and South Viet-Nam have been an appropriate response to the increased war of aggression carried on by North Viet-Nam since that date. Moreover, Senator Nelson's proposed amendment did not purport to be a restriction on authority available to the President but merely a statement concerning what should be the continuing policy of the United States.

"Congressional realization of the scope of authority being conferred by the joint resolution is shown by the legislative history of the measure as a whole. The following exchange between Senators Cooper and Fulbright is illuminating:

" 'Mr. COOPER [John Sherman Cooper]. . . . The Senator will remember that the SEATO Treaty, in article IV, provides that in the event an armed attack is made upon a party to the Southeast Asia Collective Defense Treaty, or upon one of the protocol states such as South Vietnam, the parties to the treaty, one of

[25] 110 *Cong. Rec.* 18459 (Aug. 7, 1964) [Footnote in original.]
[26] *Ibid.*

whom is the United States, would then take such action as might be appropriate, after resorting to their constitutional processes. I assume that would mean, in the case of the United States, that Congress would be asked to grant the authority to act.

" 'Does the Senator consider that in enacting this resolution we are satisfying that requirement of article IV of the Southeast Asia Collective Defense Treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?

" 'Mr. FULBRIGHT. I think that is correct.

" 'Mr. COOPER. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

" 'Mr. FULBRIGHT. That is the way, I would interpret it. If a situation later developed in which we thought the approval should be withdrawn it could be withdrawn by concurrent resolution.' [27]

"The August 1964 joint resolution continues in force today. Section 2 of the resolution provides that it shall expire 'when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.' The President has made no such determination, nor has Congress terminated the joint resolution.[28]

"Instead, Congress in May 1965 approved an appropriation of $700 million to meet the expense of mounting military requirements in Viet-Nam. (Public Law 89-18, 79 Stat. 109.) The President's message asking for this appropriation stated that this was 'not a routine appropriation. For each Member of Congress who supports this request is also voting to persist in our efforts to halt Communist aggression in South Vietnam.' [29] The appropriation act constitutes a clear congressional endorsement and approval of the actions taken by the President.

"On March 1, 1966, the Congress continued to express its support of the President's policy by approving a $4.6 billion supplemental military authorization by votes of 392-4 and 93-2. An amendment that would have limited the President's authority to commit forces to Viet-Nam was rejected in the Senate by a vote of 94-2.

*"D. No Declaration of War by the Congress is required to authorize United States Participation in the collective defense of South Viet-Nam*

"No declaration of war is needed to authorize American actions in Viet-Nam. As shown in the preceding sections, the President has ample authority to order the participation of United States armed forces in the defense of South Viet-Nam.

"Over a very long period in our history, practice and precedent have confirmed the constitutional authority to engage United States forces in hostilities without a declaration of war. This history extends from the undeclared war

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[27] 110 *Cong. Rec.* 18409 (Aug. 6, 1964). Senator [Wayne] Morse, who opposed the joint resolution, expressed the following view on August 6, 1964, concerning the scope of the proposed resolution:

Another Senator thought, in the early part of the debate that this course would not broaden the power of the President to engage in a land war if he decided that he wanted to apply the resolution in that way.

That Senator was taking great consolation in the then held belief that, if he voted for the resolution, it would give no authority to the President to send many troops into Asia. I am sure he was quite disappointed to finally learn, because it took a little time to get the matter cleared, that the resolution places no restriction on the President in that respect. If he is still in doubt, let him read the language on page 2, lines 3 to 6, and page 2, lines 11 to 17. The first reads:

"The Congress approves and supports the determination of 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."

It does not say he 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. (110 *Cong. Rec.* 18426-7 (Aug. 6, 1964)). [Footnote in original.]

[28] On March 1, 1966, the Senate voted, 92-5, to table an amendment that would have repealed the joint resolution. [Footnote in original.]

[29] For text, see BULLETIN of May 24, 1965, p. 822.

with France and the war against the Barbary pirates at the end of the 18th century to the Korean war of 1950–53.

"James Madison, one of the leading framers of the Constitution, and Presidents John Adams and Jefferson all construed the Constitution, in their official actions during the early years of the Republic, as authorizing the United States to employ its armed forces abroad in hostilities in the absence of any congressional declaration of war. Their views and actions constitute highly persuasive evidence as to the meaning and effect of the Constitution. History has accepted the interpretation that was placed on the Constitution by the early Presidents and Congresses in regard to the lawfulness of hostilities without a declaration of war. The instances of such action in our history are numerous.

"In the Korean conflict, where large-scale hostilities were conducted with an American troop participation of a quarter of a million men, no declaration of war was made by the Congress. The President acted on the basis of his constitutional responsibilities. While the Security Council, under a treaty of this country—the United Nations Charter—recommended assistance to the Republic of Korea against the Communist armed attack, the United States had no treaty commitment at that time obligating us to join in the defense of South Korea. In the case of South Viet-Nam we have the obligation of the SEATO treaty and clear expressions of congressional support. If the President could act in Korea without a declaration of war, *a fortiori* he is empowered to do so now in Viet-Nam.

"It may be suggested that a declaration of war is the only available constitutional process by which congressional support can be made effective for the use of United States armed forces in combat abroad. But the Constitution does not insist on any rigid formalism. It gives Congress a choice of ways in which to exercise its powers. In the case of Viet-Nam the Congress has supported the determination of the President by the Senate's approval of the SEATO treaty, the adoption of the joint resolution of August 10, 1964, and the enactment of the necessary authorizations and appropriations.

"V. CONCLUSION

"South Viet-Nam is being subjected to armed attack by Communist North Viet-Nam, through the infiltration of armed personnel, military equipment, and regular combat units. International law recognizes the right of individual and collective self-defense against armed attack. South Viet-Nam, and the United States upon the request of South Viet-Nam, are engaged in such collective defense of the South. Their actions are in conformity with international law and with the Charter of the United Nations. The fact that South Viet-Nam has been precluded by Soviet veto from becoming a member of the United Nations and the fact that South Viet-Nam is a zone of a temporary divided state in no way diminish the right of collective defense of South Viet-Nam.

"The United States has commitments to assist South Viet-Nam in defending itself against Communist aggression from the North. The United States gave undertakings to this effect at the conclusion of the Geneva conference in 1954. Later that year the United States undertook an international obligation in the SEATO treaty to defend South Viet-Nam against Communist armed aggression. And during the past decade the United States has given additional assurances to the South Vietnamese Government.

"The Geneva accords of 1954 provided for a cease-fire and regroupment of contending forces, a division of Viet-Nam into two zones, and a prohibition on the use of either zone for the resumption of hostilities or to "further an aggressive policy." From the beginning, North Viet-Nam violated the Geneva accords through a systematic effort to gain control of South Viet-Nam by force. In the light of these progressive North Vietnamese violations, the introduction into South Viet-Nam beginning in late 1961 of substantial United States military equipment and personnel, to assist in the defense of the South, was fully justified; substantial breach of an international agreement by one side permits the other side to suspend performance of corresponding obligations under the agreement. South Viet-Nam was justified in refusing to implement the provisions of the Geneva accords calling for reunification through free elections throughout Viet-Nam since the Communist regime in North Viet-Nam created conditions in the North that made free elections entirely impossible.

"The President of the United States has full authority to commit United States forces in the collective defense of South Viet-Nam. This authority stems from the

constitutional powers of the President. However, it is not necessary to rely on the Constitution alone as the source of the President's authority, since the SEATO treaty—advised and consented to by the Senate and forming part of the law of the land—sets forth a United States commitment to defend South Viet-Nam against armed attack, and since the Congress—in the joint resolution of August 10, 1964, and in authorization and appropriations acts for support of the U.S. military effort in Viet-Nam—has given its approval and support to the President's actions, United States actions in Viet-Nam, taken by the President and approved by the Congress, do not require any declaration of war, as shown by a long line of precedents for the use of United States armed forces abroad in the absence of any congressional declaration of war."

Mr. EAGLETON. May I readdress my question to the Senator?

Mr. DOLE. I cannot respond as to what may be going on in President Nixon's mind.

Mr. EAGLETON. As the author of the Dole amendment, which would repeal the Gulf of Tonkin resolution, does the Senator, as the principal author of the amendment, view the Gulf of Tonkin resolution as authority for 400,000 troops being in South Vietnam today?

Mr. DOLE. No, and President Nixon has not relied on it.

Mr. EAGLETON. Now, can we go down the list and eliminate further? Does the Senator view the SEATO Treaty as being authority for the presence of 400,000-plus troops in Vietnam?

Mr. DOLE. As I indicated earlier; that is one of the pegs that might have been cited previously.

Mr. EAGLETON. Perhaps it was the peg that might have been used in the past. I am not going to quarrel with the Senator's recitation of history, at least through the Johnson administration. The history through that period has a way of changing even now.

I want to know whether the Senator from Kansas, as the proponent of this amendment, views the SEATO Treaty as authority for the presence of 400,000 plus troops in South Vietnam.

Mr. DOLE. I would guess not, but again, I do not know whether it can be answered precisely yes or no. There are a number of considerations. I would guess not, if that would satisfy the Senator.

Mr. EAGLETON. The Senator's guess today is that the SEATO Treaty is not authority for troops being in South Vietnam?

Mr. DOLE. I refer to paragraph 1, article 4 of the SEATO Treaty, which provides that each party thereto "recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger" of the other signatories.

Mr. EAGLETON. I wish the Senator would read on.

Mr. President, I ask unanimous consent that article IV of the SEATO Treaty be printed at this point in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

"ARTICLE IV

"1. Each party recognizes the aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Senate Council of the United Nations.

"2. If, in the opinion of any of the Parties, the inviolability or the integrity of the territory or the sovereignty or political independence of any Party in the treaty area or of any other State or territory to which the provisions of paragraph 1 of this Article from time to time apply is threatened in any way other than by armed attack or is affected or threatened by any fact or situation which might endanger the peace of the area, the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense.

"3. It is understood that no action on the territory of any State designated by unanimous agreement under paragraph 1 of this Article or on any territory

so designated shall be taken except at the invitation or with the consent of the government concerned."

Mr. EAGLETON. The Senator read up to the words "common danger." It goes on to say "in accordance with its constitutional processes."

Mr. DOLE. That is correct.

Mr. EAGLETON. Then it goes on to say:

"Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations."

The Senator is guessing that the SEATO Treaty really is not any authority for our being there. Is that correct?

Mr. DOLE. I am guessing that it is one of many pegs used by previous administrations to become involved in South Vietnam.

Mr. EAGLETON. I am speaking as of this date, in June 1970. Is it authority for 400,000 troops being there today?

Mr. DOLE. I would guess it may be some authority, but not the sole authority for our presence there today.

Mr. EAGLETON. It is some authority. Is that like being a little bit pregnant? Is it authority upon which a President of the United States or a Congress that appropriates moneys can rely insofar as retention of 400,000-plus troops in South Vietnam is concerned?

Mr. DOLE. Of course, I could not respond to the Senators' first question, but, with reference to the second part of the question, I would point out that the underlying authority that any President has in this area is his rights and powers as Commander in Chief.

Mr. EAGLETON. With respect to the SEATO Treaty, the Senator from Kansas read from article 4. Is it his opinion that under that authority, affirmative action by Congress is necessary?

Mr. DOLE. Affirmative action was necessary to do what?

Mr. EAGLETON. Under the SEATO Treaty, in order to comply with section 4, when each party recognizes that aggression against the one would endanger its own peace and safety and agrees that it will, in that event, act to meet the common danger in accordance with its constitutional processes. Is affirmative action by Congress necessary in order to trigger the application of the SEATO Treaty?

Mr. DOLE. Let me say to the Senator from Missouri that I did not find that statement included in the report from the Committee on Foreign Relations, dated August 6. It might be done under Executive authority. But I do not find that as a requisite in the report of the committee chaired by the Senator from Arkansas when the Gulf of Tonkin resolution was reported to the floor of the Senate.

Mr. EAGLETON. My question related to the SEATO Treaty and especially to the words, "in accordance with its constitutional processes." Is not affirmative action by Congress necessary in order to actuate the SEATO Treaty, and could not that affirmative action be, among other things, a declaration of war or the Gulf of Tonkin resolution?

Mr. DOLE. Or the ratification of the SEATO Treaty.

Mr. EAGLETON. I beg to differ with the Senator from Kansas. There is nothing self-implementing about the SEATO Treaty, by its own language, because, in order for it to be binding and for it to be implemented in an actual situation, it has to be done in accordance with the constitutional processes of each Nation that is a signatory.

Mr. DOLE. That is correct. Of course, the constitutional processes mentioned could include executive action under our Constitution. The President, of course, is the chief maker of foreign policy; he is the Commander in Chief; he does have a right to take executive actions. I assume that is included in the broad phrase "constitutional processes."

Mr. EAGLETON. Then, the Senator takes it that the Gulf of Tonkin resolution, which he deems to be surplusage, is a historical appendage that can be done away with. In the Senator's opinion, it is not construed to be the congressional action that would comply with the phrase "in accordance with its constitutional processes."

Mr. DOLE. Would the Senator please rephrase the first part of that?

Mr. EAGLETON. The Gulf of Tonkin resolution, in the Senator's opinion, is no current authority for the continued maintenance of troops in South Vietnam; hence, it can be done away with.

Mr. DOLE. That is correct.

Mr. EAGLETON. I, therefore, ask, in reading the SEATO Treaty, especially article 4, is not the Gulf of Tonkin resolution congressional authorization of the war in Southeast Asia, and thus would it not be in compliance with the language "in accordance with its constitutional processes"?

Mr. DOLE. I do not share the view just expressed. But I would point out again that, of course, in the Gulf of Tonkin resolution there is a provision—which made possible congressional action by concurrent resolution. I recall this was an effort to placate some of those in Congress concerned about it being used as a declaration of war. In fact, if the Senator will read the House debate on the Gulf of Tonkin resolution, he will find that one of the Members of the House referred to the Gulf of Tonkin resolution as a declaration of war. I never considered it a declaration of war but the congressional processes were carried out.

As I said before, and, so far as the junior Senator from Kansas is concerned, it is not needed now, because we are not in the process of escalation. We are in the process of disengagement.

Mr. EAGLETON. One final question—perhaps I can get at it this way: Standing alone, since the Gulf of Tonkin resolution is no authority for the presence of 400,000 troops today in South Vietnam—standing alone and by itself, in its pristine glory, would the SEATO Treaty, in and of and by itself, be authority for the presence of 400,000 in Southeast Asia today?

Mr. DOLE. Again, the junior Senator from Kansas is not certain he understands the basic nature of the question. But the Senate did ratify the SEATO treaty, as I recall, by a vote of 82 to 1. It took effect on February 19, 1955. It was in effect in 1964 when the Gulf of Tonkin resolution was adopted. It is in effect now.

Again, if I were going to rely on anything—and I am not the President—I would rely on basic powers, as clearly defined under the Constitution as Commander in Chief, rather than on some treaty. Again the basic fact is that President Nixon, when he took office, found $x$ number of troops in South Vietnam. I supported President Johnson in that, as I did President Kennedy. But I do not say, today, that the President is relying on the SEATO Treaty for the presence of 400,000 American troops. I do not know why he would rely on that treaty, and do not think the Senator from Missouri does.

Mr. EAGLETON. Let me summarize it this way, to see if I am stating it accurately: That is the Senator's interpretation of it, because he is the principal author of the amendment to strip away the Gulf of Tonkin resolution, but this raises the basic question of the authority for the presence today of 400,000 troops in South Vietnam, notwithstanding past history. You have cleared up the Gulf of Tonkin issue. It is not authority for the presence of 400,000 men there today. The Senator stated he believes it is exclusive of the authority that the President has as Commander in Chief.

I take it the Senator does not think he needs SEATO, but it is a little bit of something extra there, a little bit of frosting on the cake.

Mr. DOLE. He did not get that from SEATO.

Mr. EAGLETON. He gets it in terms of authority under SEATO.

Mr. DOLE. It depends on how one interprets SEATO. The Senator from Missouri has interpreted it as a little bit of frosting. It might be interpreted by the President in some other way. I do not interpret it as being binding whatsoever upon the President, I would rely on the Constitution and the inherent powers of the office of the Presidency.

Mr. EAGLETON. As Commander in Chief.

Mr. DOLE. And as the Chief Executive officer of this country, with authority to carry out the rules promulgated under the Constitution. By being the Chief Executive, he is also the chief foreign policymaker.

Mr. EAGLETON. I should like to strip away a little more of the deadwood. I think the Senator has stripped away the Tonkin Gulf issue and has also stripped away the SEATO issue.

Does the Senator think that the presence of 400,000 American troops in South Vietnam today is in any way authorized by President Eisenhower's letter of October 1, 1954, to President Diem?

Mr. DOLE. Would the Senator please read that letter?

Mr. EAGLETON. It is four paragraphs long. I will read it. It is a letter from President Eisenhower to President Diem dated October 1, 1964:

"DEAR MR. PRESIDENT: I have been following with great interest the course of developments in Vietnam, particularly since the conclusion of the conference

at Geneva. The implications of the agreement concerning Vietnam have caused grave concern regarding the future of a country temporarily divided by an artificial military grouping, weakened by a long and exhausting war and faced with enemies without and by their subversive collaborators within.

"Your recent requests for aid to assist in the formidable project of the movement of several hundred thousand loyal Vietnamese citizens away from areas which are passing under a *de facto* rule and political ideology which they abhor, are being fulfilled. I am glad that the United States is able to assist in this humanitarian effort.

"We have been exploring ways and means to permit our aid to Vietnam to be more effective and to make a greater contribution to the welfare and stability of the Government of Vietnam. I am, accordingly, instructing the American Ambassador to Vietnam to examine with you in your capacity as Chief of Government, how an intelligent program of American aid given directly to your Government can serve to assist Vietnam in its present hour of trial, provided that your Government is prepared to give assurances as to the standards of performance it would be able to maintain in the event such aid were supplied.

"The purpose of this offer is to assist the Government of Vietnam in developing and maintaining a strong, viable state, capable of resisting attempted subversion or aggression through military means. The Government of the United States expects that this aid will be met by performance on the part of the Government of Vietnam in undertaking needed reforms. It hopes that such aid, combined with your own continuing efforts, will contribute effectively toward an independent Vietnam endowed with a strong government. Such a government would, I hope, be so responsive to the nationalist aspirations of its people, so enlightened in purpose and effective in performance, that it will be respected both at home and abroad and discourage any who might wish to impose a foreign ideology on your free people.

"Sincerely,

"DWIGHT D. EISENHOWER."

Now, that is the letter which President Eisenhower wrote to President Diem.

Does the Senator in any way consider that letter as authority for the presence today of 400,000 American troops——

Mr. DOLE. No.

Mr. EAGLETON. In South Vietnam?

Mr. DOLE. No.

Mr. EAGLETON. Insofar as the right to wage a defensive war, relating back to the debate and the exchange with the Senator from North Carolina (Mr. ERVIN) a day or so ago, insofar as that concept is concerned with the established constitutional concept, that is, the right of a President to wage a defensive war, does the Senator consider the presence of 400,000 American troops in South Vietnam today as being authorized under that constitutional precept—to wit, the right to wage a defensive war?

Mr. DOLE. First of all, of course, we have undertaken steps and commitments. President Eisenhower did so in the letter which the Senator just read. President Kennedy did so in sending troops to South Vietnam. President Johnson did so, and President Nixon has. They have the right under international law to participate in the collective defense of South Vietnam against armed attack. But our country made a commitment to give assistance back as far as President Truman's time, in various forms and at different times, in the defense of South Vietnam. At the time of the Geneva Accords in 1954, President Eisenhower warned:

"Any renewal of Communist aggression would be viewed by us as a matter of grave concern."

At the same time he gave assurance that the United States would not, with force, disturb the settlement. The formal declaration made by the United States Government at the conclusion of the Geneva Conference stated that the United States would view any renewal of aggression in violation of the aforesaid agreement with grave concern which seriously threatens international peace and security.

Later, in 1954, the United States negotiated with a number of other countries and signed the SEATO treaty. It contains in addition to the paragraph previously quoted, of course, other provisions.

So I would say "No" in answer to the question with reference to President Eisenhower's letter, and "Yes" with reference to the Senator's last question.

Let me add that if the Senator from Missouri is attempting to justify the

presence of 400,000 American troops in Southeast Asia today, then I cannot answer that. I do not know precisely why President Johnson sent 550,000 American troops to Southeast Asia——

Mr. EAGLETON. I do not, either.

Mr. DOLE. The Senator from Kansas was not privy to that.

Mr. EAGLETON. I share the Senator's mystery. Let me rephrase the——

Mr. DOLE. If the Senator is trying to charge the presence of 400,000 American troops in South Vietnam today to President Nixon, we may be here for some time, because they were there when he took office.

Mr. EAGLETON. I am not making any charges or countercharges. All I know is that there are 400,000-plus American troops in Southeast Asia today and I want to find out under what authority they are there. But let me phrase my question this way, if I may: Let me read two sections of the Constitution and ask the Senator if either one of those sections is authority for the presence of 400,000 American troops in Southeast Asia today.

Article I, section 10, clause 3 of the Constitution reads, in part:

"No State shall, without consent of Congress, engage in war, unless actually invaded, or in such eminent danger as will not admit of delay."

That is one section.

Let me read Article IV, section 4 of the Constitution:

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; . . ."

Now my specific question: Are either one of those two constitutional sections authority for the presence today in South Vietnam of 400,000 American troops?

Mr. DOLE. They might be, in part.

Mr. EAGLETON. They might be in part. Could the Senator elaborate on how 400,000 troops in Southeast Asia today could be protecting any one of the 50 sovereign States from invasion?

Mr. DOLE. Mr. President, I am certain the Senator from Missouri has read the excellent law review article that was printed in the Record a few weeks ago explaining how this section and other sections of the Constitution referring to the power of the President as Commander in Chief and chief maker of foreign policy have been interpreted through the years by any number of Presidents.

I go back basically to the power of the President as Commander in Chief and as to what he may have gotten out of the SEATO Treaty, out of the aid programs, and our commitments by Presidents Truman, Eisenhower, and Kennedy.

When we add all of these up, there was enough justification for sending troops to Southeast Asia.

I am still at a loss to know what the Senator from Missouri really wants to know.

Mr. EAGLETON. My question, I think, is quite simple. It has been phrased and rephrased in different ways to try to elicit a more precise answer.

I am not quarreling with the Senator from Kansas about what President Johnson thought he ought to do in 1965, or what he thought the Gulf on Tonkin authorized him to do.

I am concerned more about the present and the future. I am concerned about the President today, in the month of June 1970. There are 400,000 troops in Southeast Asia. I want to know under what authority they are there.

The Senator tells me they are not there under the Gulf of Tonkin resolution. He tells me they are not there under the Eisenhower letter.

The Senator tells me they are not there under the SEATO Treaty. The Senator has not told me why they are there under these two sections of the Constitution involving the right of the 50 States to be protected from invasion without.

Mr. DOLE. Mr. President, it has been suggested that they are there by inheritance. But that would not answer the question of the Senator from Missouri.

We have a right to collective self-defense between our Nation and other nations.

Again, I will attempt to respond, but do not know why President Johnson sent all of these American troops to South Vietnam.

Mr. EAGLETON. I do not know either. But I want to know why and under what authority President Nixon is maintaining 400,000 troops in Southeast Asia, under what constitutional or legal justification.

I am mystified by the actions of Lyndon Johnson, too. We can be in agreement on that. But as of today in relation to the amendment of the Senator from Kansas, what is the opinion of the Senator as to the authority for the 400,000 troops being in Southeast Asia today?

Mr. DOLE. Mr. President, I do not know the justification used by President Johnson. However, President Nixon is now engaged in the process of bringing American boys home. He is not in the process of retaining troops in Southeast Asia for any longer than it might require to have the Vietnamization program become effective.

If I were President, I would rely on my power as Commander in Chief and on any of the allied agreements we might have, and on commitments made by other presidents.

We cannot isolate it and say that this is the reason they are there, that this is the reason that they were sent, or that this is the reason they are still there.

There are a number of reasons and justifications.

As I view the action of President Nixon, it is one of disengagement. Perhaps the Senator from Missouri does not recognize we are disengaging in Vietnam.

Mr. EAGLETON. Mr. President, I am not certain. But perhaps that can be the subject of a future discussion.

Mr. DOLE. Will the Senator yield?

Mr. EAGLETON. I have the floor at the sufferance of the Senator from Arkansas. I was about to elaborate, but the Senator may go ahead.

Mr. DOLE. Mr. President, I have said many times that another justification for the action was the action taken by the great Missourian, President Truman, when he ordered troops into Korea. The justification for that was never made clear.

He came to Congress after it was done. Congress had 4 months of debate on that, as I recall. There was no declaration of war. There was no Gulf of Tonkin type resolution passed by Congress.

Mr. EAGLETON. Mr. President, I think this has been a very useful debate. The Senator says that there is no justification. He says that he finds no justification and no authority for the presence of 400,000 troops in Southeast Asia today.

Mr. DOLE. No. You see, Congress does play a role. We do not do it always by declaring war. We appropriate money in Congress from time to time. We cannot maintain an army without money.

Congress wanted to go further with respect to the Korean war. There was, if I might say so, a rather "hawkish" Congress then. Many Members of Congress were ready to do more than Truman wanted. But they did appropriate money. And that fact, in and of itself, amounts to tacit approval and tacit endorsement by the Congress.

So, that was justification. This Congress, the last Congress, and the previous Congresses have appropriated money for the war in South Vietnam.

That may be another justification for the presence of troops. We are still appropriating money. Congress is a partner in this matter.

As the Senator knows, it is proposed in the Cooper-Church proposal, and perhaps will be later in the Hatfield-McGovern proposal, that funds be cut off. We have that constitutional power.

The debate has been helpful. It might not have been helpful to the Senator from Missouri, but it has been helpful to the Senator from Kansas.

Mr. EAGLETON. Mr. President, it is becoming more helpful, because I think it is now becoming clear to me—and I ask the Senator if this is his position—that the authority for the presence of troops in Southeast Asia today is one involving the authority of the President of the United States coupled with the appropriations process. Is that in the opinion of the Senator the authority for having troops there today?

Mr. DOLE. That is part of it.

Mr. EAGLETON. What are the other parts of it?

Mr. DOLE. Mr. President, a quiz program like this is a new experience for the Senator from Kansas. It takes a little while to think. However, yes, it was the SEATO Treaty; yes, it was the pledges made by President Truman—who was a great President—by President Kennedy, and President Johnson; yes, it was by appropriations of Congress; and yes, it was by the Gulf of Tonkin resolution. So we have to consider all of these.

And we will probably appropriate some more money this year. That would be justification for the action. But let me point out a very basic difference, and not to discredit President Johnson, because as a Member of the House, I supported President Johnson and voted for the Tonkin Gulf resolution.

The Senator from Missouri did not have that opportunity, but the Senator from Kansas voted for the Gulf of Tonkin resolution.

Congress has participated very actively. We have appropriated over $100 billion for South Vietnam. But the basic difference now is that we are in the process of disengagement. We can disengage. Any President can disengage from any conflict with the kind of power he has under the Constitution.

Mr. EAGLETON. Where there was light, there is now darkness.

Mr. DOLE. It is getting later.

Mr. EAGLETON. I thought we had established that insofar as the presence of troops in Southeast Asia today is concerned, the Gulf of Tonkin resolution was no authority or authorization for them being there.

I had already checked that point off, because that was the answer the Senator had given me earlier.

Do I understand that, after a few minutes have expired, the Senator contends that the presence of troops in Southeast Asia today is in some way buttressed on the Gulf of Tonkin resolution in part, a little bit?

Mr. DOLE. The Senator is talking about numbers and I am discussing Vietnamization and disengagement.

Mr. EAGLETON. I am just talking about American bodies in Vietnam, soldiers, airmen, and so forth—400,000-plus. I want to know under what authority they are there. I thought we had gotten it down to authority under the Commander in Chief plus the continuing appropriation process. I thought we had eliminated the Gulf of Tonkin resolution, that we had eliminated SEATO, and Eisenhower was never in the picture.

Mr. DOLE. In fairness we must share the burden in this matter. There was a commitment by President Eisenhower with respect to material aid. When he left office in 1961 there were 600 or 700 Americans in Vietnam. None of them had been killed but they were there.

The aid programs go back to President Truman's time. This is not the fault of one party as opposed to the righteousness of the other.

But to be candid with the Senator from Missouri, the presence of American troops there now is justified in large part by the constitutional power of the President and the acts of Congress in appropriating money; but underlying and underscoring those points has been the Gulf of Tonkin resolution. President Johnson did not send 545,000 men there until after the Gulf of Tonkin resolution was approved on August 10, 1964.

Mr. EAGLETON. Again, I was with the Senator from Kansas until he threw in the phrase "underlying and underscoring" in reference to the Gulf of Tonkin resolution. If the Gulf of Tonkin resolution is repealed, and it is eliminated by being repealed, then, is there still remaining some authority for the presence of troops in South Vietnam?

Mr. DOLE. Oh, yes.

Mr. EAGLETON. And that authority is the power of the Commander in Chief coupled with the appropriation process?

Mr. DOLE. There are a number of bases. The SEATO Treaty, the pledges made by three or four Presidents, now, the appropriations made by Congress, plus the constitutional power which any President has and that President still has.

Mr. EAGLETON. If I may, I would like to ask a few final questions on the Gulf of Tonkin resolution. Is there any basic difference between what the Senator from Kansas seeks to do by amendment 715, and that which is sought to be accomplished by Concurrent Resolution 42?

Mr. DOLE. The intent is the same.

Mr. EAGLETON. The Senator earlier in this exchange referred to a letter from Mr. H. G. Torbert, Jr., Acting Assistant Secretary for Congressional Relations, in March 1970.

Mr. DOLE. Yes, March 12.

Mr. EAGLETON. March 12. I would like to call the attention of the Senator to a letter dated December 4, 1969, by the same Mr. Torbert.

Mr. DOLE. That would be prior to March 12.

Mr. EAGLETON. That would be an earlier letter, yes. In that letter he said, speaking for the State Department on the Gulf of Tonkin resolution:

"The existence of the Tonkin Gulf Resolution also has consequences for Southeast Asia which go beyond the war in Viet-Nam. The question of its termination must be considered carefully in terms of our other international obligations in the area, particularly the Southeast Asia Collective Defense Treaty which the Tonkin Gulf Resolution specifically cites.

He states:

"We would oppose passage of this resolution."

My first question is, Why did Mr. Torbert and the State Department change their minds, in the Senator's judgment, between December 4, 1969, and March 12, 1970?

Mr. DOLE. I have been around 10 years, and have never been able to fully understand why the State Department changes its mind.

Mr. EAGLETON. But it goes without saying they had a change of heart insofar as the utilitarian value is concerned, as expressed in these two letters.

Mr. DOLE. Basically there was a recognition when the Vietnamization program was implemented by President Nixon that it was successful and that we were on our way out of Vietnam. It is generally believed that we have passed the road of no return insofar as further escalation is concerned. I cannot, however, answer the question as to why someone in the State Department changed his mind.

Mr. EAGLETON. Could the Senator speculate on what Mr. Torbert meant by this sentence in his December 4 letter, the first letter that opposed repeal of the Gulf of Tonkin resolution?

"The existence of the Gulf of Tonkin Resolution also has consequences for Southeast Asia which go beyond the war in Vietnam."

Can the Senator interpret that for me? Does that convey any message to the Senator?

Mr. DOLE. Yes.

Mr. EAGLETON. Would the Senator care to elucidate for my benefit what message that conveys?

Mr. DOLE. I do not speak for anyone in the Department of State—not that I do not have great respect for the Department of State and the person who may have written that letter——

Mr. EAGLETON. Mr. H. G. Torbert, Jr., the same man who wrote the letter of March 12.

Mr. DOLE. I believe he was accurately stating a real fear that if the Gulf of Tonkin resolution were repealed then it might create some apprehension or fear on the part of other free countries in Southeast Asia that we were pulling out prematurely, pulling the rug out from under our friends and allies. But again, I cannot answer the question. I do not know why that particular language was used but would guess there was a feeling in some way it would undermine our policy in Southeast Asia.

Mr. EAGLETON. Mr. President, I am about finished, to the delight of the Senator from Arkansas.

Mr. FULBRIGHT. It is very interesting but I did not realize the Senator was going to be quite so long. I do have a speech to make.

Mr. EAGLETON. I thank the Senator.

When this exchange is boiled down to its distilled essence, what may have occurred in the past insofar as what previous Presidents, previous Senates, and previous Secretaries of State used as their authority for going into and staying in Vietnam, the fact remains that today, President Nixon, our President on this date, who is the Commander in Chief of 400,000 troops in Southeast Asia, does not rely on the Gulf of Tonkin resolution. The State Department said it can be repealed without its objection; and at least the Senator from Kansas does not take much solace in either SEATO or other provisions. It boils down to the power as Commander in Chief coupled with the appropriation process in this matter.

Mr. DOLE. The Senator is talking about the presence there now?

Mr. EAGLETON. Yes; the presence there today.

Mr. DOLE. Yes.

Mr. EAGLETON. Would that Commander in Chief authority, followed up on an annual basis by appropriations, be enough for him to send additional troops to South Vietnam?

Mr. DOLE. Perhaps as we have discussed in the Senate, it would depend on the purpose for which they might be sent. If it is to expand the war it might be questionable. Perhaps he can do it, as President Truman did in Korea.

Mr. EAGLETON. My question is now, predicated on the repeal of the Gulf of Tonkin resolution.

Mr. DOLE. Yes. We have established the fact that the President does have rather broad powers as Commander in Chief. It has been the subject of debate for several days on the floor of the Senate. It has been argued by the proponents of the Cooper-Church amendment that the President can go back into Cambodia, order air strikes in Cambodia send troops into Cambodia, and clean out sanctuaries in Cambodia; so if it were necessary, God forbid, that we send more troops to South Vietnam that it could be done. We are not talking about President Nixon, but rather the office of the President and the occupant of the office of the President.

Mr. EAGLETON. And this would be done under his authority as Commander in Chief?

Mr. DOLE. Yes; that and other related items the Senator from Kansas has mentioned two or three times.

Mr. EAGLETON. But not the Gulf of Tonkin resolution; we are repealing that.

Mr. DOLE. Is the Senator from Missouri for repeal?

Mr. EAGLETON. I am going to vote for repeal.

Mr. DOLE. That resolves one question I had.

Mr. EAGLETON. Would that authority be broad enough for the Commander in Chief, without the Gulf of Tonkin resolution to initiate bombing raids against China?

Mr. DOLE. Under what circumstances?

Mr. EAGLETON. Under circumstances wherein the President thought it would be propitious to strike out certain productive areas of Red China wherein they were making war machinery, armaments, et cetera, that were finding themselves in the hands of the North Vietnamese or the Vietcong.

Mr. DOLE. Perhaps the question is a little speculative. Unless there were some imminent danger to American forces or some imminent danger to American nationals or some imminent danger to American property, then I certainly would think any President would first consult with the Congress and obtain some congressional approval. But again, the junior Senator from Kansas, having been in this body only 17 months, does not have the precise answer to that very difficult question.

Mr. EAGLETON. But the Senator predicates his answer on the assumption that the President would consult with Congress before he made that decision.

Mr. DOLE. Yes; contrary to what President Nixon did in Cambodia or what President Truman did in Korea, it would be my suggestion, at least, that they call someone.

Mr. EAGLETON. Would this be a suggestion or would it be required under the Commander in Chief authority that they consult with Congress?

Mr. DOLE. It is not required.

Mr. EAGLETON. It is not required. So it is the thought of the Senator that as Commander in Chief, with no Gulf of Tonkin resolution, the President could have an air strike in Red China?

Mr. DOLE. That is right. I assume so. I am not advocating it, as the Senator from Missouri knows.

Mr. EAGLETON. But the Commander in Chief authority is, in its phraseology and in its historical implications, broad enough to embrace that of action unilaterally by the President without consultation with Congress, even though consultation might be had if he had time?

Mr. DOLE. That is right. Before World War II we sent troops into Greenland and Iceland and committed other warlike acts before becoming involved directly in World War II and before Congress declared war.

Again I would refer, and surely the learned Senator from Missouri has read it, to the Harvard Law Review article, 81 Howard Law Review 1771, previously referred to with reference to the powers and rights of the President from the time of George Washington down to the present time. There have been actions taken by the Commander in Chief—yes, without consultation with the Congress. In some cases the President reported to Congress afterward. In some cases he notified Congress in advance.

But there have been cases, and they are recited in great detail, whether it was Polk who went into Mexico, or Jefferson who got involved in the Bay of Tripoli. There are numerous examples of where the President of the United States exercised his right as Commander in Chief. These acts were generally followed by some voice of dissent from Congress. In fact, George Washington had the first confrontation with Congress when he obtained the treaty or proclamation of neutrality with France and England. As I understand it, some Members of Congress did not agree with it and thought it went beyond his constitutional powers.

So, if we want to speculate, we can assume the Commander in Chief's powers are quite broad; but the junior Senator from Kansas does not want to state on the floor that any President should bomb any place without consulting Congress.

Mr. EAGLETON. But the Senator does state that the powers are broad enough to permit him to act, and that such consultation with Congress comes after the fact, by courtesy of the President, after the decision has been made or after the die has been cast?

Mr. DOLE. The invasion of Korea is an historical precedent, to answer the Senator from Missouri, but that action taken by the President marked a clear departure from precedent in exercising the powers of Commander in Chief. Commanders in Chief had been rather timid up to that time, but President Truman was not a timid man. He acted when an emergency required him to act. He acted properly. And since that time, more and more power has been vested in the Commander in Chief.

Mr. EAGLETON. Well, then, the Commander in Chief power for the President to act by himself is broad enough to permit the bombing of China, the invasion of Korea, or any unilateral military decision the President sees fit to make, being the Commander in Chief?

Mr. DOLE. Will the Senator repeat the first part of the question?

Mr. EAGLETON. The Commander in Chief power, as the Senator views it, is broad enough to support what President Truman did in Korea, and a unilateral decision to invade or move into South Korea, his premise being assistance of Syngman Rhee, or is broad enough to have deployed troops to South Vietnam, bomb North Vietnam, or bomb anyplace in the world, if he is promising it on his authority as Commander in Chief?

Mr. DOLE. I would, in a general sense agree, but that is the view only of a junior Member of this body. It is not the President's view, probably. It may not be another President's view. It may not be the view of the Senator from Arkansas. But it depends on circumstances. Are Americans in danger? I would assume that any President who failed to act if Americans were in danger would be subject to impeachment by the Congress.

Mr. EAGLETON. I thank the Senator from Arkansas and the Senator from Kansas.

I would like to make a 1-minute comment, if I may, by way of a wrap-up of this rather prolonged exchange. I think it has served one purpose. It has pointed out that, at least in the view of the principal author of the Gulf of Tonkin repealer, the Commander in Chief authority of the President of the United States is so broad, so all-encompassing, as to permit any unilateral military act by the President, almost anywhere in the world, with no previous consultation with the Congress.

I point out to the Senate the danger of that assumption, the danger of that interpretation of the Constitution, because when and if we repeal the Gulf of Tonkin resolution, as I presume the Senate is about to do, to be concurred in by the House, and when that legislative authorization of the war has been removed from the statute books—and it was an authorization for this war and it was relied on by President Johnson, and its phraseology is broad enough to permit a war, even to permit an expanded war, as I read it—we then find the war being conducted, under the theory of the Senator from Kansas, solely and exclusively under the Commander in Chief authority, buttressed on occasion by the appropriations process. I consider this to be a very dangerous constitutional precedent.

I thank the Senator from Arkansas for yielding to me.

Mr. DOLE. Mr. President, will the Senator from Arkansas yield to me briefly?

Mr. FULBRIGHT. I will yield to the Senator from Kansas for a comment; yes.

Mr. DOLE. First of all, I appreciate the opportunity to discuss what is a very vital area of this debate with the junior Senator from Missouri. His wrap-up does not reflect the views of the junior Senator from Kansas completely. It does occur to the junior Senator from Kansas that, of course, the President has rather vast powers as Commander in Chief, and I could read the Senator the statement made by the junior Senator from Arkansas when the Gulf of Tonkin resolution was being considered by this body on August 7, 1964. But we are not in Vietnam just because of the appropriation process and the authority of the President as Commander in Chief. As the Senator intimated, there are certain other factors involved. So when the Senator characterizes my assessment, it is only the assessment of the junior Senator from Missouri and it is only the assessment of the junior Senator from Kansas, and not the assessment of anyone in the administration or of any President or of anyone in the State Department.

I thank the Senator from Arkansas for yielding.

Mr. GOLDWATER. Mr. President, will the Senator from Arkansas yield for an observation? I tried to get the Senator to yield, and he did not feel he could.

Mr. FULBRIGHT. Of course, I am going to make some remarks and then I shall be delighted to yield to the Senator from Arizona, if he wishes me to.

Mr. GOLDWATER. I think it would be more appropriate at this time.

Mr. FULBRIGHT. How long does the Senator wish?

Mr. GOLDWATER. Maybe 2 minutes.

Mr. FULBRIGHT. Mr. President, I yield for that purpose.

Mr. GOLDWATER. Mr. President, I have been more and more impressed, throughout this lengthy debate, with the need for a different approach to the two problems we face than we are making here.

I do not think there is any question about the power of the President as Commander in Chief. I agree with the language of Prof. Edgar E. Robinson, of Stanford University, that:

"The President's power as Commander-in-Chief of the Armed Forces are of greater significance than all the other powers prescribed in the Constitution."

I have detected, during the course of this debate, in the mail I have received, and at talks I have made around this country, that the American people really do not understand the limited action that we as Congress can take in the area of war, or the extreme action the President can take in the area of war.

I have come to the conclusion, Mr. President, particularly after having listened to this very interesting discussion today, that we would be better off discussing two constitutional amendments: one to better describe and prescribe the powers of Congress in the area of warmaking, and a second to describe and prescribe, if we have to, the powers of the President; because until we do either, I think we are going to go on with a very misunderstood idea of what the Constitution gives to both Congress and the President as powers. I would hope, Mr. President, that when we have finished voting on the Cooper-Church amendment and the McGovern-Hatfield amendment, this body can get down to the serious business of discussing—I do not say writing, but discussing—the need for a constitutional amendment.

Personally, I think we have to have one or two, if we are going to better understand what we were trying to understand today and what we have been trying to understand through 6 weeks of discussion on the Cooper-Church amendment.

With those words, Mr. President, I thank my distinguished friend from Arkansas for yielding.

Mr. GURNEY. Mr. President, will the Senator yield very briefly for an observation?

Mr. FULBRIGHT. I yield.

Mr. GURNEY. I, too, was present during the colloquy between the junior Senator from Missouri and the junior Senator from Kansas—a very interesting and, I thought, very illuminating discussion of the whole subject of the powers of the Commander in Chief.

My own impression, though, was that the last statement by the junior Senator from Missouri of his impression of the position of the junior Senator from Kansas was not accurate, and I take exception to it.

I did not gain any impression from the colloquy that the President of the United States at any time, any place, anywhere has the power or the right to inject American troops or to launch this country into war. It is my impression from what the Senator from Kansas said that the powers of the Commander in Chief are very broad, and that under certain facts and circumstances, when, indeed, American lives and the national security are in danger, the President does have broad powers to react, and I would go back to just one example—perhaps one of the very latest examples—which I think bears out what the Senator from Kansas is talking about. That was during the Cuban missile crisis, when President Kennedy declared a quarantine around Cuba and against the Russians, and mobilized the Air Force, the Army, and the Navy—as a matter of fact, my State of Florida was like an armed camp, with airplanes flying over day and night and troops moving in. We were actually on the threshold of war.

I think what President Kennedy did was exactly right. In this day and time, when we have to move quickly, he had to move quickly, too, in that instance, to protect the national security of this country.

That is what I think the Senator from Kansas was talking about, that the Commander in Chief does have broad powers in matters of emergency such as this to do the things that are necessary for the national security of this country.

I thank the Senator from Arkansas.

SPEECH OF SENATOR THOMAS F. EAGLETON (D., MO.) DELIVERED BEFORE LEGAL ACTION FUND FOR PEACE, COLUMBIA MEN'S FACULTY CLUB, NEW YORK, N.Y.

(Note: The Legal Action Fund for Peace held a weekend "workshop" of 250 lawyers to consider the legal and constitutional implications of the Cambodian invasion.)

We meet at a trying and difficult time—at a moment when an air of general crisis pervades this country. At stake are not simply men's lives or honor or policies, but our very institutions and the fundamental freedoms which these institutions were established to protect.

Who among us can see the marches and counter marches . . . the harangues and counter harangues as they occur day after day and not be profoundly disturbed?

You and I are all members of a profession whose basic creed is to maintain the rule of law . . . to preserve an institutional structure dedicated to the thin goals of individual freedom and community order. Now we are faced with the prospect that all the rights and liberties and regulatory mechanisms we have strived to create may crumble beneath us.

What is at the heart of this crisis? For me the answer is complex, with numerous turns and twists. It goes to our failure to pursue diligently enough the just society in which all men are judged solely by their merit and not by color or class. It goes to our unwillingness to tax ourselves fairly and heavily enough so that the governmental programs which we have authorized for better education, decent housing and a cleaner environment can be funded.

*Significantly, it goes to the war in Indo-China which not only exhausts the funds needed to solve domestic problems, but breeds the hatred and distrust which is fractionalizing our society. War, as Jonathan Swift once warned us, is "that mad game the world so loves to play." In those terms, could there be any madder game than the one we are now playing in Southeast Asia?*

Hundreds of thousands of our bravest young men have been sent by two administrations to fight the nonexistent phalanxes of a faceless enemy. Yet where is the progress . . . where are the successes . . . which would justify the better than $135 billion already spent? What vital national interest of the United States justifies the senseless sacrifice of so many of these fine men?

The Paris peace talks, which many of us hoped might produce a reasonable solution, have broken down. The reason is both the intransigence of the North Vietnamese and the intransigence of the Johnson and Nixon administrations. *President Nixon, like Johnson before him, refuses to admit that a victory denied on the battlefield cannot be won at the peace table.*

The story in Indo-China is no better. Time and again, Congress and the American public have heard glowing reports on the success of Vietnamization. Time and again we have been disappointed. True, we have been able to show that the Viet Cong hold over various areas of South Vietnam can be broken by the day-to-day presence of contingents of American and South Vietnamese troops. But what we have not been able to demonstrate convincingly is that this guerrilla infrastructure can be prevented from reappearing almost immediately once American forces have departed.

And what sort of confidence shall any of us have in the Government of President Thieu and Vice President Ky on which our leaders have spent so much money and lavished so much attention?

How long shall we remain blind to what the war is doing to the people of Vietnam?

How much longer are we to tolerate the irrationalities and inconsistencies of this Administration on the war?

On April 20, the President told us that such tangible accomplishments were being achieved in Vietnam that 150,000 more American troops would be brought home from that country within the next twelve months. Only 10 days later, the President announced that American and South Vietnamese troops would have to invade Cambodia to wipe out enemy sanctuaries and capture the enemy or COSVN headquarters.

Our troops have now been in Cambodia for six weeks. They have found no COSVN and it is becoming increasingly clear that if such a headquarters ever did exist in the border areas of Cambodia, it was moved before our troops ever entered that country—moved, the Pentagon now says, beyond the President's 21.7 mile limit. Has this failure to find COSVN, on which so much of the incursion into Cambodia was ostensibly premised, troubled our military leaders? It would appear not, for they still claim success by their own floating definition of success. The public is barraged with figures about the killing of 9,241 of the enemy, and the capture of over 17,500 enemy weapons, 28,170 rockets and 5,742 tons of

rice. Little concern is shown that, as of last week, all of these captured supplies had a value of only about $30 million—roughly the cost of supporting our Vietnam effort for fifteen hours.

And as if the invasion of Cambodia were not troublesome enough, Secretary of Defense Laird has recently confirmed a report leaked by a South Vietnamese diplomat that troops from his country, accompanied by American advisers, have made limited raids within Laos.

Also, substantial and reputable reports persist that the South Vietnamese are preparing for a "sanctuary strike" in Laos aided by Thai and Korean Troops with the silent encouragement of Souvanna Phouma.

Who cares—seems to be the attitude of this Administration—that Congress passed legislation last year barring the use of American ground combat forces in Laos? After all, these were only limited incursions taking place over a limited number of hours with only a limited number of American participants.

Well, I for one care and I believe the American people care. This Administration has overreached itself. In doing so it has stretched thin the fabric of institutions and common faith which binds this society together.

In theory, this should be the time for the Congress to reassert its constitutional authority over military policy.

First, it would strip away the rhetoric and, in lawyers' language, get down to the hard facts of who has jurisdiction to control the scope of the Indo-China conflict. We would find the language of the Constitution relatively clear in this regard and the meaning attached to that language by the Founding Fathers relevant and persuasive.

Article I, Section 3 gives the power "to declare war" to the Congress. It also delegates to the legislature the power "to make Rules for the Government and Regulation of the land and naval forces" and the power to appropriate monies "to raise and support Armies"—so long as these appropriations are not made for terms longer than two years. Finally, it leaves a reservoir of authority to Congress not only to enact laws to carry out its own powers but "all other Powers vested in the Government of the United States, or in any Department or Officer thereof."

Article II vests the "executive power" in the President and makes him "Commander in Chief of the Army and Navy of the United States."

To the draftsmen of the Constitution, this division of authority was meant to alter the unity of power that had existed in England. In the *Federalist Papers*, Hamilton wrote that to be Commander in Chief "would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature."

In short, we would find that the framers gave to the Congress the decision of whether to commit or not to commit troops to a trial of force. Once these troops were committed, the President had the power to direct their day-to-day operations so long as he did not open up this country to a new trial of force.

We would also find that the war-making power given to Congress was meant to be broadly construed and to permit Congress to define the dimensions of any war. It was to be up to the legislative branch to authorize hostilities and those who accepted this delegation—as the Supreme Court has noted on various occasions—would "act under special authority, and (could) go no further than to the extent of their delegation."

Congress would apply these constitutional principles to the present conflict in Indo-China. We would make clear that our commitment of troops to Vietnam—and presently to Cambodia—does not stem from the inherent power of the Presidency or from the SEATO Treaty which states only that each signatory will "meet the common danger *in accordance with* its constitutional processes." Rather it stems from a Congressional authorization, namely, the poorly worded and hastily enacted Tonkin Gulf Resolution.

From that position of strength, the Congress would move to define the scope of the hostilities that it originally authorized. The Cooper-Church amendment (to limit the range of conflict in Cambodia) and the McGovern-Hatfield amendment (to establish a timetable for troop withdrawal from Southeast Asia and to cut off funds for military operations in that area of the world after June 30, 1971) would be redrafted to eliminate loopholes and then passed.

These enactments would then constitute an attempt—even if belated—to end a war which is senseless and divisive and to establish some of the basic terms which should have been part and parcel of the Tonkin Gulf Resolution.

By passing these amendments, Congress would have rejected the make weight argument that it should not act when to do so might embarrass the President or cast doubt on his wisdom. *It would have replied that this country must stand on the merits of its policies, not on the pride of its leaders.* Its answer would have been that when the Founding Fathers gave Congress the power to declare war and compelled it to review military appropriations at least every two years, they recognized that the legislative branch must have power to review not only its own mistakes but the errors of a President in conducting hostilities. And in adopting these measures to limit the war in Southeast Asia, the Congress was merely enforcing that power of review.

But unfortunately, this scenario appears to be entirely hypothetical. It might happen in an Allen Drury novel, but it is not about to happen in the 91st Congress. First, I regret to say that it is my judgment that neither the Cooper-Church amendment—in anything like its original form—nor the McGovern-Hatfield amendment will be enacted and signed into law.

*Second, it is now my feeling that Congressional passage of the Cooper-Church amendment, by itself, will not make very much difference in the status of the war. Enactment would constitute a political slap on the wrist for the President, and, to be sure, a psychological lift for those who oppose the war. However, in substantive terms it would mean little.*

*A close reading of the legislative history behind the Cooper-Church amendment leads to the conclusion that Congress has not succeeded in reasserting power through it. If anything, Congress has defined the President's constitutional power as to give him virtually a free hand in Cambodia, regardless of any apparent strictures in the amendment.*

This apparent paradox stems from the fact that both opponents and proponents of the bill have insisted that it would do nothing to abrogate the President's constitutional power as Commander in Chief. At the same time, we have failed to define the *extent* of those powers with regard particularly to measures he may take without Congressional approval for the protection of American troops.

In so doing, we have effectively gutted this amendment of any significance insofar as redressing the balance of powers between Congress and the President is concerned. And we have also failed to face up to the more basic question which lies at the root of the Vietnam tragedy: Just who has which part of American war-making authority, and how much, in this supersonic, nuclear age,

I offer these excuses, which have some validity: Congress is working from a position of weakness after at least 70 years during which it has abdicated power rather than coalescing it. The debate of the Cooper-Church amendment comes at a time when American troops have been in Vietnam for six years, under the authority of the Tonkin Resolution which was itself a manifestation of Congress' abdication. The facts surrounding the movement of our troops into Cambodia will not support a clear-cut case of illegal action by the President. Partisanship, patriotism and political pressure have all conspired to obscure the constitutional issue.

What must now be done, however, is to extract the Constitutional issues from the immediate context of the Vietnam War—if not from the lessons it has taught us—and resolve them in a dispassionate, non-partisan way.

I am hopeful that this can be done. And within the ensuing months, with the help of some of you, I shall offer legislation designed to create a legislative history which will set clearly and specifically the Congressional procedures which should henceforth be followed before American troops can be committed abroad, and the reciprocal limitations which Congress understands to be imposed by the Constitution on the unilateral actions of a President. It is my hope that this legislation, divorced from any specific armed conflict, will galvanize the Congress into facing up to its constitutional role in the process of sending American troops to the shores of any foreign country. Perhaps it will focus on such subjects as the power of a President to defend American troops who have been attacked . . . or to rescue U.S. citizens who have been captured by enemy forces . . . or even to preemptively bomb a foreign country without prior authorization from the Congress.

If these questions are raised and, hopefully, discussed cogently, they will only lead to new issues such as: modernizing Congress . . . speeding its procedures . . . revamping its procedures. And all of this is going to take time, patience, and great vision.

In any case, excuses will not work forever. They will not satisfy the American public if the war does not end soon. They will not satisfy humanity or God if someday the button gets pushed.

APPENDIX B

| Instances where President can act without specific authorizing congressional action by both Houses | Repel attack on United States | Prevent an "imminent" attack on United States, etc. | Repel attack on U.S. troops | Protect U.S. citizens abroad | Protect U.S. property abroad | Under auspices of treaties | Under "national commitments" | Commit U.S. troops where imminent possibility of involvement in hostilities exists | Commit U.S. advisors to accompany foreign troops in combat |
|---|---|---|---|---|---|---|---|---|---|
| Eagleton | Yes | No (admits further debate is necessary). | Yes, but limited to defensive action. | Yes, but with restrictions. | No | No | No | No | No. |
| Javits | Yes | No | Yes | Yes | Yes | Yes, but requires affirmative congressional action within 30 days. | Yes, but requires affirmative congressional action within 30 days. | Yes, but not specific. | Yes, but not specific. |
| Taft | Yes | Yes | Yes | Probably yes, but sec. 4 is unclear. | Probably no, but sec. 4 is unclear. | Begs the question in pt. I, sec. 2. | Probably yes, but sec. 4 is unclear. | Yes | Yes. |
| H.J. Res. 1 | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes. |

Appendix C

Possible Revision of Section 2 of S.J. Res. 59

SEC. 2. The President may commit the Armed Forces of the United States to hostilities to the extent authorized by Congress through a declaration of war. The Congress recognizes that during such authorized hostilities against an enemy country or enemy forces, the President's powers as Commander-in-Chief and Chief Executive provide him with the further authority, regardless of the limitations contained in the specific declaration of war or other authorizing statute or resolution, to order the Armed Forces of the United States to deliberately enter, invade, or intrude upon the territory or airspace of a country with which the United States is not then engaged in hostilities:

(a) when in hot pursuit of fleeing enemy forces who have attacked, or engaged in battle with, the Armed Forces of the United States and then retreated to the territory or airspace of such country, to the extent necessary to repel such attack or complete such battle, or

(b) when a clear and present danger exists of an imminent attack on the United States or the Armed Forces of the United States by enemy troops located in such country, to the extent necessary to eliminate such danger.

SEC. 3. In the absence of a governing Congressional authorization described in Section 2, the President may commit the Armed Forces of the United States to hostilities, to the extent reasonably necessary to:

(a) repel an attack on the United States by military forces with whom the United States is not engaged in hostilities at the time of such attack and to eliminate or reduce the effectiveness of any future attacks by such military forces which are committing the attack being repelled; and

(b) repel an attack on the Armed Forces of the United States by military forces with whom the United States is not engaged in hostilities at the time of such attack and concurrently to eliminate or reduce any clear and present danger of future attacks by the military forces which are committing the attack being repelled; and

(c) withdraw citizens of the United States, as rapidly as possible, from any country in which such citizens, there due to their own volition and with the express or tacit consent of the government of such country, are being subjected to an imminent threat to their lives, either sponsored by such government or beyond the power of such government to control: Provided, that the President shall make every effort to terminate such a threat without using the Armed Forces of the United States: And provided further, that the President shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States; and

(d) to fulfill a commitment, as specified and authorized, in a statute or joint resolution specifically intended to give effect to such a commitment, but authorization to commit the Armed Forces of the United States to hostilities may not be inferred from legislative enactments, including appropriation bills, which do not specifically include such authorization.

The CHAIRMAN. Thank you, Senator Eagleton.

SELECTION OF BEST FROM PROPOSED MEASURES

I think both of you gentlemen have made extremely persuasive and powerful arguments for the case for legislation in this field of regulating and delineating and specifying the conditions under which we should go to war. The problem now resolves for the committee to select the best out of these and all other measures, and to get the best bill.

I see there are some differences in detail, but the overall thrust, it seems to me, is exactly the same and you have exactly the same objective in mind. I personally feel that the Senate, as well as the country, is very much interested in this subject. I think it is a most important subject, so I hope we can with our collective wisdom refine out of these suggestions and various provisions the best possible bill.

Senator JAVITS. Mr. Chairman, may I say in that connection that I hope that the committee will not look at these bills as being competi-

tive. I have no desire to testify to the defects of Senator Eagleton's approach or the superiority of my own. I am very pleased that the basic legislative framework I set out last year has been adopted by Senator Eagleton; that is the main point to me. I think there is much in his resolution that can be useful. I shall lend myself as a member of the committee to getting the best conceivable product within this framework because I think obviously the framework is sound and broadly acceptable. In addition, we may get help from lots of others. We have lots of resourceful members on our committee; other Senators may have suggestions as to how to improve on what has been offered.

I see one substantive point we will need to decide in the Foreign Relations Committee. That relates to this treaty question. Senator Eagleton has properly raised it; whether or not one of the contingencies that we wish to authorize the President to meet, even before congressional action under the 30-day discretionary period, is action under what we call a national commitment, as defined in the commitments resolution. My bill carries those words.

We may decide otherwise, but I felt it my duty to include such a category because the Senate had already taken a position on this. Senator Eagleton, coming to it without that committee background, apparently wants it excluded. I think it is a very important question.

The CHAIRMAN. It is very important.

Senator EAGLETON. I agree 100 percent with Senator Javits. This is not a contest between Senator Javits and myself over who wrote the best theme and deserves the gold star.

We agree totally on the importance of a war power resolution. Senator Javits had left the room during my remarks, but, as the committee knows, I paid great tribute to his draft. For pedagogical purposes, I felt the best way to highlight and elucidate these various issues, including the treaty difference, to which Senator Javits just referred, was to point out differences between his draft and mine.

The CHAIRMAN. I think what the Senator from New York and you have said is entirely in order. I can think of no bill of any consequence that has been introduced that hasn't been amended.

Senator EAGLETON. That is right.

The CHAIRMAN. The question here is simply to amend it. Even if there were only one bill, there would be changes undoubtedly, especially in dealing with as complex and esoteric a subject as the meaning of the Constitution and how it should be interpreted. So I had not for a moment thought these were either/or, one bill or the other. I am almost certain this will be a combination of the ideas of both you gentlemen who have developed them so well. I find great merit in both proposals. I have no doubt the final bill will draw from both pieces of legislation and that is the way it should be.

### CRITERION FOR TREATY FORM

There are many other questions that have been raised. But since you already raised one of the key substantive differences, why don't we proceed to a little discussion on what that means?

This treaty area is an extremely difficult one. By way of introduction, I might say, when I was a student I had always been taught

that matters of importance should be dealt with by treaties. These matters of importance are not clearly defined, of course. But agreements involving important substantive questions, as distinguished from routine, small, insignificant, trivial matters, should be in the form of a treaty. Perhaps my memory isn't too clear, but that was the only criterion as I can now recall.

It strikes me that recently, not just this executive branch, but the executive branch as a whole, has tended to go its own way. I use the Spanish Bases Agreement as an example of where it wasn't a treaty. You are saying the treaty cannot authorize hostilities, but we have now created by an executive agreement without any participation of the Congress a condition which, I think, is almost tantamount to a commitment to defend this country. So it is more complex even than treaties now. You have to deal both with the treaty question, which you do, and also I think, have to do something to try to bring back into focus what kind of obligations should be made by a treaty or by executive agreement.

### IMMEDIATE MILITARY ACTION UNDER NATIONAL COMMITMENT

There is a substantive difference about treaties. Your bill, Senator Javits, does not carry the same provisions or similar provisions to Senator Eagleton's.

Senator JAVITS. Senator Eagleton's resolution omits a provision which my bill contains. What I sought to do is to incorporate the definition of a national commitment, which we ourselves in committee and the Senate as a whole have accepted. Our chairman really authored it.

The CHAIRMAN. Yes.

Senator JAVITS. And the Senate passed it by a vote of 70 to 16. I used that definition as an area of specified and defined but still discretionary authority to the President. If the use of Armed Forces is required, I refer to the words at page 2, lines 11 to 13 of my bill, "Where immediate military hostilities by the Armed Forces of the United States are required." My bill provides that where we have a national commitment, as defined by the commitments resolution, the President may, for up to 30 days, use the Armed Forces of the United States in hostilities where he finds that "immediate military hostilities are required."

Senator Eagleton would not give him that authority but would require affirmative action of the Congress before he uses the Armed Forces. I will summarize why I wrote it in for two reasons: (1), the fact that we ourselves had authoritatively defined a commitment. This was done carefully and deliberately so that it is not in every engagement or every place we have a MAAG or anything like that, a commitment. But where there is a commitment which results exclusively from an affirmative action, both executive and legislative, that is our definition of a commitment, there, I feel, you have an authoritative enough expression of the national will and an undertaking of a commitment. If the President finds, in his executive authority, that immediate military hostilities are necessary, then he may engage in them without the delay or even prior disclosure of intent—that is going to the Congress first. But let us understand that this is subject to two very important conditions: (1), that there is a national commitment as defined

by the Senate, which is much more solemn than these backhanded arrangements which we have found so frequently around the world and, (2), that the Commander in Chief determines that immediate military action is necessary in accordance with the actual, existing commitment.

Now, I would say that would certainly be called for under NATO.

I think Senator Eagleton pointed that out as a salient example. I would not agree. I haven't had a chance to analyze every one of the countries which Senator Eagleton has cited. I would doubt very much that we have a national commitment, as defined, with all the countries Senator Eagleton has listed.

I don't know what particular relationships he had in mind in setting them all forth; he will state that himself. I have in mind and, therefore, used the words we had legislated. That means that we have joined in making that commitment. Otherwise it cannot be a national commitment as defined. Where there is such a commitment my bill gives the President up to 30 days latitude if he finds immediate hostilities are necessary pursuant to that commitment. It must be pursuant to the commitment. It is not a hunting license.

Senator SPARKMAN. May I ask a question?

The CHAIRMAN. Certainly.

DOES COMMITMENT INCLUDE ACTION BY BOTH HOUSES?

Senator SPARKMAN. You say where we have acted. Do you mean both Houses of Congress?

Senator JAVITS. Well, the commitments resolution is the basis for my——

Senator SPARKMAN. I know, but this goes back to this question of treaties upon which the House does not act.

Senator JAVITS. That is right, but the commitments, our national commitments resolution found a commitment to exist where there had been an affirmative action where it was on a treaty, convention, or other legislative instrumentality, it might even be a special law or it might be an executive agreement which had gone through legislative processes.

Now, a treaty would only be approved by the Senate, in accordance with the Constitution. The House has no constitutional prerogative there.

Another type of instrumentality, if there is any in these cases, could be conceivably a law which would have to be passed and signed by the President. My thought was to adopt the reasoning which we had adopted in the national commitments resolution. It seemed to me we were there taking the first step toward this kind of a law. We were defining a commitment. Therefore if we define a commitment, we accept that definition. It seems to me the next step is to say that we are ready to see such a commitment implemented to the extent the national exigency may require, while keeping residual control ourselves. That is why I wrote what I did. That is what my bill accomplishes.

In other words, that as we ourselves defined a commitment to include both executive and legislative concurrence we were then willing to run some risk in the use of that, of the employment of American means

to honor that commitment. That was my reasoning in including this provision. When I came to write this bill I wrote it with the background of our committee; so I have had this very much in my mind.

Senator Eagleton was not burdened with that particular proposition, as he did not participate in it.

The CHAIRMAN. What do you wish to say about that?

RESERVATION OF CONSTITUTIONAL PROCESS UNDER TREATIES

Senator SPARKMAN. It might be well to let Senator Eagleton answer your question. I just wanted to go this step further.

Senator Eagleton points out that our most strangly worded commitment was the North Atlantic Treaty. Subsequent to that we enacted treaties with several other countries, and I recall that in every one of those, including, I believe, the SEATO Treaty, there was always put in the phrase "according to our constitutional processes."

Senator EAGLETON. Right.

Senator SPARKMAN. It seems to me that that would tie in both Houses. But in the absence of that language, it seems to me that there would be a commitment under a treaty that was acted on, of course, only by the Senate.

Senator EAGLETON. Article 11 of the NATO Treaty states that the treaty's provisions shall be "carried out by the parties in accordance with their respective constitutional processes." And as the Senate Foreign Relations Committee of the 81st Congress in its report on the NATO Treaty said:

> Would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to an attack on New York City? In such an event does the treaty give the President the power to take action without specific congressional authorization which he could not take in the absence of the treaty? The answer to both of these questions is "no."

You are absolutely correct, Senator Sparkman, that subsequent treaties to NATO also contain the language "in accordance with constitutional processes." The 81st Congress Foreign Relations Committee didn't interpret NATO as open ended. The list of treaty countries which I cited earlier consists of the signatories of treaties, approved as the Senator points out, only by the Senate and not by the House.

The CHAIRMAN. We had great trouble, of course, in considering the commitments resolution, determining what is a commitment. We struggled with that as a matter of definition and, in a sense, we fuzzed that over because we didn't come up with exactly a satisfactory solution to it.

You are looking into the future in these cases and giving assurance to these countries that you are their ally, but I think the reservation, "according to constitutional processes," is a correct one. I had thought that most of these are interpreted that way.

The degree of assurance you wish to give to them, as of a given time, varies a great deal, of course. I don't think it was intended that you would give the assurance to come to the aid of a country that itself has acted in an outrageous manner, of which our whole country disapproves. Supposing one of these allies without provocation attacks someone else and precipitates a war. We would not follow

through on that. You have these variations in the conditions that will develop which, I think, do properly justify reservation of the final decision to the constitutional processes. That is, I think, a proper qualification.

REQUIREMENTS OF CREDIBILITY OF U.S. COMMITMENT

Senator JAVITS. I think both bills, Mr. Chairman, would contain that ultimate, residual authority. I do think that we have to decide whether the credibility of an American commitment, where there is really a commitment as we have defined it, requires us to give the President discretionary latitude. Presidents have exercised such authority, but it is very questionable as to whether they had the constitutional or statutory right to. We would endeavor to clarify and codify the question.

In doing this, you have to decide whether in the interest of credibility of our word in a commitment, which we defined as a national commitment, and the security of our Nation, we need to extend a limited discretionary authority to the President. Under modern conditions, these things break on you overnight. Whether more caution, which is evidenced by Senator Eagleton's version, must prevail over modern necessities is a question and I think we simply have to, each of us, search our consciences and pray we come to the right conclusion.

Here both proposals are before us.

The CHAIRMAN. I think, as a practical matter, you cannot deal with these matters solely by the language. It is true you can go as far as you can, but then what we have done is to go further than the written commitment with its limitations and actually create conditions which give that further credibility.

As an example, although NATO is the most far-reaching, I suppose, commitment as such as far as the language goes we have ever made, that wasn't deemed sufficient. So we sent over 300,000 troops to create this condition which makes the implementation of the words much more certain. Their very presence there does it. In a sense you have that in NATO, which is in accord with the treaty. Then you get the other example, the executive agreement with Spain, in which there is no treaty, no congressional authorization other than the appropriation of funds.

USE OF U.S. TROOPS UNDER NATO TREATY

Senator JAVITS. Mr. Chairman, I would like to ask a question which perhaps Senator Eagleton would perhaps be kind enough to answer which is raised by the NATO situation.

You do have several hundred thousand troops on the Rhine. Suppose that it was necessary to use those troops in hostilities. The NATO treaty says "an armed attack against one . . . shall be considered an attack against them all." Under my bill the President could obviously do that. I wonder what Senator Eagleton's response to that would be. I think it is very important. I am not asking that as a debating point; I think it is very important.

The CHAIRMAN. That is right; I think it is a very pertinent question.

Senator EAGLETON. Well, under section 3(b) of my bill, the President has authorization to protect legally deployed troops if they are attacked.

The CHAIRMAN. He has already been given that authority, really.

Senator JAVITS. Yes, but suppose the attack was on German or other NATO Forces and not on these forces. That is really what is much more likely to happen. The Russians aren't fools either.

Senator EAGLETON. Under my bill the President would be required to come to Congress. However, an attack on NATO is unlikely to occur without some forewarning. Congress should approve of the initiation of hostilities under a specific set of circumstances rather than granting a blank check.

Senator SPARKMAN. But the treaty says that the attack on anyone is to be regarded as an attack on everyone.

Senator EAGLETON. That is correct.

RESPONSE TO ATTACK INVOLVING NUCLEAR WEAPONS

Senator SPARKMAN. Going one step further than an attack on the troops, suppose it is an attack that involves nuclear weapons. You cannot wait to get a declaration from the Congress on that.

Senator EAGLETON. No.

The CHAIRMAN. That is defensive.

Senator EAGLETON. That is a right of self-defense, and is covered under section 3(a) and section 3(b) of Senate Joint Resolution 59. In the event of a nuclear attack on the continental territory of the United States or of U.S. troops legally deployed abroad, for instance, in Berlin, we are at it. The President can act.

Senator SPARKMAN. Suppose it is an attack on one of the NATO countries where we don't have troops?

Senator EAGLETON. If there is a nuclear attack on a country where no U.S. troops are involved, whether El Salvador or Greece, the President would have to come to Congress before the United States become involved in hostilities.

Senator SPARKMAN. Yes, but what about one of the NATO countries?

Senator EAGLETON. All treaty countries are equal under Senate Joint Resolution 59. They all fall under the treaty provision that we meet our obligations in accordance with our constitutional processes. No one country is more precious than the rest.

Senator SPARKMAN. Suppose it is a nuclear attack when you cannot afford to wait.

Senator EAGLETON. I believe that we can afford to wait if the United States and its forces have not been attacked. After all, the President can come to Congress if the situation looks particularly threatening.

Senator SPARKMAN. It breaks down, as I see it then, the NATO treaty——

Senator EAGLETON. NATO provides that we act in accordance with constitutional processes and under those processes the Constitution requires war to be declared by both Houses of Congress.

Senator SPARKMAN. I think it raises some practical problems.

Senator EAGLETON. I do not put the NATO Treaty on a higher level than the U.S. Constitution.

Senator SPARKMAN. Neither do I, but I suppose that is the tightest agreement that we have——

Senator EAGLETON. Yes, I suspect.

Senator SPARKMAN (continuing). As you say in your paper. That is all.

The CHAIRMAN. Senator Spong, you said that was the question you wanted to ask.

NATO DOCTRINE OF FLEXIBLE RESPONSE

Senator SPONG. I think Senator Javits asked it. It revolves around something on which Senator Cooper is an authority. I think the doctrine of flexible response that we have at present is NATO policy.

No, my question is really Senator Javits question worded in a different way.

Do you think that Section 1 of your bill as presently worded would run contra to the NATO doctrine of flexible response, which is, as I understand it, that we go to the aid in any conventional attack to try to hold it long enough to see if there can't be negotiations or what type of response we should give.

Senator EAGLETON. We give aid in accordance with our constitutional process. I don't know what doctrine we are going to discuss. Do you want to discuss political doctrine, military doctrine, constitutional doctrine, or warmaking doctrine? If it is constitutional or warmaking, I am satisfied that Congress must initiate hostilities.

If it be deemed in this frightening nuclear pushbutton world we live in that no longer do we have the luxury of coming to Congress on these things, if that be the best judgment, the Constitution should be amended to so state and to say this is a different kind of world than Madison and Hamilton envisioned. I would vote against such an amendment. If the world has become so troublesome that it requires one man making these horrendous decisions and he hasn't time to quibble around with Fulbright and other people before going at it, the Constitution should be changed to so state.

I would vote against it.

Senator SPONG. Are you saying, Senator Eagleton, then, that your understanding of the present situation with regard to NATO that section 1 does not change anything?

Senator EAGLETON. No. My understanding is that under NATO as drafted, as signed, further congressional action is required if one of the NATO powers is attacked and if our troops are not attacked before American forces are committed to hostilities. Considering our 300,000 NATO troops stationed in Europe those are important "ifs."

Senator JAVITS. Mr. Chairman, may I say one other word on that and then I want Senator Cooper——

The CHAIRMAN. Yes, go ahead.

S. 731 OFFERED TO BRIDGE GAP

Senator JAVITS. Just one word. We cannot assume that this bill is unnecessary. If what Senator Eagleton says is true, what do we need this bill for if we are always going to proceed by a declaration of war and everything else is illegal?

We found in experience that Presidents claim that they had to act because constitutional processes, as we have practiced them, have fallen short of modern requirements. Now that is what they claim and that is why they did what they did in Santo Domingo and in Vietnam,

et cetera. I am offering legislation which bridges the gap between modern requirements and traditional ways of looking at constitutional processes. I do this by bringing into play the constitutional powers of Congress which supplement, and were intended to be conjoined to, the exclusive power of Congress to declare war. Previous witnesses have shed considerable illumination on just this point.

I don't know how we will decide it, Mr. Chairman, and I don't know that I will be on the winning side in this particular delicate matter, but I think we have to decide this issue not on any theory that there is some unconstitutional authority involved. The Constitution needs to be clarified and implemented through legislation because we have run afoul of conditions which demand it. I think we are dealing with a policy question.

The CHAIRMAN. Senator Cooper.

Senator COOPER. I would like to comment.

First, I would like to say that both Senator Javits and Senator Eagleton have made brilliant and constructive presentations.

CONSTITUTIONAL PROCESSES UNDER TREATIES

As I understand the purpose of these hearings and of the proposals made is to lay out some rules, guidelines, definitive statutes, so that in the future we will not become involved in war without considered thought, and so that we will not back into wars as we have done in Vietnam; is that correct?

Senator JAVITS. Yes.

Senator EAGLETON. Yes.

Senator COOPER. But you are dealing with a situation which is already in existence. You make a distinction, and I believe you do intend to make a distinction. First, Senator Eagleton has pointed out we are involved in a number of treaties. I think about eight, including 42 countries. That has been done. These we entered into after World War II and have continued under several Presidents. All of those treaties provide that an attack on one party will be, as in the case of NATO, an attack upon the United States, will endanger the peace and security of the United States. All the treaties say that in the event of an attack then the United States will take some action. It doesn't say what action. but that action will be taken in accordance with constitutional processes.

Now, I have thought, and the Senate has already passed upon this, that in any case where the United States is a party to a treaty calling for action under constitutional processes the President must come to Congress to proceed. The President must come to the Congress for authority. Would you agree with that, that he should?

Senator JAVITS. I would agree that the President should come to the Congress for authority, but I would also like to note that he has not done so.

Senator COOPER. I know that.

Senator JAVITS. And that, nonetheless, we have by voting him appropriations and otherwise supporting him really allowed him to do so in the sense that we haven't stopped him. I think that—I am more than willing, because I think this is something far beyond any of us to state affirmatively for the record, that one of the values of this bill

will be that it will give statutory authority to the President where the matter has been in doubt. If we should decide that we want to give the President up to 30 days where there is a commitment, as we have defined it, from now on there will be no question about his authority. That goes right to Senator Cooper's question, that the President would be doing so with authority according to our constitutional processes. Heretofore it has been in grave doubt as to whether the President has had such authority on his own.

USE OF WORD "COMMITMENT"

Senator COOPER. We get back to the question of the use of the word "commitment." We use the term as if the treaties themselves are commitments. I don't think this is the case and I don't think the Senate by vote has agreed to that. We have said the United States has an obligation to take action according to congressional processes and that no "commitment" occurs until the Congress and the President agree.

Now, the commitments resolution which Senator Fulbright introduced and which was amended on the floor of the Senate—the amendment that actually passed—provides that in no case shall there be any commitment for the use of armed forces to assist another country except by joint action of the executive and legislative branches by means of a treaty, statute or concurrent resolution of both Houses of Congress, or statute as in the case of a declaration of war. I believe that the committee should come out with a position that in no case shall there be a national commitment to use U.S. forces until the Congress and the President agree.

Would you agree with that?

Senator JAVITS. Would you let me explain that, Senator Cooper?

Senator COOPER. Yes.

Senator JAVITS. We use the words "national commitment" to relate to the agreement we entered into with a given foreign nation which did have executive and legislative concurrence. You are now interpreting that to require yet a second act, to wit: an act happening after the agreement has been made and after it has been approved by our constitutional processes, and when it is invoked. The terms of the commitment itself are most pertinent here; I am not proposing a new hunting license or a new Tonkin Gulf blank check.

Now I think that is quite a question. I just asked for the resolution because I wanted to look at it again. But I believe, I certainly know what I meant. I meant that when the legislature and the executive had concurred in an agreement, it had not yet been invoked, they had concurred in making an agreement that was a commitment upon which the President could act if he felt immediate action was required for up to 30 days. You needed no further legislative action in order for the President to commit American forces to hostilities for up to 30 days, no more, maybe less if the Congress curtailed it. This requires that the terms of the commitment oblige us to do so. If there is no such obligation under the commitment, my bill does not create one.

If we interpret it as Senator Cooper has just stated, then you really don't need these provisions at all. If what we mean is that, when that commitment is invoked you have to come back and get legislative and executive concurrence, then all my provision does is double back on

itself, but it was not so intended. It was intended to give the President, in order to meet our situation, as I described it before, it was intended to give the President authority which is now doubtful in law, but which he has used. We confirm that authority, for a very limited period and under limited conditions, but we do confirm it and give it a statutory basis.

This is bigger than I am, or Senator Eagleton. We have got to know just what we are doing. I have tried to define it now precisely.

If I may repeat, my understanding is that a commitment as we define it is a contract approved according to our constitutional processes. No matter what you call it, treaty, convention, executive agreement, law, it is a contract which we have approved by the President and the Congress. If it is a treaty only one House, as the Constitution says, if it is some other kind of a law, both houses; and that the President can implement that commitment by the use of our forces in hostilities to a very limited way. The President doesn't have such authority as a matter of law now, although Presidents have used it. This will confirm it to him, with the concurrence of the Congress. But in return recover a string on all his war actions as envisaged in the Constitution. I wanted to make it crystal clear in fairness so that when we decide we know what we are deciding.

DEFINITION OF CONSTITUTIONAL PROCESSES UNDER TREATIES

Senator COOPER. I am dealing now with the issue where we have treaties, and those treaties say "constitutional processes," it is necessary to define what a constitutional process is.

In my view, I think the Senate has already decided it when it passed the commitments resolution; the Senate defined a constitutional process as going to the Congress for permission, for authority. That, of course, doesn't mean that the President cannot take emergency action. But it does mean he cannot take this country into war and continue war without the authority of Congress.

Senator JAVITS. Senator Cooper, may I just pinpoint out if you would be kind enough——

Senator COOPER. Otherwise you go around in a circle.

Senator JAVITS. Yes; I say he may take emergency action exactly as you say, except I define emergency action to mean the use of the Armed Forces of the United States for a period of not exceeding 30 days. I am legislating "constitutional process" in this case.

PRESENCE OF U.S. ARMED FORCES IN ANOTHER COUNTRY

Senator COOPER. The second situation, which is the present situation of Vietnam and which could become a situation of danger, is, as Senator Eagleton has stated, the presence of Armed Forces in another country. That is the way we became involved in war in Vietnam.

So I think there should be, and this has all been debated before, that there should be something in this resolution that would deal with the problem of sending considerable bodies of Armed Forces abroad. In some cases some advisers, a limited number, might be acceptable. What are you going to do about our naval fleets around the world? What are you going to do about the 6th Fleet in the Mediterranean area? What are you going to do about the fleet in the Pacific? It is not a simple

question, but when you put troops into another country where, as you say, there is the danger of hostilities, of being fired upon, we are very likely to become involved.

CONGRESSIONAL AUTHORITY TO END WAR

One further situation when we are in war, like we are now: What are your authorities then? What are the authorities of the Congress to bring it to a close?

As I see it, I don't see anything in the bill, in the resolution, maybe it is one of the unhappy situations we are in, of how do you deal with that?

Senator JAVITS. Well, in my bill and in Senator Eagleton's bill, he speaks for himself.

Senator COOPER. I want to say that both of you have done a great service and I am just raising some questions.

Senator JAVITS. Of course.

Senator COOPER. We ought to be clear about what we would do if we get into situations which could lead to general war.

EFFECT OF DECLARATION OF ILLEGALITY ON PRESIDENT

Senator JAVITS. May I just say that the structure of these bills, both of them, proceeds upon the theory that a President will not fly in the face of declared illegality. Prof. Henry Steele Commager pointed that out. A President could and it is very unlikely that he would be sent to jail or impeached. I believe that the history of America, whatever may be the fuzzy actions of Presidents, that a President will not fly directly in the face of a declaration of illegality and that is what both these measures try to contain. Presidents are enjoined by the Constitution to "take care that the laws be faithfully executed."

The CHAIRMAN. Is that all, Senator Cooper?

Senator COOPER. Yes; unless Senator Eagleton wants to respond.

The CHAIRMAN. Do you want to comment on it?

Senator JAVITS. As soon as you can let both of us go, we are both needed in the subcommittee.

The CHAIRMAN. Senator Pearson.

Senator PEARSON. I won't take long. I just want to observe that the fact that the Senator is on the committee and the Senator is testifying and can raise questions for which there is no answer is an affirmative evidence for the record. I think that something like this is needed today.

PURPOSE OF PROPOSALS

As I understand it, neither the resolution nor the bill would seek to modify in any way the President's constitutional power as Commander in Chief nor his power to act to protect American lives or to act in a sudden attack. But we have collective security agreements, American troops stationed all over the world, and the President's power to act in cases of such a sudden attack. I take it the real intent of these proposals is to cutoff open-ended commitments, and to provide some limitation as to the expansion of any war or defensive action in area or intensity. Is that really the purpose?

Senator JAVITS. Exactly right.

Senator EAGLETON. I think it is a very fair summary of both of our positions.

Senator JAVITS. Exactly.

### EFFECTIVENESS OF PROPOSED LEGISLATION IN RELATION TO VIETNAM SITUATION

Senator PEARSON. Let me ask you this. Assuming any set of circumstances that you accept in your own judgment, I can see where if this resolution or bill were in effect it would be effective in regard to the Korean situation, but I cannot understand how it would be effective at any time in relation to the Vietnam situation. I wonder if either one of you will address yourself to that?

Senator JAVITS. I don't think it will apply to the present Vietnam war, but I do believe it would have applied to the situation where we had in the early 1960's a given number of thousands, I think it is 19,000 advisers, alleged advisers. The President then for reasons we are all familiar with, decided that we would engage in combat, that those advisers were made into combat troops, many thousands were added to them, and I believe that at that point my bill would have taken effect. But now, in consonance with the Constitution, I don't want to attempt to pass an *ex post facto* law regarding Vietnam.

In my bill the President could do what he did for 30 days and no longer after having notified the Congress, according to my bill, as he is required to, of what he was doing.

Under Senator Eagleton's resolution he wouldn't have a minute. Senator Eagleton would require him first to come to the Congress and say, "I want to now engage in armed hostilities; I have no authority; I want authority."

Senator EAGLETON. Senator Pearson, Senator Javits, I think, has summarized it. I am specifically pointing to the section that covers the point you are raising, page 7 of the big section 6:

> . . . or the assignment of members of the Armed Forces of the United States to accompany, command, coordinate, or participate, in the movement of regular or irregular armed forces of any foreign country when such foreign armed forces are engaged in any form of combat activities.

When advisers were sent or when the President of the United States was thinking of sending advisers, he would have had to come under that provision to the Congress for authorization to send those advisers in that situation of hostilities then extant in the situation in southeastern Asia.

Senator JAVITS. May I add this, Senator Pearson: We did pass the Tonkin Gulf resolution in 1964. We don't like to think about it, but we did; and that was a blank check. It is very doubtful that the Congress would ever have passed any such blank check had we had a law like this in effect. We passed it because it seemed a kind of routine, as we did it in respect of Lebanon. If a President wanted to feel that "he had the Congress behind him," then he asked for such a resolution and, I think, the best witness presiding, Senator Fulbright, knows we saw it as strictly a matter of "support your President." It was a serious situation. If we had a law like this to pass where we are giving the orders, I think we would have passed

a very much better fashioned law; we might have given very limited authority. We wouldn't now be in the great embarrassment that, if we wish to call a halt, we must try to hold up the money. That is about all we have got. We know the difficulties, and I think that that makes a very strong case for this kind of a law.

I think we would have done much better when we faced it, to wit: in Tonkin Gulf. We would have acquitted ourselves much better because we would have been acting out of statutory procedure not out of, you know, "patriotic support" of your President.

### CONGRESSIONAL DEBATE REGARDING MEXICAN WAR

Senator PEARSON. Mr. Chairman, in reference to that, and I will stop, reference was made to the congressional debate in 1846 regarding the Mexican War. I would like to read one short paragraph from a letter by a Congressman who participated in that debate. I rather imagine it is so well known and the words and cadence are so familiar that you know whom I am quoting. One Congressman said:

> The provision of the Constitution giving the warmaking power to Congress was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention—

Meaning the Constitutional Convention—

> —undertook to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.
>
> But your view destroys the whole matter and places our Presidents where Kings have always stood.

Senator EAGLETON. I know that quote well, and the Republican who made it: Abe Lincoln.

Senator PEARSON. Thank you.

### IMPORTANCE OF SOLVING PROBLEMS OF U.S. SYSTEM OF GOVERNMENT

The CHAIRMAN. I know both you witnesses are pressed for time, and I am. We have one of the most important issues on this very subject, whether the Congress has the capacity to resist the Executive or not, coming up this afternoon, and I am very much interested in getting to the floor. But I have raised these questions which will require much further study, and we cannot resolve them all this morning.

I would only like to add this: That I think you have raised in a most perceptive way a very central question. Many of these questions don't arise in a parliamentary system. We are here discussing one of the dilemmas created by the separation of the executive from the legislative. There is practically no country that has survived except ours with any degree of democracy with this kind of system. It is the most difficult system in the world, and I think you have made a great step forward in trying to solve these problems that are raised here that look as if they are insoluble. It hasn't been so critical in the past. There never has been this kind of division, but it seems to me it is imperative that we either reform and make our present system work or we will

have to go to a parliamentary system if we expect to preserve any degree of democracy. Personally, I don't think there is any political feasibility about going to a parliamentary system. Therefore, I cannot exaggerate how important it is that we do something about our system to make all our people, including the Congressmen, but especially the young people, believe that this system can be made to work. I think this is what you are trying to do and I believe we can make progress on it, but we cannot do it all this morning because we have other things we have to do.

I appreciate very much your coming, but we will have further and much more prolonged discussion of these very questions that you raise.

Senator JAVITS. I would just wish to say that the country is indeed fortunate the chairman of the Foreign Relations Committee of the Senate is a man of such thoughtfulness and erudition as our chairman.

The CHAIRMAN. Thank you very much.

The committee is adjourned.

(Whereupon, at 11:50 a.m., the hearing was adjourned, subject to the call of the Chair.)

# WAR POWERS LEGISLATION

THURSDAY, MARCH 25, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10:05 a.m., in room 4221, New Senate Office Building, Senator J. W. Fulbright (chairman) presiding.

Present: Senators Fulbright, Spong, Aiken, Cooper, and Javits.

The CHAIRMAN. The committee will come to order.

## OPENING STATEMENT

Today we resume the second phase of hearings on war powers.

To supplement the informative and thought-provoking testimony of Professors Commager and Kelly, we have with us today Alpheus T. Mason, professor of political science, Princeton University.

Following Professor Mason we shall hear from the sponsors and cosponsors of further war powers legislation now before the Foreign Relations Committee: Senator Taft, sponsor of Senate Joint Resolution 18, the intent of which is "to define the principles which shall govern the deployment of the Armed Forces of the United States by the President, to express U.S. foreign policy objectives in Southeast Asia;" Congressman Findley, cosponsor of House Joint Resolution 1, "concerning the war powers of the Congress and the President," which has been referred to the House Foreign Affairs Committee; and Senator Mathias, cosponsor of S. 731, whose fellow cosponsor, Senator Pell, and sponsor, Senator Javits, testified before the committee yesterday.

Professor Mason, we are very pleased to have you this morning. We are all acquainted with your distinguished record in the academic field and we appreciate your taking your time to come and give us the benefit of your advice.

Will you proceed, please, sir?

## STATEMENT OF ALPHEUS T. MASON, PROFESSOR OF POLITICAL SCIENCE, PRINCETON UNIVERSITY

Mr. MASON. Mr. Chairman, I have had the advantage and the disadvantage of reading the excellent statements of Professors Commager, Kelly, and Morris presented to this committee earlier this month. They lighten my task by saying many things one needs to know; they drew on history, not to provide solutions for our present crisis but to illuminate it.

Their statements include much material that might otherwise have been available to me so, perforce, I am obliged to make a somewhat different approach. My predecessors and I are united on one essential point—we all share this committee's sense of concern, indeed urgency, about our present situation, particularly as it affects war-making.

America is in the midst of a grave constitutional crisis. The closest parallels are the Civil War and the economic depression of the 1930's. The Javits bill, S. 731, represents a significant effort, among others, including John Gardner's "Common Cause," to meet it. Even if S. 731 wins enactment, the present court would perhaps refuse to sustain it. A recognized scholar, no cynic, commented: "Courts love liberty most when it is under pressure least." [1] At home and abroad liberty is endangered. It is, indeed, under pressure. Except among our youth, apathy is widespread. Justice Brandeis' alert—"the greatest danger to liberty is an inert people"—moved me to accept the invitation of Senators Fulbright and Javits to appear before this committee.

### FOUNDING FATHERS' FEAR OF UNCHECKED APPETITE FOR POWER

The Founding Fathers feared, above all, unchecked appetite for power. "The truth is," Madison remarked, "that all men having power ought to be mistrusted." "Confidence," Jefferson declared, "is everywhere the parent of despotism—free government is founded in jealousy; * * * it is jealousy and not confidence which prescribes limited constitutions"—I am quoting Jefferson—"to bind down those we are obliged to trust with power * * *". In questions of power, then, Jefferson concluded, "let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution * * *." [2]

### STRUCTURAL AND BILL OF RIGHTS CHECKS

Our political system reflects distrust—written Constitution, a detailed Bill of Rights, separation of powers, federalism, judicial review. American history features a running debate concerning the relative value of these safeguards. During the formative years, James Wilson and Alexander Hamilton took up the cudgels in favor of structural checks—federalism and separation of powers. These, they argued, precluded necessity for a Bill of Rights.[3] Jefferson disagreed, insisting on additional binders. "A bill of rights," Jefferson argued, "is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse or rest on inference." [4] Jefferson, of course, carried the day. In certain quarters, the first eight amendments, our Bill of Rights—in 1789 an almost forgotten appendage—is now considered "the heart of any Constitution." [5]

Thanks to this joint concern for freedom, the Constitution embodies both these safeguards.

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[1] John P. Frank, "Review and Basic Liberties," in Edmond N. Cahn, ed., *Supreme Court and Supreme Law* (1954), p. 114.
[2] Quoted in A. T. Mason, *Free Government in the Making* (1965), p. 371.
[3] A. T. Mason, "The Supreme Court: Palladium of Freedom" (1962), pp. 49–51, 55–56.
[4] Mason, "Free Government in the Making," p. 319.
[5] Earl Warren's characterization in 1947, 6 years before he became Chief Justice of the United States H. Christman, ed., "The Public Papers of Chief Justice Earl Warren" (1959), p. 7.

Debate concerning the priority of structural vis-a-vis bill-of-rights checks continues in the councils of the Supreme Court. Justices Black and Douglas are in the Jeffersonian tradition, stressing bill-of-rights freedoms. Justice Harlan, echoing Wilson and Hamilton, highlights structural safeguards.

"We are accustomed," Justice Harlan remarked in an address in 1964, "to speak of the Bill of Rights and the 14th amendment as the principal guarantees of personal liberty. Yet," he went on, "it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. The Founding Fathers," Justice Harlan continues, "staked their faith that liberty would prosper in the new nation not primarily upon declarations of individual rights but upon the kind of government the Union was to have. No view of the Bill of Rights or interpretation of any of its provisions," Justice Harlan warns, "which fails to take due account of federalism and separation of powers can be considered constitutionally sound." [6]

SEPARATION OF POWERS

Among the checks against abuse of power, separation of powers was relied on by the Founding Fathers with implicit confidence. Inherited from Montesquieu, Madison said of it: "No political principle is certainly of greater intrinsic value." [7] "To what expedient." Madison asked, "shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution?" Madison answered: "The only answer that can be given to us is that as all these exterior provisions (dependence on the people, designated the 'primary control') are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places * * * The great security against a gradual concentration of the several powers in the same department"—I am quoting Madison—"consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provisions for defense must in this, as in all other cases, be commensurate to the danger of attack. Ambition must be made to counteract ambition * * * The constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights." [8] Quoting Montesquieu, Madison concluded: " 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.' "

Separation of powers, as inherited from Montesquieu, and interpreted by Madison, did not preclude all power blending. This did not mean that the various departments "ought to have no partial agency," as Madison put it, "or no control over, the acts of each other." Quite

[6] Address of John M. Harlan at the Dedication of the Bill of Rights Room, New York City, August 9, 1964.
[7] E. G. Bourne ed., "The Federalist," vol. 1, p. 329.
[8] *Ibid.*, pp. 353–55.

the contrary. "The fundamental principles of a free constitution are subverted," Madison wrote, "where the whole power of one department is exercised by the same hands which possess the whole power of another department * * *."[9]

### PRIMARY CONTROL OF THE BALLOT BOX

Structural limits and the Bill of Rights, though essential, do not constitute the primary control against abuse of power. "A dependence on the people," that is, the ballot box, Madison said in Federalist 51, "is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."[10]

### ALL CHECKS ARE IN JEOPARDY

The irony of our present situation is that all these checks— structural, bill of rights, "dependence on the people"—are in jeopardy. Separation of powers in war-making, constitutionally shared by Congress and the President, has all but vanished. The President is in complete, unqualified control. Though the Congress may withhold appropriations, it has, for whatever reason, refused to do so. The enormity of our present situation indicates that Congress should seek means of exercising the power the framers had the wisdom to confer upon it. Even the primary control—"depedence on the people"—is delusive or nonexistent. In the last two presidential elections, the voter enjoyed no choice. As to the war-making power, our two-party system did not exist. There looms before the voter in 1972 the same Hobson's choice.

The most ominous erosion is that of Bill-of-Rights freedoms—that part of the Constitution Jefferson gave top priority. Examples of repressive action occur almost daily. Under Presidential prerogative, or the inherent powers doctrine, Mr. John Mitchell tells us, that

> The President, acting through the Attorney General, may constitutionally authorize the use of electronic surveillance in cases where he has determined that, in order to preserve national security, the use of such surveillance is reasonable.

Advice of the Attorney General thus replaces the Constitution. Gone is the Fourth Amendment mandate against "unreasonable searches and seizures," and the Supreme Court's ruling of 1967 that "Searches conducted outside the judicial processes, without prior approval of judge or magistrate, are *per se* unreasonable under the Fourth Amendment * * *."[11]

The framers, with deliberate care, made war-making a joint enterprise. Congress is authorized to "declare war;" the President is designated "commander-in-chief." Technology has expanded the President's role and correspondingly curtailed the power of Congress. Unchanged are the joint responsibilities of the President and Congress. The fact that a congressional declaration of war is no longer practical does not deprive Congress of constitutionally imposed authority in war-making. On the contrary, it is under obligation to readjust its power position. Senate bill 731 and S.J. Res. 59 are encouragingly significant steps in this direction.

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[9] *Ibid.*, p. 331.
[10] *Ibid.*, p. 325.
[11] Alan Barth, "Wiretapping: Too Much Power to the President," *Los Angeles Times* Feb. 28, 1971.

The President is under a positive obligation "to take care that the laws be faithfully executed." His power must be adapted to changed and changing conditions. But in fulfilling this responsibility, he must also take into account those principles and provisions of the Constitution, including the Bill of Rights, which restrict as well as enlarge his powers. As Commander in Chief, he cannot pick and choose the provisions of the Constitution he executes.

### CHANGED CONDITIONS CONCERNING WARMAKING POWERS

Of course, the framers could not have foreseen conditions as they exist today, but the underlying principles of their handiwork are clear. As to warmaking, they intended Congress to participate. Early in the Philadelphia Convention debates Madison observed:

> A rupture with other powers is among the greatest national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them—wars—on the whole.[12]

Madison was referring to the possibility that individual States might unwittingly involve the country in war, but his conviction that warmaking power should be shared is clear.

Responsive to changed conditions, Presidents have shown greater willingness to carry their constitutional powers to the limit—some might say even beyond—than has Congress. Accordingly, presidential power expands while congressional influence declines. Would it not seem to follow that as presidential practice diverges from the established course, it is incumbent on Congress to seek ways of maintaining the constitutional partnership? In a dynamic world of instant mobility, the President's constitutional obligation to report on the state of the Union, for example, is not fulfilled by the annual message to Congress or televised talks to the Nation. Nor need Congress, I think, await presidential initiative. It might utilize more fully its investigative function, streamline its procedures, implement its constitutional share in warmaking.

"Taken by and large," the late Professor Corwin wrote, "the history of the presidency has been a history of aggrandizement." [13] In recognition of vastly changed conditions, Congress itself has endorsed Executive aggrandizement. Presidential power must be enlarged and delegated to meet altered circumstances. By the same token, Congress' share in warmaking should also be adapted to unforeseen developments. Otherwise technological evolution alone makes emergence of a totalitarian system inevitable.

Sharing power in this sensitive area was not meant to cripple and impede; it was designed to produce a wiser course of action. Sound in 1787, it is no less so, I think, in the 1970's. Walter Lippman puts it this way:

> The executive is the active power in the state, the asking and the proposing power. The representative assembly is the consenting power, the petitioning, the approving and the criticizing, the accepting and refusing power. The two powers are necessary if there is to be order and freedom. But each must be true to its own nature, each limiting and complementing the other. The government must be able to govern and the citizens must be represented in order that they shall

[12] Quoted in W. Taylor Reveley, III, "Presidential War-Making: Constitutional Prerogative or Usurpation?" 55 "Virginia Law Review" (November 1969), pp. 1243–1305, at 1284. See also John J. Abt, "Who Has the Right To Make War: The Constitutional Crises" (1971).

[13] E. S. Corwin, "The President: Office and Powers" (3d revised edition, 1948), p. 366.

not be oppressed. The health of the system depends on the relationship of the two powers. If either absorbs or destroys the functions of the other power, the Constitution is deranged.[14]

### U.S. HISTORY OF PEACEFUL CHANGE

Revolution of varying orientations is the most conspicuous aspect of our time. American history could be written in terms of an unending series of revolutions—1776, 1787, 1800, the Jacksonian revolution, the Civil War, the Constitutional revolution of the 1890's, the Roosevelt revolution. With one tragic exception—the Civil War—all were peaceful; all have been accommodated by the Constitution. The Civil War demonstrated the limits of reason in politics; the New Deal revolution proved its potentialities.

In the 1930's an awkward impasse between Congress and the President, on the one hand, and the Supreme Court on the other, precipitated F. D. R.'s disingenuous court-packing proposal. In this conflict, both sides won, both lost, Court packing was defeated, but the President gained judicial endorsement of his program. The beneficiaries were, I suggest, the American people and their system of free government.

Peaceful change was not a happenstance; the framers planned that way. In supporting ratification of the proposed Constitution, Hamilton and Madison argued that, while not turning their backs on our birthright—the moral right of revolution—they insisted that the Constitution of 1787 was designed to reduce the danger of violent revolution to the minimum. They hoped to achieve this happy result by providing within the political system itself the means whereby the grievances of individuals and minorities could be heard and perhaps vindicated.[15] Such a system would, in Jefferson's word, "render unnecessary an appeal to the people, * * * rebellion on every infraction of their rights." [16]

### CIVIL WAR AS PARALLEL TO PRESENT CONSTITUTIONAL CRISIS

The closest parallel with the constitutional crisis we face today is the Civil War. In this conflict two issues—slavery and the nature of the Union—entangled in economics, ethics, and politics, were at stake. Neither lent itself to resolution by recourse to reason. Two generations of debate in the halls of Congress, in the hustings, in public and private forums were of no avail. Hence resort to force. The parallels today are the Indochina war and separation of powers. Now, as in the Civil War, both moral and constitutional issues agitate public concern. Just as slavery and nature of the Union did not yield to prolonged debate and discussion, so the issue of Vietnam and separation of powers appears not to respond to reason. Presidents Johnson and Nixon have made almost a virtue of unresponsiveness. As James Reston puts it, both seem determined to perpetuate what the critics condemn. Extremes on both sides, therefore, resort to the politics of unreason—force and violent retaliation.[17]

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[14] Quoted in Reveley, *op. cit.*, p. 1300.
[15] Mason, "The Supreme Court: Palladium of Freedom," pp. 40–45 *passim*.
[16] Mason, "Free Government in the Making," p. 168.
[17] Seymour M. Lipset, "The Politics of Unreason: Right-Wing Extremism in America, 1790–1970" (1971).

Nor is the President the only organ of our Government turning a deaf ear to those who challenge the wisdom and constitutionality of what we are doing in Indochina. In the crises of the 1860's and the present impasse, one difference stands out sharply: the role of the Supreme Court. In an effort to resolve the slavery-Union issue, the Taney Court intervened with disastrous consequences. Twentieth century Supreme Court Justices are more cautious. On the narrow issue of the President's power to wage an undeclared war, the Supreme Court has repelled every effort, including one specifically contrived—the Massachusetts Shea bill—to evoke a decision. The Justices, three dissenting, not only refused to decide the case but also declined to give any reasons for not doing so.[18] Protestors are thus driven to other forums and solutions.

In the present constitutional crisis, certain Americans find themselves in the unenviable position John Locke postulated in his "Civil Society." Let no one say the aggrieved have no appeal, Locke observed in his "Second Treatise of Civil Government." For them, he declared, "the appeal lies nowhere but to Heaven * * * the injured party must judge for himself when he will think fit to make use of that appeal and put himself upon it." [19]

I have never been quite sure whether Heaven in this context is an euphemism for prayer or force. In any case, Locke's solution for those opposing the existing order did not satisfy America. Among the arguments in favor of a bill of rights, the one Jefferson singled out as carrying "great weight"—his expression—was "the legal check it puts in the hands of the judiciary." [20] In presenting Bill-of-Rights amendments to the First Congress, Madison invoked Jefferson's argument, declaring that—and I am quoting Madison:

> Independent tribunals of justice will consider themselves in a peculiar manner the guardian of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or the executive * * *.[21]

In the abstract, our political system provides within itself a forum where alleged invasion of individual and minority rights can be voiced and perhaps remedied. "No government," Chief Justice Marshall declared, "ought to be so defective in its organization as not to contain

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[18] New York Times, Nov. 10, 1970. See, in this connection, Anthony A. D'Amato, "The Massachusetts Antiwar Bill," New York State Bar Journal, vol. 421 (November 1970), pp. 639–49, and A. T. Mason, "Judicial Activism: Old and New," 55 Virginia Law Review (1969), pp. 406–07.

The Court has not always considered itself powerless in this area. Amid the undeclared Korean war, the Justices blocked President Truman's seizure of the steel mills. Rejecting the familiar argument that national security requires presidential hegemony, Justice Jackson declared that this would justify the President's authority to do "anything, anywhere, that can be done with an army and navy." *Youngstown Sheet and Tube Co.* v. *Sawyer*, 353 U.S. 579, 641–42, Justice Jackson, concurring. See Reveley, *op. cit.*, p. 1277.

[19] Quoted in Mason, "Free Government in the Making," p. 37.

For America, Locke's constitutionalism was wanting on the institutional side. Parliament being supreme, enjoying both constituent and lawmaking power, individuals and minorities, alleging that their rights had been invaded, could turn to no forum, within the Government itself for protection. Locke does not minimize their plight:

". . . But if the unlawful acts done by the Magistrate, be maintained (by the Power he has got) and the remedy which is due by law, be by the same Power obstructed; yet the Right of resisting, even in such manifest Acts of Tyranny, *will not* suddenly, or on slight occasions, disturb the Government. For if it reach no farther than some private Mens Cases, though they have a right to defend themselves, and to recover by force, what by unlawful force is taken from them; yet the Right to do so, will not easily ingage them in a Contest, wherein they are sure to perish; it being as impossible for one or a few oppressed Men to *disturb the Government*, where the Body of the People do not think themselves concerned in it, as for a raving mad Man, or heady Male-content to overturn a well-settled State; the People being as little apt to follow the one, as the other. "Two Treatises on Government," a critical edition, Peter Laslett, ed. (1960), paragraph 208.

[20] Mason, "Free Government in the Making," p. 323.

[21] Ibid., p. 327.

within itself the means of securing the execution of its own laws against other dangers than those which occur every day." [22] Moreover, through the years, our system has made it possible, with one exception, to accommodate change, drastic transformation, without resort to violent revolution. In the 1970's this vital aspect of free government is challenged as never before.

PROTESTORS AND DISSENTERS

Three administrations, two headed by Democrats, one by Republicans, embarked on a course which countless citizens, including those of highest competence, consider immoral, barbaric, and unconstitutional. Yet protestors and dissenters are not only faced with an unresponsive Government but also humiliated, stigmatized as un-American, Communists, traitors. The penalties they suffer are both physical and psychological. The police club them; hardhats assault them; [23] the National Guard murders them—second degree, of course.

So there is another parallel between the present constitutional crisis and that which led to the Civil War. Just as abolitionists were subjected to physical and psychological violence, so today protestors against the Indochina war suffer the same fate. Paying tribute to the abolitionists, in 1836, William Ellery Channing noted that "the greatest truths are often the most unpopular and exasperating." Continuing, Channing wrote:

> In regard to the methods adopted by the abolitionists of promoting emancipation, I might find much to censure; but when I regard their firm, fearless assertion of the rights of free discussion, of speech, and the press, I look on them with unmixed respect. I see nothing to blame and much to admire. To them has been committed the most important bulwark of liberty, and they have acquitted themselves of the trust like men and Christians. No violence has driven them from their post. Whilst, in obedience to conscience, they have refrained from opposing force to force, they have still persevered amidst menace and insult, in bearing their testimony against wrong, in giving utterance to their deep convictions. Of such men, I do not hesitate to say, that they have rendered to freedom a more essential service than any body of men among us. The defenders of freedom are not those who claim and exercise rights which no one assails, or who win shouts of applause by well-turned compliments to liberty in the days of her triumph. They are those who stand up for rights which mobs, conspiracies, or single tyrants put in jeopardy, who contend for liberty in that particular form which is threatened at the moment by the many or the few.[24]

Today, as in 1836, there is much to deplore in the methods of those who assert their constitutional rights to oppose and dissent, just as there is much to condemn in the methods of those professing to promote national security, unity in the face of a common danger. Certain protesters against the Indochina war carry the flag of Hanoi. Certain dissidents, protesting the protesters, display the American flag. Both, it seems to me, strike at the jugular vein of a free society.

Judge Learned Hand reminds us that "All discussion, all debate, all dissidence tends to question and in consequence to upset existing convictions and institutions: That"—Judge Hand concluded, "is precisely its purpose and justification." [25] Said Justice Holmes, "We

[22] *Cohens* v. *Virginia*, 6 Wheat. 264 (1821).
[23] U.S. News and World Report, June 1, 1970, p. 89.
[24] Mason, "Free Government in the Making," p. 516.
[25] Address before 48th annual meeting of the American Jewish Committee New York Times, Jan. 20, 1955, p. 68, col. 4. Compare Justice Douglas in *Terminello* v. *Chicago*, 337 U.S. 1, 4 (1949).

do not lose our right to condemn either measures or men because the country is at war." [26]

NECESSITY OF CHANNELING FLOW OF POWER BACK TO CONGRESS

In his state of the Union message, President Nixon called for "a new American revolution" that would direct the flow of power back to the people. Surely this is long overdue. Equally necessary is a reversal of trend, especially in warmaking, that would channel the flow of power to Congress. This aspect of a new revolution is all the more urgent in an era in which war has become the normal rather than an abnormal condition.

Lenin used to say that peace is but a pause between two wars. In the foreseeable future no pause is in sight. Even when there is no "actual fighting" there is, as Thomas Hobbes observed in his "Leviathan," "the known disposition thereto, during all the time there is no assurance to the contrary." [27]

In the present constitutional crisis our commitment of 1776, the faith that government could safely rest on reason and consent rather than on coercion and force, is at stake.

Looking back in 1825 on this wager, Jefferson called it "the bold and doubtful election we were to make for our country." [28]

At home and abroad, the future of free government is still uncertain. One observes an unwitting conspiracy in which extremes, right and left—perhaps also the silent majority—substitute the politics of unreason for the politics of reason and consent. The right resorts to repression and violence to maintain the status quo; the left uses violence and sabotage to destroy the so-called establishment. Both employ, it seems to me, the self-defeating means they profess to deplore. Anticipating our dilemma, Dr. Samuel Johnson's philosopher in "Rasselas" observed: "Of all the uncertainties of our present state, the most dreadful and alarming is the uncertain continuance of reason." It would indeed be ironical if in our desperation to save freedom from external forces, it should succumb at our own hands.

The CHAIRMAN. Professor Mason, that is a most intriguing and interesting statement. You remind us of some of the things which, at least speaking for myself, had long since passed from my memory although they are surely an inherent part of our society.

Senator Javits, do you wish to begin the questions?

Senator JAVITS. Mr. Chairman, I think I will take my turn. The chairman has been very gracious about it.

The CHAIRMAN. All right.

HEARING PROCEDURE

Senator Taft, do you wish to make your statement now and then we can question both you and Professor Mason at the same time?

Senator TAFT. I will be very pleased to do so, Chairman Fulbright.

The CHAIRMAN. You keep your seat, Professor Mason. Senator Taft, we thought it might be interesting to have both statements, and you would both be available for our cross-examination.

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[26] *Frohwerk* v. *United States*, 249 U.S. 204, 208 (1919).
[27] Thomas Hobbes, "Leviathan" (London, 1651), ch. 13, p. 84.
[28] Mason, "Free Government in the Making," p. 371.

Senator JAVITS. Mr. Chairman, we also have on the list, Congressman Findley and Senator Mathias. I don't know whether they are here, but the Chair might perhaps consider their time problems if they have any.

The CHAIRMAN. I don't believe they are here. At least I was not informed. I thought we would proceed, and later when they come in we would take them.

Senator Taft, would you proceed, please.

## STATEMENT OF HON. ROBERT TAFT, JR., U.S. SENATOR FROM OHIO

Senator TAFT. Mr. Chairman, it is a privilege to appear before you and the members of this distinguished committee on behalf of Senate Joint Resolution 18, which I introduced on January 27, 1971. This resolution, like Senate Joint Resolution 59, introduced by Senator Eagleton, and S. 731, introduced by Senator Javits, deals with the authority of the President to deploy American military forces abroad and commit them to combat without express congressional authority.

### HISTORIC NATURE OF WAR POWERS DEBATE

This debate is of a truly historic nature, owning its genesis to the very roots of our existence as a nation. The ability of the British Crown to commit the American Colonies to war produced an inherent distrust of the executive branch as an institution. The framers of our Constitution granted Congress the power to declare war and charged the President with the responsibility for conducting hostilities once they had been lawfully commenced.

Despite that constitutional mandate, there have been at least 165 instances during the history of this Nation when American Armed Forces have been committed abroad. On only five occasions, however, has war been declared by the United States: and as to one of those, the Mexican War, the declaration occurred after two battles had been fought, and the Congress in 1848 adopted a resolution stating that the war was commenced "unnecessarily and unconstitutionally" by the President.

Apart from declared wars, the Congress has on several occasions, when American troops have been committed in other nations, adopted measures relating to the propriety of the President's action. For the information of this committee I am appending to my testimony an exhibit listing the declared wars, other action taken by Congress relative to the commitment of troops, and the instances when American Armed Forces have been committed in other nations. This exhibit is a part of an excellent document entitled "Background Information on the Use of United States Armed Forces in Foreign Countries," prepared for the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, of which I was a member during the last session of the Congress.

In a letter to Herndon, Abraham Lincoln addressed himself to this critically important issue:

> Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such purpose, and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect. If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him. You may say to him, "I see no probability of the British invading us"; but he will say to you, "Be silent: I see it, if you don't."

In a 1916 Yale Law Review article, my grandfather, William Howard Taft, propounded the case for strong executive power. In part he stated, "When we come to the power of the President as Commander in Chief, it seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the Army to be moved from one part of the country to another."

The issues had become more complex by 1951 when my father wrote a book entitled "A Foreign Policy for Americans." In chapter 2 of that volume, he urged more congressional involvement in military deployment, stating that:

> In the case of Korea, where a war was already under way, we had no right to send troops to a nation, with whom we had no treaty, to defend it against attack by another nation, no matter how unprincipled that agression might be, *unless* the whole matter was submitted to Congress and a declaration of war or some other direct authority was obtained.

In that same chapter he also stated:

> If in the great field of foreign policy the President has the arbitrary and unlimited powers he now claims, then there is an end to freedom in the United States not only in the foreign field but in the great realm of domestic activity which necessarily follows any foreign commitments. The area of freedom at home becomes very circumscribed indeed.

In view of the Vice President's current "great debate" with the press, I cannot help but recall the reaction to such statements by Arthur Schlesinger, Jr., who wrote on January 8, 1951, that "Senator Taft's statements are demonstrably irresponsible."

I feel that my father's observations in chapter 2 of that book are timely today, and I therefore ask that they be incorporated into my testimony.

The CHAIRMAN. Without objection, it will be done.

(The information referred to follows:)

THE PLACE OF THE PRESIDENT AND CONGRESS IN FOREIGN POLICY

By Senator Robert A. Taft

(Chap. 2 of the late Senator Taft's book, "A Foreign Policy for Americans," Doubleday & Co., Inc., Garden City, N.Y., 1951.)

No one can question the fact that the initiative in American foreign policy lies with the President. But, if I can judge from my mail and from many considered editorial expressions, the American people certainly do not believe or intend that his power shall be arbitrary and unrestrained. They want a voice in the more important features of that policy, particularly those relating to peace and war. They expect their Senators and Congressmen to be their voice. Before discussing the correctness of the principles of foreign policy, therefore, I shall try to define the place of Congress and the President under our Constitution. The debates in the Senate in early 1951 had even more to do with the question of who shall determine policy than with policy itself.

There can be no question that the executive departments have claimed more and more power over the field of foreign policy at the same time that the importance of foreign policy and its effect on every feature of American life has steadily increased. If the present trend continues it seems to me obvious that the President will become a complete dictator in the entire field of foreign policy and thereby acquire power to force upon Congress all kinds of domestic policies which must necessarily follow.

The fundamental issue in the "great debate" was, and is, whether the President shall decide when the United States shall go to war or whether the people of the United States themselves shall make that decision. Also, for many years the State Department has been developing a theory that almost any action can be taken by executive agreement, which does not absolutely require any congressional approval at all, instead of by the treaty method prescribed in the Constitution. Undoubtedly, the necessity of obtaining a two-third vote in the Senate is very

difficult and has encouraged many people to think that this development was necessary. But if the treaty method is not satisfactory, then the Constitution should be amended to provide for the approval of all executive agreements and to define the scope of and effect of such agreements much more clearly than at present.

More and more the State Department has assumed to do many things which are beyond its power in the field of trade, by an executive agreement known as the General Agreement on Tariff and Trade (GATT). It has insisted that the Executive have the power to raise and lower tariffs, through reciprocal trade agreements, within constantly widening limits and without the slightest shadow of a standard prescribed by law. Political agreements as important as those made at Yalta have never been submitted to Congress at all.

The execution of international agreements, such as the United Nations Charter and the Atlantic Pact, has now given rise to extended claims that the President can do anything which can be related to those treaties and anything recommended by the international commissions there created, without any consultation whatever with Congress.

I think it is fair to say that the State Department has adopted an attitude of hostility toward Congress and an unwillingness to submit any matter to Congress if it thinks it can possibly carry it through without such submission. It shows a complete distrust of the opinion of the people, unless carefully nursed by State Department propaganda.

The matter was brought to an issue by the intervention of the President in the Korean War without even telling Congress what he was doing for several weeks. And it was brought still further to the fore by the proposal that we commit troops to an international army under the control of a council of twelve nations. I do not think that the American people have ever faced a more serious constitutional issue or one which in the end may present a greater threat to their freedom.

In the long run, the question which the country must decide involves vitally not only the freedom of the people of the United States but the peace of the people of the United States. More and more, as the world grows smaller, we are involved in problems of foreign policy. If in the great field of foreign policy the President has the arbitrary and unlimited powers he now claims, then there is an end to freedom in the United States not only in the foreign field but in the great realm of domestic activity which necessarily follows any foreign commitments. The area of freedom at home becomes very circumscribed indeed.

If the President has unlimited power to involve us in war, then I believe that the consequences of opinion is that war is more likely. History shows that when the people have the opportunity to speak they as a rule decide for peace if possible. It shows that arbitrary rulers are more inclined to favor war than are the people at any time. This question has become of tremendous importance, perhaps greater than any particular problem of troops to Europe or the manner in which the Korean War shall be conducted. The claims made by the President of the United States and by various documents presented to the Senate by the executive representatives far exceed the powers claimed by President Roosevelt during World War II, those claimed by President Truman when the United Nations Charter was passed, and those claimed by President Truman when the Atlantic Pact was adopted.

On January 4, last, President Truman, commenting on the Coudert resolution to bar him from sending more troops to Europe without the consent of Congress, said emphatically that he did not need the permission of Congress to take such action.

On January 11, at a press interview, according to the Washington *Post*:

"Mr. Truman, whose right to send troops to Europe recently was challenged by Senator Taft, said he had the power to send them any place in the world. This, he said, had been repeatedly recognized by Congress and the Supreme Court.

"A reporter asked Mr. Truman in effect what would happen if Congress tried to tie his hands by putting restrictions in the appropriation bills for the forces to be sent to Europe.

"That, said the President, was up to Congress. If they wanted to go to the country about it, he said, he would go with them—and he recalled that he licked them once."

At the President's conference a week later, on January 18, according to the press:

"He repeated that his constitutional authority to send American forces to Europe to take up their positions in an integrated European army was clear and did not depend upon the consent of Congress. What he would be glad to have, he said in substance, was a Senate expression that affirmed his constitutional authority."

Furthermore, a document was submitted to Congress, entitled *Powers of the President to Send the Armed Forces Outside the United States*, dated February 28, 1951, which was printed, though not endorsed, by the Joint Committees on Foreign Relations and Armed Services of the Senate. This document contains the most unbridled claims for the authority of the President that I have ever seen written in cold print. In effect, the document asserts that whenever in his opinion American foreign policy requires he may send troops to any point whatsoever in the world, no matter what the war in which the action may involve us. The document also claims that in sending armed forces to carry out a treaty the President does not require any statutory authority whatever, and it does not recognize the difference between a self-executing treaty and one which requires, even by its own terms, congressional authority. It ends with the most sweeping claims for power:

As this discussion of the respective powers of the President and the Congress in this field has made clear, constitutional doctrine has been largely molded by practical necessities. Use of the Congressional power to declare war, for example, has fallen into abeyance because wars are no longer declared in advance. The Constitutional power of the Commander in Chief has been exercised more often, because the need for armed international action has grown more acute. The long delays occasioned by the slowness of communications in the eighteenth century have given place to breathtaking rapidity in the tempo of history. Repelling aggression in Korea or Europe cannot wait upon Congressional debate. However, while the need for speed and the growth in the size and complexity of the armed forces have enlarged the area in which the powers of the Commander in Chief are to be wielded, the magnitude of present-day military operations and international policies requires a degree of Congressional support that was unnecessary in the days of the nineteenth century.

That seems a very gracious concession to Congress. Congress no longer has any power to act. It is simply given the right to support the President after the President has acted. I was shocked in the very beginning of this controversy by the speed with which blind partisans in the administration rushed to the defense of the proposition that the President can make war and warlike commitments. Senator Connally, the chairman of the Foreign Relations Committee, made this extraordinary assertion on the floor of the Senate:

The scope of the authority of the President as Commander in Chief to send the Armed Forces to any place required by the security interests of the United States has often been questioned, but never denied by authoritative opinion.

That certainly is a complete misrepresentation of the discussion of these constitutional powers which has taken place since the foundation of the nation.

As soon as I made my speech of January 5, 1951, the New York *Times* rushed to get Professor Henry Steele Commager to throw together in a day or two a superficial article, published in its Sunday magazine at that time, in which he asserts that the President has the right to start war whenever he sees fit to do so.

Editors of many newspapers and magazines accepted without question the State Department's claims, made without any basis, that history books have listed more than one hundred and thirty cases where United States Presidents sent United States armed troops into action "to defend the national interest."

The most interesting but alarming thing is that there seem to be so many responsible people in the country who follow the party line of the State Department in foreign policy with complete blindness as to where it may lead, in spite of the fact that it has led us a long way toward disaster recently and in spite of the fact that it may be the opposite of a policy adopted six months earlier. In so doing they blithely dismiss all interest in the maintenance of popular government under the Constitution. They are obviously afraid of popular government, thinking that the people are too dumb to understand foreign policy and might oppose policies which these blind followers favor but which the people think may lead to war.

Of course, the President has wide powers in foreign policy, but the framers of the Constitution provided expressly that only Congress could do certain things. Those powers are expressed in Section 8 of Article I. Of course, Congress is given the power, and the exclusive power—

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To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

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

That reflects a certain and definite suspicion of a possible desire on the part of some President to set up a great permanent military force. Further powers of Congress as stated in Section 8:

To provide and maintain a navy.

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

There are other powers, such as calling forth the militia and disciplining the militia.

The Constitution also provides that the President shall have the power to make treaties, but only by and with the advice and consent of the Senate, provided two thirds of the Senators present concur. The President's relationship to the Armed Forces is stated only in Section 2 of Article II of the Constitution:

The President shall be Commander in Chief of the Army and Navy of the United States . . .

There is one very definite limit—and I think it is admitted by every responsible authority who has discussed the problem—on the President's power to send troops abroad: he cannot send troops abroad if the sending of such troops amounts to the making of war. I think that has been frequently asserted; and whenever any broad statements have been made as to the President's power as Commander in Chief to send troops anywhere in the world the point has been made that it is always subject to that particular condition.

Perhaps no one has been quoted more on this general subject than has my father, who discussed this question in various lectures, articles and books. My father had wide experience, as governor general of the Philippines, Secretary of War, and President of the United States. He never served in a legislative body, and, if anything, I think he leaned toward the power of the Executive. The clearest statement of the question, I believe, is contained in his article in the June 6, 1916, number of the *Yale Law Journal*, from which I quote:

"When we come to the power of the President as Commander in Chief, it seems perfectly clear that Congress could not order battles to be fought on a certain plan, and could not direct parts of the Army to be moved from one part of the country to another. The power to declare war is given to Congress. . . . This is necessarily a limitation on the power of the President to order the Army and the Navy to commit an act of war. It was charged against President Polk that he had carried on a foreign war against Mexico before Congress had authorized it or declared it and it is difficult to escape the conclusion that the act of President Wilson in seizing Veracruz was an act of war without congressional authority, at the time it was committed, though a resolution authorizing it was pending, and had passed one House and was passed in a very short time after the act by the other House, constituting a valid ratification.

"It is not always easy to determine what is an act of war. The President has the authority to protect the lives of American citizens and their property with the Army and the Navy. This grows out of his control over our foreign relations and his duty to recognize as a binding law upon him the obligation of the Government to its own citizens. It might, however, be an act of war if committed in a country like England or Germany or France which would be unwilling to admit that it needed the assistance of another government to maintain its laws and protect foreign relations, but would insist that injuries of this sort must be remedid through diplomatic complaints and negotiations. . . . Of course the President may so use the Army and Navy as to involve the country in actual war and force a declaration of war by Congress. *Such a use of the Army and Navy, however, is a usurpation of power on his part.* (Italics mine.)

Some may feel that if the President can do certain things there is no sense in arguing that he has no right to do them. But the division and limitation of powers is the very basis of our constitutional system, and decisions regarding the proper limits of such powers affect the validity of many other actions such as the right of Congress to pass legislation to restrain the President's authority to send troops abroad in such a way as to involve the country in war. True, the President perhaps cannot be prevented from usurping power, but we can only presume the President will follow constitutional laws passed by the people's representatives.

Most of the cases which have been cited as authority for the President sending troops abroad are cases where the use of our troops was limited to the protection of American citizens or of American property.

The Boxer Rebellion is frequently cited; but in that case troops were sent into China because the legations in Peking were besieged and the legitimate Chinese Government was unable to defend them against the rebellious Boxers. So the various nations sent their troops there, in order to rescue those who were in the legations. That was a clear effort to protect American lives, to protect American diplomatic lives which were threatened contrary to the law of nations; and certainly it was not an act which would necessarily involve us in war.

The case of the Mexican rebellion is referred to, and it was referred to by my father, who said that President Polk's right was challenged. It was challenged by a very distinguished American, Abraham Lincoln, who on February 15, 1848, wrote his law partner with reference to Polk's use of the Army against Mexico.

"Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such purpose, and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect. If today he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him 'I see no probability of the British invading us,' but he will say to you, 'Be silent: I see it, if you don't.'"

Lincoln said further:

"The provision of the Constitution giving the warmaking power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power f bringing this oppression upon us."

I do not believe history will defend as lawful the action of President Theodore Roosevelt in seizing Panama.

On the other hand, that action was certainly not the making of war.

The administration pamphlet to which I have referred cites the case of Iceland and says that none of the constitutional restrictions were regarded by President Roosevelt "as a limitation on his power to use the Navy in the North Atlantic Area or send troops to Iceland and Greenland and other places." My own view is that President Roosevelt clearly usurped authority when he sent American troops to Iceland to replace the British troops there in 1941, and I made a vigorous protest at the time on the floor of the Senate and was supported also by Senator Danaher. I quote from the speech which I made on July 10, 1941, and which, as far as I remember, was answered by no one except Senator Connally.

"Mr. President, on Monday the President of the United States notified the Senate that forces of the United States Navy had already arrived in Iceland in order to supplement, and eventually to replace, the British forces now stationed there. This action was taken in accordance with an understanding reached by the President with the Prime Minister of Iceland, frankly inspired, however, according to the Prime Minister, by the British Minister to Iceland, who explained to him that British forces in Iceland were required elsewhere, and suggested that he apply to the United States for forces. The Prime Minister stressed the fact that the United States forces must be strong enough to meet every eventuality; and the President promised that the Government of the United States would immediately send troops, apparently including the United States Army as well as the Navy, to supplement, and eventually to replace, the British forces now there. Judging from the various press reports, it is likely that 80,000 American boys are in course of being sent to Iceland 2400 miles from any American territory, and substantially a part of the continent of Europe.

"In my opinion, the President has no legal or constitutional right to send American troops to Iceland. It is not an agreeable task for me to question the authority of the President to take any action which he has taken in the name of the Government of the United States; but I believe it would be most unfortunate if the Senate of the United States should acquiesce without protest in acts of the President which might nullify for all time the constitutional authority distinctly reserved to Congress to declare war.

"It would be a tremendous stretching of the Constitution to say that without authority from Congress the President of the United States can send hundreds of thousands of American soldiers to Europe when a war is raging over that entire Continent, and the presence of American troops would inevitably lead to war. The President cannot make aggressive war. Neither can he intervene in a war between

two other nations, because such intervention, even though it does not immediately involve a physical attack on one of the combatants, is clearly the making of war.

"There has been no attack on the United States and no threat of attack. The action of the President is not only beyond the powers which the Constitution has granted to him, but it is a deliberate violation of his pledge to the American people."

The speech which I made in the Senate on March 29, 1951, refers to various supporting statements by J. Reuben Clark, Assistant Secretary of State under the Hoover administration, by Quincy Wright, professor at the University of Chicago, and by Attorney General George E. Wickersham. We have perhaps even more eminent authority to the effect that the President has no right to send troops abroad in such a way as to intervene in a war between two nations. When the Germans broke through in France in June 1940 Mr. Roosevelt gave every encouragement to France and England to go on fighting. The end of his letter of June 15, 1940, to Premier Reynaud is enlightening, and I quote:

"In these hours which are so heart-rendering to the French people and yourself, I send you the assurances of my utmost sympathy and I can further assure you that so long as the French people continue in defense of their liberty, which constitutes the cause of popular institutions throughout the world, so long will they rest assured that matériel and supplies will be sent to them from the United States in ever increasing quantities and kind.

"I know that you will understand that these statements carry with them no implication of military commitments. Only the Congress can make such commitments.

FRANKLIN D. ROOSEVELT."

Yet Harry S. Truman in the case of Korea undertook to do exactly the thing which Franklin Roosevelt said he had no power to do.

In the case of Korea it was claimed that the intervention could take place under the United Nations Charter on the call of the Security Council. Of course the Security Council never acted under Articles 41 and 42 of the United Nations Charter, and even if it had done so the obligation to send troops is clearly limited by Article 43. That Article provides that troops can only be called for when an agreement has been entered into with the Security Council specifying the number and character of the assistance to be furnished. No such agreement has ever been entered into. The United Nations Participation Act of 1945, approved by President Truman, also made it clear that any agreement which required the providing of military aid must be subsequently approved by Congress, and, of course, it never has been. Not only that, but President Truman sent a cable from Potsdam when the United Nations Charter was under consideration, in which he said: "When any such agreement or agreements are negotiated, it will be my purpose to ask the Congress by appropriate legislation to approve them." The charter was adopted largely on that assurance, but now the President's claims are far beyond what they were then.

The State Department itself admits that the action of the Security Council in the Korean case was only a recommendation under Article 39. If the President can carry out every recommendation of the Security Council or the General Assembly supported by the vote of the American representative whom he can direct, then he has almost unlimited power to do anything in the world in the use of either troops or money. The Security Council might recommend that the nations should rebuild the canals on the Tigris and Euphrates and establish a vast Garden of Eden in the Kingdom of Iraq. According to the argument made, the President would then have power to use all American forces to establish such an economic project. On the same theory, he could send troops to Tibet to resist Communist aggression or to Indo-China or anywhere else in the world, without the slightest voice of Congress in the matter. If that could be the effect of an international treaty, we had better watch closely the approval of any such treaty in the future. Of course, it is not.

My conclusion, therefore, is that in the case of Korea, where a war was already under way, we had no right to send troops to a nation, with whom we had no treaty, to defend it against attack by another nation, no matter how unprincipled that aggression might be, unless the whole matter was submitted to Congress and a declaration of war or some other direct authority obtained.

The question of sending troops to Europe is certainly much more complicated. There is no doubt about the President's power to send troops to occupied Germany. There is no question that he can send them if he wants to do so, as Commander

in Chief of the Army and Navy. Whether Congress could limit the number to be sent is a point which may be open to question. However, certainly the President has the power to do so if Congress does not act.

I think he can station troops in a friendly country if such country asks that the troops be sent and if there is no imminence of attack and if they are stationed there for some possible convenience in repelling a general attack upon the United States itself.

Particularly, it seems to me that the President of the United States may station air forces and may send the Navy to odd places throughout the world, as Presidents have done many times, because the sending of such forces does not necessarily involve or threaten involvement in war. Such forces can be easily withdrawn in case an attack is made upon the country. There is no question about their remaining there and becoming involved in a war, if our country determines that it does not wish to become involved in a war.

But it seems clear to me that the sending of troops without authorization by Congress to a country under attack, as was done in Korea, is clearly prohibited. The sending of troops under the Atlantic Pact as a part of a defensive operation against Russia without previous authority from Congress appears to me to be also prohibited, because the fact that these countries are threatened by an actual attack is the very justification and reason for sending the troops. The only reason for sending troops is to defend a country against a threatened military attack which would necessarily involve the Untied States in war.

The European Army Project, however, goes further than merely sending troops to implement the Atlantic Pact. It involves the sending of troops to an international army similar to that which was contemplated under the United Nations Charter. It is an international army, apparently established by twelve nations, with a commander who is appointed by the twelve nations. It seems to me perfectly clear that the President's power as Commander in Chief does not extend to the delegation of that power to a commander who is chosen by any other nation or any other group of nations. I think it is perfectly clear that he cannot enter into an agreement of that kind to set up an international army without submitting the agreement to Congress.

The proponents of executive power have referred to many statements from the writings of Professor Edward S. Corwin of Princeton, a noted authority on constitutional law, but on this subject he says:

"The outstanding fact about the Administration's proposal from the point of view of constitutional law is that it raises a question of first impression. The proposal is novel, unprecedented and consequently the precedents do not apply to it, except perhaps in the case of Iceland in 1941. The Administration's present proposal incurs the danger of precipitating war, and it raises vast questions regarding finance and the internal welfare of the country. Congress has the right to safeguard its war-declaring power, and it is duty bound to protect the domestic interests to which its other powers extend. In fact, the right of the President to merge American forces with an army, which he cannot exclusively command, seems very dubious. Congressional authorization under the necessary and proper clause would seem to be essential."

Throughout the 1951 debate the Administration tried to avoid this question of setting up an international army, but there can be no doubt that that was in fact the project, as I point out in Chapter Five.

Under that project the President actually appointed General Eisenhower, in a letter in which he stated:

"The North Atlantic Treaty nations have agreed on the defense organization for Europe and at their request I have designated you as supreme allied commander, Europe. I view their request as a pledge that their support of your efforts will be complete and unequivocal."

When the President of the United States went that far he exceeded his authority. Up to that point, what was done at Brussels was a recommendation of the Council under the Atlantic Pact. When the President undertook to carry out that recommendation he usurped the powers of Congress. He had no authority to carry out that particular agreement made at Brussels, without submitting it to Congress.

Apparently the Administration is afraid that there was such an exceeding of authority, for it has represented the whole project now as merely the sending to Europe of a few divisions, which we can withdraw at any moment, but only to cooperate with the other nations in case war comes in a general defense under the terms of the Atlantic Pact.

But whether there is to be an American army or an international army, I do not believe the President has the power without congressional approval to send troops to one country to defend it against a possible or probable attack by another country.

Such action may perhaps be authorized by treaty, but it has not been authorized either by the United Nations Charter, as I have shown, or by the Atlantic Pact.

In my opinion, the Senate resolution and the concurrent resolution adopted by the Senate on April 4, 1951, was a clear statement by the Senate that it has the right to pass on any question of sending troops to Europe to implement the Atlantic Pact, that it is unconstitutional for the President to send any troops abroad to implement that pact without congressional approval, at least until war comes and Article 5 takes effect. It has been said that this resolution is not a law, and of course, that is true, but the declaration can be implemented by the Appropriations Committee and by other legislation when legislation becomes appropriate. There can be no doubt that it is a legislative act and that it clearly asserts the power of Congress and the Senate.

No one can prevent the President continuing to assert his power as President, and it may be that he does have the ability to involve the United States in war, even when he has no right to do so; but I think a great forward step in defense of constitutional law has been taken by the definite position now asserted by the Senate.

The President acts at his own peril, if he chooses to usurp authority which the representatives of the people have asserted that he does not possess.

### GROWING CENTRALIZATION OF POWER IN EXECUTIVE

Senator TAFT. The concerns voiced then seem quite prophetic today. The last 20 years have witnessed a continued atrophy of the congressional war powers. At the same time, the Executive has taken an increasingly broad view of its prerogatives in this area. Under modern conditions, the irreversibility and the danger of Executive action without congressional authorization has accelerated to an unprecedented extent and therefore the concern for the problem is enormously enlarged.

This growing centralization of power in the Executive, accompanied as it has been by a similar centralization of domestic power in the Federal Government, has created a deep sense of frustration among the people who increasingly despair that they lack control over their own destinies. There is a demand for participatory democracy in foreign affairs as well as on the domestic scene. Just as means must be found to strengthen local governments in dealing with matters of domestic importance, so must we increase the participation of the elected representatives of the people in the foreign policy decisionmaking process, particularly as it applies to matters of war and peace. War is not only too important to be left to the generals, Americans abhor war to such an extent that it is too important to leave to the Executive alone.

### IMPORTANCE OF PUBLIC OPINION

It has long been recognized that there must be a close parallel of military and diplomatic frontiers. To these I would add the importance of the public opinion frontier. In my judgment it is important for foreign policy questions to be decided whenever possible in the limelight of public opinion. In a democratic nation the broadest public discussion of such issues, followed by definitive action by the legislative and executive branches, produces the soundest basis for the determination of national policy. This is not to say that tacti-

cal decisions should be governed by public opinion. I am reminded in this context of the cartoon in the Saturday Review on March 13, where an aide was shown saying to Napoleon; "Sir, a public opinion poll shows 17 percent of the public believe you should fight the Duke of Wellington at Nivelles; 29 percent believe you should fight him at Wavre; and 54 percent believe you should fight him at Waterloo."

Because of my feeling that public opinion is a necessary concomitant of foreign policy, I have included in this resolution not only a provision trying to spell out what the President's powers should be and how the Congress should be required to act in connection with those powers, but also a definition of what national policy is and should be with regard to Vietnam and Southeast Asia today. That is part 2 of my resolution.

### UNITED STATES INVOLVEMENT IN INDOCHINA

Much of the pressure for increased congressional activity comes from those who opposed the current involvement in Indochina. This is understandable—the process by which we became involved in Indochina is a classic illustration of Executive usurpation of power from a Congress not willing to exercise its war powers, or an Executive willing to call for it. And what has been the result? While committing hundreds of thousands of troops abroad without congressional authority, the previous administration stepped up spending on the domestic front. The guns and butter strategy produced a ruinous inflation which has caused substantial economic disruption at home and abroad and has resulted in the obsolescence and decay of many military programs and facilities vital to our national security. It would also seem to have generated a considerable degree of psychological and economic vulnerability. One can only hope that if the Congress could have participated in these great decisions—if it had only been fully aware and made the country fully aware of the open-ended nature of our Indochina commitment—the necessary restraint would have been exercised. Of course, Congress did appropirate funds for the war—and the guns and butter policies—but there is a great difference between appropriating funds for troops already committed to battle, and deciding initially that such a commitment is proper.

### REASSERTION OF CONGRESS' CONSTITUTIONAL PREROGATIVES

But as Congress moves to reassert its constitutional prerogatives, we must profit by—rather than be blinded by—our experience in Indochina. We must divorce, if possible, our great constitutional debate from the frustrations which some may feel concerning our involvement in Indochina. Rather, the debate should be in terms of restoring a needed balance to the constitutional relationships between two great branches of Government. We must recognize that Congress has too often given an Executive a blank check because of personal confidence in the individual occupying the Presidency at that particular time—or because of a sympathy with the particular national interest which the Executive's action is designed to protect.

If Congress moves to assert its prerogatives, as I think it must, it should do so in an "institutional" manner—one that divorces itself

from the particular administration in office or the particular national interest which may be at stake. If the Congress reasserts its prerogatives, it must be vigilant to exercise these prerogatives whether it is a Democrat or Republican who is President and whether it is the survival of Berlin, Israel, or Cambodia which is at stake.

And any such reassertion must be accompanied by a searching review of our national commitments and the particular national interests served thereby. We are experiencing a reaction in this country which has been termed a "neo-isolationism." I am hopeful that this might only turn into what I would term a "new skepticism"—where we would no longer feel a compulsion to intervene in every brushfire around the world.

### DETERMINATION OF U.S INTERESTS

President Nixon in his report to the Congress on February 25, 1971, stated at page 154 that; "it is essential that the United States maintain a military force sufficient to protect our interests and meet our commitments." The unanswered question, however, is precisely what these interests are that would properly call for American military action in other nations.

With reference to the utilization of American military power we must decide precisely what American interests are involved in Southeast Asia, in the Middle East, in Europe, and in South America. That decision is intensely political in nature and as such requires the full and complete participation by the Congress. If the Congress is to have any role in the formulation of American foreign policy, and if this committee is to be anything more than a debating society, it must have authority to participate in the determination of those interests which are so vital to the American people that we must resort to military force in other nations.

### EXCEPTIONS TO PROHIBITION OF TROOP DEPLOYMENT UNDER S.J. RES. 18

Mr. Chairman, my resolution would prohibit the President from deploying troops overseas without the prior consent of the Congress, except in four carefully defined situations. These situations largely reflect the power which the President now possesses as Commander in Chief, and in addition include those instances where the President should be permitted to take action without prior authorization.

Under those four situations, however, the President would be required to notify the Congress immediately of all action he has taken and if Congress is not in session, convene Congress for such notification within 48 hours.

My resolution provides that Congress, acting by concurrent resolution, not requiring the consent of the President, could thereafter terminate the authorization to deploy and commit the Armed Forces to combat.

At this time I would like to detail to the committee those four situations under which I believe the President should have the power to act without the prior consent of the Congress.

IMMINENT THREAT OF ATTACK

First, my resolution would permit the President to act militarily without the prior approval of the Congress when he finds that the territory or Armed Forces of the United States are under attack or in imminent threat of attack. This provision is in marked contrast to the measures introduced by Senator Javits and Senator Eagleton. Their measures would not authorize the Prsident to act alone in the event an attack upon the United States or its Armed Forces is imminent. I believe that the language contained in my resolution is much more realistic in this nuclear age where reaction time to a major attack may well justify and require military action when an attack is on the way. I fully recognize the risk of abuse of such language, but nothing that this Congress legislates can ever prevent any President from making rash or improper decisions. I therefore feel strongly that we should put all nations on notice that the Congress sanctions actions by the President when he feels we are under an imminent threat of attack.

Let me add that in the event of an imminent attack, if the President had to notify the Congress prior to taking appropriate military action, there would in my judgment be the possibility of a security leak which could jeopardize the secrecy of our preparations and the effectiveness of our response.

FULFILLMENT OF VALID TREATY OBLIGATION

Second, my resolution would allow the President to act militarily when such conduct is necessary to fulfill a valid treaty obligation of the United States. It is arguable as to how many, if any, of our treaty obligations are so open-ended as to fall within the meaning of this subsection. For example, the SEATO treaty provides that in the event of an armed attack each party agrees that "it will . . . act to meet the common danger in accordance with its constitutional processes." (Southeast Asia Collective Defense Treaty, Article IV.)

It is my intention that subsection 2 of Senate Joint Resolution 18 would not authorize the President to act under the SEATO treaty, since that treaty requires the utilization of constitutional processes as a necessary predicate for military action.

Article 5 of the NATO treaty provides that:

> The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all, and consequently they agree that, if such an armed attack occurs, each of them, in the exercise of the right of individual or collective self defense recognized by Article 51 of the Charter of the United Nations, will assist the party or parties so attacked by taking forthwith, individually and in concert with the other parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

However, article 11 provides that "this treaty shall be ratified and its provisions carried out by the parties in accordance with their respective constitutional processes." The effect of this language is open to debate.

As a former Member of the House I do not believe that it is wise for the United States to enter into self-executing defense treaties that would require us to go to war without a declaration of war by the

Congress. In my judgment it would not be a sound constitutional practice for the Senate, by ratifying such a treaty, to attempt to subvert the constitutional powers of the House to act upon declarations of war.

I would also interpolate by going back to my concept that public opinion ought to take a very strong role in the determination of general foreign policy decisions. As to areas that I think it wise to try to bring in public opinion more fully, you would get, I think, to a debate in both the House and the Senate in discussion, and action in both the House and the Senate, and not merely in the Senate alone as in the case of the treaty.

If the United States does not in fact have any self-executing defense treaties I would prefer some of the language contained in Senator Eagleton's resolution which could be added as a separate section to my resolution, which revised language could be as follows:

No treaty hereafter entered into by the United States shall be construed as authorizing or requiring the armed forces of the United States to engage in hostilities without further congressional authorization.

DECLARATION OF WAR BY CONGRESS

Third, my resolution would authorize the President to commit troops to act when there has been a declaration of war by the Congress and the President is carrying out his responsibilities as Commander in Chief with regard thereto. My resolution would make it clear for example, that during World War II where a declaration of war existed, the President would have required no further congressional authorization to move into North Africa.

INHERENT RIGHT OF SELF DEFENSE

Fourth, under my resolution the President could deploy and commit our forces to combat under situations where in his judgment the United States must exercise the inherent right of self-defense as recognized by established principles of international law and article 51 of the Charter of the United Nations. The dimensions of the right of self-defense are necessarily vague. I believe, however, that it is important for us to leave open to the President the prerogatives of acting under these principles.

For example, if American borders were blockaded by hostile naval forces outside of our 12-mile limit I believe that the President should have the power to act militarily in the exercise of our inherent right of self-defense, even though such blockade did not present an attack or threat of imminent attack upon the United States or its Armed Forces.

During 1970 when American nationals were held captive by guerrillas in Jordan, the President could have acted militarily to effect their rescue. I believe that international law would have given him that right and it would be my intention that the safety of those American citizens would not have to wait for a resolution of authority from the Congress.

EXCEPTIONS DO NOT SWALLOW RULE

I wish to make it clear that the four categories which I have enumerated are not exceptions which swallow the rule. I do not believe that President Truman's actions in Korea would have been justified

under any of the four grounds which I have set forth, and he would have violated my resolution unless he had come to the Congress of the United States for prior authority. Under my resolution had he purported to act, he would have been required to report his actions and had he done so, the Congress could have acted within its constitutional powers to approve, disapprove, ignore, suggest limitations on, or comment otherwise on his action. The only sanctions would seem to be in further action on military or other authorizations and appropriation or in action through impeachment. The same would be true in the event of a failure to report.

BREADTH OF SENATE JOINT RESOLUTION 18

I should also like to stress that I intend my resolution to be applicable to all significant changes in the disposition of American forces for combat purposes which occur or are related to the territory, territorial waters or air of any other nation. If you will review the three "Whereas" clauses, you will see that the resolution has that breadth. In particular, I have reference to the use of the word "deployment." I believe that this is a valid concern of Congress and that we have the right to be consulted on all deployments for combat purposes ranging from the dispatching of smaller groups of military advisers to the larger scale deployment of forces. I have purposely not attempted to define "deployment and commitment to combat." I note that other bills, for example Congressman Findley's (H.R. 18654, 91st Cong., 2d sess.) requires reports by the President where there is a commitment to "armed conflict or the risk thereof."

My resolution would put all foreign nations on notice that presidential defense commitments will not be honored without following our constitutional processes. The danger of war to honor some vague commitment made by an American President, Vice President, or Secretary of State on a good will visit would be minimized.

I can find no constitutional authority for a President to commit this Nation to war if certain future events occur in a foreign land. Except for the four situations outlined in my resolution, such commitments would be void unless authorized by our constitutional warmaking procedures.

EFFECT OF SENATE JOINT RESOLUTION 18 ON ACTION IN LAOS

Finally, I should like to comment on the action now underway in the Kingdom of Laos as it would be affected by my resolution. Unlike the proposal of Senator Javits, my resolution is intended to apply immediately upon enactment. That is the reason that part II of my resolution, which I shall discuss in a moment, provides a general statement of policy for Southeast Asia. However, I wish that there be no confusion in the committee's mind as to how my resolution would operate with respect to the logistical support now being given to the forces of the Republic of Vietnam now operating in Laos. In 1962 the United States was party to a "Declaration on the Neutrality of Laos" as well as a "Protocol to the Declaration on the Neutrality of Laos." These high-minded documents were, in my view, quite unrealistic in their attempt to separate Laos from the rest of the Indochina subcontinent. As a matter of fact, the enemy has never lived up to its

promises and has continued to use portions of Laos quite as if there had never been any agreements at all. Indeed, the Kingdom of Laos deserves severe criticism for its failure to carry out its duties as a neutral. Under well-established principles of international law, I believe that the President would have the authority under my resolution to take the necessary protective measures within Laos, since Laos has been used as a staging area for attacks against American forces. Under my proposal, were it not for the existence of the express prohibitions in Cooper-Church, the President could take any military action in Laos. Indeed it is my understanding that Senator Cooper agrees that logistical support does not violate the Cooper-Church amendment. In this connection, I should like to call the committee's attention to an excellent article in the Columbia Law Review, volume 68, 1968, pages 1127–1148 entitled: "International Law and Military Operations Against Insurgents in Neutral Territory." With the committee's consent, I should like to append this article as a part of my testimony.

The CHAIRMAN. Without objection, so ordered.

(The information referred to follows:)

EXHIBIT III

# International Law and Military Operations against Insurgents in Neutral Territory

Note from *Columbia Law Review*

Vol. 68, 1968

## Introduction

Public interest in international law probably is greatest during periods of world crisis. Thus, the debate between the United States and Cambodia concerning the right to pursue the Viet Cong into Cambodian territory has been followed quite widely. The press has styled the right claimed by the United States the right of "hot pursuit." The use of the phrase "hot pursuit" is enough to give a purist pause because the term has a definite meaning in international law. Briefly, it refers to the right of a coastal state to pursue and apprehend the vessels of another state on the high seas when those ships have violated a law of the coastal state in its territorial waters.

Obviously, actions which may be tolerated on the high seas may not necessarily be permitted in the course of land warfare. However, the ideological strife prevalent in modern international relations, as manifested in "wars of national liberation," makes it impossible to confine "hot pursuit" to the maritime problem.[1] At a time when nations are willing to look to international law for guidance, as appears to be the case with the United States and Cambodia, an effort should be made to articulate the relevant principles.

It is well established that an infringement upon the territory of a sovereign state is an illegal violation of its territorial integrity[2] unless justified by some principle of international law. The belligerent bears the burden of showing justification if it wishes to avoid the sanctions[3] which the international

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1. The doctrine of hot pursuit in maritime law cannot be extended directly to hot pursuit on land. *See, e.g.*, Le Monde, Sept. 4, 1957, at 1, col. 3; *see also* D. Bowett, Self-Defence in International Law 40 (1958). In maritime law, the coastal state's interest in enforcing its laws outweighs the interest of the outlaw ship or the state whose flag it flies in maintaining the freedom of the seas. *See* 1 J. Westlake, International Law 177 (2d ed. 1910). This priority of interests does not necessarily hold true for neutrals and belligerents in regard to land warfare. Furthermore, the maritime doctrine is applicable in times of peace and does not involve violating the territorial integrity of any state; the right ends when the ship enters the territorial waters of its home state or of a third state. *See* Convention on the High Seas, art. 23, [1962] 2 U.S.T. 2318-19, T.I.A.S. No. 5200; Schwarzenberger, *The Fundamental Principles of International Law*, 87 Recueil des Cours de l'Académie de Droit International 191, 333 (1955).

A better analogy would be the right of a belligerent vessel to pursue ships of its enemy into neutral territorial waters. Here, however, it has been conceded that without a valid claim of self-defense or refusal of the neutral to remove the offending vessel from its waters, such action would constitute a violation of neutral rights. *See* J. Stone, Legal Controls of International Conflict 400-01 (1954); 2 H. Wheaton, International Law 393-403 (7th Eng. ed. 1944); *see generally* Borchard, *Was Norway Delinquent in the Case of the Altmark?*, 34 Am. J. Int'l L. 289 (1940); *cf.* The Vrow Anna Catharina, 165 Eng. Rep. 681 (High Ct. of Admiralty 1803).

2. *See* U.N. Charter art. 2, para. 4.

3. Sanctions which may be imposed by the Security Council as punishment for breaching the peace and committing acts of aggression may be found in Chapter VII of the United Nations Charter. Among them are the severance of diplomatic relations, "complete or partial interruption of economic relations and rail, sea, air, postal, telegraphic, radio and other means of communication" (Article 41), and collective military or quasi-military action by members of the United Nations (Article 42). Furthermore,

community imposes upon such wrongful conduct. Belligerents have sought to satisfy this burden either by claiming that hot pursuit is a matter of self-defense or by asserting that even though a particular incursion is not self-defensive, it is justifiable because the neutral state[4] has violated one of its duties by allowing its territory to be used as a refuge. It is the purpose of this Note to analyze each of these arguments in depth, to determine their status under current international law, and to test their utility for the maintenance of orderly relations between states during the course of modern limited wars.

## I. Self-Defense

Belligerents tend to think of the hot pursuit of insurgents into neutral territories as an exercise of "self-defense." In international law, self-defense, when properly invoked, may be employed to justify action which

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if the belligerent can be brought before the International Court of Justice or an arbitration tribunal, it may be required to indemnify the aggrieved state.

Another sanction which may possess considerable deterrent value as the international community becomes more sophisticated is the sanction of non-participation, through which a delinquent state is deprived of the benefits of taking part in the activities of functional international organizations, such as the International Monetary Fund, International Labor Organization, and International Bank for Reconstruction and Development. For a thorough discussion of this sanction, see W. Friedmann, The Changing Structure of International Law 88-95 (1964).

4. At this point it is appropriate to question whether the laws of neutrality can logically be said to apply in the context of a civil war. Strictly speaking, neutrality is a concept which applies only to international wariare, and its status in a civil war in which the rebels have not been recognized as belligerents is highly doubtful. *See* Castrén, *Civil War*, 142-2 Suomalaisen Tiedeakatemian Toimituksia 120-23 (Ser. B 1966). This follows from the premise that such a civil war is solely an internal matter, to be conducted by the military and police forces of the established government as they deem fit. *See* Castrén, *supra*, at 97; Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht*, 2 Handbuch des Völkerrechts, Part 3, at 173 (1928). On the other hand, some writers have maintained that at least some of the laws of international war should be observed by the parties to a civil war, generally those relating to humanitarianism. *See, e.g.*, Garner, *Questions of International Law in the Spanish Civil War*, 31 Am. J. Int'l L. 66 (1937). If this latter proposition is accepted, it still does not follow that third states are bound to follow the laws of neutrality.

Nevertheless, this does not affect the analysis of the problem significantly because the duties which a neutral state would be called upon to observe in an international war, in terms of permitting rebel troops asylum on their territory or a base of operations, are hardly different from the duties of non-intervention in domestic affairs. *See generally* E. Stowell, Intervention in International Law 345-55 (1921). Furthermore, the problem is less important in major "civil wars," such as those in Spain and Vietnam. In both cases, the political arm of the rebels was recognized by third countries as the legitimate government of the country which was the theater of military operations, and in both the rebels controlled substantial portions of the national territory. This may well go beyond recognition of belligerency, and it gives the war an international character which for all practical purposes should bring the laws of neutrality into effect. Realistically, it is difficult to characterize the wars in Spain, Algeria, and Vietnam solely as domestic uprisings. Even if the belligerency of the rebels is not formally recognized either by the established government or by third states, conditions may exist to afford the rebels a *de facto* belligerent status. For examples, see Castrén, *supra*, at 74-75, 100. A similar situation may occur when the rebels have been recognized by third powers as insurgents. For a full discussion of the legal effects of the recognition of insurgency, *see id.* at 207-23. For the purposes of this Note, it will be assumed that the conflict has reached sufficient proportions to make the recognition of belligerency justifiable. But see the discussion of the recognition of the Franco insurgents as the *de jure* government of Spain by Germany and Italy as not conferring the status of belligerent on the Nationalists, in N. Padelford, International Law and Diplomacy in the Spanish Civil Strife 17 (1939).

otherwise would be illegal and may supersede the right of territorial integrity guaranteed by the United Nations Charter.[5] However, there is no simple rule which determines what action is self-defensive and therefore permissible; proper analysis involves examining the problem in each of its several factual contexts and comparing them with the principles of law now in existence.

The claim of self-defense may be advanced in three quite distinct situations. Once warfare has broken out, a belligerent may feel that the threat posed by the presence of hostile forces in a neighboring neutral state warrants anticipatory defensive action. Such measures are anticipatory because they are motivated merely by the possibility of an attack. Of course, the belligerent may also claim self-defense in response to an actual attack. When the attack occurs from within neutral territory, he may assert the right to take necessary[6] protective measures even though to do so involves operations on neutral soil. Several operations by France against Algerian rebels firing upon them from Tunisian territory[7] provide a convenient example. Finally, defensive measures may be necessary where neutral territory is used as a sanctuary for tactical retreat and a base of operations for repeated raids. This is the basis on which the United States has sought the right to pursue the Viet Cong into Cambodia. This Note will examine in turn these three categories—action

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5. *See* D. BOWETT, *supra* note 1, at 31; 2 L. OPPENHEIM, INTERNATIONAL LAW § 326, at 698 (7th ed. H. Lauterpacht 1952). Bowett distinguishes territorial integrity from territorial inviolability. The former is a right subject to the rights of other states; the latter is an absolute right imposing strict international liability upon a state which permitted its military forces to enter upon the territory of the aggrieved state. Oppenheim finds the terms synonymous and would subject them to the right of other states to self-defense. 2 L. OPPENHEIM, *supra*, §§ 52a, 52aa, at 154-55.

6. The word "necessary" is used here in a strict sense and should not be confused with "military necessity," self-preservation and *Kriegsraison*. The phrase "military necessity" is generally used to justify the expedient. It means that a nation engaged in war can take any steps it feels are warranted by the "necessity of war" or "self-preservation," the latter term creating a subjective test for determining the danger into which the state or its armed forces is placed. See discussion at notes 85-88, *infra*, and accompanying text.

7. The French, in asserting this right, referred to it as the *"droit de riposte." See, e.g.*, Le Monde, April 27, 1960, at 5, col. 2. In exercising this right, France often bombed insurgent gun emplacements inside Tunisia which allegedly were engaged in firing upon French units close to the border. The French attempted to justify the aerial attack on Sakiet-Sidi-Youssef on February 8, 1958 as an exercise of self-defense on the ground that Algerian rebels in Tunisia had been shooting at the French planes involved while they were over Algeria. *See id.*, Feb. 11, 1958, at 3, col. 3; 38 U.S. DEP'T OF STATE BULL. 333 (1958) (news conference of Secretary of State Dulles). However, the State Department did not regard this operation as an exercise of hot pursuit. The American definition of hot pursuit at that time was explained by Secretary Dulles as follows:

> Hot pursuit is a situation where there has been an attack over domestic or international territory and the attacker is followed with continuity back to his base, which may be in other territory. The element of continuity is essential to any concept of hot pursuit. . . . actually following physically an attacker. . . . But there was no element of hot pursuit in this case, or in most of these Tunisian cases, as far as I am aware.

*Id.*

If the plane responded to enemy fire emanating from neutral territory, however, this might well have been a justifiable measure of self-defense. The "continuous chase" doctrine is not a prerequisite to the exercise of self-defense by a belligerent in a neutral state as discussed in this Note.

against anticipated attack, action against tactical retreat, and action against actual attack.

A. *Action Against Anticipated Attack*

International law is most clearly settled with regard to action against anticipatory attack.[8] This is because the *Caroline* case has established a strict definition of the necessity which will warrant defensive action. The belligerent must show a "necessity for self-defense, instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[9] Under the *Caroline* test, a virtual emergency is required before anticipatory action is lawful. Senator Calhoun spoke of the requirement

> laid down by all writers . . . that nothing short of *extreme necessity* can justify a belligerent in entering, with an armed force, on the territory of a neutral power . . . . (Emphasis in the original.)[10]

Likewise, Lord Campbell, in defending the destruction of the *Caroline*, argued that a similar threat would be posed by the erection of guns on the American shore by Canadian insurgents in order to fire at British troops on the other side.[11] Although the analogy refers to action against actual attack, it does reflect the imminent danger which is required to make anticipatory action permissible. The *Caroline* doctrine received support from Vattel, the progenitor of the law of neutrality, whose treatise, written almost one hundred years earlier, was the foremost authority on the law of war during the *Caroline* period.[12] Furthermore, the Nuremberg War Crimes Tribunal explicitly relied on the *Caroline* doctrine as authority to reject the claim that the invasion of Norway was a justifiable measure of self-defense.[13]

As its use at Nuremberg suggests, the *Caroline* doctrine remains a sensible balancing of the interests of belligerent and neutral states. Although some have said that its scope is unduly restrictive in an era of nuclear weapons,[14] this objection does not apply to a war in which the use of even "tactical" nuclear weapons is highly unlikely. Furthermore, its strict approach to the use of anticipatory action is in accord with Professor McDougal's useful notion of "minimum world public order"[15] as a basis for international law. At

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8. The use of this term in the context in which it is employed in this Note can be found in Green, *Armed Conflict, War, and Self-Defence*, 6 ARCHIV DES VÖLKERRECHTS 387, 433 (1957).

9. *See* 2 J. MOORE, DIGEST OF INTERNATIONAL LAW 412 (1906).

10. CONG. GLOBE, 27th Cong., 1st Sess., App., at 82 (1841).

11. *See* 2 LIFE OF JOHN, LORD CAMPBELL 119 (2d ed. M. Hardcastle 1881). For a contemporary application of this argument, see note 7 *supra*.

12. *See* 2 E. DE VATTEL, LE DROIT DES GENS, § 119, at 149 (Fenwick transl. 1916); *cf. id.* §§ 120-30, at 149-52.

13. *See International Military Tribunal (Nuremberg), Judgment and Sentences*, reprinted at 41 AM. J. INT'L L. 172, 205-07 (1947).

14. *See* McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 598 (1963).

15. *See generally* M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961).

the same time that the *Caroline* doctrine realistically permits action by a belligerent to protect itself from virtually immediate danger, it fosters restraint upon the belligerent's otherwise less inhibited resort to force. If a neutral's border may be ignored only in extreme situations, the need for the breach can be more easily comprehended and tolerated. Therefore, tensions between states at peace are minimized; and, more importantly, the conflict is apt to remain locally confined.

The major difficulty in applying the established principles is in determining when the danger to the established forces has become so imminent that the "necessity for self-defense" is "instant" and "overwhelming." Contrary to the views of some members of Congress,[16] this need does not occur when the insurgents are merely preparing for an attack at some future time, even if within a matter of days. To suppose otherwise would condone action which the United States condemned in the *Caroline* case itself. Although such preparations might serve as a basis for preventive action against a hostile state under Article 51 of the Charter,[17] it is more reasonable to impose a stricter requirement on preventive measures which infringe the sovereignty of a neutral state. In particular, there should be very substantial and convincing evidence that the hostile forces are poised to strike from neutral territory and that it would be impossible to defend the positions held within the belligerent state.

B. *Action Against Tactical Retreat*

Action against tactical retreat is in a sense action against anticipated attack. The action is motivated by the expectation that the enemy will return to the theater of war. But unlike anticipatory action, such measures do entail the pursuit of an enemy after his initial attack. Typically, the enemy retreats into neutral territory in order to achieve temporary sanctuary. This retreat may be due to defeat in battle or to a tactical decision to break off the engagement. Although this situation probably represents the large majority of instances in which hot pursuit is a militarily desirable tactic, international law has not explicitly treated the problem. There are, however, good reasons to apply a more flexible rule than the one applied to ordinary anticipatory action.

It has been said, sometimes by scholars of eminent prestige, that the pursuit of retreating forces into neutral states is categorically forbidden.[18]

16. A special subcommittee of the House Armed Services committee recommended that American forces take unspecified "search and surveillance measures" to prevent the use of Cambodian territory for supply routes and staging areas. *See* N.Y. Times, Dec. 14, 1967, at 4, col. 4.

17. *See* Green, *supra* note 7, at 430-35. *Contra*, Henkin, *Force, Intervention, and Neutrality in Contemporary International Law*, 57 Am. Soc. of Int'l L. Proc. 147, 151 (1963); Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 Am. J. Int'l L. 872, 878 (1947); *cf.* 2 L. Oppenheim, *supra* note 5, § 52a, at 154 (based upon violation of Article 2(4)).

18. *See, e.g.*, 2 L. Oppenheim, *supra* note 5, § 320, at 684-85; T. Benton, Thirty Years' View 290 (1856); *cf.* Brownlie, *International Law and the Activities of Armed Bands*, 7 Int'l & Comp. L.Q. 712, 734 (1958).

However, the examples cited to support this position involve the retreat into neutral territory of defeated forces which never returned during the duration of the insurrection.[19] It was the finality of the insurgents' retreat into Austria-Hungary during the Polish Insurrection of 1830 which would have made pursuit by the victorious Russians a violation of international law.[20] The same is true of the crossing of thousands of Hungarian insurgents into neutral Austria during the abortive 1956 revolt.

History, however, provides numerous examples of hot pursuit undertaken against forces using neutral territory as a base for recurring raids. General Jackson, for example, pursued into Florida, then owned by the Spanish, Seminole Indians who had frequently attacked American positions in Georgia.[21] In the course of pursuit and battle in Florida, several Spanish forts were seized. After the Indians were subdued, possession of the forts was restored to Spain, and reparations were made for injuries to Spanish property and citizens. There was evidence that despite treaty obligations to keep the Indians in Florida at "peace" with the United States,[22] the Spanish authorities had neither the strength nor the inclination to implement their pledges. Interestingly enough, there is no evidence that the Spanish government contended that American action was not in accordance with international law, perhaps because the Spanish had failed to fulfill their treaty obligations.

Similarly, the United States engaged in hot pursuit against Mexican bandits who regularly pillaged and terrorized communities in Texas from 1870 to 1877. Not only was it apparent that the Mexican central government had taken no action to prevent such incidents, but it also was clear that friends of the bandits were in military and political control of the Mexican states adjacent to the Texas border.[23] After many years of indecision, the United States gave the commanding general in Texas authority

> in the use of his own discretion, when in pursuit of a band of the marauders, and when his troops are either in sight of them or upon

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19. There is precedent for holding that the pursuit of decisively defeated insurgents into neutral territory is not an exercise of self-defense and therefore constitutes an unjustifiable breach of the neutral's territorial integrity. During the Mexican revolution of 1877, in which General Diaz overthrew the Lerdo government, a battle occurred in Mexico in which forces of the former defeated and dispersed troops of the latter. Upon doing so, the Diaz troops pushed their adversaries into Texas. The Secretary of State instructed the United States minister to Mexico to call attention of the new government to the breach of international law, demand reparations from the state, and punishment of the offenders. H.R. Rep. No. 701, 45th Cong., 2d Sess., App. B, at 254 (1878). The Mexican government agreed with the Secretary's characterization of the incursion, describing it as "an unjustifiable invasion, that is condemned by international law," and ordered an investigation so that "the parties who prove to be guilty may be punished . . . [and if any] officer of Mexico has ordered an invasion of the territory of the United States . . . that . . . the reparation . . . be made for this act which is in justice due." *Id.* at 256.

20. *See* Castrén, *supra* note 4, at 43.

21. *See, e.g.*, 2 J. Moore, *supra* note 9, at 402-06.

22. *See* Treaty of Friendship, Limits and Navigation Between the United States of America and the King of Spain, Oct. 27, 1795, art. V, 8 Stat. 138, 140-42 (1846).

23. *See* H.R. Rep. No. 701, *supra* note 19, at ix-x and App. B; H.R. Rep. No. 343, 44th Cong., 1st Sess. vii-viii, 33, 57-58 (1876).

> a fresh trail, to follow them across the Rio Grande, and to overtake and punish them, as well as retake stolen property . . . found in their hands on the Mexican side of the line.[24]

The Americans were not alone in thinking such action necessary and proper. The British authorities in Honduras responded in the same way when faced with acts of terrorism by Mexican bandits along their border.[25]

The legitimacy of hot pursuit under such circumstances is indicated by the acquiesence of Mexico in the violation of its border during the "Cortina War." Juan de Cortina was a Mexican bandit who waged a six-month insurrection against the United States and the State of Texas, vowing, at one time, to push the Mexican border back to the Nueces River. He and his men made use of sanctuary in Mexico to avoid capture by American troops and Texas Rangers. Finally, on February 4, 1860, the Americans crossed the Mexican border and dispersed the Cortina band. Although the local military commander asked for the withdrawal of American troops, no complaint was made by the Mexican central government. In fact, its military commander in the region agreed that American troops should be empowered to pursue and arrest Cortina and his men wherever found.[26]

Such tolerance toward action against raiders who use neutral territory for sanctuary is not surprising. The first duty of any government is to protect its citizens and territory. The danger to both is apparent when bands of insurgents or bandits regularly cross the border into neutral territory in order to evade government forces, rearm, and regroup. The danger is exacerbated if either the central government of the neutral state or its political and military representatives at border areas, whether through sympathy with the cause of the rebels or inability properly to police its territory adjacent to the border, permit the insurgents to use its territory with impunity.[27]

The self-defensive character of pursuit in these instances normally arises from the recurring nature of the insurgents' activities. It hardly accords with human nature to ignore a long-standing course of conduct by insurgents and to say that pursuit is not self-defensive when it is manifest that inevitably

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24. H.R. Rep. No. 701, *supra* note 19, at 241. For the favorable editorial reaction of the American press, *see, e.g.*, N.Y. Herald, June 1, 1877, at 4, col. 5; *id.*, June 2, 1877, at 4, col. 3.

25. *See* N.Y. World, June 6, 1877, at 4, col. 4.

26. *See* H.R. Exec. Doc. No. 81, 36th Cong., 1st Sess. 102-04 (1860).

27. The right of a belligerent to enter neutral territory to destroy forces of its enemy whom it suspects are regaining strength to renew their attacks is supported by Vattel:

> On the other hand, it is certain that, if my neighbour offers a retreat to my enemies, when they have been defeated and are too weak to escape me, *and allows them time to recover and to watch for an opportunity of making a fresh attack upon my territory* . . . [this is] inconsistent with neutrality . . . [H]e should . . . not allow them to lie in wait to make a fresh attack upon me; *otherwise he warrants me in pursuing them into his territory*. This is what happens when Nations are not in a position to make their territory respected. It soon becomes the seat of the war; armies march, camp, and fight in it, as in a country open to all comers.

3 E. de Vattel, *supra* note 12, § 133, at 277 (emphasis added).

they will resume the attack in the near future. Thus, self-defense under the circumstances of modern guerrilla warfare should be given an expanded meaning to permit the pursuit of retreating forces where there is reason to believe that they are using neutral territory as a base of operations for future attacks.

C. *Action Against Actual Attack*

The claim of self-defense is strongest where forces are under actual attack from within neutral territory. Before the advent of long range weapons, instances of such attack were perhaps rare; modern technology has made it a significant danger. There are, moreover, other more subtle ways in which attacking forces can exploit the sanctity of a neutral border to the detriment of their opponent. They may, for example, occupy positions just outside the neutral state, secure in the knowledge that they cannot be challenged from the rear. Or they may pin their opponent against the border and force him to choose between retreat, defense of an untenable position, or advance into neutral territory.

Despite the obvious need to violate neutral territory in such situations, justification under international law is not clear. Such measures, however, are comparable to the doctrine of self-defense encountered in municipal legal systems throughout the world. Reliance on this doctrine would in general mean that forces, if attacked, could take necessary defensive measures without regard for the existence of a neutral border.

In view of the similarity of this type of self-defense to self-defense as it is understood in criminal law, it is surprising that most international legal scholars have ignored the domestic law on this subject. It cannot be said that better sources are available because there exist neither conventions nor recorded customs which indicate the appropriate rules. Fortunately, it is permissible to resort to "general principles of law recognized by civilized nations" as a source of international law.[28]

It is generally accepted that when a person's life is in danger because of the unlawful actions of an assailant, that person may use deadly force, if necessary, to protect himself. The right of self-defense is recognized by the common and civil law systems, and many, if not most, of the newly independent states have retained the penal laws of their former colonial masters. The right of self-defense, moreover, is recognized in the Penal Code of the Russian Soviet Federated Socialist Republic.[29]

The almost universal recognition in municipal law of a right to self-defense against attack suggests that as a general principle, the defensive protection of military forces should justify an otherwise unlawful incursion

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28. *See* I.C.J. STAT., art. 38, para. 1(c).
29. *See* note 36 *infra*.

into the territory of a neutral state. That the exercise of self-defense occurs in a state of war is not relevant; the principle can be extended rationally to safeguard the right of combat troops to protect themselves as organized units when they are engaged in battle.

Self-defense, of course, presupposes that the actor is the victim of aggression. Aggression, however, is not meant in the broad sense frequently used in international politics. To assert that because the insurgents were responsible for initiating the state of war they are the "aggressors" for all purposes is to say too much. Although this is one of the bases for exercising the right to engage in activities recognized under Article 51 of the Charter, it is not helpful in determining permissible conduct in actual combat situations. To rely on a general characterization of aggression would provide the forces of the established government with an unrestricted license to cross into neutral territory whenever it was convenient to do so.

Generally speaking, the side that provoked the specific attack should not be entitled to invoke self-defense. Thus, if the troops of the established government or its allies have spotted the insurgents and have attacked them, for example, on a "search-and-destroy" operation, they are the aggressors for the purpose of that encounter. When the going gets excessively difficult, they may not claim self-defense to justify action within neutral territory. However, if they are ambushed or attacked by the insurgents, the opposite result should follow in most cases. Furthermore, the right to enter neutral territory in self-defense should not be unavailable to troops who have resorted to actions which are provocative but do not constitute initiation of battle. If a conflict such as the Spanish Civil War or Vietnamese War has reached the stage in which it is difficult to assert that either party holds the territory it controls under claim of right or sovereignty, then the entry of troops of one side into territory held by the other may be a provocative act, but it is not aggression; and if the latter troops attack, they have engaged in aggression from which the provocateurs may protect themselves.[30]

The problems of identifying the aggressor are not the only difficulties encountered in applying the municipal law of self-defense to combat situations. In general the right of self-defense is not created merely by the actor's subjective belief that his situation warrants defensive action. For example, the Model Penal Code, the most progressive formulation of American criminal law to date, denies justification for the use of deadly force if the actor is reckless or negligent in believing that the use of such force is necessary.[31] This

30. An exception to the general rule that the right to engage in "protective measures" should be unavailable to the initial aggressor may arguably occur when the enemy, engaging in defense, employs an unlawful method of warfare and thus increases the intensity of battle beyond its lawful limits.

31. MODEL PENAL CODE § 3.09(2) (Proposed Official Draft 1962):
When the actor believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish

reasonable-belief test is found in the common law of all the states[32] and in other common-law jurisdictions.[33]

Under the Continental penal codes, however, the plea of self-defense is not conditioned on the reasonableness of the actor's belief but is based on the stricter test of cause in fact—that is, that regardless of the actor's belief, there was an actual danger which justified the use of force.[34] Typical is the provision of the Italian Penal Code which provides "[a] person who has committed an act having been compelled by necessity to defend his own or another person's right against the actual danger of an unjust injury is not punishable . . . ."[35] The Penal Code of the Russian Soviet Federated Socialist Republic is to the same effect:

> Measures of social defence shall not be applied at all to persons who have committed acts within the scope of the penal law if the court recognizes that the acts were committed by them in necessary defence

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a justification under Sections 3.03 to 3.08 [including the Use of Force in Self-Protection, § 3.04] but the actor is *reckless* [defined in § 2.02(2)(c) as a conscious disregarding of "a substantial and unjustifiable risk . . . [which] disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation."] or *negligent* [defined in § 2.02(2)(d) as the "failure to perceive [a substantial and unjustifiable risk which] . . . involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."] in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those Sections is unavailable in a prosecution for an offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

32. *See, e.g.*, ILL. ANN. STAT. tit. 38, § 7-1 (Smith-Hurd 1964); People v. Miller, 403 Ill. 561, 87 N.E.2d 649 (1949); N.Y. PEN. CODE § 35.15 (McKinney 1967); Shorter v. People, 2 N.Y. 193 (1849); Harris v. State, 96 Ala. 24, 11 So. 255 (1892); Morgan v. Sate, 35 Tenn. 475 (1856); R. PERKINS, CRIMINAL LAW 883-85 (1957); *cf.* Etter v. State, 185 Tenn. 218, 205 S.W.2d 1 (1947) (reasonableness of use of deadly force); People v. Syed Shah, 91 Cal. App. 2d 722, 205 P.2d 1077 (1st Dist. 1949) (reasonable-belief standard for assault). Louisiana, the only civil-law jurisdiction in the United States, likewise adheres to the reasonable-belief test. LA. CODE ANN. tit. 14, art. 20 (1951).

33. *England:* Regina v. Symondson, 60 J.P. 645 (1896); Regina v. Smith, 8 Car. & P. 160, 162, 173 Eng. Rep. 441, 443 (N.P. 1837); *cf.* Regina v. Chisam, 47 Crim. App. 130 (1963); Regina v. Rose, 15 Cox Crim. Cas. 540 (Oxford Assizes 1884) (defense of another). *Australia:* Gotti v. The Crown, 22 W. Austl. L.R. 11 (1919); Regina v. Griffin, 10 S. Ct. R. (N.S.W.) 91 (1871); Regina v. Haley, 76 W.N. (N.S.W.) 550, 552 (Ct. Crim. App. 1959); CRIMINAL CODE OF 1899, 63 Vict., No. 9, Sched. 1, § 271 (Queensl.); Rex v. Keith, 27 Queensl. J.P. Rep. 109, 129-32 (Ct. Crim. App. 1933); Regina v. Tikos (No. 1), [1963] Vict. 285, 297-98 (dictum); *cf.* The Queen v. McKay, [1957] Vict. 560, 64 Austl. Argus L.R. 648 (1957), *application for leave to appeal denied*, 98 Commw. L.R. 673 (1957). *Canada:* CRIMINAL CODE OF 1954, 2 & 3 Eliz. 2, c. 51, § 34(2) (Can.). *India:* INDIAN PEN. CODE §§ 97, 99-100, 102 (8th ed. H. Gour 1966). *New Zealand:* CRIMES ACT OF 1961, 10 Eliz. 2, No. 43, § 48(2). For common law jurisdictions generally, see J. ARCHBOLD, PLEADING, EVIDENCE & PRACTICE IN CRIMINAL CASES §§ 2496-97 (35th ed. T. Butler & M. Garsia 1962); J. STEPHEN, DIGEST OF THE CRIMINAL LAW art. 305, at 251-52 (9th ed. L. Sturge 1950).

The reasonable-belief test is of comparatively recent vintage; earlier English legal scholars adhered to the stricter cause-in-fact test. *See, e.g.*, 1 M. HALE, PLEAS OF THE CROWN *478-92; E. COKE, THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *55-56. The cause-in-fact test is prevalent in the Continental penal codes, discussed in notes 34-36 *infra* and accompanying text.

34. *See, e.g., France:* C. PÉN. art. 328 (59th ed. Petits Codes Dalloz 1962); *Germany:* StGB § 53 (28th ed. C. H. Beck 1966).

35. C. PEN. art. 52 (Hoepli 1963) (transl. British Foreign Office 1931).

against . . . any attempt on the person or the rights of the individuals thus defending themselves or of any other person. . . .[36]

It is clear then that the reasonable-belief standard is not established as a fundamental principle common to all municipal legal systems. It may also be argued that it is inapplicable to an international system which lacks effective machinery for judging adherence to minimum standards of behavior and punishing deviations from the established norms. This conclusion is buttressed by the fact that during a state of war, the law which applies is most notable for its ambiguity, the lack of an independent forum to which complaints can be made, and its indulgence of the broadest "right" of self-preservation.[37] Cause in fact may well be the only justification which a neutral state can be expected to accept.

On the other hand, there is good reason not to punish an officer for doing what he reasonably believed necessary. Among a field commander's primary objectives is to protect the lives of his troops. Although military training emphasizes the importance of cool thinking under stress, there are situations which call for the quickest possible decision-making: delay itself may create an unreasonable risk of life.[38] Thus, a field commander in actual combat conditions must promptly make the decision which seems most reasonable *to him* under the circumstances. When the neutral state complains of his decision to cross its border either to push the enemy back or to engage and destroy it, the "reasonableness" of his decision will be subject to review by his superiors, and his provision for the safety of his troops in the field must necessarily be accorded great weight—his conduct should, at minimum, be considered presumptively correct.

This dilemma may be resolved by imposing different standards of conduct on the state and on the commander in the field. In view of the international interest in confining war, the state should not be permitted to violate a neutral border without assuming the risk that its action will later be proved unnecessary. The absence of cause in fact would, for example, justify condemnation by the Security Council and appropriate action under the United Nations Charter. The military officer, however, should be free of liability if in view of the extreme circumstances under which he had to act, those actions were reasonable.

Another problem with the use of self-defense as a doctrine of justification in international law is that of assessing the amount of force which may be used.[39] A point is reached in which self-defense becomes aggression under any

36. R.S.F.S.R. 1960 Ugol. Kod. (Criminal Code) art. 13 (1966) (transl. British Foreign Office 1934).

37. *See* J. Stone, *supra* note 1 at 349.

38. Compare Schwarzenberger, *supra* note 1, at 333.

39. *Compare* D. Bowett, *supra* note 1, at 54, *with* H. Kelsen, Principles of International Law 75 n.68 (2d ed. R. Tucker 1966) and the principle common to all municipal legal systems that the force used in self-defense be only that necessary to protect the

well developed system of law. Secretary Webster recognized this when he said in connection with the *Caroline* case that the means taken in exercise of the right must not be "unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[40] However, the exercise of hot pursuit often leads to excesses which cause death of citizens and destruction of property in the neutral state into which the battle is carried. Illustrations of this pattern may be found in the French bombing and invasion of Tunisian territory during the Algerian war. In one notable incident, when French soldiers encountered rifle fire from a hillcrest approximately 200 yards inside Tunisia, five French planes crossed into Tunisia from Algeria and bombed in the region of the village of Bourma, killing one Tunisian civilian, wounding two others, and destroying eight houses.[41]

Such mistakes, however, are not particularly surprising. Often in the heat of fighting, it may be difficult to exercise the reasoned judgment necessary to prevent a minor incident from becoming a matter for consideration by the United Nations. But the effort must be made. As in the case of testing the need for defensive measures, it is appropriate to hold the state and the military commander to different standards. The state should be liable if the force was in fact excessive, and the officer if he did not reasonably believe it was absolutely necessary to accomplish his immediate military objective.

In summary, defensive actions which infringe the sovereignty of a neutral state should be justifiable under international law if they are responses to an anticipated attack which cannot be met by any other means, if they are necessary to end repeated raids from a neutral sanctuary, or if they are required to protect the safety of troops under actual attack. Unless such reasonable measures are permitted by a system of international law, it can be expected that international law will be dismissed as an idealistic conception unresponsive to the realities of war and therefore ignored. On the other hand, if these are the standards for justification, it is more likely that actions which fall outside their scope will be condemned on a legal basis by an international polity able to impose punitive sanctions. If this is to happen, the preconditions of an effective system of international law will be fulfilled.

## II. Violation of Neutral Duties

In all of the instances of self-defense discussed above, defensive measures were necessary in part because the neutral state had failed to prevent the use

actor in the circumstances. Whether the standard is "reasonable necessity" or "necessity in fact" depends upon the particular legal system; however, the standards used generally follow the geographical pattern discussed in notes 31-36 *supra* and accompanying text.

40. Letter from Secretary of State Webster to Mr. Fox, April 24, 1841, [1843] 61 Accounts and Papers, *Papers Relative to the Special Mission of Lord Ashburton to the United States in 1842*, at 49.

41. *See* N.Y. Times, Sept. 15, 1957, at 1, col. 2; *id.*, Sept. 16, 1957, at 3, col. 4; Le Monde, Sept. 18, 1957, at 2, col. 4.

of its territory by a belligerent force. Under some conceptions of the law of neutrality, this failure is a violation of the neutral's duty of strict impartiality and terminates the right to territorial integrity. This theory, however, has come under attack, and the view has been advanced that the neutral may aid the side which it considers the victim of aggression without losing its neutral status. It might appear that this doctrinal debate is of no concern to those who believe that the right of hot pursuit is founded primarily on the necessity for defensive measures against a particular attack. But the difficulty is that these measures of self-defense are more likely to be accepted by the international community if they can be associated with some culpability on the part of the neutral.

The idea that a state claiming neutral status must remain aloof and completely impartial became popular after the end of the Napoleonic Wars.[42] Building on this foundation, the traditional law of neutrality established an elaborate system of proto-Hohfeldian rights and duties, many of which were codified in Hague Convention V of 1907.[43] Among them was the duty of insuring that neutral territory would not be used by one belligerent as a base of operations from which to attack the other. Another was the duty to take measures which would insure that forces retreating into neutral territory were rendered inoperative and preferably permanently cut off from the theater of war.[44] A neutral state was thought to be partisan if it permitted the use of its territory for unrestricted asylum or recoupment. *A fortiori*, it violated its duties if it permitted forces engaged in hit-and-run tactics to remain in its

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42. Hall made what is the most familiar statement of the positivist theory of neutrality. He declared that a neutral state is one whose

> amity must be colourless in the eyes of both [belligerents]; in its corporate capacity as a state it must abstain altogether from mixing itself up in their quarrel.

W. HALL, INTERNATIONAL LAW 73 (7th ed. 1917).

43. 36 Stat. 2310 (1907).

44. Thus, Article 11 of Hague Convention V required the neutral state to intern forces of a belligerent which crossed into its territory, preferably as far from the theater of warfare as possible. 36 Stat. 2310, 2324 (1907). Writers affirm the duty of neighboring states to intern rebel forces when their belligerency has not been recognized. Otherwise it would be possible for the rebels to return to occupied territory and thereby cause the neighboring country indirectly to interfere with the prosecution of the war effort of the established government through an illegal omission. *See* Castrén, *supra* note 4, at 120-22; Wehberg, *La Guerre Civile et le Droit International*, 63 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 1, 58 (1938); *cf.* Balladore Pallieri, *Quelques Aspects Juridiques de la Non-Intervention en Espagne*, 18 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 285, 290 (1937) (interning rebel men-of-war upon entry into the ports of third countries); *see* Kunz, *supra* note 4, at 202-03.

However, the view that a state not directly involved in a civil war is under a duty to intern forces entering its territory from the theater of war is not unanimous. In response to a question in the House of Commons, Edward Heath, then Lord Privy Seal, stated:

> There is nothing in the rules of international law to oblige the Thai Government to intern [Royal] Laotian forces which have crossed into Thai territory, unless Thailand recognised the contending forces in Laos as belligerents. This she has not done. . . . Thailand is not bound by the Geneva Convention to intern these forces unless she has recognized them as belligerents in Laos. . . .

661 PARL. DEB., H.C. (5th ser.) 21 (1962).

territory without official interference.[45] When sentiment in the neutral country was unfavorable to the claims of the victim of these tactics[46] and the government of the neutral state unresponsive to previous demands for redress, self-help proportional to the exigencies of the situation was considered appropriate.[47]

The traditional law, moreover, does not exonerate a neutral simply because it has used its best efforts. It may be wondered why a violation occurs when the neutral, through no fault of its own, is unable to effect proper protective measures. The conceptual answer is that states possess exclusive jurisdiction over their national territory and are faced with the responsibility for insuring that the effective authority of the government is maintained throughout. Thus the claim to territorial integrity under the Charter or under Article I of Hague Convention V is based upon the proposition that adequate police measures will be taken by neutral states. But on more practical grounds it appears that the need for hot pursuit may be just as great when the neutral is unable to fulfill its obligations as when it is unwilling to do so. For the belligerent there is no difference between, for example, Cambodia's physical incapability to repel the infringing insurgents because of its long, undefined, unmarked border, domestic instability, and inadequate armed forces and Tunisia's refusal to repel them.

The claim by a belligerent that hot pursuit is appropriate when other demands for recompense go unrequitted has fairly strong support, not only among the majority of commentators but in historical precedent. Historical examples are not confined to the American practice. For example, in 1870 the Prussians feared that a large number of French troops would escape to neutral Belgium, which might be reluctant or unable to disarm and intern them.[48] As

45. *See* 3 E. DE VATTEL, *supra* note 12, § 133, at 277.

46. The neutral's traditional duty of impartiality does not forbid official expression of sentiment in favor of one belligerent. *See* 2 L. OPPENHEIM, *supra* note 5, § 294, at 655.

47. Kelsen considers self-defense as a part of the larger concept of self-help. The former is considered a means of enforcing the law; the latter includes within its purview the imposition of reprisals. *See* H. KELSEN, *supra* note 39, at 74 n.67 (equating Bowett's concept of self-defense with self-help, which he considers the totality of measures by which a state can protect its legally protected interests) and 80 n.71. Other writers define self-defense more broadly, virtually equating it with protection of "vital national interests." *See* D. BOWETT, *supra* note 1, at 20-24, 270-71; 1 J. WESTLAKE, *supra* note 1, at 312-13.

The distinction which Kelsen draws is more important today than in the period during which traditional neutrality was in its heyday. The older concept of neutrality did not distinguish between mere violation of neutral duties and loss of neutral status. It maintained that the neutral state which showed any degree of preference to one belligerent by violating one of its neutral duties was an accomplice of the favored side. *See* Curtis, *The Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT'L L. 1, 5 (1914). Accordingly, the belligerent adversely affected was entitled to exact reprisals against the "neutral" state as punishment for its complicity. Today the exaction of reprisals against neutral states which had violated a duty of neutrality would probably be unlawful, particularly if the reprisals were disproportional to the violation they were designed to punish.

48. *See* J. SPAIGHT, WAR RIGHTS ON LAND 480 (1911), *quoting from* 2 DER DEUTSCH-FRANZÖSISCHE KRIEG 1870-71 Part 1, App., at 286* (1875).

a result, General von Moltke issued an order in which he stated, "should the enemy pass over into Belgium without being at once disarmed, he is to be pursued thither without delay."[49] Bismarck justified this proposed hot pursuit into Belgium on the ground that Prussia's respect for Belgian neutrality was contingent upon reciprocal respect by France.[50] Another example occurred during the Boer War when British forces threatened to cross the border into neutral Swaziland to attack retreating Boer commandos.[51]

Furthermore, history does not support the proposition that hot pursuit is used exclusively by Western powers in their internecine wars or imperialistic adventures. The Soviet government responded to White Guard activity by crossing the Mongolian border in 1921 in pursuit of the insurgents and the Manchurian border as late as 1929.[52] The Soviet position on the use of hot pursuit to redress violations of neutral duties is shown in its note to the Foreign Minister of Rumania on August 13, 1921:

> In its desire to assist the Rumanian authorities to disperse the bands organized in Bessarabia and Rumania for the purpose of carrying out acts of aggression against the Soviet Republics, the allied Soviet Governments consider it necessary that if such bands, when pursued by Soviet troops, should cross into territory occupied by the Rumanian authorities, they should be followed into the latter territory, the Rumanian authorities being informed in time so that the operations . . . shall not be interpreted as acts directed . . . against the Rumanian Government and people.[53]

The Soviet government also demanded that Rumania end moral and material support to the White Guards, expel the leaders of these groups from Rumanian territory, disband their counter-revolutionary detachments, and sever diplomatic relations with the "Ukranian People's Republic."[54] The Soviet note did not mention self-defense and apparently regarded hot pursuit as permissible if "neutral" Rumania persisted in its previous violations.

The most important problem confronting those who maintain that hot pursuit is appropriate under the traditional view of neutrality is the absence of either supporting convention or custom. In international law custom means not only usage but also that the usage is regarded as binding by the parties involved. Virtually every state into whose territory hot pursuit has been undertaken or threatened has protested the action as being contrary to principles of international law and a violation of its territorial integrity. Indeed, the United States took this position in the *Caroline* case.[55] When Cambodia

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49. *See* J. SPAIGHT, *supra* note 48.
50. *Id.*
51. *Id.*
52. *See* Brownlie, *supra* note 18, at 732-33. Note, however, that the Soviet Union justified its action on the basis of self-defense against die-hard White Guard units. *See* 2 J. DEGRAS, SOVIET DOCUMENTS ON FOREIGN POLICY 407, 413 (1952).
53. *See* 1 J. DEGRAS, *supra* note 52, at 254.
54. *Id.* at 253.
55. *See* Letter of Secretary Webster to Lord Ashburton, July 27, 1842, in 30 BRIT. AND FOREIGN STATE PAPERS 193-95 (1842).

indicated that it would not oppose American forces militarily, it recognized only that the United States had the power to engage in this policy and did not admit its right to do so.[56]

But a more significant challenge to the traditional rules of neutral duties is that the ideal of strict impartiality on which they were founded is no longer accepted. Many distinguished writers have returned to a derivative of Grotius's *bellum-justum* principle.[57] This view is reflected in Article 12 of the Draft Convention on Rights and Duties of States in Case of Aggression[58] which provides that a state which does not cooperate in the conduct of hostilities does not owe the "aggressor" any neutral duties but may assert against the latter all the rights to which neutrals are entitled.[59] Writers such as Wright and Brierly go further and assert that a neutral state has the *duty* to discriminate against the offending state and assist the state acting in "self-defense."[60] It is said that the neutral is entitled to violate the traditional requirement of impartiality because its rights under the Kellogg-Briand Pact have been violated by the "aggressor" in starting the war and "continue to be infringed

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56. The statement of the Royal Cambodian government, reproduced in N.Y. Times, Dec. 28, 1967, at 17, col. 2, does not discuss the right of the United States to engage in the more traditional means of redress such as diplomatic protest and demands for reparation. Moreover, the Cambodian government admitted the existence of a policy on its part to keep its territory free of armed Viet Cong troops, though denying the United States a right to call Cambodia to account for violations of this policy.

57. *See, e.g.*, Brierly, *Some Implications of the Pact of Paris*, 10 Brit. Y.B. Int'l L. 208, 210 (1929); Lauterpacht, *Rules of Warfare in an Unlawful War*, Law and Politics in the World Community 89, 110-13 (G. Lipsky ed. 1953); Wright, *The Meaning of the Pact of Paris*, 27 Am. J. Int'l L. 39 (1933); *cf.* 2 L. Oppenheim, *supra* note 5, § 320, at 684-85; *but see* J. Stone, *supra* note 1, at 407.

This view was not confined merely to Anglo-American scholars. For a Continental exposition reaching the same conclusion, *see* N. Politis, Neutrality and Peace 44-99 (F. Macken tran. 1935). However, Politis detected that state practice would tend to undermine the logical implications arising from the existence of the League and the Pact, particularly in regard to the introduction of non-aggression pacts in the 1930's. *See id.* at 73-78.

Nor has the experience of World War II and its aftermath dimmed the faith of the adherents of the "new neutrality." In another context, Professor Wright maintained his belief that the positivist approach to international law has been displaced by the decidedly anti-war position of the Charter. *See* Wright, *Legal Positivism and the Nuremburg Judgment*, 42 Am. J. Int'l L. 405, 413 (1948).

Professor Hans Kelsen, a legal positivist, questions the utility of the *bellum-justum* theory. He concludes that the principle "reflects political wishes rather than scientific thinking." H. Kelsen, General Theory of Law and State 341 (1945). An analysis of the jurisprudence of war in light of the United Nations Charter can be found in Kelsen, *Sanctions in International Law under the Charter of the United Nations*, 31 Iowa L. Rev. 499 (1946). One comment which bears repetition in light of the reliance upon the Charter for the adoption of the "new neutrality" is "[i]f the enforcement actions provided for by the Charter are true sanctions, the Charter is a perfect realization of the *bellum-justum* principle." *Id.* at 501-02. *Quaere* whether the post-war experience has indicated that the enforcement actions are "true sanctions."

58. 33 Am. J. Int'l L. Supp. 844, 902-04 (1939).

59. *Id.*

60. *See* Brierly, *supra* note 57; Wright, *The Future of Neutrality*, [1928] 242 Int'l Concil. 352, 362. Other authors imply that the neutral has a right to discriminate in favor of the belligerent acting in self-defense. *See, e.g.*, Boce, *Shall a State which Goes to War in Violation of the Kellogg-Briand Pact Have a Belligerent's Rights in Respect of Neutrals?*, 24 Am. J. Int'l L. 766, 769-70 (1930); Lauterpacht, *supra* note 57, at 110-13.

every minute the war continues. . . . [U]nder the Pact . . . the primary belligerent had ceased to enjoy its benefits."[61]

This alternative to the traditional theory of neutrality is almost certainly unworkable. Even if it is true that the pact gives a neutral the right to discriminate against the aggressor, it does not follow that each state is free to determine for itself where the blame lies.[62] Professor Wright recognizes the need to identify the aggressor for the reason that otherwise the neutral might be subject to heavy reparation payments should an arbitration tribunal decide that he had aided the aggressor and not the victim.[63] But this is only a small part of the problem; the same need exists in the usual case where no centralized body with recognized judicial power passes upon the aggressiveness of either party to the hostilities. There are also situations in which neither side will be innocent under the law of the Pact and the Charter.[64] Furthermore, in the event of a civil war within the confines of a single state intervention would be permitted only on the side of the established government if it requests aid, regardless of any question of aggression.[65] Therefore, there will be little incentive to identify the aggressor.

To make each state the sole judge of culpability is to add to the ambiguity which already characterizes international law concerning war[66] and to

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61. Wright, *supra* note 57, at 59-60.

62. Recently Professor Henkin reaffirmed what essentially was the position of Professors Wright and Brierly in the 1930's, except that he placed primary reliance for determining the source of aggression upon the organs of the United Nations. Henkin, *supra* note 17, at 159-62. But it does not appear that the United Nations is able effectively to undertake this task. The military provisions of the Charter (Articles 43-50) have never been implemented. Permanent collective security has given way to ad hoc peacekeeping forces and a reliance upon mutual-security agreements outside of the United Nations framework. Furthermore, even if the collective-security arrangements of the United Nations were institutionalized, the presence of the veto vitiates the effectiveness of the Security Council, and the General Assembly is without competence to implement them. For a discussion of the inherent deficiencies of a collective-security system, see I. CLAUDE, SWORDS INTO PLOWSHARES, ch. 12 (3d ed. 1964).

A determination by the General Assembly is, at best, merely evidence of what the law is (*see* Johnson, *The Effect of Resolutions of the General Assembly of the United Nations*, 32 BRIT. Y.B. INT'L L. 97, 118 (1955-56) (interpreting I.C.J. STAT. art. 38, para. 1(d))); more realistically, it is an expression by the majority of what it thinks the law should be. As the Security Council has the sole authority under the Charter to deal decisively with the breach or threatened breach of international security, its determinations are the only ones entitled to binding effect upon the membership of the United Nations. Even under the Uniting for Peace Resolution, the General Assembly is legally little more than a forum for the expression of world opinion as to the merits of both sides to an international dispute. The resolution of the General Assembly may have large persuasive value if it represents a large majority, perhaps at least two-thirds, of the membership of the United Nations. Nevertheless, it does not have the power under the Charter to render a determination legally binding upon the parties to an international dispute. *Compare* Sloan, *The Binding Force of a 'Recommendation' of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L. 1, 31-33 (1948) *and* Lande, *The Changing Effectiveness of General Assembly Resolutions*, 58 AM. SOC'Y OF INT'L L. PROC. 162 (1964) *with* Skubiszewski, *The General Assembly of the United Nations and Its Power to Influence National Action*, *id.* at 153-61.

63. *See* Wright, *supra* note 57, at 60-61.

64. *See* Kunz, *supra* note 17, at 879.

65. *Cf.* Borchard, *"Neutrality" and Civil Wars*, 31 AM. J. INT'L L. 304, 305-06 (1937).

66. P. JESSUP, A MODERN LAW OF NATIONS 205 (1948).

legitimate the anarchy which prevails in international politics.[67] The thesis that under the Pact and Charter the neutral state has a duty to assist the victim of aggression is tenable only if there exists a set of standards which members of an international tribunal can apply impartially, regardless of their ideological inclinations, to determine which side has in fact struck the first blow. At the present time and for the forseeable future, such standards are at best an idealist's dream; all attempts to formulate even a definition of aggression have resulted in failure.[68] Even if acceptable standards can be found, the propaganda efforts of both sides to an international dispute make the process of evidentiary fact-finding an arduous, if not an impossible, task. Furthermore, the ideological bent of the observer has a profound influence upon the way in which the evidence is interpreted. Thus, a Communist assessing the relevant facts in a "war of national liberation" will be influenced, perhaps unconsciously, by Marxist notions of capitalistic imperialism. It is probably too much to expect the necessary impartiality, even from lawyers, when national and doctrinal differences are as strong as they are today.

Most importantly, however, state practice during the forty years since the signing of the Kellogg-Briand Pact has been inconsistent with the interpretation which Wright and others place on that document. For example, the Pact of Friendship, Non-Aggression and Neutrality Between Italy and the U.S.S.R. of 1933 provides, "Should either High Contracting Party be the object of aggression on the part of one or more third Powers, the other High Contracting Party undertakes to maintain neutrality throughout the duration of the conflict."[69] As Bowett points out, this provision is hardly in keeping with the "just war" theory of neutrality which the Pact supposedly espoused.[70] Neutrality was declared during the Chaco War by Argentina, Brazil, and Uruguay.[71] Perhaps the greatest blow to the notion that a neutral might aid the victim of aggression was the Pittman Resolution,[72] which resulted in the strict neutrality of the United States during the Italian conquest of Ethiopia. During the Spanish Civil War, an amendment to the Pittman Resolution required an American arms embargo[73] which, in light of the extensive military assistance which the insurgents were receiving from Germany and Italy, was detrimental to the Republican cause. This was done on the grounds that the United States, as a neutral, had to manifest its "impartiality" by refusing aid to either side.[74]

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67. *See* Jessup, *The Birth, Death and Reincarnation of Neutrality*, 26 AM. J. INT'L L. 789, 793 (1932).
68. *See* R. FALK, LEGAL ORDER IN A VIOLENT WORLD 63-64 (1968); W. FRIEDMANN, *supra* note 3, at 254-55.
69. Article 2, 148 L.N.T.S. 327 (1933).
70. D. BOWETT, *supra* note 1, at 163.
71. *See* Wilson, *War and Neutrality*, 27 AM. J. INT'L L. 724 (1933).
72. Pub. Res. of Aug. 31, 1935, ch. 837, 49 Stat. 1081.
73. Pub. Res. of Jan. 8, 1937, ch. 1, 50 Stat. 3. *See* Borchard, *supra* note 65, at 306.
74. For Congressional discussion of the purposes of the resolutions, *see* 79 CONG. REC. 13955, 14366-69 (1935); 81 CONG. REC. 74, 77-79, 90, 93 (1937).

Nor does conduct subsequent to the outbreak of World War II in Europe support the case for Wright's view of neutrality. Rather it supports Bowett's assertion that favoritism was undertaken to protect vital security interests of the neutral states, not to defend a principle of "just war."[75] Although American action in support of the British during 1940-41 may be rationalized on the ground that Germany had forfeited its rights under the Kellogg-Briand Pact,[76] it is clear that during that period aid to Great Britain was a matter of American security. Even during this period the United States admitted that its actions were based on self-defense, although it adhered to its position that neutrality did not require strict impartiality between the belligerents.[77] The same is probably true of the positions of neutrals such as Tunisia and Cambodia. The authority of the newly established Bourguiba government would have been badly shaken, if not destroyed, if it had maintained a position of impartiality toward the war in which its brethren in Algeria were engaged.[78] It may well have been far safer to risk hot pursuit by the French than a possible uprising. Similarly, it has been suggested by a student of Cambodian foreign policy that Prince Sihanouk believed that the continued independence of his state depended upon entering into a *modus vivendi* with the Chinese People's Republic and the Democratic Republic of Vietnam.[79] At present, Cambodia is threatened by a Communist inspired insurgency;[80] the consequences probably would have been far worse for the Cambodian government had impartiality been maintained throughout the war in Vietnam.

However, some modification of the traditional view of neutrality is probably desirable. For example, it is not now maintained that the violation of the duty of strict impartiality gives cause to treat the neutral as a belligerent.[81] Thus the right of hot pursuit when a neutral has permitted a belligerent to use its territory is generally justified not as a punishment or reprisal, but as self-help necessitated by the neutral's inaction. This approach, moreover, presents the best hope for confining war because the belligerent is allowed to take necessary measures without bringing another state into the conflict.

But even this modified form of the rules of neutrality established by Hague Convention V was rejected by the Soviet Union and the Arab delega-

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75. *See* D. BOWETT, *supra* note 1, at 164-67.

76. This rationale was offered by the then Attorney General of the United States. *See* Address of Robert H. Jackson, Attorney General of the United States, Interamerican Bar Association, Habana, Cuba, March 27, 1941, in 35 AM. J. INT'L L. 348, 353-54 (1941). The inadequacy of the explanation is pointed out in J. STONE, *supra* note 1, at 405 n.18.

77. *See* 3 C. HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY UNITED STATES 2236 (2d rev. ed. 1945). *See also* 4 U.S. DEP'T OF STATE BULL. 89-90 (1941).

78. *Cf.* El Moudjahid, Sept. 5, 1957, at 1, col. 1, asserting that the Tunisian people would throw themselves into the Algerian war to eliminate French imperialism from northern Africa if the conflict were to persist.

79. *See* M. LEIFER, CAMBODIA: THE SEARCH FOR SECURITY 7-19, 138-42 *passim* (1967).

80. *See* N.Y. Times, March 14, 1968, at 7, col. 1.

81. For a presentation of the former view, see Curtis, *supra* note 41.

tions during the United Nations debate on French actions against Tunisia.[82] It may be argued by the Socialist and newly independent states that they have no obligation to recognize this "western imperialist" concept because it is adverse to their interests, and they had no part in its formulation.[83] But although the principle may have been formulated by a minority of states, if the uncommitted nations do not like it, they have the numerical superiority with which to change it by convention or otherwise.[84] Moreover, it is not clear that they would desire such a change. The traditional principle, although not immutable or ideal, does have the advantages of ease of application, compatibility with the common-sense notion of what neutral behavior should be, and maintenance of some semblance of order in an international system. Furthermore, as "wars of national liberation" and even purely domestic revolts become more frequent in newly independent states, the established governments, many of which dislike the principle today, may appreciate the protection it provides against those states which would aid their opponents. The development of a posture toward international law, like the conduct of foreign policy, cannot be undertaken solely on an *ad hoc* or short-run basis.

It seems then that the neutral's failure to prevent the use of its territory by any belligerent provides an additional basis in international law for the necessary defensive measures outlined earlier. Should a violation of a neutral duty also justify action which did not meet the rather strict requirements for justification by self-defense? The question is one for which modern international law provides no ready answer. If an answer can be ventured, it must involve a balancing of diplomatic considerations and the respect for territorial integrity inherent in the theory of sovereignty with a realistic appraisal of the needs of the military in conducting modern limited warfare. Thus, hot pursuit, when not a matter of self-defense, should not be undertaken unless other avenues of redress, such as diplomatic protest, invocation of the facilities of

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82. For the view of the Soviet Union, see 15 U.N. GAOR, 1st Comm. 239 (1960); for the reaction of the Algerians, see M. BEDJAOUI, LAW AND THE ALGERIAN REVOLUTION 151 (1961). The Tunisians reacted to the French exercise of hot pursuit by declaring a state of emergency at its border areas. *See* Brownlie, *supra* note 18, at 712 & 712 n.2.

83. *Cf.* Castañeda, *The Underdeveloped Nations and the Development of International Law*, 15 INT'L ORGANIZATION 38, 39, 43 (1961). Professor Wright has indicated the ways in which Afro-Asian states have contributed to changes in international law. *See* Wright, *The Influence of the New Nations of Asia and Africa upon International Law*, 7 FOREIGN AFFAIRS REPS. (India) 33, 37-39 (1958).

84. All too often, however, Western commentators maintain the attitude that it is the practice of their countries which establish the norms of international law. Note the following statement by Robert Gauthier, expressing one French response to the Tunisian position that hot pursuit was unlawful:

> We can continue to extend sympathy to a country . . . only if it remembers always that the rules of international law—*those to which western nations submit themselves*—carry obligations and limit actions which they might wish to undertake—even in favor of men with whom they sympathize and whom they refuse to regard as rebels. [Emphasis added.]

Le Monde, Sept. 4, 1957, at 1, col. 3 (transl. A. Fraleigh, *The Algerian Revolution and the International Community* 184-85 (unpublished study)).

the United Nations, demands for reparations, proposals to strengthen international border commissions, and requests for judicial or arbitral settlement have been futile. Negotiations with the neutral state should always be undertaken. It may then be possible to distinguish between those states who refuse to fulfill their obligations and those who merely cannot. A settlement may be arranged with the latter by which the borders of these states can be policed sufficiently to make hot pursuit unnecessary.

## Conclusion

Military action within neutral territory may be justified as a measure of self-defense or as an appropriate response to the failure of a neutral state to prevent the use of its territory by belligerent forces. In international law, the second justification has been more clearly articulated through the concept of neutral duties. It is suggested, however, that international law should permit and encourage primary reliance on self-defense as a justification. The presence of belligerent forces within neutral territory will always be a violation of the neutral's duty of strict impartiality; the doctrine of self-defense, however, imposes additional and probably acceptable restraints on the use of force against this violation.

Many writers on international politics have indicated that the conduct of war is in practice governed by an unwritten set of rules that all parties adhere to out of their own self-interest. These rules may be summarized in the notion that one belligerent will not jeopardize the vital interest of another state unless its own vital interests are at stake. International law can best influence the conduct of war if it gives moral support and legal authority to these unwritten rules. The doctrine of neutral duties alone does not serve this purpose because strict impartiality may often be inconsistent with a neutral's vital interests and at the same time unnecessary to the vital interests of a belligerent. Primary reliance on the justification of self-defense, on the other hand, will tend to assure that at least a significant interest of the belligerent state is involved.

Further development of the justification of self-defense will make it possible to dispense with the broad, non-legal notion of "military necessity" or "self-preservation" which generally is a rationalization for aggression, such as the invasion of neutral Belgium in 1914,[85] or the employment of excessive or unlawful force,[86] such as the bombardment of neutral villages and the use of poison gas. Before the First World War, some writing on international law, particularly by the Germans,[87] tended to support this sweeping idea of

85. *See* 2 J. Garner, International Law and the World War 191-93, 198-201 (1920).

86. *See, e.g.*, J. Stone, *supra* note 1, at 351-53; O'Brien, *The Meaning of 'Military Necessity' in International Law*, 1 World Polity 109, 169, 171, 173-76 (1957); Schwarzenberger, *supra* note 1, at 343.

87. *See* J. Stone, *supra* note 1, at 351-53 and authorities cited therein. However, the Germans were not alone in their advocacy of the doctrine. *See* W. Hall, *supra* note 42

58-809 O - 72 - 20

*raison de guerre*. However, it is recognized today by virtually all writers that this doctrine tends to destroy the international legal order, rather than preserve it. According to Brierly, the concept makes all obligation to adhere to law merely conditional, and "there is hardly an act of international lawlessness which it might not be called upon to excuse."[88] If proper self-defense is clearly defined in international law, such excuses will no longer be available.

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at 322; 1 A. RIVIER, PRINCIPES DU DROIT DES GENS 277-79 (1896); *cf.* 2 E. DE VATTEL, *supra* note 12, § 119, at 149.

88. J. BRIERLY, THE LAW OF NATIONS 404 (6th ed. H. Waldock 1963). The Germans recognized this themselves. *Cf.* Strupp, *Das Völkerrechtliche Delikt*, 3 HANDBUCH DES VÖLKERRECHTS, Part 3 at 174 (1920).

GENERAL STATEMENT OF POLICY IN SOUTHEAST ASIA

Part II of my resolution sets forth a general statement of policy in Southeast Asia. It adopts the Nixon or Guam doctrine that the primary duty of defense must rest upon the nations of the region involved. This principle is a marked improvement over the open-ended commitments developed by the Kennedy and Johnson administrations. The resolution states the policy of the United States to provide economic and military assistance when requested to those nations whose territorial integrity is threatened by aggression.

The resolution puts the Congress clearly on record as favoring orderly and irreversible withdrawal of our combat forces from South Vietnam, as the South Vietnamese assume the primary responsibility for the defense of their country. This approach is far sounder than the setting of a fixed, public timetable for complete withdrawal, which I feel will only cause confusion and could lead to a prolonging of hostilities.

RECOMMENDATION FOR COMMITTEE ACTION

In considering this and other such resolutions, I realize that we are dealing with a delicate balance of power between the President and the Congress. I am by no means attempting to hamstring our President, as I feel we must not deprive him of the flexibility needed to safeguard the Nation in an age when decisions must often be made immediately or on very short notice. What I am attempting to do is to set out clearly the actions which the President may or may not take without prior congressional approval. The adoption of such a resolution would do much to establish a responsible foreign policy—one which is based upon solid constitutional grounds and which would do much to prevent the division which unshared decisions can provoke. It is this type of foreign policy which America needs for the seventies, and which we as Members of Congress should seek for the seventies and for the years to come.

It is this type of policy which will allow the Congress to assume its proper active role of speaking for the Nation in the important area of commitment to combat and deployment of U.S. Armed Forces. It is my hope that this committee will report out a resolution which will appreciate the delicate balance between the President and the Congress and which will restore the dimension of public opinion to the formulation of foreign policy.

There is no pride of authorship in my effort, but the principles it embodies should prevail. The confidence of Americans in our decision-making processes should be strengthened, and to do this for international problems, demands action by this committee, the Senate and this Congress.

Thank you, Mr. Chairman.

(Document follows:)

## Major U.S. Armed Actions[1] Overseas, With Relevant Congressional Action, 1789–1970

### A. DECLARED WARS

1. *War of 1812.*—Congress declared war on Great Britain, June 17, 1812. Madison's review of grievances did not actually call for war, but Congress resolved the matter with a joint resolution declaring war.

2. *Mexican War, 1846.*—U.S. troops under General Zachary Taylor were ordered by President Polk to occupy the land between the Nueces and Rio Grande Rivers, territory also claimed by Mexico. This was done without any authorization from Congress. Mexican troops surprised and mauled an American unit, and Polk sent a message to Congress asking that it recognize the existence of hostilities. Congress responded by a resolution declaring that a state of war existed between the U.S. and Mexico.

There was opposition to the war from the beginning, which grew stronger with time. The House added a rider to a resolution honoring General Taylor on January 3, 1848, stating that the war was begun "unnecessarily and unconstitutionally" by the President.

3. *Spanish-American War, 1898.*—President McKinley at first merely requested Congress' permission to use military and naval forces to effect a cessation of hostilities between Spain and its rebellious possession, Cuba, and to establish a stable government in the latter. The Senate added a provision to this request recognizing the independence of Cuba. This provision was opposed by the President and deleted in the conference with the House. A resolution was passed giving the President discretionary authority to use military force to satisfy U.S. aims with respect to Spain and Cuba. Spain responded by declaring war on the U.S. In response, McKinley ordered Dewey to attack the Philippines. He then asked for a declaration of war, which Congress gave, stating that war had existed from the day Spain declared it against the U.S.

4. *World War I, 1917–1918.*—President Wilson asked Congress to recognize that the course of the German government amounted to war against the United States. Congress responded by a joint resolution declaring that a state of war existed between the Imperial German Government and the U.S. War was not declared against Austria-Hungary until December, 1917, eight months after the declaration against Germany.

5. *World War II.*—After the Japanese attack on Pearl Harbor on December 7, 1941, President Roosevelt went before Congress the next day, and asked for a declaration of war, dating from the time of the Pearl Harbor attack. Germany and Italy, who were allies of Japan, then declared war on the United States. On December 11, 1941, President Roosevelt asked that Congress recognize a state of war between the U.S. and Germany and the U.S. and Italy, a request to which Congress acceded the same day.[2]

### B. OTHER ACTIONS

| *Armed Action* | *Congressional Action* |
|---|---|
| *Undeclared naval war with France, 1798–1800.*—This was a limited war, fought essentially for the protection of American merchant ships which were being harassed by French naval vessels. This contest included some land actions, i.e., the capture by U.S marines of a French privateer under the guns of the forts in the Dominican city of Puerto Plata. | Congress:<br>1. Created a Navy Department.<br>2. Voted appropriations for new warships.<br>3. Abrogated treaties and consular conventions with France.<br>4. Authorized the enlistment of a "provisional army" for the duration of the emergency.<br>5. Authorized seizure and bringing into port of armed French vessels which had been preying on American shipping. Did not authorize seizure of unarmed French vessels.[3] |

[1] Armed action means the confrontation of U.S. forces with those of a foreign government or revolutionary faction, usually, but not always resulting in an actual clash.

[2] For an account of the moves short of war by which the U.S. sought to aid Britain in its fight against Germany, see part B of this Appendix.

[3] Two days before Congress authorized the seizure of French ships, a lone U.S. naval vessel had been sent out on patrol to protect U.S. coastal waters between Long Island and the Virginia Capes.

B. OTHER ACTIONS—continued

| *Armed Action* | *Congressional Action* |
| --- | --- |
| *War with Tripoli, 1801–1805.*—The so-called Barbary pirates exacted tribute from countries whose ships plied the Mediterranean. The European nations paid, finding this the easiest way. When Jefferson became President the Pasha of Tripoli, feeling tribute paid by U.S. was insufficient, declared war. Jefferson sent warships to the Mediterranean which, after several naval actions, succeeded in winning a treaty from Tripoli more favorable than any other nation had yet secured from her.[4] During this conflict a few U.S. marines were landed with U.S. Agent William Eaton, with a view to raising a force to free the crew of the *Philadelphia*. This expedition penetrated as far as Derna, on Tripoli's eastern frontier, and probably influenced the Pasha to make peace. | In 1802 Congress passed a law entitled "An Act for the Protection of the Commerce and Seamen of the United States, against the Tripolitan Cruisers." It authorized the President to protect commerce and seamen, to seize and make prizes of vessels belonging to Tripoli, and all other acts of precaution and hostility as in a state of war. This amounted to subsequent approval of Jefferson's actions, plus the authority which only Congress could grant: to take prizes and to give commissions to privateers. An act levying revenue duties to pay the cost of the naval operations was likewise approved. |
| *Second Barbary War, 1815.*—The Dey of Algiers declared war against the U.S. Two U.S. naval squadrons were sent to the Mediterranean. Stephen Decatur, commander of one of the squadrons, dictated peace to Algiers, and then to Tunis and Tripoli, ending the Barbary blackmail as far as the U.S. was concerned. Within a year, European warships took action against the Barbary corsairs, and the payment of tribute ended entirely. | Congress authorized the expedition against Algiers. Specifically, it authorized the use of armed vessels, "as may be judged requisite by the President." The same legislation made it lawful to take prizes. |
| *Boxer Rebellion, 1900.*—In 1900 a series of anti-foreign disorders erupted in China, fomented by a secret society known to Westerners as Boxers. This uprising was encouraged by elements within the Imperial Government, but it was not, strictly speaking, a war waged by that government. The high point of the rebellion came when the Boxers rampaged through Peking, and laid siege to the foreign legations there. An international force was organized to lift the siege, and a U.S. contingent of 2,500 men was sent by President McKinley to join this international force. These U.S. troops came from forces already mobilized for the Spanish-American War and the Philippine Insurrection. For many years thereafter the U.S. maintained a guard at Peking and other military forces at certain places on Chinese territory, pursuant to authority acquired from the Chinese. | None—Congress was not in session at the time. There was little protest when Congress did reconvene, however. |

[4] Although favorable in comparative terms, the treaty still recognized the right of the pirates to obtain ransom for imprisoned Americans.

B. OTHER ACTIONS—continued

| *Armed Action* | *Congressional Action* |
| --- | --- |
| *Panama, 1903.*[5]—U.S. warships in Central American waters were ordered to seize the Panama railroad, keep the Isthmus of Panama clear, and prevent Colombia from landing troops within 50 miles of the Isthmus if a revolution broke out. These orders were issued on November 2, 1903, and a revolution broke out in Panama on November 3, 1903. Troops from the *U.S.S. Nashville* prevented loyal Colombian troops from suppressing the revolt. On November 4 Panama declared its independence. The U.S. recognized the independence of Panama *de facto* on November 6, and *de jure* a week later. | No chance for Congress to act. Senate ratified the Hay-Bunau-Varilla Treaty on February 23, 1904. |
| *Armed hostilities with Mexico, 1914–1917.*—1. During a time of revolutionary upheaval in Mexico there were at least two major armed actions by U.S. forces in Mexico. The first was the occupation of Vera Cruz in 1914, ostensibly for failure of the Mexicans to fire a 21 gun salute to the American flag. The salute had been demanded by Admiral Mayo, U.S. Navy, following the release by Mexico of an officer and nine sailors who had been arrested and paraded through the streets of Tampico after going ashore without the permission of Mexican authorities. President Wilson backed Admiral Mayo's demands, and ordered the North Atlantic battleship fleet to Tampico. Wilson's motive, essentially, was to force Huerta out as Mexican president, so that a constitutional government would come to power. Tampico was to be attacked, but Vera Cruz was made the objective when it was learned that a German ship was heading there with munitions for Huerta. There was a clash with Mexican naval cadets and soldiers resulting in some 400 casualties, mostly Mexican. Following the mediation of Argentina, Brazil, and Chile, U.S. troops were withdrawn from Mexico. | President Wilson requested authority to use the armed forces, two days before they were actually landed. Congress passed a joint resolution giving him such authority the day after. |

[5] In terms of the military forces involved, the Panama episode of 1903 cannot be classified as a major action. In terms of the stakes involved, and the long range impact, it seems appropriate to so classify it.

B. OTHER ACTIONS—continued

| *Armed Action* | *Congressional Action* |
| --- | --- |
| 2. In October 1915, the U.S. recognized the Carranza government in Mexico. General "Pancho" Villa, whom the U.S. had briefly supported, revolted, hoping to capitalize on anti-American sentiment and embroil the U.S. in a war with Mexico. To this end his guerrilla forces held up a train carrying 17 American mining engineers in January, 1916, and shot all but one on the spot. The following March his forces raided the town of Columbus, New Mexico, killing 19 Americans, and burning the town. Public opinion in the United States demanded the punishment of Villa, and Wilson ordered a punitive expedition into Mexico, having first obtained the consent, however grudging, of the Carranza government. The U.S. forces never found Villa, but they did clash with Mexican government troops at two points, Carrizal and Parral. In the meantime, Villa raided Glen Springs, Texas. Mexico and the U.S. moved toward war, as Carranza demanded the withdrawal of American forces and Wilson called out the National Guard and incorporated it into the Army. But neither side really wanted war, and although no satisfactory settlement was reached, Wilson withdrew U.S. troops. The increasing possibility of American involvement in Europe probably contributed to his decision. | The use of armed forces was approved by the Senate, which passed a joint resolution offered by Sen. LaFollette. The use of armed force was declared to be for the sole purpose of punishing the outlaws who had raided Columbus. This resolution did not come up for a vote in the House, however. |
| *Expeditions to European Russia and Siberia, 1918–1920.*—Following the Bolshevik Revolution, Allied expeditions were sent to Murmansk and Archangel, where they joined British and French troops in operations against Bolshevik troops. Wilson resisted allied pressure for large-scale anti-Communist intervention.<br>After the end of the war U.S. troops entered Siberia through Vladivostok as part of an allied force, chiefly Japanese, sent to safeguard military supplies and assist the Czechoslovak legion to escape from Soviet territory. U.S. forces reportedly participated in this expedition as much to keep an eye on Japanese plans as anything else. U.S. troops were withdrawn in 1920. | President Wilson was criticized in Congress for waging war in both North Russia and Siberia. Two resolutions were introduced in Congress to compel the withdrawal of U.S. troops from the Siberian venture, but both died in committee. |

B. OTHER ACTIONS—continued

| *Armed Action* | *Congressional Action* |
| --- | --- |
| *Nicaragua, 1926–1933.* The U.S. employed military occupation to end civil war and establish elections and regular government. President Coolidge undertook the occupation on his own responsibility. Henry L. Stimson was sent as the President's personal representative, and managed to work out an agreement accepted by contending Nicaraguan factions, except for General Sandino, one of the Liberal generals, and his followers. Sandino carried on guerrilla warfare against the Nicaraguan government and U.S. forces for the remainder of the occupation. At its height, over 5,000 sailors and marines were either in Nicaragua or in transit there. | Resolutions were introduced in Congress requesting immediate withdrawal of armed forces from Nicaragua. Hearings were held by the Foreign Relations Committee and the ensuing report, Senate Report 498, 70th Congress, defended retention of troops in Nicaragua until settlement worked out by Stimson could be carried out. This report expressed no opinion on the constitutionality of dispatching troops to Nicaragua in the first place. Mexico and the U.S. backed rival factions in the Nicaraguan dispute. This added to existing tensions between the U.S. and Mexico. This tension evoked a "sense of the Senate" resolution, introduced by Sen. Frazier of North Dakota, that the President not exercise his powers as Commander in Chief to send any of our armed forces into Mexico, or to mobilize troops on the Mexican border, or assemble fighting units of the navy in waters adjacent to Mexico, while Congress was not in session. If the President contemplated such action, the resolution directed him to call Congress into special session and explain his reasons for proposed military moves.<br>This resolution did not contest the President's powers as Commander in Chief, but it did represent an attempt to curb his initiative in bringing about situations that might become dangerous, or lead to armed clashes. It was not adopted, but public opinion grew increasingly opposed to intervention by U.S. troops in any foreign country. The policy of intervention in Latin America was ended during the 1930's, and the country attempted to insulate itself against involvement in foreign wars through the Neutrality Acts. |

B. OTHER ACTIONS—continued

| *Armed Action* | *Congressional Action* |
| --- | --- |
| *China, 1927.* In 1927, anti-foreign disorders, which had taken place repeatedly since 1911, reached a climax. There was fighting at Shanghai between Nationalist and anti-Nationalist forces, which led to the landing of 1,250 Marines, who joined an international force that reached 13,000 men. A naval guard had to be stationed at the American consulate in Nanking. A small contingent of sailors was landed at Hankow at the beginning of the year, and a tiny contingent of Marines in April. A U.S. and a British warship fired on Chinese soldiers to protect the escape of Americans and other foreigners from Nanking. By the end of 1927, the U.S. had 44 naval vessels in Chinese waters, and 5,670 men ashore. Other countries also sent considerable forces to the area. After U.S. signed an agreement with Nationalist China in 1928 which constituted recognition, U.S. troops were gradually withdrawn. | No specific action was taken by Congress with respect to the landing of troops. However a resolution calling for the end of America's special privileges in China won overwhelming approval in the House. |
| *Pre-War moves, 1939–1941.*—After the outbreak of World War II in Europe, the U.S. took a number of actions designed to safeguard its security and that of the Western Hemisphere and to aid the allied powers against Nazi Germany. Among these actions were the following: 1. Troops were sent to garrison air and naval bases obtained from Great Britain in exchange for overage destroyers. These bases were located in Newfoundland, Bermuda, St. Lucia, Jamaica, Antigua, Trinidad, British Guiana, and the Bahamas. 2. Greenland was placed under American control, and the U.S. was given permission to build bases there by agreement with the Danish Minister in Washington, an agreement disavowed by the captive Danish government. 3. The President ordered troops to occupy Dutch Guiana, under agreement with the Dutch government in exile. 4. Iceland was taken under U.S. protection for strategic reasons, after the British had indicated they could no longer garrison their base there, and after agreement had been secured from the Icelandic government. 5. The President ordered the navy to patrol the ship lanes to Europe. These patrols began to convoy lend-lease shipments as far as Iceland, where the British navy picked them up. Clashes with German U-boats resulted from this activity. | President Roosevelt did not seek specific congressional authorization for many of the actions he took to aid Britain and other nations fighting the Axis. However, despite fierce opposition, Congress passed the Lend-Lease Act. It also passed the first peacetime conscription law in U.S. history (which it renewed by a margin of one vote) and passed the bill permitting the arming of merchant ships. In addition, Congress repealed those sections of the Neutrality Act of 1939 which forbade trade with belligerants, established combat zones into which U.S. ships were not to sail, and prevented the arming of merchantmen. In short, President Roosevelt did not seek the authorization of Congress for certain moves he made as Commander in Chief, but he did obtain what was in effect the endorsement of Congress for his policy of assisting one side in an international conflict. |

B. OTHER ACTIONS—continued

| *Armed Action* | *Congressional Action* |
| --- | --- |
| *Korean Police Action, 1950–1953.*— North Korean troops crossed the borders of South Korea on June 25, 1950. The UN Security Council, called into special session, denounced the invasion as an act of aggression, called for an immediate cease-fire, and requested member nations to render every assistance to see that its resolution was enforced. On June 27, President Truman announced that he had ordered U.S. air and sea forces to give the Korean government troops cover and support; that he had ordered the 7th Fleet to prevent any attack on Formosa as well as to prevent any Chinese Nationalist sea or air operations against the Chinese mainland. Later that day the Security Council adopted a resolution calling upon the members of the UN to furnish such assistance to the Republic of Korea as might be necessary to restore international peace and security in the area. In response to this resolution, President Truman ordered ground forces to Korea to repel the North Korean attack. Since the Korean action was undertaken under UN sponsorship, other countries also sent contingents, but that of the U.S. was by far the largest. | A few members of both houses voiced criticism that the President had usurped Congress' power to declare war. Resolutions were introduced in 1951 to declare war against North Korea and Communist China, and also for an orderly withdrawal of U.S. forces. None of these resolutions came to a vote.<br>If Congress did not formally accept, neither did it as a whole contest the contention of the Executive that it acted in response to the call of the UN Security Council. The State Department, in its memorandum defending the authority of the President to repel the attack in Korea, pointed to the debates on the UN Charter in which it was asserted that by becoming a party thereto, the U.S. would be obligated by commitments the organization would undertake, including commitments to international policing, and that it would be within the power of the Executive to see that these agreements were carried out. The Senate had approved the UN Charter, and there was some feeling, particularly at the outbreak of the Korean conflict, that it had therefore authorized, at least implicitly and in a general way, actions that might be taken under it. Furthermore the entire Congress had passed the UN Participation Act. |
| *Landing of troops in Lebanon, 1958.*— Lebanon has always preserved a delicate internal balance between Christians and Moslems. This was threatened by certain Moslems, reportedly encouraged by President Nasser of the UAR. When a pro-Nasser coup took place in Iraq in July of 1958, the President of Lebanon sent an urgent plea for assistance to President Eisenhower, saying that his country was threatened both by internal rebellion and "indirect aggression." President Eisenhower responded by sending 5,000 marines to Beirut to protect American lives and help the Lebanese maintain their independence. This force was gradually increased to 14,000 soldiers and marines, who occupied strategic positions throughout the country.<br>After the matter had been taken to the UN, and the General Assembly had passed a resolution calling on member states to respect one another's integrity and refrain from interfering in one another's internal affairs, and also requesting that arrangements be made for the withdrawal of troops, the situation stabilized somewhat. U.S. troops were then gradually withdrawn on a schedule worked out with Lebanese authorities. | The "Eisenhower Doctrine," a joint resolution, had been passed by Congress in 1957 authorizing the President to use U.S. armed forces to assist any nation in the Middle East requesting help against Communist aggression. President Eisenhower stressed the provocative nature of Soviet and Cairo broadcasts in justifying the landing of troops. |

B. OTHER ACTIONS—continued

| *Armed Action* | *Congressional Action* |
| --- | --- |
| *Deployment of troops, Thailand, 1961–1970.*—In 1961 a detachment of 259 Marines was sent to Thailand to set up a helicopter maintenance facility for ferrying supplies to anti-Communist forces in Laos, when the military situation in that country began to deteriorate. In 1962, when anti-Communists fled across the Mekong into Thai territory, and it appeared that Pathet Lao might move into Thailand, U.S. forces numbering 5,000 men were sent into Northeast Thailand to guard against that possibility. The UK, Australia, and New Zealand also sent in small units, in a show of SEATO solidarity. As the threat receded, the U.S. and other troops were gradually withdrawn. The building of U.S. air bases in Thailand began around 1964, and by 1965 U.S. air strikes against the Vietcong and North Vietnam were being flown from Thailand. These air bases in Thailand are still maintained. | In 1969 Congress voted to prohibit a commitment of U.S. ground troops to Laos or Thailand, as an amendment to the defense appropriations bill. |
| *Intervention in the Dominican Republic, 1965.*—On April 24, 1965, a revolt broke out in Santo Domingo, capital of the Dominican Republic. On April 28 President Johnson ordered a contingent of several hundred marines to land there, stating that Dominican "military authorities" had requested assistance, as they could no longer guarantee the safety of American citizens living in the Dominican Republic. The President stated that assistance would also be available to protect nationals of other countries as well. | Congressional leadership was informed before the move was made into the Dominican Republic. Several resolutions were offered supporting the President's action in the Dominican Republic. The most prominent was H. Res. 560, endorsing the use of force individually or collectively by any country in the Western hemisphere to prevent a Communist takeover. It passed the House by a vote of 312–52. |
| The first U.S. contingent numbered only 400 men, but on May 2 the President announced he was sending in 200 more, with an additional 4,500 to follow at the earliest possible moment. Eventually U.S. forces in the Dominican Republic were to number 21,500. Total personnel involved numbered over 30,000. | Many members of Congress felt that the President had overestimated the extent of Communist penetration of the revolutionary movement. Others have charged that the intervention was motivated not so much by a desire to save lives and property as by a desire to prevent a Communist takeover in the country, a desire which, in their view, arose from an inaccurate assessment of the danger of such a takeover. Some argued that the U.S. should have consulted the OAS before it intervened in the Dominican Republic, something which it did not do. |
| In announcing the dispatch of additional troops to the Dominican Republic, President Johnson cited increasing Communist control of the revolution, plus increasing needs for food and medical supplies, etc. | |

B. OTHER ACTIONS—continued

*Armed Action*

A peace commission from the Organization of American States succeeded in achieving a cease-fire among the contending Dominican groups, and on May 6, 1965, the OAS voted to create an Inter-American Peace force, to assist in restoring peace and order. As various elements of this Inter-American Peace Force began to arrive in the Dominican Republic, the U.S. withdrew a proportionate number of its forces. By the end of 1965 this Inter-American force numbered 9,400, with U.S. troops serving as part of that force. An Ad Hoc Commission of the OAS worked out a formula to restore constitutional government, and finally on September 3, 1965 a civilian, Hector Garcia Godoy, was inaugurated as provisional president. All U.S. troops were gradually withdrawn.

*Vietnam, 1964-present.* A U.S. Military Assistance Advisory Group had been in South Vietnam ever since the French relinquished authority there in 1954. In the late 1950's and early 1960's there was a marked step-up in guerrilla activities against the South Vietnamese government. This guerrilla activity was supported and directed from North Vietnam. U.S. military advisers were gradually increased, so that by 1962 there were 12,000 in the country, and this number was doubled by 1964.

U.S. policy was to work with the government of South Vietnam until the Vietcong insurgency would be suppressed, or until the forces of South Vietnam were capable of suppressing it. As time went on that date seemed farther and farther in the future.

It was against this background that the Gulf of Tonkin episode took place. On August 2, 1964, North Vietnamese torpedo boats were reported to have attacked the *U.S.S. Maddox* in international waters in the Gulf of Tonkin. The *Maddox* returned the fire, and aircraft from the *U.S. Ticonderoga* also fired on the torpedo boats. The *Maddox* was attacked again, along with the *C. Turner Joy* on August 4. On August 5, bases and an oil depot used as supporting facilities for the torpedo boats were bombed in retaliation, at President Johnson's orders.

*Congressional Action*

Tonkin Gulf Resolution—On August 5, 1964, President Johnson asked Congress for a resolution "expressing the unity and determination of the United States in supporting freedom and protecting peace in Southeast Asia." He recommended a resolution which would express the support of Congress for all necessary action to protect U.S. armed forces and to assist nations covered by the SEATO Treaty. Two days later Congress voted the Tonkin Gulf Resolution, which the President signed into law on August 10. Its operative clauses read as follows: "That the Congress approves

B. OTHER ACTIONS—continued

| *Armed Action* | *Congressional Action* |
| --- | --- |
| On February 7, 1965, Communist forces attacked a U.S. ground installation. Seven U.S. soldiers were killed, and 109 wounded. President Johnson met with the National Security Council and congressional leaders, following which he announced that U.S. and South Vietnamese Air Forces had been directed to launch retaliatory attacks. These attacks were to develop into a program of bombing missions, while at the same time the U.S. began a buildup of its ground forces in Vietnam. Except for occasional pauses, the bombing campaign continued until the partial halt announced on March 31, 1968, and the complete halt seven months later. Ground forces reached a peak of 535,000 before the program of gradual withdrawal was begun. | and supports the determination of 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. Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." The resolution is to expire when the President determines that the peace and security of the area are reasonably assured, or earlier by concurrent resolution of Congress. |
| Since the Spring of 1965 the U.S. has indicated an interest in settling the war by negotiation. All attempts at bringing both sides together failed until President Johnson's speech of March 31, 1968, announcing the partial bombing halt, and requesting North Vietnam to begin talks at once, The only result of these talks to date has been the total cessation of the bombing, in return for permitting the Saigon government to participate in the talks. As a further concession, the National Liberation Front (Viet Cong) was also permitted to participate. | The Tonkin Gulf Resolution (PL 88-408), passed the Senate by a vote of 88-2 and the House by a vote of 416 to 0. Growing anti-war sentiment in the Congress was reflected in a number of resolutions, while members favoring the Executive's Vietnamese policy introduced resolutions of support. By the time of this writing the Senate had repealed the Tonkin Gulf Resolution. Some other measures presently in effect are as follows:<br>1. The so-called "national commitments" resolution (Sen. Res. 85, 91st Congress), a resolution expressing the sense of the Senate that a U.S. commitment to a foreign power "necessarily and exclusively results" from affirmative action taken by both legislative and executive branches, through a treaty, convention, or other legislative instrumentality. |

B. OTHER ACTIONS—continued

| *Armed Action* | *Congressional Action* |
| --- | --- |
| | 2. Title IV of PL 90–5, a statement of congressional policy expressing its firm intention to provide all necessary support for the armed forces fighting in Vietnam; its support of the efforts by the President and others to prevent expansion of the war, and bring the conflict to an end through a negotiated settlement which will preserve the honor and protect the vital interest of the U.S. and allow the people of South Vietnam to determine their own affairs; and finally, declaring its support for the convening of a new conference to pursue the general principles of the Geneva Accords of 1954 and 1962, and to formulate plans to bring the conflict to an honorable end. |
| | 3. House Resolution 61, 91st Congress. Affirms support of the House for the efforts of the President to negotiate a just peace in Vietnam, expresses hope of U.S. people for peace, calls attention to numerous peaceful overtures made by the U.S., requests President to continue to press North Vietnam to abide by the Geneva Convention of 1949 in the treatment of war prisoners, calls for free elections in Vietnam and announces willingness to abide by results of such elections. |
| *Entrance into Cambodia, 1970.*—On April 30, 1970, President Nixon announced that U.S. and South Vietnamese troops had crossed the border into Cambodia in order to wipe out Communist sanctuaries there. He said that all American forces would be withdrawn by the end of June. | 4. The Senate passed an amendment to the Foreign Military Sales Bill (H.R. 15628) cutting off all funds for U.S. forces in Cambodia after June 30, 1970, unless Congress authorizes their operations in that country. The amendment also denies U.S. funds for the support of the troops of other countries which might come to the assistance of Cambodia. |
| | 5. A number of measures are pending to cut off all funds for military operations in Vietnam by a specified date. |

## C. Instances of Use of United States Armed Forces Abroad, 1798–1970

*1798–1800—Undeclared naval war with France.*—This contest included land actions, such as that in the Dominican Republic, city of Puerto Plata, where marines captured a French privateer under the guns of the forts.

*1801–05—Tripoli.*—The First Barbary War, including the *George Washington* and *Philadelphia* affairs and the Eaton expedition, during which a few marines landed with United States Agent William Eaton to raise a force against Tripoli in an effort to free the crew of the *Philadelphia*. Tripoli declared war but not the United States.

*1806—Mexico (Spanish territory).*—Capt. Z. M. Pike, with a platoon of troops, invaded Spanish territory at the headwaters of the Rio Grande deliberately and on orders from Gen. James Wilkinson. He was made prisoner without resistance at a fort he constructed in present day Colorado, taken to Mexico, later released after seizure of his papers. There was a political purpose, still a mystery.

*1806–10—Gulf of Mexico.*—American gunboats operated from New Orleans against Spanish and French privateers, such as La Fitte, off the Mississippi Delta, chiefly under Capt. John Shaw and Master Commandant David Porter.

*1810—West Florida (Spanish territory).*—Gov. Claiborne of Louisiana, on orders of the President, occupied with troops territory in dispute east of Mississippi as far as the Pearl River, later the eastern boundary of Louisiana. He was authorized to seize as far east as the Perdido River. No armed clash.

*1812—Amelia Island and other parts of east Florida, then under Spain.*—Temporary possession was authorized by President Madison and by Congress, to prevent occupation by any other power; but possession was obtained by Gen. George Matthews in so irregular a manner that his measures were disavowed by the President.

*1812–15—Great Britain.*—War of 1812. Formally declared.

*1813—West Florida (Spanish territory).*—On authority given by Congress, General Wilkenson seized Mobile Bay in April with 600 soldiers. A small Spanish garrison gave way. Thus we advanced into disputed territory to the Perdido River, as projected in 1810. No fighting.

*1813–14—Marquesas Islands.*—Built a fort on island of Nukahiva to protect three prize ships which had been captured from the British.

*1814—Spanish Florida.*—Gen. Andrew Jackson took Pensacola and drove out the British with whom the United States was at war.

*1814–25—Caribbean.*—Engagements between pirates and American ships or squadrons took place repeatedly especially ashore and offshore about Cuba, Puerto Rico, Santo Domingo, and Yucatan. Three thousand pirate attacks on merchantmen were reported between 1815 and 1823. In 1822 Commodore James Biddle employed a squadron of two frigates, four sloops of war, two brigs, four schooners, and two gunboats in the West Indies.

*1815—Algiers.*—The Second Barbary War, declared by our enemies but not by the United States. Congress authorized an expedition. A large fleet under Decatur attacked Algiers and obtained indemnities.

*1815—Tripoli.*—After securing an agreement from Algiers, Decatur demonstrated with his squadron at Tunis and Tripoli, where he secured indemnities for offenses against us during the War of 1812.

*1816—Spanish Florida.*—United States forces destroyed Nicholls Fort, called also Negro Fort, which harbored raiders into United States territory.

*1816–18—Spanish Florida—First Seminole War.*—The Seminole Indians, whose area was a resort for escaped slaves and border ruffians, were attacked by troops under Generals Jackson and Gaines and pursued into northern Florida. Spanish posts were attacked and occupied, British citizens executed. There was no declaration or congressional authorization but the Executive was applauded.

*1817—Amelia Island (Spanish territory off Florida).*—Under orders of President Monroe, United States forces landed and expelled a group of smugglers, adventurers, and freebooters.

*1818—Oregon.*—The U.S.S. *Ontario*, dispatched from Washington, landed at the Columbia River and in August took possession. Britain had conceded sovereignty but Russia and Spain asserted claims to the area.

*1820–23—Africa.*—Naval units raided the slave traffic pursuant to the 1819 act of Congress.

*1822—Cuba.*—United States naval forces suppressing piracy landed on the northwest coast of Cuba and burned a pirate station.

*1823—Cuba.*—Brief landings in pursuit of pirates occurred April 8 near Escondido; April 16 near Cayo Blanco; July 11 at Siquapa Bay; July 21 at Cape Cruz; and October 23 at Camrioca.

*1824—Cuba.*—In October the U.S.S. *Porpoise* landed bluejackets near Matanzas in pursuit of pirates. This was during the cruise authorized in 1822.

*1824—Puerto Rico (Spanish territory).*—Commodore David Porter with a landing party attacked the town of Fajardo which had sheltered pirates and insulted American naval officers. He landed with 200 men in November and forced an apology.

*1825—Cuba.*—In March cooperating American and British forces landed at Sagua La Grande to capture pirates.

*1827—Greece.*—In October and November landing parties hunted pirates on the islands of Argenteire, Miconi, and Andross.

*1831–32—Falkland Islands.*—To investigate the capture of three American sealing vessels and to protect American interests.

*1832—Sumatra.—February 6 to 9.*—To punish natives of the town of Quallah Battoo for depredations on American shipping.

*1833—Argentina.—October 31 to November 15.*—A force was sent ashore at Buenos Aires to protect the interests of the United States and other countries during an insurrection.

*1835–36—Peru—December 10, 1835 to January 24, 1836, and August 31 to December 2, 1836.*—Marines protected American interests in Callao and Lima during an attempted revolution.

*1836—Mexico.*—General Gaines occupied Nacogdoches (Tex.), disputed territory from July to December during the Texan war for independence, under orders to cross the "imaginary boundary line" if an Indian outbreak threatened.

*1838–39—Sumatra—December 24, 1838, to January 4, 1938.*—To punish natives of the towns of Quallah Battoo and Muckie (Mukki) for depredations on American shipping.

*1840—Fiji Islands—July.*—To punish natives for attacking American exploring and surveying parties.

*1841—Drummond Island, Kingsmill Group.*—To avenge the murder of a seaman by the natives.

*1841—Samoa—February 24.*—To avenge the murder of an American seaman on Upolu Island.

*1842—Mexico.*—Commodore T. A. C. Jones, in command of a squadron long cruising off California, occupied Monterey, Calif., on October 19, believing war had come. He discovered peace, withdrew, and saluted. A similar incident occurred a week later at San Diego.

*1843—Africa, November 29 to December 16.*—Four United States vessels demonstrated and landed various parties (one of 200 marines and sailors) to discourage piracy and the slave trade along the Ivory coast, etc., and to punish attacks by the natives on American seamen and shipping.

*1844—Mexico.*—President Tyler deployed our forces to protect Texas against Mexico, pending Senate approval of a treaty of annexation. (Later rejected.) He defended his action against a Senate resolution of inquiry.

*1846–48—Mexico, the Mexican War.*—President Polk's occupation of disputed territory precipitated it. War formally declared.

*1849—Smyrna.*—In July a naval force gained release of an American seized by Austrian officials.

*1851—Turkey.*—After a massacre of foreigners (including Americans) at Jaffa in January, a demonstration by our Mediterranean Squadron was ordered along the Turkish (Levant) coast. Apparently no shots fired.

*1851—Johanna Island (east of Africa), August.*—To exact redress for the unlawful imprisonment of the captain of an American whaling brig.

*1852–53—Argentina—February 3 to 12, 1852; September 17, 1852 to April (?) 1853.*—Marines were landed and maintained in Buenos Aires to protect American interests during a revolution.

*1853—Nicaragua—March 11 to 13.*—To protect American lives and interests during political disturbances.

*1853–54—Japan.*—The "opening of Japan" and the Perry Expedition.

*1853–54—Ryukyu and Bonin Islands.*—Commodore Perry on three visits before going to Japan and while waiting for a reply from Japan made a naval demonstration, landing marines twice, and secured a coaling concession from the ruler of Naha on Okinawa. He also demonstrated in the Bonin Islands. All to secure facilities for commerce.

*1854—China—April 4 to June 15 to 17.*—To protect American interests in and near Shanghai during Chinese civil strife.

*1854—Nicaragua—July 9 to 15.*—San Juan del Norte (Greytown) was destroyed to avenge an insult to the American Minister to Nicaragua.

*1855—China—May 19 to 21 (?).*—To protect American interests in Shanghai. August 3 to 5 to fight pirates near Hong Kong.

*1855—Fiji Islands—September 12 to November 4.*—To seek reparations for depredations on Americans.

*1855—Uruguay—November 25 to 29 or 30.*—United States and European naval forces landed to protect American interests during an attempted revolution in Montevideo.

*1856—Panama, Republic of New Grenada—September 19 to 22.*—To protect American interests during an insurrection.

*1856—China—October 22 to December 6.*—To protect American interests at Canton during hostilities between the British and the Chinese; and to avenge an unprovoked assault upon an unarmed boat displaying the United States flag.

*1857—Nicaragua—April to May, November to December.*—To oppose William Walker's attempt to get control of the country. In May Commander C. H. Davis of the United States Navy, with some marines, received Walker's surrender and protected his men from the retaliation of native allies who had been fighting Walker. In November and December of the same year United States vessels *Saratoga, Wabash,* and *Fulton* opposed another attempt of William Walker on Nicaragua. Commodore Hiram Paulding's act of landing marines and compelling the removal of Walker to the United States, was tacitly disavowed by Secretary of State Lewis Cass, and Paulding was forced into retirement.

*1858—Uruguay—January 2 to 27.*—Forces from 2 United States warships landed to protect American property during a revolution in Montevideo.

*1858—Fiji Islands—October 6 to 16.*—To chastise the natives for the murder of two American citizens.

*1858–59—Turkey.*—Display of naval force along the Levant at the request of the Secretary of State after massacre of Americans at Jaffa and mistreatment elsewhere "to remind the authorities (of Turkey) * * * of the power of the United States."

*1859—Paraguay.*—Congress authorized a naval squadron to seek redress for an attack on a naval vessel in the Parana River during 1855. Apologies were made after a large display of force.

*1859—Mexico.*—Two hundred United States soldiers crossed the Rio Grande in pursuit of the Mexican bandit Cortina.

*1859—China—July 31 to August 2.*—For the protection of American interests in Shanghai.

*1860—Angola, Portuguese West Africa—March 1.*—To protect American lives and property at Kissembo when the natives became troublesome.

*1860—Colombia, Bay of Panama—September 27 to October 8.*—To protect American interests during a revolution.

*1863—Japan—July 16.*—To redress an insult to the American flag—firing on an American vessel—at Shimonoseki.

*1864—Japan—July 14 to August 3, approximately.*—To protect the United States Minister to Japan when he visited Yedo to negotiate concerning some American claims against Japan, and to make his negotiations easier by impressing the Japanese with American power.

*1864—Japan—September 4 to 14—Straits of Shimonoseki.*—To compel Japan and the Prince of Nagato in particular to permit the Straits to be used by foreign shipping in accordance with treaties already signed.

*1865—Panama—March 9 and 10.*—To protect the lives and property of American residents during a revolution.

*1866—Mexico.*—To protect American residents, General Sedgwick and 100 men in November obtained surrender of Matamoras. After 3 days he was ordered by our Government to withdraw. His act was repudiated by the President.

*1866—China—June 20 to July 7.*—To punish an assault on the American consul at Newchwang; July 14, for consultation with authorities on shore; August 9, at Shanghai, to help extinguish a serious fire in the city.

58-809—71——21

*1867—Island of Formosa—June 13.*—To punish a horde of savages who were supposed to have murdered the crew of a wrecked American vessel.

*1868—Japan (Osaka, Hiogo, Nagasaki, Yokohama, and Negata)—Mainly, February 4 to 8, April 4 to May 12, June 12 and 13.*—To protect American interests during the civil war in Japan over the abolition of the Shogunate and the restoration of the Mikado.

*1868—Uruguay—February 7 and 8, 19 to 26.*—To protect foreign residents and the customhouse during an insurrection at Montevideo.

*1868—Colombia—April 7—at Aspinwall.*—To protect passengers and treasure in transit during the absence of local police or troops on the occasion of the death of the President of Colombia.

*1870—Mexico, June 17 and 18.*—To destroy the pirate ship *Forward*, which had been run aground about 40 miles up the Rio Tecapan.

*1870—Hawaiian Islands—September 21.*—To place the American flag at half mast upon the death of Queen Kalama, when the American consul at Honolulu would not assume responsibility for so doing.

*1871—Korea—June 10 to 12.*—To punish natives for depredations on Americans, particularly for murdering the crew of the *General Sherman* and burning the schooner, and for later firing on other American small boats taking soundings up the Salee River..

*1873—Colombia (Bay of Panama)—May 7 to 22, September 23 to October 9.*—To protect American interests during hostilities over possession of the government of the State of Panama.

*1873—Mexico.*—United States troops crossed the Mexican border repeatedly in pursuit of cattle and other thieves. There were some reciprocal pursuits by Mexican troops into our border territory. The cases were only technically invasions, if that, although Mexico protested constantly. Notable cases were at Remolina in May 1873 and at Las Cuevas in 1875. Washington orders often supported these excursions. Agreements between Mexico and the United States, the first in 1882, finally legitimized such raids. They continued intermittently, with minor disputes, until 1896.

*1874—Hawaiian Islands—February 12 to 20.*—To preserve order and protect American lives and interests during the coronation of a new king.

*1876—Mexico—May 18.*—To police the town of Matamoras temporarily while it was without other government.

*1882—Egypt—July 14 to 18.*—To protect American interests during warfare between British and Egyptians and looting of the city of Alexandria by Arabs.

*1885—Panama (Colon)—January 18 and 19.*—To guard the valuables in transit over the Panama Railroad, and the safes and vaults of the company during revolutionary activity. In March, April, and May in the cities of Colon and Panama, to reestablish freedom of transit during revolutionary activity.

*1888—Korea—June.*—To protect American residents in Seoul during unsettled political conditions, when an outbreak of the populace was expected.

*1888-89—Samoa—November 14, 1888, to March 20, 1889.*—To protect American citizens and the consulate during a native civil war.

*1888—Haiti—December 20.*—To persuade the Haitian Government to give up an American steamer which had been seized on the charge of breach of blockade.

*1889—Hawaiian Islands—July 30 and 31.*—To protect American interests at Honolulu during a revolution.

*1890—Argentina.*—A naval party landed to protect our consulate and legation in Buenos Aires.

*1891—Haiti.*—To protect American lives and property on Navassa Island.

*1891—Bering Sea—July 2 to October 5.*—To stop seal poaching.

*1891—Chile—August 28 to 30.*—To protect the American consulate and the women and children who had taken refuge in it during a revolution in Valparaiso.

*1893—Hawaii—January 16 to April 1.*—Ostensibly to protect American lives and property; actually to promote a provisional government under Sanford B. Dole. This action was disavowed by the United States.

*1894—Brazil—January.*—To protect American commerce and shipping at Rio de Janeiro during a Brazilian civil war. No landing was attempted but there was a display of naval force.

*1894—Nicaragua—July 6 to August 7.*—To protect American interests at Bluefields following a revolution.

*1894-96—Korea—July 24, 1894 to April 3, 1896.*—To protect American lives and interests at Seoul during and following the Sino-Japanese War. A guard of marines was kept at the American legation most of the time until April 1896.

*1894-95—China.*—Marines were stationed at Tientsin and penetrated to Peking for protection purposes during the Sino-Japanese War.

*1894–95—China*—Naval vessel beached and used as a fort at Newchwang for protection of American nationals.

*1895—Colombia—March 8 to 9.*—To protect American interests during an attack on the town of Bocas del Toro by a bandit chieftain.

*1896—Nicaragua—May 2 to 4.*—To protect American interests in Corinto during political unrest.

*1898—Nicaragua—February 7 and 8.*—To protect American lives and property at Suan Juan del Sur.

*1898—Spain.*—The Spanish-American War. Fully declared.

*1898–99—China—November 5, 1898, to March 15, 1899.*—To provide a guard for the legation at Peking and the consulate at Tientsin during contest between the Dowager Empress and her son.

*1899—Nicaragua.*—To protect American interests at San Juan del Norte, February 22 to March 5, and at Bluefields a few weeks later in connection with the insurrection of Gen. Juan P. Reyes.

*1899—Samoa—March 13 to May 15.*—To protect American interests and to take part in a bloody contention over the succession to the throne.

*1899–1901—Philippine Islands.*—To protect American interests following the war with Spain, and to conquer the islands by defeating the Filipinos in their war for independence.

*1900—China—May 24 to September 28.*—To protect foreign lives during the Boxer rising, particularly at Peking. For many years after this experience a permanent legation guard was maintained in Peking, and was strengthened at times as trouble threatened. It was still there in 1934.

*1901—Colombia (State of Panama)—November 20 to December 4.*—To protect American property on the Isthmus and to keep transit lines open during serious revolutionary disturbances.

*1902—Colombia—April 16 to 23.*—To protect American lives and property at Bocas del Toro during a civil war.

*1902—Colombia (State of Panama)—September 17 to November 18.*—To place armed guards on all trains crossing the Isthmus and to keep the railroad line open.

*1903—Honduras—March 23 to 30 or 31.*—To protect the American consulate and the steamship wharf at Puerto Cortez during a period of revolutionary activity.

*1903—Dominican Republic—March 30 to April 21.*—To protect American interests in the city of Santo Domingo during a revolutionary outbreak.

*1903—Syria—September 7 to 12.*—To protect the American consulate in Beirut when a local Moslem uprising was feared. Never occured.

*1903–14—Panama.*—To protect American interests and lives during and following the revolution for independence from Colombia over construction of the Isthmian Canal. With brief intermissions, United States Marines were stationed on the Isthmus from November 4, 1903, to January 21, 1914, to guard American interests.

*1904—Dominican Republic—January 2 to February 11.*—To protect American interests in Puerto Plata and Sosua and Santo Domingo City during revolutionary fighting.

*1904–5—Korea—January 5, 1904, to November 11, 1905.*—To guard the American Legation in Seoul.

*1904—Tangier, Morocco.*—"We want either Perdicaris alive or Raisuli dead." Demonstration by a squadron to force release of a kidnaped American. Marine guard landed to protect consul general.

*1904—Panama—November 17 to 24.*—To protect American lives and property at Ancon at the time of a threatened insurrection.

*1904–05—Korea.*—Marine guard sent to Seoul for protection during Russo-Japanese War.

*1906–9—Cuba—September 1906 to January 23, 1909.*—Intervention to restore order, protect foreigners, and establish a stable government after serious revolutionary activity.

*1907—Honduras—March 18 to June 8.*—To protect American interests during a war between Honduras and Nicaragua; troops were stationed for a few days or weeks in Trujillo, Ceiba, Puerto Cortez, San Pedro, Laguna, and Choloma.

*1910—Nicaragua—February 22.*—During a civil war, to get information of conditions at Corinto; May 19 to September 4, to protect American interests at Bluefields.

*1911—Honduras—January 26 and some weeks thereafter.*—To protect American lives and interests during a civil war in Honduras.

*1911—China.*—Approaching stages of the nationalist revolution. An ensign and 10 men in October tried to enter Wuchang to rescue missionaries but retired on being warned away.

A small landing force guarded American private property and consulate at Hankow in October.

A marine guard was established in November over the cable stations at Shanghai.

Landing forces were sent for protection to Nanking, Chinkiang, Taku and elsewhere.

*1912—Honduras.*—Small force landed to prevent seizure by the Government of an American-owned railroad at Puerto Cortez. Forces withdrawn after the United States disapproved the action.

*1912—Panama.*—Troops, on request of both political parties, supervised elections outside the Canal Zone.

*1912—Cuba.—June 5 to August 5.*—To protect American interests on the Province of Oriente, and in Habana.

*1912—China—August 24 to 26, on Kentucky Island, and August 26 to 30 at Camp Nicholson.*—To protect Americans and American interests during revolutionary activity.

*1912—Turkey—November 18 to December 3.*—To guard the American legation at Constantinople during a Balkan War.

*1912–25—Nicaragua—August to November 1912.*—To protect American interests during an attempted revolution. A small force serving as a legation guard and as a promoter of peace and governmental stability, remained until August 5, 1925.

*1912–41—China.*—The disorders which began with the Kuomintang rebellion in 1912, which were redirected by the invasion of China by Japan and finally ended by war between Japan and the United States in 1941, led to demonstrations and landing parties for the protection of U.S. interests in China continuously and at many points from 1912 on to 1941. The guard at Peking and along the route to the sea was maintained until 1941. In 1927, the United States had 5,670 troops ashore in China and 44 naval vessels in its waters. In 1933 we had 3,027 armed men ashore. All this protective action was in general terms based on treaties with China ranging from 1858 to 1901.

*1913—Mexico—September 5 to 7.*—A few marines landed at Ciaris Estero to aid in evacuating American citizens and others from the Yaqui Valley, made dangerous for foreigners by civil strife.

*1914—Haiti—January 29 to February 9, February 20 to 21, October 19.*—To protect American nationals in a time of dangerous unrest.

*1914—Dominican Republic—June and July.*—During a revolutionary movement, United States naval forces by gunfire stopped the bombardment of Puerto Plata, and by threat of force maintained Santo Domingo City as a neutral zone.

*1914–17—Mexico.*—The undeclared Mexican-American hostilities following the *Dolphin* affair and Villa's raids included capture of Vera Cruz and later Pershing's expedition into northern Mexico.

*1915–34—Haiti—July 28, 1915, to August 15,1934.*—To maintain order during a period of chronic and threatened insurrection.

*1916–24—Dominican Republic—May 1916 to September 1924.*—To maintain order during a period of chronic and threatened insurrection.

*1917–18.*—World War I. Fully declared.

*1917–22—Cuba.*—To protect American interests during an insurrection and subsequent unsettled conditions. Most of the United States armed forces left Cuba by August 1919, but two companies remained at Camaguey until February 1922.

*1918–19—Mexico.*—After withdrawal of the Pershing expedition, our troops entered Mexico in pursuit of bandits at least three times in 1918 and six in 1919. In August 1918 American and Mexican troops fought at Nogales.

*1918–20—Panama.*—For police duty according to treaty stipulations, at Chiriqui, during election disturbances and subsequent unrest.

*1918–20—Soviet Russia.*—Marines were landed at and near Vladivostok in June and July to protect the American consulate and other points in the fighting between the Bolsheviki troops and the Czech Army which had traversed Siberia from the western front. A joint proclamation of emergency government and neutrality was issued by the American, Japanese, British, French, and Czech commanders in July and our party remained until late August.

In August the project expanded. Then 7,000 men were landed in Vladivostok and remained until January 1920, as part of an allied occupation force.

In September 1918, 5,000 American troops joined the allied intervention force at Archangel, suffered 500 casualties and remained until June 1919.

A handful of marines took part earlier in a British landing on the Murman coast (near Norway) but only incidentally.

All these operations were to offset effects of the Bolsheviki revolution in Russia and were partly supported by Czarist or Kerensky elements. No war was declared. Bolsheviki elements participated at times with us but Soviet Russia still claims damages.

*1919—Honduras—September 8 to 12.*—A landing force was sent ashore to maintain order in a neutral zone during an attempted revolution.

*1920–22—Russia (Siberia)—February 16, 1920, to November 19, 1922.*—A marine guard to protect the United States radio station and property on Russian Island, Bay of Vladivostok.

*1920—China—March 14.*—A landing force was sent ashore for a few hours to protect lives during a disturbance at Kiukiang.

*1920—Guatemala—April 9 to 27.*—To protect the American Legation and other American interests, such as the cable station, during a period of fighting between Unionists and the Government of Guatemala.

*1921—Panama-Cost Rica.*—American naval squadrons demonstrated in April on both sides of the Isthmus to prevent war between the two countries over a boundary dispute.

*1922—Turkey—September and October.*—A landing force was sent ashore with consent of both Greek and Turkish authorities, to protect American lives and property when the Turkish Nationalists entered Smyrna.

*1924—Honduras—February 28 to March 31, September 10 to 15.*—To protect American lives and interests during election hostilities.

*1924—China—September.*—Marines were landed to protect Americans and other foreigners in Shanghai during Chinese factional hostilities.

*1925—China—January 15 to August 29.*—Fighting of Chinese factions accompanied by riots and demonstrations in Shanghai necessitated landing American forces to protect lives and property in the International Settlement.

*1925—Honduras—April 19 to 21.*—To protect foreigners at La Ceiba during a political upheaval.

*1925—Panama—October 12 to 23.*—Strikes and rent riots led to the landing of about 600 American troops to keep order and protect American interests.

*1926–33—Nicaragua—May 7 to June 5, 1926; August 27, 1926, to January 3 1933.*—The coup d'etat of General Chamorro aroused revolutionary activities leading to the landing of American marines to protect the interests of the United States. United States forces came and went, but seem not to have left the country entirely until January 3, 1933. Their work included activity against the outlaw leader Sandino in 1928.

*1926—China—August and September.*—The Nationalist attack on Hankow necessitated the landing of American naval forces to protect American citizens. A small guard was maintained at the consulate general even after September 16, when the rest of the forces were withdrawn. Likewise, when Nationalist forces captured Kiukiang, naval forces were landed for the protection of foreigners November 4 to 6.

*1927—China—February.*—Fighting at Shanghai caused American naval forces and marines to be increased there. In March a naval guard was stationed at the American consulate at Nanking after Nationalist forces captured the city. American and British destroyers later used shell fire to protect Americans and other foreigners. "Following this incident additional forces of marines and naval vessels were ordered to China and stationed in the vicinity of Shanghai and Tientsin."

*1933—Cuba.*—During a revolution against President Gerardo Machado naval forces demonstrated but no landing was made.

*1940—Newfoundland, Bermuda, St. Lucia, Bahamas, Jamaica, Antigua, Trinidad, and British Guiana.*—Troops were sent to guard air and naval bases obtained by negotiation with Great Britain. These were sometimes called lend-lease bases.

*1941—Greenland.*—Taken under protection of the United States in April.

*1941—Netherlands (Dutch Guiana).*—In November the President ordered American troops to occupy Dutch Guiana but by agreement with the Netherlands government in exile, Brazil cooperated to protect aluminum ore supply from the bauxite mines in Surinam.

*1941—Iceland.*—Taken under the protection of the United States, with consent of its Government, for strategic reasons.

*1941—Germany.*—Sometime in the spring the President ordered the Navy to patrol ship lanes to Europe. By July our warships were convoying and by Sep-

tember were attacking German submarines. There was no authorization of Congress or declaration of war. In November, the Neutrality Act was partly repealed to protect military aid to Britain, Russia, etc.

*1941–45—Germany, Italy, Japan, etc.*—World War II. Fully declared.

*1950–1953.*—U.S. responded to North Korean invasion of South Korea by going to its assistance, pursuant to United Nations Security Council resolutions. Congressional authorization was not sought.

1958. Marines were landed in Lebanon at the invitation of its government to help protect against threatened insurrection supported from the outside.

*1962.—Cuba.*—President Kennedy instituted a "quarantine" on the shipment of offensive missiles to Cuba from the Soviet Union. He also warned the Soviet Union that the launching of any missile from Cuba against any nation in the Western Hemisphere would bring about U.S. nuclear retaliation on the Soviet Union. A negotiated settlement was achieved in a few days.

*1962–70.—Laos.*—From October 1962 until the present, the United States has played a role of military support in Laos.

*1964–1970.—War in Vietnam.*—U.S. military advisers had been in South Vietnam for a decade, and their numbers had been increased as military position of Saigon government became weaker. After the attacks on U.S. destroyers in the Tonkin Gulf, President Johnson asked for a resolution expressing U.S. determination to support freedom and protect peace in Southeast Asia. Congress responded with the Tonkin Gulf Resolution, expressing support for "all necessary measures" the President might take to repel armed attack against U.S. forces and prevent further aggression. Following this resolution, and following a Communist attack on a U.S. installation in central Vietnam, the U.S. escalated its participation in the war.

*1965.—Dominican Republic.*—Intervention to protect lives and property during a Dominican revolt. More troops were sent as the U.S. feared the revolutionary forces were coming increasingly under Communist control.

*1970.—Cambodia.*—U.S. troops were ordered into Cambodia to clean out Communist sanctuaries from which Viet Cong and North Vietnamese can attack U.S. and South Vietnamese forces in Vietnam as stated by the President. The object of this attack, which lasted from April 30 to June 30, was to ensure the continuing safe withdrawal of American forces from South Vietnam and to assist the program of Vietnamization.

The CHAIRMAN. Thank you, Senator Taft. It is a very thoughtful statement.

Now perhaps we could have a few questions.

SEPARATION OF POWERS VERSUS PARLIAMENTARY SYSTEM

One question occurred to me immediately upon your statement, Professor Mason, about the separation of powers. I am not really suggesting this is involved as a practical matter in any of the legislation which has been submitted to the committee, but since you are a great scholar I wanted to ask if you feel that separation of powers is a greater assurance of democracy, of control by the people of the will of the Government, than the parliamentary system in which the executive is a part of the legislative branch?

Mr. MASON. Certainly the framers of the Constitution thought so.

The CHAIRMAN. You made that very clear. I was wondering whether you think so now?

Mr. MASON. I certainly do.

The CHAIRMAN. You do?

Mr. MASON. I think so. Unlike the British, we have a great variety of checks. The first, and most important, is what Madison called "dependence on the people"—the ballot box. But, Madison said, "experience has demonstrated the necessity of auxiliary controls." So, in addition to the ballot box—that is the only check the British have—we added others. One is structural. Among the structural limits is separation of powers. Another is federalism. Another, of course, is judicial review.

Even these were not enough for Thomas Jefferson. He advocated a Bill of Rights. To implement it, he assigned a special role for the Supreme Court—guardianship of those rights.

The framers didn't rely on any one curb against abuse of power; they embodied several in the Constitution. My concern is stirred by seeming erosion of all checks.

The CHAIRMAN. Certainly the federalism or the judicial review are not inherently part of the separation of powers that I had in mind as between the executive and the legislative only at the national level.

We could still have the Supreme Court and we could still have the States with whatever powers they have. I was thinking solely of the principle we have inherited from Montesquieu, which you so clearly outlined. I am now thinking only in connection with the Presidential separation from the Congress in contrast to the Prime Minister being a part of the Congress.

INFLUENCES ON SEPARATION OF POWERS

Several things have arisen, it strikes me, that influence this, specifically such things as television which enables a single executive to have access directly to all of the people, which the Congress has in a very diffuse manner, if at all. It does have some, of course, but not as an institution, only as individuals.

Senator Taft and you both say "the ballot box." Senator Taft emphasizes on several occasions in his statement the importance of public opinion and that public opinion should be allowed to be brought to bear on these basic and most far-reaching decisions.

But the way that is brought to bear effectively, it seems to me, is through their representatives in the Congress. One of the greatest problems we have today in the Congress is getting information as to what the executive is really doing. We have extreme difficulty in finding out what is going on.

All those matters, which are either embarrassing, or I suppose there are other reasons, too, are classified. When we request information, this committee, at least, has great difficulty in getting the information at first hand from the executive branch. This has been not true just of this administration but of the previous administration.

This is an institutional rivalry, I suppose, which has developed in which they find it convenient not to give information, especially in public, to an institution which, in turn, is designed to influence the public opinion that Senator Taft emphasizes as being important.

Senator TAFT. Mr. Chairman, might I comment on that? I think the chairman very properly points out that it has been a problem we have had throughout American history. It isn't anything unique. I feel that I would like to make it clear that my views with regard to it, or with regard to the whole area, don't really relate to the formulation of general policy and general policymaking decisions as in the quote from my grandfather in my testimony a few minutes ago. I think it is perfectly clear, especially under today's circumstances, that the actual carrying out of determined policy must be made by the Executive. I don't think we can constitute the immediate reaction of Congress upon a particular tactical or even a limited strategic decision within policies that have already been determined; but I do think it is tremendously important to bring public opinion to bear in deciding the overall direction of our policy.

With regard to Vietnam today the only thing we had was the Tonkin Gulf resolution. We have now repealed that and left a vacuum. That is why I feel there is a need for Congress to take a part in formulating general public policy decisions.

Going back to your earlier question, the separation of powers does present a problem that perhaps does not exist in a parliamentary system. The President is in a sense more isolated by his 4-year term. He is not subject to immediate recall, or call before the legislative body, or even immediate recall by the people in the sense that may exist in some of the parliamentary forms of government.

Mr. MASON. I wonder if I could add a footnote to that?

The CHAIRMAN. Yes.

Mr. MASON. My understanding is that separation of powers does not preclude all blending of powers. Under the separation of powers principle, the Congress has a right to know. I don't think this principle precludes substantial congressional participation in warmaking.

The CHAIRMAN. I don't think it precludes it theoretically, but as an actual practice, it has resulted in that.

Mr. MASON. Yes, sir.

### ISOLATION OF THE PRESIDENT

The CHAIRMAN. I have been very greatly impressed by Mr. George Reedy's recent book on the Presidency. I know of no man who can speak with greater authority from personal experience, having lived in the midst of both the legislative branch and also, as you know, for

a number of years as the press secretary of President Johnson. He describes the isolation, to use the word Senator Taft just used, of the President from what Mr. Reedy calls the realities of political life in the country, which could not occur if he were a member of the legislative branch. His book has disturbed me more than anything recently as to what has happened in this area of separation of powers.

The remoteness of the President—of course, he obviously is speaking of the previous administration, but he was also speaking not of simply a personality characteristic of the President, but what has happened to the office itself and the way it is surrounded by all kinds of obstacles to access to the political realities, if you like, that the Congress represents.

PRESENT PROTECTION BY SEPARATION OF POWERS QUESTIONED

I think it is that development that has raised this question very much. I am not suggesting that there is any political feasibility of changing the structural quality. I only raise it because you put such emphasis on it and discussed it in such a way that made me feel that you thought the separation of powers, as such, was still a very important protector for our liberties. I am not at all sure whether it is or not. The unresponsiveness that you speak of seems to me to derive from that. The President's having access directly to the people, in a way the Congress does not, gives him an assurance that he can override the Congress in any given situation.

Mr. MASON. Separation of powers is a dangerous principle in these times only if it is "subverted," as Madison put it. That is to say, if all the powers concerning warmaking are absorbed into the executive branch. But my understanding of Madison's interpretation of separation of powers was that it didn't prevent or preclude as I said a moment ago, all blending. It precludes absorption of the whole power regarding warmaking into a single branch. In this case, it is subverted.

The CHAIRMAN. I think that aspect of the Presidency which is of immediate importance and, of course, that is what the war powers legislation is concerned with, does not apply to the domestic situation.

Mr. MASON. Right.

The CHAIRMAN. All domestic programs have their own constituencies, and the Congress is very responsive to domestic affairs. I mean whether it is social security, of a social nature, education. We had a good demonstration yesterday with the SST, which is a matter not growing out of the war powers. In a case like that both this President and the others have all been subject to the congressional restraint. But in the war powers there has grown up the idea that he has this inherent power. In the debate last year on such things as Cooper-Church and other issues there grew up this idea that as Commander in Chief, the President has a vague and unlimited power to do as he pleases. It has been suggested by people like former Attorney General Katzenbach that the war powers provision is obsolete. In effect, that is what I think he testified to before this committee. He made a very strong statement.

Dean Acheson, a great lawyer and former Secretary of State, made a very strong statement back in the early 1950's that the Congress had

no right to interfere with the President's powers as Commander in Chief.

Of course, those are just his views. I don't think they are properly constitutional, but there has grown up that idea. That is what made me wonder about whether or not separation of powers was quite the protection we thought, especially in the field of warmaking.

Mr. MASON. If I may say so, Senator, it might well be that Congress has not, in response to this principle, exercised the powers available to it under the Constitution.

The CHAIRMAN. I think we all plead guilty that under the impact of the war, not only this war but the anticipation, preparation for war, Congress has allowed its constitutional responsibilities to be eroded. We all admit that. I suppose one of the reasons why there are so many of us who are taking these actions—trying to reassert them—is the realization that control over our foreign policy and particularly the war powers has eroded.

PROTEST AND DISSENT

In your statement, you referred to:

> Three administrations, two headed by Democrats, one by Republicans, embarked on a course which countless citizens, including those of highest competence, consider immoral, barbaric, and unconstitutional. Yet protestors and dissenters are not only faced with an unresponsive Government but also humiliated, stigmatized as un-American, Communists, traitors. The penalties they suffer are both physical and psychological. The police club them; hardhats assault them; the National Guard murders them—second degree, of course.

Why has this come about and what do you think has made this possible?

Mr. MASON. I think that it is a hard question. A great many factors are involved. One might sum it up in a word—fear—fear that dissent, protest, may make it very difficult for the administration to carry on the war.

The CHAIRMAN. It is very strange that what we call the most powerful country in the world is so afflicted with abject fears. What are we afraid of?

Mr. MASON. They are afraid of communism. Communism has been, for quite some time, an obsession; anyone who protests the action this country has taken in Indo-China tends to create apprehension in the minds of those with responsibility that the protestors are undermining the war effort.

I read a statement, I think, this morning or the day before, that if there had been no protests, if there had been no dissent, the war would have been over long ago.

Yet dissent, protest, opposition is the one aspect of our system that distinguishes it from a totalitarian regime. I believe with Justice Holmes, that we do not lose our right to criticize either measures or men because the country is at war.

The beneficiaries of protest are not merely the protestors or the dissenters. The beneficiaries are the administration, indeed the whole country. Until some man or some group gains a monopoly of truth, dissent must be tolerated. Justice Holmes once declared: "I define truth as the system of my limitations, and leave absolute truth for those who are better equipped."

Since there is no absolute truth in the White House or in Congress or anywhere else, it would seem wise to accept dissent and opposition in the interest of society as a whole.

It is to the President's advantage, it seems to me, to have the Congress participate as it is now. I feel like revising one sentence in my opening remarks about apathy. Congress is no longer apathetic, and that is a very encouraging sign.

The CHAIRMAN. On that cheerful note, I will yield to the Senator from New York for fear you might retract.

Senator JAVITS. I thank my colleague and wish to apologize to the Chair. I did wish to take my turn, but I have another hearing to which I should go for a few minutes. I am grateful; I shall be very brief.

COMMENDATION OF THE WITNESS

First, let me express to Professor Mason my deep gratitude for his appearing here today. He is a most eminent authority and his testimony is very compelling. I know it took a lot of arranging for him to finally work this out, and I am very grateful and I know the country will be grateful as well.

POSSIBLE SUPREME COURT ACTION ON S. 731

Professor Mason, I am puzzled by one reference that appears at the very opening of your statement. You say: "Even if S. 731 wins enactment, the present Court would, perhaps, refuse to sustain it."

Do I understand you to mean by that statement that the Court would pass on it on finding it wanting? I know you gave an example of the Massachusetts-Shea situation where it didn't act at all?

Mr. MASON. Yes.

Senator JAVITS. Is there any doubt in your mind as to constitutionality of S. 731?

Mr. MASON. There is no doubt in my mind but, as you know, the Court has been very reluctant to enter this area; the "political-question" doctrine is always available to avoid taking jurisdiction. It is not a question, Senator Javits, of my believing that your measure is unconstitutional; I just have some doubts about the present Court in light of recent decisions.

As a matter of fact, the Court, generally, in times of crisis, has not been very sensitive to encroachments on freedom. In 1919 and during the 1920's, the Court, by and large, sustained infringements upon freedom of speech and protest. During that period, the Court was chiefly known for the eloquent dissents of Justices Holmes and Brandeis. Nor was the Court very sensitive during World War II to encroachments on the rights of Japanese-Americans. That is the basis of my doubt. I hope it is not justified.

Senator JAVITS. But, Professor Mason, we would not need an affirmative finding of the Court so long as there was not a negative finding.

Mr. MASON. That is right; exactly right.

Senator JAVITS. In other words, if they didn't pass on the matter at all then it would be up to the President and Congress as to the enforcement of it?

Mr. MASON. That is true.

Senator JAVITS. I agree; and I have agreed before that, short of impeachment or its effect on collateral acts, there would be no way of compelling the President to act?

Mr. MASON. Right.

PRESIDENTIAL DEFIANCE OF STRICT STATUTORY MANDATE

Senator JAVITS. But I think the history, and would you confirm it, reads in another way. What would you say, Professor Mason, about the history of our country in terms of a President defying a direct statutory mandate, even in this field?

Mr. MASON. There is one striking illustration of a President responding affirmatively to a Supreme Court decision denying his power—the Youngstown Steel case. When President Truman seized the steel mills, the Court, invoking the principle of separation of powers, denied him the right to do so, and President Truman responded promptly. That was the end of the matter. Remember this was during an undeclared war. One might say the national security was then, as now, at stake. This one illustration, however, stands out almost like a sore thumb in our history.

Senator JAVITS. Does the history, as you know it, run counter to that in respect of direct statutory requirements by the Congress of a President which might not be enforceable in the courts? Bear in mind that we are talking here in S. 731 about a law which would either have to be signed by the President or passed over his veto?

Mr. MASON. Yes.

Senator JAVITS. Is our history such—does our history entitle us to believe if we made a specific statutory code for the President that he is likely to comply with it?

Mr. MASON. Well, the Constitution requires the President to take care that the laws be faithfully executed and, as I said in my opening statement, a responsible President will not pick and choose the laws he will execute. So my answer is yes; there is something on the affirmative side.

LANGUAGE CONCERNING IMMINENT ATTACK

Senator JAVITS. I thank you very much, Professor Mason.

Senator Taft, I did have a question of fact I wanted to ask you which puzzled me because I thought that in the drafting I had done exactly the contrary.

I wonder where you find in S. 731, or in Senator Eagleton's resolution, for that matter, the authority for the following sentence in your statement relating to the attack on the territory or Armed Forces of the United States: You say, "Their measure would not authorize the President to act alone in the event an attack upon the United States or its Armed Forces is imminent." I believe, and if I am wrong I certainly want to change it, that we——

Senator TAFT. Are you referring to the mention of clear and present danger?

Senator JAVITS. I don't know of any clear and present danger language in my bill.

Senator TAFT. Well, the language on page 2 of your bill, at the top, I think is probably the only language referring to it and it says: to repel an attack, which assumes there is an attack actually underway.

The use of imminent danger in my resolution was intended to go beyond that.

Senator JAVITS. Thank you. I, personally, don't think this would be that narrowly construed. I just wanted to be sure I knew what you had in mind.

Senator TAFT. I would hope that if we acted upon some such resolution we could clear that up one way or another.

LANGUAGE CONCERNING EXPEDITING CONSIDERATION

Senator JAVITS. Senator Taft, I can promise you I will be the most diligent in borrowing from these other resolutions. I assume you would, also, whatever was the fate of the legislation, be anxious to include in my bill what Senator Eagleton adopted in addition to other things from my own, which is the section which would avoid a Senate filibuster, bottling up in the House Rules Committee, expedite consideration, et cetera.

Senator TAFT. A difference between the resolutions in that regard is that there is a 30-day limitation upon the action of the President under the Javits and Eagleton resolutions which does not exist under my resolution, Senator, and, therefore, my resolution did not include such language. If such language is included, I think you are absolutely correct as is Senator Eagleton, in including a way of bringing the resolution before the Congress and bringing it before the Congress promptly.

I had in mind what you had as your escape valve—that you want authorization terminable upon the passage of a concurrent resolution.

Senator JAVITS. Yes.

Senator TAFT. So wouldn't that need some protection or it could be thwarted by 33 Members of the Senate?

Senator JAVITS. That is a danger; it certainly does exist. I would think it should be taken into account.

Senator TAFT. Thank you, Senator.

Senator JAVITS. I want to thank you, too, for joining in what we are trying to accomplish and making your very important contribution to it.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Spong, do you have any questions?

COMMENDATION OF THE WITNESS

Senator SPONG. Professor Mason, I regret that I was not here when you testified. I have one question for Senator Taft. I would like to preface it by commending you on your statement. I am in sympathy with what you are evidently trying to do in part II. I am among those who believe that having repealed the Gulf of Tonkin resolution there is an affirmative responsibility on the part of Congress to spell out future policy.

DOCTRINE OF ANTICIPATORY SELF-DEFENSE

But in reading your views with regard to the Laotian situation and also reading No. 4 of your part I, I might ask you if, assuming Congress adopted part II as you have it worded, in the absence of the Cooper-Church language or anything similar thereto, then the President would have had authority to go into Cambodia or Laos without consultation with Congress.

Senator TAFT. I believe he would under part I, the exception under part I, so long as that exception was limited to an attack upon sanctuary areas which represented an imminent threat of attack under the language of my resolution.

Senator SPONG. I just say this by way of observation. Mr. Chairman, this seems to be the broad area that we are always going to have trouble with, the doctrine of anticipatory self-defense.

Senator TAFT. Right.

Senator SPONG. It started with the *Caroline* case, I think, and it has been with us ever since, and there is no way of measuring whether the action is necessary or not in terms of the threat.

Senator TAFT. I am afraid it is an area that is going to have to be left to the discretion of the executive rather than in the legislative hands.

Senator SPONG. Thank you.

The CHAIRMAN. Senator Cooper?

DEFINITION OF PRESENT CONSTITUTIONAL CRISIS

Senator COOPER. Dr. Mason, in your statement you say that America is in the midst of a great constitutional crisis. Would you define what that crisis is?

Mr. MASON. Well, I think that one measure of the crisis is this meeting this morning.

Senator COOPER. Is what?

Mr. MASON. The meeting of this committee, including the appearance of Senator Taft, is a measure of the crisis. Endangered, among other things, is the principle of separation of powers. But that is only one dimension. The President has absorbed tremendous power in the warmaking field and, along with it, one notes repression of speech, protest, dissent. This is another aspect of the crisis.

Congress is trying to do something about it, which is most encouraging. A manifestation of the crisis is the number of measures now being proposed, designed to achieve, to regain, to revitalize the part Congress may constitutionally exercise in this area.

Senator COOPER. I think Congress has been attemping to assert the powers that it believes it properly has according to the Constitution. But I think there is a difference between a particular crisis over a particular policy. Presently it is the question of the Vietnam war. Whether we should be in the war or whether we should get out, a constitutional crisis over the powers of the President and the Legislature.

You would agree with me, wouldn't you, when I say that even though I oppose the war that I believe that some of the assertions that are made about the President's constitutional powers are not correct. I think we should acknowledge the President's proper powers. Whether you like the way those powers are used or not is another question.

Mr. MASON. Sure.

GRAY AREA BETWEEN POWERS OF THE PRESIDENT AND CONGRESS

Senator COOPER. Now you would have to agree, wouldn't you, there is a very gray area defining the powers between the President and the Congress, a point which Senator Taft and others have made

very clear with regard to the President's right of defense if U.S. forces or U.S. soil is attacked.

Mr. MASON. Yes.

Senator COOPER. At what point can the President exercise the powers of defense? That point is vague; it is gray.

Mr. MASON. Yes.

Senator COOPER. Do you think we can define the precise time when such powers can be used?

Mr. MASON. I am not sure I get your question.

Senator COOPER. Do you think we can lay out by statute every situation in which the President would have constitutional authority to exercise powers?

Mr. MASON. I think it would be very difficult, because even under our system of constitutional limitations we have recognized what is known as the right of prerogative, power in the executive to act in times of emergency in behalf of the public welfare, not only without a law but even against a law.

President Roosevelt, in connection with the ending of the Emergency Price Control Act in 1942, announced that he would act if Congress did not act. "I will act," he said. Here is an example of executive prerogative, and when you recognize that, as I think we do, it certainly is going to be very difficult for Congress to draw any line against that sort of power.

### TROOPS SENT WITHOUT PRIOR APPROVAL OF CONGRESS

Senator COOPER. What other situations are there since World War II, in which the President has sent forces into another country or countries without the approval of the Congress? Korea is one; isn't it?

Mr. MASON. I think there are a number of examples. Senator Taft could probably answer better than I.

Senator COOPER. Since World War II, there would be Korea, even though there was a resolution later approving it, but the troops were sent into Korea without prior approval of Congress.

The Bay of Pigs, our troops were not involved, but those that were involved were supported by our forces; and Southeast Asia.

Mr. MASON. Yes.

Senator TAFT. Dominican Republic is the other one listed in this document.

Senator COOPER. Yes.

Mr. MASON. Senator Cooper, may I go back to your initial question about the crisis?

### CHANGE OF MIND CONCERNING SCOPE OF PRESIDENT'S POWERS

Senator COOPER. I must say again, as I have said to several witnesses during these hearings, that our purpose is to examine the powers of the President and the Congress and the events which have taken place in the past which involved the use of those powers in ways which might have been not in accord with the Constitution. I think it is a proper inquiry, and I know the chairman's purpose is to lay before the country and the President the media, and particularly our young people, the inherent difficulties of the exercise of these powers. I don't

think it is proper, myself, to give the impression, although some of the testimony we have heard has given it, that the President has no authority to act in specific occasions which he believes it necessary to protect our interests, or to protect our security. In recent years many people have changed their minds about the proper exercise of these powers since World War II.

Senator Taft has spoken in his statement of the efforts of his father in 1950 to prevent the assignment of troops to Europe without congressional approval. I might say I testified in those hearings and I then had the opposite viewpoint. But I have changed my mind since then, as many people have changed their minds.

Mr. Commager spoke the other day very critically of the recent uses of the powers of the President, and I had to recall to him a statement he had made in 1950, in which he severely criticized Senator Taft for his position, and said that the President has great powers with respect to the movement of U.S. forces abroad and the use of those troops in hostilities.

A few days later I had a letter from him saying that I was right, that he had made the statement at that time. He said that he had changed his views about the proper scope of Presidential power, and I think that is true throughout the country.

I think the present crisis, myself, is not primarily a matter of the proper constitutional exercise of the powers of the President and the Congress, but, rather, a crisis of policy about the war in Vietnam, of how to get out and the way to get out. It is more a matter of policy more than a crisis of constitutional powers, although the constitutional question is a large factor.

Mr. Mason. There is an aspect of the present crisis that perhaps wouldn't occur to anyone other than an academician—a crisis in terms of our commitment in the Declaration of Independence. We are pledged to the idea that a government can safely rest on reason and consent rather than on coercion and force; and it seems to me that in both the domestic and at the international level there is a decline of faith in reason; we are tempted—and we don't always resist the temptation—to adopt the adversary's way as our own.

Jefferson realized that our moral commitment to a free society was risky. There was no assurance free government would endure. We had to wait until practically our own time before we could realize how difficult it would be to adhere to that belief. I find evidence on various fronts that we are beginning to wonder whether, in the kind of world we are living in today, reason and consent are secure foundations.

This aspect of our crisis impresses me as basic. It threatens the very foundations of our system.

Senator Cooper. I believe that is correct. Several years ago most people argued that the President had the widest power. They have changed their view, and I now have the position that the President has very limited powers with respect to warmaking.

I would like to ask Senator Taft a few questions about his resolution.

### IMMINENT SITUATION

In Part I you use the word "imminent." Does this mean to refer to situations which the President might believe so dire or the danger so

imminent he would not have time to come to the Congress? Was that your idea?

Senator TAFT. Yes, sir; I believe that would be true, Senator.

Senator COOPER. Other than nuclear war or immediate attack upon this country by a power which has the capability of threatening the security of this country, do you think there is any situation in which the President would not have time to come to the Congress for approval?

Senator TAFT. I can think of circumstances with regard especially to attack upon the Armed Forces. I point out that the first exception in my resolution relates to attacks upon the Armed Forces. I suppose you might go to the field of undersea warfare and imminent submarine attack, that type of situation.

Senator COOPER. You used the word "imminent"?

Senator TAFT. Yes.

CONSTITUTIONAL PROCESSES BEFORE IMPLEMENTATION OF TREATIES

Senator COOPER. Second, your second exception assumes that in every case where there is a treaty obligation, the treaty must contain a provision requiring "constitutional processes" before implementation. Do you agree upon that?

Senator TAFT. I agree with that, and I might even go further to say that I, even under the present language of NATO, do not interpret NATO as being an exception.

Senator COOPER. I agree with you.

Senator TAFT. Actually, under NATO, I believe it would require coming to Congress.

Senator COOPER. The NATO treaty, while it does say an attack upon one shall be deemed an attack upon all, also prescribes that the action that the United States should take must be determined by its constitutional processes.

Senator TAFT. Senator, in connection with that, I asked the State Department several days ago to comment as to whether there were any so-called self-executing treaties. I have received a reply in a letter from Assistant Secretary Abshire which indicates in substance that there are no longer any such treaties. There have been some, now terminated.

(See p. 330.)

Senator COOPER. Yesterday, Senator Javits and I had a colloquy on this point. I stated even in the case of the NATO treaty that the President should come to the Congress for approval of whatever action he intended to take; that would not inhibit him, though, from taking such steps as were necessary to protect our troops who are stationed in Europe from imminent danger.

Senator TAFT. I would like to make it perfectly clear that the other exceptions would still apply.

Senator COOPER. Yes.

Senator TAFT. As to NATO, just because it is a treaty does not mean the other exceptions would not apply if we were under threat of armed attack on the United States or our Armed Forces. I certainly feel the President has authority to act even though the NATO treaty exists.

USE OF "IMMINENT" IN PART I(4) OF SENATE JOINT RESOLUTION 18 SUGGESTED

Senator Cooper. In (4) you said as an exception: "When he finds that such deployment is necessary to exercise the inherent right of self-defense of the Nation or its nationals."

You quoted in your statement that well-known statement of Abraham Lincoln to support your view.

Would you agree that the word "imminent" ought to be used in section 4 as you have used it in section I?

Senator Taft. I had not thought about using an alternative clause relating to the imminence of the danger. I think, really, what we are referring to is an existing circumstance where nationals and property have already been either endangered or clearly threatened. The Dominican Republic, I suppose, would be a most recent example of that.

PRESIDENT'S AUTHORITY TO MAINTAIN FORCES IN SOUTH VIETNAM QUESTIONED

Senator Cooper. Turning to part II, where you deal with the present war——

Senator Taft. Yes.

Senator Cooper (continuing). You provide to the President under part II that he should have such powers as he deems "necessary and appropriate to accomplish a responsible and irreversible withdrawal of such Armed Forces of the United States and the assumption by the Armed Forces of the Republic of South Vietnam." I raise this question: Doctor Mason said previously that he thought Congress has not asserted any authority at all. I would call to his attention that the Congress had asserted some authority with respect to Laos, Thailand, and Cambodia, ground combat forces shall not be used. But your statement, Senator Taft, assumes that the Armed Forces would leave South Vietnam at the earliest feasible date.

I raise the question as to whether the President—any President—has the authority to maintain forces in South Vietnam for the protection of South Vietnam itself or for Vietnamization without the consent of the Congress?

Senator Taft. I think that is a very real question, and that is the vacuum or void that exists today; and I think the Congress ought to act upon it to correct it.

NATURE OF PRESENT PROBLEM OF DISSENT

Going back, I would like to make a comment on the discussion with Professor Mason about the nature of dissent, and the language of his statement. I would just like to comment that I don't think there is any freedom from stigmatization or criticism in taking a position on foreign policy. Some positions can be very unpopular. I think the nature of the problem we have today is that during the war demonstrations and the like have sometimes become unlawful and have raised questions of proper enforcement of law in this country. But they also point up the very real need, I believe, for Congress to act in this area and to determine national policy in this area. It is the frus-

tration arising out of the fact that Congress failed to do so, failed to participate, and that public opinion failed to participate in this decisionmaking process, that I think is responsible for the deinstitutionalization of the process.

The CHAIRMAN. I wonder if the Senator would yield a moment? Professor Mason needs to go, unless there is anyone who wishes to question him.

Doctor Mason, I know you have other business you must perform. We appreciate very much your coming.

Mr. MASON. Thank you.

The CHAIRMAN. Since we have all had an opportunity to engage with you, although there are many things I would still like to ask you about, such as executive privilege and executive prerogative, I will defer that to another time.

We thank you very much for coming.

Mr. MASON. Thank you very much.

The CHAIRMAN. I can only say to the Senator, we have two more witnesses we would like to have if the Senator——

Senator COOPER. I think the Senator's resolution is quite important.

Senator TAFT. Senator, I think we ought to recognize that in perhaps going back to the first part of the resolution, *ex post facto*, a determination becomes very much more difficult to get through because of political realities than one which is made in advance and kept current.

I envisage the duty and responsibility of Congress in foreign policy to try to express public opinion as to the general scope of U.S. foreign policy, and not just Southeast Asia but every area of the world, to the extent that we can.

### PRESIDENTIAL AUTHORITY TO REMAIN IN VIETNAM DOUBTED

Senator COOPER. I will close by just making this suggestion again, that on page 4, lines 8 to 11, where you would provide that our forces would remain there until the forces of the Republic of South Vietnam were able to assume the responsibility for the defense of their republic. I don't believe that the President has any authority to remain in Vietnam indefinitely to protect the government of South Vietnam unless that power is specifically given. This authority has not been given for activities in Laos or Cambodia or even for the policy of Vietnamization.

Senator TAFT. Senator, I do not think this statement makes that claim. All the statement says is that the President make a decision as to what the earliest feasible withdrawal date is, and then proceed to withdraw in accordance with that.

### STATE DEPARTMENT VIEWS CONCERNING SELF-EXECUTING TREATIES

Senator SPONG. Senator Taft, we had quite a bit of discussion yesterday about self-executing treaties. I wonder if you would have any objection to putting that letter in the record?

Senator TAFT. I have none at all. I would ask unanimous consent that it be included as part of my testimony.

(The information referred to follows:)

DEPARTMENT OF STATE,
*Washington, D.C., March 23, 1971.*

Hon. ROBERT TAFT,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR TAFT: Reference is made to your inquiry whether the United States has ever concluded a treaty under which it would be required to supply armed force to another country immediately and without regard to constitutional processes in the United States.

Unlike our recent defense treaties such as NATO, SEATO, ANZUS and other recent defense treaties, the earlier treaties promising assistance contain no reference to constitutional processes in connection with their application.

There is enclosed a list of treaty provisions requiring assistance which appear to contemplate obligations that would be immediate and could include armed force. None of those provisions are any longer in force.

The first two treaties listed, those of 1778 with France, were concluded at a time when the United States and Great Britain were at war with each other.

The provisions of the third of the treaties listed, the Treaty of Peace between the United States and Spain of 1898, contain no reference to armed assistance but the phrase in Article I regarding obligations of the United States in connection with its occupation of Cuba reading "assume and discharge obligations that may under international law result from the fact of its occupation" contemplates the use of armed force where necessary.

Similarly, the commitment in Article I of the ship canal convention 1903 with Panama to guarantee and maintain the independence of Panama contemplates the use of armed force where necessary.

The last of the treaty provisions listed, those of Article XIV of the treaty of September 16, 1915 with Haiti, were concluded following the landing of United States Marines in Haiti on July 28 of that year.

I hope that this information meets your needs, but if I can be of any further assistance, I shall be glad to do so.

Sincerely yours,

DAVID M. ABSHIRE,
*Assistant Secretary for Congressional Relations.*

Enclosure.

TREATIES REQUIRING IMMEDIATE ARMED ASSISTANCE BY THE UNITED STATES

Treaty of Amity and Commerce between the United States and France signed at Paris February 6, 1778.[1]

ARTICLE VI.[2]

The Most Christian King shall endeavour by all the means in his power to protect and defend all vessels and the effects belonging to the subjects, people or inhabitants of the said United States, or any of them, being in his ports, havens or roads, or on the seas near to his countries, islands, cities or towns, and to recover and restore to the right owners, their agents or attorneys, all such vessels and effects which shall be taken within his jurisdiction; and the ships of war of His Most Christian Majesty, or any convoy sailing under his authority, shall upon all occasions take under their protection all vessels belonging to the subjects, people or inhabitants of the said United States, or any of them, and holding the same course, or going the same way, and shall defend such vessels, as long as they hold the same course or go the same way, against all attacks, force and violence, in the same manner as they ought to protect and defend the vessels belonging to the subjects of the Most Christian King.

ARTICLE VII.

In like manner the said United States and their ships of war, sailing under their authority, shall protect and defend, conformable to the tenor of the preceding article, all the vessels and effects belonging to the subjects of the Most Chris-

[1] This Treaty and the Treaty of Alliance mentioned below were terminated pursuant to an act of Congress approved July 7, 1798.

[2] Article VI specifies only obligations of the King of France to the United States but it is quoted here solely for the understanding of Article VII which specifies corresponding obligations for the United States.

tian King, and use all their endeavours to recover and cause to be restored the said vessels and effects that shall have been taken within the jurisdiction of the said United States or any of them.

(8 Stat. 12; 18 Stat. (Pt 2) 203; TS 83)

Treaty of Alliance between the United States and France, signed at Paris February 6, 1778.[3]

ARTICLE I.

If war should break out between France and Great Britain during the continuance of the present war between the United States and England, His Majesty and the said United States shall make it a common cause and aid each other mutually with their good offices, their counsels and their forces, according to the exigence of conjunctures, as becomes good and faithful allies.

ARTICLE III.

The two contracting parties shall each on its own part, and in the manner it may judge most proper, make all the efforts in its power against their common enemy, in order to attain the end proposed.

ARTICLE IV.

The contracting parties agree that in case either of them should form any particular enterprise in which the concurrence of the other may be desired, the party whose concurrence is desired, shall readily, and with good faith, join to act in concert for that purpose, as far as circumstances and its own particular situation will permit; and in that case, they shall regulate, by a particular convention, the quantity and kind of succour to be furnished, and the time and manner of its being brought into action, as well as the advantages which are to be its compensation.

ARTICLE VIII.

Neither of the two parties shall conclude either truce or peace with Great Britain without the formal consent of the other first obtained; and they mutually engage not to lay down their arms until the independence of the United States shall have been formally or tacitly assured by the treaty or treaties that shall terminate the war.

ARTICLE IX.

The contracting parties declare, that being resolved to fulfill each on its own part the clauses and conditions of the present treaty of alliance, according to its own power and circumstances, there shall be no after claim of compensation on one side or the other, whatever may be the event of the war.

ARTICLE X.

The Most Christian King and the United States agree to invite or admit other powers who may have received injuries from England, to make common cause with them and to accede to the present alliance, under such conditions as shall be freely agreed to and settled between all the parties.

ARTICLE XI.

The two parties guarantee mutually from the present time and forever against all other powers, to wit: The United States to His Most Christian Majesty, the present possessions of the Crown of France in America, as well as those which it may acquire by the future treaty of peace: And His Most Christian Majesty guarantees on his part to the United States their liberty, sovereignty and independence, absolute and unlimited, as well in matters of government as commerce, and also their possessions, and the additions or conquests that their confederation may obtain during the war, from any of the dominions now, or heretofore possessed by Great Britain in North America, conformable to the 5th and 6th articles above written, the whole as their possessions shall be fixed and assured to the said States, at the moment of the cessation of their present war with England.

[3] This Treaty and the Treaty of Commerce mentioned above were terminated pursuant to an act of Congress approved July 7, 1798.

ARTICLE XII.

In order to fix more precisely the sense and application of the preceding article, the contracting parties declare, that in case of a rupture between France and England the reciprocal guarantee declared in the said article shall have its full force and effect the moment such war shall break out; and if such rupture shall not take place, the mutual obligations of the said guarantee shall not commence until the moment of the cessation of the present war between the United States and England shall have ascertained their possessions.

(8 Stat. 6; 18 Stat. (Pt 2) 201; TS 82)

Treaty of Peace between the United States and Spain signed at Paris December 10, 1898.

ARTICLE I.[4]

Spain relinquishes all claim of sovereignty over and title to Cuba.

And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

ARTICLE XVI.[4]

It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy, advise any Government established in the island to assume the same obligations.

(30 Stat. 1754; TS 343.)

Convention between the United States and Panama for the Construction of a Ship Canal signed November 18, 1903.

ARTICLE I.[5]

The United States guarantees and will maintain the independence of the Republic of Panama.

(33 Stat. 2234; TS 431.)

Treaty between the United States and Haiti with respect to the Finances, Economic Development, and Tranquility of Haiti, signed at Port au Prince September 16, 1915.[6]

ARTICLE XIV

The high contracting parties shall have authority to take such steps as may be necessary to insure the complete attainment of any of the objects comprehended in this treaty; and, should the necessity occur, the United States will lend an efficient aid for the preservation of Haitian Independence and the maintenance of a government adequate for the protection of life, property and individual liberty.

(39 Stat. 1654; TS 623.)

TREATY AFFAIRS,
OFFICE OF THE LEGAL ADVISER,
DEPARTMENT OF STATE,
*Washington, March 22, 1971.*

PUBLIC OPINION CONCERNING CONGRESSIONAL PARTICIPATION

Also on the public opinion point, there was a rather good editorial in the Lorain Journal, and I would ask unanimous consent that this be included as part of my testimony.

Senator SPONG (presiding). Without objection.

[4] The occupation referred to terminated on May 20, 1902.

[5] This article was terminated by Article I of the General Treaty of Friendship and Cooperation between the United States and Panama signed at Washington March 2, 1936; entered into force July 27, 1939 (50 Stat. 1807; TS 945).

[6] Terminated on May 3, 1936, at the expiration of the ten-year period as extended to twenty years by the Additional Act signed at Port au Prince, March 28, 1917 (TS 623–A).

(The information referred to follows:)

[From the Lorian Journal's Page of Opinion, Lorain, Ohio, Feb. 28, 1971]

THE TROOPS AND SENATOR TAFT

Sen. Robert Taft Jr. of Ohio is considered a solid supporter of President Nixon and he has genuine credentials as an authentic Republican and moderate.

He upholds the President in wanting to disengage from the nasty war in Indochina as soon as practical.

But Taft has now gone a step further. Sen. Taft has introduced a Joint Resolution into the United States Senate which limits any President's power to commit troops without the prior authorization of Congress.

Why the Taft resolution? He tells why himself in the resolution:

"Congress has, through acquiesence and overt action, sanctioned on numerous occasions the deployment of the Armed Forces of the United States beyond its territorial limits..."

This is a step in the right direction. People in all walks of life, in both political parties, desire that the decision to send American men to fight should be shared by Congress, and not be the judgment of one man.

After all, Congress represents all the people and is in a better position to understand and appreciate the mood of the country.

Sen. Taft deserves credit for making this important point. It is a positive effort toward regaining the confidence of the people, and it is the right thing to do.

Senator SPONG. Congressman Findley and Senator Mathias are the two remaining witnesses.

In the absence of the chairman, Senator Taft, let me again thank you for your testimony here.

Senator TAFT. Thank you very much, Senator.

The CHAIRMAN (presiding). Mr. Findley and Senator Mathias, would you take your seats? Thank you very much, Senator Taft. I appreciate your coming.

Senator TAFT. Thank you, Senator. I appreciate the opportunity.

The CHAIRMAN. We are very pleased to have both you distinguished gentlemen here this morning.

Senator Mathias, do you wish to lead off?

Senator MATHIAS. Thank you very much, Mr. Chairman.

The CHAIRMAN. You are the cosponsor of S. 731, as I recall; is that right?

Senator MATHIAS. That is right.

## STATEMENT OF HON. CHARLES McC. MATHIAS, JR., U.S. SENATOR FROM MARYLAND

Senator MATHIAS. I consider it a privilege to be a cosponsor with the distinguished Senator from New York, Senator Javits, in bringing this legislation to the attention of the committee. I might say, Mr. Chairman, that it is with particular pleasure that I sit at this witness table with Congressman Findley with whom I have served for almost 12 years now, and who has, I think, taken remarkable initiative in trying to bring some responsibility into the congressional role in foreign policy.

Because I may stray from my text and possibly be able to paraphrase it more briefly to save the committee's time, I ask that my statement be included in the record.

The CHAIRMAN. Your statement can be put in the record and you can summarize it. We have had, as you know, the elucidation of this

legislation by the Senator from New York, so you might tidy up all the details for us.

Senator MATHIAS. Well, the Senator from New York is usually so comprehensive in the attention that he gives to the legislative business that I doubt there is anything I can tidy up that he has left undone.

IMPORTANT OF S. 731

But I would say this: as the chairman knows, we have all been enormously concerned with restoring the balance between the Congress and the Presidency in the responsibility for questions of war and peace. I think that this bill, S. 731, would be an important step toward that objective, and it is one that I think we should take.

I think that prior to the taking, that step itself has already proved to be an important point of focus on the question. It is a point of focus within the Congress and, I think, as demonstrated by the lucid testimony of Professors Commager, Morris, and Kelly, and today of Professor Mason, it is a point of focus for the whole country.

TONKIN GULF SITUATION HAD S. 731 BEEN LAW

I think, as we have discussed on previous occasions, that the Congress has contributed to the process of creating the imbalance with the executive branch. We have readily offered up to the President large elements of congressional jurisdiction in the Formosa resolution, the Middle East resolution, the Cuban resolution, and the Gulf of Tonkin resolution. And at that point I would like to stray, Mr. Chairman, to examine very briefly what might have happened at the time of Gulf of Tonkin had S. 731 been the law of the land. Because Congressman Findley and I were both Members of the House at that time, I think we can both recall the circumstances, the kind of urgency which was placed on immediate action by the House, the very little amount of time that was allowed for thoughtful investigation of the facts. But, had there been some procedure for dealing with a situation of that sort, had it been recognized that some reasonable, responsive action on the part of the President was to be anticipated, but that there would be a month before the Congress would necessarily have to act, and that the investigative apparatus of the Congress could immediately have been applied and some time and attention given to the very important factual details, then the kind of blank check given to the President in the Gulf of Tonkin resolution might never have been written. And I, for one, might never have voted for it as, in fact, I did vote for it in 1964.

So I think that we have to go beyond just undoing the work that was done in the passing of those resolutions. I think we have to move on to providing some statutory framework which will avoid the necessity for that kind of grant of power.

S. 731 SETS STAGE FOR PRESIDENTIAL ACTION

Now, of course, there are those who say that we are giving the President an invitation to act. I don't believe that is true. I believe that by citing circumstances which history has taught us are likely to arise, we are not issuing any invitation, we are merely setting a stage.

There are those who argue that the bill is too restrictive, but I don't believe that is the case. I think it simply provides a means by which a President in some orderly way, instead of in the disorderly way in which we acted at the time of the Gulf of Tonkin resolution, can bring an urgency to the official attention of the Congress and request official action.

RETURN TO AUTHORITY OF THE PEOPLE

Now I don't think that this will in any way diminish the President's effectiveness in the conduct of foreign affairs. The power of an American President is so immense today, so well known throughout the world, that this recourse to the authority of the people, which is what we are really talking about, is not any enhancement of congressional authority. It is merely a return to the authority of the people. I think it will, in fact, give greater force and greater influence to a national action which is truly a national action, as against the action of a President or an administration which may or may not find the popular support essential to carrying on any kind of protracted modern struggle, as we are so clearly seeing today.

I think the unhappiness of Vietnam the groundswell of resentment and frustration, which is in some cases turning to bitterness and in others to a kind of political vacuum, all leads us to the conclusion that some remedial action of a general nature should be taken, and that this is the time to take it.

(Senator Mathias' prepared statement follows:)

STATEMENT OF SENATOR CHARLES MCC. MATHIAS, JR.

Mr. Chairman, I am very grateful for the opportunity to testify today in support of the War Powers Bill, S. 731, introduced by Senator Javits. I believe that it has been and will be a useful basis for serious debate on a new kind of problem that plagues us. Its enactment will be an important step in restoring the balance between the Congress and the Presidency in responsibility for questions of war and peace. I believe that it will be judged by history as a decisive milestone along the road back to the Constitution.

In their extremely lucid and erudite testimony before this Committee, Professors Henry Steele Commager, Richard Morris and Alfred Kelly made vividly clear the process by which the Presidency accumulated exceptional war powers over the past two decades. Arising to a large degree from the pressures and compulsions of the Cold War, these powers were gained partly by Presidential assumption, partly by Congressional inadvertence and partly by direct and positive delegation by Congress.

Indeed, Congress contributed significantly to this process, conferring on the President special authority to meet crisis situations, but failing to rescind these powers once the crisis had passed. One need only name the Formosa Resolution of 1955, the Middle East Resolution of 1957, the Cuba Resolution of 1962, and the Gulf of Tonkin Resolution of 1964, to illustrate how readily Congress delivered up to the President large elements of its Constitutional jurisdiction.

Clearly these Resolutions reflected a strong unity of purpose between the Congress and the Presidency. But like many other actions easily committed and without the clarifying debate engendered by dissent, these have been devilishly difficult to remand. It was not until last year, in the convulsive upheaval over the Cambodian incursion, that the first reverse step was taken and the Gulf of Tonkin Resolution revoked. Now, there seems reason for hope that the remaining three will be rescinded during this Congress.

But rescinding these Resolutions serves only to eliminate specific *ad hoc* measures. The virtue of S. 731 is that it creates an abiding statutory framework under which all such emergency situations could henceforth be handled, clearly and uniformly. It provides for the unexpected and the unpredictable and spells out the balanced allocation of powers between the Congress and the President in the awesome responsibility of committing American forces to battle.

Sadly, there are those who view this bill with deep distrust and equate it with betrayal of the President as he seeks to wind down the Vietnam war. It therefore bears repeating here that S. 731 addresses itself not to the present, but to the future. It excludes from consideration our present bitter predicament in Indochina and seeks to avoid future Indochinas.

There are also those who argue that this bill would tie a President's hands and sorely limit his ability to react to crisis situations. This argument is equally unfounded. For, this bill guarantees the President full authority to react instantly to virtually any conceivable emergency situation. If reporting promptly to Congress and seeking its authorization for military action is viewed as a burdensome constraint, then it is simply one we must learn to live with. It is this constraint we wish to restore, for it is the fulcrum of that delicate balance or responsibility set up between the Congress and the Presidency by the Constitution.

Indeed, a more subtle but pervasive side of this constraint is the prior knowledge that every commitment of American military forces will have to be justified before the Congress and must secure it authorization. An inhibiting ingredient of such abiding nature should yield the most salutary benefits.

Finally, there are those who argue that any restraints on Presidential latitude would surely diminish our international image by betraying serious disharmony in our foreign policy, thus impelling our allies to discount our steadfastness of purpose and our adversaries to question our resolve.

I submit, however, that the converse would be the case. I believe that the requirement for Congressional authorization for military actions would guarantee a policy far more broadly based on the will of the people than now is the case. The divisiveness and rancor which now wrack this nation are the product of a policy which has lost the support of the people and the authorization of Congress. And it would be very hard to deny the serious damage our image and effectiveness have suffered as a result. In some foreign quarters, the underlying concern is whether, in our present state of disunity, we could really react to a new international crisis. And so it is now, under our present circumstances, that our allies have begun to discount our steadfastness and our adversaries to question our resolve.

Mr. Chairman, over the past weeks I have become aware of an increasing feeling on the part of the American people that we must make real changes in our present situation. It is a groundswell of discontent with the status quo. Focused in large part on Vietnam, it reflects the concern of a broad base of moderate Americans that we have perhaps veered too far in one direction and that we must now pull together to ensure that we do not veer too far the other way. It is a feeling which seeks clarity and balance and proclaims that the time has come to leave the jagged topography of national conflict and return to the bedrock of our constitutional system of government. Only then can we begin to bridge the vast gulf that has so bitterly divided us and begin to pull together. And only by restoring our unity at home can we resume a role of practical and moral leadership abroad. The enactment of S. 731 will represent a significant step in this direction.

The CHAIRMAN. Thank you very much.

Mr. Findley, would you present your case?

## STATEMENT OF HON. PAUL FINDLEY, A REPRESENTATIVE IN CONGRESS FROM THE 20TH CONGRESSIONAL DISTRICT OF ILLINOIS

Mr. FINDLEY. Yes, Mr. Chairman.

First of all, I want to thank Senator Mathias for his overly generous comments about my work, and to express my pleasure that he is continuing his effective work in the Senate which he so well advanced when he was a Member of the House. I salute the committee, its distinguished chairman and other members for undertaking these hearings, and especially Senator Javits for formulating a proposal which has become the focus for discussion.

When Senator Javits introduced the same proposal in the 91st Congress, it impressed me as a constructive and imaginative attempt to enhance the influence of the Congress on decisions which might bring

on war and peace, and 10 of my colleagues in the House joined me in introducing the Javits bill on June 24 of last year. Later, when the Subcommittee on National Security Policy of the House Foreign Affairs Committee held hearings on the war powers issue, Senator Javits gave illuminating, impressive testimony. I was pleased to be associated with him last year and am glad to have this renewed association today.

### LIMITATIONS OF CONGRESS IN REASSERTING CONTROL

Mr. Chairman, at this point, even though I would like to have the remaining language included in the record, I would like to draw the committee's attention to language in my statement, reading this way:

> As we consider ways to reassert control over the power of the sword, I think we have to recognize the limitations that Congress does have. It cannot by statute reduce what a President perceives to be his constitutional duties as Commander-in-Chief. He may thwart a 30-day statutory limitation on his authority to continue hostilities by applying a very narrow definition to the term "military hostilities." He may ignore legislatively imposed reporting requirements or respond to them incompletely or too late for them to be effective. He may use the vast resources of his office to influence the happening of events or to marshal pub'ic opinion so that, regardless of what the Congress does or attempts to do it will be unable to play a meaningful role in the determination of war policy.

To the extent that events, rather than legal interpretations, tend to settle struggles over war powers—and the struggle is continuous—the President can be expected to have the upper hand over Congress. But, nevertheless, I feel that the quest for a better relationship is worthy of our best efforts.

The Javits bill deals entirely with rules respecting the engagement of our forces in military hostilities.

### STATIONING U.S. ARMED FORCES ABROAD IN ABSENCE OF HOSTILITIES

My purpose in appearing here today is to suggest that this committee also consider rules respecting the stationing of forces equipped for combat abroad in the absence of hostilities.

While it is highly important that Congress be involved intimately in decisions which engage our forces in military hostilities, it is also essential that we be similarly involved in decisions which place our forces in circumstances where armed conflict may later develop.

The decision to place U.S. Armed Forces in foreign areas were hostilities may subsequently break out could well have greater and graver implications than a subsequent decision authorizing such forces to continue—or discontinue—their engagement in actual hostilities.

Certainly, the political, psychological, and emotional factors present when the earlier decision is made would be much more conducive to thoughtful, objective deliberation than later when guns are blazing. On the later occasion, our forces and our flag would be under attack. Concern would center on the safety of our forces and the broad—and important—questions of national honor, prestige, and influence. At that juncture, the wisdom of our presence could not receive the same dispassionate consideration that would have been possible earlier.

Most Americans, I would judge, today believe the United States acted unwisely when it first placed forces equipped for combat in South Vietnam. They would like to turn the calendar back and not

have them there at all, regardless of the consequences for the south. But, primarily because our forces and our flag are under attack, under fire, many of the same people today oppose a quick departure of our forces. They support actions in Cambodia and Laos and the more gradual Vietnamization of the war.

Unfortunately, the Congress did not deal directly and promptly with the question as to whether the initial commitment of forces equipped for combat to Vietnam was either constitutional or in the national interest.

Congress was never called upon to grant specific approval in connection with the stationing, by President Kennedy, of 16,000 troops equipped for combat in Vietnam in 1962, troops which were initially identified as military advisers but soon were given direct combat responsibility.

While we cannot turn the calendar back, hopefully we can profit from this experience. We can establish rules which will enhance the likelihood that in similar future circumstances—before fighting breaks out—Congress will receive promptly a formal written report from the President detailing and justifying the steps he has ordered. Upon such a report, hearings could be expected. Congress, if it deemed such advisable, could pass judgment on the wisdom, propriety, constitutionality, and necessity of the action reported by the President.

MANDATORY REPORTING REQUIREMENT OF HOUSE JOINT RESOLUTION 1

The Subcommittee on National Security Policy of the House Committee on Foreign Affairs conducted 11 days of hearings last summer on the war powers of the Congress and the President. Based on these hearings, the committee favorably reported House Joint Resolution 1355, which was approved by the House on a record vote of 288 to 39 on November 16, 1970. That resolution was reintroduced on the first day of the 92d Congress as House Joint Resolution 1.

The most significant effect of House Joint Resolution 1 would be the mandatory reporting requirement it would place on the President.

Section 3 of the resolution states:

> In any case in which the President without specific prior authorization by the Congress (1) commits United States military forces to armed conflict; (2) commits military forces equipped for combat to the territory, airspace or waters of a foreign nation, except for deployments which relate solely to supply, repair, or training of U.S. forces, or for humanitarian or other peaceful purposes; or (3) substantially enlarges military forces already located in a foreign nation; the President shall submit promptly to the Speaker of the House of Representatives and to the President of the Senate a report, in writing, setting forth:
>
> (*a*) The circumstances necessitating his action; (*b*) the constitutional, legislative, and treaty provisions under the authority of which he took such action, together with his reasons for not seeking specific prior congressional authorization; (*c*) the estimated scope of activities; and (*d*) such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of U.S. Armed Forces abroad.

Under this proposal, the President must give attention to a detailed report to Congress at the very time he ponders a decision to commit military forces to foreign territory or to enlarge substantially forces already there. At the very least, this would remind the President and his advisers forcibly and before the commitment is made of congressional responsibility and authority in this area.

As a practical matter, this reporting requirement might also cause the President to consult directly with the legislative branch before making the final decision on force commitment.

EFFECT ON PAST FORCE MOVEMENTS HAD REPORTING REQUIREMENT BEEN LAW

Had House Joint Resolution 1 been law, in my opinion it would have required a prompt, written, detailed report on: the Berlin airlift following the blockade of that city in 1948; the intervention of U.S. troops in Korea in 1950; the enlargement of our forces in Europe in 1951; the sending of reinforcements to Berlin after the German border was closed in 1961; the deployment of our troops in Thailand in 1961–62; the various troop buildup stages in Vietnam through August 1964; and sending of Marines to the Dominican Republic in 1965; and the present activities over Laos.

These are some of the major incidents since the end of World War II involving American troops in which neither prior nor subsequent congressional approval was sought.

Each of these force movements was undertaken without specific prior authorization of the Congress. Each involved armed conflict or the definite risk thereof. Most importantly, many of these instances might not have invoked the provisions of Senator Javits' bill, while each would have required a report to Congress under the House proposal.

Had this reporting requirement been in effect in 1962 when the number of U.S. advisers in Vietnam was raised from 700 without combat gear to 16,000 equipped for combat, President Kennedy would have been required to explain promptly and in writing to Congress the circumstances necessitating his decision, the constitutional, legislative, and treaty provisions under which he took such action, and his reasons for not seeking specific prior congressional authorization.

This reporting requirement of itself might have caused sober second thoughts by the President. It might have caused him to reconsider. If he went ahead, the report on the action would have provided Congress with a formal document on which to hold hearings.

Certainly the consideration of the report in 1962 would have been in circumstances more favorable to objectivity than existed when the Gulf of Tonkin resolution was passed in 1964.

The House bill would have required the President to report to Congress promptly after the commitment of our forces to Laos on February 7 of this year. He would have had to give the circumstances necessitating the action, the constitutional, legislative and treaty provisions under the authority of which he took such action, with his reasons for not seeking specific prior congressional approval; and the estimated scope of activities.

The President, due to the need for secrecy, could have placed the highest security classification on part or all of the report for a period of time. But, importantly, the President would have reported in writing, in detail and promptly to the Speaker of the House and the President of the Senate, who then would be able to place the documents before the appropriate committees for further consideration.

To be sure, this procedure provides no guarantee that the Congress would not have been subjected to the same total week-long news blackout as was the rest of the Nation. To the best of my knowledge, the

Congress to this date has not been supplied with a formal report providing basic data about the Laos action, such as the House bill would require.

EXPANDED REPORTING REQUIREMENT

Prompt reports would be required, with the modest exceptions listed, whenever forces equipped for combat are sent to foreign areas for any purpose.

Would the reports be so numerous as to bog down both the executive and legislative branches? Based on past history, the answer must be no. Reports would be required only when the original force commitment is made, or when forces are substantially enlarged. Additional reports would not be required as personnel and equipment are rotated.

"Substantially" is open to varied definitions, but I do not feel admits of too much flexibility or is overly vague. A thousand additional men sent to Europe under present circumstances clearly would not substantially enlarge our 300,000 men already stationed there.

The aim is to facilitate the fulfillment by Congress of its responsibility for committing the Nation to war, and also its responsibility to "provide for the regulation of its Armed Forces."

Congress can hardly regulate the Armed Forces as the Constitution requires if it does not even know where they are or where they are being sent.

This expanded reporting requirement would place congressional influence far closer to the points and moments of great decision. It would require the President and his advisers to give thorough consideration to the judgment and reaction of Congress, as well as to the relevant provisions of laws, treaties, and the Constitution, to which they must turn for authority. Consideration of legal justification would become part of the decisionmaking process—not a subsequent exercise of small importance in which State Department lawyers handcraft a legal garment to cover the subject long after the military action has been decided upon and undertaken. And the Congress, charged under the Constitution with the power to commit the Nation to war, would be better equipped to fulfill its responsibility.

Thank you.

(Congressman Findley's prepared statement follows:)

STATEMENT BY REPRESENTATIVE PAUL FINDLEY (R-ILL.), A MEMBER OF THE HOUSE FOREIGN AFFAIRS COMMITTEE

THE WAR POWERS OF THE CONGRESS AND THE PRESIDENT

Mr. Chairman, I salute you and this distinguished committee for undertaking hearings into the relationship between the Congress and the President in respect to war powers. And especially I congratulate Senator Javits for formulating a proposal which is the focus of discussion.

When he introduced this same proposal in the 91st Congress, it impressed me as a constructive and imaginative attempt to enhance the influence of Congress in decisions which might bring on war or peace. Ten of my colleagues joined me in introducing the Javits bill in the House on June 24, 1970. Later, when the subcommittee on National Security Policy of the House Foreign Affairs Committee held hearings on the war powers issue, Senator Javits gave illuminating, impressive testimony.

I was pleased to be associated with his initiative last year, and am glad to have this renewed association.

Under the Constitution, the Congress clearly is the branch with the greatest war-making authority and responsibility, deriving them from specific provisions as well as from residual powers.

The somber fact, however, is that the Congress has exercised this authority to only a modest degree. For the most part, Congress has been content with the role of supply sergeant to the nation's military needs, leaving to the President the great decisions of war and peace. Neglect of its responsibility has been greatly to the disadvantage of the public interest.

In light of our grim experience in the quagmire of Vietnam, it is timely—in fact, urgent—for the Congress to identify the factors contributing to this neglect. We must find ways to promote greater Congressional participation in the decisions which cause our armed forces to engage in hostilities, or cause them to be stationed where hostilities may develop. Congress must find effective ways to reassert its control over the Power of the Sword committed to it by the Constitution.

Although I feel the Congress has pre-eminent authority and responsibility in the war-making field, clearly the Constitution confers responsibilities in this area to the President, certain others to the Congress as a whole, and still others to the Senate.

The language of the Constitution actually invites struggle among these institutions as to which will have the decisive voice in determining the course of the American nation. In this struggle the Supreme Court provides little help. The final arbiter becomes the American electorate, with the court almost without exception choosing to regard conflicts between the Congress and President over war powers as extrajudicial.

Why the Presidency has become the institution of greatest influence in the field of war powers, to the disadvantage of the Congress, is easy to understand.

The Presidency has advantages in terms of action and influence over public opinion. Among these are the unity of the presidential office, its capacity for secrecy and dispatch, its generally superior sources of information, its capability to make war, and its functioning continuity, that is, its readiness to act any hour, any day.

These advantages are inherent and must be recognized as the Congress attempts to exercise more adequately its own responsibility under the Constitution.

As we consider ways to reassert control over the Power of the Sword, Congress must also recognize its own limitations. It cannot by statute reduce what a President perceives to be his Constitutional duties as Commander-in-Chief. He may thwart a thirty-day statutory limitation on his authority to continue hostilities by applying a very narrow definition to the term "military hostilities." He may ignore legislatively-imposed reporting requirements, or respond to them incompletely or too late. He may use the vast resources of his office to influence the happening of events or to marshal public opinion so that, regardless of what we do, Congress will be unable to play a meaningful role in the determination of war policy.

To the extent that events, rather than legal interpretations, tend to settle struggles over war powers, the President can be expected to have the upper hand over Congress.

The quest for an improved relationship is nevertheless worthy of our best efforts.

The Javits bill, S. 731, deals entirely with rules respecting the engagement of our forces in "military hostilities."

My purpose in appearing here today is to suggest that this committee also consider rules respecting the stationing of forces equipped for combat abroad in the absence of hostilities.

While it is highly important that Congress be involved intimately in decisions which engage our forces in military hostilities, it is also essential that we be similarly involved in decisions which place our forces in circumstances where armed conflict may later develop.

The decision to place U.S. armed forces in foreign areas where hostilities may subsequently break out could well have greater and graver implications than a subsequent decision authorizing such forces to continue—or discontinue—their engagement in actual hostilities.

Certainly, the political, physiological and emotional factors present when the earlier decision is made would be much more conducive to thoughtful, objective deliberation than later when guns are blazing. On the latter occasion, our forces

and our flag would be under attack. Concern would center on the safety of our forces and the broad—and important—questions of national honor, prestige and influence. At that juncture, the wisdom of our presence could not receive the same dispassionate consideration that would have been possible earlier.

Most Americans, I would judge, today believe the United States acted unwisely when it first placed forces equipped for combat in South Vietnam. They would like to turn the calendar back and not have them there at all, regardless of the consequences for the South. But, primarly because our forces and our flag are under attack, many of these same people today oppose a quick departure of our forces. They support actions in Cambodia and Laos and the more gradual "Vietnamization" of the war.

Unfortunately, the Congress did not deal directly and promptly with the question as to whether the initial commitment of forces equipped for combat to Vietnam was either constitutional or in the national interest.

Congress was never called upon to grant specific approval in connection with the stationing by President Kennedy of 16,000 troops equipped for combat in Vietnam in 1962, troops which were initially identified as military advisers but soon were given direct combat responsibility.

While we cannot turn the calendar back, hopefully we can profit from this experience. We can establish rules which will enhance the likelihood that in similar future circumstances—before fighting breaks out—Congress will receive promptly a formal written report from the President detailing and justifying the steps he has ordered. Upon such a report, hearings could be expected. Congress, if it deemed such advisable, could pass judgment on the wisdom, propriety, constitutionality and necessity of the action reported.

The Subcommittee on National Security Policy of the House Committee on Foreign Affairs conducted eleven days of hearings last summer on the war powers of the Congress and the President. Based on these hearings, the committee favorably reported H.J. Res. 1355, which was approved by the House on a record vote of 288 to 39 on November 16, 1970. That resolution was reintroduced on the first day of the 92nd Congress as H.J. Res. 1.

The most significant effect of H.J. Res. 1 would be the mandatory reporting requirement it would place on the President.

Section 3 of the resolution states:

"In any case in which the President without specific prior authorization by the Congress—

"(1) commits United States military forces to armed conflict;

"(2) commits military force equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, repair, or training of United States forces, or for humanitarian or other peaceful purposes; or

"(3) substantially enlarges military forces already located in a foreign nation;

the President shall submit promptly to the Speaker of the House of Representatives and to the President of the Senate a report, in writing, setting forth—

"(A) the circumstances necessitating his action;

"(B) the constitutional, legislative, and treaty provisions under the authority of which he took such action, together with his reasons for not seeking specific prior congressional authorization;

"(C) the estimated scope of activities; and

"(D) such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad."

Under this proposal, the President must give attention to a detailed report to Congress at the very time he ponders a decision to commit military forces to foreign territory or to enlarge substantially forces already there. At the very least, this would remind the President and his advisers forcibly and before the commitment is made of Congressional responsibility and authority in this area.

As a practical matter, this reporting requirement might also cause the President to consult directly with the legislative branch before making the final decision on force commitment.

Had H.J. Res. 1 been law, it would have required a prompt, written detailed report on:

The Berlin airlift following the blockade of that city in 1948.

The intervention of U.S. troops in Korea in 1950.

The enlargement of our forces in Europe in 1951.

The sending of reinforcements to Berlin after the German border was closed in 1961.

The deployment of our troops in Thailand in 1961–2.

The various troop build-up stages in Vietnam through August, 1964.

The sending of Marines to the Dominican Republic in 1965.

Present activities over Laos.

These are some of the major incidents since the end of World War II involving American troops in which neither prior nor subsequent Congressional approval was sought.

Each of these force movements was undertaken without specific prior authorization of the Congress. Each involved armed conflict or the definite risk thereof. Most importantly, many of these instances might not have invoked the provisions of Senator Javit's bill, while each would have required a report to Congress under the House proposal.

Had this reporting requirement been in effect in 1962 when the number of U.S. advisers in Vietnam was raised from 700 without combat gear to 16,000 equipped for combat, President Kennedy would have been required to explain promptly and in writing to Congress the circumstances necessitating his decision, the constitutional legislative and treaty provisions under which he took such action, and his reasons for not seeking specific prior Congressional authorization.

This reporting requirement of itself might have caused sober second thoughts by the President. It might have caused him to reconsider. If he went ahead, the report on the action would have provided Congress with a formal document on which to hold hearings.

Certainly the consideration of the report in 1962 would have been in circumstances more favorable to objectivity than existed when the Gulf of Tonkin resolution was passed in 1964.

The House bill would have required the President promptly after the commitment of our forces to Laos on February 7 to report in writing to the Congress the circumstances necessitating the action; the constitutional, legislative and treaty provisions under the authority of which he took such action, with his reasons for not seeking specific prior Congressional approval; and the estimated scope of activities.

The President, due to the need for secrecy, could have placed the highest security classification on part or all of the report for a period of time. But, importantly, the President would have reported in writing, in detail and promptly to the Speaker of the House and the President of the Senate, who then would be able to place the documents before the appropriate committees for further consideration.

To be sure, this procedure provides no guarantee that the Congress would undertake an examination of the report, but the basic information and opportunity would be at hand.

In respect to the Laos operation, Congress was subjected to the same total week-long news blackout as was the rest of the nation. To the best of my knowledge, the Congress to this date has not been supplied with a formal report providing basic data about the Laos action, such as the House bill would require.

Prompt reports would be required, with the modest exceptions listed, whenever forces equipped for combat are sent to foreign areas for any purpose.

Would the reports be so numerous as to bog down both the Executive and Legislative branches? Based on past history, the answer must be no. Reports would be required only when the original force commitment is made, or when forces are substantially enlarged. Additional reports would not be required as personnel and equipment are rotated.

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This expanded reporting requirement would place Congressional influence far closer to the points and moments of great decision. It would require the President and his advisers to give thorough consideration to the judgment and reaction of Congress, as well as to the relevant provisions of laws, treaties, and the Con-

stitution, to which they must turn for authority. Consideration of legal justification would become part of the decision-making process—not a subsequent exercise of small importance in which State Department lawyers handcraft a legal garment to cover the subject long after the military action has been decided upon and undertaken. And the Congress, charged under the Constitution with the power to commit the nation to war, would be better equipped to fulfill its responsibility.

The CHAIRMAN. Thank you, Congressman Findley.

SUGGESTED SECTION CONCERNING STATIONING OF TROOPS ABROAD

If I understand you, you are suggesting a new section providing for the stationing of troops abroad be added to the bill.

Mr. FINDLEY. Yes, sir.

The CHAIRMAN. I think it is a very useful suggestion. We had quite a controversy about the stationing of our troops in Spain under an executive agreement. The country knew very little about it. I think it should have been a treaty, but the Executive didn't think so. This would require information about that, which I think is a very useful addition to the other provisions of the bill.

I take it you are in favor of the bill as written, but you are suggesting an addition?

Mr. FINDLEY. I am suggesting an addition. I certainly support the concept and thrust of the Javits bill and I hope the committee will report something of that sort.

The CHAIRMAN. Yes.

I think it is a very useful addition to it and certainly it is consistent with its overall purposes.

I was greatly impressed by the statement by General Wheeler to Spanish officials that in order that they not have to worry about having a treaty, we were creating circumstances that gave them a greater guaranty that we would do whatever was necessary for their defense than a treaty would.

He was saying: "We are giving you better than a treaty."

Mr. FINDLEY. We were creating circumstances which would make a treaty somewhat unimportant in respect to that because the presence of our troops would in effect accomplish the same purpose.

The CHAIRMAN. I agree. I have been very much impressed by that myself.

Thank you very much.

I unfortunately have a luncheon and I will turn the meeting over to the Senator from New York, if that is agreeable.

Senator JAVITS. I thank the chairman.

I will not detain my colleagues very long.

The CHAIRMAN. I thank both of you for coming and giving the committee this information.

Senator JAVITS. Thank you, Mr. Chairman.

COMMENDATION OF THE WITNESSES

I would like to thank you very much gentlemen, for this testimony which is very helpful and very supportive of what we are trying to do, and I would like to join the Chair, Congressman Findley, in welcoming your suggestion which has already passed the House, giving the added force and authority. I shall certainly do two things: One, I

think we need urgently to get the testimony of the administration. We hope to have that at our next set of hearings. Second, one of the things which the committee would want to consider when it finally deliberates on what kind of a bill to turn out, is see it has every thoughtful consideration. I thank you for bringing us this idea, with the authority of the House behind it.

Senator Mathias, I wanted to thank you, too, for raising what is identified now so especially with you, the need for clearing the books of all these resolutions, some obsolescent, which some President might like to invoke at some time, whether it is relevant or not.

You, in your oral summary, I think, just relied upon the fact that it was already in the record in writing, but I think this is very important. I think we would not be discussing this bill had we not cleared the record of the Gulf of Tonkin resolution, or indeed discussing practical ways to manifest congressional impact on the President.

So I hope very much that you will continue that role.

Senator MATHIAS. I can assure the Senator from New York that I will.

### S. 731 ADDRESSES ITSELF TO CONGRESSIONAL RESPONSIBILITY

If I might at this point, because I think it is so helpful to the record of support for S. 731, I would like to come back to a statement in Congressman Findley's testimony in which he states this: "It cannot," speaking of the Congress, "by statute reduce what a President perceives to be his constitutional duties as Commander in Chief."

I think Congressman Findley has put his finger really on what our problem is here. It is what a President perceives. Now, while I would agree that we cannot by statute reduce the constitutional powers of the Presidency, yet we ought not to acquiesce in circumstances and situations which made a President able to expand his constitutional authorities by his perception. The most conscientious Chief Executive who will ever sit in the White House might have a perspective which is not 360 degrees in vision. And I think that, while it is true that we cannot by statute reduce what the President perceives to be his constitutional duties, at the same time there is nothing either that the President may do or that we may fail to do which will diminish our responsibility to the American people for the conduct of foreign who will ever sit in the White House might have a perspective which the bill addresses itself.

Senator JAVITS. No question about it, and may I just say it another way. We are asked to accept the proposition that the President is Commander in Chief but also that the President alone may define what that term—Commander in Chief—encompasses, and when and how that authority is to be utilized. It seems to me this really strains the Constitution, in view of all of the other provisions which are in it, respecting the power of Congress over war and the Armed Forces.

I know you gentlemen have noted, indeed probably one of the reasons why you feel as you do, that S. 731 proceeds in part from the power of the Congress of the United States to make rules for the Armed Forces. This is expressly conferred by the Constitution. That is reflected in page 1, line 5, of my bill. This was done most purposefully because it is a constitutional way for us to establish what are the rules governing the Armed Forces in such situations. In this way we can

bring about some kind of balanced control over this situation between the Congress and the President.

Would you both agree with that?

Mr. FINDLEY. Yes, sir.

Senator MATHIAS. Yes.

Senator JAVITS. I thank my colleagues very much.

Senator Cooper?

Senator COOPER. I have no questions.

Senator JAVITS. Gentlemen, may I again thank you very, very much. You have been most helpful. I wish to express my feeling that the measure that we are for has stood up very well in the very sharp scrutiny to which it has been subjected so far in the hearings.

Thank you very much.

The hearing will stand adjourned subject to the call of the Chair.

(Whereupon, at 12:30 p.m., the hearing was adjourned, subject to the call of the Chair.)

# WAR POWERS LEGISLATION

FRIDAY, APRIL 23, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10 a.m., in room 4221; New Senate Office Building, Senator William B. Spong, Jr., presiding.

Present: Senators Spong, Aiken, Case, and Javits.

## OPENING STATEMENT

Senator SPONG. Today we resume hearings on the war powers legislation now before the Foreign Relations Committee. Early in March we heard the testimony of three historians on historical and constitutional questions raised by the war powers bills. Later in the month we heard from the sponsors and cosponsors of the specific war powers bills. We are pleased to have with us today Senator Barry Goldwater, of Arizona, and Congressman Frank Horton, of New York.

We are pleased to have you, Senator. Please proceed.

## STATEMENT OF HON. BARRY GOLDWATER, U.S. SENATOR FROM ARIZONA

Senator GOLDWATER. Thank you.

Mr. Chairman and members of the committee, I would like to introduce my companion, Mr. Terry Emerson, who is on my legal staff and who has done the legal research which is presented in this paper.

Mr. Chairman, the committee has heard from a steady stream of witnesses who have announced their endorsement of legislation fixing rules for the use of U.S. forces in military hostilities abroad. It is with some trepidation that I, a layman and a nonlawyer, feel compelled to disagree with the position held by the distinguished historians and Senators with law degrees, who have preceded me at these hearings.

But the issues raised by the war powers bill are so fundamental and the possible drawbacks of such legislation are so immense, I feel someone should join the issue so that the committee may make its judgment on these grave matters in the light of all possible points of view. So if you will consider my statement as being intended to assist the committee in making an objective analysis of the war power bill and measures like it, I will present my admittedly personal thoughts on this subject.

And in doing so, Mr. Chairman, I wish to interject a thought that as a former candidate for the Presidency, I have come to a very close

and personal realization of the awesome powers held by that office. Thus, in speaking to you, Mr. Chairman, it is from the standpoint of one who shares to some extent your concern about the sweeping breadth of the Executive's powers.

### WAR POWERS BILL NOT CORRECT WAY TO TACKLE ISSUE

Nevertheless, Mr. Chairman, in my opinion, the war powers bill is not the correct way to tackle this issue. To my mind, the bill is improper, unwise, and perhaps illegal. It would leave the United States helpless to prevent the annihilation of Israel. It would emasculate NATO. It would unwittingly allow a militant Congress to initiate a nuclear holocaust. And it may incite one of the gravest constitutional crises in American history.

### COUNTRIES WITH WHICH WE HAVE NO DEFENSE TREATIES

Mr. Chairman, as strange as it seems, this country has no forma legislative commitment to defend the security of Israel, for example There is no treaty or convention or any kind of legislative device committing the United States to assist in preserving Israel's independence.

What this means, under the war powers bill, is that the United States must stand idly by in the event of an all-out attack against the Israeli people. No matter that Arab fanatics may be seeking to make good on their aim of shoving the Israelis into the sea. No matter that approximately 20,000 Soviet personnel may be manning SA-3 missile sites and advanced jet fighters while massive Egyptian tank forces mount an invasion on disputed Sinai territory.

Congress may be in recess or adjournment. The United Nations may be bogged down in an endless exchange of animosity and bombast. But no matter. Regardless of the humanitarian exigencies and the dire consequences upon European security, the war powers bill prohibits an immediate limited response by the United States to forestall an Arab conquest of Israel. The war powers bill prohibits any action for strategic purposes unless there is in effect a legislative instrumentality specifically covering the interest at stake.

Of course, by the time Congress assembles and gathers a quorum for acting on the crisis, it may be too late for anything but resolutions of condolence. The victim people may have been slaughtered, and the world may be confronted with a fait accompli. It is interesting in this regard that though the war powers bill establishes a special procedure for speeding up congressional action on legislation in the event of some emergencies, the procedure does not apply in the case of countries with which we have no defense treaties.

### CREDIBILITY OF BASIC DEFENSE AGREEMENTS

Not only does the bill fail to provide a means for taking prompt action in behalf of countries such as Israel with which we share mutual bonds of trust, religion, and free democratic institutions, but it also will undermine the credibility of our most basic defense agreements such as NATO. With one swipe, our 42 defense pacts will be chopped into 30-day wonders, if that. This is because under the war powers

bill, U.S. military forces shall not be used to comply with our treaty commitments beyond 30 days unless Congress subsequently enacts legislation extending our military participation over a longer period. What is more, Congress can curtail our assistance short of 30 days if it passes a joint resolution to this end.

Thereby, the proposed bill will place all of our treaty obligations in a state of permanent doubt. No ally can ever know if the United States will stand by it for more than 30 days; and even then, it cannot be certain whether Congress will shut off our aid sooner.

If Communist troops sweep across the island of free Berlin, the war powers bill tells us Congress might order American forces not to respond. If a Russian attack begins on Turkey, the war powers bill says Congress may direct U.S. troops to terminate whatever collective self-defense measures they had started.

In other words, Mr. Chairman, the war powers bill would turn over the day-to-day calculations of strategic military and foreign policy decisions from the President to the Congress. The President and the National Security Council, the Secretary of Defense and the Joint Chiefs of Staff, and our 42 defense commitments as well, would all be dispatched to the sidelines. Congress would don its brass uniforms and take hold of the reins guiding the when and where of each American military activity.

Now, Mr. Chairman, imagine the shock which this concept will have upon the minds of foreign leaders who are told the United States can no longer make long-range promises of American support, even when those commitments have been nailed down in written treaties duly ratified under the American Constitution. Such an approach would, in my opinion, utterly demolish their judgment of America's dependability as an ally.

By converting our treaties into 30 day notes payable, with cancellation optional at a sooner date, we would, I fear, seriously endanger the entire structure of American mutual security agreements reached over a lengthy history of past negotiations and cooperation. Thereby the greatest safeguard of global peace would be downgraded to a community of suspicious, confused signatories who could never know when the United States might be counted on to live up to its past assurances or when one Congress might change the policy directives laid down by its predecessor.

### POWER TO ORDER PRESIDENT INTO BROADER HOSTILITIES

Equally bad, if it is true Congress has the right to legislate concerning the conduct of war and the President has no right to contravene such legislation, then Congress must also possess the power to order the President into broader hostilities than he wishes. In this sense, the war powers bill would be a terrible sword of Damocles hanging over the heads of the American people. At one moment it may pulverize our national treaty commitments. At the next, it might lead the Nation right up to the brink of nuclear destruction.

Mr. Chairman, those who look to Congress as the ultimate haven of peaceful thinking might thumb through the pages of Robert Kennedy's short manuscript on the Cuban missile crisis. Senator Kennedy recounts that of all the deliberations which preceded President Kennedy's address to the Nation on the situation in Cuba, his meeting with the leaders of Congress was the most difficult.

Senator Kennedy writes:

> I did not attend, but I know from seeing him afterward that it was a tremendous strain.
>
> Many congressional leaders were sharp in their criticism. They felt that the President should take more forceful action, a military attack or invasion, and that the blockade was far too weak a response.

That is the end of the Senator's quote.

Is it not possible that Congress might when confronted with dramatic pressure for making an immediate decision, vote in favor of a military strike? Are the Members of Congress more immune to emotional, impulsive reactions than other humans? Can we be certain a majority of some future Congress, mindful of an imminent election, will not be overwhelmed by the pressure of events and steer our Nation to greater military action than is warranted?

### REACTION TO POSSIBLE SUPREME COURT RULINGS

But there are other dangers in the war powers bill. Suppose the Supreme Court considers the bill and rejects it as an improper abridgment of the shared powers divided among the President and Congress. If a frustrated Congress fails to accept the decision, might it not impeach the President for disobeying its rules against the conduct of military hostilities? In that event, could the Supreme Court restrain the Senate from sitting as a court of impeachment?

On the contrary, let us suppose the court should approve congressional regulation over the use of Armed Forces. If the President defies the court in the belief the final existence of this country is utterly at stake, how will the court enforce its decision? Since the President controls the sanctions which the court must rely upon, won't the court lack an effective means for carrying out its order?

I must admit these considerations might seem novel but they are exactly the ones raised by the Supreme Court itself in rejecting a motion asking it to enjoin President Andrew Johnson from stationing troops in Mississippi under the Reconstruction Acts. *State of Mississippi* v. *Johnson*, 71 U.S. 475 (1866).

### LIKELY DISINCLINATION OF SUPREME COURT TO ACT

Mr. Chairman, this case illustrates the reasons why the Supreme Court has consistently refused to directly question the legality of Presidential military decisions. The courts have dropped this issue like a hot potato.

For example, the Supreme Court has turned down several challenges against the validity of the Vietnam conflict. In one important test, it left standing a significant ruling by Chief Justice Burger, who was then sitting as a circuit judge in the Court of Appeals for the District of Columbia. *Mora* v. *McNamara*, 389 U.S. 934 (1967). In this decision, the circuit court had flatly stated:

> The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive. *Luftig* v. *McNamara*, 373 F. 2d 664–666 (1967).

It is true the Supreme Court once tackled a potentially embarrassing case when it acted on President Truman's seizure of most of the Nation's steel mills; but it must be recalled the President had

served early notice he would comply with any Supreme Court ruling in that case. Also, it should be remembered the case turned on the far different nature of the President's authority over internal affairs as contrasted with his role in external matters. *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

Mr. Chairman, I may be wrong, but I think the probable course which the court will take has been revealed in a recent legal discussion examining the precise question of what it might do if confronted with an act of Congress restricting the President's war-making authority. This article suggests that in the first place Congress should not create a crisis by placing the court in a position where it must take sides with one of the political branches. Second, it concludes the court will not entertain the issue because a decision on the merits "might jeopardize the Supreme Court's ability to function effectively and endanger the constitutional system." (The Supreme Court as Arbitrator in the Conflict Between Presidential and Congressional War-Making Powers, 50 Boston University Law Review 78, spring 1970.)

Further warning about the likely disinclination of the High Court to pass on the war powers bill comes from a current Library of Congress report on the Massachusetts statute which purports to exempt its citizens from service in undeclared wars. Though the statute is designed to stir up a court test on the legality of the Vietnam war, the Legislative Reference Service concludes the issues of undeclared war and the sending of troops aboard are political questions not meant for judicial decision. ("Undeclared War and the Right of Servicemen to Refuse Service Abroad," pp. 110–16, Nov. 30, 1970, L.R.S.)

POLITICAL QUESTION DOCTRINE

The report builds a sound case for the application of the political question doctrine to all matters of foreign military policy. For example, it recalls a declaration made by the Supreme Court in 1918, when it said:

> The conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.

*Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918).

The Court recognized the same doctrine again in 1949 in these words:

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the commander in chief in sending our armed forces abroad or to any particular region * * * The issue tendered * * * involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible.

*Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950).

The report also mentions the above-stated case of *Mississippi* v. *Johnson* in which the court found it had no power to restrain acts of either Congress or the President regarding the use of troops.

Thus an impressive line of cases can be mustered which cast serious doubt on the willingness of the Supreme Court to consider any statute governing the President's deployment of troops. And, it goes without saying, our Nation will be placed in a pretty bad constitutional muddle in the event Congress and the President are left without any arbiter to resolve the statute's legality.

But even should the Court look at the merits of the bill, it is by no means certain the measure could stand the test of judicial scrutiny. In this regard, Mr. Chairman, I would like to review the legal memorandum offered by the Senator from New York. For unless I have read the six cases wrongly upon which the bill stands, three of them might be taken as authority for the contrary, one is plainly limited to domestic affairs only, and the remaining two had no restraint at all on the President during the course of military hostilities.

One case is *Ex parte Milligan*, in which the Court held that neither Congress nor the President could authorize the trial of a civilian before a military tribunal in a State which had been loyal to the Union during the Civil War. 71 U.S. 2 (1866). To me, the pertinent part of this decision lies in the following comment by four of the justices, who remarked upon the power of Congress in time of war as follows:

> This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief.

While I am not a lawyer, it appears to me this case might reasonably be read as saying Congress cannot restrict the President's command of military decisions once hostilities begin, whether war is declared or not.

Another decision which may expand the President's power, but is cited as authority for the war powers bill, is *United States* v. *Midwest Oil Co.*, 236 U.S. 459 (1915). The case concerned a Presidential decree, issued in 1909, which withdrew from private acquisition all public lands containing petroleum. The President issued the order even though Congress had by statute made these same lands free and open to purchase by U.S. citizens. Nevertheless, the Court found the Executive had for a long time been making similar orders contrary to acts of Congress and determined this established a power in the President to do what he had been doing. 236 U.S. 469. Thus, the Court expressly recognized a power of the President, in certain circumstances, to ignore congressional enactments.

A third decision mentioned in the war powers brief is the *Prize* cases, a Civil War action regarding the legality of President Lincoln's blockade against the Confederacy. 67 U.S. 635 (1863). It is claimed this case proves "the Court's insistence upon congressional authorization as the basis of Presidential war powers."

And yet, Justice Grier, who wrote the Court's opinion, carefully explained the issue is not whether Congress authorized the blockade, but whether the President, acting alone, had a right to take military action "on the principles of international law, as known and acknowledged among civilized states?" 67 U.S. 671.

In upholding the Executive's right to meet the insurrection, the Court said:

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. 67 U.S. 668.

Again, Mr. Chairman, we have an opinion which far from establishing a superior role for Congress, points to a duty on the part of

the President to meet certain challenges against the Nation without waiting for Congress to baptize them with a name.

DECISIONS RELIED ON BY WAR POWERS BRIEF QUESTIONED

Another decision relied on by the war powers brief is the *Steel Seizure* case which arose from President Truman's attempted take-over of most of the Nation's steel mills. Though the Court held, 6 to 3, the President lacked power to take possession of private property, it is quite clear the Court's majority treated the case as a domestic affair far removed from instances involving day-to-day fighting in a theater of war, 343 U.S. 5.

Justice Jackson appears to have captured the mood of the Court correctly when he wrote and I quote him:

> We should not use this occasion to "circumscribe," much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. 343 U.S. 645

Accordingly, I cannot see that the *Steel Seizure* case is controlling in a situation regarding the use of U.S. troops outside the Nation.

Nor do the final two cases discussed in the war powers brief give me any more comfort. One of these, *The Eliza*, involved nothing more than whether the word "enemy" should be applied to French privateers during the late 1790's; 4 Dallas 38 (1800). The purpose of the Court's exercise was simply to determine whether the owner of the *Eliza* had to pay salvage under a Federal law relating to the recapture of ships from the enemy, rather than under a general law which required payment of a much smaller sum.

It is true three justices spoke in brief, but sweeping, terms about the limits which Congress might set on the hostilities, but these references were in no way necessary to the decision of the case. They are gratuitous dictum and cannot sustain anything more than the interesting concept that American forces can properly engage in fighting without a general declaration of war.

The final case raised in support of the war powers bill also construed the meaning of a Federal statute applicable to the undeclared naval war with France. This time the case involved a law providing for forfeiture of American vessels employed in commerce with France. Though the statute empowered American warships to seize craft going into French ports, President Adams directed our ships to capture trading vessels both going to and from French ports. In these circumstances, when an American frigate seized a Danish vessel, the *Flying Fish*, upon leaving a French port, the Court held the action was unlawful even should the vessel have been an American ship. *The Flying Fish*, 2 Cranch 170 (1804).

Now on the surface, this decision may appear to support the validity of congressional restraints over the conduct of military hostilities. However, upon close inspection, it can be seen that even this citation is a highly dubious one. In the first place, the Court's discussion of the conflict between the presidential order and the congressional statute was superfluous. Neither the President nor Congress had authorized the seizure of neutral vessels, which the *Flying Fish* was. The capture of a Danish vessel was unlawful under either claim of authority.

Second, the decision had no effect whatsoever upon subsequent military activities. The case was decided in 1804, 4 years after peace had been achieved. What the Court would decide in the course of an ongoing war, and what the President's reaction would be if a holding shackled his ability to conduct that war, present a far different situation than the minor incident settled by this decision.

Third, the decision was not aimed at stopping the President from using American forces. The case solely affected the civil obligations of the commander of the one armed vessel which had taken the Danish ship.

USE OF MILITARY FORCES ABROAD WITHOUT REFERENCE TO CONGRESS

The fact is, Mr. Chairman, I know of no record that has been made, and I know of no legislative history, or constitutional history, or Court history that gives us the right to legislate as the matter of American military and foreign policy. To the contrary, I am convinced there is no question that the President can take military action at any time he feels danger for the country or for its freedoms or, stretching a point, for its position in the world. The truth of the matter is that out of the 158 military actions this country has engaged in during its history of nearly 200 years as a Republic, only five, Mr. Chairman, only five of them have been declared wars.

I find support for this impression in the works of the late Prof. Edward Corwin, who has written about the President's power to repeal was as follows:

> It had developed into an undefined power—almost unchallenged from the first and occasionally sanctified judicially—to employ without congressional authorization the Armed Forces in the protection of American rights and interests abroad whenever necessary. (Corwin, "Who has the Power to Make War?" New York Times Magazine, July 31, 1949, p. 14.)

Even as early as 1912, U.S. Solicitor of the Department of State, J. Reuben Clark, was able to compile a list of 48 instances in which the United States used military force in foreign countries without any statutory or treaty right and in accordance only with a general authority recognized by international law. (Clark, "Right to Protect Citizens in Foreign Countries by Landing Forces," 1912, revised edition.)

By 1945, James Grafton Rogers, a former Assistant Secretary of State, was able to expand upon this statement by saying, and I quote:

> The Executive has used force abroad at least a hundred times to accomplish national purposes without reference to Congress. (Rogers, "World Policing and the Constitution," 1945.)

Four years ago, the State Department updated its list of armed actions taken by the United States without any declaration of war and this time the total reached 137 incidents. (Department of State Research Project No. 806A, August 1967.)

Regardless of the actual number, and my own research has turned up 153 such actions, I agree with Professor Corwin who evaluated the Rogers list as follows:

> While inviting some pruning, the list demonstrates beyond peradventure the power of the President, as Chief Executive and Commander in Chief, to judge whether a situation requires the use of available forces to support American rights abroad and to take action in accordance with that decision. (Supra, p. 399.)

And yet some writers argue these instances are "relatively minor" and "short lived." Henry Steele Commager complained they were confined to the Western Hemisphere. Let us study the record and see for ourselves.

To this end, Mr. Chairman, I have collected a list of 153 military operations which were conducted without any declaration of war. I would be glad to offer this material at the end of my statement if the committee would care to have it in the record. But Professor Commager may be interested to know the list includes 59 military actions which occurred before 1950 outside the Western Hemisphere.

Also, the summary shows that 56 incidents involved actual gunfire or the imminent threat of warfare. Sixty-four continued beyond 30 days. And only 63 out of 153 could arguably have been initiated under any form of legislative instrumentality.

### WERE THE OPERATIONS MINOR?

Were the operations minor? And that I must say is a very difficult question. Between 1899 and 1901 the United States used over 126,000 troops against the Philippine insurrection. This represented at least 60 percent of our total military force then in existence.

I might inject, Mr. Chairman, although it is not a part of my formal statement, at one time in history 50 percent of the American Army was located in the territory of Arizona fighting 200 Indians.

Remember Commodore Perry's expedition? In 1854, at a time when American forces did not exceed 50,000 men, Perry took 2,000 of them to the other side of the world in order to pressure Japan into reaching a commercial treaty with us.

In 1927, we had 5,670 troops ashore in China and 44 naval vessels in its waters. After World War I had ended, we landed 5,000 soldiers at Archangel in Russia, plus 9,000 more in Siberia.

Were these engagements "minor?" Set in the perspective of their times, I think not. In the words of Professor Henry Monaghan, who has written an article on this issue:

> The validity of each of the precedents . . . need not be separately defended. Taken as a whole, they seem to me to add up to the following: with ever-increasing frequency, presidents have employed that amount of force that they deemed necessary to accomplish their foreign policy objectives. When little force was needed (e.g., in our incursions in Latin America), little was used; when larger commitments were necessary, they too were forthcoming. (Monaghan, "Presidential War-Making," 50 Boston U. L.R., Spring, 1970, p. 27.)

### PRESIDENTIAL POWER IN CURTISS-WRIGHT DECISION

What are the powers that Presidents have claimed in order to take these actions? First, I suggest we might reexamine the words of the Supreme Court in the *Curtiss-Wright* decision, where the country's highest tribunal declared it was "dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal Government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319–320 (1936).

PRESIDENTIAL POWERS UNDER ARTICLE II OF CONSTITUTION

Next, we might consider the wide range of powers that has been granted to the President under the first sentence of article II of the Constitution, which reads:

> The Executive power shall be vested in a President of the United States of America.

It was Alexander Hamilton who first used this sentence in arguing that the President's role in international matters is a positive one. In a series of articles in the "Gazette of the United States," Hamilton claimed this clause had vested in the President all the general executive powers of a sovereign nation, including the right to form policy, which "may, in its consequences, affect the exercise of the power of the legislature to declare war."

President Taft, who was later Chief Justice of the Supreme Court, held much the same view. In 1916, during lectures at Columbia, he stated, and I quote:

> Under the Constitution, only Congress has the power to declare war, but with the Army and the Navy the President can take action such as to involve the country in war and to leave Congress no option but to declare or to recognize its existence.

There is a third power of the President, which is set forth in section 3 of article II of the Constitution. This provision places upon the President, and the President alone, the duty and right to "take care that the laws be faithfully executed."

Now, as we all know, the laws of the land include international law as well as domestic law. And inasmuch as it is the President who carries out our international obligations, it would seem to be left for him to interpret the scope of those obligations.

Again, if I may quote Professor Corwin, it appears this particular view has received judicial support. In this famous work on the Presidency, Corwin writes, and I quote:

> Thanks to the same capacity to base action directly on his own reading of international law—a capacity which the court recognized in terms in the *Neagle* case—the President has been able to gather to himself powers with respect to warmaking which ill accord with the specific delegation in the Constitution of the war-declaring power to Congress.

Corwin, *The President—Office and Powers*, Chapter V.

In the *Neagle* case, which Corwin spoke about, the Supreme Court ruled that the power of the President to enforce the laws extends to the

> rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution.

*In re Neagle*, 135 U.S. 1, 64 (1889).

PRESIDENT'S POWER AS COMMANDER IN CHIEF

Finally, Mr. Chairman, we come to the President's power as Commander in Chief of the Armed Forces, which is spelled out in article II, section 2 of the Constitution. The President is designated commander in chief, and I believe him to be just that, even having the power as Lincoln once almost did to publicly assume command of the armies in the field.

Just why the Founding Fathers saw fit to confer this title on him and to invest him with these powers, I've never quite been able to understand; but I have a growing feeling that with the recognized and infinite wisdom of the Founding Fathers, they realized that a single man with these powers who would not be disturbed by the politics of the moment would use them more wisely than a Congress which is constantly looking toward the political results.

Let me give you an example of what leads me to this thought.

Mr. Chairman, I might repeat what I have often said, before making these remarks, and that is I am half Jewish and I am darned proud of it. But let me just suggest an election year is upon us and recognizing there is a large concentration of Jews in all of the large eastern cities, and some of the western ones, and they are a strong voting bloc, wouldn't it be perfectly proper to expect a Member of Congress from that area to stand up and demand strong action in defense of Israel—while, at the same time, with no strong concentrations of South Vietnamese living any place in the United States, a politician would not be so interested in that part of the world?

Would it be improper to foresee this same attitude arising on behalf of the Italians should they suddenly become embroiled in an action which would require our assistance, or on behalf of any other country in which we find a large number of people constituting a minority living in our country?

Would it not be proper to assume therefore that the Founding Fathers in their wisdom foresaw the day when this situation might come about, and realizing that a Congress divided amongst different minority interests would be loath to give proper direction to a single American course, though the power of war and peace might better be vested in a single man where the probability of minority weight might not have this effect?

Mr. Chairman, I may be terribly wrong in this surmise, and of course I hope I am, but I believe it would offer an explanation of a means by which our forefathers and we ourselves were meant to become a single people with a single purpose. These are, of course, my own thoughts. I have gathered them from no other place because I have not seen them recorded in other places.

Mr. Chairman, to get on with my discussion of the President's power as Commander in Chief, I should mention that what little judicial holdings there are suggest this power is a broad one.

In 1860, Justice Nelson, who was sitting as a district judge, upheld the authority of the President to take whatever action he determines proper to protect the lives and property of American citizens abroad, without awaiting word from Congress. *Durand* v. *Hollins*, 4 Blatch 451.

Six years later, in *Ex parte Milligan*, the Supreme Court pointedly stated "Congress cannot direct the conduct of campaigns . . ." 71 U.S. 139 (1866).

In 1897, the Court of Claims held: "Congress cannot in the disguise of 'rules for the government' of the Army impair the authority of the President as Commander in Chief." Significantly, this decision was later affirmed by the Supreme Court. *Swaim* v. *U.S.*, 28 Court of Claims 173, 221; 165 U.S. 553.

Finally, in 1904, the Court of Claims restated its view of the President's ability to act without authority from Congress. The court said, while speaking of the undeclared war in the Philippines, "In time of war, the Commander in Chief has the same powers as other civilized governments, and the exercise of them needed no ratification to give to them effective force." *Warner, Barnes and Co.* v. *US*, 40 Court of Claims 1, 32.

Mr. Chairman, I do not expect these few citations will convince anyone that the President enjoys an exclusive role in the domain of foreign military matters. But I do hope I have raised enough questions and disclosed enough varying positions to suggest it may be improper and unwise to adopt the opposite view—that the controlling powers are deposited solely with Congress.

### RESOLUTION OF DIVISION OF POWERS AT POLITICAL LEVEL

Mr. Chairman, the truth may lie somewhere in between these two theories and perhaps the power is divided among both branches, to be resolved on a political level.

And if this be so, the American citizens may not be badly served. The Constitution clearly vests the power of the purse in Congress and even limits appropriations for the military to 2 years at a time. This may be a very unwise restraint to use, but nevertheless it exists. In addition, the forum of public opinion, backed by a free press, can place a true check on the President's decisions.

### CONSTITUTIONAL AMENDMENT TO CHANGE PRACTICE SUGGESTED

In summary, Mr. Chairman, it is my opinion it would be most improper for Congress, by legislation, to change the long established practice of Government through which the President has protected the freedoms of the country. If a majority should feel deeply enough this practice must be changed, I believe it is a matter of such serious consequence to the future of our Republic that it would be far wiser if they prepared an amendment to the Constitution so the people could vote on it in their State legislatures. Though I would not support it if I felt it would be a vote for American isolation, a vote to make this country an ingrown, third-rate power, or a vote for dishonoring an American commitment, I certainly would be the first one to say, yes, let the America people speak their voice on it.

In closing, Mr. Chairman, I have to agree with every one of you sitting in this room who spends most of his free time out visiting with the American people that there is a very grave concern about the powers vested in the President, not only in the field of warmaking but more and more in the powers that govern our every day lives, and while I think the present approach is the proper one, I would be perfectly willing to offer an amendment to the Constitution, written in conjunction with you gentlemen, that would curtail his powers and spread the powers more between the two political branches of Government. As I say, even though I strongly disagree with this approach, I think the American people have a right to say something about it. That concludes my testimony, Mr. Chairman.

(Appendix follows:)

# APPENDIX

## A. Chronological List of 153 Military Actions Taken by the United States Abroad Without a Declaration of War

*1798–1800: Quasi-War with France.*

When John Adams became President in 1797, he faced the serious problem of strained relations between France and the United States. France was displeased with the terms of the treaty the United States had concluded with England in 1794 and had made it a practice to seize American merchant ships and to manhandle their crews. Adams at first attempted to negotiate a settlement. His envoys arrived in France in October 1797, but, when the French demanded exorbitant bribes and loans, the envoys rejected the proposals and departed.

Adams, thereupon, decided to abandon his attempts to appease the French and, in March 1798, asked Congress for the power to arm merchant ships and take other defensive measures. The opposition party balked, but when the details of the French demands were made public both the American public and Congress reacted strongly against the French. Congress acceded to most of Adams' requests. It created a Navy Department, voted appropriations for new warships, and authorized the enlistment of a "Provisional Army" for the duration of the emergency. In July 1798, the French treaties and consular conventions were abrogated.

The result was a "quasi-war" during which neither country declared war. The America Navy, which won some notable victories, attacked only French warships and privateers and fought primarily for the protection of commerce. Some ninety French ships were caputred during this naval war. In 1800 a convention was agreed to and peace was achieved.

*1801–1805: War with Tripoli.*

During the early years of the Republic, the United States, following the practice of several European nations, paid tribute to North African pirates. Shortly after Jefferson became President, the Pasha of Tripoli, dissatisfied with the apportionment of tribute, declared war on the United States (May 1801). Jefferson thereupon sent warships to the Mediterranean. After naval actions and landings under Commodore Preble, an inconclusive treaty of peace with Tripoli was signed in 1805. Congress passed various enabling acts during the conflict but never declared war.

*1806: Mexico (Spanish territory).*

Captain Z. M. Pike, with a platoon of troops and on the orders of General James Wilkinson, invaded Spanish territory at the headwaters of the Rio Grande, apparently on a secret mission. Pike was imprisoned and later released.

*1806–1810: Gulf of Mexico.*

American gunboats operated from New Orleans against Spanish and Frenen privateers.

*1810: West Florida (Spanish territory).*

Governor Clairbourne of Louisiana, on orders from the President, occupied with troops disputed territory east of the Mississippi as far as the Pearl River. No armed clash occurred.

*1812: Amelia Island and other parts of East Florida (Spanish territory).*

President Madison and Congress authorized temporary occupation of Amelia Island and St. Augustine by American troops in order to prevent occupation by any other power, but, when General George Matthews took possession by making himself the head of a revolutionary party, the United States disavowed his action because of its irregularity. This incident is included only for purposes of historical completion.

*1813: West Florida (Spanish territory).*

On authority granted by Congress, General Wilkinson seized Mobile Bay with 600 soldiers; a small Spanish garrison gave way without fighting.

*1813–1814: Marquesas Islands, South Pacific (claimed by Spain).*

United States marines built a fort on one of the islands to protect three captured prize ships.

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*1814–1825: Caribbean Area.*

There were repeated engagements between American ships and pirates both ashore and off shore about Cuba, Puerto Rico, Santo Domingo, and Yucatan.

In 1822, Commodore James Biddle employed a squadron of two frigates, four sloops of war, two brigs, four schooners, and two gunboats in the West Indies. The United States sunk or captured 65 vessels.

*1815: Second Barbary War (Algiers).*

In 1812 an Algerian naval squadron operated against American shipping in the Mediterranean. In one attack an American merchantman was captured and its crew imprisoned. With the termination of the war with England, the United States was able to turn its attention to Algiers; in March, 1815, Congress passed an act that authorized the use of armed vessels "as may be judged requisite by the President" to provide effective protection to American commerce in the Atlantic and the Mediterranean. The act also made it lawful to take prizes. A naval squadron of 10 vessels under Commodore Stephen Decatur attacked Algiers, compelling the Dey to negotiate a treaty. Decatur also demonstrated at Tunis and Tripoli. All three states were forced to pay for losses to American shipping, and the threats and tribute terminated.

*1816–1818: Spanish Florida.*

During the "First Seminole War," United States forces invaded Spanish Florida on two occasions. In the first action, they destroyed a Spanish fort harboring raiders who had made forays into United States territory. In the second, Generals Jackson and Gaines attacked the Seminole Indians because their land was a haven for escaped slaves and border ruffians. In the process of pursuing the Indians, United States forces attacked and occupied Spanish posts.

*1817: Amelia Island (Spanish Territory).*

Under orders from President Monroe, United States forces landed and expelled a group of smugglers, adventurers, and freebooters.

*1822: Cuba (Spanish Territory).*

United States naval forces landed on the northwestern coast of Cuba and burned a pirate station.

*1823: Cuba (Spanish Territory).*

Between April and October naval forces made a number of landings in pursuit of pirates, apparently incident to Congressional authorization which became operative in 1822.

*1824: Cuba (Spanish Territory).*

In October, the *U.S.S. Porpoise* landed sailors to pursue pirates during a cruise authorized by Congress.

*1824: Puerto Rico (Spanish Territory).*

Commodore David Porter headed a landing party of 200 men that attacked a town inhabited by pirates who had insulted American naval officers. He forced an apology from the pirates. This action was claimed to be incident to Congressional authorization, but he was court-martialed for exceeding his powers.

*1825: Cuba (Spanish Territory).*

In March, British and American forces landed on two offshore Cuban islands to capture pirates who were based there. The action appears to be incident to Congressional authority.

*1827: Greece.*

In October and November, United States forces from the *U.S.S. Warren* landed to hunt pirates on three Greek islands.

*1831–1832: Falkland Islands (Argentina).*

American forces under Captain Duncan of the *U.S.S. Lexington* landed to investigate the capture of three American sailing vessels. The Americans released the vessels and their crews and dispersed the Argentine colonists.

*1832: Sumatra.*

A force of 250 men from the *U.S.S. Potomac* landed to storm a fort and punish natives of a town for an attack on American shipping and the murder of crew members.

*1833: Argentina.*

Between October 31 and November 15, at the request of American residents of Buenos Aires, a force of 43 marines and sailors landed from the *U.S.S. Lexington* to protect American lives and property during an insurrection. There was no American Legation or Consulate in Buenos Aires at that time.

*1835–1836: Peru.*

Marines from the *U.S.S. Brandywine* landed at various times at Callao and Lima to protect American lives and property during a revolt.

*1838–1839: Sumatra.*

American forces landed to punish natives of two towns for attacking American ships.

*1840: Fiji Islands.*

American forces totaling 70 officers and men landed to punish natives of two towns for attacking American exploring and surveying parties.

*1841: Drummond Island (Kingsmill Group, Pacific Ocean).*

American marines from the *U.S.S. Peacock* landed and burned two towns to avenge the murder of a seaman by natives.

*1841: Samoan Islands.*

American forces from the *U.S.S. Peacock* landed to avenge the murder of a seaman. They destroyed some native settlements.

*1842: Mexico.*

Acting on the misconception that war had started between the United States and Mexico, Commodore T. A. C. Jones, in command of a squadron cruising off the California coast, landed at and occupied Monterey. He withdrew and saluted. A similar incident occurred a week later at San Diego. This is not cited as a precedent, but for purposes of historical completeness.

*1843: West Africa.*

In November and December, four United States vessels demonstrated and landed various parties (one of 200 marines and sailors) to discourage piracy and the slave trade along the Ivory Coast and to punish attacks made by the natives on American seamen and shipping. In the process, they burned villages and killed a local ruler.

*1844: Mexico.*

President Tyler deployed our forces to protect Texas against Mexico, pending Senate approval of a treaty of annexation, which later was rejected.

*1846: Mexico.*

President Polk ordered General Scott to occupy disputed territory months preceding a declaration of war. Our troops engaged in battle when Mexican forces entered the area between the Nueces and Rio Grande Rivers. The fighting occurred three days before Congress acted.

*1849: Smyrna (Now Izmir, Turkey).*

In July, the *U.S.S. St. Louis* gained the release of an American seized by Austrian officials.

*1851: Turkey.*

After a massacre of foreigners (including Americans) at Jaffa, the United States Mediterranean Squadron was ordered to demonstrate along the Turkish coast. Apparently no shots were fired, but the display amounted to compulsion.

*1851: Johanna Island (East of Africa).*

The *U.S.S. Dale* delivered an ultimatum, bombarded the island, and landed a force to punish the local chieftain for the unlawful imprisonment of the captain of an American whaler.

*1852–1853: Argentina.*

Several landings of marines took place in order to protect American residents of Buenos Aires during a revolt.

*1853: Nicaragua.*

American forces landed at Punta Arenas and remained for two days (March 11–13) to protect American lives and interests during political disturbances.

*1853–1854: Japan.*

Commodore Matthew C. Perry led an expendition consisting of four men-of-war to Japan to negotiate a commercial treaty. Four hundred armed men accompanied Perry on his initial landing at Edo Bay in July, 1853, where he stayed for ten days after refusing to leave when ordered. He then sailed south, landing a force at the Bonin Islands, where he took possession, and at the Ryukyus, where he established a coaling station. In March, 1854, he returned to Edo Bay with ten ships and 2,000 men, landed with an escort of 500 men, and after six weeks signed a treaty with Japanese authorities at Kanagawa. The whole campaign was on executive authority.

*1854: China.*

American and British forces consisting of 150 English sailors, 60 United States sailors, and 30 merchant sailors landed at Shanghai to protect their nationals during a battle between Chinese imperial and revolutionary troops.

*1854: Greytown, Nicaragua.*

The commander of an American naval vessel demanded reparation after an American official was injured during a riot. When this was not forthcoming, the vessel bombarded the town. Foreign property, including British and French, was destroyed. President Pierce defended the action of the American commander in his annual message to Congress.

*1855: China.*

There were two brief actions by United States warships, the first at Shanghai to protect American interests there, the second at Hong Kong against pirates.

*1855: Fiji Islands.*

American marines from the sloop-of-war the *U.S.S. John Adams* landed to seek reparations for depredations against Americans. The landing party fought skirmishes and burned some villages.

*1855: Uruguay.*

United States and European naval forces put sailors ashore to protect American interests during an abortive revolt in Montevideo.

*1856: Panama, Republic of New Granada.*

United States forces landed and stayed two days to protect Americau interests, including the Isthmian railroad, during an insurrection. (By the treaty of 1846 with New Granada, the United States had acquired the right to protect the Isthmus and to keep it open, in return for guaranteeing its neutrality.)

*1856: China.*

The United States warships *Portsmouth* and *Levant* disembarked 280 officers and men to protect American interests at Canton during hostilities between the British and the Chinese and in response to an unprovoked assault upon an unarmed boat displaying the United States flag. The American squadron took and destroyed four Chinese forts.

*1857: Nicaragua.*

In May, Commander C. H. Davis, in charge of a United States man-of-war, mediated between the forces of William Walker, an American citizen and filibuster who was trying to seize Nicaragua, and the Central American army opposing him. The leader of the Central American forces agreed to allow Walker and his men to surrender to Davis. In November and December, marines from the United States vessels *Saratoga* and *Wabash* landed at Punta Arenas and blocked another attempt by Walker to seize power. An American commander compelled Walker to leave the country, an action tacitly disavowed by the Secretary of State and apparently repudiated by President Buchanan.

*1858: Uruguay.*

Forces from two United States warships landed in January to protect American property during a revolt in Montevideo. The action was taken in conjunction with the forces of other powers at the request of the local government.

*1858: Fiji Islands.*

About 60 marines and sailors from the *U.S.S. Vandalia* landed to punish natives for the murder of two American citizens and engaged in a fierce conflict with 300 native warriors.

*1858–1859: Turkey.*

American citizens were massacred in 1858 at Jaffa and mistreated elsewhere. In the face of Turkish indifference, the Secretary of State asked the United States Navy to make a display of force along the Levant.

*1859: Mexico.*

Two hundred United States soldiers crossed the Rio Grande in pursuit of the Mexican bandit Cortina.

*1859: China.*

Forces from the *U.S.S. Mississippi* landed at Woosung and Shanghai to protect American interests and restore order. The American consul had called on the ship for assistance.

*1859: Paraguay.*

Congress authorized a naval squadron to seek redress for an attack on a naval vessel in the Parana River during 1855. Apologies were forthcoming after a display of force, which amounted to compulsion.

*1860: Kissembo, West Africa.*

About 50 American forces from the sloop-of-war *Marion* landed twice to prevent the destruction of American property.

*1860: Colombia (State of Panama).*

Under Commander Porter of the *St. Mary,* American forces landed to protect American interests during a revolt. This may have been authorized pursuant to the Treaty of 1846.

*1863: Japan.*

When Japanese shore batteries at Shimonoseki fired on a United States merchant ship, the American Minister demanded redress. Accordingly, the *U.S.S. Wyoming* retaliated by firing on three Japanese vessels lying at anchor. The shots were returned, and, by the time the action was over, there were casualties on both sides. A claim of $10,000, presented by the American Minister to the Japanese Government for the action against the merchant ship, was promptly paid.

*1864: Japan.*

Between September 4 and 8, naval forces of the United States, Great Britain, France, and the Netherlands jointly forced open the Straits of Shimonoseki, which had been closed in violation of commercial agreements. Shore batteries were destroyed and 70 cannons seized. In addition, the Japanese Government agreed to pay $3,000,000 to cover the expenses of the action. The share the United States received was regarded as grossly disproportionate by Congress, which, in 1883, voted to return the sum to Japan.

*1865–1866: Mexican border.*

In late 1865, General Sheridan was dispatched to the Mexican border with 50,000 troops to back up the protest made by Secretary of State Seward, who notified Napoleon III that the presence of over 25,000 French troops in Mexico "is a serious concern to the United States." In February 1866, Seward demanded a definite date be set for withdrawal and France complied. Though American forces did not cross the border, the threat of foreign military operations was clear and imminent.

*1865: Panama.*

American forces from the *U.S.S. St. Marys* landed to protect American interests during a revolt. This was apparently implied by the Treaty of 1846.

*1866: China.*

Various landings were made in June and July, including one to punish an assault on the American Consul at Newchwang.

*1866: Mexico.*

To protect American residents, General Sedgwick and 100 men obtained the surrender of the Mexican border town of Matamoras in November. He was ordered to withdraw to Texas after three days, and his act was repudiated by the President. This incident is included only for historical purposes.

*1867: Formosa.*

Some 181 American forces from the *U.S.S. Ashuelot* landed to punish natives who had murdered the crew of a wrecked American bark. Several huts were burned.

*1868: Japan.*

Various landings were made in February to protect American interests during local hostilities in which one American seaman had been wounded.

*1868: Uruguay.*

At the request of local Uruguayan authorities, several landings were made at Montevideo during the month of February in order to protect foreign residents and the customs house during an insurrection.

*1868: Colombia.*

An American force landed at Aspinwall in April to protect the transit route during the absence of local police. This was impliedly permitted by the Treaty of 1846.

*1870: Mexico.*

The *U.S.S. Mohican* pursued a pirate ship up the Tecapan River near Mazatlan in June and destroyed it during a pitched battle.

*1871: Korea.*

American landing forces under Admiral Rodgers captured five Korean forts after a surveying party, which had been granted permission to make certain surveys and soundings, had been attacked. No treaty or convention was in effect.

*1873: Colombia.*

About 200 American forces landed on three different occasions near the Bay of Panama to protect American interests during local hostilities. The action was impliedly allowed by the Treaty of 1846.

*1873–1882: Mexico.*

United States troops repeatedly crossed the Mexican border to pursue cattle thieves. Mexico occasionally reciprocated. Such incursions were finally recognized as legitimate by an agreement in 1882.

*1874: Hawaii.*

A party of 150 men from two United States vessels landed to preserve order at the request of local authorities.

*1876: Mexico.*

At the request of the United States Consul at Matamoras, American forces were landed under Commander Johnson to preserve order when the town was temporarily without a government.

*1882: Egypt.*

Over 100 forces from the *U.S.S. Lancaster* and two other vessels landed at Alexandria in July when the city was being bombarded by the British navy, in order to protect American interests there, including the American consulate.

*1885: Colombia (State of Panama).*

American forces landed to protect American property and guard valuables in transit over the Isthmus during local revolutionary activity. The action was likely authorized under the Treaty of 1846.

*1888: Korea.*

Twenty-five men from the *U.S.S. Essex* landed to protect American residents in Seoul during unsettled political conditions. The action was requested by the American Minister.

*1888–1889: Samoan Islands.*

In 1886, the German consul announced that the Sanwan group was henceforth a German protectorate, an action that brought the United States and Great Britain together in opposition. By 1889, Germany and the United States were close to a direct confrontation. The United States and Germany, together with Great Britain, shared certain treaty rights in Samoa for the maintenance of naval depots. In November 1888, United States marines landed from the *U.S.S. Nipsic*

to protect American interests after civil strife broke out ashore. In January, 1889, German forces landed, and, when those forces were attacked by the natives, German ships shelled the island. This action by Germany aroused the American public, and Congress appropriated $500,000 for the protection of American lives and property on the island and $100,000 for the development of Pago Pago harbor. The United States also ordered two more warships to the scene. All three powers had warships on the scene and an untoward event might have touched off war had not a hurricane in March, 1889, destroyed all the warships except one British vessel. Thereafter, the Germans took the initiative and invited the three powers to a conference on Samoa. Representatives of Great Britain, the United States, and Germany met in Berlin, and in April, 1889, they created a new government for Samoa and established a three-power protectorate there. In 1899 the Samoans were divided, the United States acquiring Tutuila.

*1888: Haiti.*

American warships made a display of force in December to obtain the release of an American merchant vessel captured by a Haitian warship. The Haitian Government surrendered the ship and paid an indemnity after Admiral Luce gave an ultimatum ordering its release before sunset.

*1889: Hawaii.*

At the request of the American Minister in Honolulu, the *U.S.S. Adams* sent a marine guard ashore for one day in July because of revolutionary disorder.

*Late 1880's: Bering Sea.*

United States patrol boats seized British sealers operating in the Bering Sea outside the three mile limit. Subsequently, the United States paid nearly $500,000 to Britain in damages. The incidents are mentioned only for reasons of historical completeness.

*1890: Argentina.*

The *U.S.S. Tallapoosa* landed a party in July to protect the American Consulate and Legation in Buenos Aires during a revolt.

*1891: Navassa Island, Haiti.*

American forces disembarked in May from the *U.S.S. Kearsarge* to protect American lives and property during a period of unrest. The action was taken pursuant to congressional action.

*1891: Chile.*

In August, 102 Americans of the South Pacific station landed at Valparaiso during a revolt in order to protect the American Consulate.

*1894: Brazil.*

The United States navy engaged in gunfire and a show of force in January to protect American shipping at Rio de Janeiro during a revolt of the Brazilian navy. President Cleveland stated our action "was clearly justified by public law."

*1894: Nicaragua.*

American forces landed in June, July, and August at Bluefields to protect American interests during a revolt.

*1894: Korea.*

At the request of the American Minister, a force of 21 marines and 29 sailors landed at Seoul in June to protect American lives and property during the Sino-Japanese War. A marine guard remained at the American Legation until 1896.

*1894: China.*

Marines disembarked from the *U.S.S. Baltimore* at Tientsin in November and marched to Peking for protection purposes during the Sino-Japanese war.

*1895: Colombia (State of Panama).*

Marines from the *U.S.S. Atlanta* landed in March to protect American interests during a revolt. This appears to have been authorized by treaty.

*1896: Nicaragua.*

Marines were put ashore at Corinto by the *U.S.S. Alert* during revolutionary disorders to protect American interests.

*1898: Nicaragua.*

Marines landed at San Juan del Sur by the *U.S.S. Alert* to protect Americans against disorder in February.

*1898–1899: China.*

American forces guarded the Legation at Peking and the Consulate at Tientsin from November, 1898, to March, 1899, during a period of unrest.

*1899: Nicaragua.*

In response to a petition from foreign merchants during an insurrection American marines landed in February in cooperation with British forces to protect life and property at San Juan del Norte and Bluefields.

*1899: Samoan Islands.*

Sixty Americans landed in March from the *U.S.S. Philadelphia*, and in April joined a British force in efforts to disperse native rebels. This may have been under color of treaty or statute.

*1899–1901: Philippine Islands.*

The United States employed 126,468 troops against the Philippine Insurrection without a declaration of war after the Treaty of Peace with Spain was concluded. Presumably the United States acted to suppress the rebellion under authority of the Treaty of Peace, which transferred to it the sovereignty possessed by Spain in the Philippine Islands.

*1900–1901: "Boxer" Rebellion (Peking).*

In 1900 President McKinley sent 5,000 troops to join the international military force organized for the relief of foreign legations besieged in Peking by Chinese "Boxers." Using troops already mobilized for the Spanish-American War and the Philippine Insurrection McKinley did not seek authority from Congress. Peace terms were concluded at an international conference, and a peace Protocol was signed September 7, 1901. The Protocol was not submitted to Congress. Because of the obvious inability of Chinese authorities to control local disorders, the United States acquired the right to maintain a guard at Peking for defense of the American Legation and to station military forces at certain points in Chinese territory to keep open communications between Peking and the sea. (Earlier, in 1858, the United States had acquired the right by treaty to station naval vessels in Chinese waters.)

*1901: Colombia (State of Panama).*

American forces went ashore in November and stayed until December to protect American property and to keep transit lines open across the Isthmus during serious political disturbances. This apparently was authorized by the Treaty of 1846.

*1902: Colombia (State of Panama).*

Marine guards landed in April to protect the railroad across the Isthmus during civil disorders. They continued to land at various times between April and November. This appears to have been authorized by the Treaty of 1846.

*1903: Honduras.*

American forces disembarked at Puerto Cortez in March to protect the American Consulate and port facilities during a period of revolutionary activity.

*1903: Dominican Republic.*

In April, 29 marines landed at Santo Domingo, where they remained for three weeks to protect American interests during a period of political disturbances.

*1903–1904: Turkey.*

A marine guard landed and remained for a few days at Beirut in April to protect the American Consulate during a Moslem uprising. Also our Mediterranean Squadron demonstrated at Beirut from September to January and at Smyrna the next August.

*1903: Panama.*

A revolution leading to the independence of Panama from Colombia broke out in November. Marines landed from the *U.S.S. Nashville* to prevent Colombian troops from carrying out a threat to kill American citizens, after Commander Hubbard had refused to allow the Colombians to transport their troops across the Isthmus. Marine guards remained on the Isthmus from the date of Panamanian independence (November 4, 1903) until January, 1914, to protect American interests during the construction of the Canal. This was allowed under the Hay-Bunau-Varilla Treaty.

*1903–1904: Abyssinia.*

Twenty-five American marines were sent with U.S. Counsel General to protect him while negotiating our treaty.

*1904: Dominican Republic.*

The *U.S.S. Detroit* landed marines at Puerto Plata and Santo Domingo to protect American lives and property during a revolt.

*1904: Morocco.*

A squadron demonstrated in Moroccan waters in June to force the release of a kidnaped American. A marine contingent landed briefly to protect the Consul General.

*1904: Panama.*

American troops were used to protect American lives and property at Ancón in November when a revolt seemed imminent. This action seems to have been authorized by treaty.

*1904–1905: Korea.*

In January, American troops were sent to guard the American Legation at Seoul because of the outbreak of the Russo-Japanese War. They remained until November 1905.

*1906: Cuba.*

An American squadron demonstrated off Havana, and, in September, marines landed to protect American interests during a revolution. In October army units landed and took up quarters in many Cuban towns in connection with the temporary occupation of the country under a provisional governor appointed by the United States. This occupation was within the scope of the provision of the 1903 Treaty of Relations between the two countries, which gave the United States the right to intervene to preserve order. The occupation lasted until January 1909.

*1907: Honduras.*

During a war between Honduras and Nicaragua, the *U.S.S. Marietta* disembarked 10 men to guard the American Consulate at Trusillo. The *U.S.S. Paducah* also landed forces at Laguna and Choloma.

*1910: Nicaragua.*

One hundred men from the *U.S.S. Paducah* landed at Greytown to protect American lives and property during a revolt. The *U.S.S. Dubuque* also engaged in shows of force. Joined combat was "hourly expected."

*1911: Honduras.*

Sixty men from the *U.S.S. Tacoma* and *Marietta* went ashore at Puerto Cortez during a revolt to protect American interests. The American Commander threatened to use force if necessary.

*1911–1912: China.*

American forces made six landings to protect American interests during the initial stages of a revolution. They were stationed at Foochow, Chinkiang, Peking, Hankow, Nanking, Shanghai, and Taku. This may have occurred pursuant to treaty rights acquired during the "Boxer" Rebellion.

*1912: Honduras.*

A small force landed in February from the *U.S.S. Petrel* at Puerto Cortez to protect an American-owned railroad there. Apparently Washington disapproved and the men were withdrawn in a day or two. This is cited for historical completeness only.

*1912: Panama.*

During June and July, at the request of local political groups, American troops supervised elections outside the Canal Zone. This was impliedly authorized by the Hay-Bunau-Varilla Treaty.

*1912: Cuba.*

American troops landed in eastern Cuba during a revolt and remained for three months to protect American interests. This appears to have been authorized by the treaty of 1903.

*1912: Turkey.*

A troop detachment from the *U.S.S. Scorpion* assisted in the protection of the diplomatic corps at Istanbul during the Balkan War.

*1912: Nicaragua.*

During a civil war, the President of Nicaragua asked the United States to protect its citizens resident there. Acting on a recommendation of the American Minister, President Taft ordered a detachment of marines to Managua in September, 1912. Other detachments landed at Bluefields and Corinto. Political stability returned to Nicaragua by January, 1913, but a detachment of marines was kept in Managua to guard the American Legation after the rest of the American troops withdrew. The Legation guard remained until 1925.

*1913: China.*

United States forces landed in July at Chapei and in August at Shanghai to protect American interests. Rogers reports there were many demonstrations and landing parties by United States forces for protection in China continuously from 1912 on to 1941. He writes: "In 1927, for example, this country had 5,670 troops ashore in China and 44 naval vessels in its waters. In 1933 we had 3,027 armed men ashore. All this protective action was in general terms based on treaties with China ranging from 1858 to 1901." (Rogers, "World Policing and the Constitution," p. 117, 1945.)

*1913: Mexico.*

In September a few marines disembarked at Ciaris Estero, during a period of civil strife, to aid in the evacuation of American citizens.

*1914: Haiti.*

American troops landed in January, February, and October to protect American citizens during a period of unrest.

*1914: Dominican Republic.*

During a period of revolutionary activity, United States naval forces fired at revolutionaries who were bombarding Puerto Plata, in order to stop the action. Also by a threat of force, fighting in Santo Domingo was prevented.

*1914: Occupation of Vera Cruz, Mexico.*

On April 9, 1914, a commissioned American naval officer and 9 crewmen from the *U.S.S. Dolphin*, anchored off the coast at Tampico, Mexico, were arrested and marched through the streets by local authorities. They were released and an apology was extended as soon as the local Mexican commander learned of the incident, but Admiral Mayo, the commander of the American squadron, also demanded a 21-gun salute to the American flag. This the Mexicans refused to give, and President Wilson, who backed Mayo's demands, promptly ordered the North Atlantic battleship fleet to Tampico. On April 20, he addressed Congress in a joint session and asked for authority to used the armed forces. While Congress debated, Wilson learned that a German steamer was headed toward Vera Cruz to unload munitions for Huerta, and he decided to direct the naval action against Vera Cruz instead of Tampico. American armed forces landed at Vera Cruz, and, after an armed engagement resulting in 400 casualties, the Americans occupied the city on April 22. The same day, apparently after the fighting began, Congress passed a joint resolution which declared (1) that the President was "justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for certain affronts and indignities committed against the United States" and (2) that "the United States disclaimed any hostility to the Mexican people or any purpose to make war upon Mexico." By November 1914, American troops had left Mexican soil.

*1915: Haiti.*

In July, at the initiative of the Executive, the United States placed Haiti under the military and financial administration of the United States, in part to forestall European intervention to collect debts. Marines were stationed in Haiti until 1934. The occupation was sanctioned by a treaty signed and ratified by the Senate in February 1916, but the first months of the occupation were on executive authority alone.

*1916: Dominican Republic.*

President Wilson ordered the occupation of Santo Domingo in May, 1916, owing to local unrest. At one point, 3,000 marines were ashore. The United States

placed a military governor in the Dominican Republic but turned political affairs over to the Dominicans in 1922. United States troops withdrew in 1924, and a general treaty signed that year formally sanctioned the previous occupation.

*1916: China.*

American forces landed at Nanking to quell a riot taking place on American property. Apparently this was authorized by a treaty.

*1916–1917: Pershing Expedition into Mexico.*

In October, 1915, the United States recognized the Carranza regime as the *de facto* government in Mexico. Another Mexican rebel, Pancho Villa, directed a campaign against the United States. In January, 1916, Villa's followers massacred 18 American mining engineers in Santa Ysabel, Mexico. The popular reaction in the United States was one of indignation. Resolutions favoring intervention were introduced in Congress, though not adopted.

On March 9, 1916, 400 of Villa's men raided Columbus, New Mexico, sacked the town, and killed 17 Americans. The American public was now incensed, and Wilson delayed sending an expedition only until he could obtain Carranza's consent. On March 13, 1916, when Carranza's government acceded to the United States request for permission to dispatch an expedition, Wilson ordered General John J. Pershing to take regular United States Army units into Mexico. On March 16 Pershing crossed the border with 6,000 troops. On the following day, Congress, with Wilson's knowledge and warm approval, adopted a joint resolution introduced by Senator Robert LaFollette sanctioning the use of the armed forces.

Villa successfully eluded Pershing, and the size of the expedition soon grew to such proportions (12,000 men) that Carranza protested and demanded its withdrawal, threatening war. Wilson on June 18 called out the National Guard and incorporated it into the Army, 150,000 militia were ordered to the Mexican border. Two days later, Secretary of State Lansing warned Carranza that any attack on American forces "would lead to the gravest consequences." But neither country really wanted war, and, although some minor clashes occurred between the forces of Pershing and Carranza, the crisis gradually subsided. In view of the deteriorating situation in Europe, Wilson decided to withdraw all American troops from Mexico in February 1917.

*1917: Cuba.*

American troops landed in February at Manzanilla to protect American interests during a revolt. Various other landings were made, and, though the revolt ended in April 1917, troops remained until 1922 because of continued unsettled political conditions. This was authorized by the Treaty of 1903.

*1918: China.*

American troops landed at Chungking to protect American lives during a political crisis. Apparently this was done pursuant to a treaty.

*1918–1919: Mexico.*

United States troops entered Mexico to pursue bandits three times in 1918 and six times in 1919. In August, 1918, there was a brief skirmish between American and Mexican troops at Nogales.

*1918–1920: Expeditions to Russia.*

Following the Bolshevik reovlution in Russia in 1917, Allied expeditions landed, in 1918, at Murmansk and then Archangel. At Archangel the United States contributed some 5,000 men and suffered some 500 casualties. The Allies also landed units in Siberia, where Bolshevik troops were fighting a force of 50,000 Czech soldiers who were trying to fight their way eastward; the Japanese sent 72,000 soldiers, the Americans sent 9,000, and the British and French provided minor contingents.

President Wilson, who acted without Congressional approval, agreed to participate in the allied expeditions in order not only to aid the anti-Bolsheviks but also to forestall any possible Japanese expansionist plans in Siberia. After the end of World War I, however, Congressional and public pressure for withdrawal of troops mounted. Wilson yielded to this pressure and withdrew the American troops by April 1, 1920.

*1919: Honduras.*

A small American force went ashore at Puerto Cortez to maintain order in neutral zone during an attempted revolt.

*1919–1920: Panama.*

American troops went outside the Canal Zone, on request of the Panamanian Government, to supervise elections. This apparently was authorized by treaty.

*1920: China.*

American forces landed at Kiukang and Youchow to protect American lives and property. Apparently this was authorized by treaty.

*1920: Guatemala.*

Forty men from the *U.S.S. Tacoma* and *Niagara* went inland to Guatemala City to protect the American Legation and other American interests during local fighting.

*1920–1922: Siberia.*

The United States stationed a marine guard on Russian Island, Bay of Vladivostok, to protect United States radio facilities and other property.

*1921: Panama-Costa Rica.*

American naval squadrons demonstrated for one day on both sides of the Isthmus to prevent war between the two countries over a boundary dispute. This was impliedly authorized by treaty.

*1922: Turkey.*

In September forces from several American warships went ashore with the consent of both Greek and Turkish authorities to protect American interests when the Turkish forces were advancing on the city of Smyrna.

*1922–1923: China.*

There were three landings by marines (at Tungchow, Foochow, and Masu Island) to protect Americans during periods of unrest. This appears to have been authorized by treaty.

*1924–1925: Honduras.*

There were intermittent landings to protect American lives and property during local unrest. In April, 1925, the *Denver* put ashore 165 men at Ceiba for a day to establish a neutral zone.

*1924: China.*

Troops landed at Shanghai in September to protect Americans during a period of unrest. Apparently this was authorized by treaty.

*1925: Panama.*

As a result of strikes and rent riots, and at the request of Panamanian officials, 600 troops from the Canal Zone entered Panama City in October and remained for 11 days to maintain order. This conformed to American treaty rights.

*1926–1933: Nicaragua.*

When local disturbances broke out in 1926, the Nicaraguan Government requested that American forces undertake to protect lives and property of Americans and other foreigners. In May the *U.S.S. Cleveland* landed a force of marines at Bluefields, and the area was declared a neutral zone. Later in the year, neutral zones were also established at Rio Grande and Puerto Cabezas. Early in January, 1927, American forces established neutral zones at Pearl Lagoon, Prinzapolca, and Rama, and a Legation guard of 175 men was established at Managua. In all, five thousand soldiers were put ashore in 1927.

This occupation was undertaken entirely on the executive responsibility of President Coolidge. The Democratic minority bitterly criticized his policy as a "private war" and as "imperialism," but did not question the President's authority.

*1926: China.*

American forces landed at Hankow in August and September during the Nationalists' attack there. This appears to have been authorized by treaty.

*1927: Armed Actions in China.*

Anti-foreign incidents in China, a nation wracked by almost chronic disorder from 1911 onwards, reached a climax in 1927. On January 3 of that year, a large mob tried to overrun the British consulate at Hankow, but Cantonese soldiers dispersed the rioters. The United States landed 50 sailors to protect American lives

and interests. Then in February, as a result of disorders in the Shanghai area, the United States landed 1,250 marines as reinforcements in Shanghai, where the combined foreign contingent reached 13,000 men.

The most serious incident of 1927 occurred in Nanking. Civilians and Nationalist soldiers in that city attacked foreigners, including Americans. On March 22, eleven men from the *U.S.S. Noa* landed to protect the American Consulate. In addition, the *U.S.S. Preston* sent a small guard to protect Americans and their property. Following further Chinese hostile action, the Consulate was evacuated, and Americans and other foreigners took refuge on property owned by the Standard Oil Company. When Nationalist soldiers attacked the beleaguered group, the *U.S.S. Noa* and a British vessel at the scene laid down a barrage which drove off the Chinese soldiers and allowed the foreigners to escape to the warships.

In April, 1927, 24 marines landed at Hankow to protect an American business firm, and in May forces from the *U.S.S. Ford* and *H.M.S. Wolverine* went ashore at Chinkiang to fight a fire caused by a direct hit on a Standard Oil fuel tank. In December during a revolt in Canton one officer and eight marines were sent to assist in the evacuation of American citizens.

By the end of 1927, the United States had 44 naval vessels in Chinese waters and 5,670 men ashore. Great Britain, France, Japan, and Italy also had considerable forces there. Although the United States had joined with them in vigorously protesting the "Nanking Incident," it refused to take joint military action when the Nationalists' replies proved unsatisfactory. The following year, when the Nationalists had gained greater control over Chinese territory and purged themselves of Communist support, the United States reached a separate accord with the Nationalists in regard to "Nanking Incident" and, in July, signed a treaty with Nationalist China which constituted United States recognition of the Nationalist Government. A gradual reduction of United States forces in China began in the same month.

*1932: China.*

American forces landed at Shanghai to protect American interests during the Japanese occupation of the city, apparently under treaty.

*1933: Cuba.*

During a revolution, United States naval forces demonstrated offshore but no forces landed. This was pursuant to the Treaty of 1903.

*1940–1941: Undeclared war.*

There are four examples of military occupations made by the President on foreign territory without Congressional authority and before we became a belligerent in World War II.

*1940: British possessions in Western Atlantic.*

On September 3, President Roosevelt informed Congress that he had agreed to deliver a flotilla of destroyers to Great Britain in exchange for a series of military bases granted us on British soil along the Western Atlantic. American troops and ships occupied a number of these points in the following months. The President did not ask approval from Congress.

*1941: Greenland (Denmark).*

In April, after the German invasion of Denmark, the U.S. Army occupied Greenland under agreement with the local authorities. Congress was not consulted and the action appears to be contrary to an express Congressional limitation on using troops outside the Western Hemisphere.

*1941: Iceland.*

By Presidential order, U.S. troops occupied Iceland on July 7, the same day Congress was notified. The President did not consult Congress in advance, and, in fact, the action clearly violated an express restriction that Congress had enacted a year before. Both the Reserves Act of 1940 and the Selective Service Act of 1940 provided that United States troops could not be used outside the Western Hemisphere. Iceland is invariably placed with the section on Europe in each World Atlas and is some 3,300 miles away from the United States, and is only 520 miles away from Britain.

*1941: Dutch Guiana.*

In November, the President ordered American troops to occupy Dutch Guiana by agreement with the Netherlands Government-in-exile.

*1950–1953: Korean Conflict.*

Communist armies of North Korea invaded South Korea on June 25, 1950. Later that day the United Nations Security Council denounced the aggression, called for an immediate cease-fire, and asked member nations "to render every assistance to the United Nations in the execution of this resolution." On June 27 President Truman announced that he had "ordered United States air and sea forces to give the Korean Government troops cover and support" and had ordered the Seventh Fleet to prevent any attack on Formosa and also to prevent the Chinese Government on Formosa from conducting any air and sea operations against the Communist mainland. The Security Council, on the same day, adopted a resolution "that the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore internal peace and security in the area."

The Department of State prepared a memorandum, on July 3, 1950, which defended the authority of the President to take the necessary action to repel the attack on Korea, using the argument that the "President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof."

Truce talks began in July, 1951, were broken off, then resumed, and were still continuing at the time of the Presidential campaign of 1952. It was not until July, 1953, that an armistice was signed.

*1958: Lebanon Operation.*

A period of protracted civil unrest began in Lebanon in May, 1958, led by Moslems who reportedly were aided by the United Arab Republic's President Nasser. When a pro-Nasser coup took place in Iraq July 14, President Chamoun of Lebanon, alarmed at these developments in the neighboring country, sent an urgent plea for assistance to President Eisenhower, saying his country could not survive both domestic rebellion and "indirect aggression." On July 15 President Eisenhower sent 5,000 marines to Beirut to "protect American lives" and to "assist" Lebanon in preserving its political independence. Three days later British paratroopers landed in Jordan. The President publicly stressed the provocative Soviet as well as Cairo radio broadcasts, and he referred to the "Eisenhower Doctrine," a statement of policy contained in a joint resolution of Congress, passed in 1957, which authorized the President to use United States armed forces to assist any Middle Eastern nation which requested help against Communist aggression. Eventually, 14,000 American soldiers and marines occupied strategic areas in Lebanon, but with orders not to shoot unless shot at.

On the day of the initial landings, the United States asked the United Nations Security Council to establish an international police force to preserve Lebanon's independence, but the Soviet delegate vetoed the American resolution. Further, the Soviet Union announced that it would hold military maneuvers near the Turkish and Iranian frontiers. As a result, the crisis now extended beyond the Lebanon-Jordan theater.

On August 21 the General Assembly passed a compromise resolution which called on the member states to respect one another's territorial integrity and observe strict non-interference in one another's internal affairs and which requested that practical arrangements be made leading to the withdrawal of troops from Lebanon (and Jordan). A degree of stability returned to Lebanon, and, on September 26, the United States notified the Secretary-General of the United Nations that, because of the improvements in the security situation in Lebanon, it had been possible, in agreement with Lebanese authorities, to withdraw a portion of the American forces and to work out a schedule to withdraw the remainder by the end of October.

*1961: Show of Naval Force in Dominican Waters.*

On May 30, Dominican dictator Rafael Trujillo was assassinated. Political conditions in the Dominican Republic steadily deteriorated during the summer and early autumn. Then, on November 15, General Hector Trujillo and General Jose Trujillo, brothers of the slain dictator, returned to the island. Secretary Rusk stated three days later they appeared "to be planning an attempt to reassert the dictatorial domination of the political and economic life of the country . . ." He added: "the United States is considering the further measures that unpredictable events might warrant."

On November 19, U.S. Navy ships took up positions three miles off the Dominican coast and Navy jet planes patrolled the shoreline. The show of force produced the desired result because the Trujillo brothers and other members of the family

departed for Miami before the day was over. According to one authority, "It later transpired that the Kennedy Administration was prepared to order U.S. marines ashore if President Joaquin Balaguer had so requested or if the Trujillos had ousted Balaguer from the presidency."

*1962: Cuban Naval Quarantine.*

President Kennedy could not wait for Congressional approval of his actions in the Cuban missile crisis of 1962. On October 24, confronted with a build-up of Soviet surface-to-surface missile bases in Cuba, President Kennedy ordered a quarantine 500 miles deep in the waters around Cuba. The blockade was aimed both at preventing delivery of additional Russian missiles and obtaining the removal of those offensive Russian weapons already in Cuba.

The crisis appears to date from Tuesday, October 16, when the Government's inner circles first began to discuss the idea of a blociade. On October 20, the First Armored Division began to move out of Texas into Georgia, and five more divisions were placed on alert. The base at Guantanamo Bay was strengthened. The Navy deployed 180 ships into the Caribbean. The Strategic Air Command was dispersed to civilian airfields and the B–52 bomber force was ordered into the air fully loaded with atomic bombs.

On October 22, President Kennedy went on television to explain before the nation the situation in Cuba and the reasons for the quarantine. On Tuesday, the 23, the Council of the Organization of American States formally authorized by a unanimous vote "the use of armed forces" to carry out the quarantine of Cuba. Apparently, one day later the blockade went into effect.

Other notable dates include October 27, when the Defense Department announced that 24 troop-carrier squadrons of the Air Force Reserve were being recalled to active duty; October 28, when Premier Khrushchev in a message to President Kennedy, announced he had ordered the dismantling of Soviet missile bases in Cuba; October 29, when the United States announced it would lift the blockade for two days; October 31, when the White House announced the arms blockade and air surveillance of Cuba would be resumed on November 1; November 11, when Deputy Secretary of Defense Gilpatric announced the United States had counted 42 medium-range missiles being removed from Cuba on Soviet ships; and November 20, when President Kennedy announced he had ordered the lifting of the naval blockade. Most of the U.S. ships participating in the blockade returned to their ports on November 21 and the same day 14,200 Air Force Reservists were released from active duty.

Finally, on December 6, U.S. Navy planes verified that 42 Soviet jet bombers were being transported home from Cuba and on December 8 nine thousand marines were sent back to California after service in the Caribbean area. The United States apparently closed the book on the Cuban crised about this date.

*1964: Congo.*

In August the United States sent four C–130 transport planes with approximately 100 flight and maintenance crews and paratroopers to protect the aircraft while on the ground. The purpose was said to be to provide airlift for the regular Congolese troops to combat areas during a rebellion against the government of Premier Tshombé and President Kasavubu. Earlier, in July, the United States had sent 68 officers and men to Leopoldville to advise the Congolese army. Both actions followed the withdrawal on June 30 of the last of the 20,000-man force which the United Nations has placed in the Congo in order to keep the peace.

Subsequently, in November, rebels in the Stanleyville area held over a thousand foreign civilian hostages, including 60 Americans, who were subjected to many atrocities and whom the rebels threatened to kill. When negotiations between the rebels and the United States failed, the United States and Belgium arranged to land Belgian paratroopers to undertake a humanitarian rescue operation.

About 600 Belgian paratroopers were posed on Ascension Island in the South Atlantic Ocean ready to fly into Stanleyville, but when their presence was prematurely disclosed, the rebels announced that hostages were being moved into the jungle. On November 24, the force was airdropped by U.S. transport aircraft in the Stanleyville area and liberated most of the hostages.

Despite insulting attacks by most African nations and Communist countries, Belgian paratroopers undertook a second rescue operation on November 26, capturing the rebel town of Paulis. During the four-day operation about 2,000 foreigners had been rescued.

With the completion of the two missions, plans began the next day for the departure of the paratroopers. President Johnson assumed "full responsibility" for the United States role in the decision to transport the Belgian troops in American planes.

On December 30, the U.N. Security Council adopted a resolution which called for an end to all foreign intervention in the Congo. In this regard, it may be noted Ambassador Stevenson listed Algeria, Ghana, the Sudan, the Congo Republic (formerly French Congo), Burundi, the Soviet Union, and Communist China as all having supplied arms to the Congolese rebels.

*1964–1965: Armed Actions in Laos.*

At the request of the Laotian Government, unarmed United States jet planes began flying reconnaissance missions over the Plaine des Jarres in May, 1964, in order to gather information on rebellious forces headed by leftist Pathet Lao. After two jets were shot down on June 6 and 7, President Johnson decided to carry out a limited repriasal. On June 9, U.S. Navy jets attacked a Communist gun position in north central Laos, and this was followed by 36 "sorties" which knocked out a number of Communist posts.

Steadily increasing numbers of U.S. Armed Forces were sent into Vietnamese combat during the years following passage of the Gulf of Tonkin Resolution. Both this resolution and the SEATO agreement itself have been claimed as authority for United States activities in Vietnam. In addition, several appropriations laws providing for support of the hostilities in Southeast Asia have been purported to represent authority for our engagement there. However, on March 12, 1970, the State Department presented the Senate Foreign Relations Committee its view that: "The Administration is not depending on any of these resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans." The Administration position was responsive to a then pending legislative proposal which would repeal the Formosa, Middle East, Cuba, and Gulf of Tonkin resolutions. The Tonkin Gulf Resolution was subsequently repealed by P.L. 91–672 (Jan. 12, 1971).

Since assuming office in January, 1969, President Nixon has made five withdrawal announcements. From a high of 540,000 men, President Nixon has authorized the withdrawal of 384,000 troops as of April, 1971. The latest announced reduction will bring the total number of American military forces in South Vietnam to 184,000 by December, 1971.

*1964–1971: Armed Action in Vietnam.*

Following the Geneva Accords of 1954 which provisionally divided Vietnam at approximately the 17th parallel, the Communists held control of the northern half of the country while anti-Communists maintained an increasingly precarious hold on the south. A U.S. Military Assistance Advisory Group which assumed responsibility for the training of the South Vietnamese army after the French relinquished command authority was steadily expanded as Communist guerrilla activity supported and directed from the north intensified to alarming proportions in South Vietnam. By 1962 there were 12,000 U.S. advisors; two years later, twice that number.

In August, 1964, at the request of President Johnson following an attack on American naval vessels in the Gulf of Tonkin, Congress passed the so-called Gulf of Tonkin Resolution, unanimously in the House and by a vote of 88–2 in the Senate that expressed approval and support of "the determination of 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." Also it provided that the United States is "prepared as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom." (South Vietnam is a protocol state of SEATO.) The joint resolution was signed into law on August 10 as Public Law 88–408.

*1965: Dominican Republic Operation.*

A revolt broke out in the Dominican Republic on April 24, 1965, and on April 28 President Johnson announced that Dominican military authorities had requested assistance from the United States in protecting the lives of United States citizens living in that country, as their safety could no longer be guaranteed. The President added that he had ordered the Secretary of Defense to put the necessary troops ashore to protect Americans and that this assistance would be available to the nationals of other countries as well. At the same time, the President stated that the Organization of American States had been advised of the situation by the Dominican Ambassador. On April 30 the Council of the OAS called for a cease-fire and convoked a Meeting of Consultation of Ministers of Foreign Affairs of the American Republics.

The first United States military contingent to the Dominican Republic consisted of 400 men, but this number proved insufficient. On May 2 the President announced that he was sending 200 more men immediately and that an additional 4,500 would go at the earliest possible moment. He cited the increasing Communist control of the revolutionaries, as well as the urgent need for food, medical supplies, and other humanitarian assistance to the Dominican people, as reasons for his decision. At their peak 21,500 United States troops were in the Dominican Republic.

On May 5, a five-man OAS peace commission succeeded in achieving a cease-fire agreement among the various contending forces; on May 6 the OAS voted to create an Inter-American Peace Force to assist in restoring peace and order. The United States promptly offered to make its military personnel available to the inter-American force. The arrival on May 21 of the first contingent of a Brazilian force permitted the withdrawal of 1,700 United States troops, and as other foreign contingents arrived, additional United States troops were withdrawn. By the end of 1965, the Inter-American Peace Force totaled 9,400. In the meantime, a formula to restore constitutional government, worked out by an OAS Ad Hoc Commission, had also made considerable progress. The inauguration of a civilian, Hector Garcia Godoy, as provisional president on September 3, 1965, was a major step toward the restoration of stability, although sporadic outbreaks of violence continued to plague efforts to achieve a settlement.

*1967: Congo.*

In July, Lt. General Mobutu, who had now become President of the Congo, was challenged by a revolt of about 170 white mercenaries and a few hundred Katangese troops. The Congolese army numbered around 32,000, but required outside logistical support in order to crush the revolt.

Responding to a direct appeal from President Mobutu, on July 8 the United States sent three C–130 military transport aircraft to the Congo, with their crews, to provide the Central Government with "long-range logistical support." Approximately 150 American military men arrived with the planes.

The small American task force immediately began to drop several plane loads of paratroopers and their equipment and continued to fly troops until November. On July 15, the first aircraft was withdrawn; on August 4, the second; and on December, the last.

B. Five United States Military Actions Taken Under a Declaration of War

*War of 1812.* (1812–1815)

On June 18, Congress approved a declaration of war against England. The war was officially concluded by the Treaty of Ghent, December 24, 1814, but the major battle of the war occurred with an American victory at New Orleans in January, 1815.

*War Between the United States and Mexico.* (1846–1848)

Congress declared war on May 11, 1846. The Treaty of Guadalupe Hidalgo ended the conflict on February 2, 1848.

*Spanish-American War.* (1898)

On April 25, 1898, the United States declared war against Spain. The peace treaty ending hostilities was signed in Paris on December 10, 1898.

*World War I.* (1917–1919)

The United States declared war on Germany on April 6, 1917, and against Austria on December 7, 1917. The Treaty of Versailles was signed on June 28, 1919. The treaty was never ratified by the United States.

*World War II.* (1941–1945)

The United States declared war on Japan December 8, 1941, and on Germany and Italy December 11, 1941. The war ended in Europe on May 8, 1945. Japan signed the formal surrender in Asia on September 2, 1945.

C. Thirty-one Military Operations for Broad Strategic Purposes

1844: Mexico. President Tyler deployed our troops to protect Texas one year before annexation.

1864: Mexico. President Polk ordered General Scott to occupy disputed territory between the Nueces and the Rio Grande.

1853–1854: Japan. Commodre Perry's expedition of 2000 men and ten ships advanced American commercial interests.
1864: Japan. U.S. Naval units participated in a joint effort to force open the Straits of Shimonoseki for commercial operations.
1865–1866: Mexican border. General Sheridan and 50,000 U.S. troops backed up a demand from Secretary of State Seward that French forces withdraw from Mexico.
1888–1889: Samoan Islands. Germany and the United States were close to warfare due to their rivalry over naval privileges in the Samoans.
1899–1901: Philippine Islands. The United States used 126,468 troops against the Philippine Insurrection in order to preserve and foster any rights it had acquired from Spain.
1900–1901: Boxer Rebellion (Peking). The Boxer uprising in China created a demand for troops and marines to relieve foreign legations in Peking and to keep open communication between Peking and the sea.
1906: Cuba. Army units took up quarters in many Cuba towns to preserve order.
1912: Panama. American troops supervised elections outside the Canal Zone.
1912: Cuba. American troops landed to preserve order.
1914: Dominican Republic. U.S. naval forces fired at revolutionaries in order to stop the fighting.
1915: Haiti. By force of arms U.S. troops took over Haiti in part to forestall European intervention.
1916: Dominican Republic. U.S. troops occupied Santo Domingo and supported a military governor in the Dominican Republic.
1917: Cuba. American troops landed because of unsettled political conditions.
1918–1920: Expeditions to Russia. The U.S. contributed some 14,000 men to aid the anti-Bolsheviks and to forestall Japanese expansionist plans in Siberia.
1919–1920: Panama. American troops went outside the Canal Zone to supervise elections.
1919: Honduras. A small American force went ashore to maintain order in a neutral zone during an attempted revolt.
1940: British possessions in Western Atlantic. U.S. occupied military bases on British soil to protect long range national security interests.
1941: Greenland. The U.S. Army occupied Greenland for the same reason as above.
1941: Iceland. U.S. Troops occupied Iceland for the same reason as above.
1941: Dutch Guiana. American troops occupied Dutch Guiana for the same reason as above.
1950–1953: Korean War. U.S. forces acted to assist the Republic of Korea in order "to restore international peace and security in the area."
1958: Lebanon. Though an important purpose of using U.S. armed forces in Lebanon was to protect American lives, a primary purpose also was to assist Lebanon in preserving its political independence.
1961: Dominican Waters. U.S. Navy ships took up positions three miles off the Dominican coast and Navy jet planes patrolled the shoreline to prevent a revolution in the Dominican Republic.
1962: Cuban Naval Quarantine. President Kennedy ordered a naval quarantine of Cuba to prevent delivery of additional Russian missiles and to obtain the removal of those already in Cuba.
1964: Congo. A task force of four U.S. C–130 transport planes with about 100 crew members and paratrooper guards were sent to the Congo to provide airlift for the regular Congolese troops during a Communist-assisted rebellion. Also, the United States had 68 military advisers in Leopoldville.
1964–1971: Vietnam. American forces have acted to support freedom and protect peace in Southeast Asia.
1964–1965: Laos. At the request of the Laotian Government, unarmed U.S. planes flew reconnaissance missions over the Plaine des Jarres. After two jets were shot down, President Johnson carried out a limited reprisal.
1965: Dominican Republic. Though the protection of the lives of U.S. citizens was an important function of U.S. troops sent to the Dominican Republic, the threat of a Communist takeover and the need to provide humanitarian assistance to the Dominican people also were major reasons for the American landings.
1967: Congo. A task force of three U.S. C–130 transports and 150 men ferried Congolese paratroopers in order to crush a revolt against Mobutu's government.

D. Fifty-six Hostile Operations Involving Actual Gunfire or Imminent Threat of Warfare

1798–1800: Quasi-war with France.
1801–1805: War with Tripoli.
1806: Mexico.
1806–1810: Gulf of Mexico.
1814–1825: Caribbean area.
1815: Second Barbary War.
1816–1818: Spanish Florida.
1817: Amelia Island (Spanish Territory).
1822: Cuba.
1823: Cuba.
1825: Cuban Keys.
1831–1832: Falkland Islands (Argentina).
1832: Sumatra.
1840: Fiji Islands.
1841: Drummond Islands (Pacific Ocean).
1841: Samoan Islands.
1843: West Africa.
1846: Mexico.
1851: Turkey (Apparently no shots fired, but the force displayed amounted to a compulsory ultimatum).
1851: Johanna Island (East of Africa).
1853–1854: Japan (Commodore Perry's expedition including 10 ships and 2000 men conveyed an imminent threat of using force.).
1854: China.
1854: Greytown, Nicaragua.
1855: Fiji Islands.
1855: Uruguay.
1856: China.
1858: Fiji Islands.
1859: Paraguay (The Naval display of force amounted to compulsion.)
1863: Japan.
1864: Japan.
1865–1866: Mexican border (General Sheridan and 50,000 American troops backed up the demand of Secretary of State Seward that French forces leave Mexico.).
1867: Formosa.
1870: Mexico.
1871: Korea.
1888: Haiti (American Commander issued an ultimatum threatening force if necessary.).
1888–1889: Samoan Islands (Three powers had warships on the scene during an intense rivalry over claims in the islands. War was close when a hurricane destroyed German and American vessels.)
1894: Brazil.
1899: Samoan Islands.
1900–1901: Boxer Rebellion (China.)
1899–1901: Philippine Insurrection.
1910: Nicaragua (Armed combat was "hourly expected.")
1911: Honduras (The American Commander expressly threatened to use force if necessary.)
1914: Dominican Republic.
1914: Occupation of Vera Cruz, Mexico.
1915: Haiti.
1916: Dominican Republic.
1916–1917: Pershing Expedition into Mexico.
1918–1919: Mexico.
1918–1920: Expeditions to Russia.
1926–1933: Nicaraguan occupation.
1927: Armed Actions in China.
1950–1953: Korean War.
1962: Cuban naval quarantine.
1964–1965: Armed actions in Laos.
1965: Dominican Republic.
1964–1971: Vietnam War.

E. Sixty-Four Military Operations Lasting More Than Thirty Days

1798–1800: Quasi-War with France
1801–1805: War with Tripoli
1806–1810: Gulf of Mexico
1813–1814: Marquesas Islands (South Pacific)
1814–1825: Caribbean Area
1815: Second Barbary War
1816–1818: Spanish Florida
1823: Cuba
1827: Greece
1831–1832: Falkland Islands
1835–1836: Peru
1838–1839: Sumatra
1843: West Africa
1844: Mexico
1846: Mexico
1852–1853: Argentina
1853–1854: Japan
1858–1859: Turkey
1865–1866: Mexican border
1866: China
1873–1882: Mexico
1888–1889: Samoan Islands
1894: Nicaragua
1898–1899: China
1899: Samoan Islands
1899–1901: Philippine Islands
1900–1901: "Boxer" Rebellion (Peking)
1901: State of Panama
1902: State of Panama
1903: Panama
1904–1905: Korea
1906: Cuba
1911–1912: China
1912: Panama
1912: Cuba
1912: Nicaragua
1913: China
1914: Haiti
1914: Vera Cruz (Mexico)
1915: Occupation of Haiti
1916: Occupation of Dominican Republic
1916–1917: Pershing Expedition into Mexico
1917: Cuba
1918–1919: Mexico
1918–1920: Expeditions to Russia
1919–1920: Panama
1920–1922: Siberia
1922–1923: China
1924–1925: Honduras
1926–1933: Nicaragua
1926: China
1927: China
1940: Occupation of British possessions in Western Atlantic
1941: Occupation of Greenland
1941: Occupation of Dutch Guiana
1914: Occupation of Iceland
1950–1953: Korean War
1958: Lebanon
1962: Cuban naval quarantine
1964–1965: Laos
1964–1967: Vietnam
1964: Congo
1965: Dominican Republic
1967: Congo

F. Sixty-Five Military Actions Taken by the United States Outside the Western Hemisphere

1801–1805: War with Tripoli
1813–1814: Marquesas Islands (South Pacific
1815: Second Barbary War
1827: Greece
1832: Sumatra
1838–1839: Sumatra
1840: Fiji Islands
1841: Drummond Island (Pacific Ocean)
1841: Samoan Islands
1843: West Africa
1849: Smyrna (Now Izmir, Turkey)
1851: Turkey
1851: Johanna Island (east of Africa)
1853–1854: Japan
1854: China
1855: China
1855: Fiji Islands
1856: China
1858: Fiji Islands
1858–1859: Turkey
1859: China
1860: Kissembo (West Africa)
1863: Japan
1864: Japan
1866: China
1867: Formosa
1868: Japan
1871: Korea
1874: Hawaii
1882: Egypt
1888: Korea
1888–1889: Samoan Islands
1889: Hawaii
1894: Korea
1894: China
1898–1899: China
1899: Samoan Islands
1899–1901: Philippine Islands
1900–1901: "Boxer" Rebellion (Peking)
1903–1904: Turkey
1903–1904: Abyssinia (Ethiopia)
1904: Morocco
1904: Korea
1911–1912: China
1912: Turkey
1913: China
1916: China
1918: China
1918–1920: Expeditions to Russia
1920: China
1920–1922: Siberia

F. Sixty-Five Military Actions Taken by the United States Outside the Western Hemisphere—Continued

1922: Turkey
1922–1923: China
1924: China
1926: China
1927: China
1932: China
1941: Occupation of Greenland
1941: Occupation of Iceland
1950–1953: Korea
1958: Lebanon
1964–1965: Laos
1964–1971: Vietnam
1964: Congo
1967: Congo

G. 63 MILITARY OPERATIONS ARGUABLY INITIATED UNDER PRIOR LEGISLATIVE AUTHORITY (NO DECLARATIONS OF WAR)

| Year and military operation | Legislation | Treaty |
|---|---|---|
| 1798–1800: Quasi-war with France | X | |
| 1801–05: War with Tripoli | X | |
| 1813: Spanish Florida | X | |
| 1806–10: [1] Gulf of Mexico | X | |
| 1813–14: Marquesas Islands | X | |
| 1814–25: Caribbean area | X | |
| 1815: 2d Barbary War | X | |
| 1817: Amelia Island | X | |
| 1822: Cuba | X | |
| 1823: Cuba | X | |
| 1824: Cuba | X | |
| 1825: Cuban Keys | X | |
| 1827: [1] Greece | X | |
| 1832: [1] Sumatra | X | |
| 1838–39 [1] Sumatra | X | |
| 1841: [1] Drummond Island | X | |
| 1841: [1] Samoan Islands | X | |
| 1843: [1] West Africa | X | |
| 1851: [1] Johanna Island, east of Africa | X | |
| 1855: [1] China | X | |
| 1856: Panama | | X |
| 1859: Paraguay | | X |
| 1860: Panama | | X |
| 1864: Japan | | X |
| 1865: Panama | | X |
| 1867: [1] Formosa | X | |
| 1868: Columbia | | X |
| 1870: Mexico | X | |
| 1873: Columbia | | X |
| 1885: Panama | | X |
| 1888–89: Samoan Islands [2] | | |
| 1891: Navassa Island, Haiti | X | |
| 1894: Brazil | X | |
| 1895: Panama | | X |
| 1899: Samoan Islands [2] | | |
| 1899–1901: Philippine Islands | | X |
| 1901: Panama | | X |
| 1902: Panama | | X |
| 1903: Panama | | X |
| 1904: Panama | | X |
| 1906: Cuba | | X |
| 1911–12: China | | X |
| 1912: Panama | | X |
| 1912: Cuba | | X |
| 1913: China | | X |
| 1914: Vera Cruz, Mexico | X | |
| 1916: China | | X |
| 1917: Cuba | | X |
| 1918: China | | X |
| 1919–20: Panama | | X |
| 1920: China | | X |
| 1921: Panama-Costa Rica | | X |
| 1922–23: China | | X |
| 1924: China | | X |
| 1925: Panama | | X |
| 1926: China | | X |
| 1927: China | | X |
| 1932: China | | X |
| 1933: Cuba | | X |
| 1950–53: Korean War | | X |
| 1958: Lebanon Operation | X | [3] |
| 1962: Cuban Naval Quarantine | | X [4] (OAS) |
| 1964–67: Vietnam [3] | | |

[1] Indicates military activity may have occurred pursuant to broad interpretation of authority conferred by certain acts of Congress against piracy.
[2] Treaty or legislation.
[3] United Nations Charter.
[4] Organization of American States.

Senator Spong. Thank you very much, Senator Goldwater.

OPPOSITION IS TO ALL PROPOSED LEGISLATION

I take it that, although your remarks were mostly directed at Senator Javits' bill and the legal memorandum that accompanied it, the thrust of your testimony is that you oppose all of these several resolutions and bills which seek to spell out the conditions and circumstances under which the President may alone initiate hostilities.

Senator Goldwater. Yes, that is true, Mr. Chairman. I selected the Javits bill because I know him to be a student of great depth, and without impinging the wisdom of other authors, I have great respect for his ability to go into the background, and I knew I could find more gutty material in his effort than the others. But I do think it would be capricious and unwise to give the Congress the power of declaring war, waging war and making strategic and tactical decisions on war.

PUBLIC'S CONCERN ABOUT GROWING POWER OF EXECUTIVE

Senator SPONG. Being in opposition to any legislative effort endeavoring to define what the President's war powers are, do you believe, and I was interested in what you said at the end of your remarks, that the public is becoming increasingly concerned about the growing power of the Executive?

Senator GOLDWATER. Yes. I wouldn't be in American politics today at this level if it had not been back in the late 1940's I saw the trend of the American Republic away from the concept of the Founding Fathers to a concept of concentrated power in Washington. I don't believe that we have, by the actions of any Congresses I have been associated with, given any more power to the President in the field of war making. I believe that has been absolute, it has never been questioned. But in the powers to run our schools, the power to tell us where our highways are going, the powers to tell us what kind of local buildings we are going to build, the powers over the retail merchant, these are so fantastic, Mr. Chairman, they scare the daylights out of me. But I know the American people are also very worried, I think mostly because the Vietnam war is the first time outside of Korea that this war making power has really been brought home to the American people.

Senator SPONG. I didn't finish my question.

Senator GOLDWATER. I am sorry.

PUBLIC'S BELIEF CONCERNING CONGRESSIONAL PARTICIPATION IN INITIATING HOSTILITIES

Senator SPONG. Do you believe that the American people believe that under the Constitution, Congress is supposed to participate in the initiation of hostilities abroad?

Senator GOLDWATER. I would have to answer yes to that in my contact with the American people. In fact, I find great amazement when I tell audiences we have only been in five declared wars out of over 150 that we fought and when I discuss with students in universities the very limited meaning of the constitutional language that gives us the right to declare war, make rules concerning capture on land and water, to raise and support armies, then limiting the term of use of the money for 2 years, to provide and maintain a navy, to make rules for the Government and regulation of our land and naval forces, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion. I think in reading that list many Members of Congress actually believe that we have today the sole responsibility of going to war and then of maintaining the conduct of that war.

And I might remind the Senator, although I know he does not need reminding of it, last year the Armed Services Committee of both Houses, for the first time in the history of this country, were given the responsibility of fixing the force level of our military. This, the force level, hasn't even been a power that the Congress has used although, I think, under the money power of Congress the Congress can do a lot about war. It just hasn't chosen to do it.

Senator SPONG. I can't speak for Senator Javits. He is here to do that, but my own participation in this bill has come from a realization that the public does expect Congress to participate in some manner in the initiation of hostilities.

SUGGESTED ALTERNATIVES TO LEGISLATIVE EFFORT

You have testified here today, and in responding to me you have said that you oppose any legislative effort. We have had two other suggestions so far in the course of these hearings. One is that we be much more specific in the consideration of any future resolutions similar to the Tonkin Gulf resolution, that we specify the breadth of the involvement and the length of the involvement and that such resolution be drawn in such a manner that the Executive has to come back to the Congress instead of being given an open check. The other, which has been suggested by Professor Commager and many others, is that there be a special committee formed to sit all the time to take care of what you observed in your statement—should something occur when Congress was in recess or not in session.

In sum, I think what Professor Commager and others have been saying is that there has not been sufficient consultation with the Congress to fulfill the constitutional expectations that Congress would participate in the initiation of hostilities abroad.

So if you oppose doing this by legislation, do you favor either of the alternative suggestions that have been made?

Senator GOLDWATER. I would not be opposed to the formation of such a committee. I also feel that the President in the future should work more closely with the Congress in that we would know what his intentions might be.

The major reason I oppose a Congress getting into this is that the next Congress could change it, and then the next Congress could change it and because of this we would be at the disadvantage of not having our allies know from year to year what they might expect.

CONSTITUTIONAL AMENDMENT PREFERRED

I prefer frankly a constitutional amendment. I think it is of such a magnitude that we shouldn't run the risk if we recognize that the Congress should have a greater say in warmaking. Frankly, I don't think we should run the risk of having the next Congress able to say "no" so easily to whatever this Congress decides, though, as I have said, I would be very glad to present the American people with a constitutional amendment, if after proper study one could be written out to say the things tha Senator Javits is trying to say, that Senator Church and Senator Cooper are trying to say, and Senator McGovern and others are seeking to achieve by legislation. I think the American people are now enough aware of the limitations of the Congress and enough aware of the lack of limitations in the Presidential office, both in the field of domestic and foreign matters, they should be given a chance to speak; and I have a feeling we will come out of such an effort with something much sounder than just legislation that we might pass this year that could be promptly repealed by a changing majority in the next Congress.

EFFECT OF PROPOSED LEGISLATION ON NATO OBLIGATIONS

Senator SPONG. You express some concern in your statement about the effect of any legislation upon our NATO obligations. Are you under the impresssion that the NATO treaty is presently self-executing?

Senator GOLDWATER. No, not until the President acts. But my fears there would be based upon what could happen, as I have spelled out a little bit further on, if the Congress were not available for immediate decision. Let's say that the Soviet forces did attack the southern shores of the Mediterranean in such force, and we were not able to act beyond 30 days because the Congress could not be called together in time or even being called together in time couldn't make an immediate decision. This is the threat to NATO that I basically see, the destruction of one of its boundaries, namely, the southern boundary, which is in pretty bad shape now.

I think the biggest danger though would come from all of our allies' inability to understand just what American commitments amount to. Will this Congress be strong in its commitment to NATO? Will the next one be weak? If this type of legislation is passed, I frankly see many of our allies taking another look at the whole treaty.

Senator SPONG. Your concern then deals more with the 30-day period than what would have to happen constitutionally insofar as the initiation of hostilities?

Senator GOLDWATER. I think the constitutional expectations of the people could be achieved under the present system. I don't believe that any President, after having witnessed what the last three have gone through, is about to stick his neck out again and not at least call in some leading Members of Congress and say "look, I feel action is imminent and necessary in this part of the world." And I also think any future President will have learned that the Congress is very sensitive in this field, and I think the Congress should be sensitive in this field.

I believe the committee I serve on, the Armed Services Committee, should be a much more sensitive committee, even working in many areas parallel with this committee. You would be amazed at the number of decisions that you have reached that I think we should have reached or at least reached in unison. We are working at times apart from each other where I think we could work more closely together.

### PROPOSED LEGISLATION'S EFFECT ON CONDUCT OF WAR

Senator SPONG. I have one last question, Senator Goldwater. You have expressed in your statement some concern that this legislation would effect the conduct of a war. What, in the Javits bill or any of the other resolutions, with the possible exception of the Taft resolution, leads you to that conclusion?

Senator GOLDWATER. Well, I think the very fact that Congress could limit action to, say, 30 days or shorter, would be a great deterrence in the conduct of the war.

Senator SPONG. But you are not implying in any way that this legislation would take over the command of the troops in any way or spell out how the hostilities would actually be conducted.

Senator GOLDWATER. Well, again, I am not worried about that happening under the legislation we are talking about with this Congress, but we are not going to be here forever. Let's say that the next Congress that is elected is an extremely dovish Congress. Then I think that Congress by virtue of the fact that we had established the precedent under which it regulates military hostilities could extend the bill to strategic decisions.

On the other hand, the next Congress might be an extremely hawkish Congress who might say "Let us dispense with these regulations; we are going to destroy it all; we are going to go back to the power of the President." That is why I feel it is important enough to become a constitutional amendment to be debated across this country.

Senator SPONG. Senator Javits, I think in these particular hearings we have been deferring to you as the principal sponsor.

Senator JAVITS. I would yield to my senior colleague.

Senator AIKEN. I yield.

Senator CASE. I think Senator Javits ought to go next. I would like to discuss the matter with both Senators after we have finished.

Senator JAVITS. I thank my colleague very much. I thank Senator Goldwater for the amount of creative thought which he has obviously given. I don't agree with him and he doesn't agree with me but I know of nothing more stimulating than the attention which he has obviously given.

### WITNESS' ANALYSIS OF CASES AND LEGAL THEORY

I am amused by one thing, Senator. You have said here, and you have said in your testimony a number of times, "Of course, I am not a lawyer."

Now, on the other hand, you have made a very detailed analysis of cases—I am not questioning the parentage, I was going to ask you something else—you made a very detailed analysis of cases and a very detailed analysis of legal theory. You would not, I believe, wish us to treat your analysis with any less weight than my analysis because you are not a lawyer.

Senator GOLDWATER. Well, I would be highly flattered that the Senator would think that my interpretation of my legal aide's research even reached a level where a lawyer might discuss it in legal terms. I am most happy to try to do that.

Senator JAVITS. I just wondered. I knew you would want us to evaluate what you put before us with the full weight to which it is entitled, whether you are a lawyer or not.

Senator, I think that there is not quite the amount of disagreement between us that you seem to think. I think the real essence of the problem lies in certain suppositions you make which I would like to lay before you, which are the same suppositions I make except we come to very different conclusions. May I just lay them before you?

### IS PRESIDENT'S POWER WITH RESPECT TO WAR UNRESTRICTED?

You say in your statement:

> Mr. Chairman, I may be wrong but I think the probable course which the court will take has been revealed in recent legal discussion examining the precise question of what it might be if confronted with an act of Congress restricting the President's war making authority.

You then go on in your statement to say:

> While I am not a lawyer, it appears to me this case might reasonably be read as saying Congress cannot restrict the President's command of military decisions once hostilities begin, whether war is declared or not.

And then finally you say:

> The fact is, Mr. Chairman, I know of no record that has been made, and I know of no legislative history, or constitutional history, or court history that gives us the right to legislate as the master of American military and foreign policy.

Now, Senator, is it your judgment, as disclosed by these statements, that the power of the President with respect to war is unrestricted?

Senator GOLDWATER. I have to construe what I have been able to read in the way of court decisions at all levels that his authority as Commander in Chief has never been questioned. If it has, I have not been able to find it; and during the course of all the debates that we have been through in the last 2 or 3 years on different legislation affecting this, I have not heard the President's authority as Commander in Chief questioned.

Senator JAVITS. Well, Senator, the man you quoted, it seems to me, has himself questioned it. Writing in the Federalist Papers No. 69, Alexander Hamilton said the following, and I quote:

> The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same as that of the King of Great Britain, but in substance much inferior to it.
>
> It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.

Wouldn't that indicate that the power of the President is not unrestricted, even in the mind of the man whom you quoted as, I gather, support for the authority that it is unrestricted?

Senator GOLDWATER. If I am not mistaken, Mr. Hamilton made those remarks before the Constitution was ratified; and, I believe, it was an attempt to tone down the effect of the final language of the Constitution. If I remember his earlier colloquy, it was an effort to make the Constitution more palatable to the American people.

Now had his words been spelled out in the Constitution as I am suggesting we try to spell it out by amendment, I think it would be much more clear what the President could or could not do.

### DIFFERENCE IS BASED UPON APPROACH

Senator JAVITS. Then, Senator Goldwater, in all fairness, would you say to me that the difference between us is that you want an amendment and I want a law, give or take $x$ degrees respecting it.

Senator GOLDWATER. I think that is it.

Senator JAVITS. You think that is it. Well, you say in the fourth paragraph of the very opening of your statement:

> Nevertheless, Mr. Chairman, in my opinion, the war powers bill is not the correct way to tackle this issue. To my mind the bill is improper, unwise, and perhaps illegal.

But as I went through your statement, it left me with the feeling. that you don't want anything done in this field. But do I now understand that what you really wish is a constitutional amendment, not a law?

Senator GOLDWATER. I think I have made it fairly clear in my statement, and I think in past statements I have made on the floor in

debate with the chairman of this committee and with other distinguished members of this committee, that I oppose a legislative approach in this field. I would support a constitutional approach to it even though I might not support the constitutional amendment. I would have to see it written, I would have to see what kind of a compromise the Congress would want to reach with the President insofar as these powers are to be divided.

But the answer to your question is, yes, our differences are based upon an approach, not a desire.

CONSTITUTIONAL PROVISIONS CONCERNING WAR POWERS

Senator JAVITS. Well, Senator, do you contend that your legal analysis as contrasted with my own demonstrates that this question has been concluded as a matter of law, and that the President does have power to not only engage the forces but to declare and maintain war, subject only to our power of the purse? Or do you say even your analysis indicates that this is an open question—that the Constitution leaves it open?

Senator GOLDWATER. I don't think there is any question in my mind that the Constitution gives shared responsibility in this field. But the Constitution is so precise in the language involving the Presidency and so imprecise in the language involving the Congress that I think we would be better, we would be wiser, to direct our efforts toward reaching some language that could decide where we stand. We have the power of the purse. There are even a lot of questions about whether that would be effective. Beyond that, I don't really believe that Congress would want the full powers of strategic and tactical decisions in war.

DOES S. 731 GIVE FULL POWER TO CONGRESS?

Senator JAVITS. Do you believe that my bill gives the full powers to the Congress?

Senator GOLDWATER. I believe that your bill would be the opening door to subsequent Congresses to do whatever they wanted to do.

Senator JAVITS. What about subsequent Presidents? Couldn't they do what they wanted to do?

Senator GOLDWATER. They can under the Constitution now; but maybe if we can resolve the political conflict, if we give the American people the right to speak on a proposal which they understand—in other words, what you are after. And if I interpret your position correctly, you will like to see the capricious entering into war by this country prevented. You would like to see the Congress become more of a partner in the whole field of decision. I can agree with this.

Senator JAVITS. Well, Senator Goldwater, if you would allow me, I would like to strike the word "capricious."

Senator GOLDWATER. All right.

Senator JAVITS. I am sure you would, too. The people have elected a President; the people have elected a Congress. I don't claim any particular genius for either. All I say is that cojointly we are likely to be a lot more secure in terms of improvident war—not capricious war—but improvident war—than we are with each acting alone, and I gather from your testimony that you feel that we should vest this power in the President.

Senator GOLDWATER. It is already there.

Senator JAVITS. Well, I disagree with that. I think that he has seized it. I don't like to use the word "usurpation" because that is a conscious act with animus, but I think he has taken the power. Indeed, I believe Professor Corwin, whom you quote so frequently as an authority, says so; and I would like to point this out.

In your statement where you quote him, he says, and I quote:

> Thanks to the same capacity to base action directly on his own reading of international law—a capacity which the court recognized in terms in the *Neagle* case—the President has been able to gather to himself powers with respect to warmaking which ill accord with the specific delegation in the Constitution of the war-declaring power to Congress.

Well, if he could gather it to himself why can't we by law—mind you, that requires concurrence or overriding him with two-thirds—gather it back so that it is shared, rather than exclusively his?

Senator GOLDWATER. Because the Constitution still retains him as Commander in Chief, and there is no question in my mind about the language. It is precise; he is the commander.

I might remind my distinguished friend, the basic concept of our Government, as laid down by the Founding Fathers, was reached because of the unanimous feeling that power should never be concentrated in any one place, as this bill would do in Congress.

These feelings flowed from Europe, and rightly. We formed a tripartite Government. Theoretically, power can never concentrate in the hands of any one branch of our Government; but the thing that bothers me, as much as any of the things we are talking about, is that we have been shifting the power of the people, particularly over domestic matters, away from the people into the hands of the President, or you might even say into the hands of delegated bureaucrats that we have created.

Now I am not worried about President Nixon, and I wasn't worried about President Johnson or President Kennedy, but I am worried about the man we have not seen yet who might come along some day and get elected and be able to abuse all these powers.

I think what we have to do in this committee and other concerned committees is to reach a decision as to what we want the President to be able to do in all fields, domestic and foreign, in connection with us, and then accomplish this goal in a way that can't be changed easily; namely, a constitutional amendment.

Senator CASE. Would the Senator yield at this point?

Senator JAVITS. Of course.

### POSSIBILITY OF OPTING FOR IMPROVIDENT PEACE

Senator CASE. Would it be fair to sum up the position that you have been presenting with great clarity, I think, in these terms? Senator Javits said his effort is to produce a joint decision of the President and the Congress with a hope that thereby we will be prevented from entering improvident wars; your concern is that if we go in this direction, we may be making it possible to opt for improvident peace. In other words, you believe there are occasions when peace is just as improvident as war. Is that a fair summary of your statement?

Senator GOLDWATER. It is kind of hard to say yes to that.

Senator CASE. I don't want to put words in your mouth. I am just trying to find out what the differences are.

Senator GOLDWATER. I don't know what you are getting at.

Senator CASE. You seem to want the authority to commit this country to the use of armed force placed in one person. You don't want that power dispersed because then a decision might unwisely be made not to use it.

Senator GOLDWATER. I think it is more wise that it continues as the Constitution has intended it to be, as I read it; but I think it would be very wise for the Congress and the Office of the President together to reach decisions later to be included in the precise language of a constitutional amendment as to how we go about getting into and carrying on war in this country.

For example, if I understand Senator Javits' bill or part of it correctly, we would not, the Congress would not, be allowed to go to war——

Senator CASE. The country.

Senator GOLDWATER. The country would not be allowed to go to war to defend any other country unless we have a treaty with that country, a mutual defense treaty. This would prevent us from protecting the Middle East.

Senator JAVITS. Senator Goldwater, if Senator Case will defer.

Senator CASE. I didn't mean to take over.

Senator JAVITS. I will clarify that with you. I don't frankly think you understand my bill, but we will dig into it.

Senator CASE. I just wanted to see beyond the question of whether we do this by constitutional amendment or legislation. Isn't your basic concern that this Government will be stymied from taking actions in situations in which you think it would be very wise to take action?

Senator GOLDWATER. I think it should be, theoretically. But I won't make that flat assertion about the adoption of any of these legislative pieces because I honestly feel that without a constitutional amendment, the President can tell us to go to hell.

Senator CASE. You mean under the present constitutional provisions.

Senator GOLDWATER. Under the present Constitution.

Senator CASE. If we were writing the Constitution again how would we have set it up?

Senator GOLDWATER. I think we would have written it differently, but I don't know precisely how it would be written. But let me say this, if I were the President of this country and I, once as I say foolishly thought of that, I would not want that God awful power in my hand of sending this country to war, of committing this country to war. I would much rather share it.

### WAR POWERS ARE SHARED MORE THAN IS REALIZED

In fact, now it is shared much more than many people realize. War, as you know, is an instrument of national policy, and before we ever reach the use of that instrument we go through political warfare which we are not able to wage too well because of our limited access around the world. We have the ability to wage economic warfare, but we

have never done it. Also we have psychological warfare which the Germans introduced to us and we are in turn becoming better and better able to use it.

Now, having used every method that can be used, then the President, only after consultation—again, I would say, with congressional members, but certainly consultation with the Joint Chiefs of Staff, with his National Security Council, and with all the agencies of intelligence—reaches that fateful moment of decision whether he should go to war in the interests of national policy or remain at peace and, as I say, it is not something you reach easily. I honestly feel though, that even had the Congress been consulted when President Johnson decided to send so many hundreds of thousands of ground troops into South Vietnam, and had the decision been made to really go at that war as a war should be gone at, namely, warn the enemy that we would use our full power, not nuclear but our full conventional power, and outline a course of escalation, my answer to you would be we would have had peace and not war.

So there would be a case of the President acting with the power of the country in a way that I am convinced would have prevented the war in South Vietnam as we are now engaged in it.

Senator CASE. Thank you.

Senator JAVITS. Thank you very much.

### CONGRESSIONAL POWER TO MAKE WAR UNDER S. 731

Senator Goldwater, do you believe that under my bill the Congress can cause the country to make war even though the President doesn't want to make war?

Senator GOLDWATER. I don't think so frankly until we change the Constitution.

Senator JAVITS. I know. I am talking about my bill. Do you think that under my bill Congress can put the country into war even though the President does not wish to be at war?

Senator GOLDWATER. I think that under your bill the provisions of it could be used to restrain and regulate practically every detail of the President's action.

Senator JAVITS. But we couldn't make war ourselves, the Congress; could we?

Senator GOLDWATER. Not under the provisions of your bill.

Senator JAVITS. Of course not.

Senator GOLDWATER. Let me put it another way; yes, we could.

Senator JAVITS. In what way?

Senator GOLDWATER. By merely declaring it or by passing a resolution under it; but the President is the one who goes to war. This is why I think we are spinning our wheels, gentlemen. Unless the President would be the one who would acquiesce to this or any kind of legislation, I just don't think we are getting any place.

### RESTRAINING EFFECT OF COOPER-CHURCH BILL QUESTIONED

I offer you the Cooper-Church bill that we passed last year. It had no restraining effect upon the President and I said at the time that we could pass bills like that every day and the President, with his constitutional power, could in effect tell us to go to hell.

Senator JAVITS. Did the President put ground troops into Laos?

Senator GOLDWATER. I believe we had ground troops whether it was one or a thousand or how many.

Senator JAVITS. That makes a difference.

Senator GOLDWATER. This is in violation of the intents of the legislation, and it goes to prove in my book, unless we care to try to impeach him on it, that the President is the sole determinant today.

Senator JAVITS. Nonetheless the President didn't put U.S. ground troops in Laos in any appreciable number, didn't deploy any formations; did he?

Senator GOLDWATER. If one American boy were killed, in my opinion, it is in violation of the Cooper-Church amendment.

Senator JAVITS. That isn't what the Cooper-Church amendment said.

The Cooper-Church amendment was directed to ground troops. It was thoroughly argued.

Senator GOLDWATER. All right, one ground troop and while I was not there, and I can't divulge any sources, I wouldn't want to say that we didn't have any American ground troops in Laos.

Senator JAVITS. Well, I must say——

Senator GOLDWATER. In other words, I think that the intent of the legislation, not once, but probably many times in the instance of Cambodia, has been violated.

### CONGRESSIONAL WAR POWERS UNDER S. 731

Senator JAVITS. I still would like to come back to the understanding of my bill. I didn't get an answer to the question of whether you claim that under my bill the Congress can go to war even if the President doesn't want to.

Senator GOLDWATER. Well, I said if it is true that Congress has the right to legislation concerning the conduct of war, and the President has no right to contravene such legislation, then Congress must also possess the power to order the President to broader hostilities than he wishes.

Senator JAVITS. Well now, do you assume that the bill which I am suggesting could become law without being legally passed, with the signature of the President or the President's veto being overridden?

Senator GOLDWATER. I believe that I said there are features in your bill which could be used to expand hostilities.

Senator JAVITS. You do? Can you point in the bill to where you find any such authority of a Congress to go to war if the President doesn't want to be at war?

Senator GOLDWATER. I will repeat. If the Congress has the right to legislate concerning the conduct of the war, as your bill provides, and the President has no right to contravene, it, as your brief argues, then Congress must, even though you don't spell it out, must also impliedly possess the power to order the President into broader hostilities.

Senator JAVITS. So you think that not anything in my bill, but the mere fact that such a bill would be passed by Congress and might become law through overriding the President's veto, is itself the exercise of such authority as would enable the Congress to declare war even if the President didn't want to go to war?

Senator GOLDWATER. I would have to answer that by saying the President could still do what he wants to do no matter what your bill says. This is the major reason I look upon all of these legislative attempts as barking up a lot of empty trees when they attempt to take away from the President the power that can only be changed by a constitutional amendment.

Senator JAVITS. Well, that is assuming the President has any such power. The authorities seem to indicate that is very much, at the least, in doubt. Our own authorities do.

Senator GOLDWATER. I think you can find more authority, at least I have, more authority that would bear out the power than the authority that questions it. I know there is much authority that believes that the Congress has more power, and I don't doubt that the purse power is a powerful power if used. I doubt that the Congress would ever use this power to the extent that it would be required to force the President to change his mind on war.

Senator JAVITS. Well, isn't that the very reason—because the Congress is so reluctant to use the power of the purse—that we ought to try, if we could, to make better ground rules, to wit, by law, between the President and the Congress?

Senator GOLDWATER. If the ground rules could be established by changing the Constitution I couldn't agree with you more, but I don't think you are going at it in a proper way.

I cited earlier, we might pass this legislation or similar legislation. The next Congress may change it. It is up to them. But when you have to change the Constitution that is another horse, and we have never tried it in this field.

Senator JAVITS. Well now, it is a fact, is it not, Senator, that in the meantime before we change the Constitution a President could put us at war again just as we are in Vietnam? We have to make some choice of means.

Senator GOLDWATER. I think even if you pass your legislation the President can send military forces into action.

Senator JAVITS. He can defy us, but we can defy him; can't we? Isn't it a fact that the Congress can sit on its hands and do absolutely nothing, and not pass any laws, and not appropriate any money, just do nothing—if that is the option we have—as much as the President? We have it now; don't we?

Senator GOLDWATER. This is true. But he had the eight ball closer to the pocket than we have in that he has an army, navy, and air force at his command and even though we might subsequently meet and vote no funds he would have conducted a war of rather short duration.

WAR POWERS OF PRESIDENT UNDER S. 731

Senator JAVITS. That is all my bill does; doesn't it—enable him to conduct a war of rather short duration? My bill does not stop him from conducting a war; does it?

Senator GOLDWATER. No. There are some exceptions.

Senator JAVITS. Are you aware of the fact that not only does my bill deal with commitments—incidentally, they are not only treaties but any commitment which is undertaken by the Congress, including, I might say, the Gulf of Tonkin resolution—but it also provides that

the President may carry on war for 30 days to deal with certain emergencies. He may act to repel a sudden attack against the United States, its territories and possessions; to repel an attack against the Armed Forces of the United States on the high seas or lawfully stationed on foreign territory; to protect the lives and property as may be required of U.S. nationals abroad. The President has authority to initiate hostilities in those emergency situations as well as in complying with a commitment. You are aware of that, Senator?

Senator GOLDWATER. Yes; in fact, I touched on that in my testimony.

DANGER OF 30-DAY LIMITATION

There is another thing I think is dangerous and forms a partial answer to one of your questions, we do say to an enemy "if we care to, that the war will not exceed 30 days or even less" or we might say "30 days and then we will take a look at it," it might go 60.

Now the Senator has had long experience with the Army, and with the affairs of the military, and he knows, as we all know, that that type of information is the most valuable information that an enemy can have. If we knew, for example, that Hanoi could only last 30 more days because her ruling body said so, it would be a very simple war to win.

Senator JAVITS. Could an enemy assume the Congress would not act?

Senator GOLDWATER. I think the enemy would have to assume that the Congress might act or might not act. In fact, knowing the intelligence gathering ability of potential enemies, I think they could give a rather accurate guess as to what the vote would be in any instance.

Senator JAVITS. Couldn't an enemy assume now that we would cut off funds? If those are the assumptions to be made, what difference does it make?

Senator GOLDWATER. I would say if I were in enemy intelligence and having heard the number of speeches that have been made in this country, both on the floor of Congress and over television threatening to do just that, we have never done it, I would have to advise my commanders that the chances were on the lesser side of the Congress ever doing this as of now. But appropriations are decided on the spot in the setting of the particular emergency. Your bill sets out a permanent limitation unrelated to the incident at hand.

PRESIDENTIAL POWER UNDER NATO TREATY

Senator JAVITS. I would like to test out my bill with you in terms of two instances you cite. You cited the instance of NATO.

Do you believe that the President is authorized without regard to any other power to act, to carry on war in compliance with the NATO treaty?

Senator GOLDWATER. I believe that the 17 treaties with the NATO countries say precisely that without any ifs, ands, or buts. In fact, I go a step further and say that the wording of these treaties requires that the President answer them, and that means war.

Now in the case of the 41-odd other treaties we have I don't think they commit us to war.

Senator JAVITS. Are you acquainted with the first sentence of article 11 of the NATO treaty? It says:

> This treaty shall be ratified and its provisions carried out by the parties in accordance with their respective constitutional processes.

You are acquainted with that?

Senator GOLDWATER. That is right. Yes.

Senator JAVITS. Do you still say that the President alone can make war under,the NATO treaty, although you said yourself a little while ago in your testimony that the power to make war is a shared power?

Senator GOLDWATER. I said I think we should try to make it that way. I don't look upon it as a shared power which can be controlled by Congress, especially when the Congress does not use the power which it has.

In answer to your question, Senator, I can only restate the Constitution, that the President shall be Commander in Chief of the Army and Navy of the United States and, the militia of the several States, and I can't see how he could duck the decision. Let me say it another way, yes, he wouldn't have to go to war but I think it would result in very dire consequences to our Nation if he didn't fullfill the expectation of a treaty. Now if the treaties are wrong, and I have talked this over with Senator Fulbright, then let's talk about changing the treaties.

One might say under your bill, the very fact that a question is raised immediately in the minds of our NATO allies that we may not honor the treaty could cause the NATO countries who are now our allies to begin making book with other countries.

Senator JAVITS. The NATO allies were not shaken when 7 years ago President Johnson came to the Congress for a confirmatory resolution; were they?

Senator GOLDWATER. No, but this is 7 years later, Senator, and we have abroad in this country a great division, as you know, a division that says on the one side we are not going to live up to our treaties, we are going to become an isolated country and, on the other side, we have those people who say we will cling to our treaties and we are not going to become an isolated America.

Seven years ago or maybe 10 years ago, I heard no talk at all about isolationism. Today you hear it every place you go. We are working under different circumstances.

### EFFECT OF S. 731 ON PRESIDENT'S RESPONSE TO TREATY OBLIGATIONS

Senator JAVITS. Well, for that reason, it seems to me, Senator, a law such as I am proposing would not only have a negative effect—that is, the Congress could restrain the President—but it would have a positive effect. It would vest solely in the President an authority in which the Congress had joined—that of responding to a treaty obligation—and it would confirm a power in him which you say for the last 7 years has been questioned.

Senator GOLDWATER. I don't think you interpreted my remarks correctly. I said were you to use the argument that you did about Johnson and NATO 7 years ago in the present time, I think is wrong, because the present time is vastly different than 7 years ago. Seven years ago there was criticism of the Vietnam war, but not the broad divisive criticism that we have today.

I still get back to my fundamental argument. I recognize what you want to do, what everybody else in the Congress wants to do, is to devise a way that will contribute to the achievement of peace and will limit this country's possibilities of stumbling into war.

Now to this end I don't believe that any legislation can do it as long as the language of the Constitution stands as it is.

Senator JAVITS. I am trying to test out your contentions in individual cases. I strongly maintain that my bill would confirm in the President a power which is extremely valuable to the NATO countries and which has been in question in the United States for the last 7 years. Under my bill the President would have the authority to respond to the NATO treaty for 30 days without coming to the Congress at all.

Senator GOLDWATER. Well, that is where you and I part track because I think that he has that authority regardless of what your bill or any other bill says. In fact what would be the reaction of any NATO country to legislation passed by the Congress that would limit our support in the event they were attacked to 30 days? Today it is unlimited.

Senator JAVITS. Pardon?

Senator GOLDWATER. Today if the Soviets or any other potential enemy should launch an attack on Western Europe the leaders of Western Europe know that we are going to come to their assistance. If they don't—they know that it is up to the President, they feel the President will honor the commitment, and they know, if he does this, it is not going to be 10, 30 or 60 days. It will be for the time required and for the force required.

Senator JAVITS. How can they be sure—since you say yourself that we can stop him by cutting off the funds?

Senator GOLDWATER. I think you could wage a pretty good war with the money we would have already appropriated and with the forces we already have.

Senator JAVITS. Couldn't you wage a pretty good war if it were nuclear, and the President's immediate response were nuclear? There is nothing in my bill that stops him from doing that.

Senator GOLDWATER. I don't think you can wage a good war when the enemy knows you are not going to fight but so long. That has been one of the great troubles in Vietnam. We have tried to fight a limited war. We refused to bomb targets that should have been bombed, we have been restricted by civilian dominance over the judgment of military people. Of course, my feelings on this are well known, and I think any war that we entered into again where the possibilities of eventual total civilian control would occur would be a tip to the enemy that we couldn't win the war, in my opinion.

### CAUSE OF WITNESS' OPPOSITION TO S. 731

Senator JAVITS. So really you are opposed to my bill because you have less faith in the Congress than you have in the President; isn't that true?

Senator GOLDWATER. To be perfectly honest with you, you are right.

Senator JAVITS. You don't want to trust the Congress. You do trust the President; that is it.

Senator GOLDWATER. I am not saying that I don't trust this Congress. I am worried about what is happening in America, the fact that the whole complexion of America is changing. We talked yesterday in trying to get started on writing a draft bill, which I happen to be opposed to, of the lack of and the low morale in the Armed Forces and I made the statement, it is not in the Armed Forces alone, it is also in the American people. The morale of the American people has never been at the low level it is today and I think, frankly, that a large responsibility for this rests in the leadership that we display or don't display in Washington.

I am not worried about what the Javitses and the Cases and the Spongs and the Fulbrights might do. I am worried about who is going to get elected to take your place and your place and your place when we decide we no longer want to run.

Senator JAVITS. Senator Goldwater, you could be just as worried about who is going to get born. What right have we to run the world after we have gone and lose our power?

CONSTITUTIONAL APPROACH RECOMMENDED

Senator GOLDWATER. This is just what you are proposing in your legislation. What I am proposing is that we see if it is possible to do what you want to do, what I want to do, what others want to do, by language that we just don't change overnight, namely, the Constitution.

Senator JAVITS. Senator Goldwater, that is really turning the world upside down. You say that is what I want to do. What I want to do is to be responsive to the Congress and the President. At least I want to give the Congress the right to say "no."

Senator GOLDWATER. They already have that right according to debates I have heard, but we haven't used it.

Senator JAVITS. If we are going to use that right, let's at least use it in an orderly framework, and with the ground rules laid down. That is what my bill is all about.

Senator GOLDWATER. I maintain that the legislative approach does not lay down stable ground rules. Ground rules can be changed by Congresses, and I am not saying what features I want. Nothing could be less important. I am convinced that the American people recognize what powers the President has, and they see that he is the Commander in Chief, and that means that is exactly what he is. Now if we want to change it, first, I think we ought to agree on where, how it should be changed, what checks he should have and where he should enter into the picture, and then we should go out to the American people and suggest in our collective wisdom this is a proper course.

We used the constitutional approach the other day, in the case of the 18-year-old vote and the world hasn't fallen apart.

Senator JAVITS. The 18-year-old vote, it seems to me, demonstrates exactly the contrary of your proposition. Here is a piece of legislation which is permanent in character insofar as we can make it so. Yet we passed it, and the court sustained it by a statute, not by amending the Constitution.

Senator GOLDWATER. We did it partially by legislation but we could not change the State laws relative to 18-year-old vote without amending the Constitution and this is precisely my feeling here. I am not

arguing that you want to destroy our ability to make war or that you ought to improve our ability to make war. I just don't think that the legislative approach is correct and I think we have seen it demonstrated in the last year.

Senator JAVITS. I yield.

PREFERRED JUDGMENT IN FOREIGN POLICY AND MILITARY MATTERS

Senator CASE. Is what you are saying that you believe we should have a dictator for the purposes of all foreign policy and military matters? Is that a fair statement?

Senator GOLDWATER. No; because our Constitution doesn't provide that. In the case of world affairs it is spelled out that the President works with the advice and consent of the Congress.

Senator CASE. No, Senator, I don't mean what the Constitution says. I am trying to find out what you think we ought to have.

Senator GOLDWATER. Well, I don't think we should have a dictator or that we could have one since he is an elected official; but we have the makings, let me put it that way, and we have it because the Congresses have been willing to give to the President of the United States powers in the domestic arena, exclusive of the warmaking power, which has never been changed since the Constitution was written, which turn over to the administrative branch of Government almost the sole conduct of American life if the wrong man came.

Senator CASE. But, Senator I am trying to find out what your concern is. My impression is that you believe basically in matters of foreign policy and in matters of making war the President should be absolutely untrammeled.

Senator GOLDWATER. I hope I didn't leave that impression. I would prefer to see us work toward language that could accomplish the partnership of the Congress with the President in warmaking decisions. This isn't something we can do overnight. But to answer your question completely, I will put more faith in the President's decision in these fields than I would in a Congress unless we spell the whole thing out in a practical way that protects our freedoms and I don't think that the Javits bill does.

Senator CASE. Well, the Javits bill isn't intended to go any further than it is written.

Senator GOLDWATER. Or any of the legislative attempts we have gone to. I have participated in debate on the floor and I have raised the issue time and time again. I agree with what you are saying, but I don't agree with the process. I would, to be as blunt as I can, I would put more faith in the judgment of the Office of President in the matter of warmaking at this time than I would of Congress.

EXCLUSIVE AUTHORITY OF PRESIDENT NOT WANTED

Senator JAVITS. Nonetheless, even you don't want to give the President exclusive authority in that field.

Senator GOLDWATER. No. As I say, I lived through this little thing of finding out what you live and sleep with up there in this God awful area, and I myself, as President, could never just wake up and decide we are going to war. I don't think any President ever really has done

that. I think there have been some Presidential decisions made that we may have disagreed with at the outset, that we agree with now. I think Harry Truman's decision to use the atomic bomb probably saved millions of lives on both sides of the fence and brought an end to a war that wasn't headed for a quick solution. I felt that President Kennedy's entrance into Korea—I mean into Vietnam, was an unwise one, I still do, even though I feel that the Vietnam war is protecting or should be protecting a part of the world that is of extreme interest to the free world. I disagreed with President Truman, but he was right in going into Korea and I later changed my mind, and then later felt he was wrong in his restriction of actions to the Yalu.

So I know what these men are faced with. Certainly I would like to see, and I know they would like to see, because three of them have told me this, that there would be some better mechanism; but I don't think we can, with today's world picture, depend upon congressional action being responsive, because if the President had to wait a week or 2 weeks for Congress to assemble and debate, the war could be beyond turning around.

### PRESIDENT DOES NOT HAVE TO WAIT UNDER S. 731

Senator JAVITS. But he doesn't have to wait under my bill.

Senator GOLDWATER. No, he doesn't as a constitutional matter. He doesn't have to wait now.

Senator JAVITS. But he doesn't have to wait under my bill.

Senator GOLDWATER. I know, but you put some ground rules around it.

Senator JAVITS. Even for the 30 days? What are they?

Senator GOLDWATER. Even as to 30 days limitation, I don't think it is right. I don't think any days limitation are right.

### POWER TO PROTECT U.S. CITIZENS ABROAD

Senator JAVITS. May I ask you a question which interests me greatly about your point of view? You gave the example of Israel, which interests you and interests me. Now, isn't it a fact that there are very likely to be Americans in Israel?

Senator GOLDWATER. I would think so.

Senator JAVITS. So the provisions of my bill respecting the protection of life would spring into operation there; isn't that true?

Senator GOLDWATER. Yes, for the protection of American citizens. But I would have to reason that if the President can use troops in other countries to protect those countries and their citizens under the guise of protecting American citizens abroad, then your bill has no particular meaning. He can still do it.

Senator JAVITS. Nonetheless, my bill does not deprive him of that power.

Senator GOLDWATER. In that area your bill means nothing.

Senator JAVITS. But it does not deprive him of a power. You are objecting to my bill because it would hamper the President in your mind unwisely. However, my bill does not deprive him of the power to protect Americans abroad does it?

Senator GOLDWATER. No. You might attempt it, but that power remains in the President as long as the Constitution remains written as it does.

Senator JAVITS. Also in terms of Israel, is there any reason why the President could not come to the Congress and say "I recommend that we adopt a resolution,"—since a commitment is defined not only as a treaty but as any resolution adopted by the Congress and approved by the President—"as to what will be our policy with respect to Israel and with respect to U.S. troops which might be employed there"? Wouldn't that be a very wise exercise of discretion by a President and go far toward curing the disquiet, the malaise, and the erosion of morale which so vitally affects the American people?

Senator GOLDWATER. I think he has already done this, Senator.

Senator JAVITS. In the case of Israel?

Senator GOLDWATER. In my own mind if you were to ask me are we committed to the defense of Israel I would say yes. I think the statement he made in his visit to the 6th Fleet, the actions we have taken in the case of Lebanon, other actions that we have taken in that general area of the world, plus his own words leave no question in my mind that while we have no congressional commitment or even congressionally approved commitment, I think if Israel required the assistance of the United States that the President would act and could act.

Senator JAVITS. As a practical matter, however, I believe that a declaration by the President and the Congress in that situation would be very salutary and very healthy, very good for our foreign policy, and certainly would qualify under our bill.

Senator GOLDWATER. I would join you in that.

PROTECTION OF PEOPLE WHO DIE

Senator JAVITS. The last question I would like to ask is this: In all this discussion about the President and treaties and Congress, what about the people who die? Aren't they entitled, in view of their experience in Vietnam, to have some greater protection than apparently our laws, procedures, traditions, customs, and definitions afford them?

Senator GOLDWATER. Well, Senator, nobody likes death, particularly in war. I think it is completely and utterly senseless that we ever engage in such things.

On the other hand, I think the protection of our freedom, the maintenance of our freedom, is something that American men have always recognized as something they are willing to risk their lives for.

You used the Vietnam war. There has never in the history of this country been a more misunderstood war or a more poorly fought war from the standpoint of strategy, of strategic and tactical use, but not from the standpoint of the men, because I have been there several times and I have seen them and I have great pride in them as I have in the soldiers, sailors and airmen of our Nation.

Now should they have a say in it? It is difficult to know how a man who is no longer with us is going to have a say, but certainly the American people should have a say.

Now you want to get at it your way through Congress, which I don't think is a safe way because it can easily be changed. I want to get at this through a constitutional amendment through which the people would certainly speak, and I think it is way past time for the American people to understand perfectly well what we are talking

about. We are talking about the powers of war and peace, and I think debates in this field, based upon a constitutional amendment, could clear up once and for all all of these exasperating little things that we try to correct on the floor of the Senate and which we never seemingly do. Certainly the people are the ones who should be deciding this thing and even though we represent the people by having been elected by them, as you know and I know, they pay too little attention to what we do. But give them a chance to speak through their State legislatures or through an open referendum in their own State as to precisely what power they want the President to have, and I think we can come up with something, and come up with it fast enough that you will be satisfied and the American people will be satisfied.

Senator JAVITS. Well, Senator, I wouldn't wish to restrain you or exhaust the committee. I think that in many of our arguments we have not met but passed each other by, but the record will stand and speak for itself.

REASONS IN SUPPORT OF S. 731

I would just like to say, in closing, that I think the Constitution makes it very clear that the Congress has at least authority to restrain the President in waging war. I have never contended that Congress has the exclusive authority to make war. However, the President certainly does not have the exclusive authority, either, even though I confirm in my bill that he may have authority under certain given circumstances to start what is equivalent to war.

Secondly, I would like to point out that it is urgent for our Nation to get the dogs of war back on the leash and to give the people some responsive mechanism to deal with improvident war. I have endeavored to do just that. As to the Constitution, I think we will raise more questions than we settle if we try to clarify the war power in the broad language which a constitutional amendment would require. Certainly we have ample basis in the Constitution for clarifying that power in legislation—in the declared powers of the Congress to declare war, to raise and support armies, to make rules for the government and regulations of the land and naval forces, to provide for calling up the militia, to provide for organizing, arming, and disciplining the militia, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.

I state categorically that my bill does not vest any exclusive authority in the Congress to make war but that it does seek, with due regard to the security needs of the country, to join the Congress in the decision to continue war. The only way to restore Congress' role in warmaking is through a law. The Constitution permits such a law to be made and such a law to be effective.

I agree that no Supreme Court is going to deal with this legislation, but there are many such laws on our books. We run our Government with a whole congerie of propositions which the Supreme Court is not going to deal with, and we don't assume in the face of the law that a President is going to defy it or that a Congress will defy it.

For all those reasons, and if that is the best case that can be mustered against my bill, my conviction that it should be passed has been confirmed and strengthened rather than shaken. I thank my colleague very much.

Senator GOLDWATER. I understand this is the only case against it which has been attempted. I think there will be others. I think we finally aroused the State Department into making some kind of a presentation against this. I wish that I could agree with Senator Javits in his contentions, but I have looked at this thing too long and too closely, have lived with it too long, to believe that a law is going to do it. It is simple. It is a simple way, but it can be changed too fast.

Senator SPONG. Senator Case.

Senator CASE. Thank you, Mr. Chairman. I shan't keep you much longer because I know you have had a long grilling here, and I won't keep you longer.

Senator GOLDWATER. It has been a pleasure.

### BASIC QUESTION OF A NATION GOING TO WAR

Senator CASE. I think more significant even than your comments on the specific language of the Javits amendment is what you have had to say, and I know how you feel, about the very basic question of a nation going to war at all. I gather—and interrupt me any time if I am not making a fair summary—that you believe it very unlikely that after a referendum of all the people, we would ever go to war; and that that would be unfortunate because there are occasions in which going to war would protect the safety of the Nation, the ultimate peace, and the preservation of freedom.

Senator GOLDWATER. I would agree in this way. Take the case of World War II. This country was overwhelmingly in favor of war. In the case of Korea, which was a little-known war, there wasn't a lot of support for it. In the case of Vietnam, which is the most poorly presented war we have ever fought there is very, very little support for it. I don't worry about the wisdom of the American people. I think the American people, if they knew their freedoms were threatened, would break the fence down getting in. During our hearings on the draft, for example, I can't recall one organization that openly opposed the draft in an emergency, and I made it a point to ask each group whether they opposed the draft in those circumstances—conscientious objectors, divinity students, the college students themselves. If the country were periled with going to war, every one of them said yes.

That doesn't bother me.

Senator CASE. I think that is true, but take World War II.

Senator GOLDWATER. Yes.

Senator CASE. As you know, for many years before the war, President Roosevelt was very concerned about the world situation. He tried by speeches such as the quarantine speech and others to bring the country into active participation and support of our allies. In your judgment, would it have been wiser if he could have done it alone?

Senator GOLDWATER. In my judgment, yes. I have often said that, had the United States been prepared and had it really been a power, had we had tanks to train with instead of paper tanks, had we airplanes instead of aircraft on the drawing boards, had we made it clear

to Hitler that a foot on the soil of any of our allies was a foot on our own, I don't think we would have ever had World War II.

Senator CASE. Well, it is a fascinating speculation, and you can't ever reconstruct a situation——

Senator GOLDWATER. No.

Senator CASE. Imagine what would have happened if we had been able to do this, if we had enforced the Versailles Treaty, and if we had gone to war long before 1941, one cannot know what would have happened.

Senator GOLDWATER. Down through history, whether we like it or not, power has been the determinant of peace; and Great Britain, although she didn't keep an absolute peace, at least for nearly 200 years was able to prevent any great worldwide wars until mankind stumbled into World War I; which again, had the people been prepared, they could have prevented.

Now, I have the strange and unexplainable feeling that if we don't fall into other wars, the Soviets and the United States are going to come closer and closer. I think we are making steps in this direction in science, in economics. I don't expect this to happen in my lifetime; but if we ever have a third world war, I think it would find the Soviets and the Western World alined against Red China.

Again, although we have had 14,000 wars in the history of mankind, and we have 40 going on at the present time, I don't despair. I think the time will come sometime when we can make that first base step, and make the two powers realize that we alone, the two of us, can pretty well maintain peace. Then I think we can look to a peaceful world.

Senator CASE. I have found our discussion stimulating, and I think you have made a very great contribution toward bringing this whole matter into better focus.

Senator GOLDWATER. Thank you.

Senator SPONG. Senator, we thank you for testifying.

Senator GOLDWATER. Thank you, Mr. Chairman. It is a real pleasure.

### GENERAL WASHINGTON'S COMMISSION AS COMMANDER IN CHIEF

Senator JAVITS. Mr. Chairman, could I, with Senator Goldwater's indulgence, put into the record at this point the commission given to General Washington who was the first Commander in Chief? In my judgment, it indicates that even Washington as Commander in Chief was subject to the orders of the Continental Congress.

Senator SPONG. Without objection, General Washington's commission will be admitted to the record.

(See p. 29.)

Senator GOLDWATER. Thank you very much.

Senator JAVITS. I thank the Senator.

Senator SPONG. Congressman Horton.

Senator JAVITS. Mr. Chairman, could I ask the Chair's and Congressman's indulgence while I run over and put in a bill?

Senator SPONG. Congressman, may I say how pleased we are to have you over here with us this morning.

## STATEMENT OF HON. FRANK HORTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HORTON. Mr. Chairman, and members of this distinguished committee, I am honored to have the opportunity to testify before you on a subject which may have more potential than any other single legislative action for healing the divisiveness and the diminished credibility our Nation has suffered over foreign policies of the 1960's.

The challenge to the 92d Congress to take responsible action in the arena of Presidential and congressional war powers is to me the most serious foreign policy challenge we face.

I am deeply indebted, as I believe our country is, to the senior Senator from my own State of New York for taking the thoughtful initiative he has taken, and for focusing national attention on the war powers issue by his sponsorship of S. 731.

### COMMENDATION OF SENATOR JAVITS AND COMMITTEE

Senator Javits and this committee under the able leadership of Chairman Fulbright deserve commendation for seeking an approach which would codify the provisions and the guidance of the Constitution in delineating those war powers to be exercised only with the approval and participation of the Congress.

This committee has already compiled an impressive record of testimony and questioning on Senator Javits bill as well as other proposals with similar goals. My purpose here is to praise and to supplement the 400-plus pages of legislative history you have already compiled. I shall not seek to rehash the excellent statements you have received from renowned constitutional experts, professors and from other Members of the Senate and House.

### ERA SINCE TONKIN GULF RESOLUTION

I come here, rather as one Congressman who, like all the rest of us, has felt the pressure, the temptation and the frustration of being asked by large segments of the public to call signals during an ongoing war from the sidelines, participating in what, at best, have been some back-handed and ineffective legislative efforts to bring some congressional influence to bear on the era of national tragedy and distrust which has evolved since the passage of the Gulf of Tonkin resolution 7 years ago.

I cite the Tonkin Gulf resolution as a starting point of this era because that event, inadvertently or not, led to an abandonment by the Congress of any proper exercise of constitutional responsibility we would or should have had in determining the course of America's march into the quicksand of Southeast Asia. In the statement I made on the House floor on April 6, which, Mr. Chairman, is included in the appendix, and which I would like included in the record——

Senator SPONG. Without objection.

Mr. HORTON. When I introduced my own version of Senator Javits' bill, I cited what I saw as a constitutional crisis between the legislative and executive branches of our Government. But I hasten to agree with the view that Senator Cooper of this committee ex-

pressed, that this constitutional crisis really has its roots in a policy crisis which may never have come to a head without the Gulf of Tonkin resolution and the subsequent Vietnam era.

Mr. Chairman, an exchange Senator Fulbright had last weekend with former Under Secretary of State Katzenbach during a panel discussion quickly got to the point of this whole issue. That point is precisely whether Congress, or Congressmen and Senators individually, want to forsake the luxury of sideline criticism of foreign policy and Monday morning quarterbacking and take on a role which I see as being dictated by the Constitution, a role which would forge a partnership in responsibility with the executive over the commitment of U.S. troops abroad.

Mr. Katzenbach said he seriously doubted Congress would prefer responsibility to Monday morning signal calling—at the same time he said that the passage of the Tonkin Gulf resolution was "one of the most unhappy things from the point of view of the President," because it precluded his having to return to Congress to win a continuing mandate on the war.

While Mr. Katzenbach may be correct in his assessment that at least some Members of the House and some Senators would prefer the politically safer course of criticizing military actions which are solely a result of presidential orders, I don't believe the safety of our political skins is a justifiable factor in considering this legislation. As I see it, and as Senators Javits, Eagleton and others who have testified here have seen it, we in Congress have a duty, a responsibility like it or not, under the Constitution to play a major role in any decision to involve American troops in hostilities. Congress, in effect, abandoned this responsibility in 1964 when it accepted President Johnson's determination to retaliate against the North Vietnamese by enacting the Gulf of Tonkin resolution. The power gap we created was quickly filled, and has been filled to this day by exclusively presidential decisions as to the extent of our commitment of troops to hostilities in the nations of Indochina.

I, like many members of this committee, supported the Tonkin Gulf resolution in 1964, and I supported its repeal last year, as did the President. But, particularly in terms of future possibilities for involvement of U.S. military personnel in hostilities abroad the power gap created by the Tonkin Gulf action is still there, and it will remain unless this Congress will act to apply, through legislation, the procedures for our exercise of legislative powers delineated under article I, section 8 of the Constitution.

### DIFFERENCES BETWEEN H.R. 7290 AND S.731

The bill I sponsored in the House on April 6, is identical in all but two significant respects to the carefully forged language of the Javits bill.

One relatively minor deviation is my omission of the word "property" from section A(3) of the Javits bill, which is section 101(a) of H.R. 7290. The issue of protection of property as a legitimate cause for presidential commitment of American troops was discussed in your hearings on March 24. I note that Senator Javits said he would be prepared to delete the term "property" because of the potential for misinterpretation of its intent.

The major difference between S. 731 and H.R. 7290 and the major thrust of my testimony this morning is the attention my bill gives to the actual mechanics of the exercise of congressional responsibility in warmaking decisions.

I am one who believes that while the powers assigned to Congress under article I, section 8 are intended to provide a thorough and workable system of checks by Congress over presidential authority, the actual exercise of these powers does not require the Congress and the President to pair off in an adversary role whenever a decision involving national security is called for. Over the nearly 200 years of our history, our foreign policy has been more successful when Congress and the President have acted in an atmosphere of trust and of partnership, rather than in one of distrust and sniping over foreign policy issues. To a major extent, presidential decisions during the Vietnam era, and the failure of Congress to affirmatively carry out its duties in this period, have eroded that desirable atmosphere of trust and partnership.

I feel that any legislation we adopt must be drafted with an eye to reestablishing, in the long run, a working partnership between the executive and legislative branches where war decisions are concerned.

Thus, in H.R. 7290, I have sought to establish a procedure whereby, psychologically as well as substantively, the fostering of such a partnership would be encouraged.

JOINT COMMITTEE ON NATIONAL SECURITY

Title II of my bill would create a Joint Committee on National Security.

The Joint Committee on National Security would bring together authoritative Members of Congress in foreign and military affairs. Its membership would include the majority and minority leaders of both Houses and the chairmen and ranking minority members of congressional committees concerned directly with foreign and military policy and the Judiciary Committee.

The President of the Senate, the Speaker of the House, and the minority leaders in the House and Senate would each appoint one additional member. I have attached to the appendix a detailed listing of this and I would like to ask that this also be included in the record.

Senator SPONG. Without objection.

Mr. HORTON. This new committee would be designated by Congress as the panel authorized to consult with the President and his national security advisers in situations where congressional powers are involved and where congressional ratification of military actions is required as described in the Javits bill and in my own proposal.

The joint committee must transmit reports it receives pursuant to the provisions of this bill to the appropriate committees of both Houses, which would be responsible for drafting and reporting to the House and Senate legislation to ratify or change the President's actions. While the joint committee has no direct legislative responsibility, it must transmit the President's report, together with its recommendation for action.

I cannot overemphasize, Mr. Chairman, that the need for this Joint Committee does not arise from any demonstrated inadequacy or

ineffectiveness of the existing legislative committees of the House and Senate which have responsibility for foreign and military affairs. It is precisely the importance of these committees and the role they would play in the actual carrying out of congressional powers under the Javits bill which prompted me to assemble the leadership of these committees, together with the leadership of both parties in the House and Senate on a single panel—a panel which would be officially and formally designated by the Congress to receive presidential communications required under this legislation, and to be available to consult privately with the President or his national security advisers in international emergencies.

You will note, Mr. Chairman, that my bill assigns absolutely no legislative power or jurisdiction to the joint committee on national security. Any legislative measures short of or including a declaration of war must first be considered and reported out by the appropriate committees of the House and Senate.

ADVANTAGES OF JOINT COMMITTEE ON NATIONAL SECURITY

Despite its lack of a direct procedural role in formulating legislation which would approve, change or reject presidential action to dispatch U.S. troops into hostile areas, I feel very strongly that the creation of such a committee has distinct advantages.

During the Cuban missile crisis, President Kennedy hurriedly summoned 20 congressional leaders to the White House at 5 o'clock on the afternoon of October 22, 1962, to lay out the reasons for his impending announcement that evening of a naval quarantine in the waters surrounding Cuba. This consultation, despite the fact that the action was not preceded by any affirming congressional resolution, did much to unite the American government and the American people and our allies behind the necessary but risky course that was followed in October 1962. It also left no doubts in the minds of our adversaries as to American unity and resolve. The atmosphere of partnership and unity that was forged in that crisis is one which I feel we could in the future encourage by designating a joint committee on national security which the President, at his option, could consult with, prior to taking military action under the terms of the Javits bill, and which he must consult with within 24 hours after taking such action.

The prestigious and bipartisan nature of the joint committee membership would, I feel, help to set the stage for an atmosphere of partnership and unity in such decisions, without risking a reluctant rubber stamp of presidential actions in situations where the Congress does not feel his decisions are in the national interest.

I have also included in H.R. 7290, a provision requiring the joint committee to transmit the President's report on his actions to the appropriate committees of the House and Senate together with a recommendation for congressional action. Far from impeding the legislative process which is to take place within the 30-day period following a military action under the President's emergency powers, I feel that a prompt and authoritative recommendation from this prestigious panel would fulfill a great psychological need for the Congress and the Nation during what would inevitably be a moment of crisis and uncertainty.

While the joint committee's recommendation, even if it were unanimous, would not preclude individual Congressmen and Senators from publicizing differing points of view on the President's action, it would provide a prompt focal point of national and international attention as to the stance of the Congress on the matter, as a backdrop to the legislative deliberation and debate that would follow.

In short, I feel the establishment of a joint committee on national security would acknowledge the roles of both the Senate and House in the exercise of legislative powers delineated under the Constitution and in the Javits bill. More importantly, I feel it would encourage the creation of a working partnership between the Congress and the executive in moments of internatioual crisis. I do not feel that the joint committee would be an impediment to prompt action or mere excess baggage because of its lack of legislative jurisdiction, but think its very existence would enhance the role of Congress in decisions whether or not to dispatch U.S. troops into hostile action.

### POSSIBLE ALTERATIONS IN JOINT COMMITTEE MEMBERSHIP OR STRUCTURE

Mr. Chairman, I do not come before you to profess pride of authorship in the detailed makeup or functions of the Joint Committee. My bill presents one way, and I feel a responsible way, to constitute and utilize such a committee. However, I can appreciate that in its expertise your committee may decide to alter the membership or structure of the committee in some way. For example, since drafting the bill, I have come to prefer a rotating chairmanship between the President pro tempore of the Senate and the Speaker of the House, rather than the permanent designation of the Speaker as chairman which my bill contains. Also, my bill provides for the chairman and ranking minority member of the joint committee on atomic energy to serve on the National Security Committee. Perhaps the best way to work this out would be to designate the Chairman of the Atomic Energy Committee as a member. If, in a particular Congress the chairman is a Senator, then the ranking minority house member serving on the Atomic Energy Committee should fill the other seat. When a House Member is chairman, the ranking minority Senator should serve.

These are merely two examples I have considered of changes you may want to make, should you decide that the concept of a Joint Committee on National Security is a worthy one.

### PROPOSED LEGISLATION SHOULD NOT ATTEMPT EXHAUSTIVE "SERVICE MANUAL"

There is one general point in support of the language of the Javits bill, as adopted in H.R. 7290 that I would like to make. I do not feel that the legislation we enact should be an attempt to write an exhaustive "service manual" for national emergencies. We cannot possibly predict every sort of eventuality and then seek to describe in detail the roles of Congress and the President in each possible occurrence. Whatever the language of the bill we enact, its effectiveness will depend to a great extent on an atmosphere of trust between the two branches of government. Without this atmosphere, Presidents

will tend to opt for their interpretations of foreign policy, history, and constitutional provisions in justifying their actions, and Congress could again largely be left with the role of Monday morning quarterback, although this legislation would still serve as a powerful legislative tool.

I feel that the language of the Javits bill is firm enough to define the proper war power roles of the Congress and the Executive, without succumbing to the serious charge that the bill ties the President's hands, or seeks to limit his legitimate powers.

### NEED FOR WAR POWERS LEGISLATION

There is no question that legislation is needed to apply the meaning of legislative war powers in article I section 8 to the present day world of rapid communications, instantaneous weapons of war, and American leadership of the free world. A bill is needed which accomplishes this without hamstringing legitimate presidential powers to respond to emergency situations. I strongly feel that the provisions of the Javits bill meet this standard.

Also, I feel that my proposal for a Joint Committee on National Security, while it would not substantively change the balance of war powers between the White House and Capitol Hill, would add to the stature of the legitimate role of Congress, and would encourage an atmosphere of partnership and trust in the functioning of both branches of Government in an emergency.

The war powers of Congress are not fully understood by the American people, Mr. Chairman, and there are indications that the Congress itself does not understand its legitimate role in this vital area.

As a result of the lack of an affirmative congressional role in the Vietnam era, congressional opposition to the Vietnam war has been cluttered with diverse motivations, a clutter which is confusing to our allies and misleading to our adversaries. Some oppose the war on moral grounds, others on political or geo-political grounds, others for tactical reasons, other for constitutional or legal reasons.

This is the burden that Congress, the Nation—indeed, our foreign policy—have had to bear amid confusion as to the proper role of Congress, in the absence of a procedural arrangement for congressional participation in the war-making activity. I need hardly add that this uncertainty has encouraged a variety of responses, ranging from the most olympian scholarship to the most adolescent hysteria.

As my distinguished New York colleague in the Senate so brilliantly stated in his testimony here on March 24, if we act to correct this situation, "The President will know where he stands. The Congress and the people will know where they stand. And the world will know where America stands."

I think the world needs to know where America stands in these situations, and this legislation would be of immense value in resolving doubts among our own Armed Forces, among our adversaries, and among our allies.

Congress is not the Commander in Chief nor is it an adjunct of the military structure. Congress, as spokesman for the people, has an independent responsibility involving questioning, evaluation and judgment.

My bill is addressed to the fulfillment of this responsibility, and I hope that my testimony here this morning will be a constructive addition to the commendable attention your committee is already giving to this subject, which lies at the very heart of our democratic system of government.

(Appendix follows:)

## Appendix

### Membership of the Proposed Joint Committee on National Security

Chairman: The Speaker of the House
Vice-Chairman: The President pro tempore of the Senate Members:
- The Majority Leader of the House
- The Majority Leader of the Senate
- The Minority Leader of the House
- The Minority Leader of the Senate
- The Chairman and ranking minority member of each of the following Committees:
  - Senate Foreign Relations Committee
  - Senate Armed Services Committee
  - Senate Judiciary Committee
  - House Foreign Affairs Committee
  - House Armed Services Committee
  - House Judiciary Committee
  - Joint Committee on Atomic Energy
- One Member of the House who is not a member of any of the aforementioned Committees to be appointed by the Speaker of the House
- One Member of the Senate who is not a member of any of the aforementioned Committees to be appointed by the President pro tempore of the Senate
- One Member of the House who is not a member of any of the aforementioned Committees to be appointed by the Minority Leader of the House
- One Member of the Senate who is not a member of any of the aforementioned Committees to be appointed by the Minority Leader of the Senate

[From the Congressional Record, Apr. 6, 1971]

### Speech of Hon. Frank Horton of New York

Mr. HORTON. Mr. Speaker, we are nearing the seventh anniversary of the passage of the Gulf of Tonkin resolution in 1964—an action which marked the start of the current crisis in the distribution of constitutional powers of war and peace between Congress and the Executive.

Charges that the current and past Presidents have exceeded their authorities as Commanders in Chief in carrying out military actions in Southeast Asia are definitely sustainable. But perhaps equally sustainable and more serious is the uncomfortable fact that Congress has virtually abandoned its constitutional role in foreign affairs by providing no viable modern-day procedure for exercising this authority, and by allowing the Executive to flex and extend its constitutional power by overinterpreting largely passive congressional actions which imply the granting or retracting of authority to carry out certain military activities.

I am today introducing a bill to fill that vacuum left by Congress, which will offer a viable procedure whereby Congress can exercise a positive and an active role in the determination of military policies which fall short of a declaration of war.

I feel that the need for this bill, or some similar procedure for congressional reentry into its role under article I, clauses 11 through 14 of the Constitution, is best understood in light of an overall analysis of the key questions surrounding the situation in Southeast Asia.

Questions arising from our involvement in Indochina might be divided into three categories: constitutional, military, and moral.

The primary question is one which we, as Congressmen, must be most concerned about. That is the question of the constitutionality of the policies pursued by the current and past Administrations in Southeast Asia.

I am not here referring to the constitutionality of Vietnamization as a grand design for ending American participation. Mr. Speaker, I feel that Vietnamization, coupled with a resolve to take real risks to promote a negotiated peace, is

the right way to extract America from this war, and, hopefully, to end the war itself. I was calling for de-Americanization of the war and a greater priority on training the Vietnamese to defend themselves as early as 1967.

The serious constitutional crisis to which I refer, surrounds Executive decisions to employ United States military personnel beyond the borders of Vietnam, into Cambodia and Laos.

During the Cambodia crisis in mid-1970, I stated my opposition to the invasion, not on military grounds, but on constitutional grounds. The President had dispatched American troops across an international boundary without any private consultation with congressional foreign policy leaders prior to the attack, and there was no congressional approval.

I had and have no argument with the notion that the forces of South Vietnam, which have been under attack by North Vietnamese and Vietcong operating from sanctuaries in Cambodia and Laos, should, upon the determination of the Saigon government, be able to engage their enemy in these areas. While this amounts to aggression against the territories of these neutral nations, it does not surpass or equal the aggressions committed against these nations by the North Vietnamese. The existence of Communist troops and sanctuaries in these nations in violation of international law does not, however, provide a sufficient justification under our constitutional system for the President to order Americans into actions in these countries without some participation in that decision by the Congress.

I say some participation, because even the Constitution is unclear as to what exact procedure should be followed by the two branches of government in deciding to engage in military action short of a declaration of war. It is obvious in this technological age of rapid communications and transportation that situations will arise where military action short of a full declaration of war would be prudent policy—situations in which the alternatives of a declared war, or no action at all, would be irresponsible and undesirable. Tradition and custom have shown such situations to include repelling attacks, protecting American lives abroad, and fulfilling treaty obligations. It is time to codify these traditions into law.

An honest analysis of the current situation, where seemingly all of the power to engage American forces has been gathered up by the Executive, would lead to the conclusion that Congress is at least as much at fault as the President. Congress, and particularly the Senate, has cast itself in a role where it is close to impossible to exercise the necessary judgment in a modern-day situation. It is clear that some military and foreign policy decisions cannot be responsibly made if they must await week after week of inconclusive debate, and survive all of their details and strategies being subjected to public debate and world scrutiny. By consuming several months while debating the Cambodia situation, the Senate showed itself to be concerned with foreign affairs, but at the same time illustrated that Congress, as a whole, is presently ill equipped to take a responsible role in making decisions affecting war and peace.

In short, Congress has failed to provide a proper and a timely procedural channel through which it can bring its will to bear on crucial foreign policy decisions. It must equip itself to participate in these decisions in order to properly protect public's interest in foreign policy decisions, as intended under the Constitution.

The failure of Congress to provide such a mechanism creates a situation where the President can take unto himself most of the warmaking powers which can be invoked to engage U.S. troops in hostilities. The practical result of this failure is to insure that Congress will not get back its constitutional powers over war and peace unless and until some means is found for Congress to make such decisions consistent with the protection of national security and the technological realities of modern-day warfare.

It must be possible for Congress, or a designated body in the Congress, to receive classified information surrounding a pending military decision, and to accomplish, within a reasonable period of time, congressional ratification or change of such a decision without rendering it moot by airing before the world information affecting our national security or bearing on the success or failure of the actions involved. While it is unreasonable to think that Congress can be practically consulted in a nuclear emergency, or in an instant tactical situation, it is not unreasonable to think that Congress can exercise its power and judgment over decisions to engage American troops in any foreign country.

Technically, with the repeal last year of the Gulf of Tonkin Resolution, the President has only implied congressional approval to continue any engagement of U.S. troops in Southeast Asia. The implied power is rooted in the enactment of appropriations for American troop activities and support in Vietnam, and in prohibitions against the use of U.S. ground troops and advisers in certain nations—implying permission to use them in other nations.

Constitutionally this is a very tenuous basis for the operation of the Executive's foreign policy. But it is the Congress which has permitted the Executive to fill this wide vacuum in the exercise of his constitutional prerogatives under article I.

I have prepared a bill seeking to fill this vacuum, and to provide a viable procedure for the exercise of the power of Congress which will fit the realities of the 1970's and the requirements of the Constitution. Until this resolution and procedure or some other is adopted, however, I feel that the Executive should take far more literally the words of article I of the Constitution in interpreting the extent of its own power to initiate or extend hostilities. (The text of my bill follows:)

H.R. 7290

A BILL to provide a procedure for the exercise of congressional and executive powers over the use of any Armed Forces of the United States in military hostilities, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

TITLE I

SEC. 101. In the absence of a declaration of war by the Congress, the President of the United States is authorized to commit Armed Forces of the United States to military hostilities only—

(1) to repel any attack against the United States, its territories, or possessions;

(2) to repel any attack against the Armed Forces of the United States on the high seas, in the air, or lawfully stationed on foreign territory and, for the purposes of this paragraph, such Armed Forces shall be considered to be lawfully stationed on foreign territory if such stationing has had the approval of the Congress or if such stationing meets the conditions of paragraphs (3) and (4) of this section;

(3) to protect the lives of United States nationals abroad; and

(4) to comply with a national commitment resulting from affirmative action taken by the executive and legislative branches of the Government by means of a treaty, convention, or legislative enactment specifically intended to give effect to such commitment.

SEC. 102. In any case in which military hostilities described in section 101 of this title are initiated by the President, the Joint Committee on National Security established under title II of this Act shall be convened prior to or within twenty-four hours after the initiation of such hostilities, and the President shall report the initiation of such hostilities to the Joint Committee, together with a full and complete account of the circumstances bearing on the necessity for the initiation of such hostilities.

TITLE II

SEC. 201. There is established a Joint Committee on National Security (hereafter in this title referred to as the "Joint Committee") to be composed of twenty-four members as follows:

(1) The Speaker of the House of Representatives.

(2) The President pro tempore of the Senate.

(3) The Majority Leader of the House of Representatives.

(4) The Majority Leader of the Senate.

(5) The Minority Leader of the House of Representatives.

(6) The Minority Leader of the Senate.

(7) The Chairman and ranking minority member of each of the following committees:

(A) The Committee on Foreign Relations of the Senate.

(B) The Committee on Armed Services of the Senate.

(C) The Committee on the Judiciary of the Senate.

(D) The Committee on Foreign Affairs of the House of Representatives.

(E) The Committee on Armed Services of the House of Representatives.

(F) The Committee on the Judiciary of the House of Representatives.

(G) The Joint Committee on Atomic Energy.

(8) One Member of the House of Representatives who is not a member of any committee referred to in this section, to be appointed by the Speaker of the House of Representatives.

(9) One Member of the Senate who is not a member of any committee referred to in this section, to be appointed by the President pro tempore of the Senate.

(10) One Member of the House of Representatives who is not a member of any committee referred to in this section, to be appointed by the Minority Leader of the House of Representatives.

(11) One Member of the Senate who is not a member of any committee referred to in this section, to be appointed by the Minority Leader of the Senate. The Speaker of the House of Representatives shall serve as Chairman of the Joint Committee and the President pro tempore of the Senate shall serve as Vice Chairman of the Joint Committee. Any vacancy occurring in the membership of the Joint Committee shall be filled in the same manner as in the case of the original selection.

SEC. 202. It shall be the duty of the Joint Committee to convene at the call of the Chairman to receive any report required under title I of this Act and to report to those committees of both Houses of the Congress which will consider legislation referred to in section 203 of this title. The Joint Committee shall be the officially designated body of the Congress to be consulted by the President and his national security and military advisers, and to receive and transmit information to other committees of the Congress concerning actions taken and reports received under Title I of this Act. The establishment of the Joint Committee shall not affect the duties and responsibilities of other committees of the Senate or of the House of Representatives. The Joint Committee has no authority to report legislation to the floor of either House, but it shall transmit information under this section together with its recommendation for legislation to be considered or adopted.

SEC. 203. Military hostilities by the Armed Forces of the United States described in title I of this Act shall not be continued for more than thirty days from the date such hostilities are initiated unless the authority to continue such hostilities for more than thirty days is contained in enabling legislation enacted by the Congress, including a declaration of war. For the purposes of this paragraph, no legislative enactment, including appropriations legislation shall be considered enabling unless such enactment specifies authorization for actions initiated under the provisions of section 101 of title I.

SEC. 204. The authority to continue military hostilities by the Armed Forces of the United States described in title I of this Act may be terminated by joint resolution of the Congress before the expiration of the thirty-day period referred to in section 203 of this title.

SEC. 205. Upon the expiration of the thirty-day period referred to in section 203 of this title, or upon the termination of authority to continue military hostilities by the Armed Forces of the United States described in title I of this Act, the President shall take such steps as may be necessary to disengage the Armed Forces of the United States from such hostilities in the safest manner possible at the earliest time possible, unless the Congress has otherwise authorized the continuance of such hostilities.

SEC. 206. If any bill or joint resolution authorizing the continuance of military hostilities by the Armed Forces of the United States described in title I of this Act or terminating the authority to continue such hostilities is sponsored by not less than one-third of the Members of the House of the Congress in which it originates, it shall be reported to the floor of that House of the Congress no later than one day after its introduction, unless the Members of that House of the Congress determine otherwise by a rollcall vote. Any such bill or joint resolution which has been passed by one House of the Congress and referred to the other House of the Congress shall be reported to the floor of the House of the Congress to which it was referred no later than one-day after such referral, unless the Members of the House of the Congress to which it was referred shall determine otherwise by a rollcall vote.

SEC. 207. Any bill or joint resolution reported to either House of the Congress under section 206 of this title immediately shall become the pending business of the House of the Congress to which it was reported and shall be voted on not later than three days after it has been so reported, unless the Members of the House of the Congress to which it was so reported shall determine otherwise by a rollcall vote.

TITLE III

SEC. 301. This Act shall not apply to any military hostilities by the Armed Forces of the United States undertaken before the date of enactment of this Act.

You will note, Mr. Speaker, that my bill closely resembles a similar measure introduced by my distinguished Senate colleague from New York (Mr. Javits) on February 10, 1971. Senator Javits' proposal was widely discussed a year ago and its recent introduction in the 92d Congress has been accompanied by a scholarly and realistic study of the issues involved. Hearings on S. 731 are already

underway. In an age when slogans are regarded as facts, when the art of persuasion has been replaced by loud volume, where hysteria has acquired some political respectability, my Senate colleague's approach is both impressive and reassuring.

The differences between our bills are not many, but they are significant, and I cite them as follows: My bill provides a procedure whereby the President can keep Congress informed either prior to or immediately after he takes military action and still safeguard information vital to the success of the action and the safety of our troops. My bill calls for creating a Joint Committee on National Security which codifies the canny and successful consultation President Kennedy undertook with leading Members of Congress prior to the Cuban missile crisis in 1962.

Either prior to the military action, but no later than 24 hours thereafter, this committee would consult with the President or his advisers, and receive information on the circumstances requiring this military action.

The Joint Committee on National Security brings together authoritative Members of Congress in foreign and military affairs. Its membership would include the majority and minority leaders of both Houses and the chairmen and ranking minority members of both House, Senate, and joint committees concerned directly with foreign and military policy. The President of the Senate, the Speaker of the House, and the minority leaders in the House and Senate would each appoint one additional member. This new committee would be designated by Congress as the panel authorized to consult with the President and his national security advisers in situations where congressional powers are involved and where congressional ratification of military actions is required as described in the Javits bill and in my own proposal.

The joint committee must transmit reports it receives pursuant to the provisions of this bill to the appropriate committees of both Houses, which would be responsible for drafting and reporting to the House and Senate legislation to ratify or change the President's actions. While the joint committee has no direct legislative responsibility, it must transmit the President's report, together with its recommendation for action. In a real crisis, a prompt and official, though not final, reaction from Capitol Hill could have great psychological value during the hours following a military action taken by the Commander in Chief.

At present, there is no similarly organized procedure whereby Congress or its leadership can comment officially and promptly on Presidential actions of great international and domestic importance.

My bill also insures the President some flexibility in withdrawing troops while underscoring his responsibility to undertake withdrawal. For example, if the 30-day period is about to end, say on the 28th day, and Congress had passed no legislation enabling the military hostilities to continue, the President could hardly be expected to withdraw American forces in a 2-day period and do so safely in every instance.

I wish to emphasize, Mr. Speaker, that this bill is not intended to force limitations on the President, to tie his hands in foreign policy, or anything of the kind. My bill is designed to clarify the obligations of both the executive and legislative branches when the Armed Forces of the United States are engaged in hostilities.

The intention of this legislation is not to limit the powers of the President as Commander in Chief, but to clarify and separate them from the powers of Congress. These Presidential powers are clearly outlined in the language of my bill.

The President, as Commander in Chief must have discretionary authority over our Armed Forces for emergency situations. But when we talk of the need for Congress to be consulted, that request is not a fatuous seeking of power over the Executive. If anything, it is the legitimate resumption of responsibilities which Congress has for the past decade largely ignored. I should think that both the executive and legislative branches of Government would welcome legislation such as this bill, for it would go a long way toward clarifying a serious constitutional crisis and lessening the potential credibility problems and propensity for this trust, ill will, and lack of cooperation between the two branches.

Discussion of this proposal leads to another question surrounding the current situation in Southeast Asia—the question of military tactics. Should the United States support South Vietnamese action in the Ho Chi Minh trail areas of southern Laos, or into North Vietnam itself? Should our troop withdrawal rate be 12,500 troops per month, or double that figure? Once the Congress has made its determination to authorize any or all of these actions, which we have failed to do in any positive sense, once Congress has charged the Commander in Chief with carrying out a clear-cut policy decision, then the tactical and strategic judgments

are properly those of the Executive. Second-guessing military moves by Congressmen and Senators was risky in the days of the Continental Congress. It is even riskier in the days of modern warfare. The reason so many Members of Congress have engaged in discussions of tactics and strategy is that the lack of a clear-cut role for Congress in authorizing this war has clouded the line between policy and tactical decisions. By taking the constitutional authority of Congress unto himself, the Executive has permitted an open season on his tactical as well as high policy judgments. This is a dangerous situation. American troops must feel that they have official as well as public backing when they engage in actions which risk their lives. But the present crisis between Congress and the Executive has deprived them of both on many occasions.

For example, there are those who say that the Cambodia action was illegal, because it was not congressionally sanctioned. On the other side are those who say it was a bold and successful military strategy which permitted the acceleration of U.S. withdrawals from Southeast Asia and sharply reduced American casualties in the months that followed the invasion. Both sides are right.

To bring both the political and military situations in Southeast Asia into proper focus for the American people, there must first be a solution of the constitutional crisis between Congress and the President. As long as Congress permits and the President assumes a wide discretion in warmaking powers, public debate on the war will consist of military, moral, and legal second-guessing, and the overall chances for prompt withdrawal and for peace will be reduced. We must return to the point where Congress makes clear-cut decisions on the use of American forces abroad, and where the President, as Commander in Chief, carries out and abides by those decisions. Short of this, the credibility of the President, of the Congress, and even of the troops in the field will be near zero in the eyes of a confused and angry populace. Short of a return to the exercise of constitutional powers and requirements, our ability as a Nation to maintain flexibility in foreign policy and credibility as a member of the family of nations will seriously suffer.

Mr. Speaker, the moral aspects of our Indochina policies are of concern to most of us, and I shall conclude my remarks on that subject. The morality of our policy is most difficult to view objectively. The right of the Vietnamese people to choose their own future is a moral precept that both supporters and opponents of our efforts in Indochina have used to support their own points of view. In short, it is almost impossible to get agreement on definitions and premises, let alone reach a national consensus on a policy conclusion. Regrettably, both supporters and opponents of our Vietnam policy have claimed a monopoly on righteousness and have questioned the good faith, if not patriotism, of the other side. Debate on Vietnam has been so long, so repeated, and so common, that many people have substituted slogans for facts, and intensity of feeling for logic. This kind of reasoning, devoid of logic, leads to trouble. Some would have us end an immoral war by immediate withdrawal, ignoring or considering moral the bloodbath that might follow. They feel that by stopping all American involvement in immoral killing, morality itself will be served. Others have advocated an even greater land war in Asia and bombing North Vietnam back into the stone age, because communism is in their view, such an immoral system that it justifies such acts.

I believe, therefore, that the mortality of our present policies in Indochina is a matter almost impossible to resolve; however, the question of our moral responsibility to the South Vietnamese people is one which can be debated rationally.

Politics has lost much of its relevance to this war-torn and largely agricultural people. They, like human beings everywhere, want freedom from war, from terror, and from deprivation. They will likely offer political loyalty to whichever side seems best able to deliver security, peace, and prosperity. We may criticize U.S. backing of the Thieu regime because it does not offer freedom as we know it, even though there is no question that the limited freedom below the 17th parallel exceeds that permitted by the totalitarian Hanoi regime in the north.

Despite unpardonable mistakes and tragedies which our involvement in this war has brought, American might and men have helped convince a majority, estimated at 70 percent to 90 percent, to side with the elected Saigon government against the North Vietnamese and Vietcong. If we had no responsibility or moral commitment to the Vietnamese people before we stepped in, we certainly do now. An immediate unilateral, moral, withdrawal undertaken regardless of consequences, which many well-intentioned Americans advocate as a means of ending the expense of this war and of cleansing our hands of killing and suffering, would solve little and would not promote an instant peace. While our entry into the Vietnam war was, in my opinion, a tragic mistake, that mistake cannot be erased by burying our heads in the sand and making believe we were not or are not involved.

We cannot honestly pretend that we have no responsibility for what happens in Indochina in the months following our departure. We can and must, however, be willing to take major new risks to obtain a peaceful settlement. Now that the allies have the upper hand militarily, our demands at the Paris table might be lessened. This is a risk. Our troop withdrawals can be considerably accelerated. This is a risk.

In one important sense, the acceleration of U.S. troop withdrawals and the Vietnamization process will hasten and enhance the chances of a negotiated truce prior to full U.S. withdrawal. For the fewer Americans remaining in Vietnam, the less control Washington policymakers will have over the situation, and the more the North Vietnamese will be forced to deal directly with the Saigon government, with whom it will be far more difficult for Hanoi to strike a bargain.

We should not be led into thinking that United States-South Vietnamese military superiority can deliver a finishing military blow. We should instead use this superiority to increase and quicken the desire of Hanoi to reach a settlement, before they are faced, across the bargaining table, by a lone delegate of a strengthened and intransigent Saigon government.

There is no doubt, Mr. Speaker, that the moral aspects of our policies and effort in Indochina, have troubled us all, no matter what our persuasion. The people of Vietnam, and Laos, and Cambodia are so terribly vulnerable, that any decisions taken have almost an immediate impact on their well-being, if not their lives.

When I hear the plea, "No more Vietnams," it is this suffering and disruption that comes to mind. It is time for Congress to assume vital responsibilities which have been permitted to wander—over the past decade—down Pennsylvania Avenue. The warmaking responsibilities of Congress are not fully understood by our people, Mr. Speaker, and there are indications that Congress, itself, does not fully understand its legitimate role in this vital area. Congress is not the Commander in Chief, nor is it an adjunct of the military structure. Congress has a responsibility involving questioning, evaluation, and judgment. My bill is addressed to that obligation and I urge my distinguished colleagues to support it.

For my part, I intend to concentrate in the 92d Congress on rectifying this constitutional crisis—on persuading the Congress to assert itself responsibly into the vacuum of power it has left for harvesting by the Executive. Once this is accomplished, second-guessing strategic and tactical decisions will be far less in vogue, and far less necessary, for the American people will once again feel that they have had a voice in the making of decisions which affect their lives, their future and their national honor.

COMMENDATION OF WITNESS

Senator SPONG. Congessman, I want to commend you for your very thoughtful statement here this morning. I also want to apologize to you for having to wait so long over here this morning to testify. I think you have made an addition to this record.

FUNCTION OF JOINT COMMITTEE

If I understand your proposal, your bill contains the language of the Javits bill, with the exceptions of deleting the word "property" and your suggestion of a joint committee to begin its function immediately upon the initiation of any hostilities in consultation with the President.

Mr. HORTON. No. I think I should correct that. The consultation would begin immediately.

This committee would be a joint committee of the House and Senate whose members would be available for consultation with the President, prior to or within 24 hours after he engaged American troops in hostilities.

Senator SPONG. Perhaps I didn't express myself properly. It would be a standing committee.

Mr. HORTON. Standing joint committee.

Senator SPONG. When would its functions with the Executive begin?

Mr. HORTON. They would begin immediately. If the President or National Security Council had some critical information involving a possible national emergency, the information would be made available to the joint committee. The committee could be summoned by the President at any time, but I would hope that the committee, the President and his national security advisers would work out a procedure for meeting on a regular basis.

Regular meetings would establish a close working relationship with the Executive especially with regard to warmaking decisions. It was not intended that the committee be consulted only in the event of a national emergency. But in event of a national emergency, my bill would require such consultation. Then the President would have the obligation to tell them before or within a 24-hour period, after which they must then make a recommendation to the appropriate committees of the Congress, within the prescribed 30-day period.

Senator SPONG. Thank you.

Senator Javits.

Senator CASE. If I may say a word, I do have to go.

Mr. HORTON. I very much appreciate the gentleman's staying.

Senator CASE. It is a privilege to have you testify before us. I have known of your good work in the House and your own district for a long time, I am very happy indeed to have the benefit of your suggestions.

I have just one point that I would like you to comment on.

### PREVIOUS PROPOSAL OF JOINT COMMITTEE

The Joint Committee on National Security that you propose is a very interesting suggestion. I have previously introduced legislation that would develop a means of cooperation between the President and the Congress, so that Congress could in these matters of national security exercise its full responsibility in a way we never have done in the past. I proposed the formation of a joint committee on national security.

The committee I had in mind would have a somewhat broader base and purpose than the one you propose. It would continually review national security questions and have an independent function from the President, although it would not necessarily function in an adversary role to the President.

It would have ample staff of its own to deal with such questions as the adequacy of our defense structure, the threats facing us from foreign countries, the stating of our national security goals, and the then adaptation of our defense structure to meet those goals. Thus, Congress would be in a good position to carry out its functions in the national security area. If legislation of the sort you propose should be seriously considered, I would want to consider it with the view of developing and strengthening the concept of this joint committee.

Mr. HORTON. I certainly thank the Senator for these comments.

My thought was not to get involved in redefining the jurisdiction of the standing committees of the House and Senate. The Armed Services Committees and the Foreign Relations and Foreign Affairs Committees have their unique responsibilities, some of which you spoke about. The joint committee I propose would serve as a liaison between the legislative branch and the executive branch, and would be available to act immediately, especially in these situations envisioned by the Javits bill.

Senator CASE. Your committee would have a considerably more limited function than I had proposed.

Mr. HORTON. Right. Mine is a technique to try to get us in a position where we can act instantly and get information instantly and not have to rely upon the structure of the Congress, the House and the Senate, to resolve some of these problems. The committee would bring together the leadership and foreign policy experts of the Congress so that it could be available for consultation with the President and make statements and recommendations during situations set forth in the Javits bill involving the exercise of warmaking powers.

COMMENDATION OF WITNESS

Senator CASE. I thank you very much, and again I want to commend you for an excellent statement and suggestion.

Mr. HORTON. Thank you.

Senator SPONG. Senator Javits.

Senator JAVITS. Yes; I shall not detain you long, Congressman. First, let me thank you for your interest, your participation, and your great patience in waiting here until we were through with the previous witness. It was really very generous of you. I would also like to thank you for your cooperation in putting this bill in the other body and know you will carry the responsibility there with great distinction.

JOINT COMMITTEE ON NATIONAL SECURITY

I would like to ask you just a question or two about this very interesting suggestion of a joint committee which is crystallizing the consultation aspect of the situation, and formalizing it in a very interesting way.

One of the worries that we always have is that if the President is going to rely on this consultation as if it were an action of both bodies, which sometimes Presidents have invoked, aren't we under the disadvantage that this group of leaders may themselves not necessarily be the representative voice of the membership? Isn't that a problem?

Mr. HORTON. That is, of course, a problem. But the committee as I see it, would perform a liaison type of function, and would be able to meet quickly with the President and his national security advisers. The committee would not be the sole voice of Congress in foreign policy matters, but it would enhance the chances for unity among the branches of government during a national emergency.

If the Congress sees fit, it certainly can exercise its constitutional responsibility and take an action other than that proposed by the committee. The committee should not and could not take the place of Congress.

Senator JAVITS. Or even of the legislative committees.

Mr. HORTON. Or of the legislative committees. It would work with them.

Senator JAVITS. You are really codifying what we mean when we say the President has called in the leadership

Mr. HORTON. That is it, basically.

Senator JAVITS. And your proposed committee would introduce at least four members who are not in the technical leadership.

Mr. HORTON. And also other committees, including the Judiciary Committees and the Joint Atomic Energy Committee so that there are some additions to the leadership as we know it today.

Senator JAVITS. Well, a quick count of this indicates it would be a committee of 23.

Mr. HORTON. Twenty-four.

Senator JAVITS. Twenty-four; yes.

Well, it is a fascinating suggestion. I have indicated what might be a problem. I think it is certainly better than the present setup of the "leadership." I have been in on those meetings myself and who comes and who is invited, aside from the hierarchy of each House pretty much depends on the President. He always invites the chairman and ranking member of the particular committee the President thinks is involved. Under your bill we would be giving him our own evaluation of the committees we think are involved which is an improvement.

So I assure the Congressman I will study this very carefully and very sympathetically.

### COMMENDATION OF EFFORTS CONCERNING WAR POWERS

Mr. HORTON. Senator, I certainly want to commend you especially, and the members of this committee for looking closely at these war-making powers. As I indicated in my statement. I feel there is a great misunderstanding abroad and in our country about the constitutional authority of the Congress and of the President. I think that you, Senator Javits, in the introduction of your bill have crystallized this problem for the American people and it gives us an opportunity to state for the American people what this problem is in constitutional terms. The previous witness talked about the numerous instances when the President took action without the Congress. This does not in itself stretch the language or authority contained in the Constitution.

I think your bill has brought out that there are certain instances under the Constitution where the Congress has the power to declare war, together with other authority given to us under the Constitution. The President is the Commander in Chief, and what you are saying is that the authority of the Congress has been usurped by the President.

We have let it go in most instances, and what we have got to do is get back to the Constitution. The Congress has to have a voice in this decisionmaking process. We are in a situation in the present-day world where things can happen just with a snap of the fingers, and what you have tried to do, I think, is to enumerate realistically those instances when we must share in the decision. You are saying, "We are not going to take away any of your authority, but we must be consulted and want to be a partnership."

And what I tried to do is put a mechanism in there so that we can have an established procedure for consultation.

I would envision that this committee would be a standing committee in the sense that it would be a continuing committee, it would have a staff, and it would perform valuable functions, and so I think it would be a very important addition to the suggestions you made in your legislation. And I again want to commend you because this point of constitutional distinction between the role of the President and the role of the Congress. I think, is one that needs to be understood by the American people.

BASIC PHILOSOPHICAL ISSUE

Senator JAVITS. That is the way I feel about it and that is the way Senator Spong feels about it. Personally I was fortified rather than shaken by Senator Goldwater's testimony. I think the basic issue of philosophy is whether we do or don't have as much faith in the capability of Congress to do its duty as we have in the President to do his duty. There is a sense of restraint about the frequency of our going to war, and I think this is symptomatic of our development as a nation—that we want to be somewhat more deliberate about it than we have been, consistent with protecting the security of our people.

Mr. HORTON. I heard your questioning of Senator Goldwater, and I heard his testimony, and I would agree with him that in order to accomplish what he wants to do, namely to give the President more authority and more power than he now has under the Constitution he needs a constitutional amendment. I would agree with the position that you took that we don't need a constitutional amendment. What we need is a clarification and a better understanding of the constitutional authority given to the Congress and the Congress now, I think, should take over that authority and should exercise it, as a partner with the Executive.

Senator JAVITS. Precisely. We are seeking to restore authority which has been eroded, taken away, given up or usurped rather than to create some new authority.

Mr. HORTON. Right.

Senator JAVITS. Well, I thank my colleague very much and thank the Chair.

Senator SPONG. Again I thank you Congressman Horton.

EFFORT IS TO HAVE CONSULTATION AVAILABLE

I think you have focused these hearings upon the question of consultation. It was interesting to me that Senator Goldwater used the Cuban missile crisis consultation as an unsatisfactory example. All too often past history has shown that the consultation is after the fact. What you are seeking is to have consultation readily available at all times.

Mr. HORTON. Prior to, immediately and within the 24-hour time frame depending upon the circumstances.

I might say another thing that might be brought up with regard to my suggestion because it has been mentioned by some of the other witnesses who have referred to creating a committee. It has been suggested that the committee should be available at all times. I don't feel that it is necessary for everyone to remain in Washington because, with the quick means of transportation and communication I don't think the committee members have to remain in Washington. I think the majority of that group of 24 could be available on a personal basis in a very, very short period of time.

Senator SPONG. Thank you again for your testimony.

(Whereupon, at 12:30 p.m., the committee was adjourned, subject to the call of the Chair.)

# WAR POWERS LEGISLATION

MONDAY, APRIL 26, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10 a.m., in room 4221, New Senate Office Building, Senator J. W. Fulbright (chairman), presiding.

Present: Senators Fulbright, Spong, Aiken, Case, and Javits.

The CHAIRMAN. The committee will come to order, please.

## OPENING STATEMENT

The committee today continues its hearings on several bills pertaining to the authority to initiate war. Last month the committee heard testimony by four distinguished historians on the broader historical and constitutional questions raised by the prospective war powers legislation.

We have also heard testimony by a number of Senators and Congressmen who are sponsors or cosponsors of war powers legislation. We have also received testimony from one Senator who opposed the bills now under consideration. The administration's views will be presented by Secretary Rogers to the committee in public session on May 14.

Our three witnesses today bring a variety of perspectives and experience to the committee's continuing inquiry. Our first witness is Mr. McGeorge Bundy who served as Special Assistant for National Security Affairs to both Presidents Kennedy and Johnson. In 1966 Mr. Bundy was appointed president of the Ford Foundation, an office of great responsibility which he still holds.

Mr. George Reedy has served as press secretary and special assistant to President Johnson and is now a fellow of the Woodrow Wilson International Center for Scholars. He is the author of "The Twilight of the Presidency," published in 1970. In my opinion, Mr. Reedy's book is one of the most thoughtful and perceptive studies of the Office of the Presidency ever made.

John Norton Moore, professor in the school of law at the Univestity of Virginia, is a noted authority in both international and constitutional law. The committee was privileged to include in its own recent compilation of documents on the war power an article by Professor Moore relating to the legal aspects of the intervention into Cambodia.

The committee will hear first from Mr. Bundy, then Mr. Reedy, and finally from Professor Moore.

Senator JAVITS. Mr. Chairman——

The CHAIRMAN. The Senator from New York.

Senator JAVITS. I just want to thank Mr. McGeorge Bundy for really putting himself out to be here today. I think what he will tell us is very important. I hope he will find it well worth his while. I thank the chairman who went to great trouble to give us an early hearing to accommodate McGeorge Bundy. I appreciate that very much.

The CHAIRMAN. The Senator from New York is so persuasive that no one can resist him.

Mr. Bundy.

## STATEMENT OF McGEORGE BUNDY, PRESIDENT, FORD FOUNDATION

Mr. BUNDY. Mr. Chairman, Senator Javits, it is an honor to respond to your invitation to take part in these hearings on S. 731, a bill to regulate undeclared war. I believe that the problem addressed by this bill is one of the most important and difficult we have, and I believe that the provisions of this bill are the best yet devised. I intend no criticism of other resolutions that are before you; I haven't studied them as carefully as I would like to have done. I think that in working his way to his present proposal Senator Javits has made a most serious contribution.

### BALANCE STRUCK BY S. 731

I believe this proposal strikes the best balance I have yet seen between the national need for certain powers of immediate presidential action and the national need to insure that in any sustained hostilities the executive branch must act only in partnership with Congress—a partnership in which the President does not act beyond authority explicitly granted by Congress.

The need for the right of rapid presidential action is clear from our history and our present world situation. That the President has—and must have—the power to order immediate reply to immediate attack; that Presidents have legitimately moved troops into foreign territory to protect American lives; that there is always a possibility that local military action will be necessary when forces are stationed abroad even for the most peaceful purposes—all this is plain.

But it is equally plain that there is a great difference between these necessary immediate executive powers and the power to make war without any limit of time or size. It is clear in the Constitution, as it is in our political history, that war, in this larger sense, should have both popular support and explicit congressional authorization. What S. 731 does is to provide an orderly procedure under which no immediate resort to armed force by the executive branch could be sustained for more than 30 days without specific affirmative authorization by the Congress.

### AUTHORIZATION OF HOSTILITIES BY MEANS OTHER THAN DECLARATION OF WAR

The bill also provides that the Congress, if it chooses, can authorize the conduct of hostilities by other means than a formal declaration of war. I believe this provision—section 1.C—is a most important advance in the process of properly engaging the Congress in decisions

about the use of force. I believe that the traditional declaration of war has many dangers, both in its internal and in its foreign effects. For excellent reasons it has not been employed in cases like Korea and Vietnam. And one special weakness of the declaration of war is that by our whole tradition it transfers unfettered direction over the conduct of war to the Commander-in-Chief. I think one of the most powerful lessons of our long and painful involvement in Southeast Asia is that such a transfer is particularly unwise in situations where there is deep division of opinion in the country. Hard as it may be—and different as it is from some of the traditions of earlier wars—I believe that in such a case there is no substitute for a full and continuous sharing of responsibility between the President and the Congress. This cannot be achieved either by waging war without consultation with Congress or by the one-shot process of the formal declaration of war.

One objection to this notion of a regulated process, short of a declaration of war, may be that we have no reason to be happy with the history of the Tonkin Gulf resolution, which falls exactly into the category of actions authorizing the use of armed force without a declaration of war. But I believe that if we examine that history closely we can see that the exact trouble with the Tonkin Gulf resolution was that it was misperceived, both by the Congress and by the executive branch, in ways that would be much less likely to occur under the procedures of S. 731. The Congress surely did not believe, in 1964, that it was voting for the war that happened. And the executive branch, while I believe it was mistaken in describing the resolution as the functional equivalent of a declaration of war, was thinking and acting in a framework of legal and traditional experience in which there was no clear middleground between unauthorized hostilities and such a formal declaration. Neither misunderstanding could have occurred under S. 731. Both parties, almost surely, would still have believed that a formal declaration was unwise. Both would then have been required to address the precise question of what other authorization of hostilities they would ask and support. The result might still not have been happy, but I do believe it would have been much better.

Moreover, we now have the history of the Tonkin Gulf resolution to help us and we can assume with confidence that any Congress which is asked to authorize limited hostilities at any time in the future, under a bill like S. 731, will remind itself that it must write no blank checks. The Congress can and should put appropriate conditions on any authorization of limited hostilities. The constitutional power to declare war clearly includes the power to put limits on any hostilities that are authorized. This is what we have not properly understood in the past; this is what S. 731 explicitly affirms; and this affirmation opens the way to a reconstruction of the relation between Congress and the President in this crucial area.

### POSSIBLE OBJECTIONS TO S. 731

We must all remember, however, that no use of armed force is ever anything but a lesser evil. The best way to deal with the possibility of war is to try, by all means, to avoid it. I would not favor S. 731 if I

thought that it could operate in any way to make the choice of a war-like option more attractive to our Government. I make this point because I think it conceivable that some of those who honestly believe that all wars are bad may object to S. 731, on the ground that it could open an avenue to prolonged warfare without forcing the Government to face the unpleasant task of declaring war. It can be argued that the establishment of a procedure for congressional approval of limited hostilities makes the resort to such hostilities more likely. This is an understandable concern, but I think it is groundless. I believe that the requirements of S. 731, together with all that we have learned as a nation in the hard case of Vietnam, would operate to insure great care in the executive branch as well as in the Congress itself.

And unfortunately we cannot assume that there will never be a case in the future in which limited use of our Armed Forces will be necessary while a formal declaration of war remains undesirable. It is obvious that we must not have another Vietnam and I believe we can avoid any such misfortune simply because Vietnam is genuinely unique in many ways. And there are many lessons to be learned from that experience to help us do better in the future. But the world is full of difficult and dangerous situations and I believe it would be wrong for us to pretend that it will be wise in every case, in every area, in every time, for our Congress to have no choice between a declaration of war, on the one hand, and a complete reliance on the powers of the President, on the other.

One other possible objection deserves mention, although again I think it is not persuasive. We have a long tradition, and a good one against trying to wage war by committee. For this reason we have left the conduct of campaigns to field commanders, and we have left the conduct of wars to the Commander in Chief. And so it can be argued that it is wrong for Congress to assert itself in defining the terms and conditions of any authorization of hostilities. But this is an error, I think—a confusion of different kinds of control. I think that Congress would be most unwise to attempt to tell a field commander how to fight a specific battle, but I think it has every right to assert itself on broad questions of place, time, and the size of forces committed. It also has a right, and even a duty, to concern itself with the purposes of any hostilities and the conditions on which they may be continued or ended. I do not say that all such congressional concerns will be comfortable for the Commander in Chief and his field commanders. I do say that they should be heeded, because the alternative is what we have seen in recent years, namely, a progressive breakdown in the indispensable partnership between President and Congress.

### PURPOSE OF S. 731 IS RIGHT

So I favor this bill, Mr. Chairman. I do not say that it is perfect, and I hope it will have the careful study, in both Houses and in the executive branch, that the importance and the difficulty of the subject justify. Alternative approaches, or improvement in this one, may well be possible. But the purpose is surely right: it is nothing less than to help to reconnect the President and the Congress in the effective control of the use of our Armed Forces.

The CHAIRMAN. Thank you, Mr. Bundy. That is a very concise and a very unequivocal statement. I think I understand your point very well.

There are two questions before I turn it over to the Senator from New York.

ASSUMPTION OF WAR POWERS BY COMMANDER IN CHIEF

On this question of the Commander in Chief, which you refer to in your statement, we have had considerable pressure, sentiment, in the Senate that the Commander in Chief has in some mysterious way assumed all of the war powers. This grew up especially at the time of the Cambodian invasion.

Would you comment a bit about it?

Mr. BUNDY. Well, I think, as I said in a different place in the statement, Mr. Chairman, that one of the misfortunes of recent years has been this increasing separation between Congress and the President. There are many reasons for it, some of them quite understandable, in the sense that there have been real differences and difficulties. You, sir, have had some long and close connection with the whole problem and you know better than I, how painful this has been and how serious it has become.

I believe the situation in which we now find ourselves in Southeast Asia is one in which whatever authorization there was in the Tonkin Gulf Resolution has disappeared with its repeal and in which there is no other explicit authorization unless you count the Southeast Asia Treaty, and I think there is a grave question about that when a more explicit resolution has been passed and then repealed.

We have a situation in which the President is relying on his direct powers, not simply as President and Commander in Chief in the constitutional sense, but his immediate command responsibility for the safety of troops and he is making that single responsibility carry all the weight of policy, not only in Vietnam but also in Cambodia and in Laos; and I have to say I think this is a profoundly unsatisfactory basis on which to act. It is the only one he has. There is no other authorization yet by the Congress.

I don't think, therefore, we can say that all of the responsibility for this unsatisfactory situation rests with the White House, but I guess my short answer to your question is that the war powers are shared; the Constitution writes it that way; history shows it that way, and we have allowed the process of that sharing to break down. This is what this bill is designed to repair.

The CHAIRMAN. I think that is a very good answer. I remember President Johnson, on some occasions said that he could do what he was doing in Vietnam without the Tonkin Gulf Resolution. The purpose it served was simply—in his sense as a politician—to neutralize the Congress. I don't think that was always the case. Some of his other supporters sometimes attributed greater significance to the resolution but they did on occasion say he didn't need it to do what he was doing. Is that not correct?

Mr. BUNDY. That is correct.

The CHAIRMAN. Of course, President Nixon, in reply to requests for his opinion about the repeal of the resolution has said he didn't need it to do what he was doing in Vietnam. When the war was expanded into Cambodia and Laos, it struck me as a most unusual statement. Put together both Presidents seemed to dismiss the war power of the Congress as being of no effect at all. They could do whatever they liked. This seemed to be a logical conclusion from those statements.

Is that putting it too strongly?

Mr. BUNDY. Well, Mr. Chairman, I don't know that I can say exactly, I am not sure what alternatives were left in the situation which had developed. I am not myself disposed to say that there never was a cause or a reason or justification for some military action either in Cambodia or Laos. My criticisms of those actions would rest rather to some of the arguments that were advanced in their defense and some of the claims that were made for their value both of which seem to me to have been overstated.

The difficulty is that nobody, I believe, is saying that the White House has no power, the executive branch has no power to conduct the operations of armed forces in Southeast Asia, but the fact is that over a period of several years there has been this very grave separation, no question about it.

### CONSTITUTIONAL LIMITATIONS ON POWER OF COMMANDER IN CHIEF

The CHAIRMAN. I wasn't really at this time thinking of the substantive question of the on-going war, only the constitutional aspects of it, the limitations on the power as Commander In Chief.

It seems to me that the Founding Fathers at least had a pretty clear idea this was a restricted power, that is, not pertaining to policy-making or the determination of whether a war should be carried on, but only to the conduct of it.

### CONGRESSIONAL AUTHORITY TO SET A DATE TO TERMINATE WAR

I take it that you feel that the Congress has every constitutional authority, at least to set a fixed date for the termination of the war. In other words, there is no constitutional question in your mind about a bill like the Hatfield-McGovern bill. We have every right to do it if we choose to do it?

Mr. BUNDY. I agree.

The CHAIRMAN. That this is not an interference with the Commander in Chief's power?

Mr. BUNDY. It seems to me that the power of the Congress to declare war clearly includes a power which I suppose is joint with the President, to settle. I don't believe the Congress can do that unilaterally but the bill would have to be signed by the President or passed over the veto.

The CHAIRMAN. I don't want to prolong this. I know the Senator from New York has some questions. That is a difficult question. This is in the nature of a limitation of an amendment to the Foreign Assistance Act. Of course, if the President chooses to do without that act, he could veto it, as you say, and I suppose it would be very difficult.

It strikes me, however, it is very important for the Congress to act on this as a matter of persuasion upon the President.

PERSUASIVE POWER OF CONGRESS ON PRESIDENT

You have been in the White House. Do you think the White House occupant, not any particular one, but generally, is wholly immune to the persuasive power of action by Congress? Have they so isolated themselves that if we pass the bill even though the President didn't agree with it, it would have no effect upon him?

Mr. BUNDY. It has never been my observation that Presidents pay no attention to the Congress. They may not agree with the Congress, but they are concerned about its position.

The CHAIRMAN. They do take note of it if it is brought to their attention?

Mr. BUNDY. Yes, sir.

The CHAIRMAN. That comes as a surprise to me; I hadn't felt that way.

Mr. BUNDY. The chairman underestimates the degree to which his views were watched closely, certainly in the years in which I was there.

CONSTITUTION GIVES NO MIDDLE WAY

Senator JAVITS. I think you have contributed one thing in here which is critically important, and that is that there is no law we now have, and nothing in the Constitution, which gives us a middle way between the relatively obsolescent declaration of war and the Presidential reacting power in lieu of the declaration of war. That is the thrust of your testimony?

Mr. BUNDY. That is correct, sir.

Senator JAVITS. I think this is extremely valuable. I feel it buttresses the case for this kind of legislation.

The important thing, I think, is to support the concept that we have the power to do it by law, that we should exercise it would be helpful to the Nation. That essentially is your testimony, as I see it.

EFFECT OF S. 731 DURING CUBAN MISSILE CRISIS

I would like to ask you about a situation which comes out of your own experience. Now you were deeply involved, were you not in the Cuban missile crisis?

Mr. BUNDY. Yes, I was involved in that.

Senator JAVITS. Within the parameters in which you can testify, do you see anything in our effort to pass a law such as the one I have proposed dealing with the division of the war powers, which would have interferred with or hamstrung the President whom you served, in respect of handling of a crisis like that?

Mr. BUNDY. I think the essential processes of the Cuban missile crisis would not have been sharply affected by this resolution or this bill or this kind of procedure.

That was a very unusual case, in my judgment, in that the justifications for a private deliberation and a secret decision were unusually great and those justifications had to do with the importance of having an established U.S. position clear and on the record, in a sense to take the diplomatic initiative from the Soviet Union, and I think there would have been very important advantages in that which

probably would have led the President—and I am of course speculating—to follow the essentially lonely executive route of decision-making which he did follow in that case. Then, of course, under this bill and others like it, he would have had to do what he did in any case, namely, to report the matter to the Nation and to the Congress and within the 30-day period under your proposal there would have had to have been an affirmative authorization for the quarantine to be sustained, naval quarantine.

I would think that given the national reaction and the gravity of the issues, the prospect of effective support from the Congress would have seemed to the President sufficiently great so that he would not in that case have modified his preferred policy. It was a very difficult affair and I don't think the process by which the congressional leadership was in effect informed rather than consulted was ideal, and I think the pressure which it placed upon members hearing the situation for the first time was very great.

In a similar way, as President Kennedy himself said, in the week of executive deliberation over that problem and what to do about it, a great many people had ideas at the beginning of the week that they had changed by the end of the week, so that the process of discussion with the leaders was not perfect. The reason was the overriding need, as it appeared to the President, and I think correctly, for a basically private decision which could capture the diplomatic initiative. If there had been a national debate over what to do about those missiles we might easily have had a much more dangerous reaction than in fact we had.

### ALTERNATIVES UNDER S. 731 DURING CUBAN MISSILE CRISIS

Senator JAVITS. Isn't it true that the President, between the time that he declared a naval quarantine and the outbreak of hostilities, because we must assume that if that naval quarantine had been enforced there might have been an outbreak of hostilities, that he could have sought a resolution of the Congress and that that would have fully brought him four square within the parameters of this bill so he could have acted? In other words, my bill does not require simply a post facto resolution, to wit, within 30 days, it is entirely susceptible of being met according to its terms by a prior resolution.

Mr. BUNDY. It is an interesting question, I think, and tell me if this answer is not quite responsive. I may not have fully understood your own question. Interesting whether he would have wanted to come for an authorization for quarantine or imposed the quarantine under the 30-day provisions, under one of the four excepted cases of your bill. I would think probably the latter although it is very speculative.

Senator JAVITS. It is quite consistent because my bill deals with hostilities and there was no outbreak of hostilities; even though he imposed the quarantine he had a right to expect there might be one.

Mr. BUNDY. That is right.

Senator JAVITS. But he could have fully qualified under my bill, as I understand my bill, by seeking congressional resolution which would have authorized him to take an action which could create hostilities as much as he could qualify under my bill by engaging in hostilities and then seeking congressional concurrence.

Mr. BUNDY. Either way.

S. 731 WOULD MEET CUBAN MISSILE CRISIS

Senator JAVITS. I want to make clear that is my interpretation of the bill as it would meet the Cuban missile crisis.

Mr. BUNDY. I read it the same way.

Senator JAVITS. I say that because we had a witness on Friday, Senator Goldwater, who strove mightily to point out that we had such tremendous vacant spaces in this measure as to invite grave jeopardy to our national security, though he ultimately had to admit that the real reason for his testimony was he didn't have very much confidence in the Congress. But it is a fact, and this is important to me to point out, that as far as our historic experience goes, there are no means for breakdown in this process, short of the Congress just refusing to act, and that is its right just as the President could refuse to act. Do you agree with that?

Mr. BUNDY. I agree strongly. It seems to me in fact that the bill is very thoughtful and comprehensive in its listing of the kinds of cases that do arise where a President might have to act without taking the time to ask the Congress with its own procedures to act and those procedures can, of course, sometimes be long. So another thing I like about the bill is its careful provision for getting action within a 30-day period unless the bulk of the Congress resists it.

DOES S. 731 ADD TO CONGRESSIONAL WAR POWERS?

Senator JAVITS. Another thing that interested me greatly about your testimony, vis-a-vis that of Senator Goldwater, is an interesting parallel point in your analysis in your statement as to what you think we can legislate. Senator Goldwater expressed great fear we would try to run the Army, Navy and Air Force, tell them what missions to perform, where to be deployed and when and how and so on, we would try to run the war by committee.

Now, do you read anything into my bill which adds to the power whatever power we have under this score? We certainly have not tried to run a war by committee.

Mr. BUNDY. It is an honorable and traditional concern of those who, have been close to the Armed Forces. One simple shorthand way of thinking about it is the historic feeling that there was attempted interference with the conduct of the Civil War by the Committee on the Conduct of the War at that time.

I remember being lectured by Secretary Henry L. Stimson on that point, but I think as to the actual history, certainly in the 20th century, you are entirely right that the conduct of wars has not been interfered with by the Congress except in the sense of congressional inquiry and investigation of the way in which the homefront backs up the soldiers, in the case, for example, of Senator Truman's famous committee in the second war, and in the quite proper business of informing themselves about the course of hostilities which a number of committees have concerned themselves with in the case of Vietnam.

These things seem to me clearly justified and I go further, as you see, on the last page of my statement and do believe that the power to declare war and the share which the Congress has in the conduct of war by raising and supporting an army and providing the sinews of war is broader than the Congress has recently chosen to assert.

Senator JAVITS. It seems to me you have also contributed materially to our thinking with the suggestion that whereas if we declared war we have no power to undeclare it, but if he did it pursuant to this law and reserved to ourselves, for example, the same power we had in the Tonkin Gulf resolution to terminate it by concurrent resolution of the two Houses, we could put a limit for practical purposes upon the concurrence which we have. This would be in addition to any specific limitations that might be contained in the initial authorization.

Mr. BUNDY. That is correct.

EFFECT OF S. 731 ON VIETNAM WAR

Senator JAVITS. My last question is this: I am very interested in the effect of this legislation on the Vietnam war. After all, this would not affect directly the war in South Vietnam. In my judgment it would affect hostilities within its definition, in Laos, Cambodia, North Vietnam, or anyplace outside of the hostilities the President contends he has the right to liquidate. That, I think, is the legal concept of the President's action now.

Under those circumstances can you see, either a direct effect upon the President's position respecting Vietnam, or upon the overall climate in the Nation, if we passed this kind of a law?

Mr. BUNDY. Let me be sure I understand, Senator Javits, because I am not sure I have fully studied the way the act applies to the current situation.

I read section 3 to say this act shall not apply to military hostilities already undertaken before the effective date of this act?

Senator JAVITS. I agree.

Mr. BUNDY. So as you see it that refers primarily and perhaps uniquely to military hostilities in South Vietnam.

Senator JAVITS. Right. The President claims that he derives his present legal authority from the fact that having been Commander in Chief, having become Commander in Chief when a war was in being, that he has the power to do all necessary to liquidate that war, to deal with the security of our forces, to bring them back and to deal with everything which is appurtenant to the war which he found in being. So he said he didn't need the Tonkin Gulf resolution.

I think we can pass a law saying get out of Vietnam by a given date which would be constitutionally even more effective than to cut off the money. But as most of my colleagues believe in the cut-off-the-money route I have gone with them because I want the war ended, but I don't think that is necessarily the best constitutional means at all.

This is the President's power, I have excluded that from my bill, I couldn't abridge his constitutional power by law if I wanted to, yet I feel in two respects this bill, and this is what I would like your comment on, this war powers bill or any version of it would have a great effect on ending the Vietnam war. One, it would prevent by law the development of a new war, and I think we could put the President to his proof, if he invaded North Vietnam, for example, that it was strictly an action required to safeguard the security of our troops being withdrawn from Vietnam. Or that there is a new set of hostilities which is unlawful if not carried on pursuant to this law.

Secondly, that it would create a climate in the country in which the Congress could then take the next step, which is to curtail the Vietnam war because it had established the principle that we shared the war-making responsibility, just as the repeal of Tonkin Gulf established the platform upon which we now feel we can intervene in respect of ending the Vietnam war, I would appreciate your comment.

Mr. BUNDY. Well, I have not fully understood the bill until this last exposition of yours. I would have supposed before from what you say probably at least it could be argued that section 3 would cover military, would exempt military hostilities generally in the area of South Vietnam. My own view is that it would not be desirable for the United States to take military action beyond South Vietnam except under very special circumstances that I have not seen in recent months and do not honestly expect. I think, therefore, that I would not object to an interpretation of section 3 which limited the authorization, whatever it is that the President now has in this relation, to military hostilities in South Vietnam to South Vietnam explicitly, which is, I take it, your judgment.

### S. 731'S EFFECT ON VIETNAM WAR

Senator JAVITS. It is not that strict. I don't say he has to operate militarily only in South Vietnam. I say that he can operate outside of South Vietnam but only related to the extrication of our troops, their security, et cetera, but not pursuant to Vietnamization, pacification, or a dozen other objectives.

Mr. BUNDY. Let me say a word about Vietnam and about the role of the Congress in helping bring that to an end. I not only have no constitutional questions, I have no political question about that. It seems to me important and desirable that the Congress should move in this area. I do feel—and I have this much of a sense of the obligations and responsibilities of the executive branch too—that it is very difficult to manage these matters from only one end of Pennsylvania Avenue, and obviously the better way of getting to the quick end of the war that I think the country now really almost insists on is that it should be done in partnership between the executive and legislative branches, and this is the particular reason in the current situation why I find so distressing the progressive breakdown of that process of working together.

### S. 731 IN VIEW OF CONGRESSIONAL JUDGMENT

Senator JAVITS. As a public person of long experience and as a former public servant of very high office, we are faced with the argument that while Congress can be improvident too, like action on the railroad strike in Truman's day, it really doesn't add anything because Congress will just whoop through any resolution with the war fever, when the President asks for it. It is charged that Congress may have been even more improvident than an executive.

Balancing against that possibility—and I don't shrink from it—against the points which you made, especially your evaluation of why the Tonkin Gulf resolution would have been less likely with its very broad grant of authority, if this law had been on the books, balancing that against the advantages you find in this law, where would you say would be the greater weight of the public interest?

Mr. BUNDY. Well, I think it has to be granted that not everything the Congress has done or will do the last 200 years or the next 200 years will be as wise or as well considered as we would all like. That has to be granted about the executive branch too. And it seems to me that there isn't any escape either under the constitutional law or under the requirements of democratic process from reliance on Congress for its full share in these matters, and there is always going to be impatience in the executive branch. At any given moment probably any Members of the Congress themselves could think of committees or of areas in the Congress which are not serving in their view the public interest as well as they should, but I don't think it an answer to that set of difficulties to simply beg the question of the responsibilities of the Congress.

I don't think of any time since World War II when I would say that the dominant judgment of both Houses of the Congress has been more impatient and less responsible than that of the executive branch. There may have been a time when sentiment toward Communist China, the Peoples Republic of China, was more violent on the Hill than in the executive branch, and there may have been other episodes of that sort. Of course in the early 19th century the term "war hawk" applied much more to Members of Congress than to members of the administration in some of our difficulties with European countries, but I don't think one should say that these matters are too important for the Congress. That seems to me to be wrong.

Senator JAVITS. I thank you very much.

The CHAIRMAN. Mr. Bundy, we thank you very much. I am sorry to detain you longer than we said, but you made one statement which prompts one further question.

### LIMIT OF CONCEPT OF EXECUTIVE PRIVILEGE

Just before the end you were talking about the necessity of cooperation in the form of partnership in the relationship between the Congress and executive. You suggested the question which is becoming very pertinent, I think. What would you think is the limit of the concept of executive privilege? It is a very troublesome problem at the moment. Having been in the position you were for so long, would you give us your view about executive privilege?

Mr. BUNDY. I will try, Mr. Chairman. I was always told what my views on executive privilege were when I was working for the Government. I recall having incautiously agreed to come to either a formal or informal hearing, I forget which, in 1961, and the then Director of the Bureau of the Budget, David Bell, a man of great conscience and integrity, called me up and said that is something you don't do. You are a member of the White House staff and the White House staff doesn't testify. I said is that an order? He said, Well it will be if you don't listen to me; and we left it at that and I never did, as a staff officer of the White House, come in any formal way to the proceedings of the Congress.

I may say in passing, Mr. Chairman, I think that for those who hold these staff positions in the White House there is a very serious limitation on how far they perceive and understand the full range of process of the Government of the United States and I think I came to understand more and more that in working in a staff position of that kind

one simply is not fully engaged in the relations of the executive branch with one very important part of the Government. I am not saying that there weren't people involved in legislative relations in the White House staff who were constantly involved, of course, in consultation and work with Members of both Houses and all kinds of committees, but for those who had particular responsibility in the national security areas that was not true and I gather it hasn't changed very much in that respect and that I think is a misfortune, and it is doubly unfortunate if there isn't a very strong and effective relationship between the President and those in his government who do regularly appear before committees and who do engage in the discussion of substantive matters. In foreign policy, that means primarily the Department of State, then beyond that the other executive departments concerned with international relations, of which there are very many nowadays.

As to executive privilege in the sense of who can see whose papers, I find that difficult too and the part I know most about it is the handling of papers that relate directly to the affairs of the President, and there I think I would take the presidential view, the right of the President to protect his own internal deliberative process in the same sense that any man coming to a decision has a right to keep private the back and forth and the interchange of those giving him direct advice and the papers on which he may rule or overrule positions of associates. Once a position is reached, however, within the executive branch, it seems to me there is great importance in full exposition and continuous exposition, and this is one of the areas in which again I think there has been breakdown in recent years, especially in relation to Southeast Asia, and I also believe, Mr. Chairman, that there is another whole kind of information which is not of this character of being a necessary part of the preliminary judgment of a man who is entitled to privacy as he makes up his mind. I do not believe most of what is highly classified under the intelligence, the military classification security system, should be kept from responsible Members of the Congress at all. Indeed I believe the opposite.

I believe there ought to be a wide and sustained and official process by which things like intelligence estimates and understanding and information gathered by the executive branch at vast expense should be available to the responsible committees of the Congress and to their staffs.

The CHAIRMAN. Of course, you know it is not.

Mr. BUNDY. I understand that very well.

### IMMUNITY OF MR. KISSINGER

The CHAIRMAN. To come down more specifically, I am not quite clear whether I understand you or not. There was a time when there were relatively few people in a confidential relationship to the President on the White House staff. It has now grown very large. Mr. Kissinger is the head now of an agency that is estimated directly to have over 100 people in it.

Do you think Mr. Kissinger would be immune from appearances and discussion of these matters before this committee or any committee of the Senate?

Mr. BUNDY. Well, as I say, Mr. Chairman, my views on that were set for me by——

The CHAIRMAN. You are now out. I understand that. What are your present views? You are not told by the White House now what to say.

Mr. BUNDY. I have had a rule for a long time that one thing I would try not to do would be embarrass the poor sinners who are trying to do that job now, and I think I will hold to that rule, if you will forgive me.

The CHAIRMAN. I think since you have accepted this job of public service, it is part of your responsibility to give us the benefit of your wisdom. Our next witness can testify to this, but there are very few possibilities for us to inquire on this subject of other than academic circles.

Certainly no one is in a closer or more intimate or more important relationship with the President insofar as making policy than Mr. Kissinger. I don't want to see his papers. I don't want to see his memos. I want to talk to him. The committee wishes to talk to him and find what they really have in mind for Vietnam, what is behind all of this rhetoric which allows the people to have entirely different views about the objectives. In other words, we want clarification of the policy, not the intimate conversations with the President. Who else could better clarify the real objective of the President in Vietnam and what the Nixon doctrine means?

Mr. BUNDY. Mr. Chairman, I myself think the right way and the best way to conduct the exposition of the foreign policy of the United States before the Congress is that in formal hearings the principal spokesman for the U.S. Government should be the Secretary of State. That seems to me the right and proper tradition.

The CHAIRMAN. For public hearings?

Mr. BUNDY. Yes, sir.

REQUEST FOR MR. KISSINGER'S APPEARANCE IN EXECUTIVE HEARING

The CHAIRMAN. I am thinking now of executive hearings, for example. We have asked him in executive.

Mr. BUNDY. I would say there certainly are ways and should be ways by which any person who is perceived to have a particular importance and a means of, a role in the formulation of or formulation of recommendations or in counseling with the President should be available informally to people.

The CHAIRMAN. This is what we are asking. Mr. Kissinger doesn't hesitate to have backgrounders. In fact, he solicits them and he brings in all kinds of press people and gives them what he wants. I have seen some of the backgrounders although he wouldn't make them available to the committee. What has developed is a very special attitude toward the Congress or this committee, which I assume arises from the fact the committee isn't entirely of the same mind as the White House, but this is what the committee is for. I really don't see how they can justify in the light of the enormous growth of this agency, which in the mind of many people overshadows the State Department.

Mr. BUNDY. Am I wrong, Mr. Chairman, in thinking that there have been informal meetings between Mr. Kissinger and members?

The CHAIRMAN. Not the committee. The nearest to that is simply a meeting at a private home with the distinct understanding it was not only off the record, but it was not a committee meeting and with people other than the committee. You have seen the rumors in the papers. There is some truth in them, but these are not what I would call committee meetings. This committee has asked formally to meet with the President and that has been denied. We were merged in with practically the whole Congress. There is this attitude which seems to me to set aside very specifically the Congress as contrasted to the press. The press is briefed on backgrounders. In effect an executive session is quite similar to a backgrounder in its effect; is it not?

Mr. BUNDY. I prefer really not to try to answer you and I know it may seem unresponsive as to the specific ways that are more appropriate for this kind of communication. As I say, I don't have that experience because the firm position was the other way when I was in Washington.

I do believe that it is very important that the White House in the wide sense be in close communication with the Congress and responsive to the fair requests of the Congress, and I am sure ways and means of doing that can be worked out.

The CHAIRMAN. One correction. The staff seems to think I said we had not received the written transcripts of backgrounders. We had difficulty and did finally receive them, but I think we usually got them from the press itself rather than from Mr. Kissinger. We did finally receive some. What I meant was he had not appeared in a committee meeting. Whatever contact has been strictly informal, not with the committee, but a member of the committee, and he always makes a distinction. He invites you down there. It is perfectly all right to go to the White House, but this is a distortion in my view of the whole relationship. It was Mr. Lyndon Johnson who worked this overtime in bringing members of the Senate down there to so-called briefings, trying to commit them in advance before there were any hearings or any full knowledge, and then imposed upon the members their honor as having told him in advance whatever he wished to do was correct. To me it was subversion of the congressional process.

### NEED FOR GREATER COMMUNICATION BETWEEN EXECUTIVE BRANCH AND CONGRESS

I don't want to delay this. This wasn't the subject you were asked to discuss. You made such a persuasive statement that it was important that we work together. That prompted it. I don't know how we can unless there is greater communication between the Executive and Congress. The next witness, of course, is also an expert. He is about the only other one I think of who has the background which enables him to discuss this with great authority.

Mr. BUNDY. Mr. Chairman, I didn't expect to trigger the particular line of inquiry that you have been pursuing but I do respect the objective you are stating and I do believe it can be achieved. I think there may well be problems about opening the whole White House staff to the kind of continuous appearances that a variety of committee hearings—that is the necessary and proper business, in my

judgment, of cabinet and subcabinet officers, but between that and a total failure of communication there is a great deal of open ground which it seems to me could be filled in in one way or another.

The CHAIRMAN. At your leisure I would like some suggestion as to how it can be done.

Mr. BUNDY. Perhaps I could meet informally with you and some from the White House, Mr. Chairman.

The CHAIRMAN. Thank you, very much, Mr. Bundy.

### INTRODUCTION OF WITNESS

We are very blessed to have as our next witness Mr. George Reedy, who was for many years on the White House staff and who has written, I think, the most perceptive book about the establishment we call the White House that has ever been written, at least the most useful one. As a practicing member of the legislative branch I have relied upon it and referred to it innumerable times in the last year. Mr. Reedy, I want to congratulate you on having produced such an informative and very interesting description of the White House and Executive Office.

Do you have a statement?

## STATEMENT OF GEORGE REEDY

Mr. REEDY. Yes, sir; I do have a statement. I would like to speak somewhat informally, if I could.

The CHAIRMAN. You would put it all in the record and then comment on it?

Mr. REEDY. Yes, sir.

The CHAIRMAN. That is perfectly all right.

Mr. REEDY. I prefer doing that.

The CHAIRMAN. You may proceed.

Mr. REEDY. Mr. Chairman, first of all, I want to thank you very much for this opportunity because Senator Javits and the other two gentlemen have introduced legislation which in my judgment goes to two problems. One, is the tremendous gap that now exists between what the founding fathers, I believe, intended to be congressional powers, or congressional controls over executive action in time of war, and the present situation where I believe there is practically no control. Secondly, I think these measures also go to what in some respect is an even deeper problem, and that is the question of the environment in which Presidential decisions are made.

### PRESIDENTIAL INITIATIVE CONCERNING LARGE-SCALE HOSTILITIES

From a substantive standpoint there is very little doubt in my mind that in the modern world there is virtually no check whatsoever other than certain political preconditions over the capacity of a President to take a nation into very large-scale hostilities which may not be war in the normal legal sense. I am not a lawyer and I do not propose to comment upon legal points, but I am referring to a situation in which a lot of people are shooting at each other and people are being killed on a very massive basis, and the domestic impact of a war is being fully felt.

I don't believe that there is very much that can be done to control the Presidential initiative in this respect. I have been on both ends of this question both as a White House staff assistant who saw the planning that led to the Vietnamese situation and also as a staff assistant on the Senate Democratic Policy Committee where we were on the receiving end of Presidential initiatives in the field of foreign affairs. A number of these verged very closely on the type of hostilities which started in Vietnam, but did not quite get to that point. I believe that it is rather futile to attempt to control the initial act itself. I don't know about the legal situation again. There are very eminent lawyers on this committee who can judge that. But I believe that when we are considering government and governmental policy we also have to take into account that there are structures of government which give men a certain power base and that the power base of the executive today is of such a nature that he can always bring the Armed Forces into some type of clash with another nation, and that Congress is then going to be faced with a necessity for supporting our men who are fighting, or at least acquiescing. Since there is one necessary political prerequisite for such an action, and that is some form of a crisis, it is inconceivable to me that Congress could possibly resist the initial act or rather it is inconceivable that the initial act would be taken under circumstances where Congress would want to resist. And even if these things could be tied down by a series of legal definitions, I think that the quality of ingenuity in the executive branch is such that it can always find arguments, that it can always find motivations and it can always find rationalizations for whatever it is doing.

### INGENUITY WITH WHICH EXECUTIVE DECISIONS ARE MADE

I am not overly impressed with the wisdom of executive decisions but I am highly impressed with the ingenuity with which they are made. There is a quantity on the Presidential staffs of lawyers, of technicians, of experts. One does not have to question either the ability of these experts or their integrity to realize that in the executive branch, all powers are vested in one man, and must be under our system of government. Therefore, the primary purpose of those experts is basically to tell a President how to do what he wants to do.

### DRIVE TO ACT RIGHT NOW

It may be that at the very beginning of an action, at the very ecstatic moment that it takes place, a man with reservations might have some impact on the decisions. But from what I have seen of crises as they take place within the White House itself, it is not the kind of atmosphere which encourages reservations, it is not the kind of atmosphere which tends to make men believe that quite possibly they shouldn't act at all.

Invariably there is a tremendous search for immediate solutions and a tremendous psychological impulse to act right now, and once the action is taken, once troops are committed to battle, I think that the President is going to have the overwhelming support of the American people.

It is not until a period of time has elapsed and the situation gets into some sort of perspective where quite often we see the initial act itself was a mistake and at that point, as we are now established there is absolutely no method by which we can prevent a mistake, even a very tragic mistake from becoming a catastrophe. I believe this is pretty much the situation in which we now find ourselves.

I doubt very much whether at the time of the Tonkin Gulf, Congress could conceivably have turned down the resolution that was sent up to it any more than the Lebanese resolution could have been turned down when President Eisenhower was President, or President Truman's request for support in Korea could have been turned down when he was President. And I am not passing judgment at the moment on the merits of either one. The only point I wish to make is that at the particular moment of crisis, the action is going to be carried through.

This may seem rather difficult for us to realize at the present time when there is such massive disillusionment with the Vietnamese war, but I don't believe we can base our policies upon the belief that there will never again be such a conflict. This will go away but the world situation will continue to be a rather dangerous one and a rather tricky one, and I think that unless some safeguards are set up now that we are going to perhaps find ourselves repeating this thing again another 10, 15, 20 years from now, and I really doubt whether the country's social and political structure can stand this type of strain.

### QUESTIONING OF PRESIDENT'S JUDGMENT AS SOON AS POSSIBLE

We must grant that the political realities are such there is little we can do at the moment of the crisis. This does not mean that we should avoid questioning the President's judgment just as soon as possible and, even more important, that we should avoid questioning the context within which it is made.

I think one of the principal problems of the past 20, 30, 40 years has been the rise of a body of thought which ascribes a sanctity, almost a holiness to the Presidential decision-making process and assumes that anyone questioning it, even in times when disillusionment has set in, is being rather presumptuous and is intruding in the fields of foreign policy where he has no business.

I believe this is a very dangerous type of thought. I think it is the sort of thing which if accepted too easily will get us into more and more Vietnams, and that unless there is some sort of challenge brought to bear upon it, unless we can find some truly adversary discussion, unless there is some way of really challenging, of really pressing home the second thoughts, second-guesses, and deep misgivings, that this situation will go on permanently.

Now, you asked the previous witness, Mr. Chairman, as to whether the President would pay any attention to a congressional resolution? My judgment is that he would. But the important point is I do not think that a determined President is going to pay too much attention to congressional disaffection once he has started upon a course of action, or for that matter is not going to pay too much attention to public disaffection once he has committed himself to a form of action. He will only pay attention, I believe, if some machinery is established whereby there is a formal expression of Congress, an expression that takes place by vote, and I think almost a mandatory expression.

SUPPORT FOR PROPOSED LEGISLATION

This is the reason that I am so very strongly attracted by the bills introduced by Senator Javits and the other two gentlemen. I am not in a position to comment on the legal technicalities in them but I believe that in substance, in terms of governmental structure, in terms of political realities, this is about the wisest and most astute course that can be taken. In effect these measures concede that there are circumstances under which hostilities will start without a congressional declaration. But they bring in the factor of congressional judgment as soon as possible and quite possibly periodic reviews suggested.

If I might suggest it, I believe you should consider not just having a 30-day review. That strikes me being too short. It should be possible to provide for further reviews if the first review concludes in a congressional approval of the action taken. I believe that 30 days after the Tonkin Gulf Congress would probably have approved that action and if that had been set down in law as the last shot that you were going to have, then that would have been the end of congressional review. Not only would the initial action have been approved but it would have been reapproved 30 days later, and it is for this reason that I would like to suggest these periodic reviews—not because I believe everytime we get into trouble it is going to be protracted, but in case it is I think it is essential to bring in this kind of skeptical judgment.

CONCEPT OF SANCTITY OF PRESIDENTIAL JUDGMENT IN FOREIGN AFFAIRS

Now the thing I would like to look at for a moment is the set of circumstances under which has arisen this concept of sanctity of Presidential judgment in foreign affairs. This has been an extremely potent instrument. Even people who have very deep misgivings about actions that Presidents have taken in this field have a tendency to reserve comment, in fact, generally to withhold comment because they too are impressed with this argument.

The argument breaks down into about three parts. The first is that only the President knows all the facts. This view has not only been expressed by Presidents themselves, it has been expressed by their former staff employees. It is quite a common assertion in columns that are written about the Presidency and even in a number of studies of the Presidency.

Second, it is held that only the executive branch has the type of machinery that is sufficient to gather all of the relevant data upon which sound judgments can be based.

And third, it is held that the heavy concentration of experts within the executive branch of the Government will inevitably produce better judgments than those that are produced by men who do not have the same machinery at their command and who cannot call upon the tremendous corps of technicians that are available through the various executive agencies of Government.

I myself believe there is extremely good reason to question all of these assertions. I think they should be questioned strongly and in fact I believe both from direct observation and subsequent study that they are incorrect, that they are wrong, and that it is a type of thinking that has gotten us into considerable trouble.

I should add I think in a sense they also do the Presidents themselves a disservice because if there is an assumption that presidential decisions are the best that can possibly be made—that they are the product of this massive information-gathering machinery and this tremendous gathering of experts—that consequently if something goes wrong the President must either be a venal or a corrupt man. This myth has become so completely imbedded into our consciousness when we reach the field of foreign affairs that people stop realizing this man is human like the rest of us and that he can make just as many mistakes as anyone in this room or anyone in this country. When this happens—when the assumption starts arising, that the only reason the President made a wrong decision is because he wanted to make a wrong decision—then immediately he becomes assailed by a series of charges, many of which he regards as unfair. This is the sort of thing that tends to make him even more stubborn and dig in his heels even harder.

I know today in talking to young people, and I have conducted a number of classes and spoken at a number of universities, the thing that I keep running into is an almost unshakable belief that we are committed to Vietnam either because of old-fashioned economic imperialism or some form of blatant racism. I myself do not believe there is any substantial evidence that would support either assertion. And, furthermore, my knowledge of some of the men that are engaged in this and had quite a bit to do with getting us into this mess would also lead me to believe that those thoughts were not in their mind. But the problem of the myth of presidential infallibility in the field of foreign affairs is such that when we do get into trouble we assume he must have planned it that way.

Most of our really grave difficulties arise out of actions that were very carefully planned for many months in advance and you sometimes say: "there must have been some venal method behind this, honest men can't plan a thing like this and do it."

### ASSUMPTION THAT PRESIDENT KNOWS ALL THE FACTS

I would like to look at the three basic assumptions for a moment. First of all, the question that the President knows all of the facts. I have seen quite a bit written about that, including a number of columns explaining that this person or that person cannot possibly have an adequate analysis of the Vietnamese war because he doesn't know all of the things that the President knows.

Well, the converse of that is that other people do not know what the President knows, or let's put it a little bit better, what a President thinks he knows. Presidents gather their information from very many sources. They do not base their judgments solely upon the heavy flow that comes in from the Defense Department and from the State Department. They are human. They will have certain sources, people they trust in, and no one—not even including staff members or even possibly members of his own official family—no one is ever quite certain whether a President is operating on the basis of information, misinformation, hunch, rumor, feelings, or psychological background. He is human like all the rest of us and the only way I know to really find out what he is acting on is to place him in a spot where he must defend his position under skeptical and critical questioning.

Again, this is one of the reasons I am so very much interested in these resolutions because since there must be an affirmative act by Congress, members of the executive branch must come up and state their case for securing that affirmative act and must also defend their case under questioning which after a certain period of time is going to be adversary from at least a part of the Congress. People in that position, I think, will reveal what they know or what they think they know. That is also another reason, however, that I believe that the 30-day period is not quite long enough.

I think there has to be a certain period here in which some of the critical thoughts, some of the skeptical thoughts, resolve themselves and begin to emerge. At the moment this authority does not exist. A President can always retire behind the statement that he knows things that other people do not know. And when you bring before you the members of the executive branch of the Government they are not faced with the necessity of persuading you to take an affirmative act so they can stay in business. Consequently, they also can cloak themselves behind the shield that this is a presidential act and that, therefore, there is information here and things which cannot be revealed but which they know that nobody else knows.

This is one of the things that I think has to be broken and I know of no other way of doing it other than to compel the Executive to state a case for that affirmative action.

MASSIVE INFORMATION GATHERING MACHINERY IN EXECUTIVE BRANCH

Another very interesting field for analysis is this thought that only the massive gathering machinery of the Federal Government is adequate for gathering relevant data. Again in a sense this is true. But I become less and less impressed with the data that emerges out of massive information gathering machinery. I think what we tend to forget is that this machinery is basically a multiplier and that it multiplies misinformation just as easily as it multiplies information. Almost anyone that has ever gotten in trouble with American Express because the computer broke down on his card will be fully aware of what I mean.

What comes out of this massive information machinery is a series of conclusions that look very solid and very unarguable.

I can recall as one of the best examples during my period in the White House the pacification reports which would come to us week after week, month after month. Fifty percent of Vietnam was pacified, then 60 percent, 65, 70, 75. I should have realized that it was very much like the old Amos and Andy program when they started totaling, 1 million, 2 million, 5 million, and that there is something wrong when things come in that way, constant, 50, 55, 60. Frankly at the time I was in the White House I examined the figures and I could see no reason whatsoever for assuming there was anything wrong with them. I knew how they were gathered, at least I thought I knew. There was a check sheet which was taken by men who would go through the villages and they would determine whether the head man slept in the village, whether they were paying taxes to the Vietcong, etc. It wasn't until after I left the White House that I met an old friend of mine who had been engaged in the pacification program and got a flash of inspiration that I should have been able to

acquire without having to talk to him. It was that after all these statistics were gathered by men who would visit Vietnamese villages only for a couple of hours every month, who would stand in the middle of a village amidst some nervous native who wanted them out because if they were present too long the Vietcong would quite likely lob a shell into the village and kill somebody; who would mark down answers from natives who knew that the easy way to get rid of the man under those circumstances was to tell him what he knows.

While I am not a Vietnamese expert, I have been in parts of the world with people of another culture and another language, and I know the remarkable capacity they have for determining from facial expressions what you want to know—what gets rid of you the fastest. All of this information was being put together with information from other villages gathered in a similar way. It would go from there to Saigon, from Saigon to the Pentagon, and it would be reevaluated at each level. Reevaluation means the human factors are taken out and it becomes more and more of a mathematical proposition, and by the time it got to the White House it resembled nothing so much as the Sermon on the Mount—absolutely unassailable figures.

I don't believe that this question of massive information machinery is any reason whatsoever to leave these things solely in the hands of the executive branch because the Executive can just as easily be acting on massive misinformation as on massive information. What is really necessary is to apply some skeptical judgment to those facts and figures and there is no way, at the present time, in which Congress can really get enough of the information upon which to apply skeptical judgment. I do not believe there will be any way unless there is some device whereby the Executive must come before Congress and justify his position with sufficient force to induce you gentlemen to give him an authorization to continue.

### QUESTION OF EXPERTS IN EXECUTIVE BRANCH

Finally, on the question of the experts, again this is a thing which has a certain amount of truth to it, but it is only a partial truth. The experts are there. I think they are good. I think that they are men of integrity. But I am terribly impressed by the fact that it wasn't until after I left the White House that I found out just how many second level experts were in the Government—just how many people in subcabinet positions had reservations at the very time that the steps were being taken which got us into Vietnam. There was no hint of that in the White House.

It may have been because my responsibilities were not direct in terms of foreign policy or in terms of Vietnam. It may have been that other White House assistants who had direct responsibilities knew many of them. But certainly in the National Security Council, certainly in the Cabinet meetings, there was no hint of this whatsoever. It is also possible that some of these men are only now revealing themselves. The war has become so massively unpopular it is a safe thing to do. But I rather doubt it because a number of those men do not impress me as being that type of person.

The important thing is that at the time these decisions are being made, at least in the collective discussions that went on in the White House among Cabinet members and staff members, there was no hint

of so many of the things that we have heard since. I do know that if the only information available was the kind that was discussed in Cabinet meetings, I can well understand why the President took the steps that he took initially because all of the information that was presented was information which made the rightness of the policies almost indisputable.

The CHAIRMAN. He knew there were some differences of view in the Congress.

Mr. REEDY. Yes; he knew there were differences of view in the Congress.

EXECUTIVE BRANCH ATTITUDE TOWARD CONGRESS

The CHAIRMAN. That didn't matter.

Mr. REEDY. What happens, Mr. Chairman, I think, is that in the executive branch there is a certain feeling that Congress is merely a problem that must be grappled with.

The CHAIRMAN. And resisted.

Mr. REEDY. And resisted. And somehow things must be run around Congress. This is a standard thing and, I think, probably, for most of the problems that face the United States this may be somewhat of a healthy feeling. I think Congress has the same feeling about the executive. I have served both branches of the Government and I don't quite agree with Mr. Bundy about the partnership thing. I think our Government is much better served when there is an adversary relationship. I think it only becomes a mischievous thing when you have one sided power. At the moment the warmaking power is almost totally within the hands of one branch of the Government and really is not subject to challenge by the Congress except under extraordinary circumstances.

Most of the things that the Founding Fathers wrote in the Constitution in my study of history seemed to be very wise and I think at the time they were put in they were quite adequate as a check on the Government—such things as the appropriation authority, and quite possibly even the impeachment process. I do not think today those are adequate checks at all and no other check really exists. Therefore, when congressional disaffection arises you meet a psychology of resistance in the Executive. In the first place, he always feels that he is going to be vindicated by history regardless of what is happening contemporarily. He knows that Congress consists of people that have to be reelected every 6 years or every 2 years, therefore, the Executive will reason that these are "merely politicians."

"We, of course, have the truth; we, of course, are statesmen; we, of course are moved only by objective considerations of what is best for the United States, and if we have some problems at the present time, we will get around them somehow and history is going to vindicate us." This is the Executive attitude.

I personally think unwritten history is a very poor guide to public policy, but, nevertheless, there is no doubt whatsoever not only from the observations that I have had personally, but from many people that I have talked to who have been through other administrations, it is a mistake to believe this is a disease confined to one administration only.

This is a rather serious factor. Again, I do not think there is any harm in it in fields where Congress has the capacity to confront the Executive directly in an adversary relationship. But as things now

stand, as the laws on our books now stand, there is no adequate check in what is probably the most vital of all fields, and that is the capacity to launch hostilities.

### DISSENT IN THE WHITE HOUSE

My basic point is, however, despite the fact there was disaffection in the Congress and despite the fact there was much disaffection in all levels of the Government, this never penetrated the walls of the White House.

It is true that there was a sort of a devil's advocate type of argument that went on. Really it was not argument, and the devil's advocate is a very unsatisfactory substitute for adversary debate.

If one man is more or less designated to dissent, if it is known in advance that he is going to dissent, if there is a pattern of dissenting, then the people that listen to the dissent really listen with wax in their ears. I think what should be brought in the White House is the type of discussion that I have heard among Senators during my years as a staff director of the Senate Democratic Policy Committee behind closed doors. They were not always polite to each other, although in public they were. They were not necessarily polite behind closed doors. I have heard some table pounding, which there should be, because it was mostly upon issues upon which men should pound the table, and I think a reasoned judgment is more likely to come out of that type of discussion than merely having someone there that officially states the opposing view. You know that it is coming, you have already discounted it, it makes you better, and it reinforces you when you can go out and say you heard both sides.

### NEED FOR ELEMENT OF ADVERSARY DISCUSSION IN NATIONAL SCENE

I don't believe there is any reorganization in the executive branch of the Government which can alter this situation. I think that the executive, as long as our Government is as it is now, will continue to be a type of structure which isolates a President, which tends to give him a greater and greater conviction in his own righteousness, and which also unfortunately has no graceful way in which a mistake can be remedied. About the only hope that I can see is to introduce onto the national scene an element of adversary discussion which can operate at a sufficiently early point to head off catastrophe.

### VALUE OF PROPOSED LEGISLATION IN EARLY DAYS OF VIETNAM WAR

I believe that the resolutions such as the ones that these three gentlemen have sponsored in substance would have had tremendous value if they had been in effect some time in 1965, 1966, 1967, during that period when people really began to have some second thoughts about the Vietnam war.

I think that in the present atmosphere, the present environment, it is rather difficult for most of us to remember the early days when there were very few questions. I think the reason there were very few questions, was because we were dealing with a part of the world about which we knew little or nothing. Until the war actually broke out the only thing I knew about Indo-China is that it was where

Tonkin cane for fly rods came from, and I only knew that because I am a very ardent trout fisherman. That is the only thing I knew about it, and I doubt if the average American knew that much. Consequently when we first got started at the time of the Gulf of Tonkin, I think to most Americans this really looked like a Communist challenge to the United States and to the U.S. integrity and they reacted automatically. But if these resolutions had been in effect then there would have been some mechanism by which the later reservations could have had an effective expression. They were not in effect.

Congress was placed in a position where it would have to take extraordinary action, so extraordinary that really what happened was that action was not taken and the very real disaffection which Congress was expressing and which, I think, was an expression of very real disaffection in the country, had no outlet. This is something I don't believe democracy can stand for any lengthy period of time. One of the greatest problems in the country today is the feeling of frustration. You can find it almost wherever you go. There are very few people who don't want to get out of Vietnam tonight. I have even heard criticism of setting December 1971, as a terminal date because people say that is too far away, but they have no legislative way of expressing themselves, no way of making their feelings known.

### TRANSLATING LEGISLATION'S APPROACH INTO CONCRETE REALITY

I think I want to be very clear that I am well aware of the difficulties that are involved in translating the approach of these resolutions into concrete reality.

It will be argued that Congress cannot run a war; that Congress cannot have information equal to that possessed by the Executive; that it is hazardous to distract a President when he is directing American Forces in armed combat.

I think that it is valid to try to place these objections into context. First of all, as I read these resolutions they do not seek to usurp the Presidential authority to run a war. I think this is a rather ridiculous contention. I think what they do is to strengthen the proper prerogative of Congress, and that is to determine whether the President has the right to wage a war, and I don't see any other way of doing it at the present time. I believe that the modern age is conducive to the type of war in which there will be no declaration. I think that even after we get out of this one we are quite likely to run the risk of getting into another, and lacking something like this there will be no machinery whatever by which we can get out short of the determination of the Executive.

Second, I think I have already commented on this machinery of the information system. Of course Congress can't set up an information system equivalent to that of the Executive, but I don't believe that is the problem. I believe the problem is applying skeptical judgment to the information upon which the Executive is acting. And you can be certain that he will not apply skeptical judgment to it because that is what he has acted upon and you can be even more certain that none of the people close to him or associated with him are going to apply skeptical judgment to it. At least they aren't going to apply skeptical judgment and remain close to him very long.

I think you will also hear the argument that there is a risk of conveying information to an enemy if Congress is in a position of insisting upon the kind of information that would be necessary to give the President his authorizing resolution. I think that is very much less of a risk than the very real one which I know is with us right now of dividing our country because of unilateral judgments in the use of military force.

We have succeeded in surviving many situations in which information was leaked to an enemy, but I doubt whether we can survive the kind of massive disillusionment that is now setting in our society.

Finally, the argument that it is hazardous to distract the President by forcing him to defend his position against skeptical judgment strikes me as being totally invalid within the context of our times. No policy can be any stronger than its resources. And when we are discussing foreign policy and discussing military policy, the most important of all resources is that of the people, of the will of the people, and I think the will of the people is something that is being sapped very rapidly.

I find when I talk to students that it is almost impossible to get a sensible discussion on a long list of issues which are not directly pertaining to Vietnam but which are related to Vietnam. I think that we are in great danger of adopting some military manpower policies which we will regret simply because the preoccupation with the war is overshadowing everything else. It has thrust a tone of emotional hysteria in the country which makes rational debate almost impossible. I think there is only one way to handle such things in a democracy and that is to somehow bring back the concept that the Nation is not going to launch into one of these tremendous ventures again without having Congress, which is after all the expression of the people's will, having a say in it and retaining some possibility of bringing it under control.

Thank you, Mr. Chairman.

(Mr. Reedy's prepared statement follows:)

STATEMENT BY MR. GEORGE E. REEDY, BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE REGARDING S. 731, S.J. RES. 18, S.J. RES. 59

For purposes of the record, my views are individual and do not reflect in any manner the Woodrow Wilson International Center for Scholars of which I am a Fellow. My comments are directed solely to the impact I believe the bills would have on the Presidential decision making process in military operations short of a formal declaration of war and I do not presume to address myself to the legal issues as this is a field in which I have no special training.

Within that context, it is my judgment that the sponsors of all three measures have focused on the one area in which it is possible to introduce a reasonable measure of legislative control over the power of the Executive to commit American armed forces to combat without a formal war declaration. Short of attempting to eliminate Presidential control over the armed forces or going to a parliamentary form of government—futile, impractical and dangerous endeavors—there is no effective way in which the Presidential capacity to *initiate* hostilities can be brought within bounds. But it is conceivable that after a reasonable period of time, he can be called upon for an accounting and forced to defend his position as the price of continuing that which he has started. All three measures before this Committee propose machinery to accomplish that purpose and I believe they are important not only as they address themselves to the problem of war but in that their adoption would have a salutary effect upon Presidential thinking and decision making.

The crucial factor which, in my judgment, would make futile any effort to place bounds upon the Presidential initiative is his position in our political and governmental structure. The realities of the world situation compel the United States to maintain a sizable military force. Of necessity, ultimate control over this force in its day-to-day disposition must be lodged in the President. There are obviously legitimate reasons why this force must be committed to hostilities upon some occasions without enough time to consult another branch of the government. If such reasons do not exist, the Executive branch, which has a structure that does not necessarily foster wisdom but which always fosters ingenuity, will devise them and convince even itself that they are valid. And finally, the necessary *political* background for launching hostilities is a crisis in which legal principles become blurred if they are noticed at all.

Two examples which are in the memories of the Committee members will serve to illustrate the point above. Without passing judgment upon the validity of either action, it is inconceivable to me that Congress as a body would have rejected under any circumstances either a resolution approving President Truman's original commitment of forces to Korea or the Tonkin Gulf resolution. In both instances there was an overwhelming desire to back the President and under similar circumstances, the same reaction can be anticipated in the future. The dissatisfaction did not arise until a later date and there was no Congressional machinery to translate the dissatisfaction into effective action. Therefore, the Executive was able to dismiss the questions that were raised as mere "second guessing." This is a phase which has a strong impact upon most Americans and frequently inhibits sensible discussion of policy. It is generally concluded that arguing over an event that has already taken place cannot change that event. This conclusion is correct but it overlooks the fact that "second guessing" could prevent a serious mistake from becoming a disaster and could also produce principles that will prevent a repetition of the mistake.

The fact that in a crisis we are dependent upon a President's judgment does *not* mean that we should avoid questioning that judgment as soon as possible or, even more important, that we should avoid questioning the factors that go into that judgment *and the context within which it is made.* There is a widely accepted body of thought which ascribes a certain sanctity to the Presidential decision making process and equates questioning of his decisions with presumptuous arrogance in the field of foreign policy. (For some reason, this same line is rarely advanced in the field of domestic policy where the President is assumed to be a human being liable, like the rest of us, to normal mistakes.) It is held that only the President "knows all the facts;" that only the massive information gathering machinery of the Executive branch is adequate to gather all of the relevant data; that the heavy concentration of "experts" within the Executive branch will inevitably produce better judgments than those which come from the outside. From direct observation and subsequent study, I believe there is good reason to question all of these assumptions. I also believe that they do a personal disservice to the President himself in terms of history. When things go wrong, they foster a psychological disposition to assume that the President deliberately made incorrect decisions out of venal or corrupt motives rather than a realization that he just made some tragic mistakes. In discussions with young people opposed to the Vietnamese war, I usually find that they are absolutely convinced that we are in it for motives either of economic imperialism or blatant racism and they cannot be argued out of these conclusions even though they have been reached on the basis of highly questionable evidence or no evidence at all. This has an unfortunate effect. A man who is assailed by charges which he regards as unfair is quite likely to become even more stubborn about a course he is following. I have every reason to believe that Presidents are no exception to this rule.

It is interesting to think through the point that *only* the President "knows all the facts." In a certain sense this is true, even though no human being can possibly know everything that is happening even in matters of direct concern. But there is another side to this coin. The converse is that no one else can really be certain that he knows *what the President knows.* There is no manner in which even persons close to him, including members of the Presidential staff, can judge whether he is acting on information, misinformation, verified data, questionable data or just plain hunch. If he is questioned on such matters, he can always fall back upon the flat statement that he has sources which are personal to him alone. In practice, those close to him are not going to raise such questions anyway and those who are not under his direct influence are in no position to compel answers to their questions. In either case, the point is moot. Presidents have sufficient

authority to act without defending their position against adversary debate (at least until the next election) and men in such a position are unlikely to make what they regard as unnecessary explanations.

Another interesting field for analysis lies in the thought that only the massive information gathering machinery of the Federal Government is adequate for gathering relevant data. Again, there is a sense in which this is true. But it overlooks the rather obvious point that the data might not be valid—that massive information gathering machinery is a device which multiplies misinformation as well as information and that colossal mistakes can be virtually compelled in the decison makng process by the presentation of invalid "facts" in a most beguiling form. When I was in the White House, I was highly impressed by the "pacification" figures which arrived with regularity demonstrating that substantial areas of Vietnam were completely under the control of the Republic of Vietnam. No matter how I analyzed the statistics, allowing for normal margins of error, appeared valid. It was not until I had left the White House that I came to the realization that they could be entirely meaningless. This happened when I encountered an old friend who had been engaged in gathering the basic statistics in the villages themselves. The picture that he painted shed quite a different light. It was that of an American speaking little or no Vietnamese, standing in the middle of a village which he could visit for only a few hours every month, talking to people who wanted to get rid of him because they were vulnerable to Viet Cong retribution by his very presence and well aware of the fact that the easiest way to get rid of him was to tell him what they sensed he wanted to know. The figures so gathered would be combined with other figures similarly gathered and forwarded to Saigon; then to appropriate agencies in Washington and then to the White House itself. At every step of the journey, the figures would be evaluated and reevaluated and by the time they reached the National Security Council staff, they would carry the same weight as the Sermon on the Mount. I have never had the resources to check further into this matter but I do not believe that it is necessary. The most elementary common sense should have warned all of us that computers cannot render valid data which ultimately depends upon questioning people of a different culture; a different language; a different experience of life; and a burning desire that we go away. It obviously is not possible to do so but there would be immeasurable value in anlyzing all of the data upon which Executive decisions are based from the standpoint of the sources themselves. Unfortunately, by the time that I received a flash of insight from my friend, it was too late to do anything about it. The pacification figures had become accepted gospel in the White House—an atmosphere in which a questioning of accepted gospel arouses only a vague wonderment as to "what has gone wrong" with whoever does the questioning.

Finally, it is not only legitimate but absolutely essential to question the assumption that the heavy concentration of experts in the Executive branch assures sounder decisions than can be made on the outside. This is an assertion which should undergo the most rigorous challenge—not because there is reason to doubt either the skill or the integrity of the experts but because of the use to which they are put. It takes very little service in the White House, and only a minimum of perception, to learn that the role of the expert is to tell the President how best to accomplish his purposes—not to question policies already made. At the very start, an individual may have an impact upon a Presidential decision. But once the commitment is made, the whole machinery of the Federal Government is geared to defending the commitment and those individuals with second thoughts are lost in the shuffle. I have been quite startled since leaving the White House at the number of second level, sub-Cabinet officials who had strong reservations about the Vietnam policy during the period that the decisions were made. Perhaps some of them are only now revealing those reservations because the war has become unpopular and it is safe to do so. But I doubt it because many of them strike me as men who would always make their feelings known at least to their superiors. Perhaps other White House assistants with direct responsibilities in foreign affairs knew about the reservations at the time as one of the factors of life in the Executive Mansion is that assistants rarely know what other assistants know and do not want to ask (and would not get an answer if they did ask) out of fear of betraying their ignorance and therefore their lack of status. Perhaps these reservations were made known to the President at meetings attended only by the President, the Secretary of State, the Secretary of Defense and the Chief of the CIA—meetings which were not attended by any assistant. I do not know. But I do know that such matters were never raised in the Cabinet or the National

Security Council meetings—theoretically the Presidential mechanisms for obtaining collective judgment. From time to time there would be a "Devil's Advocate" type of discussion but the "Devil's Advocate" is always anticipated and people listen to him with at best tolerance. It is no substitiute for a genuine adversary discussion—the only kind which I believe ever produces a reasoned judgement. From the type of discussion I heard in such meetings in 1964 and 1965, I do not see how the President could have reached decisions other than he made. The tragedy is that the skepticism which existed in many areas could not have penetrated the walls and really have been debated.

I do not believe there is any reorganization of the Executive Branch of the Government which can alter the situation I have described. The only hope I can see is to introduce into the national scene an element of adversary discussion which can operate at a sufficiently early point that it will head off catastrophe. As I have already stated, I believe it is futile to attempt to do this at the point of crisis itself, and even if it were not futile, it would be a dangerous undertaking. But it is not futile for Congress to assume the power, after a reasonable period of time, to require the President to defend his position as the price for continuing whatever hostilities he has launched during the crisis. The 30-day period set in these resolutions strikes me as being a bit short but this is a question of practical judgment and I am not disposed to argue over such matters. And, I repeat, I am not in a position to discuss the legal issues but there is obviously enough experience on this Committee—let alone the expertise available to you—to render sound judgment on such matters. The important thing to me is my belief that the principle behind these resolutions is valid and I hope they can be carried into effect.

In closing, I want to be clear on the point that I am well aware of the difficulties involved in translating this approach into a reality. It will be argued that Congress cannot "run" a war; that Congress cannot have information equal to that possessed by the Executive; that such a procedure runs the risk of conveying information to an enemy; and that it is hazardous to distract a President when he is directing American forces in armed combat. All of these are valid when made in a vacuum. I believe they are beside the point when considered within the context of our present national problem. To take them up on a point-by-point basis, I would like to submit the following considerations:

1. These resolutions do *NOT* seek to usurp the Presidential authority to run a war. They go instead to the proper prerogative of Congress—a determination of whether he has a right to wage a specific war in an age when most wars seem to be run without declarations and probably will be operated that way for some time to come.

2. Congress cannot possibly set up an information system equivalent to that possessed by the Executive. But what is needed is *NOT* alternate data gathering systems but the application of skeptical judgment to the data that already exists. It is not conceivable that such skeptical judgment can be brought to its most effective point within the Executive branch under a governmental system where *all* Executive powers are concentrated in the hands of one man and I doubt strongly that the system can be changed. Under these circumstances, the only hope for skeptical judgment comes from the Congress.

3. The risk of conveying information to an enemy is inherent in any system which brings skeptical judgment to bear upon a problem. But it is less of a risk than the very real hazard, which we know is with us now, of dividing our country because of unilateral judgments on the use of military force. We have succeeded in surviving many situations in which information "leaked" to an enemy. I doubt whether we can survive the kind of massive disillusionment that is now taking place in our society.

4. The argument that it is hazardous to distract a President by forcing him to defend his position against skeptical judgment strikes me as invalid within the context of our times. A nation cannot be any stronger than its resources and of those, the most important is the confidence of the people in their government. The skeptical judgments are not going to disappear from public debate just because there is no machinery for bringing them to a test of public will. All that is going to happen is that they will fester and undermine the consciousness of national unity. It is far better to bring such matters to a head at any early reasonable point and I know of no better place to do it than in the Congress. Perhaps the decisions that will be made will be wrong because there is no guarantee of rightness even in collective judgment. But at least they will be collective judgments and I believe that a free nation can survive even gross mistakes made

in that vein. And under any circumstances, collective judgment made in the wake of adversary debate has a far better chance of being right than the judgments we are living under now.

The CHAIRMAN. Thank you, Mr. Reedy. That was a very thoughtful statement.

NECESSITY OF ELEMENT OF ADVERSARY DISCUSSION

I would assume you think that an element of adversary discussion is essential to the proper function of our democratic system?

Mr. REEDY. Right.

The CHAIRMAN. The idea of partnership or being very nice to each other is not conducive to the public welfare; is that correct?

Mr. REEDY. Right.

The CHAIRMAN. Then you wouldn't subscribe to the criticism that has been leveled at this committee so vigorously the last few years, because we have been accused of being uncooperative with the Executive?

Mr. REEDY. I would go further than that, Mr. Chairman. I think that the mere fact that this committee has been a place where the people who are so strongly opposed to this war could at least get a hearing, is one of the things that has sustained what confidence there is in our Government today.

I think one of the grave problems is that people come to Washington and they feel that the Executive is not listening to them—that if there is a tremendous demonstration, no one in the Executive comes out to hear their complaint. You know people are not going to be governed under such circumstances. There comes a certain point where they decide it is not their Government. [Applause.]

The CHAIRMAN. You have touched a very responsive chord with that statement.

Mr. REEDY. I have talked to enough young people to know what the reaction was to the demonstration after Cambodia and after Laos.

The CHAIRMAN. Mr. Reedy, you don't have to talk to young people. There are a lot of old people in Congress who feel the same way.

Mr. REEDY. Yes. [Applause.]

The CHAIRMAN. Of course, I referred to your book before, and I strongly recommend it again.

Mr. REEDY. Thank you, sir.

IMPRACTICALITY OF INITIATING PARLIAMENTARY SYSTEM

The CHAIRMAN. You seem to suggest there that this question of bringing about an adversary discussion for the purpose of refining the issues and for determining the wisest course, is built into the parliamentary system because a Prime Minister must daily, you might say, be confronted with the necessity of defending his action.

Mr. REEDY. Right.

The CHAIRMAN. But you say that this is not practical.

Mr. REEDY. No.

The CHAIRMAN. There is no probability, I would say, of our having such a system. Therefore, we have to do with our system as best we can; is that right?

Mr. REEDY. That is right, Mr. Chairman. At the time I wrote my book, I had some hopes that I could honestly make some recommendations on the parliamentary system. I have since gone into some deeper study. The British started to evolve their present parliamentary system in the early part of the 13th century, and have had all of that long period to modify it. It is a system that has grown up with subsidiary political institutions, such as a type of party responsibility which I do not think is possible in this country or desirable. I believe that if we were to try to initiate it, we would run into the same troubles that the French had when they imitated the British parliamentary system in 1875. It is not the basic system is wrong; it is that any governmental system must fit into the context of the Nation.

Now, our system has grown up with us. I think we have gotten into a very dangerous point now because of changing world conditions and because of the complexity of modern life. But I really think it is much too late to change the system. I think that we have to explore it and find ways to make it work.

The CHAIRMAN. I merely wanted to clarify. There are some interested people who are trying to promote the idea. In fact, they have been to see me. And I agree with you for the same reasons. There are additional reasons, I think. We have simply been brought up sort of like we have been nursed as we have with our mother's milk. This is the greatest instrument in the mind of man and, therefore, it is practically treason to question the basic system. So we do what we can with it.

POWER OF IMPEACHMENT

There are provisions in it, however, on which you have commented, that we have allowed to lapse. You say you would revive the control over the war power, the exercise by Congress of the power of the purse to a greater extent. I believe you mentioned in passing the power of impeachment.

Mr. REEDY. Right.

The CHAIRMAN. It has never been used; it has been attempted. I haven't thought of this before, but it grew out of your comments. What if this could be regarded as not such a serious matter. It has always heretofore been associated with an attack and only based upon moral turpitude of some kind. If it could be regarded as no more than political disagreement, even that power might be revived. It is in the Constitution. It is a procedure. What if it could be regarded as no more serious than a vote of no confidence, which occurs all the time, and implies nothing more than a difference of political judgment? I merely throw that out. I never thought of this before. This Constitution does have within it many varieties of derivatives which can be used if the Congress can be brought to the point of, say, skepticism and independence to use them.

Mr. REEDY. It does, although I think the concept of the impeachment power as implying very high crimes and moral turpitude is so thoroughly ingrained in our consciousness that people would draw back from it as too severe even when they had a burning desire to rid themselves of a President.

The CHAIRMAN. I agree.

Mr. REEDY. It is not graceful. The main thing our Government lacks, I believe, Mr. Chairman, is some graceful means of correcting mistakes by the Executive, and there is no graceful way of doing it today.

The CHAIRMAN. I would agree with you. That is why impeachment is very seldom mentioned. I have never mentioned it in this context before at all.

I am only suggesting that perhaps by a change in attitude it could be a graceful one. That was about all. It is not at the moment; I agree with you. It is considered only to be applicable in case of gross moral turpitude, and so long as that attitude prevails, it isn't graceful. If there were a change of attitude, it could be. But it is not much more fundamental than the whole attitude with regard to the Congress interfering with the war power.

ATTITUDE CONCERNING CONGRESSIONAL INTERFERENCE WITH WAR POWER

You have been very persuasive, but I bring up again, as a kind of devil's advocate, that attitude, going back at least 20 or more years. The statement with regard to Congress that impressed me the most was Dean Acheson's along about 1950. I have used it several times. Just for the record I would read it. This is 1951 before this Committee, and I quote, "Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution." I don't know how you go much further than that. That attitude has grown up and it has become about as strong as the attitude toward impeachment. So they both have to be changed and you are advocating changing the latter?

Mr. REEDY. Yes, sir.

HOW CAN ATTITUDE BE CHANGED?

The CHAIRMAN. The question is how do we do it. The pieces of legislation introduced by the Senator from New York and others are designed to try to bring this about and they will be effective only if they can create, it seems to me, a change in attitude toward the sanctity of presidential decisions. Again it seems to me, and this has come up before, that today the sanctity of the presidential decision has had the effect of identifying the country with the presidential decision. In other words, because we have had a President who has made a serious mistake in judgment, then the country adopts that as their judgment and they say that the whole country is humiliated if that judgment is acknowledged to have been incorrect or in error. This is a rather ridiculous trend of thought, it seems to me. It implicates the whole country although they are a great majority of people who were not involved other than in the electing of the President. They weren't even aware of the decisionmaking process at the time. President Johnson went out of his way to conceal from the Congress and the public what he really had in mind in 1964. How he could have run the campaign he did in 1964, and have had in his mind what he evidently did have in

mind, is beyond belief. Perhaps he felt some higher duty to the public welfare, so high that the Congress and the public couldn't share it. I don't know how else he could do what he did. He obviously did not believe what he was telling the public and telling me and other Members of Congress in 1964, and yet we are satisfied we would be humiliated if we acknowledged that a mistake was made. That is what we are being told today by a different President. So it illustrates your reference to the alleged sanctity of the Presidential decision.

What do we do about it? How can we shake ourselves loose from these psychological fixations and obsessions? Would you expand a little?

Mr. REEDY. That is the reason I am attracted by the approach of these resolutions. I don't think that we can shake ourselves loose by mere public relations activities. And, as I have stated, I don't believe there is any mechanism by which the initial presidential action can be controlled. But I think one of the things that happens, Mr. Chairman, is that there is a broad assumption throughout the country that when the President takes such steps that he does have the approval of Congress. I doubt whether very many Americans are aware of the fact within the context of the world scene today that these actions can be taken without congressional approval and can be continued without congressional approval and can be continued without Congress having the right to assert its voice and its effective will.

Now I believe that the mere fact that this machinery existed and would have to be exercised; the mere fact that within 30 days (again as I have said, I would prefer a longer time period), the mere fact that within a certain time period the President would have to send his people before the Congress to defend his action—I think that that would make people aware of the realities. As it stands now the average American is under the impression that everything that we have done has had congressional approval and that the dissent that is being heard from Congress is a mere dissent from certain individuals because Congress——

BELIEF OF AVERAGE AMERICAN CONCERNING AUTHORIZATION OF HOSTILITIES

Senator SPONG. May I intercede for 1 minute, Mr. Chairman?

The CHAIRMAN. Yes.

Senator SPONG. Would you go a little further and say that the average American believes today that the Constitution requires congressional authorization of American participation in hostilities?

Mr. REEDY. Oh, yes, no question about that. I think he is unaware of the rather fine shading of distinction between hostilities and a declaration of war. After all, at the time the Founding Fathers wrote the Constitution a declaration of war, or rather the lodging of the declaration of war power in Congress, was quite an adequate control. Back in those days there were as much as 6, 8, 10, 12 months between a declaration of war and actual fighting. That was plenty of time for that power to be effective.

I doubt if very many Americans are aware of the fact that large scale hostilities can be launched today without congressional action.

Senator SPONG. You believe the limited consultation that has taken place on some occasions in our history, in the absence of any specific legislative authorization, has given the public the idea?

Mr. REEDY. Yes; and you see unfortunately those consultations always take place in a crisis atmosphere, in an environment where really there is nothing else that a man can do other than to express his support of the President.

In the matter of the Tonkin Gulf, all that was really known was, that an American boat had been fired upon. That is naturally a rather startling fact, and I think the average American and the average Senator and average Congressman would have been placed in an almost impossible position to have done anything other than what he did.

You know, the facts in those things never really come out until much, much later. I think there is another factor here and that is the concept of the White House as a place into which all of the relevant facts are flowing at the moment of crisis. The reality is that what comes into the White House is the same thing that comes into any other center during a crisis—fragmentary information, bits and pieces. I think the congressional consultation that has taken place has probably helped to weaken the congressional control.

Senator SPONG. Thank you.

### CONGRESS REFLECTS IMPRESSION OF PUBLIC

The CHAIRMAN. In connection with the public being under this impression, I think the Congress reflects very accurately the public. The Congress also is very reluctant to raise this question.

Senator SPONG. Mr. Chairman, I don't know that I completely agree with that. I think that there is some validity to the Monday morning quarterbacking. Second-guessing is the word Mr. Reedy used. I think this committee, although I was not a member at the time, has put itself on record as saying that Congress in many ways has been the instrument of its own demise insofar as these powers are concerned. I was trying to distinguish a little bit between the general public and the Congress because I think too often in the past the Congress has been content to wait and see and has not participated when it had the opportunity. That is one of the attractions to me of the Javits legislation.

Excuse me.

The CHAIRMAN. Are you through?

Senator SPONG. Yes.

### CONGRESSIONAL ACTION ALLEGED TO SUPPORT WAR

The CHAIRMAN. The point I was going to make is that during this period the Congress has by a number of acts been in support of the war. Opposition hasn't been a fact until recently, and I am not sure yet just where the majority of the Congress is when it comes to a showdown. We have a number of resolutions which are to test that out. But the allegations which have been made by the various executive supporters, that Congress's continuing to appropriate money and to take certain allied or related actions in the field of weaponry, such as ABM, would indicate that up to now the Congress, reflecting this same attitude, has supported the war. Is that not true?

Mr. REEDY. Yes, but I think what should be said, Mr. Chairman, is that in the absence of resolutions of this type, there really is no machinery by which Congress can directly confront the issue itself unless it is willing to take very extraordinary action.

The CHAIRMAN. That is right.

Mr. REEDY. Almost all of the votes that can be quoted as proving Congress to be in support of the war, involve subsidiary issues. Even on the Tonkin Gulf resolution there is no question in my mind the sole purpose of most Members of Congress in voting for that resolution was a demonstration that they were solidly behind the President when he was defending the United States. I think it is as simple as that. And as Mr. Bundy said earlier, I agree with him that was misperceived in a number of different ways.

I think that on the question of appropriations, this has become an impractical check upon the Executive because there are so many reasons why appropriations must be voted for the maintenance of the military establishment. It is impractical to assume that the Congress is going to cut off all of the appropriations of the military establishment.

The other issues that have arisen, have arisen in regard to Vietnam and Southeast Asia specifically and they become a little bit shadowy because at this point you get into the question of whether the President is or is not liquidating the war. And that again introduces an element where it is impossible to meet the issue head on. The virtue of these resolutions, as I see it, is that they set up machinery whereby the issue can be met head on.

EXECUTIVE PRIVILEGE

The CHAIRMAN. There is one other question that I asked Mr. Bundy. Just comment a little further on this aspect of executive privilege. You have said that you think the discussion by the Congress of the information upon which the Executive has acted would make a great contribution to better policies.

Would you address yourself a bit to the situation in which we now find ourselves? Because this committee has not acquiesced in the Executive view, we have great difficulty in obtaining information about the information upon which the Executive has acted. As you know, Mr. Kissinger and his entire staff have taken the position of executive privilege. The Department of Defense is no longer at all reluctant; it simply refuses to supply data which has been gathered at public expense, decision-making studies. They simply refuse to supply that and they refuse to come and discuss it. The State Department for the first time since I have been in the Senate has instructed directly and officially ambassadors, whom we confirm, not to respond to questions before the committee. This has never happened before. So we are going very much in the opposite direction in recent months and recent years and we have really great difficulty in mounting a discussion of the information upon which the Executive acts. Would you comment upon ways and means in addition to the legislation, because this goes a little beyond the war move.

Mr. REEDY. This is a question that has interested me very much for a number of years both as a practical and intellectual question. I believe if I were a member of the Senate that I would take the position that the President has no executive privilege whatsoever in any public question. The reason that I could do that without too much hesitation is that from an intellectual standpoint I believe this is one of the points in the Constitution where all you can really do is to reach equilibrium. What has happened in the last 30 or 40 years is that the

equilibrium under which executive privilege was handled reasonably satisfactorily throughout most of our history has been upset by the tremendous growth of the White House staff. If it were a question of a really small official family, of close personal advisers to the President, I don't think there would be any difficulty. But you put your finger on the problem when you pointed out that in effect new agencies are being created from the White House. The National Security Council staff has now reached a point where it is actually an agency, not merely a convenient place at which correspondence to the President could be sorted out. The present staff I am told is about three times the size of the staff that Mr. Rostow had and Mr. Bundy had, and with all due deference I thought that was a bit too large.

I know in terms of the press staff it is about three times the size of the staff I had.

I assume if we have two agencies of the White House that are about three times their former size, this rule will hold throughout the entire White House, and I don't think you are any longer confronted with the question of trying to pry loose things from a President's personal family. I believe what you are confronted with is a new type of agency which just happens to be housed within the confines of the President's residence. And when you get a situation like that I would be inclined to insist there was no privilege whatsoever in any public question.

I am not a lawyer, I do not know what the legal methods are by which this information could be forced out, but I am quite certain that there is sufficient legislative ability in this committee. Some of the gentlemen here are extremely distinguished lawyers and extremely distinguished students of our Government and can devise various demands to be made upon the Executive. If I could have an ideal structure, what I would like to see is some type of a situation where not only the specific information can be forced out on what is happening but also what is being planned.

### POSSIBLE RESULT OF SHOWDOWNS FORCED BY COMMITTEE

The CHAIRMAN. What do you think would have been the response of President Johnson if this committee had subpoened Mr. Rostow to come here and tried to force him to come by legal means?

Mr. REEDY. I think he would have refused.

The CHAIRMAN. Then we would have gone to court. You say you are not a lawyer. You don't wish to comment?

Mr. REEDY. Not upon legal questions.

The CHAIRMAN. Isn't it finally really a political matter?

Mr. REEDY. Of course it is, and that I don't mind commenting on. I think what would happen if the committee forced certain showdowns, that even though the legal recourse might be an impractical one, that sooner or later an equilibrium that would be satisfactory could be reached. This is, as you quite properly point out, a political question. I do not mean a political question in the sense of bringing voters to precinct 5 in the first ward, but I mean in terms of the structure of our Government.

There are a number of things in the Constitution which I look at from some of the experience I have had in labor management relations, and in that field it is tremendously difficult to find out what the

equities are. The best that you hope for is some kind of equilibrium with which people can live. I do not think Congress can live with this present situation where it cannot get enough information upon which it can make reasonable judgments. I think that by trying and by insisting that the President has no privilege and trying every single step of the way to compel the production of information and witnesses sooner or later we will achieve a sensible equilibrium. There are many questions in life where a man cannot produce absolute answers but where trying does get somewhere.

INTERRUPTION OF PROCEEDINGS

The CHAIRMAN. I wonder if I might ask our guests please to take your seats. We have seen these declarations. Many of us are very sympathetic, but we are trying to conduct a hearing here on legislation which is significant. In fact I think it is consistent with your own view. This disrupts the other guests and these are very serious bills. I hope you won't try to disrupt this committee in its work.

A VOICE. May I be recognized?

The CHAIRMAN. It is not practical for us.

A VOICE. I honestly would not speak long. I wonder if you would be willing to allow me after the witness is through to read the contents of the peace treaty to the committee?

The CHAIRMAN. We have another witness too. These are orderly meetings and we are trying to move on as fast as we can.

A VOICE. This would take 5 minutes to read this.

The CHAIRMAN. I am afraid we cannot allow you to disrupt this meeting. If you wish to come as a witness before this committee, we do have days on which we accept public witnesses and if you will talk to Mr. Marcy perhaps you can arrange to come as a witness. We had a representative of the veteran's the other day and we will be glad to have you if you wish to represent a responsible organization. I certainly will be glad to read it myself. And if you would like to give it to Mr. Marcy——

A VOICE. We can do that, but we wondered if we may be able to simply publicly read this joint treaty of peace?

The CHAIRMAN. Unfortunately these committee meetings are arranged in advance. I regret I cannot throw this subject aside to take up yours. If you wish to have a time, that can be arranged.

A VOICE. May I ask simply if you are familiar with the contents of this treaty?

The CHAIRMAN. I am. Someone else brought it the other day.

A VOICE. We have requested three speakers before your committee to inform the press. One man by the name of Kuhl in your office said we would have an answer before 3:30. I should add he also told us there would be a day available this week reserved for the State Department that won't send any representatives. So it would be nice for the people to testify. We will have an answer to it at 3:30.

The CHAIRMAN. We will have to proceed with our hearings. If you will come to Mr. Marcy's office, he makes the arrangements for all these people. We will be glad to.

STANDING COMMITTEE TO CONSULT WITH EXECUTIVE

Senator SPONG. I have one further question. I thank you for your testimony here this morning. I am sorry I was late in arriving. We have had in addition to the legislation on which you have testified, several suggestions, one by Professor Commager. On Friday we had a bill before us from Congressman Horton of New York. They have recommended a standing committee comprised of different Members of the House and of the Senate to be available for consultation at all times with the Executive. Congressman Horton has introduced his suggestion as an appendix to the Javits bill. Professor Commager, I believe, suggested a permanent committee so that there would always be someone here regardless of a recess.

Would you care to comment on the desirability of that?

Mr. REEDY. I would have to do it off the top of my head without being familiar with all of the details, but I think as a general principle I can say this: I don't believe that a consultation committee is necessary. In effect, you have consultation now with the leadership of the two Houses and both the majority and minority.

I myself would like to see some type of a joint committee which would be composed of certain senior members of all the committees, and I have a specific reason for that. They could compel a full, frank and very free discussion with no holds barred at regular intervals of the executive planning, of its approach toward world affairs, of possible military moves that are under consideration. This is a project that I am working on now in my own mind as a somewhat preliminary thing. I have not centered down on it.

Again I think the operative thing is that this is not a cooperative question, that there should be some device which actually compels the production of certain testimony and certain facts and figures, that I think consultation you have already, and I don't believe it gets anywhere.

Senator CASE. I have just two comments. I am sorry I didn't hear all of your testimony. It does seem to me that everything you have said makes great sense. On this last point of the continuing of a special committee composed of senior members of standing committees, I have already made a proposal along that line which I think probably is very close to yours and I look forward to exploring that with you.

Mr. REEDY. I would like to see it, Senator.

DIFFICULTY OF GETTING SENIOR MEMBERS TO YIELD PREROGATIVE

Senator CASE. The problem, of course, here is that it is very difficult to get senior members to yield any prerogatives. I am not referring to our chairman or to the ranking members of our committee.

Obviously the Armed Services and Appropriations Committees as well as this committee and the Joint Committee on Atomic Energy, all have responsibilities in the national security field. Yet very little, if anything, is considered jointly by these committees. National security matters should be considered in a much broader context than is presently the case.

LOSS OF CONGRESSIONAL POWER

That leads me to my second observation on which I would appreciate your comments: that we in Congress have acquiesced in the downgrading of Congress, especially of the Senate. We could use more of the fighting spirit of Wayne Morse, Ernest Gruening, and the late Senator Taft.

I remember when Senator Taft stood up on the railroad strike and insisted that action be delayed and not taken in light of what the President had contrived. I say "contrived" in a very kind sense, since President Truman thought he was doing the right thing.

I don't blame anybody for the loss of congressional power. This is a situation that has gradually evolved. The academic world has encouraged it as have the newspapers. When a new editor has been faced with a specific crises, he has tended to demand that the Congress follow the President's leadership.

Mr. REEDY. You placed your finger on one rather important point. I think there is a general consensus that Congress is too easily stampeded. I think the Executive can be just as easily stampeded and I think that the railroad resolution, which you mentioned, which I covered as a newspaperman before I had any association with the Government, was a very fine instance to illustrate a point that Executives can be stampeded too.

VALUE OF STANDING COMMITTEE TO GAIN INFORMATION

Now, I agree with you that there is a need to bringing in the members of the other committees, but I think there is another point also of deeper value, and that is when a committee is specifically devoted to one subject, which most of the standing committees are, that of necessity, they tend to give something of an image of being either an advocate or the adversary of the particular agency with which they are dealing. I think there would be a broader degree of public confidence if there were a somewhat larger group of men that had the clearcut authority to gain this information. The specifics, of course, would still go back to the standing committees, but I think there is a value in terms of public confidence in getting the information processed on as broad a basis as possible. I think that there is also a certain value to just plain cantankerousness in these things, and when you bring in a large group of men like this and they are confronted with certain information that is going to come from the executive agencies, I think they will express some of this cantankerousness—express it in a form where they can go back to their standing committees and be combative.

I think we have placed much too high a value on the question of cooperation in the last 20 or 40 years. I think we have cooperated ourselves into Vietnam. I am not quite as happy with the peace and harmony thing as I was possibly 15 or 20 years ago.

I think this is a constructive note.

The CHAIRMAN. The Senator from New York.

Senator JAVITS. First, let me thank Mr. Reedy for having applied his mind to this complex subject. I am deeply gratified by his statement.

PROVISIONS OF CONCURRING RESOLUTION

I would like to say, for your information, that I contemplated that any resolution adopted by the Congress concurring in the decision of the President to continue, that any conditions which would be compatible with the Constitution, as for example the right to terminate, the right to terminate in a given time, 30, 60, 90 days, 6 months could be contained in it. One of the great advantages of doing this is that this would formalize the practice, and you wouldn't get into the Gulf of Tonkin type situation.

Mr. REEDY. To see if I understand, you mean by that you assume that any concurring resolution would have within it an element providing for another review?

Senator JAVITS. Exactly.

Mr. REEDY. A concurring resolution to allow us to go on for 60 days?

Senator JAVITS. Or it might call for that plus reports. It would be a way, as we see it, to put a handle on it which we don't have now.

Mr. REEDY. I see the point.

ESTABLISHING ILLEGALITY OF CONTINUING HOSTILITIES

Senator JAVITS. The central reason for this, and I would like your comment on this, as we stand now it is doubtful whether the President is acting illegally or not in continuing hostilities.

Mr. REEDY. That is right.

Senator JAVITS. Once we have such a law, he will have declared with us, according to the law of the land, he is acting illegally and then we will have a hold on the situation. It compels us to think we are not just, you know, certifying what the President has already done, but that we are taking an independent responsibility.

Mr. REEDY. Right.

Senator JAVITS. And that to me is one of the great assets of this.

Mr. REEDY. Yes.

Senator JAVITS. And you would agree with that?

Mr. REEDY. Yes, sir, and very much so; that is what in fact attracted me by your resolution.

EFFECT OF RESOLUTION ON MORALE OF COUNTRY

Senator JAVITS. Another thing that impressed me is your statement, I think I got it accurately, that the will of the people in our own country is being sapped very rapidly by the Vietnam war.

Mr. REEDY. Yes, sir.

Senator JAVITS. I am interested in your statement that the adoption of this resolution would show such character and determination by the Congress at long last to meet the needs of, the crying needs of these younger people and others, that it would have effect upon the morale of the country and confidence of Americans.

Mr. REEDY. I think it would have a very definite effect, Senator, because again I repeat the other major problem is the feeling of despair. As things now stand, there is a widespread impression that no matter how clear cut becomes the extreme unwillingness and reluctance of our people to go ahead with this war that nothing can be done about it. I

believe an assertion of Congress that something can be done and that Congress will do it is probably the only hope at the moment of reestablishing among our people the type of relationship to their Government they should have—a feeling that it is their Government.

EXTENT OF EXECUTIVE PRIVILEGE

The CHAIRMAN. I don't want to prolong this, but we didn't quite finish because the interruption distracted me. A moment ago you had said you would not accept executive privilege. You do not mean by that we wouldn't recognize that we cannot force the President to come?

Mr. REEDY. Oh, no, sir; obviously not.

The CHAIRMAN. That is really the origin of the principle. You couldn't mandamus. That is what you are saying. Any agency of the character certainly of Mr. Kissinger's National Security Council clearly is not within that, and you don't mean to say he is the equivalent of Harry Hopkins, a man who is a personal friend and has no official position. Again you would not be concerned about that?

Mr. REEDY. No, sir; I wouldn't be concerned about it, Senator. I think that obviously I was not referring to the President for the simple reason that he is another branch of the Government. There is nothing you can do about that.

The CHAIRMAN. I wanted to clarify, and we were interrupted.

Mr. REEDY. I think from the standpoint of what I would assert is that there is no official document or no official person around the President that could be brought within his official family. Therefore, he cannot have his own personal privilege extended to them. I am being quite practical about this. Since this is another branch of the Government, I know there is no way in which you can compel this; but I also think that by standing on this ground that eventually you can arrive at a satisfactory equilibrium similar to that which we did have in this country up to about 10 years ago.

CREATION OF NEW AGENCIES

The CHAIRMAN. Yes. This whole thing arises as to the creation of what in effect are new agencies.

Mr. REEDY. Yes, sir; and new agencies that have been created only secondarily by Congress. I think you have authorized the President to have 14 special assistants and, I assume there is some authorizing legislation for some of the various councils such as the Council of Economic Advisers. But the thing itself has been created within the executive branch, and I don't think they can any longer be considered as advisers to the President. These are staff people that are doing the same type of work that used to be performed in the executive agencies, and in my judgment should still be performed in the executive agencies. I think the President would be a lot better off if he were removed from this type of staff work so he could concentrate upon what is his proper role which is that of political leadership.

The CHAIRMAN. It is really a creation of a vast new bureaucracy within the White House.

Mr. REEDY. It is.

COMMENDATION OF THE WITNESS

The CHAIRMAN. Thank you very much, Mr. Reedy. I think yours has been an invaluable contribution in the light of your own experience. There are few people in the world today who can testify about these matters. I will go even further and say who are willing to testify about these matters, which are of primary and basic concern to us if we are to make our constitutional system operate properly. I appreciate very much your giving your time in coming. Thank you.

Mr. REEDY. Thank you very much.

The CHAIRMAN. Professor Moore, will you come forward. I am sorry we have taken so long this morning.

Do you have a prepared statement?

## STATEMENT OF JOHN NORTON MOORE, PROFESSOR, SCHOOL OF LAW, UNIVERSITY OF VIRGINIA

Mr. MOORE. Yes, I do.

The CHAIRMAN. Would you care to put your statement in the record and comment on it, as the previous witness did, or do you wish to read it?

Mr. MOORE. I would prefer to read it.

The CHAIRMAN. Whatever you say. Proceed.

Mr. MOORE. Mr. Chairman, it is a pleasure and a privilege to appear before the Senate Committee on Foreign Relations to discuss proposals for strengthening the congressional role in the use of the Armed Forces abroad. Throughout our history the proper allocation of authority between Congress and the Executive in the use of the Armed Forces has been surrounded by controversy. This controversy has been invited by a skeletal constitutional structure which gives Congress the power "to declare War" and to "raise and support Armies" but makes the President the "Commander in Chief" and the principal representative of the Nation in foreign affairs. That this controversy has persisted suggests that there is a great deal to be said for both the executive and the congressional roles. It also suggests that the issue is not simply the triumph of the views of either Pacificus or Helvidius but is instead the far more difficult quest for reasonable lines which will optimize the strengths of both Congress and the Executive.[1]

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[1] See generally on the constitutional issues and their historical background Fulbright, "American Foreign Policy in the 20th Century Under an 18th-Century Constitution," 47 Cornell L.Q. 1 (1961); Kurland, "The Impotence of Reticense," 1968 Duke L. J. 619; Moore, "The National Executive and the Use of the Armed Forces Abroad," 21 Naval War College Review 28 (1969); Moore, "Congress and the Use of the Armed Forces Abroad," in "Congress, The President, and the War Powers, Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs of the House of Representatives," 91st Cong., 2d Sess., (Comm. Print 1970) at 124; Reveley, "Presidential War-Making: Constitutional Prerogative or Usurpation?", 55 Va. L. Rev. 1243 (1969); Rogers, "World Policing and the Constitution" in 11 America Looks Ahead (World Peace Foundation 1945); Velvel, "The War in Vietnam: Unconstitutional, Justiciable and Jurisdictionally Attackable," 16 Kansas L. Rev. 449 (1968); Francis D. Wormuth, "The Vietnam War: The President v. The Constitution" (an Occasional Paper of the Center for the Study of Democratic Institutions, 1968); Note, "Congress, The President, and the Power to Commit Forces to Combat," 81 Harv. L. Rev. 1771 (1968); Symposium, "The Constitution and the Use of Military Force Abroad," 10 Va. J. Int'l L. 32 (1969); "U.S. Commitments to Foreign Powers, Hearings Before the Committee on Foreign Relations of the United States Senate on Senate Resolution 151," 90th Congress, first session. (Comm. Print 1967); "Congress, The President, and the War Powers, Hearings Before the Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs of the House of Representatives," 91st Cong., 2d Sess., (Comm. Print 1970). See also "Documents Relating to the War Power of Congress, The President's Authority as Commander in Chief and the War in Indochina," Senate Committee on Foreign Relations," 91st Cong., 2d Sess. (Comm. Print 1970).

The starting point in drawing such lines is to recognize that the war power controversy embraces more than one or two issues concerning initial commitment of the armed forces to military hostilities. Rather, it includes a wide range of issues encompassing a broad process of decision about national commitments, the deployment of forces abroad, the commitment of forces to combat, the conduct of hostilities and the termination of hostilities. To be most effective proposals for strengthening constitutional processes should be sensitive to this range of issues and their interrelation. Inadequate focus on the full range of issues may lead to an overgeneralized response which threatens the proper balance between congressional and presidential authority. The principal issues in this process are:

I. National commitments to use the Armed Forces abroad:

(*a*) What authority does the President have, acting on his own, to commit the Nation to a contingent future use of the Armed Forces?

(*b*) What authority does Congress have to limit presidential authority to commit the Nation to a contingent future use of the Armed Forces?

(*c*) When, if at all, are national commitments for contingent future use of the Armed Forces self-executing without subsequent authorization?

II. The deployment of the Armed Forces abroad:

(*a*) What authority does the President have, acting on his own, to deploy the Armed Forces abroad?

(*b*) What authority does Congress have to limit presidential authority to deploy the Armed Forces abroad?

III. The commitment of the Armed Forces to military hostilities:

(*a*) What authority does the President have, acting on his own, to commit the Armed Forces to military hostilities?

(*b*) When congressional authorization is necessary, what form should it take?

(*c*) What authority does Congress have to limit presidential authority to commit the Armed Forces to military hostilities?

IV. The conduct of hostilities:

(*a*) What authority does the President have, acting on his own, to make command decisions incident to the conduct of a constitutionally authorized conflict?

(*b*) What authority does Congress have to limit command options incident to the conduct of a constitutionally authorized conflict?

V. The termination of hostilities:

(*a*) What authority does the President have, acting on his own, to terminate or negotiate an end to hostilities?

(*b*) What authority does Congress have to require termination of hostilities?

(*c*) When Congress terminates hostilities, what form should it take?

Although time precludes a systematic analysis of each of these issues,[2] it may be helpful to briefly review several issues which seem

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[2] I have dealt briefly with the issues subsumed under headings III, IV and V in Moore, "Congress and the Use of the Armed Forces Abroad," supra note 1. On issues I and II see "Hearings Before the Committee on Foreign Relations of the United States Senate on Senate Resolution 151, supra note 1; Remarks of Senator Fulbright," 97 Cong. Rec. 520 (1951).

"One important issue has been quite clearly defined. That issue is whether the President should seek the advice of Congress on the question of sending troops to Europe

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most relevant to the specific proposals before the committee. They are: what authority does the President have, acting on his own, to commit the Armed Forces to military hostilities, and what authority does Congress have to limit presidential authority to commit the Armed Forces to military hostilities?

CONSTITUTIONAL PROVISIONS CONCERNING WAR POWERS

The Constitution provides that "Congress shall have Power * * * to declare war * * *" It seems evident from Madison's notes of the debates in the constitutional convention that this provision was intended to lodge with Congress the power to commit the nation to war. It seems equally evident that in changing the initial draft language empowering Congress "to make war" to language empowering Congress "to declare war" the Convention intended to leave "to the Executive the power to repel sudden attacks" and to make command decisions incident to the conduct of hostilities.[3] Beyond these broad outlines the Constitution left broad gaps. Thus, it was uncertain which branch would have the authority to commit the nation to force short of war or indeed what "war" meant.[4] Similarly, the scope of the Executive's

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now, or whether his discretion should be subject to the consent of Congress. Apparently the President is agreeable to the idea that it is proper for Congress to give him its advice about this question, leaving to him the full responsibility for making the final decision. He is not willing, however, to accept the principle that the consent of the Congress is necessary to validate his decision. In other words, he does not agree that his decision in this matter must be subject to the approval of Congress .

"Personally, I agree with the position of the President. I do not agree with the proposal of the minority leader. The Congress has the right and power to raise the Armed Forces, but the President has the responsibility for the command of those forces. If in the exercise of his best judgment the defense of this country requires the sending of troops to Europe, he has the power and the duty to do so. Congress, of course, can refuse to appropriate the money for the troops but that is a decision for which Congress must take the responsibility. In the long run decisions on military strategy are best left the executive. That is the plain intent of our constitutional system. It would be dangerous for our future welfare to change the underlying principle simply because a strong minority or even a majority of the Congress may lack the confidence in the wisdom of the Executive in some particular instance such as the present one."

Id. at 520–21. See also S. Res. 85 expressing the sense of the Senate relative to commitments to foreign powers.

[3] Madison's notes indicate that "Mr. Madison and Mr. Gerry moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." They also indicate that Mr. Elseworth, who initially voted against this motion, changed his vote to one in favor of the motion after "the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function * * *." "Notes of Debates in the Federal Convention of 1787" reported by James Madison 476 (Ohio University Press 1966).

[4] One authority on the concept of war in contemporary history and international law writes:

"The laws of the American Constitution which regulate the initiation of war obviously deal with war in the formal sense. The Consitution provides that only the Congress shall have the power to declare war. On the other hand there is little doubt that the President has been recognized the right, exercised frequently in the past, to utilize the Armed Forces for the defense of national rights and interests, which in many instances gave rise to a waging of war in the material sense. Hence the legal right and the practical power of the President of the United States to put into operation the country's Armed Forces outside of the United States has been a subject of considerable discussion. The question at stake was whether or not the Presidential use of armed force contradicted the terms of the Constitution according to which only Congress was entitled to initiate war.

"From the standpoint of modern international law the competence to initiate war under the American Constitution must be considered differently according to whether formal or material war is concerned. While the competence of the Congress to initiate war is concerned with war in the formal sense, the President, owing largely to his position as Commander in Chief, is entitled, if need be, to engage his military forces in material war."

L. Kotzsch, "The Concept of War in Contemporary History and International Law" 62 n. 73 (1956). See also Potter, "The Power of the President of the United States to Utilize its Armed Forces Abroad," 48 Am. J. Int'l L. 458 (1954); Note, supra note 1, at 1774–75, 1778–94.

That the framers were aware of the distinction between declared war and measures short of war is suggested by the prevalence of hostilities without a formal declaration of war during the 18th century. A study of hostilities in the absence of a declaration of war, compiled as long ago as 1883, indicates that historically the nations of the world had

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power "to repel sudden attacks" was uncertain. Since no constitutional language is self-interpreting, particularly the broad brush strokes with which the framers set out the war powers, constitutional history, the practice of successive Congresses and Presidents, changed global conditions, and functional distinctions between Congress and the Executive are all relevant to defining constitutional policy.

### PAST USE OF ARMED FORCES ABROAD

During the 18th and 19th centuries there were approximately 100 instances of use of U.S. Armed Forces abroad. Only three of these, the War of 1812, the Mexican War, and the Spanish-American War were fully declared.[5] Congress, however, did participate in authorizing a number of other instances during this period such as the undeclared naval war with France. Moreover, most of these instances were relatively minor actions for the protection of nationals, for the suppression of pirates, or for the punishment of violations of international law. As American involvement in world affairs increased during the first half of the 20th century and, particularly, as it reached a high plateau of involvement following World War II, instances of use of the Armed Forces abroad have reflected a stronger presidential role. From 1900 to 1970 there have been over 60 instances of the use of U.S. Armed Forces abroad of which only two, World War I and World War II were fully declared by Congress.[6]

The CHAIRMAN. Were those 100 instances wars?

Mr. MOORE. No, sir.

The CHAIRMAN. What were they?

Mr. MOORE. For the most part they were relatively minor uses of forces abroad; that is, most were hostilities short of war.

### MEANING OF WORD "WAR"

The CHAIRMAN. Do you think there is no commonly understood meaning of the word "war?"

Mr. MOORE. The real issue, Senator, would be the question of the meaning of the term in the constitutional sense, that is what magnitude of hostilities is meant when the Constitution provides that Congress shall have power "to declare war." On that point there is substantial doubt as the record of the Convention is very sketchy. Constitutional practice, however, suggests an interpretation that the President has a great deal of independent authority in authorizing minor hostilities abroad and that such minor hostilities would not be considered "war" in the constitutional sense.

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frequently utilized the power to engage in hostilities without a formal declaration of war. In fact, the author of the study found that:

"Circumstances have occurred in which declarations of war have been issued prior to hostilities; but during the 171 years here given (from 1700 to 1870 inclusive), less than 10 instances of the kind have occurred * * *.

"On the other hand, 107 cases are recorded in which hostilities have been commenced by the subjects of European Powers or of the United States of America against other powers without declaration of war."

Maurice, "Hostilities Without Declaration of War" 4 (1803). This study was concerned with cases in which hostilities were commenced prior to formal declaration of war, and the number of cases in this study in which there was never a declaration of war would be substantially lower.

[5] See the list of instances of use of U.S. Armed Forces abroad from 1798–70 in "Background Information on the Use of U.S. Armed Forces in Foreign Countries, Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs," 91st Cong., 2d sess. (Committee Print Revised 1970), at 50, app. II.

[6] Id. at 54–57.

The CHAIRMAN. This is what I meant—short of war. I was trying to get in my own mind your attitude. You think there is an uncertainty about what our Founding Fathers had in mind when they used the words, "to declare war", that war to them could have been sending one marine ashore to pick up an isolated American. Did they mean that? I never had that feeling of uncertainty. I was a little surprised that you feel there is great uncertainty about what "war" means.

Mr. MOORE. There is substantial constitutional uncertainty in the meaning of the term although certainly war would not extend to sending one marine ashore for the protection of nationals. As you suggest "war" does imply major and perhaps sustained hostilities. It seems probable that the framers were familiar with the fairly common practice not to declare war in situations of minor and even some major hostilities. Declarations of war, even in the 18th century, were unusual compared with the number of nondeclared hostilities in which nations then engaged.

This interpretation of "war" as major hostilities is supported by a very broad practice which has developed over the last 180 years which certainly sustains an interpretation that in situations short of commitment of regular combat troops to sustained hostilities the President has independent authority to use the troops abroad.

The CHAIRMAN. Proceed.

### EXPANDED PRESIDENTIAL ROLE

Mr. MOORE. Although many of the remainder of these incidents were either minor or authorized by Congress, a number evidenced a broad expansion of the presidential role. Thus, major instances of presidential commitment of the Armed Forces to military hostilities during this period include President McKinley's commitment of several thousand troops to the international army which rescued Western nationals during the Boxer Rebellion, President Wilson's arming of American merchantmen with instructions to fire on sight after Germany's resumption of unrestricted submarine warfare in 1917, President Franklin Roosevelt's Atlantic war against the Axis prior to the U.S. entry into World War II, President Truman's commitment of a quarter of a million American men to the Korean War, President Kennedy's commitment of substantial numbers of military advisory personnel to Vietnam and President Johnson's commitment of marines to the Dominican Republic.

In view of the decision of the Constitutonal Convention to lodge with Congress the power to commit the nation to major hostilities abroad, the expanded presidential role may have gone too far. In particular, the waging of a sustained major war in the Korean conflict without explicit congressional authorization, a war in which the United States sustained more than 140,000 casualties, seems a poor precedent.[7] On the other hand, experience suggests a need for some independent presidential authority in committing troops to combat abroad.

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[7] Senator Douglas, however, presented a paper to Congress on the constitutional basis for the President's action in using armed forces to repel the attacks against South Korea in which he concluded that despite the absence of congressional authorization the President's action was "in thorough harmony with the legislative intent of the framers of the Constitution" and "in line with sound historical precedent." Douglas, "The Constitutional and Legal Basis for the President's Action in Using Armed Forces to Repel the Invasion of South Korea," 96 Cong. Rec. 9647, 9649 (1950).

There may be a need for defense against sudden attacks on American forces abroad, sudden attacks on areas which the Nation is committed by treaty to defend, minor commitments such as humanitarian intervention, the protection of nationals or regional peacekeeping operations, defensive actions such as the Cuban missile crisis requiring secrecy and negotiating responsiveness, and "ongoing command decisions" concerning day-to-day operations of military assistance programs or defensive deployment of American forces. These may all be areas in which the need for decisiveness, speed, secrecy, negotiating responsiveness or simply the difficulty in informing Congress on a day-to-day basis call for some room for presidential authority. These functional needs should neither be exaggerated nor underestimated. With the exception of the Korean War the need for speed has probably been exaggerated. On the other hand, more subtle linkages to presidential bargaining power in contexts of threat and negotiation may have been generally underestimated.

### LIMITATIONS ON AND POLICING OF PRESIDENTIAL ROLE

It is clear that American constitutional history supports a substantial role for the President in the initial commitment of the Armed Forces to combat abroad in defending against attacks on U.S. forces or territory and in situations short of war or sustained major hostilities. The real issue in allocating authority between Congress and the President in initial commitment decisions is not whether the President has a role but rather what the limits are on that role and how it might be adequately policed. In this respect several kinds of tests have been suggested. One would look to the purpose of the presidential use of force. Along these lines a thoughtful recent note in the Harvard Law Review suggests that we might allow presidential initiatives which are "'neutral' with respect to foreign political entities." [8] Other purposes commonly suggested as a basis for independent presidential authority are protecting American nationals abroad and repelling attacks on U.S. territory or Armed Forces. A second kind of test would look to the actual or probable magnitude of hostilities. For example, I have suggested that congressional authorization should be required in all cases where regular combat units are committed to hostilities which are likely to become or do become sustained hostilities.[9] This test is a rough effort to separate major hostilities from those not involving substantial casualties and commitment of resources. Professor Quincy Wright rephrases this test as "the President should obtain congressional support in advance for military action which will probably require congressional action, as by appropriations, before it is completed." [10] None of the tests suggested to date are wholly satisfactory and all are frayed at the edges. Nevertheless, my own feeling is that some version of the test based on probable or actual magnitude of hostilities is preferable to a purpose of the use test. A magnitude test seems more functionally responsive to the major policy decision of the Constitutional Convention to require congressional authorization before

[8] Note, supra note 1, at 1794–98.
[9] See Moore, "The National Executive and the Use of the Armed Forces Abroad," supra note 1, at 32.
[10] See Wright, "The Power of the Executive to Use Military Forces Abroad," 10 Va. J. Int'l L. 43, 49 (1969).

the Nation can be committed to major hostilities abroad. Moreover, constitutional history demonstrates too many diverse purposes for presidential commitment to minor hostilities to make a purposes test workable.

The judgment that Congress should oversee the Nation's involvement in major hostilities abroad remains as valid today as it was in 1789. Congressional support of that policy, however, should not destroy needed presidential flexibility.

At a minimum, independent presidential authority to commit the Armed Forces to hostilities includes authority to repel sudden attacks on the United States or its Armed Forces. Both constitutional experience and policy suggest that presidential authority also extends to a range of activities short of war and to responses to situations of genuine emergency in which prior congressional authorization is not feasible. It is doubtful how far this independent authority may be constitutionally restricted by Congress. On the one hand, a number of factors point to broad congressional authority to limit independent presidential authority.[11] Thus, under the Articles of Confederation the Continental Congress seemed to take a broad view of its own authority and a narrow view of the authority of George Washington as Commander in Chief. Similarly, The Federalist Papers suggest that the framers were concerned to distinguish the war powers of the President from the broad inherent powers of the British monarch. Moreover, Congress has authority not only "to declare War" but "to raise and support Armies [and a Navy]," "to make Rules for the Government and Regulation of the land and naval Forces," and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ."[12]

Several Supreme Court decisions also lend some support to this position. In a line of cases growing out of the undeclared naval war with France the Supreme Court seemed to subordinate presidential directives on the capture of ships to detailed congressional regulations authorizing the modalities of capture.[13] And in the famous *Steel Seizure* case the Court held that President Truman could not validly direct the Secretary of Commerce to take possession of the steel mills to avert a strike during the Korean War in the face of congressional legislation precluding such action.[14] In a concurring opinion Mr. Justice Jackson pointed out that presidential authority is highest when the President acts with congressional authorization and is at its lowest ebb when the President acts in opposition to Congress.[15]

### CONGRESSIONAL RESTRICTIONS ON INDEPENDENT AUTHORITY OF PRESIDENT

On the other hand, there are a number of at least equally strong reasons for suggesting that congressional restrictions on the independent authority of the President would be unconstitutional. First, the

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[11] See generally "A Brief on S. 731, To Make Rules Respecting Military Hostilities in the Absence of a Declaration of War," Congressional Record S. 2527 (daily ed., March 5, 1971).

[12] U.S. Const., Art I § 8.

[13] See *Bas* v *Tingy* (the *Eliza*) 4 U.S. (4 Dall.) 36 (1800); *Talbot* v *Seeman* (the Ship *Amelia*), 5 U.S. (1 Cr.) (1801); *Little* v *Barreme* (the *Flying Fish*), 6 U.S. (2 Cr.) 169 (1804).

[14] *Youngstown Sheet and Tube Co.* v *Sawyer*, 343, U.S. 579 (1952).

[15] *Id.* at 634, 637.

general historical argument for broad congressional authority proves too much both in terms of history and in terms of principles of constitutional interpretation. The historical evidence is fragmentary at best that there was any thought given to the specific issue of congressional authority to limit independent presidential authority. Yet it was clear that the Constitutional Convention at least intended the President to have the independent authority to repel sudden attacks and to conduct the course of hostilities. Furthermore, reliance on the experience under the Articles of Confederation seems a frail reed for interpreting a constitution promulgated in large measure as a result of dissatisfaction with the experience under the articles. Perhaps more to the point, historical evidence as to the intent of the framers, however realistic an approximation, is only one source for interpreting a living document such as the Constitution. As Mr. Justice Frankfurter pointed out in a concurring opinion in the *Steel Seizure* case:

> It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.[16]

Nowhere in this statement or that of Mr. Justice Holmes that "the life of the law has not been logic: it has been experience" [17] been more apt than in the interpretation of the war power. In the more than 180 years following the adoption of the Constitution there have been numerous instances of Executive action commiting the Armed Forces to hostilities abroad yet there are few instances in which Congress has sought to place restraints on Executive action. One such restraint was enacted by Congress as a proviso to the Selective Training and Service Act of 1940. It provided:

> Persons inducted into the land forces of the United States under this Act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands.[18]

The proviso, however, was partial in that it did not apply to volunteer personnel or naval forces and was in any event repealed almost at once following the outbreak of World War II. A more recent example is the proviso in the Defense Appropriation Act of 1969 which provides that none of the funds appropriated by the Act "shall be used to finance the introduction of American ground combat troops into Laos or Thailand." [19] In comparison with the active history of presidential initiatives in the use of the Armed Forces abroad the lack of congressional restraints suggests a cautious estimate of congressional authority to limit independent presidential authority. Perhaps because of this lack of historical precedent for broad congressional authority, at least two American Presidents have urged that such restrictions might be unconstitutional. President Taft said:

> The President is made Commander-in-Chief of the Army and Navy by the Constitution, evidently for the purpose of enabling him to defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the army for any of these purposes, the action would be void.[20]

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[16] *Id.* at 593. 610.
[17] See I "Mark DeW. Howe, Justice Oliver Wendell Holmes" 26 (1957).
[18] Act of Sept. 16, 1940 (54 Stat. 885, 886).
[19] 83 Stat. 469 (1969).
[20] Q. Wright, "The Control of American Foreign Relations" 308 (1922).

And President Fillmore said that—

> no legislation could add to or diminish the power . . . [of the President to use the regular armed forces] but by increasing or diminishing or abolishing altogether the army and navy.[21]

AUTHORITY OF CONGRESS TO LIMIT INDEPENDENT PRESIDENTIAL AUTHORITY

With respect to the principle of the *Steel Seizure* case that the President's authority is at its lowest ebb when he acts in opposition to congressional action, it does not follow that in all such situations the congressional action will prevail. In this respect the *Steel Seizure* case is hardly on point when the issue is the authority of the President to use the Armed Forces abroad, since the case involved a domestic aspect of the presidential war power and at that a domestic aspect which was far from clear even in the absence of limiting congressional legislation. In many ways a case which is more on point is *Myers* v. *United States* [22] in which the Supreme Court struck down an act of Congress which sought to require the concurrence of the Senate in presidential decisions to dismiss certain postmasters. The Court held that the President's removal power over executive agencies was an exclusive power even though the Constitution provides for the concurrence of the Senate on the initial appointment and even though the experience under the Articles of Confederation had been to allow congressional exercise of the removal power. Another Supreme Court case suggesting limitations on congressional authority to limit the independent authority of the President is *Ex Parte Milligan*.[23] In that case Chief Justice Chase pointed out that congressional authority did not extend to interference with presidential command decisions. According to the Chief Justice. congressional authority—

> necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.[24]

Although this statement in *Ex Parte Milligan* deals specifically with the core area of command decisions in the conduct of hostilities which is one of the strongest areas for exclusive Presidential authority, the principle that there are some areas of exclusive Presidential power in the use of the Armed Forces abroad is clear. In fact, this principle enumerated in *Ex Parte Milligan* seems more applicable than the line of cases growing out of the undeclared naval war with France which are suggested to be indicative of broad congressional

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[21] Wright, supra note 10, at 46. The statement in Professor Wright's context is:
"The Supreme Court has held that it belongs to the President himself to determine the exigencies in which a call for the militia under the congressional act of 1792 is justifiable, and the same principle would seem to apply to uses of the regular forces if, as was assumed in the Constitutional Convention, as Commander-in-Chief he uses them for necessary defense of the territory and probably other purposes such as protection of citizens abroad. President Fillmore, like all other Presidents except Buchanan, insisted that the Constitution itself granted the President power to utilize the regular armed forces, even though power to call forth the militia depended upon congressional delegation. "Probably," he added, "no legislation could add to or diminish the power thus given but by increasing or diminishing or abolishing altogether the army and navy." The Supreme Court, as well as long practice, has sustained this position in the *Neagle, Debs* and other cases."

[22] 272 U.S. 52 (1926). This case is also cited by Mr. Justice Jackson in his concurring opinion in the "Steel Seizure" case as an example of a case in which Presidential actions incompatible with the expressed will of Congress were nevertheless upheld. Youngstown Sheet & Tube Co. 1. Sawyer, 343 U.S. 579, 634 at 638 n.4.

[23] 71 U.S. (4 Wall.) 2 (1866).

[24] *Id.* at 139. (Opinion of the Chief Justice and Justices Wayne, Swayne, and Miller).

authority.[25] Although *Little* v. *Barreme*,[26] the principle case in this series, applied a congressional act limiting lawful naval captures during the war rather than a Presidential interpretation of that act, the issue in the case was a narrow one of civil liability for damages for capture and detention rather than the validity of a broad restriction on independent Presidential authority. Moreover, these cases involved an issue squarely within a specific grant of authority to Congress. That is, the power "to make rules concerning captures on land and water." [27] Under the circumstances it hardly seems surprising or relevant that a congressional act concerning rules for captures was preferred by the Court to a Presidential interpretation of that act.

If the arguments for and against a broad congressional authority to limit the independent Presidential authority to commit the Armed Forces to hostilities abroad are inconclusive, at least one astute constitutional observer, Prof. Quincy Wright has unambiguously urged that:

"[I]f he considers such action essential for the enforcement of acts of Congress and treaties and for the protection of the citizens and territory of the United States, the President is obliged by the Constitution itself to use his power as Commander-in-Chief to direct the forces abroad, *and this duty resting on the Constitution itself cannot be taken away by act of Congress.*" [28]

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[25] See *A Brief on S. 731*, *supra* note 11, at S. 2529.

[26] (The Flying Fish), 6 U.S. (2 Cr.) 169 (1804).

[27] U.S. Constitution Article I § 8.

[28] Q. Wright, *supra* note 20, at 307 (italic added). On the same page Wright reiterates that:

"By reduction of the Army and Navy or refusal of supplies, Congress might seriously impair the *de facto* power of the President to perform these duties, but it cannot limit his legal power as Commander in Chief to employ the means at his disposal for these purposes."

Id. at 307, n. 93. Elsewhere Wright makes the same point equally forcefully:

"[A]uthority supported by practice shows that the President has independent power under the Constitution to employ the military or naval forces of the United States at home or abroad except as restricted by international law, in time of peace to enforce the laws and treaties, to protect officers of the United States, to prevent obstruction of national functions, to protect the privileges and immunities of American citizens, to prevent foreign aggression and to protect inchoate interests of the United States abroad; and in time of war to prosecute campaigns, to compel submission of the enemy and to govern occupied territory. It is true that Congress can authorize the use of the Armed Forces either by declaration of war or by joint resolution in time of peace and the President is bound to execute such declaration or resolution, but Congress cannot impair the concurrent power of the President to authorize the use of forces as given by the constitution."

Wright, "Validity of the Proposed Reservations to the Peace Treaty," 20 Col. L. Rev. 121, 135–36 (1920) (italic added). And in speaking of a proposed reservation to the Peace Treaty which would have provided that "Congress * * * under the constitution has the sole power to declare war or authorize the employment of the military or naval forces of the United States," Wright says: "[t]he first part is merely declaratory, the second unconstitutional." *Id.* at 134.

Writing in 1929 Prof. Westel Willoughby of The Johns Hopkins University said:

"There has been no question as to the constitutional power of the President of the United States, in time of war, to send troops outside of the United States when the military exigencies of the war so require. This he can do as Commander-in-Chief of the Army and Navy, and his discretion in this respect can probably not be controlled or limited by Congress."

III W. Willoughby, The Constitutional Law of the United States 1567 (2d ed. 1929). Professor Willoughby goes on to say:

"As to his constitutional power to send U.S. Forces outside the country in time of peace when this is deemed by him necessary or expedient as a means of preserving or advancing the foreign interests or relations of the United States, there would seem to be equally little doubt, although it has been contended by some that he exercise of this discretion can be limited by congressional statute. That Congress has this right to limit or to forbid the sending of U.S. Forces outside of the country in time of peace has been asserted by so eminent an authority as Ex-Secretary Root. It would seem to the author, however, that the President, under his powers as Commander-in-Chief of the Army and Navy, and his general control of the foreign relations of the United States, has this discretionary right constitutionally vested in him, and, therefore, not subject to congressional control. Especially, since the argument of the court in *Myers* v. *United States* with reference to the general character of the executive power vested in the President, and, apparently, the authority impliedly vested in him by reason of his obligation to take care that the laws be faithfully executed, it is reasonable to predict that, should the question be presented

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On balance, Congress would seem to have the authority to limit Presidential use of the Armed Forces abroad in areas which fall within exclusive congressional authority. Using my earlier test, I believe that Congress would have the authority to prohibit or place restrictions on Presidential commitment of regular combat units to sustained hostilities abroad. In areas which do not fall within exclusive congressional authority, however, it is unclear whether Congress could limit Presidential authority. The same policies which suggest some independent Presidential authority also suggest that except in extreme cases of Presidential abuse Congress should not be able to limit such authority.

### PRESIDENT'S INDEPENDENT AUTHORITY PROBABLY BROADER THAN PROPOSED LIMITATIONS

The proposals for strengthening the congressional role in the use of the Armed Forces abroad which are before the committee, S. 731, introduced by Senator Javits, Senate Joint Resolution 59, introduced by Senator Eagleton, and Senate Joint Resolution 18, introduced by Senator Taft, differ in specifics but are similar in that they all delimit in advance the independent authority of the President to commit the Armed Forces to hostilities. The purpose of these initiatives is commendable in seeking to clarify the constitutional balance on a vital issue. But to the extent that they restrict Presidential authority beyond the area of exclusive congressional competence they are of doubtful constitutionality. To use S. 731 as an example, it limits independent Presidential authority to four categories. Even in those four categories Presidential authority is only recognized as initial and "shall not be sustained beyond 30 days from the date of their initiation except as provided in legislation enacted by the Congress to sustain such hostilities beyond 30 days." [29] But the independent authority of the President is probably substantially broader than the four categories in the bill.

Thus, Presidential authority would also seem to include certain low level commitments such as regional peacekeeping, actions in defense of United States interests in free transit of international straits, humanitarian interventions such as the Stanleyville operation, defensive quarantines such as were involved in the Cuban missile crisis, and the commitment of military assistance advisory groups provided that such commitments stop short of the commitment of regular combat units to sustained hostilities. Though some of these situations might be brought within the language of the bill, most seem prohibited or at least doubtful in the absence of a prior declaration of war. In attempting to restrict the area of independent presidential authority, then, this bill may be unconstitutional. Even if the bill is constitutional, it

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to it, the Supreme Court will so hold. Of course, if this sending is in pursuance of express provisions of a treaty, or for the execution of treaty provisions, the sending could not reasonably be subject to constitutional objection."
Id. Cf. Fulbright, supra note 1:
"The source of an effective foreign policy under our system is Presidential power. This proposition, valid in our own time, is certain to become more, rather than less, compelling in the decades ahead * * *.
"As Commander-in-Chief of the Armed Forces, the President has full responsibility, which cannot be shared, for military decisions in a world in which the difference between safety and cataclysm can be a matter of hours or even minutes."
Id. at 2, 3.

[29] Section 1(c) of the bill.

seems unwise to enact such a constitutionally uncertain restriction. In the absence of greater constitutional clarity the bill might precipitate a constitutional crisis between Congress and the President when the Nation can least afford it. Since the area is one regulated in general terms by the Constitution, it may be unwise to attempt a specific codification by statute.

DIFFICULTY OF ADVANCE SPECIFICATION OF POLICY-RESPONSIVE AUTHORITY DIVISION

Regardless of the resolution of the constitutional issues, a fundamental objection to proposals which seek to delimit independent Presidential authority is the difficulty and consequent danger in attempting to specify in advance a policy-responsive division of authority. As an illustration of this difficulty it may be useful to examine several initiatives historically within Executive competence which would be prohibited by these proposals in the absence of prior congressional authorization. By way of illustration I will refer to the specifics of the carefully drafted S. 731, but each of the parallel proposals could be similarly analyzed.

In the absence of a prior declaration of war S. 731 would prohibit, among others, the following kinds of Presidential initiatives: humanitarian intervention similar to the joint United States—Belgian operation in the Congo if the intervention were not for the protection of U.S. nationals,[30] an attack on U.S. naval vessels in transit in international straits or engaged in innocent passage in the territorial sea, a threat of imminent attack against the United States or U.S. Forces similar to that facing Israel prior to the Six Day War, collective defense against a sudden armed attack on a nation to which we have no national commitment (under this standard President Truman would have required a prior declaration of war before engaging North Korean forces in the Korean War as it was not until 1954 that the Mutual Defense Treaty with Korea entered into force. Since we have no specific defense treaty with Israel, or for that matter with Egypt, a parallel problem is not impossible under present conditions in the Middle East), low level or intermittent counterintervention, as for example a hypothetical air strike made at the request of the Jordanian Government against Syrian tank columns intervening in the recent Jordanian Civil War, military hostilities arising from efforts to prevent foreign warships from engaging in espionage activities within U.S. territorial waters, the naval quarantine of Cuba against the emplacement of Soviet IRBM's if "military hostilities" were necessary to maintain the quarantine (in this case apparently the only lawful route for the Cuban quarantine of 1962 which the President could rely on would have been a prior declaration of war against the Soviet Union or Cuba!).

In addition to these areas which seem fairly clearly to require a prior declaration of war under the bill, a large number of other important areas are ambiguous. For example, as written the bill might require a prior declaration of war in order for the United States to

[30] As to the permissibility of humanitarian intervention under international law see generally Lillich, "Forcible Self-Help by States to Protect Human Rights," 53 Iowa L. Rev. 325 (1967); Moore, "The Control of Foreign Intervention in Internal Conflict," 9 Va. J. Int'l L. 205, 261–64 (1969).

participate in a United Nations or OAS peacekeeping operation, to participate in a big four peacekeeping operation in the Middle East, to proceed in hot pursuit of attacking forces, and to provide military assistance advisory teams in insurgency settings. My own feelings is that it would be unwise in the extreme to deprive the President of needed flexibility in the many situations such as these which are clearly or ambiguously prohibited by the bill. Even if it is possible to seek prior congressional action in some of these cases the bill does not make adequate provision for fast action in situations in which Congress is not in session (for example during an election year). Moreover, in requiring a formal declaration of war as the only means of authorization for categories other than the four listed, the bill rejects the constitutional practice which properly treats any specific form of congressional authorization as sufficient, a practice which was specifically adopted by the committee during the national commitments hearings.[31]

The bill also seems inconsistent with the United Nations Participation Act of 1945 which provides that "[t]he President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said charter and pursuant to such special agreement or agreements [an article 43 agreement] the armed forces, facilities, or assistances provided for therein. . . ." [32] Though no article 43 agreement has yet been concluded, the recent Brewster report of the United Nations Association recommends a renewed effort to negotiate such an agreement.[33] In light of the critical need to strengthen the capability of the United Nations it seems unwise to discard the United Nations Participation Act even if it has not yet been implemented.

THIRTY-DAY LIMITATION AND PROCEDURES FOR EXPEDITED CONSIDERATION

S. 731 may also be overly restrictive with respect to the operation of the 30-day limitation and the applicability of the procedures for expedited consideration. Inexplicably, the commendable procedure for expedited consideration is only available with respect to continuation of hostilities within the four categories of initial presidential authority. Other situations would not even benefit from these expedited procedures yet the President would be prohibited from acting even on an emergency basis until he first secured a congressional declaration of war. Even in the areas in which the expedited procedure is applicable, Congress may still be unable to affirmatively act within 30 days possibly because of disagreement about the modalities of action or restrictions on the action rather than because of any disagreement about whether the action should be taken. The bill would also remove any flexibility now possessed by Congress in exercising discretion about the advisability of a full congressional debate at the time of the action.

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[31] See the "Report of the Senate Committee on Foreign Relations," 90th Cong., 1st Sess., National Commitments 25 (No. 797, Nov. 20, 1967). "The committee does not believe that formal declarations of war are the only available means by which Congress can authorize the President to initiate limited or general hostilities." Id. Constitutional scholars are in substantial agreement with this principle. See, e.g., Reveley, supra note 1 at 1289.

[32] 59 Stat. 619–21 (1945).

[33] See "Controlling Conflict in the 1970's," "The Report of the United Nations Association of the United States Policy Panel on Multilateral Alternatives to Unilateral Intervention" 41 (1969) (The Panel was chaired by Kingman Brewster, Jr.).

### DIFFICULTY OF DELIMITING EXECUTIVE AUTHORITY IN ADVANCE

These examples suggest the difficulty if not impossibility of satisfactorily delimiting executive authority in advance (and particularly of satisfactorily delimiting it in advance by a purpose of the action test). Efforts to delimit in advance despite these difficulties are likely to lead to a rigidity which would destroy presidential independence needed for the management of crisis situations. Perhaps for these reasons the witnesses testifying before the House Subcommittee on National Security Affairs last summer on similar proposals then pending before the House largely agreed on the danger of approaches which sought to delimit presidential authority in advance even though they disagreed on the constitutional implications of such measures.[34]

### EFFORTS TO RESTRICT PRESIDENTIAL AUTHORITY IN ADVANCE MAY PROVE TOO MUCH

Finally, though the congressional interest in improving constitutional processes in the use of the Armed Forces abroad should be encouraged, efforts aimed principally at restricting Presidential authority in advance may prove too much. Congress already has constitutional authority to terminate major hostilities, at least where such hostilities require initial congressional approval.[35] As such, any gain from restricting Presidential authority or from an automatic 30-day authorization deadline hardly seems worth the price. Conversely, as a result of his power as the principal representative of the Nation in foreign affairs the President may frequently be in a position to precipitate or avoid war by the diplomatic posture which he selects. Prior to the Japanese attack on Pearl Harbor it was the President who played the predominant role in war-peace decisions. After the attack the congressional declaration of war was little more than a formality. And in the European theater President Roosevelt's decision to convoy Allied shipping made it more likely that American Armed Forces would be attacked. Similarly, President Truman's decision to deploy seven divisions in Germany or the recent effort prior to the 6-day war to join with other maritime nations to send shipping through the Strait of Tiran might have precipitated an escalating series of events making congressional action inevitable. The issues in the use of the Armed Forces abroad involve a process of decision rather than a single commitment decision. Control of this process requires congressional involvement in decisions both prior and subsequent to initial commitment of the Armed Forces to combat. A vigorous congressional

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[34] See, e.g., "Congress, The President, and the War Powers," supra note 1, at 23–25 (McGeorge Bundy), 36, 38, 49 & 77 (W. T. Mallison, Jr.), 45, 50, 56–58, 79 (Alexander M. Bickel), 58, 74 & 75 (William D. Rogers), 89 (James MacGregor Burns), 130 (John Norton Moore), 135–37 (Abram Chayes) 210 (John R. Stevenson), 216 (William H. Rehnquist), 304 (Nicholas de B. Katzenbach). On the constitutional issues Professor Mallison expressed doubts about the constitutionality of such proposals and Professor Bickel supported the constitutionality of such proposals. See id. at 38, 49 & 77 (Professor Mallison) and at 50 (Professor Bickel).

[35] It is worth noting that the Articles of Confederation assigned the Congress the power to determine "on peace" as well as on war. Yet at the Constitutional Convention a motion by Mr. Butler "to give the legislature [the] power of peace, as they were to have that of war," failed of adoption. The remarks of Mr. Gerry who seconded the motion suggest that the delegates expected that the Senate rather than the Congress would make decisions "on peace," probably through the treaty power which was the usual technique for concluding formally declared wars. See "Notes of Debates in the Federal Convention of 1787 Reported by James Madison" 477 (Ohio University Press 1966).

involvement in each of these areas would probably be more effective than reliance on mechanical tests for delimiting Presidential authority.

### STRENGTHENING CONGRESSIONAL ROLE

Strengthening the congressional role in the use of the Armed Forces abroad is largely a problem in achieving balance throughout a range of decisions from the decision to make a national commitment to the decision to terminate hostilities. Decisions on any one issue may be predominantly executive or predominantly congressional, but the overall effect must be to reinforce the functional strengths of each branch and the essential partnership between both branches. The starting point in this process is the decision to make a national commitment. Congress should play a major role in considering national commitments which may subsequently lead the Nation into major hostilities. The setting of national priorities and goals is certainly a paradigm function of the more broadly based Congress.

With respect to decisions to commit the Armed Forces to military hostilities, the President should seek meaningful congressional authorization prior to the commitment of the Armed Forces to sustained military hostilities. In conflicts like the Korean war, in which there may be a genuine need for speed, the President would be required to submit his action to congressional scrutiny at the earliest opportunity. And in conflicts which gradually escalate, the dividing line for requiring congressional authorization might be the initial commitment to combat of regular U.S. combat units as such.

The President also should seek congressional involvement whenever feasible in other circumstances and should not rely on exaggerated claims of speed or secrecy. In any sustained hostilities the President is dependent on congressional cooperation and to fail to obtain congressional involvement when such involvement is feasible is to needlessly weaken the Presidential action as well as to weaken the constitutional structure. For its part, when considering initial commitment decisions Congress should consider carefully the scope of its authorization and the probable implications of its action. In retrospect, although the Tonkin Gulf resolution was a valid congressional authorization for increased U.S. involvement in the Indochina war, the unnecessary sense of urgency surrounding its passage and the ambiguity of the congressional debates suggest that both Congress and the President share responsibility for a sloppy exercise of congressional authority.[36] In this respect the standards developed for such authorization during the course of the national commitments hearings are a useful starting point.[37]

It seems probable that in a post-Vietnam world Congress will be particularly sensitive to the need for care in authorizing sustained hostilities. Even so it might be helpful in confirming the congressional role in the commitment of the Armed Forces to military hostilities if Congress would require a report from the President whenever

[36] For a discussion of the legal effect of the Tonkin Gulf resolution see Moore, "The National Executive and the Use of the Armed Forces Abroad," supra note 1, at 36–37 & 38 n. 16. And with respect to the constitutional issues in the Cambodian incursion see Moore, "Legal Dimensions of the Decision To Intercede in Cambodia," 65 Am. J. Int'l L. 38, 61–72 (1971).

[37] See Report, "National Commitments," supra note 31, at 26.

there is a substantial shift in the deployment of troops abroad or a commitment of the Armed Forces to military hostilities. The reporting idea in the proposals before the committee and in H.J. Res. 1, which is the parallel legislation in the House, is sound and might be adopted by Congress as a useful step. Such a requirement also has the advantage of avoiding the constitutional and practical dangers in efforts to delimit Presidential authority in advance while operating to trigger congressional action where needed and to hasten an orderly common law growth in the division of authority between Congress and the President. It might also be useful in encouraging greater Executive cooperation with Congress if Congress were to adopt expedited procedures for the authorization of certain kinds of nonmajor hostilities. Senator Douglas suggested such procedures at the time of the constitutional debate during the Korean War and if such procedures were carefully safeguarded to assure meaningful congressional authorization they might encourage greater cooperation between Congress and the Executive.[38]

Finally, in the exercise of its concurrent authority to terminate major hostilities, Congress should play a continuing role in reexamining major policy. To facilitate this role, it might be helpful to create a mechanism for continuing cooperation between Congress and the President during the course of major hostilities. For example, it might be useful to encourage periodic meetings between the President and congressional leaders during the continuance of sustained hostilities. Similarly, it might be useful for Congress to create new machinery to facilitate such continuing communication with the Executive. One possibility would be a joint congressional body composed of appropriate representatives from the Foreign Affairs, Appropriations, and Armed Services Committees of both Houses. Whatever the mechanism, there is a major need to improve the communication between Congress and the Executive concerning the exercise of the war powers. I would also urge the importance of congressional oversight continuing to proceed on a nonpartisan basis.

### PRESENT DISSATISFACTION WITH INDOCHINA WAR

In considering proposals for strengthening the congressional role in the use of the Armed Forces abroad, Congress should not let the present dissatisfaction with the Indochina war lead to a proposal which may alter the proper balance between Congress and the Executive. The Indochina war will come to an end, but the need for balance between the Executive and Congress will continue. In August 1937, the Young Democrats of America voted unanimously at their national convention to endorse the Ludlow amendment requiring a national referendum before declaration of a foreign war.[39] Five years later, as the Nation fought World War II, the proposal seemed strangely dated. History teaches that we tend to respond to past prob-

[38] See Douglas, *supra* note 7, at 4649.
"I submit, moreover, that we of the Congress could make it easier for the President to consult us in the event of such a national emergency, and to share any attendant responsibility, by so revising our rules that congressional action in such matters can be speeded up. The House, for example, might waive for this range of subjects the formal engrossing of a bill and the Senate could for such issues permit the vote on cloture to come more quickly after the submission of the petition."

[39] See 84 Cong. Rec. 2055 (1939).

lems rather than anticipate future dangers. In the long run, a commitment to a balance between congressional and presidential authority seems the best safeguard to avoid this danger.

The CHAIRMAN. Thank you very much, Professor Moore.

MECHANISM FOR CONSULTATION

With reference to this use of a mechanism for consultation with the President, we have a mechanism now. We discussed this with the previous witness. The advisers, many of whom are the principal ones in this field, take the position they don't want to consult. Mr. Kissinger and his staff take the position they shouldn't come before the committee either in executive session or in public session. We have the mechanism; they won't use it.

Mr. MOORE. I am not an authority on the question of executive privilege, but my own feeling is that it is part of a much broader problem, that there is a very great need for Congress not only to be informed in general but particularly to be informed about the course of hostilities when we are engaged in what are clearly major wars.

Prof. Roland Young tells us, for example, that during World War II, Congress was no more informed about the course of hostilities than the average reader of a metropolitan newspaper. That is a serious state of affairs, and I rather think we need to address the problem more directly by creating a formal structure for continuing cooperation between the President and his staff and key members of both Houses of Congress.

The CHAIRMAN. That is a matter of argument. I agree that I wish that we could have a much franker exchange of views with people in the executive branch who are involved in these decisions. All I can say is they don't feel disposed to take the Congress into their confidence on these matters. The purpose of the bill is to create a situation which would give them an incentive to do this, to precipitate a discussion of the basis for their decision.

I don't see how it can greatly really hinder the President in his responsibilities to require him, if we can, to come and discuss these matters in the usual procedures that have been established in the congressional area, such as our committee hearings. Those are the accepted bases for a discussion of such matters.

CONGRESSIONAL INVOLVEMENT IN CONSTITUTIONAL AREA

I detected that you feel the Congress should be very reluctant to involve itself in this area. I am not sure whether I interpreted you properly or not.

Mr. MOORE. I am in sympathy with the purpose of these hearings which is to strengthen the congressional role in the use of the Armed Forces abroad. The difficulty with the legislation presently before the committee which attempts to accomplish this objective is that in attempting to rigidly delimit Presidential authority, it is of both doubtful constitutionality and doubtful practical wisdom. This legislation may improve the information flow between the President and Congress, but the cost involved in order to do that is very great indeed. The same objective can be achieved better by other alterna-

tives; for example, a reporting requirement which would require the President to report to Congress whenever he deploys or uses the Armed Forces abroad.

COST AND BENEFITS OF JAVITS' PROPOSAL

A principal cost of proposals to delimit Presidential authority in advance is that the great variety of possible situations in which the President ought to have independent authority to use the Armed Forces abroad cannot adequately be anticipated in advance. If the carefully drafted S. 731 illustrates these dangers by prohibiting Presidential authority which we believe the President should have, then we should be cautious about accepting any legislative approach which seeks to establish rigid categories for Presidential authority. Yet the Javits bill (S. 731) would prohibit the President from defending against attacks on American ships proceeding through international straits or proceeding in innocent passage through territorial waters in the absence of a prior declaration of war from Congress. Since a prior declaration of war is both impractical and undesirable in most such situations this prohibition would seriously hamper needed Presidential authority.

The CHAIRMAN. Do you mean to say that you think the Javits bill prohibits the President from defending our ships on the high seas or in an international strait?

Mr. MOORE. It would not prohibit defensive action on the high seas but it would prohibit defensive action if the United States ships were in territorial waters when attacked. The basic structure of the Javits bill is that it establishes two routes for lawful action. The first of these provides four categories in which the President can take initial action. The second requires a congressional declaration of war. Category 2 under the first route provides authority to repel an attack against the Armed Forces of the United States on the high seas or lawfully stationed on foreign territory. It is clear that American naval vessels proceeding through international straits or proceeding in innocent passage through territorial seas do not fall within the language of section 2 of the bill and, therefore, defense against attacks on American ships in such circumstances might be prohibited if this legislation were passed. This highly unwise prohibition is simply one example of the difficulty in attempting to anticipate all of the circumstances in which the President must have independent authority.

Senator SPONG. Are you saying if we had attempted to force the Straits of Tiran back at the time of the six-day crisis, that would have required a formal declaration of war?

Mr. MOORE. Under this bill as presently formulated that would be the only lawful possibility. That is precisely the kind of situation which suggests the lack of wisdom of trying to rigidly delimit Presidential authority in advance. Another example is that the Javits bill would rule out humanitarian intervention. There is a growing body of international legal opinion that humanitarian intervention may be lawful under the United Nations Charter. Certainly the President ought to have the power to undertake humanitarian intervention without requiring a prior declaration of war.

There are also other difficulties with the Javits bill. For example, under section 1–D of the bill it is uncertain whether Congress could terminate hostilities after the 30-day period has expired because the bill provides only that Congress may terminate hostilities prior to the running of the 30-day period. I also agree with Mr. George Reedy in his testimony this morning when he said that the 30-day period would not have been a meaningful period with respect to the Tonkin Gulf resolution and that within that period, and even for the next several years, Congress had not changed its mind basically in its Tonkin Gulf judgment. The critical power is the continuing power of oversight for the purpose of deciding whether Congress will terminate a major hostility, not some mechanical 30-day period.

The CHAIRMAN. Senator Spong.

RECREATION OF BALANCE

Senator SPONG. Professor Moore, if I understand the thrust of your testimony, you believe that something should be done to recreate some balance?

Mr. MOORE. Again I am sympathetic with the purpose of these hearings. There are instances in which the President has gone too far in reliance on independent Presidential authority. The Korean War is a paradigm example of such an instance. There is also a continuing need to strengthen the interchange between Congress and the President in this area. In responding to these needs Congress might usefully legislate by a reporting requirement which could even be substantially broader in its coverage than the Javits bill. The Javits bill, as you know, does not go to deployment, but only to the initial commitment to hostilities. Such a reporting requirement might even include executive decisions purporting to make a national commitment. Second it could include reporting of deployments abroad; and, third it could require a report when forces are committed to military hostilities. It might also be helpful to establish a more structured mechanism for involving Congress in the continuing decisions relating to the conduct of hostilities.

Senator SPONG. You are then recommending more reporting, more consultation?

Mr. MOORE. Yes; reporting and consultation are very useful and they avoid the kinds of constitutional defects and practical problems that one gets into when attempting to rigidly delimit the independent authority of the President in advance.

OPPOSITION TO PROPOSED LEGISLATION

Senator SPONG. But you oppose any of the three or four pieces of legislation before us that attempt to delineate those instances in which the President might respond immediately without a formal declaration of war?

Mr. MOORE. Yes. I am, however, sympathetic with a few features of those proposals. For example, section 5 of Senator Eagleton's proposal which sets up a continuing reporting requirement during the course of hostilities might be useful. Also part 2 of Senator Taft's proposal which sets out general policy with respect to Southeast Asia seems

generally sound. But on the basic question of the wisdom of attempting to delimit in advance the constitutional and practical dimensions of the President's power to use the Armed Forces abroad I believe that any such effort would be a serious mistake.

CONSTITUTIONAL MANDATE FOR CONGRESSIONAL ROLE

Senator SPONG. Let me go back to Madison and all those gentlemen whom we have invoked here in the past few weeks.

Do you believe that the Constitution mandates a role for Congress in the making of decisions to use force?

Mr. MOORE. Yes; but it depends on the kind of force that is used. It is reasonably clear that Congress must participate in decisions to commit United States forces to major and sustained hostilities. The Mexican War, the Korean War, and the Indochina War are examples. It is equally clear that when the issue is force short of war, the President has substantial independent authority. The difficulty is in coming up with a constitutional test which is not dangerously frayed at the edges for intermediate situations.

The information which we have about precisely what the framers meant about the war power is not terribly useful. We know that Congress has the power to declare war; we know the President is Commander-in-Chief; we know there were a series of vigorous debates in the early years of the Nation, the famous debate between Hamilton and Madison for example, but when all is said there is very little specific information about what the framers meant. The truth of the matter seems to be that we are just beginning to get a full picture of the range of issues in the use of the Armed Forces abroad. For example, the initial focus in the Indochina debate was on the decision to commit our armed forces to hostilities, then emphasis shifted to the conduct of hostilities, then finally termination became an important issue. We really have a constitutional process of commitment involving not one but a range of issues. Let me briefly review the issues and the constitutional divisions of authority with respect to each. With respect to the decision to make an advance national commitment Congress, or the Senate if a treaty is involved, has a broad role to play. The participation of the Senate in the formation of NATO and SEATO are examples of this role. With respect to the deployment of troops abroad the President may have a broader role to play than Congress. Certainly he has historically had a broad role on this issue.

With respect to the decision to initially commit the armed forces to military hostilities, the roles of Congress and the President seem to depend on the magnitude of the hostilities. Congress must authorize the initial commitment to major and sustained hostilities. Below that threshold the Executive has independent authority. On the issue of conduct of hostilities the Executive has the predominant authority. Lastly, with respect to the power to terminate hostilities Congress has substantial authority, at least with respect to major hostilities.

LIKELIHOOD OF SUPREME COURT RULING ON JAVITS' PROPOSAL

Senator SPONG. We had testimony on Friday from Senator Goldwater who also spoke in opposition to these bills. He prefaced what he

said by saying he was not a lawyer, but he went on at some length about what could happen if the Supreme Court were called to rule upon something akin to the Javits proposal. You have spoken of the constitutionality of this proposal. As a practical matter, do you believe the Supreme Court is going to rule on a bill such as this if it is enacted?

Mr. MOORE. The likelihood of Supreme Court action in this area is not high. The Court historically has been cautious in intervening in decisions such as this. They have declined on several occasions during the Indo-China conflict to consider the constitutionality of the executive-congressional authorization for the conflict. Such a judicial examination is not, however, impossible. Some constitutional scholars urge that such issues ought to be justiciable and certainly in a situation in which the President acts in opposition to the limits of congressional authorization you maximize the likelihood that the Court will say that the issue is justifiable. At least it is accurate to say that it is a much stronger case for justiciability when the President is forced to take action in opposition to congressional action than when Congress and the President act together.

### CONGRESSIONAL AUTHORITY TO LIMIT CONTINGENT FUTURE USE OF ARMED FORCES

Senator SPONG. There is one area on which I would like you to comment, in addition to the statutory approach, the reporting and the consultation. In delineating the issues in this process, you asked the question, "What authority does Congress have to limit Presidential authority to commit the Nation to a contingent future use of the Armed Forces?". I would like you to enlarge upon the whole area of resolutions, the national commitments report and the suggestion that this committee made in offering that report. You might pass judgment on the Cooper-Church amendment, which I supported. I think Congress is on very sound ground when it seeks to tell the President where a war may not be fought, not how to proceed, but where it may not be fought. I would like you to comment on this area.

Mr. MOORE. Your question includes a broad range of issues most of which are relatively new in our constitutional history.

With respect to advance national commitments to other nations, Congress, or the Senate in the case of the treaty power, should have a substantial role to play. Major commitments such as NATO or the Rio Pact should certainly involve Congress in the process.

In terms of the authority of Congress to limit Presidential authority to commit the Nation in advance, the recent Senate National Commitments Resolution squarely poses that issue. To my knowledge there has never been a ruling of the Court that is on point, a practice of the Congress that is on point, or any particular authority one way or the other to suggest an answer.

My own feeling would be that we ought to draw the line in terms of whether we are talking about a commitment likely to involve major hostilities in which case Congress or the Senate should participate in the decision, or certain kinds of minor commitments in which case the President would have independent authority to commit the Nation in advance. An example of this latter situation is the general assur-

ance given by President Eisenhower and Secretary of State Dulles to Israel at the conclusion of the second Arab-Israeli War that the United States would support them in keeping the Strait of Tiran open to shipping of all nations. The commitment was made, you will recall, to encourage an Israeli pullback from Sharm-el-Sheikh and to prevent further hostilities. That is the kind of situation in which the President ought to have authority to make advance commitments.

Shifting to your question regarding the Cooper-Church amendment, that gets us into the problem of authority with respect to decisions concerning the conduct of hostilities. A threshold problem in evaluating the Cooper-Church amendment is whether it should be characterized as a conduct of hostilities decision or whether it should be characterized as a decision concerning new commitments. Was the Cooper-Church amendment aimed principally at preventing a new commitment to the Cambodian Government or was it aimed at directing the conduct of ongoing hostilities in the Vietnam war? My assessment is that it has overtones of both. If the purpose of the Cambodian incursion was to protect U.S. forces and more broadly to support the general defensive effort in South Vietnam, it was constitutional for the President to take the action which he did under his Commander-in-Chief power. Thus, if the purpose of Cooper-Church was to regulate these ongoing command decisions then it would seem constitutionally doubtful. If, on the other hand, the Cooper-Church amendment was largely aimed at preventing assistance to the Cambodian Government then the constitutional case for the amendment is stronger.

Senator SPONG. Senator Javits.

Senator JAVITS. I don't want to protract this, Professor. I welcome you here.

DEFINITION OF HOSTILITIES

I did note, as I went through your statement, your desire to have some definition of hostilities and also your judgment as to the authority of Congress in this field of a definition of hostilities which would include both sustained hostilities and, second, the nature, character, and size of hostilities. Your definition is regular combat units.

I am sure our committee will consider those suggestions with the greatest care and the greatest interest.

Normally we have chosen to legislate in this field with a rather great amount of freedom within an assigned definition, and I have tried to do that in the drafting of the bill. The definition of military hostilities, I thought, should remain flexible because you can get involved in a big war even through an action which might conceivably involve legation personnel or a Military Assistance Group. Nonetheless I am interested in your view, as it also involves your legal view. You would concur in the law if there was a "substantial and sustained" criterion. I shall study it carefully. Senator Spong and I will discuss it.

FLEXIBILITY OF S. 731 QUESTIONED

Mr. MOORE. Thank you. I would like to make one additional point if I might, Senator, concerning the use of the language "declaration of war" instead of "congressional authorization" in the bill. As it is

presently drafted the bill does not do what McGeorge Bundy this morning suggested that it would do, and that is, provide a flexible technique for congressional authorization intermediate between a formal declaration of war and no congressional authorization at all. It does not do this because, first, Congress already has constitutional authority to authorize major hostilities without using a formal declaration of war and, as such, no bill is necessary to provide such authority. And second, it does not do this because as it is presently worded unless a situation falls within the four categories of section 1 the only authorization available is limited by the bill to a formal declaration of war. One way to avoid this would be to change the language "declaration of war" to "congressional authorization" whenever it appears in the bill. In the absence of such a change the bill would reduce rather than increase the flexibility of Congress in this respect.

Senator JAVITS. I cannot agree with you in that unless the thing says what you have implied. I am a pretty fair drafter and Senator Spong is a pretty good lawyer. Certainly I did not intend that congressional resolutions should be confined to those four premises. I intended on the contrary, and I said that in response to Senator Goldwater's strictures on this measure, that I fully expect a President who is going to get into a situation where he may get into hostilities, impermissible under this bill, to come to us for a resolution in advance. I said this morning to Mr. Bundy, as I interpret this resolution we could have an action of the Congress which would fully qualify under this bill even if it passed as it is, which was a resolution passed before hostilities actually occur. So nonetheless in deference to you, Professor Moore, I will certainly look it over very carefully.

Mr. MOORE. I am pleased to hear that you plan to reconsider the bill.

Senator JAVITS. Thank you.

Senator SPONG. Thank you very much, Professor. Your testimony here has provided a balance for the record. You have certainly given the sponsors of the bill something to look into further and I assure you we will.

Mr. MOORE. Thank you.

(Whereupon, at 1 p.m., the committee adjourned subject to call of the Chair.)

# WAR POWERS LEGISLATION

FRIDAY, MAY 14, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10 a.m., in room 319, Old Senate Office Building, Senator J. W. Fulbright (chairman), presiding.

Present: Senators Fulbright, Church, Symington, Pell, McGee, Aiken, Case, Cooper, and Javits.

Also present: Senators Stennis and Eagleton.

The CHAIRMAN. The committee will come to order.

## OPENING STATEMENT

The committee welcomes the opportunity today to hear the views of the Secretary of State on a number of bills relating to the respective war powers of the President and Congress.

Although interest in this issue has undoubtedly been aroused by the war in Indochina—which many of us believe to be unconstitutional because of the lack of congressional sanction—the legislation under consideration looks beyond the present war. The bills introduced by Senators Stennis, Eagleton, and Javits specifically exclude Indochina from their application, purporting only to profit from the Vietnam experience in working out an improved method of authorizing the use of the Armed Forces in future circumstances.

## NEED FOR REASSERTING CONGRESS' CONSTITUTIONAL AUTHORITY

Since the initial consideration of the National Commitments Resolution in 1967, this committee and the Senate have been increasingly concerned with the need for a reassertion of the constitutional authority of Congress in matters of war and peace. In June 1969, by a vote of 70 to 16, the Senate adopted the National Commitments Resolution expressing its conviction that the Armed Forces legally could be committed abroad only as the result of "affirmative action taken by the executive and legislative branches of the U.S. Government. * * *"

To our dismay the Executive—not just the present administration but most of its recent predecessors as well—has chosen to ignore such congressional expressions of constitutional principle. Instead, recent Presidents have relied upon dubious historical precedents and an extravagant interpretation of the President's authority as Commander in Chief to justify Presidential initiation of military hostilities without the consent or even the knowledge of Congress. The Gulf of Tonkin

resolution was treated by the Johnson administration alternately as the "functional equivalent" of a declaration of war and as a mere ceremonial gesture toward the Congress. As President Johnson put it in a press conference on August 18, 1967, "We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we are doing."

Although I would be pleased and grateful to have the Secretary demonstrate otherwise, I have been forced to the conclusion thus far that the present Administration shares its predecessor's belief that the President is at liberty to use the Armed Forces as and when he sees fit. The commitment of American military forces to Cambodia in 1970, and to Laos in 1971, without the consent or even the knowledge of Congress, suggests that the present Administration believes itself to be at liberty to initiate war at will and, in so doing, to ignore not only the Constitution, but also the explicit will of the Senate as expressed in the National Commitments Resolution.

### REPEAL OF GULF OF TONKIN RESOLUTION

When Congress undertook last year to repeal the Gulf of Tonkin resolution, the Executive offered no objection to the repeal of that and a number of other military resolutions on the ground that it was "not depending on any of these resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans." Since the Tonkin resolution has now been repealed, the question arises as to what authority the Nixon administration is acting under in its conduct of the war in Indochina. The Administration appears to have regarded the repeal of Tonkin as unobjectionable because, in its view, the President is thought to have full authority to make war in his capacity as Commander in Chief. To others of us—strict constructionists—repeal of the Tonkin resolution represented the withdrawal of congressional sanction from the one legislative instrument which, contested and corrupted though it was, provided some facade of constitutional legitimacy for the war in Indochina. The President apparently signed the repealer because he thought it did not matter, because he thought he could conduct the war without it. I voted for repeal because I thought it did matter, because I want the war ended, and I believe that Congress has the legal authority—if not the actual power—to end it.

### RESTORATION OF CONSTITUTIONAL BALANCE

Vietnam has surely been the catalyst of concern for the war powers, but, as I have already noted, the legislation now under consideration looks beyond Vietnam to the restoration of a constructive, cooperative, constitutionally sound relationship between the Executive and Congress in matters of committing the Armed Forces to hostilities abroad. The need for such a partnership was summed up by the Chairman of the Armed Services Committee, Senator Stennis, in his notable speech to the Senate of 3 days ago. As Senator Stennis put it, and I quote: "The fact of the matter is that the decision to make war is too big a decision for one mind to make and too awesome a responsibility for one man to bear. There must be collective judgment given and a col-

lective responsibility shared. That is exactly the tone, the letter, and the spirit of the Constitution of the United States."

By undertaking to reassert its war powers, Congress is moving toward a significant turning point in our constitutional history. For its own sake as well as that of Congress and the country, I hope that the Executive will see fit to cooperate with Congress in the restoration of constitutional balance.

In recent decades, the executive branch of our Government has seemed attracted to a spurious conception of what is required for a "strong" Presidency. According to this school of thought, a "strong" President has been regarded not as one who strengthens and upholds our constitutional system as a whole but as one who accumulates and retains as much power as possible in the Presidential office itself. It is this kind of thinking which has led recent Presidents to interpret their powers as Commander in Chief in a manner far exceeding the intent of the Constitution. It is this kind of thinking which has led the State Department witnesses to come before this committee and cite dubious and irrelevant past instances of foreign military operations undertaken by the President without congressional approval—as if one act of usurpation legitimized another. As the Chairman of the Armed Services Committee pointed out the other day: "These incidents do not constitute binding precedents. They have not made law, and this practice is most certainly not in concordance with the Constitution."

The pendulum has begun to swing away from the dangerous practice of Presidential initiated warfare. If the Executive undertakes to thwart the current effort to restore constitutional balance by all of the considerable means at its disposal, it is entirely possible that Congress will be driven to employ some of the unused means at its disposal, and that, as a result, the pendulum will swing too far, carrying us toward the kind of overbearing congressional role which resulted in the rejection of the League of Nations in 1919. If, on the other hand, the Executive chooses to be forthcoming, and cooperates with us in the restoration of Congress's proper authority in matters of war and peace, it should be possible to construct a relationship of balance and trust between the two branches of Government. We are confident, Mr. Secretary, that you will choose the latter course, both in your statement today and in future developments affecting the war powers legislation now under consideration by this committee.

Mr. Secretary, I believe you have a prepared statement.

Secretary ROGERS. Yes, thank you, Mr. Chairman.

The CHAIRMAN. Do you wish to read that to the committee?

## STATEMENT OF HON. WILLIAM P. ROGERS, SECRETARY OF STATE

Secretary ROGERS. Yes, I would like to read it. I will try to shorten it some, but I think it is such an important subject that it deserves fairly extended treatment.

It is, as always, my privilege to appear before this committee and I am grateful to you, Mr. Chairman, and to members of the committee for the opportunity to testify on the serious questions under consideration.

Senator SYMINGTON. Mr. Secretary, would you move the microphone a little closer?

Secretary ROGERS. The committee has helped stimulate an important examination of the war powers of the President and Congress under our Constitution. This Administration, of course, fully respects Congress' right to exercise its constitutional role in decisions involving the use of military force and in the formulation of our Nation's foreign policy. We realize that under our constitutional system decisions in this vital area should reflect a common perspective among the Legislature, the Executive and the electorate so that each may play its proper role. We also recognize that this common perspective can only be built through cooperation and consultation between the legislative and executive branches. Generally speaking, the constitutional process so wisely conceived by the Founding Fathers has worked well throughout our history. Any attempt to change it should be approached carefully and should be subjected to long and full consideration of all aspects of the problem.

QUESTIONS INVOLVED IN WAR POWERS ISSUE

The issue before us involves the constitutional authority to commit forces to armed combat and related questions. These questions have been the subject of considerable debate and scholarly attention.[1] Unfortunately, they are often approached polemically with one side arguing the President's constitutional authority as Commander in Chief and the other side asserting Congress' Constitutional power to declare war—the implication being that these powers are somehow incompatible. I believe that the contrary is true. The framers of the Constitution intended that there be a proper balance between the roles of the President and Congress in decisions to use force in the conduct of foreign policy.

In discussing these issues with you today, I wish first to review the historical background of the war powers question, beginning with the Constitution itself and tracing the practice of the Nation throughout our history. I might say, Mr. Chairman, in that connection I do not cite these instances in our history necessarily to show that they should be precedents, but merely to show what the history of the country has been. I would like than to place the war powers issue in the modern context and discuss with you the factors which I see bearing on the issue of the exercise of Presidential and congressional powers now and in the foreseeable future. Finally, from this perspective, I will describe what I believe the national interest requires in terms of a proper balance between the President and the Congress.

First, let me stress that cooperation between the executive and legislative branches is the heart of the political process as conceived by the framers of the Constitution. In the absence of such cooperation, no legislation which seeks to define constitutional powers more rigidly can be effective. Conversely, given such cooperation, such legislation is unnecessary. Obviously, there is need for and great value in congressional participation in the formulation of foreign policy and in decisions regarding the use of force. But, at the same time, there is a clear need

[1] See generally, Background Information on the Use of United States Armed Forces in Foreign Countries, House Committee on Foreign Affairs, 91st Congress, 2d Session (Committee print 1970) (hereinafter cited as Background Info. 1970); Documents Relating to the War Power of Congress, the President's Authority as Commander in Chief and the War in Indochina, Senate Committee on Foreign Relations, 91st Congress 2d Session (Committee Print, July 1970) (hereinafter cited as Documents on the War Power 1970); Hearings on Congress, the President, and the War Powers before the Subcommittee on National Security Policy and Scientific Development, House Committee on Foreign Affairs, 91st Congress, 2d Session (Committee Print 1970).

in terms of national survival for preserving the constitutional power of the President to act in emergency situations.

CONGRESSIONAL AND PRESIDENTIAL POWERS UNDER CONSTITUTION

Let me turn, then, first to the historical background beginning with the Constitution. Article I, Section 8 of the Constitution grants Congress a number of specific powers relevant to our discussion, including the power "to * * * provide for the common Defense * * *; "to declare War * * *; To raise and support Armies * * *; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces * * *." The Senate, in particular, is given certain foreign relations powers to advise and consent to treaties and to the appointment of ambassadors and other officials.[2] Congress has the power to make all laws which are necessary and proper for carrying out powers vested by the Constitution in the Federal Government.[3] In addition, Congress has the sole authority to appropriate funds[4]—a vital power in the war powers and foreign relations area.

The powers of the President which are relevant to this inquiry are found in article II. The President is vested with the executive power of the Government; he is named Commander in Chief of the Army and Navy and is required to "take Care that the Laws be faithfully executed."[5] From these powers and the power to make treaties and to appoint and receive ambassadors is derived the President's constitutional authority to conduct the foreign relations of the United States.

INTENT OF FRAMERS

The framers of the Constitution were not writing in an historical or political vacuum. Experience during the colonial period and under the Articles of Confederation had shown the need to strengthen the central government. The problem was to create a strong Federal system and yet prevent tyranny.[6] Accordingly, the framers established three powerful Federal branches of Government and depended upon the independence of each branch and their coequal powers to provide the checks and balances necessary to preserve the democracy.

The division of the war powers between the legislative and executive branches is illustrative of the general constitutional framework of shared powers and checks and balances. By this division, the framers changed prior U.S. practice under the Articles of Confederation where the "sole and exclusive right and power of determining on peace and war" had been vested in the Legislature.[7] They wished to take advantage of executive speed, efficiency, secrecy, and relative isolation from "public passions."[8]

[2] U.S. Const., art. II, § 2.
[3] Id. at art. I, § 8, cl. 18.
[4] Id. at art I, §§ 7, 8, cls. 1, 2, 12 and 9 cl. 7.
[5] Id. at art. II, §§ 1–3.
[6] Solberg, The Federal Convention and the Formation of the Union of the American States, at xc (1958).
[7] Articles of Confederation of 1781, art. IX. This consolidation of power in the Legislature was principally intended to put the war powers in the hands of the central government rather than the States, except in certain specified emergencies. A division of the war power between Congress and the President was not at issue, for the fear and dislike of monarchy was so great among the colonists that the articles did not provide for an independent executive branch. Had the framers intended to give Congress exclusive control of the war powers they could have incorporated the same war powers provision into the Constitution.
[8] See The Federalist Nos. 70–75 (J. Hamilton ed. 1864) (A. Hamilton); id. No. 49, at 390–92 (A. Hamilton); id. No. 63, at 476–77 (A. Hamilton).

At the same time, they wished to avoid the dangers to democratic government exemplified by the unchecked British monarch who, as Hamilton noted, had supreme authority not only to command the military and naval forces, but also to declare war and to raise and regulate fleets and armies.[9] Mindful of the hardships which war can impose on the citizens of a country and fearful of vesting too much power in any individual, the framers intended that decisions regarding the initiation of hostilities be made not by the President alone, nor by the House or Senate alone, but by the entire Congress and the President together.[10]

Yet, it is also clear that the framers intended to leave the President certain indispensable emergency powers.[11]

The grant to Congress of the power to declare war was debated briefly at the Constitutional Convention and that well-known debate reveals the essential intention of the framers. The Committee of Detail submitted to the general convention a draft article which gave the Congress the power "to make war." Purusant to a motion by Madison and Gerry, this was amended to the power "to declare war". This change in wording was not intended to detract from Congress' role in decisions to engage the country in war. Rather it was a recognition of the need to preserve in the President an emergency power—as Madison explained it—"to repel sudden attacks" and also to avoid the confusion of "making" war with "conducting" war, which is the prerogative of the President." [12]

RATIONALE BEHIND PRESIDENT'S POWER TO REPEL SUDDEN ATTACKS

The necessity to repel sudden attacks was the case cited by the framers in which the President clearly had power to act immediately on his own authority. That was the one situation, in 1787, in which it was evident that emergency action was required. But I submit that the rationale behind the concept is broader—that is, that in emergency situations the President has power and a responsibility to use the Armed Forces to protect the Nation's security.[13]

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[9] Id. No. 69, at 516.

[10] II M. Farrand, The Records of the Federal Convention of 1787, at 313, 318–19 (1911). "The power of the President with regard to a declaration of war does not end with the functions of communication or information, and of recommendation. A declaration of war, like any other bill, order, resolution, or vote requiring the concurrence of both Houses of Congress, must be submitted to the President for his approval or disapproval." Berdahl, War Powers of the Executive in the United States 95 (1921).

[11] Farrand, supra at 313, 318–19. That the scope of these emergency powers was controversial from the beginning is evidenced by Hamilton's vigorous attack on President Jefferson's conservative interpretation of his defensive powers in his conduct of the limited war with the Barbary Pirates in 1801. See note 16 infra.

[12] Farrand, supra at 313, 318–19.

[13] For example, the President's power to repel sudden attacks undoubtedly includes the power to provide against the imminent threat of attack. This concept was recognized early in connection with Congress' constitutional power to call forth the militia to repel invasions. In *Martin* v. *Mott,* 25 U.S. (12 Wheat.) 15 (1827) Justice Story found constitutional the Act of Congress of 1795 which empowered the President to call forth the militia if the country were invaded or in imminent danger thereof. "[T]he power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasions is to provide the requisite force for action, before the invader himself has reached the soil." Id. at 28. See also *Durand* v. *Hollins,* 8 F. Cas. 111 (No. 4186) (CCSD NY 1860) recognizing the Executive's emergency power and duty to respond quickly to threats against the lives and property of American citizens abroad. The origin of the notion, set forth in the *Durand* case, that citizens have a right to protection abroad is unclear. It is listed as an unquestionable privilege of Federal citizenship in the *Slaughter-House* Cases, 83 U.S. 36, at 79 (1872) with no authority given and mentioned also in Re Neagle, 135 U.S. 1, at 64 (1889). See also 22 U.S.C. §§ 1731–32. For authority that this is more properly a matter within the Executive's discretion, see E. M. Borchard, The Diplomatic Protection of Citizens Abroad 29–30 (1928).

This conclusion is borne out by subsequent practice and judicial precedents, as I will show later. In fact, much of the debate at the time centered on the need to curb the European monarch's tradition of precipitating offensive wars and to transfer to the Federal Government the war powers previously exercised by the States; little attention was given to the scope of the President's power to use the Armed Forces for defensive purposes to protect the Nation or its security interests.[14]

DIVISION OF WAR POWERS AUTHORITY PARALLELS OTHER FIELDS

The constitutional division of authority in the war powers area, as I see it, parallels the constitutional balance between the Executive and Legislature in other fields. By dividing these powers between the two branches, the Constitution established a system that, except in emergency situations, would function most effectively if decisions to involve the Nation in armed conflict were arrived at jointly by the President and Congress.

HISTORICAL EXAMPLES OF PRESIDENTIAL INITIATIVE

In addition to the textual authority and the framers' intentions regarding the war powers of Congress and the President, we should consider the practical exercise of those powers since the Constitution was adopted. Many scholars have reviewed the historical records[15] and I do not intend here today to cover all of this ground again. I think it is important, however, to identify the trend which developed.

From the earliest years of the Republic we find examples of presidential use of the Armed Forces without congressional approval. These were, at first, very limited in character. For example, in 1801 President Jefferson sent, on his own authority a squadron of ships to protect American vessels from the Barbary pirates, but he authorized them to take only defensive actions.[16]

The scope of presidential initiative expanded during the 19th and 20th centuries. President Polk sent American forces into the disputed territory near the Rio Grande in January 1846, where they engaged in

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[14] R. Russell, The United States Congress and the Power to Use Military Force Abroad, April 15, 1967, at 25–63 (unpublished thesis in Fletcher School of Law and Diplomacy Library); see The Federalist No. 4, at 65–70 (J. Hamilton ed. 1864) (J. Jay).

[15] See, e.g., R. Russell, supra at 64–389.

[16] J. Rogers, World Policing and the Constitution 46–47 (1945); background information 1970, supra at 40. In his first annual message to Congress on December 4, 1801, Jefferson explained his actions: "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offence also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that, in the exercise of this important function confided by the Constitution to the Legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight." II Annals of Congress 12 (1801) Jefferson's conservative interpretation of his war powers, even against a declared adversary, was vigorously attacked by Hamilton. In his view, once the nation is attacked or war is declared by a foreign nation, the President is authorized to respond with whatever force he thinks necessary. "[I]t is the peculiar and exclusive province of Congress, *when the nation is at peace* to change that state into a state of war; whether from calculations of policy, or from provocations, or injuries received: in other words, it belongs to Congress only, *to go to War*. But when a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary." Seven Works of Alexander Hamilton 746–47 (J. Hamilton ed. 1851) [Emphasis in original]; see Wormuth. The Vietnam War: The President versus the Constitution in 2 The Vietnam War and International Law 723–25 (Falk ed. 1969). Hamilton's view received judicial approval in The Prize Cases, 67 U.S. (2 Black) 635 (1863).

battle with the Mexicans purely on Presidential authority.[17] In 1900 President McKinley sent 5,000 troops to China without congressional authorization to protect Americans and help put down the Boxer Rebellion.[18]

President Theodore Roosevelt on his own authority dispatched gunboats to the Canal Zone area.[19] Later, Presidents Roosevelt, Taft, Wilson, and Coolidge intervened and temporarily occupied other Latin American and Caribbean countries without prior congressional approval.[20] Nicaragua, for example, was occupied and, in effect, administered by the U.S. Marines for nearly 7 years, from 1926–33. Congressional approval was never requested.[21]

### LACK OF CONGRESSIONAL COMPLAINT CONCERNING PRESIDENTIAL INITATIVES

This history shows an increasing exercise by the President of his constitutional powers to use American Armed Forces abroad, without the prior authorization of the Congress. And yet there was remarkably little complaint from the Congress. It is interesting to speculate why this was so. It seems to me there may have been several possible factors. In the first place, I suppose that Presidents were acting in the context of a generally popular consensus in the country that the United States should assume a posture consistent with its emerging power, particularly in the Western Hemisphere. Second, a large majority of the 19th and early 20th century Presidential actions occurred in the Caribbean, where this country's power was so predominant that there was little or no chance of forcible response to our actions. Therefore, the risks to the Nation which article I, section 8, was designed to reduce never arose. In short, there being no risk of major war, one could argue there was no violation of Congress' power to declare war.[22]

It has been suggested that even Franklin Roosevelt's executive agreements in 1940–41 with Britain effecting an exchange of destroyers for bases in the Western Atlantic and agreements with Denmark and Iceland for bases in Greeland and Iceland can be considered a legitimate exercise of hemispheric defense.[23] However, the factor distinguishing these agreements from prior Presidential actions in the Western Hemisphere was that in 1940–41 there was most unmistakably a great risk that the United States would become involved in a major war.

I cite these historical precedents not because I believe they are dispositive of the constitutional issues your committee is considering—

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[17] Wormuth, supra at 726; Rogers, supra at 48–49; background information 1970, supra at 39. Although the Mexican War subsequently became a declared war, act of May 13, 1846, ch. 16, 9 Stat. 9, there was some initial congressional opposition. See 15, Cong. Globe 782–88, 29th Cong., first sess. (1846). This opposition had so increased 2 years later that the House passed a rider to a resolution honoring General Taylor reading "that the war was unnecessarily and unconstitutionally begun by the President of the United States." A subsequent motion to strike the rider was defeated. See 17 Cong. Globe 95, 343–44, 30th Cong., first sess. (1848).

[18] Rogers, supra at 58–62; background information 1970, supra at 40.

[19] Rogers, supra at 73–74; background information 1970, supra at 41; S. Bemis, A Diplomatic History of the United States 513–15 (4th ed. 1955).

[20] Rogers, supra at 74–78; Wormuth, supra at 748–49; Bemis, supra at 519–38.

[21] Rogers, supra at 77–78; background information 1970, supra at 43.

[22] Note, Congress, the President and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771, at 1790 (1968).

[23] Henry Steele Commager, hearings on S. 731 before the Senate Committee for Foreign Relations, 92d Cong., 1st sess. (Mar. 8, 1971). The Statement is based on the assumption that the President's emergency powers can, under certain circumstances, encompass hemispheric defense as a necessary correlative of his power to defend the United States.

far from it—but to illustrate how the constitutional system adapts itself to historical circumstances. Whatever the reasons for Presidential initiatives during this period, they seem to have been responsive to the times and to have reflected the mood of the Nation.

You are, of course, equally familiar with the post-World War II history surrounding the exercise of war powers by the President and the Congress.

### PRESIDENT TRUMAN'S ACTIONS CONCERNING REPUBLIC OF KOREA

At the invitation of the Government of the Republic of Korea and pursuant to resolutions of the United Nations Security Council, President Truman committed over a quarter million of air, naval, and land forces to war in Korea without congressional authorization.

The Truman administration based its authority to commit these troops squarely on the President's constitutional authority. It asserted that, "the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof." [24] Citing past instances of Presidenital use of armed force in the broad interests of American foreign policy, the Administration asserted that there was a "traditional power of the President to use the Armed Forces of the United States without consulting Congress.[25]

Reliance was also placed on the fact that the action was taken under the United Nations Charter, a part of both the treaty and international law which the President is constitutionally empowered to execute.[26]

### PRESIDENT EISENHOWER'S REQUEST FOR RESOLUTION ON FORMOSA

President Eisenhower sought congressional authorization for possible engagement of American forces in the Middle East [27] and in the area around Formosa.[28] In his request for a resolution on Formosa he stated his view that:

> Authority for some of the actions which might be required would be inherent in the authority of the Commander in Chief. Until Congress can act I would not hesitate, so far as my constitutional powers extend, to take whatever emergency action might be forced upon us in order to protect the rights and security of the United States.
>
> However, a suitable congressional resolution would clearly and publicly establish the authority of the President as Commander in Chief to employ the Armed Forces of this Nation promptly and effectively for the purposes indicated if in his judgment it became necessary.[29]

### PRESIDENT EISENHOWER'S SENDING OF TROOPS TO LEBANON

When President Eisenhower sent 14,000 troops into Lebanon in 1958 he did so without seeking specific congressional approval and without specifically basing his authority on the 1957 Middle East

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[24] U.S. Department of State, authority of the President to repel the attack in Korea, 23 Dept. State Bull. 173 (1950).
[25] Id. at 174.
[26] Powers of the President To Send the Armed Forces Outside the United States, Senate Committees on Foreign Relations and Armed Services, 82d Cong., first sess. 2–3, 20–22 (Committee Print Feb. 28, 1957).
[27] Public Law No. 85–7, S. 2, 71 Stat. 5 (Mar. 9, 1957), as amended by sec. 705 of the Foreign Assistance Act of 1961, 75 Stat. 424 (1961).
[28] Public Law No. 84–4, 69 Stat. 5 (Jan. 29, 1955).
[29] 101 Congressional Record 601 (Jan. 24, 1955).

resolution. He said that the troops were sent "protect American lives—there are about 2,500 Americans in Lebanon—and by their presence there to assist the Government of Lebanon to preserve its territorial integrity and political independence." "I have," President Eisenhower said, "come to the sober and clear conclusion that the action taken was essential to the welfare of the United States. It was required to support the principles of justice and international law upon which peace and a stable international order depend." [30]

### 1962 QUARANTINE OF CUBA ORDERED BY PRESIDENT KENNEDY

In 1962 President Kennedy ordered the quarantine of Cuba, "acting under and by virtue of the authority conferred upon me by the Constitution and statutes of the United States, in accordance with the aforementioned resolutions of the U.S. Congress and the Organ of Consultation of the American Republics, and to defend the security of the United States . . ." [31] The resolution of Congress referred to by the President was passed 1 month before the Cuban missile crises and the quarantine proclamation. The Cuban resolution, unlike the other area resolutions contained no grant of authority to the President; it simply declared that the United States was determined to use any means necessary to prevent Cuba from extending its subversive activities through the hemisphere and from creating or using an externally supported military capacity which would endanger U.S. security.[32]

### PRESIDENT JOHNSON'S SENDING OF MARINES TO DOMINICAN REPUBLIC

In April 1965 President Johnson sent U.S. Marines into the Dominican Republic without congressional authorization, and stated initially that he was exercising the President's power to protect the safety of American citizens.[33] A few days later when the peacekeeping objectives of the action became predominant, he explained his action as an exercise of the President's power to preserve the security of the hemisphere in accordance with the principles enunciated in the OAS Charter.[34] At no time during the Dominican action did the President seek congressional authorization.

### PRESIDENT JOHNSON'S SENDING OF COMBAT TROOPS TO VIETNAM

When President Johnson began sending American combat troops to South Vietnam in 1965, he relied as authority for his action, on a combination of his own constitutional authority as Chief Executive and Commander in Chief, the Senate's advice and consent to the SEATO Treaty, and the authority granted by the Congress in the Tonkin Gulf Resolution.[35]

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[30] 104 Congressional Record 13, 903–904 (1958) for July 15, 1958, statement of the President.

[31] Pres. Proc. No. 3504, 27 Fed. Reg. 10,401 (Oct. 23, 1962).

[32] Public Law No. 87–733, 76 Stat. 697 (Oct. 3, 1962).

[33] See New York Times, Apr. 29, 1965, at 1, col. 8; id. Apr. 30, at 1, col. 8.

[34] See statement by the President, May 2, 1965, in New York Times, May 31, 1965, at 10, col. 1. The OAS subsequently authorized a multination peacekeeping force.

[35] U.S. Department of State, The Legality of U.S. Participation in the Defense of Vietnam, 54 Dept. State Bull. 474 (1966). The Tonkin Gulf Resolution, Public Law No. 88–408, 78 Stat. 384 (Aug. 10, 1964) repealed by Public Law No. 91–672, S. 12 (Jan. 12, 1971) provided that "the Congress approves and supports the determination of the President, as Commander in Chief, to take all measures necessary to repel any armed attack against the forces of the United States and to prevent further aggression," and that, "the United States is * * * prepared, as the President determines, to take all necessary steps, including the use of armed force."

AREA RESOLUTIONS AND CONCEPT OF NATIONAL INTEREST

Looking back then over the last 20 years, one can see that Presidents have given varying rationales for Executive action and varying interpretations of the necessity of congressional authorization. I think there are two points to be made regarding this period of our history. First, certainly the area resolutions were some evidence of congressional approval. Usually, however, they arose in an atmosphere of crisis or else in a different factual context than that in which they were eventually relied upon. The question is not whether these resolutions are useful to Presidents—of course they are—but instead whether such open-ended delegations are an effective means for Congress to exercise its constitutional authority.

Second, it serves no useful purpose to argue today whether or to what extent past Presidential decisions regarding the use of military force have served the national interest. The very concept of that which best serves the national interest in the United States has undergone significant change since the uses of force of the 1950's and 1960's. The Nixon doctrine represents a recognition that protection of our national interest does not require an automatic U.S. military response to every threat. The aim of the Nixon doctrine is to increase the participation of other nations in individual and collective defense efforts. While reaffirming our treaty commitments and offering a shield against threats from nuclear powers aimed at our allies or other nations vital to our security, we now look to the nation directly threatened to assume the primary responsibility for providing the manpower necessary for its own defense. I am sure this new approach will be of great help in achieving balanced executive-legislative participation in decisions regarding the use of military force.

RELATIVELY FEW JUDICIAL PRECEDENTS IN WAR POWERS AREA

Let me turn now briefly, Mr. Chairman, to an examination of judicial precedents in the war powers area. There are relatively few judicial decisions concerning the relationship between the Congress and the President in the exercise of their respective war powers under the Constitution. The courts have usually regarded the subject as a political question [36] and refused to take jurisdiction. For example, in *Luftig* v. *McNamara*, the District of Columbia Court of Appeals upheld the dismissal of a suit by an Army private to enjoin the Secretary of Defense from sending him to Vietnam on the ground that the war was unconstitutional. The court stated:

> It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the

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[36] *Massachusetts* v. *Laird*, motion for leave to file complaint denied, 400 U.S. 886 (1970); *Mora* v. *McNamara*, 387 F. 2d 862 (D.C. Cir.), cert. denied, 389 U.S. 934 (1967); *Luftig* v. *McNamara*, 373 F. 2d 664 (D.C. Cir.), cert. denied, 387 U.S. 945 (1967); *Mitchell* v. *United States*, 369 F. 2d 323 (2d Cir. 1966), cert. denied, 386 U.S. 972 (1967). The political question has been defined as a question which the Constitution requires to be determined by an agency of government other than the judiciary. See, generally, A. Bickel, "The Least Dangerous Branch" (1962); H. Wechsler, "Principles, Politics, and Fundamental Law," 3–48 (1961); Scharpf, "Judicial Review and the Political Question: A Fundamental Analysis," 75 Yale L.J. 517 (1966); Tigar, Judicial Power, the "Political Question Doctrine," and Foreign Relations, 17 U.C.L.A. L. Rev. 1135 (1970); Brief for Defendant at 35–41, *Massachusetts* v. *Laird*, supra.

conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive * * *.[37]

Accordingly, to the extent issues regarding the war powers are resolved, their resolution is likely to come, as has been the case in the past, through political interraction of the President, the Congress, and the electorate. And, in the final analysis, that is the most appropriate means for the settlement of fundamental constitutional questions of this character.

EXPRESSIONS OF JUDICIAL OPINION RELEVANT TO WAR POWERS ISSUE

There are, however, a few court decisions which contain expressions of judicial opinion relevant to the war powers issue. These cases suggest some rough guidelines. First, the decisions indicate that courts recognize and accept the President's authority to employ the armed forces in hostilities without express congressional authorization.

For example, in *Duran* v. *Hollins*,[38] the second circuit held in 1860 that in the absence of congressional authorization, the Executive had broad discretion in determining when to use military force abroad in order to respond quickly to threats against American citizens and their property.

In the *Prize* cases[39] during the Civil War, the Supreme Court upheld President Lincoln's Southern blockade despite the absence of a declaration of war or other specific congressional authorization. The Court held that when war is initiated by the other party, the President is not only authorized, but obligated to resist force by force and has broad discretion in deciding what measures are demanded by the crisis. The decision was also based on the Court's finding of a general congressional sanction of the war from ancillary legislation and subsequent congressional ratification.

The *Steel Seizure* case, *Youngstown Sheet & Tube Company* v. *Sawyer*,[40] in which the Supreme Court held invalid President Truman's seizure of the steel mills during the Korean war, is sometimes cited as indicating the limits of the President's independent constitutional authority. However, it is important to note that the precise issue in that case was not the President's authority to conduct hostilities. I think it is a different case, though, because it involved a domestic matter, really labor management relations, but the scope of his power over a clearly domestic matter—labor management relations. Moreover, the Court noted and several Justices based their concurring opinions[41] on the fact that Congress had enacted a number of laws concerning domestic labor disputes and in so doing explicitly withheld the power of seizure from the President.

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[37] *Luftig* v. *McNamara*, 373 F. 2d at 664, at 665–666 (D.C. Cir. 1967).

[38] 8 F. Cas. 111 (No. 4186) (CCSD NY 1860), involving a suit for damages against a Navy commander who, on orders of the President and Secretary of the Navy, bombarded and burned the city of Graytown, Nicaragua, in retaliation against a revolutionary government which refused to make reparation for damage done there to U.S. citizens and their property. Mr. Justice Nelson (on assignment to the second circuit) decided in favor of the defendant; the case never reached the Supreme Court. Cf. *Perrin* v. *United States*, 4 Ct. Cl. 543 (1868).

[39] 67 U.S. (2 Black) 635, 665 (1862), involving suits by four shipowners alleging their ships had been illegally seized as prizes under President Lincoln's blockade against the Confederacy. The Court held the blockade legal. Mr. Justice Nelson and three others dissented, arguing that the President had no authority to impose a blockade and seize the property of U.S. citizens without a congressional declaration of war.

[40] 343 U.S. 579 (1952).

[41] Concurring opinions of Mr. Justice Frankfurter, id. at 604–609; Mr. Justice Burton, id. at 655–660; Mr. Justice Clark, id. at 662–665.

This aspect of the *Steel Seizure* case leads to this second observation: that throughout our history a head-on collision between legislation and Presidential action has rarely, if ever, occurred in the field of foreign policy,[42] and I think sober consideration of that observation leads to the conclusion that it is a testament to the strength and flexibility of our system and to the statesmanship of the Nation's leaders throughout our history.

### JUDICIAL PRONOUNCEMENTS CONCERNING COLLISION IN WAR POWERS AREA

There are a few judicial pronouncements on what would happen in the event of a clear collision in the area of the war powers. In *Ex Parte Milligan*,[43] the concurring opinion of four Justices indicated there were limits to what Congress might do by legislation:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interfere with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.[44]

But perhaps Justice Jackson stated the wisest rule when he said that in the event of a clear collision between legislation and Presidential action ". . . any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." [45]

### PRESIDENT'S POWER WHEN CONGRESS HAS AUTHORIZED PRESIDENTIAL ACTION

A third guideline that emerges is that when acts of Congress authorize presidental action, the President's power is at its zenith; it encompasses both the authority delegated to him by Congress and whatever independent constitutional authority he may have with respect to the subject matter. It is in this third situation that we find the much-quoted case of *United States* v. *Curtiss-Wright Export Co.*[46] in which

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[42] See E. Corwin, The President: Office and Powers 1787–1957, at 259 (1957): "Actually Congress has never adopted any legislation that would seriously cramp the style of a President who was attempting to break the resistance of an enemy or seeking to assure the safety of the national forces."

[43] 71 U.S. (4 Wall) 2 (1866). The case arose as a *habeas corpus* proceeding contesting the legality of a conviction by a military tribunal of a Northern civilian in Indiana during the Civil War. The court invalidated the conviction, holding that the military tribunal had no jurisdiction, since neither the Congress nor the President could constitutionally authorize the trial of a civilian before a military tribunal in a State which had been loyal to the Union during the Civil War. Id. at 118–22.

[44] Id. at 139.

[45] *Youngstown Sheet & Tube Co.* v. *Sawyer*, supra at 637. In an early case involving seizure of vessels on the high seas it was held that the President could not act inconsistently with a specific legislative prohibition. *Little* v. *Barreme* (The Flying Fish), 6 U.S. (2 Cranch) 170 (1804) involved the seizure of a ship sailing from a French port which was made in accordance with presidential orders interpreting the Act of 1799 (which only provided for seizure of ships bound to French ports). Chief Justice Marshall, for a unanimous court, held the seizure unlawful, but noted in passing that the Presidential order might well have been lawful in the absence of congressional authorization were it not for the express negation of authority contained in the act. See also the concurring opinion of Mr. Justice Clark in *Youngstown Sheet & Tube Co.* v. *Sawyer*, supra at 660–61.

The Flying Fish involved an issue squarely within the specific grant of authority to Congress "to make Rules concerning Captures on Land and Water" (U.S. Cont. Art. I, sec. 8) and for this reason should not be considered authority for congressional predominance in an area of shared powers, such as the war powers. Moreover, The Flying Fish was decided before the doctrine of "political questions" was formulated by Chief Justice Marshall in *Foster* v. *Nielson*, 27 U.S. (2 Pet.) 253 (1829) and, therefore, although it has never been overruled, a similar case would probably never reach decision on the merits today.

[46] 299 U.S. 304 (1936). See also, *Martin* v. *Mott*, supra, involving an act of Congress of 1795 which delegated authority to the President to call forth the militia in the event of an invasion or the imminent threat thereof.

the Supreme Court held that the normal legal restrictions upon congressional delegations of power to the President in domestic affairs do not apply with respect to delegations in external affairs because of the Executive's extensive independent authority in that realm and the desirability of allowing him maximum flexibility in exercising that authority.[47]

There are numerous other examples of wide definition of presidential powers when acting under and in accordance with an act of Congress.[48]

CHANGES IN FACTUAL SETTING FOR EXERCISE OF WAR POWERS

As we turn from an examination of history to an analysis of the modern context in which the President and Congress operate, I think we have to be impressed by the fundamental changes in the factual setting in which the war powers must be exercised. And indeed, it is this very change in setting which has raised difficult constitutional issues that cannot be answered by reference to history alone.

The primary factors underlying this transformation are rather evident and need only be summarized. They include, first, the emergence of the United States as a world power. Since World War II we have found it necessary to maintain a large, standing military capacity which is sufficiently well equipped and mobile to enable the United States to play a major peacekeeping role almost anywhere in the world and often with little delay. This development, and we must not lose sight of this, has generated a reliance upon the United States by other nations to help protect them—which has been translated into a series of defense treaties—and a sense of responsibility on the part of this country to fulfill our commitments in good faith.

Let me say again, because I think it is important to the issue before us, that this Administration has begun to reverse the trend of expanding U.S. military involvement abroad. The Nixon Doctrine means that while the United States must continue to honor its commitments and to play a large and active role in world affairs, we should not seek in all cases to have the preponderant role. We seek a new partnership with nations of the world in which they become increasingly self-reliant and assume greater responsibilities for their own welfare and security and that of the international community.[49]

The second factor which characterizes the modern context is the development of technology, especially in the field of nuclear weaponry. The fear of nuclear war and the importance of deterrence have

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[47] Id. at 319–22. The Curtiss-Wright case is more often cited for the Court's dicta than its holding. The Court saw the foreign affairs powers as inherent attributes of national sovereignty and, consequently, vested exclusively in the Federal Government, to be exercised by the President as "the sole organ of the Nation in its external relations." The Court suggested that this "very delicate, plenary, and exclusive power of the President" with respect to foreign relations did not depend upon congressional authorization, although like every other governmental power it had to be exercised in subordination to the applicable provisions of the Constitution, Id. at 320. The case holding has been interpreted as withdrawing "virtually all constitutional limitation upon the scope of congressional delegation of power to the President to act in the area of international relations." Jones, The President, Congress and Foreign Relations, 29 Calif. L. Rev. 565, at 575 (1941). But see recent Supreme Court decisions which contain warnings that the Curtiss-Wright holding may not be followed should a similar set of facts arise in the future. *Afroyim* v. *Rusk*, 387 U.S. 253 (1967); *Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Reid* v. *Covert*, 354 U.S. 1 (1957).

[48] See *Youngstown Sheet & Tube Co.* v. *Sawyer*, supra at 635 n. 2.

[49] See, e.g., Richard M. Nixon, President of the United States, U.S. Foreign Policy for the 1970's—Building for Peace, Report to Congress, Feb. 25, 1971, at 10–21; United States Foreign Policy, 1969–70, Report of the Secretary of State, March 26, 1971, at II, 36–39.

engendered a sense of need to be able to take prompt, decisive Executive action. On the other hand, the fact that even a minor skirmish could lead to a confrontation of the major powers and raise the specter of nuclear war, serves to emphasize the desirability of appropriate congressional participation in decisions which risk involving the United States in hostilities.

Third, the institutional capacities of the Presidency have facilitated the broad use of Presidential powers. The heightened pace, complexity and hazards of contemporary events often require rapid and clear decisions. The Nation must be able to act flexibly and, in certain cases, without prior publicity. The institutional advantages of the Presidency, which are especially important in the area of foreign affairs, were pointed out in "The Federalist:" the unity of office, its capacity for secrecy and dispatch, and its superior sources of information.[50]

### LIMITATIONS OF CONGRESS AND PRESIDENCY

Unlike the Presidency, the institutional characteristics of Congress have not lent themselves as well to the requirements of speed and secrecy in times of recurrent crises and rapid change. The composition of Congress with its numerous Members and their diverse constituencies, the resultant complexity of the decisionmaking process, and Congress' constitutional tasks of debate, discussion and authorization inevitably make it a more deliberative, public and diffuse body.[51]

Yet, in order to balance this picture, we must also note the inherent limitations of the Presidency. There are few significant matters which can be accomplished by Presidential order alone. The essence of Presidential power is the ability to enlist support for national policy,[52] and in this the President needs the cooperation of Congress. Virtually every Presidential program requires implementing legislation and funding. Through their powers of investigation, and supervision, congressional committees have amply demonstrated their ability to inspire national debate, focus public opinion and thereby influence Presidential policy. The Senate's power to advise and consent to treaties and appointments serves as a constant reminder of the Senate's indispensable role in foreign policy.

### ELECTORATE IS ULTIMATE RESTRAINT

Of course, the electorate is the ultimate restraint upon the President and Congress in the exercise of the war powers. As President Nixon said in his "State of the World" message: "Our experience in the 1960's has underlined the fact that we should not do more abroad than domestic opinion can sustain." [53]

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[50] See "The Federalist" No. 64, at 485–486 (J. Hamilton ed. 1864) (J. Jay); id. No. 74, at 552 (A. Hamilton); id. No. 75, at 559 (A. Hamilton).

[51] Reveley, "Presidential War Making: Constitutional Prerogative or Usurpation?" 55 Va.L. Rev. 1234, at 1271 (1969).

[52] See R. Neustadt, "Presidential Power: The Politics of Leadership (1960)": "The President of the United States has an extraordinary range of formal powers, of authority in statute law and in the Constitution. Here is testimony that despite his "powers" he does not obtain results by giving orders—or not, at any rate, merely by giving orders. He also has extraordinary status, ex officio, according to the customs of our Government and politics. Here is testimony that despite his status he does not get action without argument. Presidential power is the power to persuade." Id. at 23.

[53] Richard M. Nixon, Representative to Congress, Feb. 25, 1971, supra at 16.

The President and Congress must be sensitive to the people's willingness to suffer the potential physical, economic and political costs of military actions. The Nation's ability to sustain long-term military action depends on the ability of the President and Congress to convince the people of the wisdom of their policies.

### WHAT IS PROPER BALANCE BETWEEN CONGRESS AND PRESIDENT?

Thus far I have discussed what has happened to the war powers over the course of our history and described the modern context in which those powers must be exercised. The most difficult question is still before us. What should we seek for the future—what is the proper balance between the Congress and the President?

It seems to me that we must start from the recognition that the exercise of the war powers under the Constitution is essentially a political process. As the chairman says, it requires cooperation and mutual trust between the President and Congress and wise judgment on the part of both if the Nation's interests are to be well served.

### OPPOSITION TO PENDING WAR POWERS BILLS

Your committee now has before it several bills [54] which attempt to define and codify the war powers of the President and Congress in a way that I believe would not serve the Nation's long-term interests. I believe that the objectives of the sponsors of these bills, including Senator Javits, Senator Taft, and Senator Eagleton, and most recently Senator Stennis, are the same as the objectives of this Administration. We both want to avoid involving the Nation in wars, but if hostilities are forced upon us, we want to make certain that U.S. involvement is quickly and effectively undertaken and is fully in accordance with our constitutional processes. So the difference is not in our objectives but in how to achieve those objectives.

I am opposed to the legislation before you as a way to achieve these objectives because (1) it attempts to fix in detail, and to freeze, the allocation of the war power between the President and Congress—a step which the framers of the Constitution, in their wisdom quite deliberately decided against and (2) it attempts in a number of respects to narrow the power given the President by the Constitution.

Regarding the first point, these bills reflect an approach which is not consistent with our constitutional tradition. The framers of the Constitution invested the executive and legislative branches with war powers appropriate to their respective roles and capabilities, without attempting to specify precisely who would do what in what circumstances and in what time period, or how far one branch could go without the other. This was left to the political process, which is characteristic of the constitutional system of separation of powers, and I think it is the basic wisdom of our system and reflects the wisdom of those who drafted the Constitution. Our constitutional system is founded on an assumption of cooperation rather than conflict, and this

[54] See, e.g., Senate Joint Resolution 18, 92d Congress, first session (introduced by Senator Taft Jan. 27, 1971); S. 731, 92d Congress, first session (introduced by Senator Javits Feb. 10, 1971); Senate Joint Resolution 59, 92d Congress, first session (introduced by Senator Eagleton Mar. 1, 1971); Senate Joint Resolution 95, 92d Congress, first session (introduced by Senator Stennis May 11, 1971).

is vitally necessary in matters of war and peace. The effective operation of that system requires that both branches work together from a common perspective rather than seeking to forge shackles based on the assumption of divergent perspectives.

As for the second aspect, although the bills recognize to a significant extent the President's full range of constitutional authority, and I know that all of the authors of these bills attempted to do that, they do tend to limit the President in some questionable ways. It appears, for example, that two of the bills [55] do not cover situations like that of the Cuban missile crisis. In failing to recognize the need for immediate action and the propriety of a Presidential response to such situations, the bills, are unduly restrictive. It is inconceivable, for example, that the President could have carried out the delicate diplomatic negotiations with the Soviets which led to the removal of the missiles from Cuba if there had been a full-scale congressional debate prior to his deciding on a course of military and diplomatic action.

### IMPINGEMENTS UPON AUTHORITY OF COMMANDER IN CHIEF AND CHIEF EXECUTIVE

Some of the bills would also seek to restrict the President's authority to deploy forces abroad short of hostilities. This raises a serious constitutional issue of interference with the President's authority under the Constitution as Commander in Chief. Moreover, requiring prior congressional authorization for deployment of forces can deprive the President of a valuable instrument of diplomacy which is used most often to calm a crisis rather than inflame it. For example, such a restriction could seriously limit the ability of the President to make a demonstration of force to back up the exercise of our rights and responsibilities in Berlin or to deploy elements of the 6th Fleet in the Mediterranean in connection with the Middle East situation.

At least two of the bills would require that action initiated by the President within his specified authority be terminated after 30 days unless Congress enacts sustaining legislation; [56] and three of the bills would permit Congress to terminate Presidential action in less than 30 days.[57]

The bills would provide for expedited action on such legislation, but would not and could not insure definitive congressional action within the 30-day period. This raises another constitutional issue, that is, whether the President's authority under the Constitution—for example, to protect the Nation against sudden attack—could be limited or terminated by congressional action or inaction. The 30-day limitation also raises practical problems regarding the conduct of our forces. Once our forces are committed to hostilities, it might prove impossible to terminate those hostilities and provide for the safety of our forces

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[55] S. 731, supra, would only authorize the President to use the Armed Forces, in the absence of a declaration of war, in four specific situations: (1) to repel a sudden attack against the United States, its territories, and possessions; (2) to repel an attack against U.S. Armed Forces on the high seas or lawfully stationed abroad; (3) to protect the lives and property of U.S. nationals abroad; and (4) to comply with a "national commitment" as defined in S. Res. 85, 91st Congress, first sess. (1969). S.J. Res. 59, supra, would limit unauthorized presidential military action to (1) repelling an attack on the United States; (2) repelling an attack on U.S. Armed Forces; and (3) withdrawing U.S. citizens from countries where their lives are subjected to an imminent threat.

[56] S. 731 and S.J. Res. 95, supra.

[57] S. 731, S.J. Res. 59 and S.J. Res. 95, supra.

within an arbitrary time period. To the extent the legislation would impinge in these ways upon the President's authority as Commander in Chief and Chief Executive, I think it is clearly of doubtful constitutionality.

EFFECT ON ENEMY'S REGARD FOR U.S. ABILITY TO ACT IN CRISIS

There is another consideration. To circumscribe presidential ability to act in emergency situations—or even to appear to weaken it—would run the grave risk of miscalculation by a potential enemy regarding the ability of the United States to act in a crisis. This might embolden such a nation to provoke crises or take other actions which undermine international peace and security.

CONGRESSIONAL RESTRICTION OF PRESIDENTIAL FLEXIBILITY UNNECESSARY

Mr. Chairman, I do not believe we have sufficient foresight to provide wisely for all contingencies that may arise in the future. I am sure the Founding Fathers acted on that premise; and we should be most reluctant to reverse that judgment that has worked so well for the most part, for 200 years. Moreover, I firmly believe that Congress' ability to exercise its constitutional powers does not depend on restricting in advance by legislation the necessary flexibility which the Constitution has given the President.

At the same time, I want to make clear that I do not interpret "flexibility" as a euphemism for unchecked Executive power. Some have argued that Congress power to declare war should be interpreted as a purely symbolic act with little real substance in a world in which declared wars have become infrequent despite the existence of real hostilities.[58]

In my judgment, it would be improper to do so. Congress' power to declare war retains real meaning in the modern context. While the form in which the power is exercised may change, nevertheless, the constitutional imperative remains: If the Nation is to be taken into war or to embark on actions which run serious risk of war, the critical decisions must be made only after the most searching examination and on the basis of a national consensus and they must be truly representative of the will of the people. For this reason, we must insure that such decisions reflect the effective exercise by the Congress and the President of their respective constitutional responsibilities.

INSURING SHARED RESPONSIBILITY WORKS IN NATION'S BEST INTERESTS

What needs to be done to insure the constitutional framework of shared responsibility for the exercise of the war powers works in the Nation's best interests?

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[58] Formal declarations of war are often deliberately avoided because they tend to indicate both at home and abroad a commitment to total victory and may impede settlement possibilities. The issuance of a formal declaration also certain legal results: Certain treaties are suspended, trading, contracts and debts with the enemy are suspended; vast emergency powers become operative domestically; and the legal relations between neutral states and belligerents can be altered. See Eagleton, "The Form and Function of the Declaration of War" 33 Am. J. Int'l. L. 19–20, 32–35. On the other hand, Professor Moore argues that: "probably the most compelling reason for not using a formal declaration . . . is that there is no reason to do so. As former Secretary of Defense McNamara has pointed out '[T]here has not been a formal declaration of war—anywhere in the world—since World War II.'" Moore, The National Executive and the Use of the Armed Forces Abroad (21 Nav. War. Col. Rev. 28, at 33 (1969)). See generally, J. Maurice, "Hostilities Without Declaration of War" (1883).

First, we are prepared to explore with you ways of helping Congress reinforce its own information capability on issues involving war and peace. For example, I would be prepared to instruct each of our geographic assistant secretaries to provide your committee on a regular basis with a full briefing on developments in his respective area, if you believe this would be helpful. Regular and continuing briefings would enable the committee to keep abreast of developing crisis situations. This would be in addition to the numerous official and informal contacts which regularly take place between members of the two branches.

Second, there needs to be effective consultation between Congress and the President, and we have tried to follow this policy. It is not only Congress that is weakened by a lack of consultation. Our Nation's foreign policy is itself weakened when it does not reflect continuing interaction and consultation between the two branches.

Third, the Congress must effectively exercise the powers which it has under the Constitution in the war powers area. In its 1969 Report on the National Commitments Resolution, your committee recognized that "no constitutional amendment or legislative enactment is required" for Congress to assert its constitutional authority. "If Congress makes clear that it intends to exercise these powers," the report states, in referring to Congress' war powers, "it is most unlikely that the Executive will fail to respect that intention." [59] I agree with that conclusion.

Fourth, there is the need to act speedily, and sometimes without prior publicity, in crisis situations. We should try, Mr. Chairman, and members of the committee, to find better institutional methods to keep these requirements from becoming an obstacle to Congress exercising its full and proper role. Suggestions have come from a number of quarters for the establishment of a joint congressional committee which could act as a consultative body with the President in times of emergencies. If, after study, you believe this idea has merit, we would be prepared to discuss it with the committee and determine how best we could cooperate.

Fifth, there is, in my view, the clear need to preserve the President's ability to act in emergencies in accordance with his constitutional responsibilities. This ability to act in emergencies, by its very nature, cannot be defined precisely in advance. Let me emphasize that I am not suggesting a presidential carte blanche. As I indicated at the beginning of my statement, I believe the framers of the Constitution intended decisions regarding the initiation of hostilities to be made jointly by the Congress and the President, except in emergency situations. I believe that constitutional design remains valid today.

### CONSIDERATION AND STUDY OF WAR POWERS QUESTION REQUIRED

In conclusion, I would like to refer to the suggestion which the distinguished Senator from Mississippi, Senator Stennis, made last Tuesday that the war powers question requires thorough consideration and full study. He said, "I think this matter should be pending for a year or more. It must be understood in every facet and the people must understand fully the question that is involved." [60]

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[59] Docs. on the War Power 1970, supra at 32.
[60] 117 Cong. Rec. at S6616 (daily ed. S. Jour. May 11, 1971).

I believe that is wise advice. This is a basic question affecting our constitutional structure and the security of our Nation. It is most important that such a matter be considered deliberately and calmly, in an atmosphere free from the emotion and the passions that have been generated by the Vietnam conflict.

We in the executive branch are prepared to continue the discussion of the war powers question with you. Our sole objective is to insure that the Nation's interests are best served in this vital area.

My own view is that the constitutional framework of shared war powers is wise and serves the interests of the Nation well in the modern world. The recognition of the necessity for cooperation between the President and Congress in this area and for the participation of both in decisionmaking could not be clearer than it is today, and certainly the events since 1965 have made it dramatically clear. What is required, we believe, is the judicious and constructive exercise by each branch of its constitutional powers rather than to seek to draw arbitrary lines between them.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Mr. Secretary.

In view of the very large attendance, I think it would be proper for us to follow the 10-minute rule so that everyone would have an opportunity to have some questions the first time around. Mr. Clerk, will you keep us within that time.

ADMINISTRATION'S RESPONSE TO RECONCILIATION EFFORT

Mr. Secretary, I cannot remember when I have been more disappointed at the negative response to what I thought and believed to be a good faith offer by members of this committee, and also the distinguished Senator from Mississippi, to try to make progress in a reconciliation, if I may say that, between the Congress and the Executive in this area.

You know the more I observe this Administration the more closely I find it follows its predecessor's policies in nearly all respects with regard to foreign policy. You have gone just about as far as Mr. Nicholas Katzenbach did when he came before the committee.

Secretary ROGERS. Mr. Chairman, I do not think that is accurate at all.

The CHAIRMAN. I noticed yesterday you had Mr. Katzenbach, Mr. Acheson, Mr. Ball, and Mr. McCloy, all down to consult with you about our policies. This is really a great disappointment.

I do agree with you about——

Secretary ROGERS. Mr. Chairman, could I say that on Mr. Katzenbach's statement, I clearly disagreed with him and I said so in my statement.

CONGRESSIONAL BRIEFINGS EMPTY

The CHAIRMAN. I cannot see any difference in the ultimate result which is practically to say the Congress has no role to play in foreign policy, in the formulation of the war powers—that we should be good boys and receive your briefings.

One thing you said that particularly arouses me a bit concerns briefings. Just last week I had a briefing from one of your deputies on

Pakistan and he refused to give this committee in executive session a report from our own consul. This is a most recent example of how empty these briefings are.

DETERIORATION OF U.S. AFFAIRS

But to come more specifically to this, you say on the one hand this usurpation of the war powers by the Executive has worked so well. The real reason why this has precipitated what Senators like the Senator from New York and the Senator from Mississippi and others are concerned about is because obviously it is not working well. We find ourselves in the most deplorable condition internationally that we have ever been in, I believe, since the beginning of the country. Not only are we distracted at home, but now we find the dollar abroad is a rejected currency as far as being acceptable at parity. It has already been discounted roughly 5 percent. All of this is indicative of the deterioration of our affairs. This is why the Congress, after neglecting it, must begin to reassert a proper constitutional balance. I admit we have not in many cases been as sensitive to Executive usurpation as we should have been, but that is no reason whatever why we should not begin now, belatedly though it may be. I can see from your statement we are not going to get any assistance from the Administration.

DOES WITNESS REJECT WAR POWERS LEGISLATION?

I do think you could have been a little more forthcoming in seeking to give some suggestions about an amendment to the Javits bill or the Stennis bill, but, as I take it, you reject them out of hand.

Secretary ROGERS. No; Mr. Chairman, I do not. I say I think it is the kind of thing we should carefully consider and, as Senator Stennis says, I think it should be done after the passions of Vietnam have faded into the past, and we should decide whether we want to attempt to restrict the constitutional authority of the President by legislation and, if so, how to do it. We are prepared to discuss it with you, and I have not in any way rejected the whole concept. I attempted to point out carefully, I thought, and thoughtfully, what has happened throughout our history to say it has worked well and to point out how modern life has created new problems. I am not adamant in any sense of the word.

POSITIONS OF WITNESS AND OF FORMER UNDER SECRETARY KATZENBACH

The CHAIRMAN. Well, you surely do not think it is working well today; do you?

Secretary ROGERS. I did not agree with Secretary Katzenbach, I disagreed with him. I think that was wrong.

The CHAIRMAN. I think you only said it in a little different language. The end result seems to me to come out the same place.

Secretary ROGERS. Well, I will say it directly. I disagree with what Under Secretary of State Katzenbach said when he testified about the power of Congress under the Constitution. Now, can I say it any more clearly than that? I disagree with him.

The CHAIRMAN. I cannot see where the net result, the thrust of your remarks, comes out at a different place. It is that the administration wishes to do nothing about this legislatively, and we should accept the power of the President to do as he pleases. You do not suggest any restrictions.

ANALOGY OF SHIP TAKING TRIP

There is one classic example illustrative of this, although perhaps simplistic. The analogy has been used of whether or not a ship is to take a trip. It is the Congress has that authority to decide and not the President, but the Congress is not captain of the ship. Once we decide to go into a war then nobody questions the right of the President to direct it. He is to guide the ship, as we say. It is a very simple analogy, but it is not a bad one. We have departed from it time and again, only recently, of course, in the recent invasion of Laos and Cambodia. There are such cases as this question about the troops in Europe.

CONSTITUTIONALITY OF CONGRESS' RIGHT TO WITHDRAW TROOPS FROM EUROPE

Do you question the constitutionality of the right of Congress to bring back the troops from Europe? Do you think that is going beyond our constitutional power?

Secretary ROGERS. Well, no. As I understand Senator Mansfield's resolution, it refers to appropriation of funds, and that is, of course, within the constitutional power of the Congress.

The CHAIRMAN. It is clearly within our power.

CONSTITUTIONAL AUTHORITY FOR CONTINUING VIETNAM WAR

In regard to the continuation of the war in Vietnam, what is now the constitutional authority for continuing the war?

Secretary ROGERS. The constitutional authority is two-fold. First, as Commander in Chief the President has the power to withdraw our forces in an orderly way from Vietnam, in a way that is consistent with the policy of our initial involvement, and second, as Chief Executive of this Nation. Now, if we were embarking on new military activity in Vietnam, it would be different. But as I have explained to the committee several times our policy is to withdraw from Vietnam and we are doing it, and everything I have represented to the committee we have accomplished. We are going to continue to accomplish it and I do not think the President has any lack of constitutional authority to withdraw from a war.

U.S. OBJECTIVE IN VIETNAM WAR

The CHAIRMAN. Mr. Secretary, only about 10 days ago your deputy, the Under Secretary of State, came before the committee and he very pointedly stated that the objective of this war is not to withdraw the troops, but to give the South Vietnamese people a chance to create a free society. This is quite different from a withdrawal of troops. He

stated that in his prepared statement. I asked him specifically, "Are you speaking for the Administration?" And he said, "Yes." This is absolutely contrary to saying withdrawal of troops. Every common-sense tells us that the expansion of the war into Laos and Cambodia is not the withdrawal of troops.

There comes a point when this double talk does not appeal to us. It is no longer withdrawal of troops.

Secretary ROGERS. Mr. Chairman, could I make a comment on that?

The CHAIRMAN. How do you reconcile the withdrawal of troops with the affirmative positive statement that we are there to give the people of South Vietnam a right to a free society?

Secretary ROGERS. We are following a program of withdrawing American forces from Indochina. We told the committee several months ago that we were going to, and we are continuing to do it. Now the President has said that he is going to withdraw those troops in an orderly fashion consistent with the schedule which he has announced in a way to provide a reasonable opportunity for the people in South Vietnam to determine their own future and in a way to safeguard, if possible, the lives of prisoners of war. I do not believe there is any lack of constitutional authority for those actions. I am sure that many disagree with the way the President is doing it, and that is the way our system works. But I do not believe there is any lack of constitutional power.

We found ourselves in the war when this Administration took office. We are getting out of the war and we are doing it in an orderly way, and the things the President has represented have come true. The hostilities have been considerably reduced. The hostilities this week are at a very low ebb, very low mark, and I think that you will find that the policies of Vietnamization of the President are working.

### FOREIGN REACTION TO PRESIDENT'S POLICY

I just came back from a trip and it was interesting to me to talk to people in other nations and they are very complimentary, almost unanimously, about the policy of this Administration and this country, and I hear very little or no criticism in other parts of the world. They say the President is embarking on a very difficult, delicate task and he has done it well and it is working. I do not believe there is any lack of constitutional authority at all.

### SOLUTION WILL BE IN POLITICAL ARENA

The CHAIRMAN. My time is up. I would comment that I do agree with your thought that the sanction for the Constitution to come into effect is political and that is what it is all about. It will be solved in the political arena. I do not expect the Supreme Court to solve it for us.

Secretary ROGERS. I understand, Mr. Chairman.

The CHAIRMAN. The Senator from Idaho.

Senator CHURCH. Thank you, Mr. Chairman.

### ADMINISTRATION OF NICARAGUA BY U.S. MARINES

Mr. Secretary, I was intrigued with the historical review of the use of presidential power, particularly as it related to some of the

examples you mentioned in connection with American troops being dispatched in the Caribbean in earlier years. In your testimony, you cite Nicaragua. You say that "Nicaragua, for example, was occupied and in effect administered by U.S. Marines for nearly 7 years from 1926 to 1933," without any constitutional authority. Do you believe that that was a proper exercise of the President's constitutional powers?

Secretary ROGERS. Senator, I did not include that to indicate any approval of it, and I do not think it would be wise for me to pass judgment on it now. That is something for historians. I think it is just a fact, that is all. I think you would have to go back and make a careful study of the situation that existed at the time before you could come to any such conclusion and I am just not prepared to do that. I think the interesting part of it was that it caused so little complaint, apparently.

Senator CHURCH. That's the interesting part of your argument; that is, it caused little complaint. You mean, don't you, if we are involved with a little country, no congressional consent is necessary, but if it is a big country, you have to get it?

Secretary ROGERS. Senator, I did not say this was constitutional. I said just the opposite. I said before I started I wanted to make it clear I was not suggesting those actions were necessarily constitutional. These were historical precedents that we had to look at, but I just said the opposite from what you just stated.

### LIMITS ON PRESIDENTIAL AUTHORITY TO DISPATCH TROOPS

Senator CHURCH. Your position is not to say that the action of the President, in the case of Nicaragua, was constitutional. What limits do you see on the President's authority to dispatch troops to foreign lands for purposes of conducting hostilities? There is nothing in your statement that indicates what those limits might be. What are the limits?

Secretary ROGERS. Well, let me say, first, that when we talk about whether an action in this area is constitutional or not we have to keep in mind that it is a different situation that exists in other areas when constitutional questions arise, because in most cases you can refer the matter to a court, and the court will decide if this was constitutional or if it was not constitutional. The fact is, as I have attempted to state in my prepared statement here, the courts have shied away from that, and they have said the question is really one of political process, and I am sure there are limits. There may be cases where, and I have cited a couple, where the courts would determine that, but I think that, as I have tried to explain, the genius of the system is that it has worked so well on a cooperative basis. People would argue back and forth whether it is constitutional or not, and because there is no clear way of determining, as there is in other instances, then an adjustment is made.

Senator CHURCH. Mr. Secretary, if it had all worked so well, we would not be involved in this argument today. My question was not what limits the courts might be willing to impose on Presidential authority. My question was what limits do you see on the President's unilateral authority as Commander in Chief to make war in foreign lands without congressional consent?

Secretary ROGERS. Well, I am not really prepared to discuss hypothetically constitutional questions because it is too risky and unwise. In order to pass judgment on those matters you have to know all the facts, and I think any answer based on a hypothetical question which does not present all the facts would be very inappropriate.

Senator CHURCH. Your statement does not indicate any limits on Presidential power. It is simply a review of how the power of the President has expanded over the years to conduct war; so let me suggest a couple of questions that might bring this into closer focus.

AUTHORITY FOR U.S. ACTION IN LAOS, CAMBODIA AND CHINA

The American participation in the invasion of Cambodia and the invasion of Laos were done on the theory that the President had the right to send our troops into those countries to make war in order to protect our troops that were still remaining in South Vietnam. The rationale for the action was that it was necessary to interdict the supply routes that constituted a threat to our troops in South Vietnam.

When it comes to the setting of limits, the same argument could be made of an American aerial bombardment of the supply lines that China uses to send war material into North Vietnam. Do you believe the President has constitutional authority to commence the bombing of those routes in China without first securing the consent of Congress? Would you think that would lie within the authority of the President quite apart from the wisdom of doing it?

Secretary ROGERS. Well, there again, I would want to know a lot more about the situation before I answered it hypothetically. I think under those conditions which you have outlined, clearly we would come to Congress and present the facts. Now——

Senator CHURCH. But you did not come to Congress in the case of Laos and Cambodia.

Secretary ROGERS. No, and we went all over this.

Senator CHURCH. Is that because China is a big country, and Cambodia and Laos were small countries?

Secretary ROGERS. No; it is quite different. There are a lot of factual differences. I can take the time if you want me to, but I think the differences are quite obvious, in fact. In the first place, there are no North Vietnamese troops in China making attacks on U.S. troops as there were in Cambodia and Laos. China is not used as a sanctuary area the way Cambodia and Laos have been. In Laos the combat had been going on in that area since 1965. There has been no combat going on in China. China has avoided participation.

Senator CHURCH. All of this has to do with the necessity, or the wisdom, of launching an aerial attack on China under the present circumstances. But I am trying to get to the basic question of the authority.

Secretary ROGERS. Well, suppose——

Senator CHURCH. The rationale that was used to justify the Presidential action in Laos and Cambodia could be used to justify similar action against most any country, and the effect of this is to make the President's power to make war total.

Secretary ROGERS. I do not think so.

LIMITS OF PRESIDENTIAL AUTHORITY

Senator CHURCH. What are the limits? There are no limits in this 40-page statement, Mr. Secretary, and you say you are not prepared to suggest any limits.

Secretary ROGERS. The limits, it seems to me, are that in any situation that is not an emergency situation, or one such as Cambodia and Laos involving a war that had been going on for a long time, the President should come to Congress, consult with Congress, and get its authorization for the initiation of war. But I do not think it helps in considering these constitutional issues to try to decide hypothetical situations unless you carefully go into them.

For example, suppose that, talking about China for a moment, suppose a situation existed where the Chinese had used a nuclear bomb on our troops and were about to use another nuclear bomb, I suppose that the situation would be quite different. I think under those conditions the President would probably have a duty to act quickly.

In the situation in Cambodia and Laos, as I testified before, when I appeared before this committee, it was part of the war then going on, and it was an attempt to save American lives. It did result, I believe, in saving American lives.

If you are talking about another nation, not just because it is large, but another nation that we might attack, I think that would be quite a different situation. There, I would expect that we would come to Congress and get Congress' approval.

CONGRESSIONAL LIMITATION OF FUNDS TO EFFECT WITHDRAWAL

Senator CHURCH. If the Congresss were to decide to limit the funds for the purpose of effecting a withdrawal of our forces from Indochina and such defensive action as may be needed to protect them against imminent danger in the event that became necessary, as they withdrew, do you think that that falls within the constitutional power of the Congress to determine how public money is spent, or do you think that that would be an interference with the President's inherent powers as Commander in Chief?

Secretary ROGERS. Here again, I would want to see the language, of course, but I fully recognize the power of the Congress to appropriate funds, and we do respect the wishes of Congress. For example, Congress included some restrictions on the use of ground troops in that area, and we have observed those restrictions. So we are not at odds with the Congress. We are trying to carry out our constitutional duties in a very difficult war, and you are trying to do the same thing, and I think it is working surprisingly well.

Senator CHURCH. Thank you, Mr. Secretary.

The CHAIRMAN. Senator Aiken.

APPROVAL OF SECRETARY'S EFFORTS AND U.S. MIDDLE EAST POLICY

Senator AIKEN. Mr. Secretary, first, let me say that I do not believe that a comparison of our policies in the Middle East with our policies in Southeast Asia is a very good comparison. In the case of the Middle East where you have so conscientiously carried out the policy, this has received almost universal approval here in the United States; whereas

the policy in Southeast Asia has come to be regarded almost equally universally as a mistake that we have to recover from the best we can.

I do want to commend you again, as I have before, for your efforts in the Middle East which we hope are going to prove very successful.

Secretary ROGERS. Thank you.

### VALIDITY OF HISTORICAL REFERENCES QUESTIONED

Senator AIKEN. I am not sold on all of your historical references, however. You referred to President Roosevelt and his executive agreements made in 1940 and 1941, which might be considered as good precedents. However, the fact is, is it not, that President Roosevelt did ask Congress to legalize these agreements which he made, even those which had been made retroactively and that culminated in the Lend-Lease bill which was passed in March 1941? This bill, which was generally regarded or promoted as an aid-to-England bill, was in fact legislation giving the President authority to make most any deal he wanted to with any other country if he felt it was something which added to the security of the United States. But did not that bill giving the President almost unlimited authority expire in 1946?

Secretary ROGERS. I frankly do not know the answer to that. We are not sure whether it was 1946 or not.

Senator AIKEN. I think it was. He did make one major agreement with it, but, of course, that was really forced on us by Japan. But the law did expire in 1946; so I do not think that would be a very good precedent at all.

I would not compare the sending of troops to Lebanon or to the Dominican Republic or some of the other instances you cited where it was very clearly done to protect American lives, and setting a definite time as soon as possible for withdrawal of the troops.

Troops were sent into Lebanon to protect American lives; troops were sent into the Dominican Republic for fear that American lives, and also French lives, would be jeopardized at that time. But were troops sent into South Vietnam in 1961 to protect American lives?

Secretary ROGERS. Senator, I really am not here to defend all the things that have happened in the past. I really am here to talk about whether legislation can be drafted that would make it a better system between the executive and legislative branches of Government. I did not cite those other instances to indicate that we necessarily agreed with them. I have tried to avoid in all of my public discussions passing judgment on what happened at that time.

### APPROVAL OF SUPPLEMENTAL APPROPRIATION FOR CAMBODIA

Let me say that on the Cambodian matter, for example, after the Cambodian incursion we came to the Congress and we asked for money. We had a supplemental appropriation, and Congress had a chance to consider whether it will appropriate that money or not or whether it was too much or too little. Although Senator Fulbright made a point, which was certainly a valid point, that it is more difficult after the fact to turn down the President, the fact was the Congress did have an opportunity to consider the appropriation of funds for Cambodia, and Congress passed the appropriation. So in effect to that extent,

at least, Congress approved the policy, and I suppose the Congress could have turned us down, could have said, "This is unwise and we will not do it."

I do agree with the basic validity of the chairman's point. It is much more difficult after the fact, but it does show that Congress felt that the money that we have asked for for Cambodia should have been appropriated and Cambodia, much to everybody's surprise, has continued on. The Government seems to be in control, though everyone was making predictions at that time it was probably not going to survive, but it has continued to survive. And conditions in Laos are better than they were. But in any event, I do not think it serves any useful purpose at this point in our history to reargue whether the beginning of events in Vietnam were wise or unwise. Historians will have plenty of opportunity to discuss that.

### INTERVENTION IN VIETNAM DIFFERENT THAN IN DOMINICAN REPUBLIC AND LEBANON

Senator AIKEN. Well, I think maybe we look back too much for examples of history that bear out our own present-day ideas. My opinion is that troops were sent into Vietnam at the start more to prevent people of a different ideology from taking over the country than to protect American lives. It was not an emergency like the Dominican Republic. I have almost no complaints on the troops going to the Dominican Republic. In Lebanon we went in and out and protected the lives of 2,500 Americans there, and there was not much complaint on that. But it seems to me that the troops going into South Vietnam went in on a long-range adventure even though perhaps those who sent them in at the beginning did not think it was going to be so long range. After some troops were sent there, we sent in more troops to protect American lives—the lives of the servicemen who were in the field—and then we sent in more and more and more until we got 534,000 troops in there. Then we are told that the sending of troops into Cambodia and Laos was to protect the lives of the American servicemen while the withdrawal was underway.

As to the success of those ventures, I say let us leave that to history. It is the safest thing to do at this time.

I doubt if the emergency powers apply to long-range planning, such as a long-range war against communism as it is called. Sometimes I think communism is an excuse, but in other cases it probably is not.

### PRESIDENT'S AUTHORITY CONCERNING TREATY COMMITMENTS AND FOREIGN BASES

The United States has treaty commitments with more than 40 nations. We are told that we have over 2,000 bases, 400 of which might be considered major bases in about 60 different countries. In your view could the President, on his own, find that the security interests of the United States required the commitment of U.S. forces to hostilities at any of these bases?

Secretary ROGERS. I think almost without exception those treaties provide that in the event of danger of attacks that we will operate consistently with our constitutional processes. So I would think that

in most cases certainly we would come to Congress for authorization for any action. I suppose the exception would be a direct attack on our troops which would require the President as Commander in Chief to act in the defense of our troops.

Let me again say, Senator, I do not know how anybody could live through the period that we have lived through since 1965 and have any interest in getting involved in a war without congressional support and public support. If there is one lesson we have learned from this involvement in Vietnam, it is that we need congressional support and we need public support. So the fact that I am here today and testifying as I am is not in any way suggesting that we have the slightest interest in becoming involved in another conflict without congressional support and approval. Quite the contrary.

AMBIVALENCE WHEN TALKING ABOUT VIETNAM

I notice ambivalence when we talk about Vietnam, between how did we get started and how do we get out. Now, the fact is, we are not starting the war in Vietnam. We are getting out of the war in Vietnam, and I do not think we ought to be involved in how we got started. We have been around that track a lot of times, but we are withdrawing and it is working. We have a feeling of frustration in this Nation about it. We hardly see that it is succeeding, but when you go into other countries they say, "We do not understand your public reaction. Everybody here thinks it is working quite well."

PEOPLE IN FOREIGN COUNTRIES APPROVE OF U.S. WITHDRAWAL PROGRAM

It was interesting to me on this trip, I had nothing—in the discussions I had with leaders of government in, I guess, 12 or 14 nations, newspaper people, young people, universities, almost without exception they approved of the President's policy of withdrawal from Vietnam. There were very few hostile questions. Two years ago when I was in Europe and other places of the world, the whole questioning was focused on Vietnam. Now there is very little.

I appeared on a television program in London. There were very few questions on Vietnam. I attended a university in Riyadh. Nobody asked me any questions about Vietnam. People seemed to think that the program is working quite well and I believe it is.

COMMENDATION OF WITNESS

Senator AIKEN. Let me say finally, that I think 250,000 troops in Vietnam are much better than 534,000 troops, and again, I want to commend you on the work you have been doing in regard to the Middle East which shows signs of success, if I can use the old Vermont escape clause, so far.

Secretary ROGERS. Thank you, Senator.

The CHAIRMAN. Senator Symington.

Senator SYMINGTON. Thank you, Mr. Chairman.

Mr. Secretary, I would join the Senator from Vermont in congratulating you on your trip to the Middle East. It has been one of the fine efforts in recent years in attempting to establish peace.

Secretary ROGERS. Thank you very much.

PRECIPITATENESS OF REDUCTION OF U.S. FORCES IN EUROPE QUESTIONED

Senator SYMINGTON. The word "precipitate", as if we were rushing into something, has been used in the debate on troops in Europe, the Mansfield amendment which I support. For 5 long years I have been one of those who supported efforts to achieve a substantial reduction of American forces in Europe. In 1966, your predecessor briefed the Democratic policy committee on this subject, along with Secretary McNamara and Secretary Fowler. We were urging it then.

A lot of the cold war warriors assembled in the White House yesterday, and all of them said it was a terrible mistake to reduce our ground troops in Europe. Those cold war warriors were involved when we had the bomb and nobody else had it, and also when we had some $25 billion in gold roughly, and owed $7 billion. Today we owe around $33 billion, current liabilities, and have less than $11 billion in gold against that liability.

In any case, on October 26, 1963, President Eisenhower said:

> Though for eight years in the White House I believed and announced to my associates that a reduction of American strengths in Europe should be initiated as soon as the European economy was restored, the matter was then considered too delicate a political question to raise. I believe the time has now come when we should start withdrawing some of these troops. One American division in Europe can "show the flag" as definitely as can several.

Do you agree with President Eisenhower about that?

Secretary ROGERS. Well, I do not like to disagree with President Eisenhower, but if you would like to discuss the Mansfield resolution, I can. We are very much opposed to it, Senator, for a lot of reasons.

Senator SYMINGTON. You brought it up in your talk by implication, at least; so I would like to have your thoughts on it.

Secretary ROGERS. Well, I did not intend to, but maybe I did. Yes, my view is that when we say precipitous, and I am not sure who used the word, whether I did or someone else——

Senator SYMINGTON. The chairman of the Armed Services Committee.

Secretary ROGERS. I see, Well, the reason that that is true is that this would be a very major step, and it seems to me that it is the type of thing that requires hearings, careful consideration.

Now, my own view is that it would be a mistake of historic proportions to enact the Mansfield amendment now for reasons which are military, political, and psychological.

Senator SYMINGTON. Then you disagree with President Eisenhower's 1963 statement?

Secretary ROGERS. I do not think President Eisenhower's statement refers to conditions today, obviously. It referred to conditions then. And you have to consider a legislative amendment in the light of the facts as they exist today.

Senator SYMINGTON. Senator Mansfield only wants to take out half as many as President Eisenhower suggested 8 years ago.

Secretary ROGERS. I say, as I said, I think that the passage of this bill at this time would be a very serious mistake and would be very detrimental to our foreign policy. It would be very harmful to our national interests and I do not think this is the way we should make a decision of this magnitude. If Congress in its wisdom feels that there should be some changes made, then I think it should be thoughtfully,

carefully done. I have the highest regard for Senator Mansfield, but I think in this case he has made a mistake. I do not think it is a wise act at all.

EFFECTS OF U.S. TROOP REDUCTION IN EUROPE

Senator SYMINGTON. Well, Mr. Secretary, it would appear unfortunate that under this Administration, as well as under the previous Administration, there has been no effort to achieve a substantial reduction of our forces in Europe, despite the political, economic, and military danger signals which have now been flashing for years. Now the financial crisis is right here with us. Our balance of payments and budgetary deficits have finally caught up with us. The major European countries have now told us that, in effect, they have little or no confidence in the soundness of our economy. They have, as a practical matter, in recent days, now done what we have refused to do ourselves, namely, devalue the dollar.

I was in Europe last month with the Chairman of the Joint Atomic Energy Committee—and add in passing that the unanimous approval of our Vietnam policies was not characteristic of some of the observations made to me—but in any case, having recently returned from this inspection of the incredibly strong, lethal nuclear umbrella we have established in and over Euurope which, even though I have been on the Armed Services Committee for over 18 years, I knew little about. It is difficult for me to see why reducing our forces by 150,000 will leave the Western Europeans vulnerable and defenseless.

In any case, as I see it, when 260 million Europeans continue apparently indefinitely to rely on being defended by 200 million Americans against 240 million Soviets, especially in light of the fact that these 240 million Soviets must also contend with some 790 million Chinese, give or take 20 million—Now in West Germany, there are 415,000 German, British, and French Army forces. Excluding troops stationed overseas, the ground forces of Belgium, Britain, France, West Germany, the Netherlands, Italy, Denmark, Norway, Greece, and Turkey total 1.8 million, that would seem a sizable potential force. Inasmuch as there has been testimony to that effect that we have over 7,000 nuclear warheads, our own, in Europe, I do not see why now that we are having this economic crisis. It would be such a dreadful mistake to cut our forces in half.

I have heard stories that a reduction would tempt the Soviets to make a military move in Europe, that a reduction would cause a psychological shock in Western Europe that would cause NATO to unravel; that a reduction would cause Europeans to be susceptible to increased Soviet political pressure; that a reduction would reduce the prospect of negotiating mutual force reductions with the Soviet Union. But these arguments have always seemed specious to me. I just do not see why we cannot make a sizable reduction. We need the money over here. We need to do things we know of well in our domestic economy. If having taken 150,000 conventional forces out of Europe that would seriously hurt the future of NATO, then would you not agree that NATO, from a conventional standpoint, was pretty much of a hollow shell?

Secretary ROGERS. No, Senator. I think that this action would signal the end of NATO. It would have ramifications of, I think, tragic proportions.

I think, Senator, that you might be interested in connection with the discussion about reducing forces by any negotiation that this morning you may have seen on the ticker, and this is a Reuters dispatch——

Senator SYMINGTON. I have it here, but believe it would be fine if you would read it.

Secretary ROGERS. It says, "Soviet Communist Chief Brezhnev today called for international negotiations which would discuss the reduction of forces in central Europe."

Now it is obvious if we do it unilaterally that we can kiss that initiative goodbye. We have been attempting for a long time to see if we could embark on negotiations with the Soviet Union so that we could have reciprocal reduction of forces, and in the last two NATO meetings this has been a policy that all 15 nations have agreed upon. At the last Warsaw Pact meeting, the Russians indicated they might be willing to engage in such negotiations. So, I think it is pretty clear if we do it unilaterally we do not have a chance of negotiating with the Soviet Union. I think it would have an adverse effect on the SALT talks.

Senator SYMINGTON. Would you not give Senator Mansfield a little credit for this?

Secretary ROGERS. Well, I will give Senator Mansfield credit for a lot. I think he is a great American.

Senator SYMINGTON. Mr. Brezhnev said: "In connection with the Western reaction to the proposals made by the Congress" (by the Congress, that is why I thought of Senator Mansfield) "I want to mention one detail," continued Mr. Brezhnev. "Some of the NATO countries show an evident interest and nervousness when it concerns reduction of armed forces and armaments in Central Europe. Their spokesman ask whose armed forces foreign or national, what armaments, nuclear or conventional, are to be reduced? They ask whether the Soviet proposals concern all this taken together. In this respect, we also have a question," says Mr. Brezhnev. "Do not these curious people resemble a person who tries to judge the flavor of wine by its appearance without imbibing it? If anything is not clear to somebody, we are ready to make it clear. But you have to muster the resolve to try the proposal you are interested in according to its taste." Then Brezhnev said, "In translating the Congress' decisions into life, I salute Senator Mansfield. We shall spare no effort in consolidating the unity and friendship."

It would seem this shows what the majority leader has done has moved action from the legislative side, at least in this one case, to establish a better relationship. I am confident in my own mind that was the purpose.

### IMPACT OF UNILATERAL TROOP WITHDRAWAL ON NEGOTIATIONS AND NATO

Secretary ROGERS. Senator, I certainly do not interpret the Brezhnev remarks the way you do. The reason that he has made this statement, I am quite convinced, is because at the NATO meetings we have made it clear that we are prepared to discuss mutual and balanced force reductions. In other words, we are prepared to discuss them on a reciprocal basis, and it has only been recently in the last year or two they have

indicated a willingness to do that. The reason they indicate a willingness to consider it is because they know that we will not do it unilaterally, and when the President was in Europe, in Limerick, he made it clear he felt it was not in our national interest to unilaterally reduce our forces. If we do it unilaterally Brezhnev does not have any point at all. Why bother, why bother if we are going to have reductions anyway? He is not going to reduce his forces; he is not even going to discuss it if we are going to destroy the effectiveness of NATO.

Now, the actual fact is that the Soviet Union is, has been attempting for many years to undercut NATO, to weaken it. In fact, the whole effort that they have made in regard to the European Security Conference is designed to that end, and I think it would be a major disaster for this country to fail to support NATO. NATO has been a great success, it has prevented us from—it has kept the——

Senator SYMINGTON. Mr. Secretary, I believe in NATO. Maybe Mr. Brezhnev is talking about his own Congress, but the point is, if you take 150,000 troops out of Europe, but leave 7,000 nuclear warheads there in the control of United States' military forces, how can that be destroying NATO?

Secretary ROGERS. Well, I do not want to, Senator, and I am sure you do not want to have as our only alternative a nuclear counter-attack. The whole idea of conventional forces there is to prevent a nuclear counter-attack and have a flexible response.

Now, at the present time our forces, and the Warsaw Pact forces, are about even. They have a little edge on us. They have better tanks than we do, but we are about even. If we withdraw 150,000 troops from NATO, I have no doubt about it that it would have tremendous impact not only militarily but politically. We have indicated to our NATO allies that we would not move in this manner, that we would only move deliberately in full consideration of their interests.

Senator SYMINGTON. But we have been debating this on the Floor of the Senate, to my certain knowledge, 8 years. What is precipitate about that?

My time is up. But I would read one statement I placed in the record in support of the Mansfield amendment.

With respect to the current Mansfield amendment to reduce substantially U.S. military forces in Europe, which I fully support, it would appear to be increasingly clear that politically we are following the often criticized military policy of victorious countries in the past; namely, following tradition as against modernity.

One of the reasons I support wholeheartedly this amendment is that we do not seem yet to recognize in any practical fashion the growing obvious difference between the former concept of "balance of power"; and the present actuality of a "balance of terror."

It has been reliably reported that today over 50,000 megatons are stored for the possible ultimate destruction of civilization. That is over ten tons of TNT for every man, woman, and child on earth.

Under these unique and unprecedented circumstances, I do not see how taking 150,000 ground troops out, half of what we have over there, to help our economy, would jeopardize NATO.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Case.

COMMENDATION OF WITNESS

Senator CASE. Mr. Secretary, I join my colleagues in expressing my high personal regard for you, your service in general, and also in particular your efforts in the Middle East.

Secretary ROGERS. Thank you very much.

Senator CASE. I also feel, as I know all of us do, that it is almost an imposition upon you personally for you to come before us so soon after you made this arduous trip. But that really was within your discretion and we have to assume that your judgment as to your capacity and strength is adequate to take care of the problem.

Secretary ROGERS. Thank you.

Senator CASE. I welcome, too, your offers of greater institutional structural cooperation with Congress that you make in your statement. I think it is useful and will be useful, although I must say that I think when it comes down to the nitty-gritty we may have some difference of opinion. Real cooperation to me means telling the whole story and not everything else except what is immediately happening, as you have sometimes found it necessary in the past to do. But broadly, the suggestion of cooperation is great.

CONCEPT OF CHANGE IN PRESIDENT'S AUTHORITY UNDER CONSTITUTION REJECTED

I know the position you announce today is in behalf of the President. You are his attorney, his surrogate, and his representative here and this is not a Rogers policy. This is a Nixon policy and should be.

I do not think it is unfair to characterize your policy as follows: That in substance the President's authority in the conduct of foreign affairs and in the disposition of American armed forces abroad is and should be untrammeled. And I just do not accept that position. I cannot accept the idea that modern conditions have changed the President's authority under the Constitution. I think flexibility in this context is an evil word, and I say that with all the emphasis at my command. It means changing the whole concept of America's activity as a nation. You advocate flexibility, so the President can act without prior publicity. I think that introduces a most dangerous concept, and an intrusion upon what this country stands for, that is to say, the public's right to know.

I know it is easy for us in Congress to identify ourselves with the people and even to try to pit the Congress and the people against the President. It is not our purpose to do that in any sense. But I do feel the doctrines of our Founding Fathers and the constitutional arrangements that they attempted to establish were meant to be a departure from the old idea of unilateral action on the part of a single Executive in the context of old world balance of power politics. If this was not the case, then I am very much mistaken as to what our American constitutional experiment was meant to do.

I think the Constitution was written to make it more difficult for the United States to get into war. I do not find, I must say, any recognition of that on the whole, in your whole statement.

I leave to Senator Javits and Senator Stennis and others who have introduced specific resolutions on this subject to deal with the specific

questions that you have raised, such as the difficulty that there would have been if any of these legislative provisions had been in effect when the President had to deal with missiles in Cuba. I do not accept the dangers you hint would obtain, but I leave that to Senator Javits and Senator Stennis and others to meet specifically. But I must say that on the very broadest grounds I think we have come to a confrontation here. I don't know whether it will be resolved in the consideration of this legislation or as perhaps more likely partly with this legislation and partly over a longer period. But I think the American people can be and will be aroused to recognize and assert that in America we intend to have and we must have something different than old world power politics.

Secretary ROGERS. Mr. Chairman, could I just make a brief comment on the Senator's statement?

The CHAIRMAN. Yes, certainly.

DELAY IN CONSIDERATION OF CONSTITUTIONAL MATTERS RECOMMENDED

Secretary ROGERS. You know, I fully understand the logic of what you said. We are not intransigent. I think Senator Stennis made a very good suggestion that this is the kind of a matter that should be considered. We are prepared to consider it, the different possibilities, with the Congress. I think that it should be done a little bit down the road and after Vietnam is behind us because everything we talk about these days relates to Vietnam. I mean, it is clear here. I come up and talk about constitutional matters, and immediately we get involved in Vietnam at once, and whether what we did in Vietnam was correct or incorrect, and I think that is the wrong way to deal with constitutional matters.

CHANGING PRESIDENT'S CONSTITUTIONAL POWERS BY STATUTE QUESTIONED

It may well be that in modern society that there should be some change made in the constitutional system. I am not sure that the legislative process is the way to do it. In the first place, I am not sure that it has any effect. The question about whether a statute can change the President's constitutional powers or affect Congress constitutional powers is a very doubtful proposition. But in any event, I do not want to suggest that we are not fully prepared during the next year or so to talk about it and see if there is something that can be done. Whether it is a constitutional amendment or some kind of a statute that somehow would clarify things or whether it is a modus vivendi that could be set up between the executive and legislative branch, I just do not know. I do not believe that the present bills do it and I do not believe this is a time to take action.

As I said at the opening of my statement, I think it is a very useful discussion and I think that Senator Javits and Senator Eagleton and the others who offered bills are to be congratulated because it is a vitally important matter.

ADMINISTRATION POSITION REJECTED

Senator CASE. Well, Mr. Secretary, I repeat what I said at the outset. Your views are presented in a moderate, conciliatory way. But I

must say that I detect under the velvet glove the iron fist just as strongly as I did when it was Nick Katzenbach coming up and telling us we had no business in this important area. I do not expect any President to accept our position voluntarily, so I do not think it is at all strange that you are acting as you are acting. It is proper from the standpoint of one in your position. But I must say that as a Member of the Senate, I cannot accept it.

If I could cite just one little example, this morning's paper quotes presidential spokesman Ronald Ziegler as saying, "that the Administration would accept no compromises, no alternative that would have the effect of Congress determining the foreign policy of the United States toward NATO." Now, this is intolerable, it seems to me. I think it was also most undiplomatic for Mr. Ziegler to make any such statement unless it was intended to raise the issue and to force a confrontation and to humiliate Congress.

I am sorry that the particular matter of the Mansfield amendment is going to be discussed and has come to be discussed in such a setting because this should not be the case. I am sure not you personally nor Senator Mansfield personally has any desire to do this. I know you have deep feelings about it but not in the sense of questioning the right of Congress to be involved with this situation.

Secretary ROGERS. No, as a matter of fact, I talked to Senator Mansfield yesterday about it and, as I said this morning, I do not know of anyone I respect more.

Senator CASE. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Pell.

COMMENDATION OF WITNESS

Senator PELL. Mr. Secretary, I join those congratulating you on the personal relations that exist between you and the committee. I think, as you said earlier, these questions may be political, but not partisanly political. Your own relations are certainly, I think, more warm and closer than those of your predecessor with a good many of us on this side of the aisle and with the committee as a whole.

FUNCTIONS OF LEGISLATIVE AND EXECUTIVE BRANCHES

In connection with the resolution that we are discussing today, I am very glad to join Senator Javits. I know he will touch on it. I am wondering whether the American public is a little confused as to what this is all about. We all learned one simple point in school which is that there are three branches of Government, all co-equal: The judiciary, which judges; and the legislative, which passes the laws and the policies; and the executive, which executes them. In your excellent presentation here you point out that this is really of no concern of the judiciary, but it is a question of the balance between the executive and the legislative.

But is it not under our Constitution, to oversimplify a fact, that the legislature sets the policy, sets the laws, and the executive is really what in the corporate world is called the principal executive officer and carries out the policies of the legislature? This is the concept, I think, in the United States as a whole. From reading your paper, it

seems you do not agree with that. You believe that both the policy-making functions and the executive functions should rest with the executive. Is this an unfair statement on my part?

Secretary ROGERS. It does not quite state my position, no. As I have said, the courts have indicated that there is a difference between domestic affairs and foreign affairs because the President does have additional authority in the foreign affairs field, but we were really talking about warmaking powers, not foreign policy, and certainly, in the foreign policy field the Congress plays a major role. As I pointed out there is nothing we can do in the foreign policy field that does not have to be implemented, carried out, supported by the Congress, and if we acted in a vacuum without close consultations, and so forth, we would never get any support from the Congress.

Second, in the formulation of policy, we feel that we should consult and take into consideration and act upon congressional views. But, you know, looking at it realistically today, the difficulty is that everything focuses on Indochina. I mean, I have offered to brief committees from time to time, on other subjects and there is not any particular interest in other subjects.

Senator PELL. I think this is an example of where the impact of war, the making of war, does have an impact on policy.

PRESENT POLICY ON ASSERTION OF EXECUTIVE PRIVILEGE

To go on to another point, you suggest that cooperation between the executive and legislative branches is the heart of the political process, and I would agree with you. We have some problems here because we get into this question of the relationship with the executive and our right to information. I wanted to ask you very specifically, Mr. Secretary, if the policy of the executive branch is still what it was as set forth in the letter, with which I am sure you are familiar, from President Nixon to Chairman Moss of the House Government Operations Information Subcommittee, where President Nixon said: "Under this Administration executive privilege will not be asserted without specific Presidential approval."

Would that be the present policy?

Secretary ROGERS. Yes.

Senator PELL. It would. In other words, any time you feel we should not have access to a document, and there is plenty of reason to say that, it will be denied in accordance with the procedures spelled out by President Nixon?

Secretary ROGERS. I would not want to suggest that every time we have a hassle about a particular document that I go over to see the President about it.

Senator PELL. No, but you know the frame of reference I am talking about in what he said.

Secretary ROGERS. Yes, but I think this. If we get down to the point where these things cannot be resolved, I would expect to call the matter to his attention. Now, I think most of these can be resolved. You know this is a matter that is traditional between the two branches of government. When I was Attorney General I gave a long statement on it that is now cited as authority. Obviously there is always going to be a tussle about exactly what we give to Congress.

Now the chairman raised the point about some correspondence with our people. This difficulty is not the substance of what is in it, but if we, if everything an employee in the State Department says can be surfaced and given a lot of publicity, regardless of what it is and how tentative it is, and how factually incorrect it is, it makes it very difficult to conduct a department just as it would if the executive branch wanted to have all the communications between the members of your staff. A lot of them you should not make public because it is nobody's business.

On the other hand, on any of the factual material we are fully ready to give to you. I am going to work with the chairman and see if we cannot work it out. I do not think there is any problem really.

Senator PELL. I am not arguing on the merits, but I am asking is it still the policy that executive privilege will not be asserted without specific Presidential approval?

Secretary ROGERS. Well, within the limitations I have just mentioned. No final assertion of executive privilege will be claimed if the President does not agree with me.

Senator PELL. Thank you.

### EFFECT OF PREVIOUS ENACTMENT OF PENDING LEGISLATION

Another question we face here in the legislation we are working on today is that we are trying to do what I think the Congress should do in spelling out its policies to refine and to close up the ambiguities in the Constitution. If we had these resolutions we would then not be faced with the necessity, as we are now, of voting on the rather harsh proposals—McGovern-Hatfield and the Mansfield proposal—which I shall support. If the Javits bill had been previously accepted and passed by the Congress, I would think we would not be in the position of the hassle we are in now because we would have set forth policy before and you would be following it. Would that not be a correct statement?

Secretary ROGERS. I do not think I can answer, that Senator. You mean, in other words, if the Javits bill had been——

Senator PELL. A bill along these lines.

Secretary ROGERS. In 1965?

Senator PELL. If such legislation were in effect, we would not be faced with these pretty rough alternatives we have now of executing the power of the purse and closing off one area of hostility or of reducing the forces in Europe by a resolution.

Secretary ROGERS. I just could not answer that question.

### DOUBLE MORALITY IN AMERICA

Senator PELL. Another thing that concerns me is the kind of powers we leave with the President. Again, I apologize for adverting to Indochina, but it is on our minds. It seems to me that we have a double morality in America. For if people are killed by being burned to death or demolished with bombs, somehow that is not quite the same thing as if they are killed in hand-to-hand combat, when you see the whites of their eyes. I think most of us, if we look into our hearts, realize that one is much more difficult for us than the other, but do you think we

are correct in the differentiation now where we permit the Air Force to engage in operations, but not the land forces? From the viewpoint of the man being killed, it is just as unpleasant.

Secretary ROGERS. Well, sure, sure it is. Well, the use of the air power is to continue to protect our forces as we withdraw.

Senator PELL. All the sorties now are to protect our forces in Indochina?

Secretary ROGERS. That is right. That is the purpose of the bombing. I know you can argue, it can be argued, that the bombing in North Laos is less direct than that in South Laos and Cambodia, but that is the rationale.

Senator PELL. I realize it is the rationale. My time is limited; that is why I am moving on.

POSSIBILITY OF COMPROMISE ON MANSFIELD RESOLUTION

In connection with the Mansfield resolution, some of us, particularly those who have been associated with the NATO organization, are not too happy about it. But when we see the kind of big guns that you pulled in yesterday, when Dean Acheson call this idea asinine, and when the President says no compromise, it turns off those of us who are skeptical. I would think in a political process of this sort, rather than hardening the issue, there is always an area of compromise. I would hope that and I am sure, knowing your nature, you would seek to try to find some area of compromise. Do you see any directions in which we could move that you would recommend to us at this time?

Secretary ROGERS. I do not, Senator. But let me quickly disassociate myself from the use of the word "asinine".

Senator PELL. Thank you.

Secretary ROGERS. I do not think that is constructive. I do not feel that way.

Senator PELL. Thank you. My time is up.

The CHAIRMAN. Senator Cooper.

Senator COOPER. Mr. Chairman, and Mr. Secretary, I know this is a hearing on the war powers, but my good friend Senator Symington has raised a question on the amendment offered by Senator Mansfield and I would like to ask you a few questions about it because it may be the only chance we will have before we have a vote.

Secretary ROGERS. Yes.

RESULTS OF MANSFIELD RESOLUTION

Senator COOPER. I think all of us agree we would like to see our forces in Europe reduced. We understand the cost problem, the effect upon balance of payments; these questions are important. But you do consider, as I do, and many of us do, that the presence of our forces in Western Europe in adequate numbers to maintain a relative conventional balance with the Warsaw Pact forces is essential to the security of the United States, as well as to the European countries?

Secretary ROGERS. Yes, and I think that is often overlooked.

Senator COOPER. I think it is overlooked.

You stated that it would be helpful to our security, and to prospects of peace and settlement of outstanding issues with the Soviet Union if we could get a mutual reduction of forces, and you have said that NATO is attempting to enter into negotiations for that purpose. Do you affirm, as you did a while ago, if we cut our forces in half in the absence of an agreement by the Soviet Union to do so as well that really means dismantling NATO?

Secretary ROGERS. That is correct.

Senator COOPER. If we cut it in half it would make very difficult any mutual reduction of forces?

Secretary ROGERS. It would be more than that. It would eliminate the possibility.

Senator COOPER. I am not saying we should not proceed to see if we cannot reduce forces in many ways such as reducing unnecessary headquarters and logistical support, but it seems to me the immediate result of what Senator Mansfield proposes is dismantling NATO without any agreement with the Soviet Union on mutual reduction of any forces.

You talked about another point that we are all concerned about that is, the growing possibility of nuclear war. That is the reason for the SALT talks. We have made a number of efforts in Congress to help the SALT talks to be a success. Is it not a fact that the Administration has been trying to get our NATO partners to strengthen their forces qualitatively and also jointly to improve the defense facilities and infrastructure of NATO in order to make it less likely that there would be a need to use tactical nuclear weapons immediately in the event of an attack.

Secretary ROGERS. Yes. That is really the purpose of our forces there now, which is to eliminate as much as possible the necessity to use nuclear power as a deterrent.

### EFFECT OF TROOP REDUCTION ON MONETARY CRISIS

I think also, Senator, I would like to point out that although there is a good deal of discussion about the costs of the troops, if we brought back 150,000 troops from our NATO forces, the costs would be just about the same. I do not believe there would be any reduction in the costs. It is not a matter of costs. It is a question of balance of payments.

Now, the balance of payments factor is also rather minimal, probably in the neighborhood when you consider the offsets, probably in the neighborhood of $700 to $800 million. The monetary crisis is caused by really other factors quite unrelated for the most part, to our force levels in Europe, and I think people tend to forget that.

### REDUCTIONS IN U.S. ARMED FORCES

They also tend to forget, Senator, that the total forces in the United States in 1969 were roughly 3.5 million men. Now there are 2.7 million men. So, we have reduced our Armed Forces by about 800,000. Our forces overseas have been reduced from, in 1969 from 1.2 million to 825,000 now, and we are continuing to reduce those forces, and so that the change in our NATO structure would have very serious impact on our foreign policy without any material impact on the costs at all.

EFFECT OF MANSFIELD PROPOSAL ON OTHER FOREIGN POLICY INITIATIVES

Senator COOPER. I have one further comment: Even though Vietnam still hangs over the country and all of us, it is not correct, and I think you are very largely responsible for it, that some positive initiatives have been taken, in the Mideast, the SALT talks, the talks over Berlin, and the efforts made by West Germany to solve some of the problems left from World War II? With all my respect for Senator Mansfield, and I hardly ever disagree with him, do you believe the action he has suggested would help those constructive initiatives?

Secretary ROGERS. No, there is no doubt in my mind, Senator, it would be very harmful. It would be very harmful to both the Middle East initiative because I think one of the reasons that there is some progress in the Middle East is because we have made it clear to the Soviet Union that we are diplomatically involved, and that we consider it a very serious matter. I think if the Soviet Union felt we were getting out of the world, just withdrawing our troops everywhere indiscriminately in a way that was not orderly, they would conclude that we had lost our resolve, that we were not prepared to play our role in the world.

Now, in the SALT talks I think maybe the harm would be somewhat less in that I think largely the motivation of the Soviet Union was largely economic in the SALT talks. I think if they felt the Congress was not going to support the President in matters of this kind, that he was not going to be able to maintain our military capability, they would be less likely to negotiate in the SALT talks. So, I think in the Middle East it could have quite a serious effect and I think it could also have an adverse effect on the SALT talks.

Senator COOPER. I do want to say however, that I think the Administration has to realize that in such important matters as NATO that the Congress has to make some judgments of its owns.

INCONSISTENCY BETWEEN PRESIDENT'S EMERGENCY POWERS AND VIETNAMIZATION SUGGESTED

I will go briefly to the question of the war powers. I read your straightforward statements of the incidents that have occurred in the past, and I also think you have given a useful statement about some of the problems connected with the constitutional powers. I don't consider it to be anything like former Secretary Katzenbach's statement. In your recounting of the history of these incidents and I think you come to the place where we are in agreement on one thing, that the President alone has emergency powers to protect U.S. troops if they are attacked, to protect our territory and to take such actions required to protect the security of our country.

It seems to me from what you say in your own statement that beyond that all other powers are in the province of the Congress. Now to turn to Vietnam, if you stay there to protect Cambodia, to protect Laos, to protect South Vietnam until it is able to protect itself even to protect the policy of Vietnamization per se, how can you say that such actions are based upon the emergency power? Isn't Vietnamization the kind of situation, that you would have to get the approval of Congress?

To put it another way, is there any power that the President has at this time except to withdraw all U.S. forces and to protect the troops

against imminent danger as they withdraw? You used the word "imminent." I think that is the difficulty we are up against up here. We consider that unless the Congress gives authority to the President to stay there he has no power but to withdraw as soon as safety permits and to protect against imminent danger as they withdraw.

Secretary ROGERS. Well, Senator, I think the difficulty is——

Senator COOPER. I think there is an inconsistency in your statement because when you mention emergency power, power to protect our troops, repel against attack, but this policy of Vietnamization which was developed before this Administration has aims far beyond that.

Secretary ROGERS. Senator, I don't agree that there is an inconsistency.

We are talking about war powers in the sense of how do you initiate a war, who has the power to initiate a war, what happens when it starts, and that is what I was addressing my remarks to. The other question that you raise is how do you get out of a war. The President is getting us out of Vietnam and, as I say, we found the war there when we came, when the Administration took over, and we have a policy that is getting us out.

First the Congress knows the policy. Secondly, many of the policies that will be followed in the future are going to require Presidential approval—I mean congressional approval, funding, for example. So that when the President announces policy, he advises Congress what it is and Congress will obviously have to be consulted and will have to approve funds to carry it out. So in that sense we are talking about how do you get out of the war and, as I have said before, so it is no secret, I think we are getting out very well. I think we are getting out in one of the most difficult wars, in fact one of the most difficult periods of time, that our Nation has ever faced and it is working out pretty well.

Senator COOPER. I agree. I think the Administration's withdrawal is a reversal of policy. But still, the question I have is how long is he going to stay in Vietnam? I don't think the President has any authority to stay in Vietnam. I think you only have the authority to get out.

The CHAIRMAN. Senator Javits.

### COMMENDATION OF WITNESS

Senator JAVITS. Mr. Chairman, I, too, would like to join with many of my colleagues in our expression of appreciation for the Secretary's coming here after a hard trip and for keeping his assurance to me and to the committee he would be here to testify on this profound question. I thank him very much.

### WHO GETS US OUT OF WAR?

Mr. Chairman, I heard with great interest the Chair's disappointment expressed at the conclusion of the Secretary's presentation. I don't think the Secretary wants to follow the Katzenbach example of a claim of plenary power outside the bounds of authority of the Congress. But I ask the Secretary, who is a very competent lawyer,

whether he isn't in effect doing that. That is why we are so troubled. He said, just in response to Senator Cooper, "We are not—we are arguing about who initiates a war rather than who get us out of it."

I respectfully submit that this is not the theory of my bill, because it does allow the President to initiate a war. Any hostility can initiate a war: Sarajevo, with a few shots, initiated a war. The vital question is who gets you out of it. What I cannot follow is that granted the constant statement, and I counted eight times in which you say in your statement that the Congress and the President share the warmaking power, yet you claim some independent authority on the part of the President to carry on the warmaking power no matter what Congress does. But you say, "If you don't appropriate money we can't carry it on," and I say to you, if we can stop you by cutting off the money, why can't we do it by cutting off your power? If two people have to consent to something, and one disagrees—no matter how arbitrary, that is the essence of our system, and when that disagreement is recorded—aren't you deprived of authority? That is what my bill says. It is the same concept adopted in Senator Stennis' bill and in Senator Eagleton's resolution. Unless we are to agree on that constitutional premise, then you are, charming, delightful, kind, soft, but you are challenging our constitutional power to stop a war we haven't concurred in through a declaration of war. You say we only have one way to do it and that is by appropriations. That I cannot accept because it is contrary to the letter and spirit of the Constitution.

Secretary ROGERS. Well, Senator, maybe I should revert to type and not be friendly and charming and all those other things [laughter] because I totally disagree with you and I will tell you why. I don't think you can change the Constitution, amend the Constitution, by legislation. I didn't say it this flat out before, but I don't think so. You are an eminent lawyer, you were attorney general of New York State. I have great respect for you, and you are a very persuasive and attractive fellow. [Laughter.]

Senator JAVITS. I will leave that to you.

Secretary ROGERS. I disagree with you; I don't think that is the way to do it.

EX PARTE MILLIGAN

Senator JAVITS. Now, Mr. Secretary, you cited a case and I would like to cite it back to you. You cited in your statement ex parte Milligan. Now ex parte Milligan reads as follows:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war.

Then we skip a sentence or we go right on:

> This power necessarily extends to all legislation essential to the prosecution of war with vigor and success except such as interfere with the commands of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief.

Now I respectfully submit that if we have the power to provide by law for carrying on war, then we have the power to provide by law for not carrying on war, without any way interfering with the President's power to command the forces and the conduct of campaigns if there be a war. If Congress says there is no war and there

will be no war then that is the end of his power as Commander in Chief to conduct a war. What is wrong with that interpretation of ex parte Milligan?

Secretary ROGERS. In the first place you can't by legislative fiat say there isn't any war. It is pretty clear you can't say that. You can say it if you want to but nobody is going to pay any attention to you. There is a war going on.

Secondly, what the Court was talking about was that there is a way for the Congress to act and that is through the appropriations process, and you can prevent the President from having funds, but you can't run the war. That is why he is the Commander in Chief and that is why the Constitution provided one man should do it. It can't be done by a whole legislative body. So that says that you as the Members of the Congress, have authority under the Constitution to cut off funds, so the President would be unable to continue to carry out his policy. He fully understands that and I do. We don't think it makes any sense, and I don't believe you do on reflection, for Congress to say there is no war in effect. There is a war in effect. We have had 45,000 Americans killed, we have had 400,000 wounded, and they are still there and the war is going on.

Now, how do we get out of it? I think the way that the President is getting out of it is the only sensible way and it is working very well, and I would hope that we would go through the next year and by a year from now consider this very important question which you have raised in a little calmer atmosphere and not in a war atmosphere.

### CONSTITUTIONALITY OF CONGRESS' PASSING RESOLUTION OR LAW

Senator JAVITS. Mr. Secretary, let me just phrase this question and then I shall leave the subject and go to another. As I understand it from you, and please correct me if I am wrong, you do not challenge the congressional power to pass the McGovern-Hatfield resolution cutting off funds, and then I would assume that a President, like President Nixon, lawfully elected and lawfully operating, would obey. But you do challenge our power to pass a law saying—a law, I say—which may require passing over a veto, saying for instance that on December 31, 1971, the same date, you are to remove all our forces from Vietnam. You say if we said the latter we are acting unconstitutionally, if we said the former we are acting constitutionally, if I understand you correctly. Therefore on what constitutional provision do you base your opinion?

Secretary ROGERS. Well, on the latter points that you make, I don't say that Congress has no power to pass such an act. I say it has no constitutional effect. It is like a sense of the Senate resolution that would have an effect in terms of public reaction, but it does not have any constitutional effect. Whereas under the Constitution, and I have cited the provisions, Congress does have the constitutional authority to appropriate funds, so that is clearly spelled out in the Constitution as your authority.

### WORKING OUT MODUS VIVENDI

Let me say that on trying to work out a modus vivendi in this field, if the Congress and the executive branch could come to some agree-

ment that was not too detailed, because I don't think you can conjure up all the hypothetical situations that might occur to take care of them, words like hostilities in the act, when hostilities start and when they cease. What are hostilities? That is a vague expression, and there are all kinds of questions I could raise. I don't want to do it here now, and I would be glad to do it over a period of time, but it is very difficult. That is why the framers of the Constitution avoided being too detailed. It is very difficult to be specific and still have the system work. If there is a way of working out a modus vivendi, and by that I mean some cooperative way which would form a precedent which could be used later on—as a matter of fact, that is what we did in the terms of presidential succession. If you remember, we found the Constitution was vague on it after President Eisenhower's heart attack, and we worked out a method of operation until there was a constitutional amendment which worked out pretty well. It is possible we can do something of that kind. We have no interest in not cooperating with the Congress. We haven't started any war. I can't imagine any situation that might occur where we would be inclined to do anything of that kind without coming to Congress and getting your support.

So, as I say, I hope over the next year or so we can work it out and we would be very happy to work with you and the other authors of these bills to see if we can work out something that is in our national interest.

DESIRABILITY OF SOME PIECE OF LEGISLATION ON WAR POWERS

Senator JAVITS. Mr. Secretary, do you accept the desirability, even going as far as you do, of working out some piece of legislation on this subject which at worse is an open one in the Constitution? Of course, the Constitution is much more detailed and explicit about the war powers of Congress than it is about the President's role as Commander-in-Chief.

Secretary ROGERS. I don't want to pin myself down to legislation. I would like to work out something so that the relationship was better, so that the Congress felt that it was playing a more vital role, and so that the public felt that the relations between the President and the Congress were better.

Senator JAVITS. Well it is my conviction, Mr. Secretary, that the divisiveness, and anguish of this country, having gone as far as they have on Vietnam, that there is now really no substitute for the Congress exercising its power under the necessary and proper clause, in article I, section 8 of the Constitution: "to make laws which shall be necessary and proper for carrying into execution the foregoing powers," and all other powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." I think this power has been eroded or usurped. I am not making any charges with respect to any particular President; we in Congress simply have to reestablish it. The only way, in my judgment, that we can effectively do it is by law, and it is my judgment, as reinforced by the hearings we have had on this subject, we have that constitutional authority—and duty. If war is a joint decision, and you say so time and time again, and we have the authority which was given to us by the Constitution to withhold our approval, then if we withhold it,

there is no approval. There is no valid constitutional basis for the President to make war unilaterally on his own exclusive authority.

Thank you, Mr. Chairman.

CONGRESS' CONSTITUTIONAL ROLE IN MAKING DECISIONS TO USE FORCE

The CHAIRMAN. Mr. Secretary, Senator Spong, who was unable to be here this morning, wrote me a letter and asked me to ask you these three questions, if I may.

Mr. Secretary, do you believe that the Constitution mandates a role for Congress in the making of decisions to use force?

Secretary ROGERS. Yes.

The CHAIRMAN. Do you wish to elaborate on that?

Secretary ROGERS. No; I think I have in my statement.

POPULAR BELIEF REGARDING CONSTITUTIONAL REQUIREMENT FOR CONGRESSIONAL AUTHORIZATION

The CHAIRMAN. Do you agree that most people in this country believe that the Constitution requires congressional authorization of American participation in hostilities?

Secretary ROGERS. At some point, not necessarily prior authorization, but with that exception my answer is "Yes."

The CHAIRMAN. But most people believe that.

Secretary ROGERS. Yes.

The CHAIRMAN. Whether it is true or not they believe it.

Secretary ROGERS. Well, I added a word, though. Don't forget my word.

The CHAIRMAN. What was the word?

Secretary ROGERS. Not "necessarily" prior—read it again.

The CHAIRMAN. Do you agree that most people in this country believe that the Constitution requires congressional authorization of American participation in hostilities?

Secretary ROGERS. Yes; but not necessarily prior authorization.

The CHAIRMAN. Well, you do agree they believe it whether it is true or not; don't you?

Secretary ROGERS. I believe they believe it as long as it is not prior authorization.

CONGRESSIONAL PARTICIPATION IN MAKING USE-OF-FORCE DECISIONS

The CHAIRMAN. Question three.

Are there any instances since the end of the Second World War when Congress has participated in the making of use-of-force decisions? By use-of-force decisions, I take it he means the entry into war.

Secretary ROGERS. I would like to avoid that. I don't want to—I am about to give an answer that will make the chairman mad and I would rather avoid it.

The CHAIRMAN. It won't make me mad. [Laughter.] I have complete control of my patience at the moment. You won't make me mad.

Secretary ROGERS. Well, a previous President felt the Gulf of Tonkin resolution did that.

The CHAIRMAN. That is the only one you can think of?

Secretary ROGERS. That is the only one I can think of now.

The CHAIRMAN. Based upon deception.

Secretary ROGERS. Based upon what?

The CHAIRMAN. Misleading information, deception.

I would add, as long as we are adding words, that is one instance in which we were told untruths about the incidents which they used as an excuse. I think that is very well documented.

### CHANGES IN TRADITIONAL INTERPRETATION OF CONSTITUTION

You were speaking with the Senater from New York about the inability to change constitutional powers by legislation.

What has actually happened and I think what has precipitated this is that the Office of the President, this President and his predecessors, has de facto changed the traditional interpretation of the Constitution. They have already done that, and you have described and justified it in very persuasive terms this morning. But the purpose of the bill of the Senator from New York and others is to restore the Constitution. This should not be necessary, but in view of the developments I feel, and I think the Senator from New York and others feel, it is necessary to restore what we believe to be the proper interpretation of the Constitution. It is the usurpation of the President over the course of a number of years. You cited many of the instances, as if that were a precedent. I don't see how you can argue that a President, by usurping the traditional constitutional powers of the Congress, thereby changes the Constitution any more than a piece of legislation.

Secretary ROGERS. Mr. Chairman, you do me a disservice because I did not cite them as a precedent.

I disavowed them as a precedent. I said I was just citing what had happened throughout history and I did not argue from that that was a precedent.

The CHAIRMAN. What is the purpose of citing them if not to be persuasive upon us as a precedent? Because you did it before, then it is legal?

Secretary ROGERS. No; I am tracing the way the Constitution has worked in fact over the years, right or wrong.

The CHAIRMAN. But this erosion of the congressional authority has taken place primarily within the last 30, 40 years, beginning with any significance, at least, with Roosevelt. Most all of the prior incidents were of trivial and minor significance that could not be classified as really making of war. They always refer to the Barbary pirates any time anything is said. I don't know why the Barbary pirates are so appealing, but it really has no relevance at all. The real question is the one that the Senator from New York has raised.

### SUBVERSION OF TREATY POWER AND CONSTITUTION

You spoke of the treaty power. Just within the last few months I implored you to submit the agreement with Spain as a treaty, and you declined to do it. You executed it as an executive agreement, thereby subverting, in my opinion, the treaty power of the Congress. You submit many agreements dealing with the most trivial matters as treaties, but something that is as important as the stationing of troops and the payment of millions of dollars, you say is proper for an executive agreement.

It is true there are no clear guidelines, but it has always been my impression that the distinction between the kind of matter that should be submitted as a treaty, as distinguished from an executive agreement, was its importance. It is a matter of degree which involves the possibility of the use of force, the involvement in a commitment that results in a war, and certainly the classic example I would think would be the Spanish base agreement. It has been done and I thoroughly disapprove of it. I believe it is subversive of the Constitution, just as the continuing to carry on this war for a new purpose, a different purpose from that which was alleged only a few months ago, is not in accord with the Constitution.

I think the Executive has changed the Constitution and all we are trying to do is restore what I consider to be the traditional interpretation of it.

I come back again to your saying this cannot be settled in the courts. It is political; so it is up to the Congress. You have given us fair warning. I mean we have to take whatever means we can to try to bring pressure as a political matter, to bring pressure to persuade the President to follow the policies that we believe to be in the national interest.

CONGRESS' COLLECTIVE JUDGMENT PERHAPS SUPERIOR TO SINGLE MAN'S

This brings us to a very fundamental question which Mr. Stennis raised. Some of us believe the collective judgment of the Congress, with all its faults, could be superior to that of one man who makes the final decision, in the executive. That is really the fundamental question involved. Is the country's interest better served by a judgment in which all of the Congress participates or is it better served by a judgment of one man. He is assisted, of course, by some of his people, but he bears the final responsibility. They always insist on that, and there is no President who does not take the responsibility. I think that is the fundamental question, and what you are really saying to us is that in modern time because of the complexity of the world, the Congress is no longer a fit agency to exercise judgment as to what is in the interests of the American people. It finally comes to that.

Secretary ROGERS. No, Senator, I don't accept that position at all.

SIMILARITIES BETWEEN POSITIONS OF MR. KATZENBACH AND WITNESS

The CHAIRMAN. All right. I wish you would enlighten me as to why that isn't a fair characterization of the position of yourself, of Mr. Katzenbach, of Mr. Acheson. Dean Acheson in 1951, I believe it was, made a statement very similar to the ones you and Katzenbach have made, which in effect says the Congress has no business meddling in foreign affairs. I wish you could correct it. I think that is a fair characterization of the meaning of the executive attitude.

Secretary ROGERS. I will leave it up to the reader. But I am constantly reminded of the fact every time I testify, Mr. Chairman, I am associated in your thinking with a lot of other people like Katzenbach and Dean Acheson and now——

The CHAIRMAN. This is the first time I have seen the similarity; I have never said that before. [Laughter.] I don't recall that I ever said that before.

Secretary ROGERS. No, but——

The CHAIRMAN. You were Attorney General, so was Katzenbach, and now you are the Secretary of State and he was Under Secretary. There is some similarity even in your records; isn't there?

Secretary ROGERS. Well, if it will make you feel better, I will endorse what he said, but I don't actually. I disagree with him.

The CHAIRMAN. It doesn't actually make me feel better. I was only disappointed.

Secretary ROGERS. I disagree with what he said; I don't think it is the proper spirit. It is not the attitude of this Administration, I attempted to set forth in this statement our views. It is quite opposite from that. He was in a position of testifying for an administration that really did become involved in Vietnam. My position is testifying for an administration that is getting out of Vietnam, so I am not defensive about it at all, and we are not going to become involved in anything of this nature without the utmost effort to get congressional support.

### REASON EXECUTIVE AGREEMENT USED ON SPANISH BASES

You talk about the Spanish bases. You know the reason that we did that by executive agreement is because it replaced an executive agreement and we felt we were justified under those circumstances.

### REVERSION OF OKINAWA PRESENTED AS TREATY

On the other hand, Mr. Chairman, I do think you should acknowledge that in the reversion of Okinawa, which we could have done by executive agreement, we are prepared to present it as a treaty.

The CHAIRMAN. Yes, I congratulated you for it at the time.

Secretary ROGERS. But not in public, this is the first opportunity——

The CHAIRMAN. Well, I did. [Laughter.] I think I have made reference in public that I was pleased that you were going to do it. It hasn't been done. I have gotten to where I am always skittish about saying what is going to happen until it is done. This is the difficulty.

### BREAKING OF TWO DEADLOCKS BECAUSE OF MANSFIELD RESOLUTION SUGGESTED

I want to suggest one other thought about the troops in Europe. I think it could well be argued that Mr. Brezhnev's response is because of the Mansfield resolution rather than in spite of it. I think back to the Brooke resolution which the committee and the Senate passed last year. The Administration refused to take it into account at all and nothing whatever has happened at SALT. My own feeling is if they had taken it seriously and followed the resolution that was passed, something might have happened. This idea that you must always negotiate, that you should never take the initiative, whether it be a mutual reduction of troops or in SALT, I think, is a wrong psychological approach.

I would like to believe, and I am not at all sure it is not reasonable, that two things have happened because of the Mansfield resolution, two deadlocks broken, you might say. One is the decision of the French, apparently, according to the papers, to allow British entry into the

Common Market. This has been a highly controversial matter for years. I wouldn't be a bit surprised that this threat of our withdrawal of troops, whether it passes or not, it is a clear indication to all of the Europeans that the Congress, at least, is getting ready and the country is turning against continuing to pay all their defense bills in view of the developments in Germany on the devaluation of the dollar and many other things. This is what I believe to be the country's sentiment. The Europeans very abruptly, almost overnight, decided they will solve this problem, and the British are apparently going to be allowed into the Common Market. It is my feeling that the Europeans have more respect for the wisdom of the Congress than the Administration does as reflecting in sentiment of this country.

The next thing was the Brezhnev thing. Both of these I think could well be argued as a result of the initiative of the Congress. This encourages me to believe that the Congress does have some proper role to play in our Government, and that we should not be reduced to an observer of the executive exercise of power. This is really persuasive to me. I don't think it is just coincidental both of these things happened as a result of the threat of the beginning of an exercise of congressional power. I think it justifies our confidence that the Congress does have a proper role to play.

Secretary ROGERS. Well, Mr. Chairman, do you want a comment? I don't care——

The CHAIRMAN. I don't care. If you wish to comment you may.

Secretary ROGERS. Let me say this, on the Brezhnev speech. The Warsaw Pact meeting, the last one, said essentially the same thing long before Senator Mansfield offered his amendment, that was about a year ago, that they would be prepared to discuss mutual and balanced force reductions. The condition they laid down was that it had to be after a European security conference. So I don't believe their stated intention of a willingness to discuss mutual and balanced force reductions relates at all to the Mansfield amendment. Nor do I think the British entry into the Common Market relates in any way. I think that judgment was pretty well made sometime back.

The CHAIRMAN. I know you don't think so, but I think it is quite reasonable to think otherwise. It is a rather interesting coincidence.

Secretary ROGERS. I think on the——

The CHAIRMAN. Senator Aiken, I yield for a question.

EFFECT OF REDUCTION OF CANADIAN ARMED FORCES IN EUROPE

Senator AIKEN. Mr. Secretary, I would like to ask you what was the effect on NATO of the withdrawal of a considerable percentage of the Canadian Armed Forces in Europe? Did it affect the morale or military strength materially? NATO didn't go to pieces, did it?

Secretary ROGERS. No, of course not, because the Canadian forces were not very large anyway.

Senator AIKEN. About 10,000.

Secretary ROGERS. Something like that.

Senator AIKEN. I think they withdrew about 5,000.

Secretary ROGERS. That's right.

Senator AIKEN. Was NATO very much upset?

Secretary ROGERS. Yes, they were very much upset. But the magnitude, of course, is quite different. As Senator Cooper said, our NATO

forces are not there to protect Europe, they are there to protect the United States. We think it is important for our security to have a strong NATO, and it has been successful. It is the most successful, the most important, alliance we have, and anything that undermines that alliance, I think, would be very unwise.

DISTINCTION BETWEEN WAR POWER AND FOREIGN POLICY QUESTIONED

The CHAIRMAN. Before I call on others, one thing I want to comment on. You seem to make a distinction between the war power and foreign policy. Do you not consider that the power to make war is the very core and heart of foreign policy? Can you make a distinction between a formulation of foreign policy and warmaking?

Secretary ROGERS. No, of course not. They are both involved in foreign policy, but there are many foreign policy matters that don't involve war, thank goodness.

The CHAIRMAN. That is true, but war is the most important of all our foreign policies, the most disastrous, as it has proved in many cases.

Secretary ROGERS. Sure.

The CHAIRMAN. It seems to me if we have any power at all it certainly should be that. Of course, the Constitution very explicitly gives it to the Congress in any case.

Secretary ROGERS. That's right.

The CHAIRMAN. Senator Church.

ARGUMENTS AGAINST U.S. TROOP REDUCTIONS IN EUROPE

Senator CHURCH. Mr. Secretary, I would like to put one question to you on the NATO matter. Yours is not the first argument. As long as I have been in the Senate, which is now 15 years, I have heard other Secretaries and other Presidents make the same argument that you have made in regard to NATO. There cannot be any reduction in our forces, the argument goes, because it would have a disabling effect on NATO, that we have to maintain 300,000 troops and 250,000 women and children in Europe, which must be the most sizable colony one country has ever maintained on another continent, and we must do this, presumably indefinitely or at least until such time as a mutual reduction in force can be achieved.

We waited 15 years for this, and there has been no progress on the negotiating front. It is the same old refrain year in, year out, and the same old team is always gathered to go to tell us of the calamity that will befall if there is any change in American policy.

ACTIONS PRECEDING U.S. AGREEMENTS WITH SOVIET UNION

All of us on our side of the Iron Curtain aren't very willing to trust the Russians, but it is equally true that the Russians on their side of the Iron Curtain aren't very willing to trust us. So it might be instructive to consider what has preceded those few agreements we have reached with the Soviet Union. I think of two cases. There was the Limited Test Ban Agreement, and the long period of time that we unsuccessfully tried to negotiate that, and there was this same element of distrust on both sides that made any deal exceedingly difficult.

Then the United States announced that it would unilaterally refrain from detonating any further atomic weapons in the atmosphere or underwater. We followed on that by offering to negotiate an agreement to this effect. The agreement was then forthcoming. The Russians apparently assumed that we meant what we said, that we were prepared to do it unilaterally, and they were then prepared to do it on the basis of a treaty.

I think of President Nixon's highly capable action taken unilaterally to put a stop to our bacteriological warfare. He said, "We are going to stop it ourselves. We are not going to continue it and we are going to take the arsenal and going to detoxify it and throw it all away." And then, interestingly enough, comes a Russian proposal that they are prepared to make an agreement to this effect.

Is there nothing to be gained from this experience? Have we during all this time in 15 years, when we have been cemented in every Administration, which seems to get the same advice from the same advisers, ever undertaken in your time or in any other time to reduce or withdraw an American division? That should not, should it, have an enormous impact of demobilizing the whole force by cutting it in half or destroying, kicking the pillars out from under NATO. Wouldn't it be helpful to see if that would not provide a climate that would lead to similar withdrawals on the Russian side, and perhaps even lead to a mutual agreement with respect to the reduction of forces.

EFFECTS OF 1967 U.S. TROOP REDUCTION IN EUROPE

Secretary ROGERS. Yes, Senator. In 1967 we decided to reduce our forces by 35,000 in Europe, by redeploying them to the United States, and there was no response from the Soviet Union. Second, our position is not—in the first place, we have not made these judgments based on anyone else's assessment. We have made them based on our own assessment.

Senator CHURCH. May I ask, Mr. Secretary, on that 35,000, was that a withdrawal of combat forces?

Secretary ROGERS. I think so, yes. Yes.

Senator CHURCH. And what happened with nuclear weapons? Wasn't that reduction accompanied with an increase in nuclear weapons?

Secretary ROGERS. I don't know. There was no increase in nuclear weapons, and there were 35,000——

Senator CHURCH. Would you check the record on that very carefully and supply it?

Secretary ROGERS. I will check it. In any event the forces in Europe were reduced by 35,000, and there seemed to be no response from the other side.

INCREASE IN QUANTITY OF NUCLEAR WEAPONS IN EUROPE DURING 1967 (SUPPLIED BY DEPARTMENT OF STATE)

There was a small increase in the quantity of nuclear weapons in Europe during 1967. However, it should be made clear that (*a*) the number of nuclear weapons in Europe fluctuates slightly as a result of normal logistic factors including maintenance of the weapons and delivery systems and other military planning considerations: (*b*) the small increase in 1967 was in no way related to the decision in 1967 to reduce the number of military personnel in Europe.

HEARINGS ON TROOP REDUCTIONS

As a matter of fact, I think one of the difficulties with this situation is that there haven't been any hearings on this. This is a matter of major concern to the U.S. foreign policy, and if any such actions——

The CHAIRMAN. There have been hearings, not this year; this is an old matter. Mr. McCloy and others came here and discussed it.

Secretary ROGERS. I am talking about hearings now.

The CHAIRMAN. Not now, but this is an old subject.

MAKING MOVE TO SEEK RECIPROCAL MOVE SUGGESTED

Senator CHURCH. I hope you will take into account the possibility that under present circumstances, which you think may differ from previous years, there might be some profit in making a move to see if it would lead now to some kind of a reciprocal move. That is the point I am making.

AUTHORITY FOR CONTINUING U.S. PARTICIPATION IN INDOCHINA WAR

Returning to the war powers question, Mr. Secretary, since the Congress repealed the Gulf of Tonkin resolution, there is nothing on the books that authorizes our continued participation in the war in Indochina. The congressional authority for the war, insofar as it was conveyed to the President through the Gulf of Tonkin resolution, was removed when the Congress repealed the resolution last year.

Since then, all actions, including our Laotian adventure, our Cambodian adventure, the bombing that has taken place in the north and elsewhere, all these and other actions have been justified upon the grounds of protecting our remaining troops; isn't that true?

Secretary ROGERS. That is correct.

Senator CHURCH. All right. If the President removes our remaining troops, as he says he plans to do, so that there are no more troops left in South Vietnam to protect, would he then, in your view, possess constitutional authority to continue the bombing of Vietnam from Thailand or from aircraft carriers based at sea without congressional authority?

Secretary ROGERS. I think it would depend on the circumstances at the time. Certainly if we have prisoners of war there, I would think as Commander in Chief he has the authority to take that action; yes.

Senator CHURCH. Would you say that again. I didn't hear it.

Secretary ROGERS. I say it would depend on the circumstances at the time. If we have prisoners of war there at that time I would think he would be authorized as Commander in Chief to take the actions that you suggest.

Senator CHURCH. You mean we would continue bombing Laos and Cambodia and Vietnam without any congressional authority after our troops have been removed from the south because North Vietnam is keeping American prisoners in the north?

Secretary ROGERS. Well, as I say, I hesitate to answer a hypothetical question because it is very——

Senator CHURCH. Mr. Secretary, this is not a hypothetical question; the papers are filled with what is reported to be the Administration's game plan on this war. I am not asking a hypothetical question. Evidently these reports in the paper are based upon some evidence that this is seriously being considered. I am asking you a question that goes right to the heart of what we are told in the newspapers is the Administration's projected policy.

I don't know whether it is or it isn't. If it is the projected policy to continue the war from aircraft carriers and neighboring airfields after our troops have left South Vietnam, then it raises a serious constitutional question whether that can be done within the power of the President and without congressional consent.

Secretary ROGERS. Well, Senator, obviously it is hypothetical in the sense that it is not happening; so anything that is not happening has to be hypothetical. There is no doubt about that. I say that I would hesitate to be categorical about my answer in that respect. I would think that his powers as Commander in Chief would authorize him to take whatever action he felt necessary to try to protect the safety and the lives of our prisoners of war. Now, he has said that he would not remove all the troops from South Vietnam; he would retain some of our troops there as long as the enemy had our prisoners of war. So it is obviously a hypothetical question because we would still have some troops there as long as they have our prisoners of war.

GETTING PRISONERS OF WAR BACK

Senator CHURCH. What makes you think that the North Vietnamese will ever agree to give up our prisoners of war as long as we continue participating in the war?

Secretary ROGERS. Because they might like——

Senator CHURCH. The real way to get back the prisoners, as the French found out, is to do the one thing that the North Vietnamese are determined should happen; namely, that we should leave South Vietnam. There would be no difficulty getting the prisoners out once we had made a decision to leave, and were prepared to negotiate then for the return of our prisoners. This was the French experience. But as long as we participate in this war, the prisoners will continue to be held.

Secretary ROGERS. The incentive that the enemy will have, we hope, for the release of the prisoners, would be our agreement to leave, and the President has said that our objective is to get all of our troops out of Vietnam.

Senator CHURCH. Is the President prepared to negotiate with North Vietnam to establish a date for this in exchange for the prisoners of war or is he not prepared to do this?

Secretary ROGERS. He is prepared to negotiate, we are prepared to negotiate, with the North Vietnamese on any subjects involving the war. We are not going to say anything additional to what we have said now. The President has recently stated his position, restated it. The enemy knows that we are prepared to negotiate. If they want to negotiate in private there would be no difficulty; they can get in

touch with us. We think that all the things they have done recently have been for propaganda purposes. I had a long talk with Ambassador Bruce when I was there, and he is one of our most experienced men in public life, certainly one of our most experienced diplomats, and he said he has not seen any sign of any kind of good faith on the part of the other side to negotiate on anything.

Senator CHURCH. Can you tell us whether or not, Mr. Secretary, the President in the course of these negotiations has offered to fix a final date, as a bargaining chip for the purpose of securing the release of our prisoners?

Secretary ROGERS. I don't think he has because we have not had these private discussions. As I have just said, the enemy doesn't show any interest in having any serious negotiations on any subject.

INCREASE IN U.S. TROOP STRENGTH IN EUROPE

The CHAIRMAN. Before I go on, I want to clear up one matter about the troops. Is it not a fact we had only four divisions until President Kennedy, I think in 1962 and after the Bay of Pigs when there was considerable apprehension, and it was increased from four to six. Is that not true?

Secretary ROGERS. Which troops are we talking about?

The CHAIRMAN. In Europe, in Germany. Did we not increase from the four to six divisions? NATO survived and thrived, we will say, up until then with four divisions. How can you argue that to take out some of them now, 150,000, is going to undermine and destroy NATO, especially in view of the enormous increase in the financial resources of Western Europe. It is much easier for them to pay for their additional troops than for us. I don't get the logic, but I think that is true. I have not checked it, but as I recall it, Kennedy increased them by two divisions, and it is true that the 35,000 were taken out to send to Vietnam. There was a period in 1967 when President Johnson thought they needed troops in Vietnam more, but I think that NATO survived quite all right with only four divisions. I don't think it is right to come and cry that, oh, this whole thing will collapse if we take out 150,000. Is that not correct, that they only had four divisions prior to 1962? Your aide there can tell you. I think it was 1962.

Secretary ROGERS. Let me give you the facts for the record.

The CHAIRMAN. You remember after Kennedy met with Khrushchev in Vienna and he was very embarrassed.

Secretary ROGERS. I think it was 1961; wasn't it?

The CHAIRMAN. It was either the latter part of 1961 or 1962. It was after he had his meeting with Khrushchev in Vienna.

Secretary ROGERS. Yes.

The CHAIRMAN. Shortly after the Bay of Pigs he was going to show Mr. Khrushchev we would not be pushed around, so when we had trouble in Berlin, he sent approximately two divisions. I believe it was 35,000 to Vietnam and two divisions to Europe. Isn't that correct?

Secretary ROGERS. Let me check for the record.

The CHAIRMAN. It certainly isn't very consistent now with the plea it will all collapse if we withdraw 150,000 troops. I think it is very relevant to that question.

If you don't have it there, will you supply it for the record, please?

Secretary ROGERS. Sure.

The CHAIRMAN. I think that is approximately correct.

Senator Cooper.

Senator COOPER. I have no further questions.

Secretary ROGERS. I will get the figures. It indicates here that we have not been below 300,000 since, in the early 1950's, but let me give you the exact figures for the record.

The CHAIRMAN. All right.

HISTORY OF U.S. FORCES LEVELS IN EUROPE

(Supplied by Department of State)

Forces in Europe reached a low of about 150,000 military personnel at the end of 1949. At this time, ground forces consisted of only one Army division equivalent plus armored cavalry regiment.

They were sharply increased to over 400,000 after the attack on South Korea in June 1950 when the President approved and the Congress endorsed the deployment of four additional Army divisions to Europe.

Since 1955, when there were about 405,000 US military in Europe, the number has steadily decreased except during the 1961–62 Berlin crisis when we reached a peak of 434,000.

Army tactical units sent to Europe in 61–62 consisted on only one brigade plus support personnel; the Army brigade was returned to the United States in 1964.

No major Army units (division size) have been sent to Europe for deployment there since the 1950–51 period.

In 1968 two thirds of one Army division (2 brigades) and one armored cavalry regiment were returned to the United States and dual-based here.

Air Force squadrons and naval elements have fluctuated considerably throughout the period, however, these changes have not impacted greatly on the strength.

Adjustments in total forces in the European area as of Calendar years: 1961, 434,000; 1962, 412,000; 1963, 380,000; 1964, 374,000; 1965, 363,000; 1966, 366,000; 1967, 337,000; 1968, 320,000; and 1970, 300,000.

WITNESS' VIEWS ON KATZENBACH POSITION

Senator COOPER. I have one observation. I assume you were joking, I hope you were, were you, when you said you would endorse the Katzenbach——

Secretary ROGERS. Would I what?

Senator COOPER. I thought you were joking, but I would like to ask you whether you were joking when you said you would endorse the Katzenbach position?

Secretary ROGERS. No, no; I said I did not. No, no; I said I did not.

The CHAIRMAN. Senator from Missouri.

IMPORTANCE OF AGREEMENT AT SALT

Senator SYMINGTON. Mr. Secretary, I would now like to talk with you about something that is far more important to me than anything we have talked about so far—arms limitation. President Johnson started the SALT talks, as I understand it, in order to effect an arrangement on the ABM.

It is my understanding that this Administration says that if we do not include an offensive treaty with a defensive treaty there is not going to be any deal.

Now I have seen no figures that indicate less than a hundred million dead Americans if we attacked the Soviets tonight, and they didn't know we were coming, and certainly if they attacked us and we didn't know they were coming, we could still inflict unacceptable damage on the Soviet Union. So I am confident in my own mind that if we don't reach an agreement in the SALT talks we are almost guaranteeing to future generations an Armageddon—a nuclear holocaust. Also if we don't reach agreement fairly soon with the Soviet Union, 10 years from now it won't make too much difference because so many other countries will have nuclear weapons and the capacity to throw them.

If we maintain a position that we won't have any agreement in the SALT talks on a defensive basis without at the same time having an offensive agreement, especially in that the Soviets offered a defensive agreement, according to what I understand from reading the papers, then I believe we are guaranteeing there wan't be any SALT agreement. If we do that, I think it would be the worst mistake this country, very possibly any country, ever made in history.

Now we have a chance now to make one step forward in controlllnig the arms race and I sincerely hope we take that step.

One thing that the American people don't really understand is what a full nuclear exchange would mean to the world today.

I thank you for listening.

Secretary ROGERS. Thank you.

Senator SYMINGTON. If you have any comments I would be very glad to have them.

Secretary ROGERS. No; I will take into consideration what you have said and I appreciate it, thank you.

The CHAIRMAN. Senator Javits.

ENDING EMOTION AND PASSIONS OF VIETNAM CONFLICT

Senator JAVITS. Mr. Secretary, there are two things that I would like to go into with you.

At the conclusion of your statement you make a plea for delay, I don't say this invidiously but for thinking it over and so on. You pick up Senator Stennis' suggestion about let's wait a year or more, and you say, "In an atmosphere free from the emotion and passions that have been generated by the Vietnam conflict."

I would like to ask you this: Is it the Administration's view that if we leave the kind of a presence in Vietnam which you intimated in your testimony, to wit, numerous American forces, still actively involved in the war, if we do leave them, after the year, that that will end the emotion and passions that have been generated by the Vietnam conflict?

Does the Administration labor under the view—I am not going to use an invidious word like "illusion"—that the passions and emotion of the Vietnam conflict will be ended by anything other than a complete termination of the United States presence there?

Secretary ROGERS. I don't think it will be ended, but I think it will subside a great deal. I think there have been probably two or three reasons, principal reasons, why the emotion have been as high as they have: first, that we conducted our foreign policy in a way inconsistent with our statements. We had said that we were not going to become

involved in land forces in Indochina, and we did. Secondly, the length of the war was so surprisingly long and people felt a sense of frustration. Three, our casualties were high, and there was considerable doubt about the ability of the South Vietnamese to handle their own affairs.

Now, if those things change, if our casualties become even smaller, and fortunately this week they are very low—I am not talking about last week, I am talking about this week up to date—and the hostilities are very light, very few combat activities, and we withdraw on schedule which we are going to do, and the South Vietnamese have an election and it is a free and fair election, and their economy continues to improve, other nations begin to show interest in Indochina, as they are beginning to do, other nations realize that the area may be stabilized, yes, I think the emotions will subside. I don't mean they will disappear. I think people are going to debate this war for as long as any of us are alive, but I think it will be quite a different situation.

Senator JAVITS. Does the Secretary base that opinion on the situation in Korea or does he consider Vietnam to be sui generis?

Secretary ROGERS. I think it is sui generis.

Senator JAVITS. So you base it notwithstanding the Vietcong and the activity within, intra, the country and behind the lines. You still are of that opinion that the emotions and passions in, say, a year, will be such that we can deal with the war powers issue on a relatively dispassionate plane?

Secretary ROGERS. Yes; I think the climate will be quite different a year from now.

Senator JAVITS. But you are not signaling to us, are you, Mr. Secretary, that the United States is going to pull out lock, stock, and barrel in that year?

Secretary ROGERS. No; I am not signaling anything different from what the President has already said.

### EFFECT OF PASSING WAR POWERS BILL ON VIETNAM PASSIONS

Senator JAVITS. Well, with all respect, I believe that this matter, which is before us, that the passage of a war powers bill, would be perhaps the most important asset in calming the passions of Vietnam. It would give us nationally, a restoration of the sense of confidence in the American people because the decision to go to war would be shared from that point on, that it will not recur in the fashion of Vietnam and that our Government is capable of responding effectively to the national will in opposition to this war, and this way of getting into war. This is a very fundamental question and I hope, Mr. Secretary, that both you and the President will give this particular factor the most profound thought.

Secretary ROGERS. Thank you, Senator.

### POSSIBLE EFFECT OF S. 731 ON CUBAN MISSILE CRISIS

Senator JAVITS. Now, the other question I had for you comes with respect to your view about the Cuban missile crisis.

You say that "If there had been a full-scale congressional debate prior to his deciding," that is, President Kennedy, "on a course of

military and diplomatic action, that he could not have carried out," I am extrapolating from your statement, "the delicate diplomatic negotiations with the Soviets which led to the removal of missiles from Cuba."

Isn't it a fact, Mr. Secretary, that when the President was carrying on those negotiations, he already was covered by the Cuban resolution passed October 3, 1962, and its operative paragraphs say:

> The United States is determined (*a*) to prevent by whatever means may be necessary including the use of arms, the Marxist-Leninist regime in Cuba from extending by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere, (*b*) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States.

So wasn't it a fact by then he had already had the debate and we had already made a national decision to which the Congress was a party?

Secretary ROGERS. Well, I referred to that in my statement. I don't think that is quite accurate, but in any event, you will notice I did make reference to that in the statement.

Senator JAVITS. We also had the testimony here in committee of McGeorge Bundy, who was at the time President Kennedy's National Security Assistant in the White House and a party to it all, who said, "I think the essential processes of the Cuban missile crisis would not have been sharply affected by this resolution or this bill or this kind of procedure." Mr. Bundy, with his experience, came out decisively for S. 731, my own bill. He was as close to the Cuba missile crisis as anyone, and he does not support the charge that my bill would have inhibited President Kennedy's handling of the Cuba missile crisis.

Secretary ROGERS. Well, I respect his views.

Senator JAVITS. Mr. Secretary, aside from that, isn't it a fact that the bill which I have introduced certainly in the presence of such a resolution as the Cuban resolution, would have enabled the President to even start hostilities and continue them for 30 days, if his order of quarantine on Soviet ships bringing missiles to Cuba had resulted in any U.S. vessel shooting at a Soviet ship to make it stop, which never happened, of course.

Secretary ROGERS. Yes; I think so.

Senator JAVITS. So that would you say, therefore, that we have certainly dealt realistically, in the context of my bill, with the exigencies of the Cuban missile crisis?

### TIME FRAME MIGHT RELIEVE PRESIDENT OF RESPONSIBILITY FOR ACTION

Secretary ROGERS. Well, it is late in the day to get back into the subject, but let me say one of the doubts I have about the time frame, any kind of a specific time frame, is that I am afraid it would be construed in the future in a way to relieve the President of responsibility for taking the action. As the chairman has said repeatedly in our discussions, once hostilities start it is very difficult for Congress to turn them off, and I think that any legislation that, in a sense, says you go ahead and start it and then Congress will take the responsibility for stopping it, should be very carefully thought through, whether that is wise or not. Doesn't that maybe relieve the Presi-

dent of the awesome responsibility of beginning it in the first place? I don't know. One of the arguments that the chairman made to me on Cambodia was, he said, once you have incursions into Cambodia it is going to be very difficult for Congress not to appropriate money to support Cambodia, and there is a lot of logic in that point of view. So I think we have to be careful about legislation of this kind which might relieve the President of the terrible responsibility he feels to start anything of this kind.

No President wants to start a war. Every President wants to avoid it, and certainly any President in this day and age is one that will want to share the responsibilities. He won't want to exercise it all by himself.

### ADMINISTRATION'S ATTITUDE TOWARD CONGRESSIONAL ACTION ON VIETNAM WAR

Senator JAVITS. President Nixon doesn't give us that impression with respect to the Vietnam war. He gives us precisely the contrary impression. Why aren't you here with a resolution asking us to join you in a declaration of policy on Vietnam for carrying on this war?

Secretary ROGERS. Because we are getting out of the war and not getting into it.

Senator JAVITS. But that is inconsistent with your statement that you are going to wait for the readiness on the part of the Vietnamese, and that you are going to stay there until the POW's are released. There is so much argument on our side that Vietnamization could take 15 years and that the pattern of war is that you won't get your POW's unless we do get out. Why aren't you here, why isn't the President here, asking us to join with him in this solemn decision? But to the contrary, our effort is resisted at every turn and even there is the implication that some of us are unpatriotic, if not worse, for advocating any congressional action in which we want to join, want to take the responsibility, that will get us out.

Secretary ROGERS. Senator, I certainly don't know of anybody who has ever said what you just said.

Senator JAVITS. Well, the Vice President of the United States did or intimated it.

The CHAIRMAN. He said it, I think.

Senator JAVITS. Well, thank you, Mr. Chairman.

Secretary ROGERS. I think any such suggestion is inexcusable.

Senator JAVITS. I thank you.

Secretary ROGERS. Inexcusable. I don't see any reason at all to talk in those terms. I certainly never have. I am sure the President has never talked in those terms. I think it is very harmful to our national interest to talk in those terms. As I have said, the policies that the President is pursuing in Vietnam require congressional support and will continue to, and we are going to have to come back to Congress each year for appropriated funds, and we respect your views. We are perfectly happy to consider any proposals that you care to make. Certainly I never made any such suggestions and I wouldn't ever make any such suggestions.

Senator JAVITS. Mr. Secretary, I can promise you, and I am through with questioning, that I will turn myself inside out to work with you

and with our President. You know that. There is no question about that, but I will say it goes down pretty hard here often when the first thing you see is questioning your motivation for doing what you deeply feel in your conscience is in the highest interests of our people and our time and our country. Thank you, Mr. Chairman.

APPEAL OF ELECTIONS TO VIETNAMESE PEOPLE QUESTIONED

The CHAIRMAN. Mr. Secretary, one thing happened yesterday. I only call it to your attention because I am sure it wouldn't come otherwise. We had two witnesses, both with long experience in Vietnam: Mr. Hickey, a professional anthropologist, and Mr. Luce, who has been out there in one capacity or another for about 15 years. Both of them said elections as such don't appeal to the Vietnamese, although we are insisting on them.

Mr. Hickey made the point quite persuasively, and I think Mr. Luce, agreed that the Vietnamese have a process of accommodation. These people know what they are talking about. I think they have had as long experience there as anyone in the Government has had. We are left in the position of continuing this war to foster a system that is really not appealing to the Vietnamese. I have a very strong suspicion that this is probably right.

DELAY IN FULFILLING U.S. NEEDS TO PROVIDE VIETNAMESE ELECTION QUESTIONED

This being true, my last point is, that I do think that in the balancing of what is good for Vietnam against what is good for the United States, it is quite logical that those representatives in the House and the Senate—regardless of what one may think of them as individuals—who do feel more sensitive to the needs of our own country, find it difficult to feel that it is important to delay the things that need to be done in the United States.

I don't need to recount these needs. They are a long story, and I cannot agree to delay them in order to give a people 10,000 miles away an opportunity to have an election which very likely doesn't even interest the majority of them. It may interest the man in control, such as Mr. Thieu, because he thinks this is a way to legitimize his power, but it doesn't interest the ordinary people in Vietnam. This was very persuasive testimony yesterday saying that really the average Vietnamese are not interested in the elections which we are fighting to give them. This really makes a very frustrating picture.

I wonder if this sort of testimony ever filters up as high as the White House or the eighth floor. I doubt that it does.

Secretary ROGERS. Seventh floor. [Laughter.]

The CHAIRMAN. Seventh floor, I am sorry.

Do you have any questions?

EFFECT OF SETTING WITHDRAWAL DATE ON POW'S

Senator PELL. Yes; I do. There is one point that bothered me in connection with the prisoners of war. My understanding, based on a series of private conversations and other knowledge, is that the North Vietnamese have indicated very definitely that if we would set a date

for the withdrawal of our forces, the substantive arrangements for the prisoners of war will fall into place very quickly. This does not touch the second point in which the President is interested, which is providing South Vietnam with its chance for independence. The first point, I think, is correct; is that not so?

Secretary ROGERS. They said they would discuss it, but they didn't say release. They said that at the beginning of the Paris talks.

Senator PELL. I realize that is in the public record, but would you not believe in your own heart, in your own mind, from the private knowledge that is available to you, that the pieces would fall into place very quickly?

Secretary ROGERS. No.

Senator PELL. You would not agree?

Secretary ROGERS. No; I would not; no.

### WORRY REGARDING REUNIFIED AND REARMED GERMANY

Senator PELL. The other question that I had concerns the withdrawal of troops from Europe. Isn't one of the real unsaid reasons why we are concerned about it is we don't want to see the vacuum caused by the departure of our troops filled by the West Germans? While we want to see Germany reunified in the long haul, I think most people are worried about the idea of a reunified and rearmed Germany. Isn't this one of the factors that should be surfaced, and is at stake here or am I wrong in this?

Secretary ROGERS. Well, it is not a factor in my thinking at all. There are so many other factors that seem to weigh against this amendment at this time, that the one that you mentioned is not under consideration.

I think we have probably discussed this subject enough.

Senator PELL. That is all.

### PAST HEARINGS ON U.S. TROOPS IN EUROPE

The CHAIRMAN. I want for the record to state that in April and May 1967, there were hearings on U.S. troops in Europe, and in May, June, and July of 1970, last year, there were hearings.

Altogether there are some 400 pages of hearings on this subject if you are saying we need to consider and have hearings on it. Less than a year ago, we were having hearings on this subject. I know of nothing that has newly developed, certainly unless you can inform us, that requires such great reevaluation. Those hearings were very thorough and exhaustive. The position of the Administration then, I think, is the same as it is now.

Thank you very much, Mr. Secretary.

Secretary ROGERS. Thank you, Mr. Chairman.

(Whereupon, at 1:20 p.m., the committee adjourned subject to call of the Chair.)

(The following information was subsequently received for the record:)

### STATEMENT AND QUESTIONS OF SENATOR GALE MCGEE FOR SECRETARY OF STATE WILLIAM ROGERS

Mr. Chairman, now that the Secretary has finished his prepared statement, it is necessary that I take my leave in order to catch a plane for a speaking

engagement. I ask unanimous consent that I may submit two or three questions to Secretary Rogers for his response in the record of these hearings.

Mr. Secretary, what we are examining here (or ought to be) are the ways and means of updating and modernizing the role of the Senate in foreign policy.

The Founding Fathers said some pertinent things about that role, principally relating to treaty ratification, to the appointment of ambassadors, and to a declaration of war. Otherwise, the initiatives and responsibilities for projecting and executing American policies with foreign countries was lodged with the President of the United States.

This had not been an easy decision at the Constitutional Convention in Philadelphia in 1787. But some of the shattering experiences among the Thirteen Original Colonies as they had struggled against each other under the Articles of Confederation had at least convinced most of the Fathers that, whatever else, the new constitution had to place the principal authority for the Nation's foreign relations in the Office of President.

As one of the delegates in Philadelphia said at the time, because of our experiences as Colonies, it is important that our nation, when speaking overseas, speak with a single voice.

All of this would be clear enough—even today—except for one thing: The times have changed.

For example, is it not important to measure the modern role of the United States against the backdrop of the times in which the Founders of our republic drafted the original Constitution?

History has cast us in the role of a world power, with the attendant responsibilities which our position on the front lines of world politics require. Does not this new—if frightening—responsibility necessitate a reassessment of the original historic relationships between the Executive and the Legislative branches?

Also, the architects of our Constitution could not have envisaged the scientific phenomena of atomic power, the horror of nuclear warfare, nor the fateful dimension reflected in the phrase "balance of terror." How have the events since World War II raised new questions and imposed new criteria in regard to our policy-making procedures?

Does not a part of our difficulty stem from the fact that in this nuclear age it may be necessary to wage certain kinds of wars without ever declaring them?

I have often argued that in this modern day we could no longer afford the luxury of declaring war again, even though it might be necessary to wage one—particularly one of a limited nature, or a police action, or a peripheral confrontation. In the wake of our national trauma over Vietnam, I even wonder at times whether we might have been better off to have declared war formally in late 1964 or early 1965. I should add, however, that while such a step would have seemed to hold tempting advantages; i.e., total effort, censorship, national mobilization, I am still fearful that to have done so would have risked an uncontrollable and ever-widening conflict.

Mr. Secretary, is there a case still to be made for *undeclared* war? Don't misinterpet that question. I am not advocating any kind of war as a matter of national policy but only trying to face up to the real world of which we are a part and the conceivable necessity of having to resort to arms under some special circumstances.

For whatever right or wrong reasons, as a nation we have been deeply—and in the minds of many, even tragically—involved in Vietnam. The President of the United States, in my opinion, is committed to an American withdrawal from Southeast Asia. He has been living up to that commitment in a responsible way. Because of this, I believe it serves us no great purpose to quibble over procedural withdrawal issues such as are contained in several of the resolutions currently pending before this Committee.

If we learn nothing else from our internal dissensions of the past decade, it ought to be that our heavy concentration—especially in councils of this Committee—on placing the blame for the troubles of the recent past have cost us very dearly in many ways. The concentration, while understandable at times, has nonetheless remained essentially negative. And, in a sense, it tends to legislate wrong directions at irrelevant times—all of which quickly become counterproductive.

The negative attitude or the consequences of raking over the ashes of the past is not unique to the present Senate of the United States nor to this particular Foreign Relations Committee. History is replete with the seeming penchant of Senators "to prevent" earlier wars rather than look ahead to preventing new crises down the road ahead.

I remember from my own college days in the mid-1930's the obsession of the Senate with legislative procedures for preventing World War I. During the mid-1940's scholars and some Senators joined in striving to assess the blame for World War II and selected President Franklin D. Roosevelt as the scapegoat. As a result of the Korean conflict, there was a new mobilization at the senatorial level to fix the blame and then to lay out plans for preventing future Koreas. And now it is Vietnam.

But the price that the nation paid for those constantly backward glances was to ignore the force of coming events. That is why it is imperative that these hearings and this Committee in this Senate make certain that we proceed onward in the constructive inquiries of which the question of executive power and the Senate in the last generation of the Twentieth Century require wise answers. There will be little wisdom available in such a searching inquiry available in pinning the blame. There is plenty of blame to go around for everybody.

Among the proposals now before this Committee which are aimed at pinning a specific date for American withdrawal from Vietnam, or for cutting off appropriations at a time certain, or for cutting back the manpower, all seem to be not only off the central question at hand but misleading and confusing in terms of what we ought to be talking about.

Mr. Secretary, should not these proposals be separated entirely from the much larger question of constitutional balance and procedures in executive and legislative responsibilities in foreign policy?

At this very late point in our own times we would do well to emphasize the positive in these hearings and low-key the negative. For the next crisis may yet catch us with our policy-hearings down without adequate foresight or fresh thinking on how we ought to act or what we best should do next time around.

In short, what I am saying is we are in danger with this passel of resolutions of resolving the wrong issues (how fast to get out and by what date) at the expense of defining the right issue and defining it in time. That issue remains constant: Updating and modernizing our constitutional procedures for the Executive and the Senate in sharing the responsibilities for war and peace.

Thank you, Mr. Secretary, for the patience of your responses and to you, Mr. Chairman, for the courtesy of extending the privilege of raising these questions.

STATEMENT BY SECRETARY ROGERS IN REPLY TO WRITTEN QUESTIONS OF SENATOR McGEE

As I understand it, your questions relate to the impact of modern events upon the original constitutional relationship between Congress and the President in the area of the war powers. As I said in my prepared testimony, I do not see how we can fail to be impressed by the fundamental changes in the factual setting in which the war powers must now be exercised. I mentioned many of the same factors you point out—the emergence of the United States as a world power, our large standing military capacity and the development of technology, especially nuclear weaponry. All these factors highlight the need today for prompt, decisive and, in some situations, unpublicized action. At the same time, these factors also serve to reinforce the desirability of appropriate congressional participation in decisions which risk involving the nation in war.

I would also agree with your comment that declarations of war are not always appropriate in the modern context. There may be situations in which a simple statute or a joint or concurrent resolution will be desirable from a diplomatic standpoint and will still allow Congress to exercise its full constitutional role in decisions of war and peace. Whatever the form in which the power to declare war is exercised, I believe that power retains real meaning today. That power continues to represent a constitutional imperative: that the critical decisions concerning war or the risk of war must be based upon the effective exercise by Congress and the President of their respective constitutional responsibilities.

Finally I agree that there is room for improvement and possibly modernization regarding the exercise of the war powers; however, I think legislation may not necessarily be the best way to proceed. I hope I have conveyed the impression which I intended that we in the Executive branch are open to all constructive suggestions. We do not foreclose any possibility which could lead to improved legislative-executive consultation in this vital area. I want to emphasize, however, that I think this is a serious constitutional issue—one that is basic to our constitutional structure. Any attempt to change that structure should be

considered thoroughly and judiciously after the emotions and passions generated by the Viet-Nam conflict have subsided. As you point out, we are in danger of altering our constitutional structure to deal with the mistakes of the past rather than focusing our attention on the more important question of how we can assure that in the future the constitutional framework of shared responsibility for the exercise of the war powers works in the nation's best interests.

# WAR POWERS LEGISLATION

MONDAY, JULY 26, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10 a.m., in room 4221, New Senate Office Building, Senator J. W. Fulbright (chairman) presiding.

Present: Senators Fulbright, Sparkman, McGee, Spong, Case, Cooper, Javits, and Pearson.

The CHAIRMAN. The committee will come to order.

## OPENING STATEMENT

The committee today continues its hearings on several bills pertaining to the authority to initiate war. Hearings on the prospective war powers legislation now before the committee began in March, at which time we heard testimony by four distinguished historians on the broader historical and constitutional questions raised by the bills and resolutions. In April, the committee heard further testimony from well-known representatives from both the Kennedy and Johnson administrations, followed in May by Secretary Rogers presenting the Nixon administration's views on the pending war powers legislation. During the course of the hearings, we also heard testimony by a number of Senators and Congressmen who are sponsors or cosponsors of the bills.

Today we shall hear the testimony of Alexander M. Bickel, professor of law at Yale University. Tomorrow the witnesses will be Senator Bentsen of Texas; Senator Eagleton of Missouri; William D. Rogers, partner in the Arnold & Porter law firm in Washington; and George Ball, currently chairman of Lehman Investments in New York.

Professor Bickel, we are very pleased to have you this morning. You are well known, of course, in Washington for various activities. We have a very, I think, sympathetic view to our common interests in trying to reestablish what we think is the need for a better balance between the executive and legislative branches of our Government. Will you proceed, sir.

## STATEMENT OF ALEXANDER M. BICKEL, PROFESSOR OF LAW, YALE UNIVERSITY

Mr. BICKEL. Thank you.

Mr. Chairman, I greatly appreciate the invitation of the committee, of course, and the opportunity to express my views in this historic forum on the issues the committee has under consideration.

INTENT OF FOUNDING FATHERS

When the Constitutional Convention was debating the allocation of the war power, George Mason of Virginia said that he "was against giving the power of war to the executive, because not safely to be trusted with it; or to the Senate, because not so constructed as to be entitled to it." He was, he said, "for clogging rather than facilitating war; but for facilitating peace."

Oliver Ellsworth of Connecticut, who was later the third Chief Justice of the United States, expressed much the same thought. "It should be more easy to get out of war," he said, "than into it."

I believe that not only in the policies that we have permitted at least two successive Presidents to pursue, but in institutional arrangements that Congress and the people have acquiesced in for some decades now, we have managed to reverse the proper order of things. We have managed to clog peace and facilitate war. I think it is time we got back on course.

Our Founding Fathers were not so unworldly as to believe that in terms of formulating and executing the policy of a great nation, it is in fact easier to make peace than to make war. It is in fact, as Ellsworth for one, was careful to say, harder to make peace and simpler to make war. But the framers of the Constitution intended that our Nation's institutions and processes should be so structured and arranged as to make it more difficult to do the easy thing—get into a war, and easier to do the difficult—get out of war. For this reason, they insisted that the declaration of war not be an executive prerogative, as it had been under the British Crown. They insisted also that it not be left to the Senate, a single, less numerous Chamber which they viewed as capable of more expeditious action. Rather they vested the war power in Congress, acting through both Houses, with the approval of the President.

Congress, the Constitution provides, may declare war. The Convention, as the committee has heard before, had thought of using another, in many ways more comprehensive word, and of empowering Congress to make war. But this phrase seemed to confide to the Congress the function of conducting a war once it had started, and also possibly seemed to deny the power of the Commander-in-Chief to repel attacks against the United States. The President, the Convention thought, should be the Commander-in-Chief, and there was no intention to limit the authority implicit in that office. As commander, the President would control tactical decisions concerning the deployment of our forces in the field, and see to their safety. Congress, has sometimes had occasion to find out, especially during the Civil War, that, as the framers knew, it cannot well exercise command, and should not attempt to do so. Nor was there any intention to deprive the President of the power to repel attacks, or to respond to the threat of attacks against the United States or against our forces, when speed and conceivably even secrecy are of the essence.

POWERS LODGED IN CONGRESS

Yet nothing can be clearer than that the power to declare war was lodged in Congress alone. No doubt the President was to have a

function in making, as opposed to declaring, war. Even so, the framers were extraordinarily wary of standing Armies, and of their use by the Executive. The framers authorized Congress, therefore, not the President, to "raise and support Armies," and then provided that no appropriation of money to raise and support Armies "shall be for a longer term than 2 years." Moreover, it is equally clear and of greater importance, and of more crucial importance, that the residual legislative power over the whole domain of foreign policy, and of war as an instrument of policy, was placed in Congress. The vast bulk of those powers which, as the Supreme Court said in *United States* v. *Curtiss-Wright Corp.*, 229 U.S. 304 (1936), "vested in the Federal Government," without need of explicit enumeration, "as necessary concomitants of nationality"—the vast bulk of these powers belongs to Congress. Not only was Congress empowered to declare war, to raise and support Armies, to make rules for their government and regulation, and to provide for calling forth the militia and for organizing, arming, and disciplining it, but in the end Congress was given the overall, comprehensive, "necessary-and-proper" power.

The "necessary-and-proper" clause of article I of the Constitution authorizes Congress, of course, to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers * * *." The reference is to the previously enumerated powers of Congress. But there is another portion of the necessary and proper clause, not so often cited, which is of the greatest consequence when it comes to issues of foreign policy and of war and peace. The clause also charges Congress to make all laws which shall be "necessary and proper for carrying into execution all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

### POWERS VESTED IN PRESIDENT

Against this roster of congressional functions, stand the bare and summary provisions of article II, which vest the Executive power in the President, declaring that he shall be Commander in Chief, and authorizing him, with the advice and consent of the Senate, to make treaties and appoint Ambassadors. Whatever is needed to flesh out the slender recital of Executive functions must be done by Congress under the "necessary-and-proper" clause. Congress alone can make the laws which will carry into execution the powers of the Government as a whole, and of its officers, including the President.

The text of the Constitution and its history thus plainly limit the President. But the law of the Constitution under our system is defined not only by the text and by the history of the text, but by practice long accepted. The earliest practice, as the committee has heard, conformed to the division of warmaking powers envisioned by the framers. But later practice, which again has been recited to this committee in the hearings of 1967 and more recently, the later practice, particularly in this century, has gone beyond.

### VIETNAM WAR MARKS FARTHEST EXTENSION OF PRESIDENTIAL POWER

However, even as against the background of this practice, even against this background, the decisions, in my judgment, the decisions discussed as early as 1964, made in the first half of 1965, and executed

thereafter, to commit the moral and material resources of this Nation to full-scale war in Vietnam seem to me to mark the farthest, and really an unprecedented, extension of Presidential power. Certainly the power of the President in matters of war and peace has grown steadily for over a century. The decisions of 1965 may have differed only in degree from earlier stages in this process of growth. But there comes a point when a difference of degree achieves the magnitude of a difference in kind. The decisions of 1965 amounted to an all but explicit transfer of the power to declare war from Congress, where the Constitution lodged it, to the President, on whom the framers, explicitly refused to confer it.

I do not recur to the issue of the constitutionality of the Vietnam war—which properly enough, in my view, the courts have not adjudicated, and should not—I do not recur to this issue idly, or in search of a satisfying repository for blame. It seems to me there is enough blame for quite wide distribution. I bring up the issue of how we got into the current war because it is an experience from which we should learn a lesson. The lesson is that something has gone wrong with our institutional arrangements, and nothing will so readily enlighten us on the rights and wrongs of abstract institutional arrangements as the wrong practical results of an institutional arrangement.

The great number of presidential initiatives prior to the Vietnam war could with one or another degree of plausibility, be fitted into theories that fall short of complete repudiation of the constitutional division of warmaking power between Congress and the President. The decisions and actions of 1965 outran any such theories. There was no sudden attack on forces of the United States, requiring instant response, perhaps in secrecy, and thus making resort to Congress impossible if effective action was to be taken. Nor were we in any sense, as in some of our Latin American ventures around the turn of the century and after, interposing our forces in a foreign nation to protect American citizens and property, while remaining neutral with respect to conflicts there. The Korean action and the dispatch of troops to Lebanon by President Eisenhower before 1965, as well as President Johnson's intervention in the Dominican Republic later, all could at least arguably be made to fit the sudden-attack and neutral-interposition theories. But not the round the clock bombing of North Vietnam, which began in February 1965. And not the sending of 50,000 troops by a single decision that President Johnson announced on July 28, 1965, commenting at a press conference "this is really war."

It was really war and it committed as the President has said some 2 weeks earlier, another press conference on July 9, "our power and our national honor"—by a deliberate decision, considered over an extended period of time, not forced by sudden events; a decision functionally and in every other way amounting to an initiative for war. If this decision was not for Congress under the Constitution, then no decision of any consequence in matters of war and peace is left to Congress.

I will not pause to discuss subsidiary justifications for the Presidential decision to go to war in Vietnam, such as the supposed SEATO obligation, or the Tonkin Gulf resolution. As for the claim that Congress ratified the executive action by appropriating moneys to support and steadily enlarge it, undoubtedly Congress did so, and un-

doubtedly it did so in part under a misapprehension that it was in principle obliged to extend general support, even if free to make judgments on questions of detail. This is precisely the misapprehension which, I believe, it is necessary now to dispel.

BROADENING OF CONCEPT OF "SUDDEN ATTACK" QUESTIONED

Few observers or even executive spokesmen deny the import of the original constitutional arrangements. When the largest claims are entered for independent presidential power, reliance is placed in prior practice, and in assessments of modern conditions which, it is said, require a revised conception of the original separation of powers. Thus Secretary Rogers, testifying here on May 14, 1971, said that the power to repel sudden attacks, which the framers plainly meant to repose in the President, must in modern times have a broader rationale—that is, and I quote him, "that in emergency situations the President has power and a responsibility to use the Armed Forces to protect the Nation's security." Further on, the Secretary expressed his concern that any limitation on the President's ability to meet emergencies, and again I quote "would run the grave risk of miscalculation by a potential enemy regarding the ability of the United States to act in a crisis," and he spoke of the need to allow the President "flexibility."

I am not clear just what the Secretary had in mind. The "sudden attack" concept of the framers of the Constitution denotes a power to act in emergencies in order to guard against the threat of attack, as well as against the attack itself, when the threat arises, for example, in such circumstances as those of the Cuban missile crisis of 1962. So long as it is understood that this is a reactive, not a self-starting affirmative power, I have no trouble agreeing that it is vested in the President by the Constitution, that it provides flexibility, and that Congress cannot take it away. Secretary Rogers added that he did not "interpret 'flexibility' as a euphemism for unchecked executive power." I don't see, therefore, why he felt that the concept of "sudden attack" needed to be broadened.

Of course, the power is, in an emergency, to guard against attack or the threat of attack on the United States or lawfully deployed forces of the United States—not an attack on someone else. If, in the event of an attack on a friend or ally, there is implicit the threat also on us, and it is an emergency, then the President can act. If not, then if there is an adequate consensus that we should spring to the help of our friend, Congress can be persuaded to act, and fast enough. If Congress won't act, or if our friend is devoured in a matter of hours, then I think it is evident we could not have helped effectively anyway. I should think we would have learned from the Vietnam experience that without knowing why we fight, without knowing that we want to fight, we can't fight effectively, and I think friend and foe alike have learned as much about us, and know it, whatever we may say here.

Secretary Rogers also mentioned that the United States is now a world power, and that we live in a time when there is fear of nuclear

war, and when deterrence is considered important. But again, if we are talking, as Justice Holmes used to say, things and not words or euphemisms, all this means is that sudden attacks and the threat of them are more distinct possibilities now than 200 years ago, and that emergencies are more likely to be acute and dangerous. The sum of it is that the possible occasions for use of the President's constitutional power to repel attacks, or to deal in an emergency with the threat of attack, loom more ominously on our horizon than on that of the framers of the Constitution. I don't see why the conclusion is drawn—the Secretary, in fact, merely implies it—that our conception of Presidental power must be broader.

### CONGRESSIONAL AUTHORITY TO DECLARE WAR IN MODERN CIRCUMSTANCES

It is also asserted in defense of independent Presidential action—though not by Secretary Rogers—that Congress is authorized only to declare war, and in modern circumstances, that is, after all, often not what is wanted. It is too much, and since too much is all that Congress has authority to do, it must be for the President to do anything somewhat less. I think the argument is altogether fallacious. There may actually be some sort of difference between the war we have waged in Vietnam and a war that Congress might have declared, although the difference, if any, is metaphysical. But there is utterly no reason to think that Congress has only the mega-power to declare war in the exact terms of the constitutional grant, and no intermediate power to commit the country to something less than a declared war.

Congress, and Congress alone, as I have emphasized earlier, has the necessary and proper power, the power to do anything that is necessary and proper to carry out the functions conferred upon it and upon any other department or officer of the Government. If in the conditions of our day it is necessary to carry out the power to declare war by taking measures short of a declaration of war, everything in the scheme of government set up by our Constitution indicates that Congress has the needed authority.

### UNITED STATES V. CURTISS-WRIGHT CORP.

*United States* v. *Curtiss-Wright Corp.*, *supra*, to which I referred earlier, is often cited as indicating a modern development of independent Presidential power beyond what the Constitution originally intended. The case is familiar, of course, but let me take a moment to examine it. It is a rather eloquent, if not grandiloquent, opinion by a Justice Sutherland whose eloquence was usually reserved for decisions constricting rather than enlarging the power of the Federal Government. The opinion has, therefore, the impact of the unexpected. But it is really quite a limited holding. Congress had, by joint resolution, authorized the President to prohibit sales of arms and munitions to countries then engaged in a specific armed conflict in Latin America, in the Chaco, whenever the President found that such a prohibition would contribute to the reestablishment of peace between those countries. The President used this authority, and the joint resolution under which he acted was attacked as void for excessive delegation. The court assumed without deciding that the delegation would have been exces-

sive if applicable to internal affairs. Whether this assumption was valid at the time is thoroughly questionable.

Little more was delegated to the President than the power to establish a necessary factual condition precedent. The joint resolution closely defined what the President was to do, and where he was to do it—comparison with the terms of the Tonkin Gulf resolution is interesting. This was hardly delegation running riot, under cases then being decided, under contemporaneous cases.

At any rate, having assumed arguendo, without deciding, that as applied to domestic affairs the delegation would be unconstitutional, the court declared that:

> Within the international field Congress must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.

Hence the delegation was held valid. The eloquent assertions of independent Presidential power in the "vast external realm," which was Justice Sutherland's phrase, which were largely dicta, were largely restricted to statements that the President alone can "speak or listen as a representative of the Nation"; that he alone negotiates treaties, and that the Senate cannot intrude, although it must give advice and consent ultimately; that the President has "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations," which in context must be taken as a restatement of his role as chief spokesman and chief listener, especially since the court added that the President's powers "must be exercised in subordination to the applicable provisions of the Constitution"; and that the President, and not Congress, has the better opportunity of knowing the conditions in foreign countries, because the President has his agents, and is better able to maintain secrecy. That was all. Nothing about powers to go to war, or to use the armed forces without restriction. So far as broad delegation without standards of legislative power to the President is concerned, *Kent* v. *Dulles*, 357 U.S. 116 (1958), decided a generation later, has made clear that it will no more be tolerated in the "vast external realm" than domestically. Not that *United States* v. *Curtiss-Wright Corp.* really ever held anything to the contrary.

### CONGRESSIONAL POWER REMAINS LEGITIMATE DESPITE DISUSE

Passing the question of possible reach of independent Presidential power, one thing is surely clear. Whatever aggrandizement of Presidential power may have occurred during the past generation, whether or not Presidential initiatives taken in the absence of legislation to the contrary were constitutional, the practice of recent decades or of a century cannot have worked a reduction of congressional power, which may in the last two or three decades have lain largely in disuse, but which is as legitimate now as the day it was conferred. As the late Justice Robert H. Jackson said in his classic concurring opinion in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952):

> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility * * * When the

President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional powers of Congress over the matter.

RESTRICTIONS ON PRESIDENT'S AUTHORITY TO DEPLOY FORCES ABROAD

The President alone negotiates and treats, and the Senate ratifies or not, the Congress supports, or not, but neither Senate nor Congress negotiate and treat. And the President alone commands troops and sees to their safety. But the novel claim is now made, by Secretary Rogers among others, though more tentatively by him than by others, that the President has uncheckable independent authority to deploy forces abroad short of hostilities. To interfere with this independent authority, said Secretary Rogers, would raise a serious constitutional issue. Yet, in 1917, Congress forbade, while we were in a state of neutrality, the sending out of the jurisdiction of the United States of any vessel built, armed or equipped as a vessel of war, with any intent that it be delivered to a belligerent nation, 40 Stat. 217, 222; further restrictions on the sale of arms were added by the Neutrality Act of 1935, over vigorous executive objection, 49 Stat. 1081; and most importantly in the Selective Service Act of 1940, Congress provided that no draftees were to be employed beyond the limits of the Western Hemisphere, except in territories and possessions of the United States, 54 Stat. 885. More recently, Congress has acted to impose restriction on the use of forces in Laos, Thailand, and Cambodia. Even in the famous bases for destroyers deal in 1940 which President Roosevelt was said to have transferred on his own authority, his Attorney General, later Justice Jackson, advised that the transfer was lawful only because he construed the acts of 1917 and 1935 as permitting it. The Attorney General also advised that a proposed transfer of mosquito boats then under construction was prohibited by the 1917 act. Thirty-nine opinions of the Attorney General 484, 496 (1940). President Roosevelt accepted the authority of Congress as exercised in the 1917 and 1935 statutes, and acted as Commander in Chief only within it.

INSTITUTIONAL CAPACITY AND LIMITATIONS OF PRESIDENCY AND CONGRESS

The Presidency, Secretary Rogers said, has a peculiar institutional capacity for "rapid and clear decisions" based on "superior sources of information, whereas Congress," and this was said perhaps more in sorrow than in anger, is a more deliberate, public, and diffuse body. But the Secretary recognized also the institutional limitations of the Presidency, and these, in matters of war and peace, counsel I believe a redressing of the balance between President and Congress. The institution of the Presidency is, to be sure, ultimately responsive to public opinion. But the President is a single man, in many ways a distant and regal personage. The discipline of the democratic process plays on him only grossly, at wholesale. His policy making is necessarily private, almost like that of a court. The large results become known, and on these he can be judged and held to account. But the process by which he reaches them is seldom opened to scrutiny, and consequently little open to influence. Congress on the other hand is institutionalized com-

munication, access, participation. Here much of the decisionmaking process is in the open, accessible and observed. Congress is the institution where we do not merely hold our Government to account, but can in some measure participate in it. It isn't always, but it can be. The Presidency by its nature seldom is.

GRANDEUR AND POWER OF PRESIDENCY WILL REMAIN

The Congress need not fear that, in resuming a fuller share of its own constitutional function, it will denude the office of President of its grandeur and its power. It will remain true, as Woodrow Wilson said, and as in just the past couple of weeks President Nixon has once again demonstrated, that the President's office is anything "he has the sagacity and force to make it."

It will remain true, as Justice Jackson said, also in his concurring opinion on *Youngstown Sheet and Tube Co.* v. *Sawyer*, that the President "almost alone * * * fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communication." By his prestige and influence on public opinion, Justice Jackson added, the President exerts a leverage upon the institutions that are supposed to check and balance his power which can often cancel their effectiveness. In matters of war and peace, a succession of Presidents—well-intentioned and patriotic, to be sure—have indeed come close to canceling the effectiveness of Congress. The result is a dangerous contradiction of the principles of democratic government, which I believe ought to be set right.

BILLS UNDER CONSIDERATION

I am open to questions, Mr. Chairman, naturally, concerning specific provisions in the bills the committee has under consideration. I will say in general only—on the one hand—that I don't think the President can be deprived of his power to respond to an imminent threat of attack—as well as to the attack itself—on the United States or on troops of the United States lawfully stationed wherever they may be, nor I believe can he be deprived of the power to continue to see to the safety of our troops once they are engaged, even if a statutory 30-day period has expired. In these respects, the Javits and Eagleton bills raise constitutional problems, if one can call them that, which are, however, soluble I believe by simple redrafting. I do think that Congress can govern absolutely, absolutely, the deployment of our forces outside our borders and that Congress should undertake to review and revise present dispositions. In this fashion, the eventuality of an attack or threat of attack against our forces can be indirectly provided for.

On the other hand, I think that a generalized, prospective delegation by Congress to the President of the power to go to war in aid of our allies pursuant to treaty commitments gives away more of its own power than Congress may constitutionally give away by so broad a delegation—or at any rate, a delegation which it is possible to construe all too broadly. In this respect, I would favor amendment of the Javits bill.

Thank you, Mr. Chairman.

The CHAIRMAN. In view of the presence of the distinguished author of the bill, I wonder if I might not yield to him at this point on my own time if he would care to address himself to the suggestions of amending the Javits bill.

Senator JAVITS. Thank you.

Thank you very much, Mr. Chairman.

COMMENDATION OF WITNESS

I had great interest in having the committee hear the views of Professor Bickel, which he has given us this morning. I first would like to express my appreciation to him for his willingness to appear. This did not happen to be a convenient day for him, but he was gracious enough to come anyway. I think his testimony is extremely important because of the substance of what he has said and because of his great prestige and authority in the field of constitutional law.

I have one point which the chair properly prompts me on, and that is the question of amendment, as we are very directly at that point now or will be soon.

Let me say this. It is very encouraging to me that the thinking has been directed throughout these hearings along the same framework which I had the privilege of authoring.

VIRTUES AND PROBLEMS IN BASIC FRAMEWORK OF WAR POWERS BILLS

Do you see anything wrong with that basic framework that characterizes my bill, as well as those of Senators Eagleton and Stennis?

Mr. BICKEL. No, sir; I see indeed great virtues in it. I see this principal virtue, that the President's decisionmaking process, although postfacto in some measure will be brought out in the open. That there will be an obligation to come out and justify what has been done, and the continuation of it. The only problem that I mentioned that I see is that if he is engaged and 30-day period runs out, I think one can give him policy direction, one can tell him what he now ought to aim for, but I don't think one can control his tactical decisions in the process of disengagement.

I don't know that that point even requires an amendment because that is the constitutional position. If the legislative history makes it clear that is what Congress had in mind and intended, there is nothing wrong with a 30-day provision which exercises the power of Congress subject to the President's power to protect his troops tactically in order to accomplish the policy objectives the Congress has given him, which is a 30-day withdrawal. I see nothing wrong with it even as it stands but simply suggest some legislative history that would usually surround it.

Senator JAVITS. I agree. This should be done in legislative history. So far as I am concerned it is clear if the President's authority to make war has expired under the bill and our troops need to be extricated, he certainly has the authority as Commander in Chief to do what in his judgment is requisite to extricating our troops, including continued hostilities, so long as the whole thrust is to extricate.

Mr. BICKEL. Out rather than in, right.

Senator JAVITS. There is no question about that.

PRESIDENT'S POWER REGARDING IMMINENT OR THREATENED ATTACK

Also, I am very indebted to you for emphasizing the inherent power of dealing with an imminent or threatened attack. This was pointed out as a possible weakness of my bill which Senator Stennis spelled out in words dealing with the imminence of attack or imminent threat of attack. I am agreeable to spelling it out in words although I don't think I agree with you. I think that is inherent authority in the President when it is a reaction against our territory or our nationals or our forces.

On the other hand, if it is a reaction against someone else's territory, forces, or nationals, that is precisely where I would hope this bill would catch hold. Would you agree with that?

Mr. BICKEL. Yes, sir; I do.

My inclination to spell it out would be grounded in what I see as the possibility of making its limitations as well as the presence of this power clear; that is, I would use the words "threat, emergency," and that would tend to tighten it up, I would think, if it is carefully drafted, as well as making clear that Congress understands that he has the power to deal with threats and has no intention to deny the power to him. If it would be handled that way, I would prefer to see it drafted out.

Senator JAVITS. In words.

Mr. BICKEL. In words.

Senator JAVITS. For that purpose, the words "imminent threat" would seem to be the right quality.

Mr. BICKEL. I think perhaps the word "direct" so as to avoid the too distant chain of causation, something is threatening south Iraq and suddenly it is a danger.

Senator JAVITS. We will work with that and I certainly am agreeable to that.

DESIRABILITY OF DEFINING "HOSTILITIES"

I would like to ask you about the desirability of defining "hostilities." This effort is made in both the Eagleton and Stennis bills. It is not made in my original. The argument is made if you don't define hostilities then the President can define it for you. Of course, we have the veto power. If we don't think they are hostilities, we don't have to continue the authority for 30 days. We can abort the President's authority by passing the necessary measure which will shorten it from the 30 days. What would you think about the desirability of defining, always running the danger that you will define it too narrowly, the word "hostilities"? Or, rather leaving it as a word very well-defined by practice and that you simply cannot cut this too fine.

Mr. BICKEL. I am somewhat of two minds on it. I started out, as you may know, Senator Javits, I think I may have mentioned it to you privately in correspondence, I started out with some inclination against the whole process of codification, simply shying away from it as a common law lawyer instinctively does, and I am sure you instinctively did.

I came around to it, but there is a residue of that attitude in my still feeling uncomfortable with over elaborate efforts at definition, and I think that is applicable to the attempt to define hostilities.

The only point the other way that moved me at all is that I noticed in the attempted definitions the deployment of advisers and those quasi-hostile or quasi-military, quasi-hostile moves that we started in Vietnam with, for example, and for all I know are going on in other parts of the world, that those are specifically covered, and I am a little attracted by that because I think an undefined, the undefined, term "hostilities" would be construed not to include the sending of advisers who are not there to fight or of other troops.

Now, on the other hand, again, it seems to me that can be handled either if Congress should engage in a major effort to review dispositions of troops across the globe or it could be handled by being dealt with separately and put into the reporting category. That is without the effort of defining hostilities in general one can deal with a practice which we have become familiar with of sending advisers and quasi-combat troops of that sort, by asking that whenever the President lawfully does that because Congress has not forbidden him or has not said nay, that having done it he report within 30 days; and putting that in a special category of its own, without jumping from it to the necessity for a full scale definition of the term hostilities.

Senator JAVITS. That would be my feeling. I am inclined to leaving "hostilities" undefined as a word of art. That is preferable, but I am not adamant on this.

Mr. BICKEL. Yes; that is correct.

Senator JAVITS. I don't believe, and I think our chairman has pointed out, my bill would prevent a determined President from putting the United States into hostilities in the sense that he could start it even though his actions might be thereafter challenged as unlawful. We all understand the Army, Navy, and Air Force will obey the President's commands. But I think that the concept of our Government and the basis upon which we are proceeding is the basis of legality. We simply have to assume that no President is going to violate the law, where there is a law. But where there is none, of course, then strong Presidents, as you have said, can construe the laws or the Constitution. I think by leaving the word "hostilities" in that condition we have a better chance to keep a balance even.

Mr. BICKEL. I think the history of the Republic tends to confirm that. I think where we have seen what in retrospect we look back upon as undesirable or even constitutionally questionable initiatives they have taken place in an area of open texture in the law. I think there are very few instances in our history where a President has taken the law into his own hands against the will of Congress.

I think Justice Jackson was entirely right about that. When Congress fills the void you can feel fairly safe on a position of legality that covers matters.

### MECHANICS OF GETTING CONGRESS TO MANIFEST ITS WILL

Senator JAVITS. Now the rest of the bill deals with the mechanics of getting the Congress to manifest its will. This also is a structure adopted by the Eagleton and Stennis bills.

Are you satisfied with that?

Mr. BICKEL. Yes, sir. That is the field of my least expertise. I should think a committee of Congress can be counted to have expert judgment about that.

QUESTION OF "NATIONAL COMMITMENT"

Senator JAVITS. Now, the last point of gravity is this question of the "national commitment." You are aware in giving us your opinion, Professor Bickel, that the national commitments, as the words are used on page 2, line 6 of my bill, refer back to the national commitments resolution. It is a word of art. You understand that.

Mr. BICKEL. Yes.

Senator JAVITS. Now, also you are aware of the fact that we have a NATO treaty which could enable the President to proceed directly and at once, in my judgment, to come to the aid of NATO. It would come directly under this provision. You don't think so despite the "attack upon one is an attack upon all."

Mr. BICKEL. I don't think so. I don't think in light of the legislative history of that treaty, and I would think if there is doubt about that, Congress ought to express its views on it. I wouldn't think so. I wouldn't think under the NATO treaty; I wouldn't think under the SEATO. There is indeed beyond all else a serious constitutional question. One almost wishes Senator Bricker were here. There is the question of whether a treaty of that sort can override, could override, our constitutional law. To the extent that under the NATO or other treaties he can act to repel the threat of attack, he could do it without the treaty if, in his judgment, the attack threatens an attack on us. Now the treaty would be relevant because its existence would demonstrate to him that the attack on someone else has in its implicit an immediate attack, emergency conditions on us, and he can then act. But I don't think the NATO treaty, I don't think the SEATO treaty, I don't think any commitment on the books does or constitutionally could authorize the President to go to war in other circumstances than those in which he would be constitutionally authorized to go to war in the absence of a treaty.

Senator JAVITS. Couldn't it nevertheless authorize the President or give him freedom to construe under a national commitment, if we had actually undertaken one, that he was free to utilize our forces if he did feel the action which had taken place was the threshold to an attack on us. In other words, doesn't this have the virtue of settling that question for him and, therefore, reassuring our allies rather than putting them in doubt, which is one of the arguments made against this measure.

Mr. BICKEL. I understand, Senator Javits. But I would be troubled, in fact I would be opposed, to the President exercising the power even under a national commitment such as the NATO treaty with a consensus that supported it at its inception, exercising the power to go to war because Turkey had been attacked in circumstances in which you can't persuade or in which public opinion isn't persuaded there is an imminent threat of attack against us. That is precisely what I hope we learned from the Vietnam experience. We cannot fight wars that way. It is useless, it is in the end an act of self-flagellation which helps nobody, including the ally we are supposed to be helping, and which does to ourselves domestically what this present wretched war has done to us.

I don't think the system, I don't think while we are a constitutional democracy of the sort we are, we can have major commitments to combat that happen in the White House in a matter of 24 or 48 hours unless it is a Pearl Harbor or something that can convincingly be made to resemble an imminent Pearl Harbor.

NATIONAL COMMITMENT UNDERTAKEN BY PRESIDENT AND CONGRESS

Senator JAVITS. But, Professor Bickel, aren't you omitting one critical factor and that is we do have a national commitment not only undertaken by the President but undertaken by the Congress, a national commitment that is defined as a treaty or other engagement undertaken solemnly by the Nation. We have that. You overlook that. It isn't Vietnam.

Mr. BICKEL. Well, undertaken solemnly by the Nation to do what?

Senator JAVITS. To come to the aid of an ally, if that ally is attacked because——

Mr. BICKEL. Subject to its constitutional processes.

Senator JAVITS. That is correct. But aren't we wise in order to, as long as we are working out a system for handling this situation which is today so much in the twilight zone, aren't we wise to regularize it by giving a certain amount of authority to the President to act, exercising our constitutional process in advance, to that limited extent.

Mr. BICKEL. Well, Senator Javits, as I read that subsection, paragraph No. 4, on page 2, what it does is in a fashion that can be made open ended despite all the attempts through words of art, like national commitments, to not make it open ended, what it does is in a fashion that can be made open ended to tell the President that under existing national commitments which would include, for example, the SEATO Treaty, he can, despite the language of the treaty itself, in a way, go ahead and act under authority of Congress, that he is now acting with congressional authorization behind him; not in that twilight zone when he can only act when Congress does not tell him, or within his own constitutional prerogative; rather he can now act with Congress behind him to go to the aid of an ally, and I think that, as a constitutional matter, a very dubious proposition under our Constitution. I don't think that it belongs to the President and I don't think Congress can give it to him prospectively that broadly and, as a policy matter, I am not persuaded. That is just bad.

CONSTITUTIONAL DOUBT REGARDING CONGRESSIONAL DELEGATION

Senator JAVITS. Let's divide that into two parts. Why do you have any constitutional doubt that if the Congress acts, that is the acting under its constitutional processes.

Mr. BICKEL. Because the Congress when it acts is subject to constitutional constraints, procedurally, if you will, on how it can act, and that is the doctrine of delegation. Congress cannot, and that is a constitutional doctrine, Congress cannot prospectively take some of its own power and give it to someone else, whether it is the President, or some administrative officer or what have you, and when it is a criminal statute that is involved that is called the doctrine of vagueness. When not criminal it is called delegation. I take that to be an important constitutional doctrine because it is a doctrine that conduces to responsible action by the institutions of government. The theory of it is if you act prospectively on something you don't know the details of, you are much likelier to act and not worry about it too much than if

you have the hard factual situation before you and act in detail, and everybody knows exactly what they are voting on. So there is a constitutional issue raised by *Kent* v. *Dulles* whether Congress can give that away that way.

BRICKER ISSUE

Senator JAVITS. Now, the question, of course, hinges upon whether the national commitment is not itself a definition of the authority which it is conferring on the President.

Mr. BICKEL. Well, that raises the Bricker issue; that is the Bricker issue.

Senator JAVITS. That is at issue; isn't it?

Mr. BICKEL. That is a constitutional issue itself. That is whether a national commitment, even by treaty, certainly if it is not a treaty then it raises an issue, if it is a treaty solemnly ratified by two-thirds of the Senate, then there is still the question whether it can override what would otherwise be in its absence the necessary constitutional arrangements, namely you go to war by act of Congress.

Senator JAVITS. Yes; but you see that negates what you yourself have testified to because you said the Congress is not limited only to a declaration of war. The Congress can authorize and direct falling short of that, and I think you are absolutely right on that constitutionally. If you can do that, why can't it confer the limited powers.

Mr. BICKEL. Because the constitutional question still is putting the delegation matter to the side for the moment, the question of whether a treaty can, being ratified by two-thirds of the Senate, in effect, authorize the President to go to war. At that moment the position is Congress hasn't acted, whether by declaration of war, statute, any of the more limited things it can do, nothing; Congress has not acted. The Senate has acted; it is a bare treaty. So the question then arises can the treaty work a change in our usual constitutional arrangement. The answer that was given to Senator Bricker at the time was, no. I believe in that answer, and I think that is a correct answer.

CONSTITUTIONALITY OF DELEGATING POWER

So the next question then becomes, well, can the Congress, as a whole, by undertaking a national commitment supplementing a treaty or by statute or otherwise prospectively, not change the constitutional arrangements, but prospectively, exercise its constitutional power to authorize the President to go to war or take an act short of war, and there we run into the delegation problem. There if it is prospective and broad, I would argue strongly that Congress cannot do it that way.

I would argue, for example, that the real answer to the Tonkin Gulf resolution is that if it authorized anything, beyond an immediate reaction, beyond its own factual context, it was an unconstitutionally broad delegation.

Senator JAVITS. So you challenge the Tonkin Gulf as well.

Mr. BICKEL. Oh, yes.

EFFECT OF SECTION A4 OF JAVITS BILL

Senator JAVITS. Now as a practical matter, Professor Bickel, do you have any doubt that if a President, especially as the law stands now,

indeed that is what Lyndon Johnson invoked, the President as the law stands now, felt that "immediate military hostilities by the Armed Forces of the United States are required," these are words of a section.

Mr. BICKEL. To comply with a commitment.

Senator JAVITS. To comply with a commitment. Do you have any doubt that he could use it, that he wouldn't come to us for a declaration of war.

Mr. BICKEL. You mean if we just took section 4 out of here and lifted it out?

Senator JAVITS. Yes. If we didn't have it at all, do you think the President couldn't do just that.

Mr. BICKEL. I agree he would be in a situation where he would be likely to do that unless you borrowed from the Eagleton or Stennis bill some language that made it clear that an authorization to go to war is not, well, what is the language, no treaty previously or hereafter enacted shall be construed as authorizing, unless authorizations are specific and shall not be construed out of appropriations acts and what not.

Senator JAVITS. Now we are getting exactly to the point I was trying to make. I think it is critically essential that whatever we do be the best for the Nation, and it is a fact that we don't have an absolutely free choice. We have to choose some path which will be compatible with policy or with what we deemed desirable policy, which is not the complete interdiction which may be very harmful to the country which you just read or the open ended authority which could be equally harmful to the country, which I don't wish to give. That is why I proposed this 30-day framework because it is precisely an effort to regulate what is now irregular and it is very likely to go against the exercise of congressional authority rather than to accept and confirm it.

Mr. BICKEL. Senator Javits, suppose your section 4 didn't just lift the language out of the Eagleton bill, for example, but said instead that all treaties and national commitments now in existence shall be construed to mean that the President can, within his constitutional power without congressional authorization, react to attack, the threat of attack, on the United States or forces of the United States, which, after all, so far as NATO is concerned meets most of what the difficulty is—we have forces—there, but shall not be construed to mean that he can act beyond what would otherwise be his constitutional powers, wouldn't you have not been restrictive? Wouldn't you have told the world at large the reactive power of the President of the United States, it is flexible and ample and that he has a judgment to make which is a political and technical judgment of whether the United States is threatened and otherwise in a position to go to full-scale war to help an ally?

You have told that to the world and, on the other hand, you have not put language in which not only confirms what the President would do if there were no language in the bill but tends to help him do it, tends to tell him you now have congressional blessing.

When Lyndon Johnson, President Johnson came around and said "I am using the SEATO Treaty for support," he had to argue that and people said no, that is nonsense the SEATO Treaty doesn't support you. If section 4 were in the bill and he said, "I am using the SEATO Treaty for support," that would be an end to the matter and he could

have said, "Congress has agreed I may," which troubles me greatly, which seems to enlarge even that rather substantial bit of Presidential power which would exist if there were no section 4 in the bill. Isn't there some way to borrow, without being wedded to the concept of the Eagleton bill, and writing something in there which does handle the matter, but which doesn't open it up even more than it is now?

Senator JAVITS. Of course, it is arguable under the SEATO Treaty, too, as to whether that power extends because they were so-called protocal states. I have argued against the operative power of the SEATO Treaty. It is not worded as the NATO Treaty is.

But I will certainly do my best in working out the question of imminent threat to make that extensive enough to include these dangers and possibilities and see what I can do about removing your concerns, my concerns, in this matter.

CONSTITUTIONALITY OF FORWARD COMMITMENT TO GO TO WAR

Senator CASE. Would the Senator yield?

Excuse me for interrupting, but I have to leave for an appropriations conference. We seem to be getting to the essence of all these war powers bills. Your position, I take it, is that we cannot now make absolute agreement to go to war.

Mr. BICKEL. Yes, sir.

Senator CASE. At any time in the future.

Mr. BICKEL. That is my position.

Senator CASE. The President and the Congress could not now say to England, "if you are attacked we will immediately go to war"—we cannot say that?

Mr. BICKEL. Let me recede from that a little bit. I would think that Congress and the Preisdent acting together, if the prospective situation was closely enough defined so that what is left to the President as in the Curtiss-Wright case itself, is the establishment of a factual condition precedent which is really well-defined for him, then I would not think that, under our Constitution Congress and the President cannot make a forward commitment in certain circumstances to go to war. Now, I would think that what can't be done is a generalized commitment. "You, England or France, are our pals, you are our friends, and any time you are in trouble we will help you." That can't be done.

Senator CASE. This is the point, isn't it; that the President and Congress cannot commit America to the vagaries of a foreign power.

Mr. BICKEL. Yes, sir.

Senator CASE. In its conduct with other powers.

Mr. BICKEL. Yes, sir.

Senator CASE. And therefore we must not make an absolute commitment except in relation to very specific circumstances.

Mr. BICKEL. But we could say, for example, if foreign troops advance as far as Strassburg, we, the United States, will go to war.

Senator CASE. But suppose——

Mr. BICKEL. Anybody who receives a commitment like that from us ought to know as the years recede or as the years stretch into the future, that it becomes increasingly doubtful because political conditions change and what not, but I think constitutionally we can do it because it is that specific.

Senator CASE. Yes; but suppose an enemy advanced toward Strassburg or toward another country?

Mr. BICKEL. That is the difficulty and that argues against the wisdom of doing that but I would distinguish between the constitutional capacity of the Government as a whole to do anything like that, which with very specific terms described, I think, the Government can, and between the wisdom of ever doing that as a matter of policy, which I would agree with you, Senator Case, I hope we never do.

Senator CASE. Thank you very much and thank you, Senator.

RECOGNITION AND RESTRICTION OF AUTHORITY

Senator JAVITS. I just have one or two questions and I will be through. I think what you have brought out and what we have discussed is extremely helpful to me because to me the main aspect of this bill that is critically important is the framework, the idea that we can recognize authority and, at the same time, restrict it.

Mr. BICKEL. May I just interrupt to say what I hope you know, and that is how much I admire your initiative and the role that you were the first to play in this area. You know that, I hope.

Senator JAVITS. Thank you very much. That to me was the critical point.

WOULD JAVITS BILL INHIBIT PRESIDENT FROM ACTING?

Now the thing I would like to ask you is this. One of the arguments made against this bill if it had been in effect at the time that President Kennedy issued his ultimatum to the Soviet Union that would have been cast under this bill. I have said I can't see it and McGeorge Bundy agrees with me.

Mr. BICKEL. That is the threat point on which we are agreed. The only question is whether a President would have been inhibited from acting with this bill on the books because it didn't say you can react to the threat of attack and we are agreed perhaps that might be a good idea just in case he might feel inhibited that way. But your position is this bill does not deny him the power even as it stands.

Senator JAVITS. Exactly right. If he chooses to act affirmatively regarding deployment of forces which he may, in the absence of affirmative action by Congress, he is the Commander in Chief and would order the forces where he thinks they should be deployed.

RIGHT OF IMMEDIATE RESPONSE

The other point which has been made against my bill is in the Middle East if there should be great problems with Israel, that this would disable the President from immediate response. Of course, the point that I have made is why should he necessarily have the right of immediate response. Why shouldn't he act again, if it is necessary to deploy the forces, and so forth, to deploy them, as he is Commander in Chief, but if he wanted to take action beyond that, why shouldn't he seek congressional authority?

Mr. BICKEL. Why would anybody think we could really in the long run successfully help Israel by waging in the Middle East another Presidential war. Haven't we learned that we can't do that?

Senator JAVITS. Yes.

WHY MEASURE OF THIS CHARACTER IS ESSENTIAL

Finally, Professor Bickel, do you feel that a measure of this character is essential? Tell us why, if you would, in summary.

Mr. BICKEL. Well, Senator, I think the secret is in the language that I quoted from Justice Jackson in the *Steel Seizure* case and in some of the things that Secretary Rogers says.

It is true, on the one hand, as a matter of our constitutional arrangements, that any power vacuum will be filled by the President. If there is not anything else there on the books, the President will act, that is the nature of that institution as the Constitution sets it up, and even as Mr. Justice Jackson says, there is always a twilight zone. If nothing else is there he will act.

On the other hand, Secretary Rogers tells us what is undoubtedly true, we are a world power with world responsibility and all sorts of situations impinging on us, and so things will go on happening. Well, that is true. The constitutional position is true. If Congress doesn't do anything to fill the void, the President will continue to act on his own. That is as sure as the sun rising tomorrow morning. A hundred years ago, that may have been acceptable. That is, the passivity of Congress may have been acceptable, because how many opportunities had the President had.

Every now and then he would get the notion that he would annex the Dominican Republic, and the Senate Foreign Relations Committee, in a prior incarnation, stood in the way, but that posed no real problems and no need to codify constitutional arrangements. We have learned, I think, the need is real and unless Congress asserts itself it tacitly invites the President in the nature of the dynamics of our institutions to step in and act on his own authority.

Senator JAVITS. And that is certainly invidious to the interests of the Nation as shown in Vietnam.

Mr. BICKEL. That is, I think, as near to a long-term catastrophe as this country can contemplate.

Senator JAVITS. Thank you.

Thank you very much, Mr. Chairman, for your graciousness.

U.S. INTERVENTION IN DOMINICAN REPUBLIC

The CHAIRMAN. Well, Mr. Bickel, I just have a few questions. You mentioned the Dominican Republic——

Mr. BICKEL. I had in mind just now with Senator Javits the second time, President Grant's idea in the 1870's that he would annex it, which a chairman——

The CHAIRMAN. You had it in mind using it as an illustration of a suddent attack case, I believe; did you not?

Mr. BICKEL. Well, in my statement as an illustration of the remote plausibility of the sudden, of the interposition theory. I am far from defending it.

The CHAIRMAN. It wasn't so though. It isn't a good example because the allegation of protecting American lives proved not to have been true. It was an intervention without any good reason.

Mr. BICKEL. From what I know I agree with that, but the argument I was making, Mr. Chairman, was that aside from Vietnam at the very least, and however thin the covering, there was an attempt and there

was some faint plausibility to the attempt to fit the thing into prior practice.

The CHAIRMAN. The only reason I bring it up is that I think if the Javits bill or something like it had been on the books it possibly would have deterred him from doing that ill-starred adventure.

Mr. BICKEL. He would have to know he would have to come to Congress and explain the facts.

The CHAIRMAN. That is the only reason I raise it.

Mr. BICKEL. Certainly.

The CHAIRMAN. That it may have been a deterrent to him.

Mr. BICKEL. Certainly.

PRESIDENTIAL PRIVACY IN NEGOTIATION QUESTIONED

The CHAIRMAN. One other thing. You emphasize in two or three places that the President alone can negotiate and you talk about that the President is necessarily private. Is he all that necessarily private? It seems to me the word "advice" in the Constitution contemplated a degree of consultation with the Congress prior to making an agreement. I mean as a matter of seeking advice in the case of what to do. I believe it was interpreted that way up until recently; wasn't it, in the early days?

Mr. BICKEL. Well, I recall the incident of President Washington coming back to consult and walking out in a huff and saying, "I will never go back to that damn place again."

The CHAIRMAN. That had nothing to do with it except ill manners.

Mr. BICKEL. I think the argument you are making is entirely tenable and I was really relying there on the *Curtiss-Wright* case which assumes that much, but that is not graven on stone.

The CHAIRMAN. But taking, for example, the present case. It seems to me the same argument you make that you can't fight a Presidential war if a country does not support it—you cannot do it successfully; you have just said that—I believe that in making agreements of a far-reaching nature, presumably far reaching with China, why wouldn't it be very wise and in conformity with the spirit of the Constitution, and, I think, with the wording of the Constitution, that these very substantial changes in our posture be discussed with the Congress? It seems to me it would be both constitutional and wise because to be confronted with a fait accompli, after it is already done, may or may not be acceptable to a lot of people. It paves the way, it strikes me.

Mr. BICKEL. The classic instance, I should think, that illustrates your point, Mr. Chairman, would be President Wilson's actions in negotiating the Versailles Treaty that came a cropper because it was presented as a fait accompli and the Congress had the stark choice of taking it or not taking it. The result was undesirable from any point of view.

The CHAIRMAN. More recently in the case of Cambodia, the committee sought to consult with the Secretary of State only 2 days before and we were not told about it. This same idea you have that it is necessarily private seems to have grown. Everything must be secret and we are not to be trusted until they take the action. I think it is just bad policy.

I mean it is much more likely to gain the adherence and support of the Congress and the country if they are consulted. They well may have

made a convincing argument. In view of the long traditions of both Houses of Congress having been dominated now for 25 years by the military establishment, the military very likely could have persuaded them to go along in Cambodia.

It would have been healthier than to go along without any consultation is the point I make.

Mr. BICKEL. I don't disagree.

The CHAIRMAN. You say it was necessarily private. I thought you were giving undue support to a view which, it seems to me, was not very wise.

Mr. BICKEL. It seems to me it was—I was sort of repeating by rote the doctrine of the Curtiss-Wright case and I guess I must have had some subconscious feeling that I was trying to knock the case and I ought to give it something with the other hand.

### ABDICATION OF CONGRESSIONAL POWER

The CHAIRMAN. You make a very good case all through here that Congress has neglected to assert its proper constitutional responsibility and the power has simply been surrendered to the Presidential area. I don't think it is a very wise thing. If we look at our present state of affairs, both domestic and/or foreign, I don't see how one can think this has been a very productive or very useful situation for the country for Congress to have abdicated. Congress has abdicated almost as much on the domestic scene when it comes to such things, well, as Lockheed—I don't know whether we have abdicated it or not.

They think they have the votes, but if we do abdicate, it is just a further example of abdication of our basic principles of even how we run our domestic economy.

Mr. BICKEL. Well, there has been a pendulum in our affairs historically with the dominance of one or the other institutions and up until now it has always swung. I hope it swings this time.

### SUGGESTED AMENDMENTS TO JAVITS BILL

The CHAIRMAN. You are suggesting, if I understand your exchange with Senator Javits, some slight amendment particularly to section 4; is that correct?

Mr. BICKEL. Yes, sir.

The CHAIRMAN. That is about the only major amendment you have in mind. Any other specific suggestions?

Mr. BICKEL. Well, we discussed the advisability of making specific reference to the President's power to react to a threat of attack as well as attack.

The CHAIRMAN. That doesn't bother me too much. This one does bother me a good deal, in a sense of how to deal with the prior commitments. There is the feeling that you have dealt with it in the case of NATO and that we are committed, and you go to the Congress and they say we are committed. I think I see the wisdom of your observations that the Constitution does not say you would do that because it just isn't wise to do that.

Mr. BICKEL. On NATO, Mr. Chairman, as I understand it, there is a very substantial legislative history. Secretary Dulles, I guess Acheson—Dulles on SEATO.

The CHAIRMAN. Acheson on NATO.

Mr. BICKEL. As I recall it, he was asked specifically does this commit us to go to war without pursuing our usual constitutional processes and he said no.

The CHAIRMAN. Dulles, just as explicitly in the case of SEATO.

Mr. BICKEL. Well, SEATO, is explicit, the language is explicit.

The CHAIRMAN. Yes, but nevertheless there grows up the idea that we are committed.

Mr. BICKEL. Well, I was suggesting to Senator Javits, the language of the Eagleton bill may seem too restrictive, but I would substitute for section 4 of the Javits bill language which makes it understood that Congress reads prior commitments as enabling the President to act to the full extent of his independent constitutional power, which means that he can react to the threat of attack on the United States if he finds it implicit in the attack on somebody else or he can react to an attack or threat of attack on our troops where they are lawfully deployed, but that otherwise it is the understanding of Congress that no treaty and no existing commitment can constitutionally or does authorize the President to simply go to war because he wants to help an ally.

WITNESS' SUPPORT OF S. 731

The CHAIRMAN. Finally, you are very much in favor of a bill like this.

Mr. BICKEL. Yes, sir.

The CHAIRMAN. You think it would render a great public service.

Mr. BICKEL. Yes, sir; I didn't start out that way. I shied away. As I mentioned, just from my common law training I shied away from the act of codification, but I have come to think that something is absolutely essential, and I can't think of any—the only alternative really is to wait until Congress affirmatively exercises power specifically on this, that or the other troop deployment, on this, that or the other commitment, and we could be here for the next 10 years waiting for that process to have been completed and, in the meantime, every lacuna that is left, every place which Congress had not filled, the President has the power. The world moves too fast for us to wait on that.

The CHAIRMAN. Senator Sparkman.

PRACTICALITY OF WAR POWERS LEGISLATION

Senator SPARKMAN. I want to say I have enjoyed your statement, and enjoyed the discussion. I have long felt that the thing we needed badly in this country was some kind of a drawing of the line, defining the executive powers of the Congress with reference to the making of war and dealing with other nations.

I wonder, though, how practical it is in these days of instantaneous war. Of course, as I understand it, under your view and probably all of ours, if that attack is on us or on our forces then the President can move immediately.

Mr. BICKEL. And beyond that, Senator Sparkman, if he can in good faith—and he will have to come back to Congress and explain it Of course, in the event of an atomic attack, there is not likely to be anybody to explain it to, but assuming we are still all around—there

is in addition power to respond to an attack on someone else if he can in good faith on the facts that are before him conclude that there is implicit in that attack on someone else, the threat, imminent immediate direct threat, on us as well. So somebody drops an atomic bomb on Paris or somebody marches in to Paris, it is, I think, constitutionally open to the President, and I take it Senator Javits agrees it is open under his bill, for him to say, for the President to say "I know what that means; that means that tomorrow morning they are coming at us. I am going to react to that threat," the way after all President Kennedy reacted to what was only a threat implicit in the Cuban situation. I think that is within his constitutional power. I think that is there within the Javits bill.

More than that, in my judgment, I think we now know it won't work, won't work. You can't push this country from the White House into a war which it isn't clear on the facts to us we couldn't avoid. You can't do it effectively.

CONSTITUTIONAL PROCESSES MUST BE FOLLOWED

Senator SPARKMAN. In NATO, and I believe in all of our security treaties that we have with different countries, we wrote in that the phrase, "in keeping with our constitutional processes," and it is my understanding that you feel that this would have had to be followed even if it had not been written into the treaty.

Mr. BICKEL. Yes, sir; that is my feeling.

Senator SPARKMAN. In other words, his powers, if they are there, cannot be taken away unilaterally.

Mr. BICKEL. I take it there is nothing on the books, Missouri and Holland would be the only case even remotely in the neighborhood, that so much as suggests that a treaty or indeed anything that this Government can do can override the Constitution and if the NATO treaty tried to change what under our Constitution are the processes by which we go to war, it would itself be unconstitutional.

I would suppose we would all agree that a treaty that said any time that we agree with some foreign nation that a newspaper in the United States which is criticizing that foreign nation and hurting its security ought to be shut down, the President of the United States ought to shut it down or opponents of that foreign nation's government will be put up against the wall and executed, I take it we would all agree a treaty like that is unconstitutional.

Under our Constitution you can't do that. I have never been able to see why since you can't do that, you can by treaty change the way we go to war. Or suppose we agreed by treaty that the President in case of an emergency shall continue in office past his 4-year term. Obviously we can't do that. I don't see why we can by treaty enable him to go to war when otherwise he could not.

RESPONSE TO ATTACK ON NATO TREATY

Senator SPARKMAN. I believe the NATO treaty has a provision in it to the effect that an attack on one of the countries is an attack, can be considered as an attack, on all the others. That is true, isn't it?

Mr. BICKEL. Yes.

Senator SPARKMAN. And we actually have forces in the NATO territory. So it seems to me that any attack that came there the President would be empowered to act.

Mr. BICKEL. No, sir; I wouldn't think so. I would think that any attack that came which he considered was in fact or carried the threat of an attack on our forces in Europe—which, I take it, was one of the reasons we have kept forces in Europe, this screen idea that they represent—or any attack that, even without there being forces there, in which, he found implicit the threat of an attack on us he could react to. The NATO treaty might help him to the extent he would say "that fellow who attacked my ally knew I am allied to him. I therefore interpret whatever other facts I have as more likely to mean that he also intends to attack me. I would be less likely to interpret them that way if there were no treaty." To that extent the treaty can help him. But he has to, under our Constitution, make a good faith finding, make a judgment in good faith that there is an attack impending against us or our forces, else, as I read our Constitution, he can't act.

A treaty helps because a treaty will help him reason that the attacker of our ally has bad intentions against us, but that is about all it can do.

Senator SPARKMAN. Are those words "an attack upon one nation is an attack upon all," useless in the NATO treaty?

Mr. BICKEL. Well, they are not useless, Senator. They certainly indicate our understanding of the world situation as of that time. They are, however, within the legislative history of that very treaty modified and the signatories of the treaty must have known they are modified or qualified by the constitutional arrangements that prevail in this country. And when the Secretary of State was asked does that mean do we go to war automatically he said no, as he was obliged to say no.

### DEPLOYMENT OF MILITARY ADVISERS

Senator SPARKMAN. You said something a while ago about the military advisers that we were sending to Vietnam. I don't remember how you brought that in.

Mr. BICKEL. Well, sir, I suggested in colloquy with Senator Javits, that the only reason I could see for attempting a detailed definition of the term "hostilities" would be that I thought it advisable, I thought it might be a good idea, to try to reach action by the President which is short of commitments to combat, but which sends troops into combat situations, the way we did early on in Vietnam and have done elsewhere without actually committing them to combat. That would seem to me something that it would be advisable to provide for because if you just said hostilities without otherwise defining it it would be open to the President to say "I am not deploying these troops to hostilities, just deploying them to help others to be hostile," and I think it might be well to cover that. Otherwise I suggested I would be wary of trying too detailed a definition of the term "hostilities," wary indeed always of unnecessary detailed definitions as if this were the Internal Revenue Code.

Senator SPARKMAN. Then you think sending in the advisers to Vietnam, sending in advisers in the case of Greece was within the Presidential powers.

Mr. BICKEL. Absent anything, absent any——

Senator SPARKMAN. Prohibition by Congress.

Mr. BICKEL. Absolutely. So long as Congress says nothing, he is Commander in Chief of those troops and can send them to the moon, in fact has.

Senator SPARKMAN. In the case of Greece, Congress did act favorably.

Mr. BICKEL. Yes.

Senator SPARKMAN. By making the appropriation that President Truman requested of us.

The CHAIRMAN. You said appropriations do not——

Mr. BICKEL. No; but I thought in the case of the Greek thing wasn't there a statute that adopted that policy? My memory is vague on it. but I had the impression that was more than an appropriation; that the President came to Congress with that program and that the Congress approved that program.

Senator SPARKMAN. I may be wrong in my recollection, but my recollection is it was through appropriations. He came to Congress and announced the program, as I recall it—I was there, but I may not remember clearly—and asked for appropriations of $300 million or $400 million, whatever it was, in order to carry out the program.

Mr. BICKEL. And there was a bill that provided specifically for what the program was going to be.

Senator SPARKMAN. I don't think it named advisers as such.

Mr. BICKEL. But it was prior to the events any way. It wasn't coming in for appropriations to support what was going on.

Senator SPARKMAN. No, no, it had to be authorized.

Mr. BICKEL. Well, that is something different.

Senator SPARKMAN. But it was done, as I recall, in a request coupled with a request for appropriations. Anyhow, that is immaterial.

Mr. BICKEL. My memory is vague.

### CONGRESSIONAL PROCEDURE PROVISION IN JAVITS BILL

Senator SPARKMAN. There is one provision I want to bring up with reference to the bill of Senator Javits. I don't know that it is necessarily too relevant to this, but the procedure that is mentioned whereby the House Rules Committee could be bypassed and it must come up immediately and if it passes that House then it automatically goes to—I have forgotten just what it said.

Mr. BICKEL. Reported by the committee in 1 day.

Senator SPARKMAN. Any such bill or resolution after having passed one House of Congress shall be considered reported from such committee within 1 day after it is referred to the committee unless the Members of the House referring it to the committee shall otherwise determine by yeas and nays.

It seems to me that that might run into a good bit of trouble in Congress in trying to short circuit our legislative processes. As I say that really doesn't bear upon the constitutional question.

Mr. BICKEL. I would say as to that only that the reason for the rather strict provisions there is that in the absence of congressional action the thing stops automatically the way the thing is constructed, so it is by way of a protection for the President, so that by the inaction of Congress his action may not be canceled.

Senator SPARKMAN. I realize that is to get quick action, but it provides if one-third of the membership of either House agrees to the bill, then all of this goes into effect. It seems to me it would run into some legislative difficulty, but I don't care about discussing that.

I was just calling it to the attention of my friend from New York.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Cooper.

PRESIDENTIAL AUTHORITY TO COMMIT U.S. ARMED FORCES TO WAR

Senator COOPER. I may go over some ground you have already discussed with Senator Javits and others, but I want to start out by giving you three situations. One, in your belief, does the President have authority to commit our forces, Armed Forces, to war except to meet an attack upon our Armed Forces or our land or territory.

Mr. BICKEL. Or a threat.

Senator COOPER. Or an imminent threat.

Mr. BICKEL. No, sir; I think he has no authority.

Senator COOPER. What.

Mr. BICKEL. No, sir; I think he has no authority beyond those circumstances, with the exception that the practice reads into it, of which the Javits bill takes account, and it is after not too major a matter. One can concede to the practice on that, namely, of interposing himself not in a combat way but interposing himself with his forces in the absence of any contrary congressional action in a foreign country where lives and property are in danger.

PRESIDENTIAL ACTION UNDER SECURITY TREATIES

Senator COOPER. I will go back to the word "imminent" in a few minutes. Second, and with respect to action under our security treaties, we have bound ourselves to some degree to about 40 countries. You said that those treaties require us to help them in some way; is that correct?

Mr. BICKEL. Subject to our constitutional processes.

Senator COOPER. I agree wholly with you. If he is to take any action, particularly in a war under those treaties, he must act under constitutional processes.

Mr. BICKEL. I think so, with this qualification, Senator Cooper, if we have a treaty connection with a country or a commitment of some sort, with a foreign country, if that foreign country is subjected to a sudden attack, I would think the treaty would be a factor—it is difficult to say without a concrete factual situation how important a factor—but a factor in the making of the President's judgment on whether that attack on our friends implies imminently an attack as well on us. I suppose if a foreign country attacks, if there is a country left in the world with which we don't have a commitment, such a country, the judgment that that constitutes a threat against us is surely more remote than in the case of an attack on somebody with whom we have a treaty.

Senator COOPER. But you are really coming back then to the principle, which is correct, that there must be an attack or a threat of an imminent attack upon us for the President to act without first coming to Congress.

Mr. BICKEL. Yes, sir. I think that also accounts for what runs through the testimony of historians, for example, that the Western Hemisphere has been traditionally in our eyes in a special position ever since the Monroe Doctrine again because an attack on somebody right on our doorstep, the judgment that that implies a threat against us, is surely a nearer judgment than an attack on somebody in a far off place.

### TIME FACTOR IN ATTACKS OTHER THAN NUCLEAR

Senator COOPER. At times in testimony before us it has been argued because this is a nuclear age, because of the danger of nuclear attack, the whole role has been changed. Of course, everyone knows that if we were subjected to nuclear attack the President has the authority to act. But leaving aside the countries which have the capability to destroy us, to really threaten our security—I can only think of the Soviet Union, Communist China, West Germany—do you think of any other country in any kind of attack other than a nuclear attack, the President would not have the time to come to Congress, except to protect U.S. troops from imminent danger?

Mr. BICKEL. I am out of my depth on that. It is hard to imagine what kind of an attack other than a nuclear one any country could make on us. While our troops are deployed across the world, it is not difficult to imagine that a country can attack us and that the President must react instantly for the security of the troops but any attack on us or our possessions, I suppose Pearl Harbor.

Senator COOPER. I mean to go to war, not just the protection of our troops against immediate attack, but enter into a course which would take our country into war.

Mr. BICKEL. It is difficult to imagine that anybody would stage a nonnuclear Pearl Harbor on us in these days because obviously the reaction would be nuclear.

### LIMITS OF CONGRESSIONAL DELEGATION OF AUTHORITY DURING WAR

Senator COOPER. I will come to my third situation where we are involved in a war, as we are involved now in Indochina. I believe you stated that either a joint resolution, passed by the Congress, or a concurrent resolution, which says the President can take action in certain cases which could lead us into war, such as happened in Vietnam. I believe you said that kind of resolution would only have effect as to the immediate and present danger; is that correct?

Mr. BICKEL. Yes, sir.

Senator COOPER. And would not carry with it the constitutional authority to approve in advance other actions that the President might take.

Mr. BICKEL. I was applying, Senator Cooper, standard delegation doctrine which requires standards, which requires that whenever Congress authorizes anybody to do something prospectively, whenever Congress gives its power away, to an administrative officer, President, whoever it is, that it be done under standards, and that the delegation be reasonably narrow and specific so that ideally little more is left to

the person carrying it out than the filling in of details or the finding of a factual condition precedent or things of that nature rather as opposed to, as compared with, a broad prospective delegation of power to act in circumstances not now foreseeable.

CONSTITUTIONAL AUTHORITY FOR WITHDRAWAL AND PROTECTION TROOPS

Senator COOPER. We are engaged in a war and we have been engaged in it for a long time. I think, according to your thinking, and I share your view, that there is no constitutional authority——

Mr. BICKEL. That is my view.

Senator COOPER (continuing). Except withdrawal.

Mr. BICKEL. That is my view.

Senator COOPER. And to protect U.S. troops while they withdraw; is that correct?

Mr. BICKEL. That would be my view. My view would be that we entered this war unconstitutionally.

Senator COOPER. I think also——

Mr. BICKEL. And it is an unconstitutional situation.

Senator COOPER. I think that it is important to stress the word "imminent" because most of the statements made just cite the broad general power of the President to protect the troops which could be an unlimited power. So what you are talking about is an "imminent" threat of danger that might arise during the actual withdrawal. In other words, the power to protect troops, even while withdrawing them can only be used again a danger which is "imminent." Would you apply that to the present situation?

Mr. BICKEL. Well, as I view it, it is an unconstitutional situation. He is in there unconstitutionally. Nobody has authoritatively decided that for him. That is my view. I understand that is your view. He is, in the absence of a legal document, a decision of the Supreme Court, which I don't hold out as the proper way to do this, or in the absence of an act of Congress like the McGovern-Hatfield resolution or something of this sort, he is entitled to hold a contrary opinion. We are in an area of the open texture of the Constitution, strongly as I hold my view of it, and I suppose he is acting not only to withdraw but to achieve other objectives on the way out. It is difficult to say that that action, given what has gone before, what he inherited as he came into office, that that action, that attitude, is itself flatly unconstitutional, when no other institution that countervails him, like Congress, has by statute told him, "you be out by such and such a date and you do nothing between now and then except get out."

So I am a lot clearer about the unconstitutionality of the way in——

Senator COOPER. Yes.

Mr. BICKEL (continuing). Than I am about the position of a President who comes into office once you are in and who then maneuvers around to both get the troops out and rescue one or another objectives. He is entitled to his view on the matter without committing an impeachable offense.

Senator COOPER. So far, half the troops have been withdrawn.

Mr. BICKEL. I didn't understand.

Senator COOPER. I think half the troops have been withdrawn.

LIMITS OF POWER TO PROTECT TROOPS DURING WITHDRAWAL

It is my own view, although I am not the witness, but I believe his power to protect the troops during withdrawal is limited to action against imminent danger. Otherwise we would have to approve Cambodia and Laos and any operation like those.

Mr. BICKEL. That would be my view. I was merely shying away only from using the word unconstitutional in what would now be—as applied to a sitting President who is taking certain actions—a use of it in a somewhat different sense, because if, beyond peradventure of doubt, say, if there were a Supreme Court decision or an applicable act of Congress and the President continued to act against it, I would think that would be an impeachable offense.

I don't think what President Nixon is doing now is unconstitutional in that sense. It is subject to differences of opinion. We are in that constitutional area where men can differ, and especially a President who comes into office with a going war. No matter how it may have started, he may feel himself entitled, and not unreasonably, to wind it up his own way.

I am quite clear that we got into it unconstitutionally, and that in another sense it is a total unconstitutional situation.

RECONCILIATION OF SEPARATE POWERS OF CONGRESS AND PRESIDENT

Senator COOPER. I certainly would agree with most of what you have said in your statement. I think we come down to the point of trying to reconcile the separate powers of the Congress and the powers of the President and particularly with what the President can do to protect the troops. There was a gray area in whatever legislation we passed.

Mr. BICKEL. I would favor Congress saying, Congress making the policy. I favored yours and Senator Church's resolution, and I favored the McGovern-Hatfield resolution, if Congress said "you be out by $x$," date then all that would be left legally for the President to do is get out by $x$ date, and if he can't make the date say "I had some difficulty getting out and I am 30 days behind but I am pursuing the objective you gave me."

PROTECTION OF TROOPS AFTER 30-DAY LIMITATION

Senator COOPER. This is my last question. I think you explained your position, but you previously said if Senator Javits' bill is adopted providing for 30 days of authority and if the danger persisted after the President sent the troops into battle, after 30 days he would have the constitutional power to continue to fight with troops even if the Congress did act. Is that what you mean?

Mr. BICKEL. Yes, to protect them. I think if the Congress acted within that 30 days and told him, he is fighting in Vietnam and the Congress said, you made a mistake getting in, get out, within 30 days, after that 30 days I think all that is left to him is tactical decisions to seek the safest ways of getting out. He may miss the deadline but you can't fault him if he missed it by some days because that was all that was left to do.

The CHAIRMAN. Senator McGee.

COMMENDATION OF WITNESS

Senator McGee. Thank you, Mr. Chairman.

I want to lend my voice to the compliments for the views you have expressed here and the manner in which you have addressed yourself to the issues.

Mr. Bickel. Thank you, Senator.

INTENT OF CONSTITUTION AND REALITIES OF NUCLEAR AGE

Senator McGee. I think this is one of the great constructive things we have been seeking answers to and it is long overdue. Something as wise as this should have been done back in the 1920's and 1930's because of lessons of World War I. But I think that part of the bind that we find ourselves in today derives from the extremes to which the events of our time have forced us—namely, to an undeclared war. After World War II the liberals in the international community, and I speak as one of them, really believed that in this nuclear age nations could ill afford the risk of declaring wars. Wars would probably have to be fought, but could not be declared. Yet, our Constitution is specific about the delegation to the Congress of the sole power to declare war. Therefore, what the Constitution intended and what the realities of a nuclear age require are two quite different sets of circumstances.

The events in Korea ultimately capsulized in a convenient way in a shorter interval of time so that everybody involved escaped criticism. In Vietnam it dragged out in a protracted way and into more severe circumstances that have raised a great many doubts in all of our minds. This is the area, as I understand from your remarks, where we are really focusing attention, where Senator Javits' amendment is aimed.

I still am not satisfied we have the answer. I think the Javits proposal comes the closest, but we are still not really asking ourselves, or coming up at least with the enlightenment that we must have in determining the role of Congress with the President in taking steps that might lead to war, steps that nonetheless are important steps because they might avert a more serious war.

That is really what got us into the difficulties to begin with; steps that were sincerely taken with the conviction that it might likely head off a much larger conflict. Each step then seemed to lead to another step and another step and each succeeding step, taken with equal conviction by those who made the decision at that time.

CAN UNITED STATES EXERCISE WORLD POWER ROLE IN PEACE-SEEKING MISSIONS?

So my real question to you on that is whether, given the mechanism in our form of constitutional procedures, we are realistic in believing that with all of these concepts we can exercise a role as a world power in the peace-seeking missions around the world.

I have very serious doubts myself and I would be interested in your addressing yourself to that, whether a free society, as we see it, can really live up to that kind of a responsibility.

Mr. Bickel. Well, Senator, you raised the largest underlying issue. I don't—I would be out of my depth if I tried to really foresee the

necessity that will impinge upon us in coming years. I act from this conviction, which is a lot simpler, and a risk no doubt, there are always risks, we take chances; I act from the conviction—the last 10 years have demonstrated to me—that the vision of this country maneuvering around in the world on the basis of a steady and relatively unchanging national consensus that would therefore enable the President to act entirely on his own hook, that that vision has proved wrong and brought us to the brink of disaster.

What the future will bring I don't know, but I do believe in the constitutional arrangements and in their wisdom, and since the departure from them over the past 10 years has worked as badly as it has, I think the risk that I would like to take is the constitutional risk, is the risk of the original arrangement.

I see nothing persuasive that anybody has said concretely. Secretary Rogers, for example, who expressed some of the point of view that you are now expressing, Senator McGee. I see nothing convincing that is said concretely that can persuade my mind that the constitutional arrangements will, in a given situation, be dangerous to us in the world as it is. I don't really see the bearing of nuclear dangers. I don't see the bearing of our need to be able to undertake convincing commitments to allies because I think the answer to the latter point, for example, is that our allies have, everybody around the world has, eyes to see. It is now evident to everyone with eyes to see that the United States cannot far from its borders effectively engage in Presidential wars.

In order for us to be able to convince anybody that we can, we would, I think, have to make major repairs in our institutions, not continue to accept an extra constitutional practice but rewrite the Constitution in some fashion. I don't believe anybody can still think that we can do it the way the great builders of our international position 20 years ago thought we could, and so I don't see any point in trying to pursue that. I know what it does to us domestically, and I am sort of like a boy who left home and roamed around the streets and got beaten up a little bit and finds that the best idea is to retreat back home to the safety of the surroundings to which he has been accustomed for 200 years.

ARE WE ADDRESSING OURSELVES TO WRONG QUESTIONS?

Senator McGee. I suppose what that still leaves out—and it bothers me to no end—is that the pending proposals now before the committee there lies an emphasis pointing to the specifics of Vietnam. The proposals fail to address themselves to forestalling preconditions which could lead to war. We live in a world without law; the principal substitute for war still remains in the balance of power. How we achieve and then maintain a realistic balance in the world is a question avoided by the current proposals. Thus, in trying to avoid a war, we could still contribute to conditions which would involve us in one.

Mr. Bickel. But there must also be——

Senator McGee. I don't know. That is why I wonder if we are really missing the point, if we are not addressing ourselves to the wrong questions. Maybe we ought to enlarge the constitutional process. I don't know.

Mr. BICKEL. There must be something better than war, but there has got to be in light of the experience of the last 10 years something better than American Presidential wars which don't work.

PRESIDENT FRANKLIN ROOSEVELT AND U.S. WORLD WAR II ENTRY

Senator MCGEE. I think we have all learned some very harsh lessons in that category. I can't help but remember, go back to, the parallel of Franklin Roosevelt with Hitler. I think Sam Bemis, who was no lover of the New Deal or Franklin Roosevelt, said of Roosevelt that he tricked us into the war for our own good.

What he was pointing his finger at was the actions of a President who was realistic about the public opinion, and about the role of Congress which had just enacted neutrality laws. There was a different kind of world facing us. F.D.R. was soon to be involved in the spotting of a submarine off the New Jersey coast, which incident was never verified; he was talking about never sending American boys to a battle front in Europe again, a promise he made to the mothers and fathers again and again and again. Consider also the transferring of 50 destroyers, which really in hindsight was a pretty militant action, or the extending of the confines of the Monroe Doctrine. This, however, served the purpose, for whatever motivations, to bring more public opinion around to the President's side. It may be still doubtful in hindsight, but I would think he could have successfully proceeded without the Japanese attack on Pearl Harbor.

I think we sometimes forget the serious division within the country so that brings me back to right where we are now. Without that kind of maneuvering by a President who is less than candid, I suppose, with the Congress or with people, we still come up very short of where the national interests might require that we be.

I don't want to trust a President in this. There must be a better place to put that trust, but I don't think we have found it yet and that is why I think we may be missing the whole point here.

POWER OF PRESIDENCY TO LEAD PUBLIC OPINION

Mr. BICKEL. The power of the Presidency, Senator McGee, to lead the country along to the point where F. D. R. was leading it along by the time Pearl Harbor happened, the power of the institution to do that is enormous. If anything it is greater than in F. D. R.'s time. There was no TV then, radio was more or less in its infancy. This is an enormous office and his power to lead public opinion, if he puts his mind to it, is still very great and can overbear the Congress. Nothing that is proposed would cut that down. All that is proposed is to prevent now a contrary experience what even F. D. R. didn't do, which is the attempt to bring the country in without making it ready.

That, I don't think, works. We now know it doesn't work. We thought it might work at a time when we had convinced ourselves that there was—we had sort of settled the issue; there was—a permanent consensus in the country. We were no longer isolationist. That was behind us. There was a permanent consensus about how we were going to be a world power and what we were going to do about it.

It turned out that there is never any such thing as a permanent consensus especially since conditions change. There might very well have been a consensus that would have remained permanent if the world stayed as it was in 1945, but it didn't.

### REVERSION TO CONSTITUTIONAL ARRANGEMENTS AND RELIANCE ON INTERNATIONAL INSTITUTIONS

I just don't see that we can help ourselves otherwise than by reverting to the constitutional arrangements which are intended precisely to see that the country doesn't get into wars unless it knows that it wants to and has been persuaded that it should; and possibly and hopefully in the more distant future learn to build and rely on extranational institutions, international institutions, which can take some of the burden of leadership or of action from our own shoulders, because I think so long as we stay the country we are, which after all ought to be the point of the exercise, I don't think we can be the effective imperium capable of acting on the spur of the moment and acting efficiently that way.

Holmes somewhere says in one of his opinions, I forget whether it was in a civil liberties matter or economic relations matter, that surely ultimately the meaning of the Constitution is if the people of the United States decide to go to hell in a basket it is his job to let them do so.

I don't think we can do anything that will prevent in the far distant future the institutions and people of this country making a decision which might be wrong.

### BRIDGING GAP FROM REAL WORLD 1971 TO FUTURE

Senator McGee. I certainly agree with you that we somehow have to get to the extranational processes that may assist in this matter or take some of that weight off or distribute the weight more universally, but I think the problem that we still avoid is how do we get from here to there. This is what I consider to be a very problematical gap, and I am not sure that we are going to make it if we don't get from here to there. That is the reason I still think we fall a little short in bridging that gap from the real world of 1971 to the real world of 1991 or 2000, whatever that time lag may be.

I couldn't agree with you more on the responsibility that was there for administrations, plural, to have brought the American people along more rapidly opinionwise into the responsibilities that I think we ought to have in this kind of world in which we find ourselves suddenly thrust. But it wasn't done. They were afraid of, at times, the dirty language. I mean they were afraid to talk about balancing forces or the balance of power or vacuums or voids. The result is that for having been afraid to come to grips with that and talk only in very loose and rhetorical ways of freedom and democracy and free elections and these sorts of things that we now find ourselves caught in a backwash of bitterness and disillusionment and hate——

Mr. Bickel. Yes.

Senator McGee. In regard to that and this may throw us back still further. We may really be going back to what I would hate to think

of pre-World War II because some strides significantly were made. Sometimes for unreal reasons but they were made nonetheless, and I just wish somehow we had those who were wise enough to come up with the larger answers, which I think, continue to elude us in this matter.

HISTORICAL ARGUMENTS ON EXPECTATIONS OF U.S. ACTION

Going back to the point you just made about the limitations on commitments that we might make. I think that is true under our Constitution. Yet one of the arguments that historians still make to us is that if the Kaiser had known in 1917 that the Americans really would move or could move effectively this may have changed the decision. They still argue that in hindsight. Also it is said that Hitler would have acted differently if he had thought that an isolationist America would move into Europe so soon, or that had the Japanese been persuaded that the United States would have moved into the whole Pacific in the wake of a simple elementary attack on Pearl Harbor the result would be different. Also what would the North Koreans have done if they had known there would have been a substantial American response, and so on?

This concept that the knowledge that certain things will happen used to be framed in that now ill-begotten phrase called deterrence. I don't know what a better substitute for that concept is, but we haven't supplied one yet. Therefore, aren't we contributing to the unraveling of a reasonably balanced world in general with the exception of the things that go wrong? This leaves out the things that do happen to balance themselves off.

BEST THAT CAN BE GOTTEN OUT OF PRESENT SITUATION

Mr. BICKEL. Well, let me say as to that, Senator, you know, it far from depreciates but recognizes the importance and the reach of the concerns that you have that I am unable to deal with them fully and satisfactorily. You raise the largest problems.

But I would say reducing them again to a size that I can answer, I would say that, on the one hand, some water has gone over the dam that we cannot recapture. Nothing we can do or say here will persuade anybody in the world that American Presidential wars work. That cat is out of the bag.

On the other hand, Congress can act quickly, and there is a lot of power left to the President, and flexible power to act independently under the Javits bill and under the constitutional position. Can't it be viewed as a profitable tradeoff for us? Instead of sitting here, as we always have, doing nothing about straightening out our own institutional arrangements at home with a whole world knowing that the prior practice won't work any more, isn't it a profitable tradeoff to admit what everyone knows, which is that Presidential wars as such don't work and, on the other hand, to make it clear to the world, as the Javits bill does, that there is a lot that can be done which not only will work but which we hope in future will work better because Congress has now defined it and put itself behind it. Isn't that quite possibly the best that we can get out of the situation we are in. There is a lot that is irretrievable. The American President cannot, nobody has

the power at the moment to make him, look as strong and as capable of quick effective independent action as he may have looked 20 years ago.

That is gone. The Vietnam experience is there, and everybody has drawn a lesson from it. We can't change that. We can accept that, and try to make as certain and as prospectively supported as possible the powers that do exist in the President, and try to tell the world that Congress, as under section 2 of the Javits bill, can act quickly, as of course we know it can act quickly.

The average time taken to pass a declaration of war when, in those halcyon days when we used to have declarations of war must have been a matter of under 24 hours. That is a capacity to act when there is a consensus and when the action is going to be effective, and when that capacity does not exist we have not helped anyone.

CONGRESSIONAL NEGLECT OF FOREIGN POLICY

Senator McGee. I think that is very correct. I can see another day coming. Perhaps the events of the world will not be harsh enough to let us sink down into it again. Even we in the Congress, who we like to think are leaders, like to imagine that we will see all these things coming soon enough and that our opinion and knowledge and judgment relative to it will be alert enough that we will act in cadence and produce the necessary kind of decisions.

You see, the real worry, I think, which you put your finger on in your statement when you talk about the void that existed because Congress simply didn't move or was not interested in moving or was moving some place else and somebody had to move, and the President moved. Now it ought not to happen that way.

Mr. Bickel. But it hasn't worked.

Senator McGee. I can't see anything in Senator Javits' proposal that is going to really change that process if we are exposed to the dangerous period of a decade of relative inactivity in the international community. I would see the Congress sinking down again and then slowly we begin with another Manchuria, another Hitler into the Rhineland, another something, which begins to build with a set of forces that make a difference, maybe a new Japan. I don't know what it might be. Yet we could find the Congress still obsessed with its understandable concerns on the domestic front, to the neglect of the international community, because there is very little constituency in the international community.

Mr. Bickel. I would hope, Senator McGee, and I would hope if Congress revs itself up to enact something on the model of the Javits bill at least, for a foreseeable period of time there will be a sense that a responsibility has been undertaken as Congress—after all, it was Congress that made our foreign policy in the thirties, after the First World War when the pendulum swung back to the Congress.

Senator McGee. You were not old enough then.

Mr. Bickel. I am old enough to read. It was ill-advised—besides I am older than I look—it was ill-advised, but Congress was in charge of American foreign policy. I would hope that a bill like this would reopen a period when that same sense of responsibility was felt in

Congress, and Congress took an active part. I would hope, for example, that Congress would review in great detail the dispositions of American forces across the globe.

POSSIBILITY OF PARALLEL WITH 1930'S

Senator McGee. I would certainly hope so, too, and that we realize not only how small the world is but that it is round, but we don't act that way sometimes. And I am a little bit frightened at the parallel of the 1930's, possibility because that was a very vivid impression for me as a young college student and young professor in thinking we were going to get involved in the world when I thought we ought to be isolated. I was very enlightened, but the whole thrust of the congressional leadership in the thirties, if I remember was how, what laws can we pass to prevent World War II. Wasn't that the thrust of the neutrality laws of the thirties? How do you build a structure, build something with that experience?

Mr. Bickel. But it is not wrong for us to learn a lesson on how active a Congress could be, that it is possible for Congress to feel responsible for foreign policy. Congress was wrong then, but there is no need to conclude that the next time it takes responsibility it will be equally wrong.

Senator McGee. Let's just say its track record hasn't been too good until now.

Mr. Bickel. Nobody's has.

Senator McGee. That is why I express my misgivings.

Mr. Bickel. Nobody's has.

Senator McGee. That is right, and that is why we are groping for that mix of consciousness and participation in what I would regard as responsibility in a real world that we somehow still fall short of at the present time.

CHANGES IN AMERICAN POLITICAL PROCESS

Mr. Bickel. There are changes that have taken place in the American political process since then which can be viewed as encouraging from this point of view.

The rate of education, we have a Nation now in which college education, let alone high school, let alone literacy rates, are at unprecedented heights as compared with a generation or two ago. The rate of travel, the way the world, because it really is now round and small, impinges on us in ways that it then did not.

There are likely to be very few Congressmen now, as there were then two generations ago, who have never been off that farm in Minnesota and to whom Europe is a sinful place way out there that nobody ever goes to or hears about or nobody knows about. People are more educated, more mobile, I think all those things will have a bearing on the way this Nation will handle its foreign affairs through an institution like Congress.

Senator McGee. I would hope so. I would hope it would find its expression in the Senate where we would like to believe that steadily the individual Senator is less——

Mr. Bickel. Parochial.

Senator McGee (continuing). A local representative, although he must remain an important figure on that level, but that he is a Senator of all the United States, in fact of the world.

Mr. Bickel. The Senate clearly would have primacy in this area. It is constitutionally put in a position of primacy and it traditionally has exercised it so that is another source of encouragement of what might be.

EDUCATIONAL FUNCTION OF OFFICE OF PRESIDENCY

Senator McGee. To the President's credit, I mean no President, I just mean the Office of the Presidency, I would think given the new media available, the new aspects of coming to grips with problems, that the President has to assert himself more in the field of raising the level of public understanding, not of agreement, but of understanding of what the problem is. It seems to me there has been a reluctance of Presidents to do this. That is, they will speak once, but you don't educate in a one-time around thing. It has to be constantly built, and I think the President is reluctant to assume overexposure. Maybe it is impossible for a President, under our present system, to do those things.

Mr. Bickel. That is an extremely interesting point. I have felt, and it is an inexplicable paradox. Possibly the personality of people is perhaps the only explanation, but through the very period, post-F. D. R. when we witnessed a really very substantial, almost a matter of kind rather than degree, growth in Presidential power and, if you will, Presidential assertiveness, we witnessed also as compared, if you will look back, Franklin Delano Roosevelt, Woodrow Wilson, Teddy Roosevelt, Andrew Jackson, as compared with those figures we witnessed also a drawing in somehow of the Presidency, and a, not an obsolescence, but a diminishing of the high educational function of the office. Teddy Roosevelt used to say it is a bully pulpit. Somehow in the same period in which the Presidency as an institution asserted its power, more magnificently than ever before, it seemed to withdraw from its educational role, from the pulpit role of the Presidency.

There are explanations for it. When John Kennedy was in office, he thought he had a small constituency and he had to be careful how much credit he expended. Before him Eisenhower, it wasn't in his nature. Harry Truman also not a great firer of imaginations. now President Nixon with this terrible Vietnam situation on his hands, somehow the succession of these men not only didn't enlarge but came close in some instances to abandoning the educational function while, at the same time, enlarging beyond all prior imagination the assertion of power of the Office.

It is a very curious paradox, and it sure should have worked out exactly the other way around.

COMMENDATION OF WITNESS

Senator McGee. Well, I have no more questions, but I want to say again you have been very instructive in your contributions in the dialog, and I hope that we will not rest on our oars here if we enact

a piece of legislation in this field because I think we are still far from our ultimate answers to the problem.

But the fact that we are trying, I think, is the one small bit of hope on the horizon.

Mr. BICKEL. I appreciate very much the opportunity for this conversation.

Senator MCGEE. Thank you.

Senator SPONG (presiding). Senator Pearson.

POSSIBILITY OF INDIRECT DECLARATION OF WAR

Senator PEARSON. Professor Bickel, I want to ask you a couple of questions that deal with procedures, but I do so with the kind of respect and appreciation that lawyers have for procedural rights.

When you made reference to the claim that has been made that Congress ratified the war, I looked back and called for the record. In World War I there was a joint resolution. The same is true of the declaration of war with Germany and Japan, in joint resolution, and whereby the words "we formally hereby declare."

Constitutionally would it not be possible for Congress to act indirectly by ratification, by the passage of resolutions, by the appropriations of money and that would be in a legal sense and in a constitutional sense, a declaration of war.

Mr. BICKEL. Well, sir, first, the general question whether Congress can act, whether it would satisfy the Constitution if Congress acted by ratifying by resolutions or statutes, I think the answer to that is clearly "Yes." For example, the Japanese exclusion case, Hirabayashi, which started with a curfew first, the decison of the Supreme Court there rested on the fact that a month after the President's military action in imposing a curfew and starting evacuation, Congress by joint resolution, I believe it was, ratified his action. That is the basis of that decision, that is why they held it constitutional. So I would think there would be no difficulty with Congress as the occasion arose, of course under the Javits bill it would arise, ratifying what the President had done.

As for appropriation acts, as for their constituting the ratification, my difficulty there is this. In the situation as we knew it in the past, the President does something he then comes into Congress for an appropriation. The ambiguity that I would like to see resolved is this: That Congress in that situation, at least many Members of Congress feel they are obliged to act.

Senator PEARSON. I know.

Mr. BICKEL. That the President has done something valid within his powers.

Let us say Congress annually appropriates money for the salary for the Chief Justice or the salary of the President. Nobody would take that appropriation as a ratification of anything because it is universally understood that Congress has the constitutional obligation to appropriate money for the operation of those institutions. The Supreme Court is set up under the Constitution and the Congress is constitutionally obligated, there would not be any remedy if it failed in that obligation, but Congress is constitutionally obligated to appro-

priate money to run it. You can decide questions of detail: does he need an administrative assistant or does he need three law clerks or should his salary be that high or should we raise it or not, but in principle you are constitutionally obligated to appropriate.

Well, I think a lot of Congressmen voted for appropriations, say, on Vietnam on the theory that while they were free to make judgments on questions of detail they were constitutionally obligated to support a constitutional action of the President, and that ambiguity makes that appropriation no ratification.

Senator PEARSON. The same attitude that you described and which I agree exists gives many Senators pause when they vote on resolutions cutting off money at a date certain

### U.S. CONSTITUTION ON MAKING PEACE

What does the Constitution say about making peace?

Mr. BICKEL. Oddly enough aside from treaty provision nothing.

Senator PEARSON. Nothing.

Mr. BICKEL. I think the beneficent assumption of the Constitution is that peace is the normal condition.

### HOW CAN CONGRESS MAKE PEACE WITHOUT DECLARATION OF WAR?

Senator PEARSON. The procedures historically have been that we have armistices declared by the Commander in Chief followed by a peace treaty, but in World War I we didn't have a peace treaty until 1923 but in 1921 Congress passed a joint resolution——

Mr. BICKEL. Declaring peace.

Senator PEARSON (continuing). Declaring once again formally that peace existed.

How can Congress make peace by joint resolution when you have not had a formal declaration of war?

Mr. BICKEL. Well, Senator, like anything else that the Constitution does not specially provide for, especially in the area of foreign relations, especially in that area as Curtiss-Wright says of what is implicit in nationhood, like anything else that is not specifically provided for it belongs to Congress if Congress exercises it, and it does so because of that vast repository of power which is the necessary and proper clause.

I would think reading what little there is in the history of the convention, that those wise and wonderful men assumed that peace was easy to make, that it would make itself, that that would come, and what you have to guard against was how you made war. That is why, as I said in my statement, they wanted to clog war and facilitate peace and you facilitated peace by just not putting obstacles in its way. But that is residual power to make peace, to withdraw from war, for example, Congress, that that power rests in Congress, I have no doubt and, for example, it has been Congress which has, it did after the First World War, which has declared the existence of emergencies sometimes giving the President a chance to bring it into effect by proclamation and which has then ended emergencies, which said—that is how price and rent controls ended after the First World War—Congress said it is no longer an emergency. Well there is nothing in the Constitution which

gives anybody the power to declare or undeclare emergencies, but like anything else not specifically mentioned, it is for Congress.

Senator PEARSON. Woudn't it naturally follow if Congress alone had the power to declare war, wouldn't it necessarily have the power to declare peace?

Mr. BICKEL. Certainly.

Senator PEARSON. Thank you, Mr. Chairman.

Senator SPONG. Thank you, Senator Pearson.

CONSTITUTIONALITY OF WAR POWERS BILLS

Mr. BICKEL. I am pleased you testified this morning for two reasons. First, I had discussed with Senator Javits that there was a void in the record on these hearings. We have heard from a number of noted historians who have assured us of the constitutionality of these bills, but we have not had anybody fresh from the courts before us—and with a reputation for legal scholarship such as yourself.

I gather that with the exception of some reservations about drafting language you have no doubts about the constitutionality of bills such as this.

Mr. BICKEL. Absolutely no doubt about the constitutionality.

CODIFYING WAR POWERS

Senator SPONG. Second, I am pleased you are here because in preparing myself for these hearings some weeks ago I read your testimony before the House on the Zablocki bill. Senator Javits had just introduced his bill for the first time. I am pleased that despite whatever qualms you had about seeking to codify war powers, you now feel differently.

Mr. BICKEL. As I said before, Senator Spong, my doubts then were not about the constitutional powers of Congress to act. My doubts were the normal reaction of a common law trained man. We don't like codes. I have since come to the view that, (*a*) that a code can be—Senator Javits taught me that with his successive drafts, that the code in this instance can be written so as to avoid most of what we common law lawyers think is bad about codes and I, secondly, have come to the view if something of this sort is not done now, we will have passed this great opportunity to redress the balance without doing anything.

Senator SPONG. I share that view. I recall in those hearings you said the way for Congress to resume is to resume, and I now take it that you think consideration of legislation of this type is part of resuming.

Mr. BICKEL. Yes. I was quoting, I think it was, John Sherman, I still have not looked it up, who said it, it must have been in the 1870's, the way to resume specie payments is to resume.

LIMITING AUTHORIZATIONS TO COMMIT ARMED FORCES TO HOSTILITIES

Senator SPONG. In replying to Senator Pearson there was a discussion of this matter of appropriations being interpreted as later authorization of an act—or ratification of it. The Eagleton resolution

and the Stennis resolution each specify that authorization to commit the Armed Forces of the United States to hostilities may not be inferred from legislative enactments, including appropriations bills which do not specifically authorize the use of such forces in armed conflict.

Would you care to comment on the desirability of a section such as that?

Mr. BICKEL. I thought about it a little bit as I read these bills. I see at first blush nothing objectionable about them. I do not think that the burden in drafting a bill like this is a little the other way, that is to say, that the shorter, the less detailed, the more constitutional, if you will, in aspect as compared to a statute, the more constitutional, as I say, in aspect that a bill like this is, the better, so on the whole the less detail the better. I would think that the vice of indirect ratification by appropriations bills would be very substantially cured by simply the passage of a thing like the Javits bill, because the vice is that Congressmen vote, Members of Congress vote, on the assumption they are in principle obligated to vote, and the Javits bill dispels that notion. But I don't have any apriori opposition to the inclusion of language like that.

It might be thought a little constricting. It may be that at some stage in the future the best vehicle for letting something go forward is an appropriations act.

Senator Sparkman and I were talking about the Greek-Turkish aid. I have a feeling that was put forward not post-facto: it was an authorization, not a ratification, but Senator Fulbright said he thought it had been nothing but an appropriations act. I am not sure it needs to be provided rigidly in advance that you can never act by an appropriations act. If you know what you are doing, that is as good a way to proceed as anything. God knows we have a lot of policy made by appropriations acts.

SPELLING OUT IMMINENT NUCLEAR ATTACK

Senator SPONG. In responding to Senator Javits earlier, and in your statement in main, you voice some concern about spelling out the President's right to respond to imminent attack or to repel an attack.

Mr. BICKEL. Yes.

Senator SPONG. Now, Senator Stennis, in his resolution, section 2, paragraph 3, spells out an imminent nuclear attack.

Mr. BICKEL. Yes, sir.

Senator SPONG. Would you care to comment on the desirability of having a section such as that in any legislation?

Mr. BICKEL. I would, compared with that section, prefer the present state of the Javits bill which does not speak of a threat of an attack at all. Because that section in the Stennis bill, as it is written, would purport to limit the President to responding to the threats of only a particular kind of an attack, and I think it is an incursion upon his constitutional power that probably wouldn't stand up.

I would prefer, my first preference would be, for some language that affirmatively speaks to his power to respond to threats of attack. My

second preference would be for leaving it out, and certainly I prefer leaving it out and assuming that it is understood, to a provision like this which purports to restrict it.

Senator SPONG. The Stennis resolution contains an earlier section dealing with repelling attacks, and I look at this as a further clarification of that section.

### LANGUAGE OF SUBSECTION 1, SECTION 2, OF STENNIS RESOLUTION

Mr. BICKEL. While we are on the Stennis bill I must say the language at the bottom of subsection 1 of section 2 at the top of page 2 "to take action that will protect the United States against future armed attacks by such foreign governments or power;" seems to me awfully broad, awfully broad.

### APPROACH TO TREATIES IN WAR POWERS LEGISLATION

Senator SPONG. In your responses earlier, do I gather that you prefer the approach used by Senator Eagleton on treaties to section A4 of Senator Javits' bill?

Mr. BICKEL. I am sensible of Senator Javits' point that the language in section 1 of the Eagleton bill is, may be read as being, too constricting. On the other hand, I did say to Senator Javits that it seems to me that something in the nature of congressional declaration that no prior treaty or commitment now existing, let alone in the future, does or constitutionally can authorize the President to go to war in a way which he wouldn't be authorized to do in the absence of a treaty, that some such language, I would greatly favor, and I would favor it as a substitute, perhaps not an entire substitute but a substitute, for his subsection which troubles me.

Senator SPONG. I am in a gray area here myself. I am a cosponsor of the Javits' bill.

Mr. BICKEL. I know.

Senator SPONG. I have felt that perhaps section 4 gives the President more power than I believe he has under the Constitution. At the same time——

Mr. BICKEL. Or can be given.

Senator SPONG. Or can be given. But at the same time I am a little apprehensive that Senator Eagleton's bill may be withholding or restricting.

Mr. BICKEL. Yes; the main difficulty with the language is that it could be read to mean that the existence of a treaty cannot form any part of the President's judgment that an attack on a foreign country is a threat of an attack on us, which I don't think is right or again possibly constitutionally viable. So my suggestion would be for borrowing from the Eagleton bill in greatly modified fashion some statement that negatives the proposition which has been made, of course, that these treaties somehow authorize action.

Senator SPONG. Senator Javits is here and I am delighted to say for the record that the longer I have looked at all of this, my admiration has grown that he put his finger on the need for war powers legislation 2 years ago. I know he recognized all of us are just trying to

come up with the best bill or resolution we can. I am pleased that you came here today and gave us the benefit of your views, Dr. Bickel.

Mr. BICKEL. Thank you

Senator SPONG. Senator Javits.

Senator JAVITS. Thank you very much.

COMMENDATION OF WITNESS

Mr. Chairman, I want to thank Professor Bickel very much. I am glad he doesn't just agree. It wouldn't be his nature and it wouldn't be as helpful. I assure him, and my colleague, Senator Spong, who has honored me by cosponsoring my bill, I will give his views very thorough consideration.

I am impressed with the "imminent danger" considerations. Senator Eagleton perhaps goes too far in his direction and I go perhaps too far the other way.

I will do my best to seek constitutional language. I think you are absolutely right about that. Anything we change as the bill is now drafted will follow that model. And finally, and very importantly, I thoroughly agree with you about negativing things. This should be a positive measure, and if you start to negative things you never know whether you have negatived everything and you are in trouble. So I hope with those ground rules you have helped us very much. We may be able to perfect my bill in a way which will get the best benefit of all the thoughts on the subject, including that of my colleagues who have complimented me greatly by adopting the general plan of my bill.

Thank you very much.

Senator SPONG. We will adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 12:25 p.m., the committee was adjourned, to reconvene at 10 a.m., Tuesday, July 27, 1971.)

# WAR POWERS LEGISLATION

TUESDAY, JULY 27, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10:05 a.m., in room 4221, New Senate Office Building, Senator John Sparkman presiding.

Present: Senators Sparkman, Fulbright, McGee, Spong, Aiken, Cooper, Javits, and Scott.

Senator SPARKMAN. Let the committee come to order, please.

## OPENING STATEMENT

I hope several other Senators will be here, but we have a rather heavy schedule and the Senate is already in session. We don't know when we shall be called over there, so I think we had better get started.

We continue our hearings on the war powers legislation that is now pending before this committee.

Senator Bentsen, of Texas, sponsor of S. 1880, will be our first witness, followed by the testimony of Senator Eagleton, of Missouri, who is the sponsor of Senate Joint Resolution 59.

(Text of S. 1880 follows:)

[S. 1880, 92d Cong., first sess.]

A BILL Relating to the authority of the President to use the Armed Forces of the United States in armed conflict

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That except as provided in sections 2 and 3 of this Act, the President may not use the Armed Forces of the United States in any armed conflict.

SEC. 2. The President may, in the absence of a specific authorization by law as provided in section 3 of this Act, use the Armed Forces of the United States in conflict to the extent reasonably necessary—

(1) to repel any armed attack on the United States by the forces of any foreign government or power and to take action that will protect the United States against future armed attacks by such foreign government or power;

(2) to repel an armed attack on the Armed Forces of the United States by forces of any foreign government or power and, concurrently, to protect the Armed Forces of the United States against any imminent danger of future attacks by the forces of such foreign government or power:

(3) to prevent or defend against an imminent nuclear attack on the United States by the forces of any foreign government or power, but only if the President has clear and convincing evidence that such attack is imminent; and

(4) to evacuate citizens of the United States from any foreign country in which they are located when such citizens are in such country with the

express or tacit consent of the government of such country and their lives are being subjected to an imminent threat by such government or by persons or forces beyond the control of such government.

SEC. 3. The President is authorized to use the Armed Forces of the United States in armed conflict pursuant to a declaration of war or other specific statutory authority, but authority to use the Armed Forces of the United States in armed conflict shall not be inferred from any provision of law, including any provision contained in any appropriation Act, unless such provision specifically authorizes the use of such forces in armed conflict.

SEC. 4. (a) Whenever the Armed Forces of the United States are used in armed conflict under any of the circumstances described in section 2 of this Act, the President shall promptly report that fact to the Congress and shall include in such report a detailed account of the reasons for so using the Armed Forces of the United States, his estimate of the scope of the Armed conflict, and the justification for the use of such forces under section 2 of this Act. Upon receiving any such report, the Congress shall decide, within thirty days after the first day on which Armed Forces of the United States were committed to armed conflict, whether the authority to so use the Armed Forces shall be extended or terminated. The following procedures shall be applicable to any such question:

(1) Any bill or resolution, authorizing the continued use of the Armed Forces in armed conflict under authority of section 2 of this Act shall, if cosponsored by one-third or more of the total number of Members of the House of Congress in which such bill or resolution originates, be considered reported to the floor of such House no later than one day following its introduction; unless the Members of such House determine otherwise by yeas and nays; and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such commiteee within one day after it is referred to such committee, unless the Members of the House referring it to committee determine otherwise by yeas and nays.

(2) Any bill or resolution reported pursuant to paragraph (1) of this subsection shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall determine otherwise by yeas and nays.

(b) In no case shall the Armed Forces of the United States be used in any armed conflict under any of the circumstances described in section 2 of this Act for any period exceeding thirty days after the first day on which such forces were first engaged in such conflict unless the Congress has specifically authorized the use of such Armed Forces in such conflict for a longer period.

SEC. 5. Whenever Armed Forces of the United States are engaged in armed conflict in any foreign country, the President shall, so long as such forces continue to be so engaged, report to the Congress periodically on the status of the armed conflict as well as on the scope and expected duration of such conflict, but in no event shall he report to the Congress less often than every six months.

SEC. 6. The provisions of this Act shall not apply to—

(1) the armed conflict in the Republic of South Vietnam in which the Armed Forces of the United States were engaged on the date of enactment of this Act; or

(2) military activities carried out against the military forces of North Vietnam, or against forces allied with North Vietnam, in North Vietnam, Laos, Cambodia, or the waters surrounding the Indochina Peninsula, so long as such military activities are directly related to the conflict referred to in paragraph (1) above.

SEC. 7. As used in this Act, the term "armed conflict" includes (1) land, air, and naval actions taken by the Armed Forces of the United States against the military forces or civilians of any foreign country or government, (2) the deployment of the Armed Forces of the United States outside of the United States under circumstances that present a reasonable possibility of the use of arms against the military or civilian forces of a foreign country or government, and (3) the assignment of members of the Armed Forces of the United States to accompany, command, coordinate, or participate in the movement of regular or irregular military forces of any foreign country or government when such military forces are engaged in any form of combat activity.

Two witnesses active in the Kennedy and Johnson administrations, Mr. George Ball and Mr. William D. Rogers, will follow Senator Eagleton.

Mr. Ball served from 1961 to 1966 as Under Secretary of State. Since 1966 he has been the president of the board of directors, Lehman Bros. International, in New York City.

Mr. Rogers is currently a partner in the law firm, Arnold & Porter, in Washington, where he has been since 1965. From 1963 to 1965 he served as Deputy U.S. Coordinator of Alliance for Progress and Deputy Assistant Administrator of AID.

Gentlemen, we are pleased to have all of you with us today and, at this time, I will call on Senator Bentsen.

## STATEMENT OF HON. LLOYD M. BENTSEN, U.S. SENATOR FROM TEXAS

Senator BENTSEN. Mr. Chairman, I want to thank you and the members of the Senate Foreign Relations Committee for this opportunity to testify on S. 1880, a bill concerning the authority of the President to commit U.S. forces to armed conflict.

### WITNESS' INTENT

Let me preface my remarks here by stating that I do not intend to even attempt to review the legislative specifics of the question of constitutional powers. You have heard testimony on those. Many witnesses better qualified than I have given numerous legal references, opinions, and precedents to support the position that Congress itself should, indeed must, share the powers with the Presidency, and in the matter of war and commitment of U.S. troops, it must exert its particular constitional duty in that regard.

I have read a great deal of testimony on this question, including the hearings last year before this distinguished committee on Documents Relating to the War Power of Congress. I have reviewed the testimony of some of my colleagues before this committee on the matter this year and I have been impressed by the legal arguments.

It is not my intent, however, to reinforce those arguments in a legal sense of presenting cases, decisions, or legal opinions. It is my intent to sincerely express my personal beliefs, my concern, and my own opinions, and express my support for a measure to help clarify a fundamental policy question.

### PRINCIPAL SOURCES OF LEGAL AUTHORITY FOR BOTH POSITIONS

We know that the principal sources of legal authority for both positions on this argument are four:

1. The language of the Constitution;
2. Debates at the Philadelphia Constitutional Convention;
3. A few judicial decisions; and
4. The practice of Presidents.

There has been quite voluminous debate and speculation which have supplied quotes from respected sources, legal and otherwise, on both sides of this question. Most, of course, have been quoted to you

gentlemen here at some point in the rather full hearings which you have conducted and are conducting.

VACUUM CREATED WHEN CONGRESS REFUSES TO EXERCISE ITS ROLE

As one of the new men in this particular scene, that is, the U.S. Senate, I come with some preconceived notions about this body. In relation to the question of warmaking authority, one such notion is that inertia, indifference, or quiescence on the part of Congress may, sometimes, enable if not invite independent measures by a President. That, I certainly believe, has been the case in recent years. We know, of course, that the Constitution does give the President considerable powers. And Presidents utilize that power, not necessarily improperly, so long as Congress has not spoken.

Let Congress be passive and refuse to exercise its role of advise and consent on this the most meaningful of issues and the vacuum created will surely find power flowing to it in the form of executive decision. Allow it to continue and Congress will ultimately be observed in the role of a constituency by the Executive rather than a partner in the decisionmaking process. This Government has its separation of powers and necessarily its shared powers but for such a relationship to continue to have meaningful input from both branches, I think it must be one in which their independence must be equal, their dependence will be mutual, and their obligations will be reciprocal. We must restore not only the balance of power but also the balance of trust.

PRESIDENT CANNOT ACT CONTRARY TO EXPRESSED WILL OF CONGRESS

The one clear, explicit position of the separation of powers, constitutionally contrived and judicially reinforced and clarified in all four sources of legal authority is that the President does not have the power to act contrary to the expressed will of Congress.

If the President and Congress do disagree on whether we should initiate, or continue, a military involvement, both the Constitution itself and all accepted theory of government that it represents indicate that it is the will of Congress which is closer to the electorate and represents a greater diversity of views than the President. This being so, in such a confrontation, on the warmaking powers, the Congress must prevail.

On that basis, I believe that the passage of legislation such as my bill would clear up some of the questions. That is, there is little question about the President's powers if Congress has expressed its will. The President does not have the power to act contrary to the expressed will of Congress—that point it clear. We should express our will, clearly, in this legislation.

ISSUE IS TWOFOLD

The issue we face is twofold; the first consideration involves the determination of the Congress to exercise its constitutional authority; the second concerns the vitality of the processes by which we, the Congress, will continue to play a foreign policy role.

EFFECTS OF S. 1880

My bill seeks to restore to the Congress a firm control over the authority to initiate hostilities that the Constitution has clearly provided us. It is prompted not by any one incident or policy but rather by what I see as a longer term trend toward excluding the Congress from a meaningful decisionmaking role in the formulation of our Nation's foreign policy.

My bill would seek to reverse this process and bring back to the Congress its role in the involvement in war. The bill delineates those situations where the President may commit U.S. forces in the absence of a specific declaration of war. It leaves the President with ample authority to defend this country, or its forces, from any attack, whether it be conventional or nuclear. It considers the need to respond quickly and authoritatively in times of national emergency.

The bill also provides, however, that the President must seek the advice and consent of the Congress within 30 days of the commitment of combat forces at any place around the globe.

In effect, the bill balances the prerequisites of national security and flexibility in the conduct of foreign policy with the constitutional prerogatives granted to the Congress in declaring war.

This measure should not, I feel, be viewed as an effort to place blame or to censure anyone for policies of the past. If there is any blame for past failure, this body and the entire Congress have a share in it. There is enough blame to go around for everyone. There is no attempt by me to point the finger of accusation at Presidents Eisenhower, Kennedy, Johnson, or Nixon—all of whom acted in what they felt was the Nation's best interest. I think, rather, that this bill should be looked upon as a move to strengthen the processes whereby U.S. foreign policy decisions are reached and enforce the sharing of the decisions and the responsibilities. It is to express the will of the Congress.

WAR POWERS DISTINCTION MADE IN CONSTITUTION

The framers of the Constitution were explicit on this point: that the President, as Commander in Chief, has authority over the operations of all U.S. Armed Forces but that the Congress and only the Congress can make a declaration of war.

This distinction has become blurred in recent times and I know that many now subscribe to the argument that the Executive must be free to decide not only how we should wage war but also when and if and where we should wage war. This usurpation of power and prerogative is dangerous if indeed we are to remain a cohesive people, both because it violates a clear constitutional structure and because it weakens public support for foreign policy decisions once they are made. Part of today's divisions, I believe, are the result of the belief that people feel they did not fully participate in the process of deciding on their involvement in Vietnam.

U.S. FACES CONSTITUTIONAL ISSUE AND CONFIDENCE IN GOVERNMENT ISSUE

What we face then is not only a constitutional issue but also an issue of confidence in Government as well.

I do not suggest that the passage of this bill will drastically alter the course of American foreign policy or bring unanimity on the controversial decisions we must make. I do suggest that if the Congress asserts itself, if the proper constitutional procedures are followed, and if the elected representatives of the people act as authorized by our Constitution, then the Nation will be provided with a strong unifying force that can carry us through the tests we must face.

The bitter debate we are engaged in now over the Vietnam war provides a case in point. The issue of how we entered the war and by what authority we continue the war has created as much controversy as any other aspect of this agonizing conflict.

Under this bill, there would be clarification of such authority. The decision to wage war and commit U.S. troops to foreign soil would be made by the elected representatives of the people and would have the full legitimacy of an act authorized by the Congress. I am not suggesting that the decisions may have been different if they had been properly shared, but I believe there would be a greater sharing of the sense of responsibility.

If the Government's decisions are to be supported and respected, then they must be made within the institutions which the people have constituted and over which they have control.

Surely this is one lesson we have learned from Vietnam which now casts a shadow of mistrust over four administrations and clearly demonstrates to us how the principle of shared powers has been weakened.

The Congress must move to dispel this mistrust in our institutions and show that we are capable of meeting our constitutional obligations in the formulation of foreign policy, especially in the commitment of our sons to war.

This committee has before it several proposals which would achieve that project by guaranteeing that no future war or conflict could be initiated without the Congress' approval.

### DIFFERENCES BETWEEN S. 1880 AND OTHER PROPOSALS

I would like to take just a moment to review some of the differences between the provisions of S. 1880 and those of other proposals before the committee.

S. 1880 would allow the President, in the absence of a declaration of war, to commit U.S. forces to conflict for the following reasons:

1. To repel an armed attack on the United States by a foreign government or to prevent against future attacks by such government.

2. To repel an attack on the Armed Forces of the United States or to protect the Armed Forces from any imminent danger of future attacks.

3. To prevent or defend against an imminent nuclear attack on the United States by the forces of any government or power.

4. To evacuate citizens of the United States from a foreign country when their lives are endangered by such government or forces beyond the control of such government.

This differs from the proposal of the distinguished Senator from New York, Senator Javits, in that it more tightly prescribes the circumstances where the President may commit U.S. forces.

The Javits bill would allow the President to commit forces without prior congressional approval, in compliance with treaty obligations or to protect the property of U.S. nationals abroad.

This is, I feel, too broad a mandate and would avoid the purpose we seek to fulfill.

On the other hand, I do not feel that we should attempt to draw into this legislation formula to cover all the various tactical situations that the President might face in dealing with a hostile government.

The legislation must be left in broad enough terms so that there is no doubt about the Chief Executive's authority to respond when necessary.

These are small differences, in effect, and do not dilute the central purpose of each of these bills. Each attempts to establish the respective roles of the President and the Congress in making the decisions to go to war.

Mr. Chairman, I know that this committee shares with me my deep concern over this issue, and I want to thank you for providing me this opportunity to share my views with you.

Senator SPARKMAN. Thank you very much, Senator Bentsen.

I think we might hear from Senator Eagleton and then perhaps we can put questions to each of you. We are very glad to have you with us also, Senator Eagleton.

## STATEMENT OF HON. THOMAS F. EAGLETON, U.S. SENATOR FROM MISSOURI

### PENTAGON PAPERS RELEVANT TO WAR POWERS DELIBERATIONS

Senator EAGLETON. Thank you, Mr. Chairman, and I will assure the committee I will be brief and I say it is unusual for a Senator to appear twice on a piece of legislation but I believe the release of the Pentagon papers throws new light on the crucial decision of the Vietnam war—new light that is relevant to this committee's deliberations regarding the war powers of Congress.

Viewed broadly in the context of determining foreign policy, the Pentagon papers portray an ever-broadening, almost boundless unilateral decisionmaking role by the post-World War II executive branch. The papers show decisions being made without the knowledge and consent either of the Congress or the people.

The key to this enormous accretion of power to the executive branch, in my judgment, is secrecy motivated by far too broad view of the President's foreign policy prerogatives. According to every recent occupant of the White House, the President can pursue foreign policy not only by diplomacy, but by the threat of force, or even the actual use of force, as well.

Admittedly the President does have great diplomatic latitude. Diplomacy by referendum or consensus was not sensible when the Constitution was drafted and it is no more sensible today.

Unquestionably the President is this Nation's chief diplomat.

But when diplomacy fails or when diplomacy leads to an impasse which threatens to result in war, the decision is no longer the President's alone. The Constitution mandates that when the talking stops, Congress, not the President, decides if the shooting starts.

In fact, nothing is clearer from the deliberations of the Founding Fathers than their desire to insure that the decision to go to war, as distinguished from the routine conduct of diplomacy, be a collective decision.

CONSTITUTION SECONDARY CONSIDERATION IN VIETNAM WAR DECISION

But as Neil Sheehan of the New York Times wrote, the intent of the Constitution was a secondary consideration as the post-World War II Executive decided that the use of force was necessary in Vietnam:

> To read the Pentagon papers in their vast detail is to step through the looking glass into a new and different world. This world has a set of values, a dynamic, a language and a perspective quite distinct from the public world of the ordinary citizen and of the other two branches of the republic—Congress and the judiciary.
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> Clandestine warfare . . . naturally has an important effect on public events. Covert operations also occasionally violate treaties and contradict open policy pronouncements.
>
> Clandestine warfare against North Vietnam, for example, is not seen, either in the written words of the senior decisionmakers in the executive branch or by the anonymous authors of the study, as violating the Geneva accords of 1954, which ended the French-Indochina war, or as conflicting with the public policy pronouncements of the various administrations. Clandestine warfare, because it is covert, does not exist as far as treaties and public posture are concerned. Further, secret commitments to other nations are not sensed as infringing on the treatymaking powers of the Senate because they are not publicly acknowledged.
>
> The guarded world of the government insider and the public world are like two intersecting circles. Only a small portion of the government circle is perceived from the public domain, however. Vigorous internal policy debates are only dimly heard and high-level intelligence analyses that contradict policy are not read outside. But as the Pentagon papers demonstrate, knowledge of these policy debates and the dissents from the intelligence agencies might have given Congress and the public a different attitude toward the publicly announced decisions of the successive administrations.
>
> The segments of the public world—Congress, the news media, the citizenry, even international opinion as a whole—are regarded from within the world of the government insider as elements to be influenced. The policy memorandums repeatedly discuss ways to move these outside "audiences" in the desired direction, through such techniques as the controlled release of information and appeals to patriotic stereotypes. The Pentagon papers are replete with examples of the power the executive branch has acquired to make its influence felt in the public domain.

In short, Mr. Chairman, the picture that emerges of the post-World War II executive branch can give little comfort to a Congress intent on reclaiming its constitutional war powers and restoring deliberate decisionmaking on whether or not we go to war.

CONGRESSIONAL ACCESS TO INFORMATION ABOUT EXECUTIVE DECISIONS

For if knowledge is power, the President has become all-powerful in the conduct of both diplomacy and warmaking. By taking secret actions suggested by a few men in secret sessions, a President can effectively limit congressional warmaking options in advance, or distort congressional judgment by withholding crucial information—as, in my judgment, in the case of the Gulf of Tonkin.

Unless Congress has regular access to information about executive decisions which could move us toward war, any "war powers" legislation emerging from this committee will be only a half step.

The Pentagon papers indicate that if Congress is going to reassert its rightful authority to decide when this country goes to war, it must have the pertinent and vital material to make an informed judgment. Such a judgment requires more than the material which the executive branch force feeds Congress, more even than the specific information Congress requests. Such a judgment requires all relevant information that deals with Executive actions that could take us into war.

That information must be secured on a regularized basis.

Senator Cooper has taken a step in this direction with the introduction of S. 2224, which amends the National Security Act of 1947 and requires the Central Intelligence Agency to keep the germane committees of Congress "fully and currently" informed through regular and special reports to Congress and special reports in response to requests made by the appropriate committees.

The importance of this step cannot be underestimated.

CONGRESSIONAL SCRUTINY OF EXECUTIVE PRIVILEGE

Executive privilege is likewise coming under closer congressional scrutiny as indicated by Senator Fulbright's testimony today before Senator Ervin's Separation of Powers Judiciary Subcommittee which is delving into the question of executive privilege.

Through the years congressional indifference has allowed to go unchallenged the broad Presidential claims of constitutional power to withhold information from Congress.

One of the clearest, and one of the most constitutionally unsupportable views of executive privilege, in my judgment, was expounded by Attorney General William P. Rogers in 1954 when he stated, this was Attorney General Rogers back 17 years ago:

> For over 150 years, almost from the time that the American form of government was created by the adoption of the Constitution—our presidents have established, by precedent, that they and members of their cabinet and other heads of executive departments have an undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy. American history abounds in countless illustrations of the refusal, on occasion by the president and heads of departments, to furnish papers to Congress, or its committees, for reasons of public policy. The message of our past Presidents reveals that almost every one of them found it necessary to inform Congress of his constitutional duty to execute the office of the President, and, in furtherance of that duty, to withhold information and papers for the public good.

Past Presidents probably assumed that withholding the full extent of our commitment to, and covert operations in, Southeast Asia was for the "public good." It certainly was the most effective way to work without the hindrance of public opinion or without the hindrance of Congress.

No one denies that the Executive has the right to counsel from his advisers in private. However, when that private counsel becomes national policy, whether it be announced or whether it be covert, then Congress has the need, indeed the right, to know.

CONGRESS MUST PARTICIPATE IN GOING TO WAR PROCESS

Some mechanism, and I readily admit that I am not sure at this time what that mechanism should be, must be found to insure that Congress

has access to relevant information regarding all decisions calling for action, before those decisions lead to violent reaction elsewhere in the world.

Finally, Congress itself must want to, and be prepared to participate in the process by which we go to war.

For Congress to pay more than pious lipservice to its warmaking role, it must not only pass a strong war powers bill, but also must be willing to demand, receive, and act upon relevant information it needs to exercise the most solemn of its constitutional responsibilities, that is making the final decision that takes this country to war.

Thank you, Mr. Chairman.

### TESTIMONY OF PROF. ALEXANDER BICKEL

Senator SPARKMAN. Thank you, Senator Eagleton.

I shall be very brief in my questioning and then call on the other Senators who are here. I will ask this of both of you. Did you by any chance read the testimony that was given yesterday by Professor Bickel before this committee.

Senator EAGLETON. I have not had a chance to read it.

Senator BENTSEN. I have not.

Senator SPARKMAN. I hope you will read it. I think it probably portrays pretty well the dilemma that has confronted the country over the years, and still confronts it, with reference to the division of powers between the Executive and the legislative.

Professor Bickel, I believe, is recognized as one of the outstanding constitutional authorities in this country. One point he made that I think is quite well to keep in mind is that regardless of what Congress writes into law with reference to its powers or the President's powers, it has no effect if the provisions of the Constitution say otherwise and, of course, we would all accept that as a general proposition.

I thought of that, Senator Bentsen, in your statement, when you said that what Congress enacts the President must observe.

Professor Bickel made it quite clear that the inherent powers in the President are granted to him by the Constitution and likewise the powers in the Congress are given to it by the Constitution, and that we cannot legislate in a way that takes away or changes those powers in any particular respect.

### COMMISSION TO DRAW UP DECLARATION OF DIVISION OF POWERS SUGGESTED

I think that is good constitutional law, but I have long wished that there might be, it might be possible to set up, a commission bringing together several of the best constitutional lawyers in the country and see if they could draw up a kind of declaration of division of powers, I think it would be helpful to us.

Senator BENTSEN. Mr. Chairman, on that one, I am thinking of particularly the political realities. I think that if the Congress were to act, and under the provisions of my bill, and take a firm and strong stand against a military commitment, Presidents are not politically rational men, and I don't think one could survive politically if the Congress had taken a strong stand against a military commitment, and I believe the President in that kind of a situation would acquiesce.

DIFFICULTY IN DETERMINING WHEN WAR COMMITMENT MADE

Senator SPARKMAN. If we use the Vietnam war as an example, have you had any difficulty in deciding when the commitment was made?

Senator BENTSEN. Of course I have, but I think one of the things that this bill would do would force a discipline on the Congress itself to take a position within a relatively short period of time. I believe something else, too, that the Congress, with its hundred Members in the Senate and we have 435 in the House, that in part these people, too, are opinion makers along with the President, and when they take a position that that helps act as a cohesive force in keeping the country together and expressing its will when we are involved in a military conflict. So I think it is a contributing force in holding the country together.

Senator SPARKMAN. Of course, conditions have greatly changed today from what they were when the Constitution was written. There are those who say that probably there may never be a formal declaration of war again in the case of war. There was not a formal declaration of war in connection with Vietnam and there was not in connection with the Korean war. Of course, that had other complications in that it was a United Nations move. There were formal declarations of war at the beginning of World War II and, I suppose, all other wars prior to that time. I noticed that in your resolution you recognize those situations, these modern situations, and would give the President power.

WITNESS' CONSTRUCTION OF CONSTITUTION REGARDING PRESIDENTIAL POWER

Again we go back to the principle that Professor Bickel brought out. Those powers would have to be included in the general powers that the Constitution gives, wouldn't they?

Senator BENTSEN. That is correct.

Senator SPARKMAN. And I take it it is your construction that the Constitution does give the President that.

Senator BENTSEN. That is right.

Senator SPARKMAN. I look back over the history of this country, and the different occasions in which Armed Forces were used either for combat, or in most instances in order perhaps to prevent combat or to allay troublesome conditions in different countries of the world, in which the President on his own deployed some of our Armed Forces.

It dates, I believe you said in your paper, it dates almost from the time of our first administration.

We could theorize a long time on this. I won't ask any more questions now. I will pass to Senator Aiken.

EFFECT OF HUMAN ELEMENT IN SEEKING SOLUTION

Senator AIKEN. Mr. Chairman, I think we ought to realize that we are seeking a solution to a problem for which we never will find a completely adequate or satisfactory solution. There is always going to be competition for power, for wealth in this world, just so long as the human being retains the traits of all forms of animal life. I don't think there is any question about that.

You suggested that we get half a dozen of the best constitutional lawyers in the country to meet and work out the proper interpretation of the Constitution. If you got the six most noted constitutional lawyers in the country together, you would get at least six different interpretations of the Constitution with each lawyer thinking that he was more knowledgeable and more capable of interpreting the Constitution than the other five. I think we just have to take these things along on a day-to-day basis, continue to search for a solution, and seek an objective which we never will quite achieve.

Senator SPARKMAN. If the Senator would permit me right there, I want to make it clear, I did not suggest this as something that I thought was likely to happen, because I agree fully with what you have just said.

Senator AIKEN. I think the exhibition last night, the heavyweight bout——

Senator SPARKMAN. It is one of these iffy things.

Senator AIKEN (continuing). Would be a prelude to the meeting of the finest six constitutional lawyers of the United States. I am not a lawyer and probably shouldn't refer to them as such, but I do know something about other animal life. I know we are no different than what we call the lower forms of animal life.

However, Senator Bensten did put his finger on a current situation twice in his remarks. He says, "We must restore not only the balance of power but the balance of trust," and then he goes on and he says, "What we face then is not only a constitutional issue but also an issue of confidence in government as well."

That is a very serious problem and has been for the last several years. Probably with the increase in educational facilities in this country that problem has intensified itself because people will take it more seriously.

We know it is also a problem which I don't think is confined to the United States, but is worldwide. I think all we can do is to keep busy hoping that we can make tomorrow a little better day than today and certainly better than yesterday. But we do have a human element to contend with. Competition is not dead. If competition were dead progress would be dead along with it, we know that. It is competition that creates progress, problems create progress. These go hand in hand.

So I think that these remarks of our witnesses, Senators Bentsen and Eagleton, this morning have been very interesting and, as I say, let's see if we can make tomorrow a little better than today or yesterday.

That is about all I have. I don't have the solution to what ails us. I don't think anyone else has either.

Senator SPARKMAN. I agree.

Senator Spong.

COMMENDATION OF WITNESS

Senator SPONG. Mr. Chairman, this is Senator Eagleton's second appearance before this committee. I think his testimony and the resolution he has introduced have made a great contribution to the record in our consideration of this problem. The entire Senate and this committee are indebted to him for this.

Senator Bentsen, I have read your statement, although I was not here when you made it. I gather that you feel that the section of the Javits bill which allows the President to commit forces without approval because of a commitment or a treaty is too broad.

Senator BENTSEN. Yes, I do, Senator Spong. Actually most treaties provide that they will be implemented within the constitutional authority of each country and, frankly, I believe the constitutional authority in this country is such that it requires the participation by the House of Representatives as well as the Senate in a declaration of war.

The treaty power is relegated solely to the Senate, and I recall Madison referring to the constitutional debates when he stated that at one time they considered giving the warmaking powers solely to the Senate but decided it should be a shared power with the House so, therefore, I believe that under the Constitution we have not given away by treaty the right of declaring war to the Chief Executive.

Senator SPONG. I think Senator Sparkman may have touched on this. Professor Bickel yesterday expressed doubt that we could give the President this authority under the Constitution. Both of you gentlemen in the legislation you have introduced provide for an imminent danger of attacks provision whereby the President can act. Professor Bickel yesterday observed to Senator Javits that his bill does not provide for this, and that he thought that any legislation passed out of this committee should provide for it.

## WHY SPELL OUT "IMMINENT NUCLEAR ATTACK"?

Senator Bentsen, in your bill you go further and spell out the imminent nuclear attack and, Senator Eagleton, you do not, although in your earlier testimony I recall you said that you had considered this. Why do you think it is helpful to have this spelled out in the bill, Senator Bentsen?

Senator BENTSEN. Well, because this appears to be the most devastating of all attacks that we can be subjected to, and one that would be done on a very short notice, and one where you have to have in turn probably a very dramatic and total commitment, and I believe that we ought to spell that out in detail to the Chief Executive so that there will be no question about his authority to react.

Senator SPONG. The public certainly believes he has authority right now; don't you think so?

Senator BENTSEN. Yes.

Senator SPONG. Of course, we won't be around to discuss that if he ever invokes it.

I think it is implicit in your resolution, Senator Eagleton, although it isn't spelled out.

Senator EAGLETON. I think it probably is. I debated with those who worked with me in drafting Senate Joint Resolution 59 on the advisability of including authorization for a preemptive strike and I came to a judgment along the lines that you articulated. If we came to the point where the button was pushed, the question of responsibility would be moot.

The Stennis resolution, which is quite similar to my resolution, does contain a preemptive strike provision. I would not be terribly upset if it were in the final product reported out by this committee.

PROVISIONS IN LEGISLATION DEALING WITH FUTURE ATTACKS

Senator SPONG. Senator Bentsen, when I was questioning Professor Bickel yesterday, he felt that the provisions of your legislation and Senator Stennis' which deal with future attacks were too broad. While telling Senator Javits that he thought we should provide for imminent attacks he observed that providing for future attacks was too broad.

The history of a great deal of justification for the making of war has been this business of being fearful that someone at some point in the future might attack you. It goes back to the *Caroline* case up at Niagara Falls where they crossed from Canada and shoved a ship, an American ship, over the falls because they had information that the ship was going to be used against it. We protested and the British Government cited the law to us, and we didn't follow up the protest.

Now, some of the justification for Cambodia went very much along the same lines. In the early conflicts with the Indians, you find orders from, I believe President Washington, reciting "Indians were going to attack so you are authorized to do so and so."

If we leave in the language that you have with regard to future attacks, doesn't the President have authority to do almost anything, subject, of course, to the reporting process. There is always possibility of a future attack.

Senator BENTSEN. There is no question, Senator Spong, but what he is given more discretion, and the judgmental factor, the subjective judgment, is more involved and can be more utilized that way, but I feel very strongly about this point of confidence in our institutions and the utilization of the institutions that we have in government today, and that the Congress has not played its full role in this, and I feel that this way it would do so, and we would see more of the balance of trust restored.

I want to emphasize I am not pointing the finger of blame on any past administration in this but just trying to develop something that will see more cohesiveness on the part of our people when we do become involved.

Senator SPONG. Well, I thank you both for your appearance here this morning. That is all, Mr. Chairman.

Senator SPARKMAN. Senator Aiken wants to ask a question.

Senator AIKEN. Senator Spong pointed out what I considered one of the loopholes in the Bentsen bill which authorizes the President to use force to prevent future attacks by a foreign government. The President might decide that Lower Slobovia, for instance, planned to attack the United States in 1995; therefore, it is up to him to put a crimp in their ambitions right now by using Armed Forces. I think that is one of the weaknesses.

MUTUAL TRUST AND CONFIDENCE NEEDED IN GOVERNMENT

It all comes down, we might say, to a question which, Senator Bentsen pointed out, of mutual trust and confidence in Government. We have our work cut out for us to restore mutual trust and confidence

between the branches of Government, not in government. I don't like it when anyone says that Government believes this or does this. They usually refer to the executive branch, and in my book there are three branches of Government, and the Government does not mean the executive branch alone. But there is sure need for restoration of confidence. That is all.

Senator SPARKMAN. Senator Cooper.

Senator COOPER. Senator Scott came before I did.

Senator SPARKMAN. Senator Scott, either one.

Senator COOPER. He was here first.

PROBLEM WHEN PRIVATE COUNSEL BECOMES PUBLIC POLICY

Senator SCOTT. Okay.

One of the big problems that Senator Eagleton mentioned, is when private counsel becomes a national policy. That is what the Romans called Arcana Imperii, the mysteries of government. It is a very difficult one and I don't know precisely how you solve it.

A hundred years ago in 1871 in the 41st Congress, I think it was—and I have been reading for light reading at home, the debates of Sherman and Garfield, and Frelinghuysen and the rest of the giants of that period in the House of Representatives, on the President's war powers—what was involved was an invasion of what was then Santo Domingo or what comprised that part of then Santo Domingo, which included Haiti. They were floundering and they were having as much difficulty as we are. There was strong disagreement.

The President's party and position was carried by some of his orators. There was much criticism of it. It seemed the President had moved into Santo Domingo and had used some armed forces and had not consulted the Congress and Congress did not like it a bit.

NEED FOR WAR POWERS LEGISLATION

I think we need some kind of war power legislation. It is the first time I have said this, but I was thinking last night of all of the times in which the Congress has tried to make clear to a succession of Presidents the necessity for, and I use the dreadful cliche of this administration, the necessity for input, sharing, constitutional sharing, and I think it is a question of what kind of legislation we come up with. It has been difficult for every President, and I have seen them all back to Roosevelt, to understand that Congress just does not want to be denied. I think the time has come when Congress will not be denied the right to participate, in accordance with the Constitution, in this whole ominous business of how wars are begun and how they are carried on and who has the responsibility for the steps that lead us into war.

Do you have any suggestion as to how you determine when private counsel becomes national policy?

Senator EAGLETON. First, let me say, Senator Scott, I subscribe to everything you said in posing the prelude to your question. I am pleased to hear you say we need some legislation in this area to better delineate the collective responsibility that is involved in this awesome responsibility. The point I am trying to make in this testimony today,

as much as I believe in a war powers resolution, the more I become convinced also we need legislation following that that provides for an adequate flow of pertinent information on a regularized basis so that the decision the Congress is called upon to participate in is not made in an informational vacuum. Or, put another way, suppose we pass war powers legislation, whether it is the Javits bill, the Eagleton bill, the Stennis bill, the Bentsen bill or a collage bill, with ideas from all the bills and put it on the books. If the Congress does not have an adequate flow of information it cannot be an intelligent partner with the Executive. Without adequate information Congress simply cannot be a meaningful partner in that decisionmaking process. In fact, if you ask Congress to participate in a decision with less than adequate information it is no decisionmaking process at all.

I said in my prepared remarks that I did not have the utopian or instant answer. I think the Cooper bill is a step in the right direction. I think the Fulbright inquiry, in his testimony today before Senator Ervin's committee, on so-called executive privilege, would help. I am interested to note that there are about nine bills already introduced, some of them pre-Pentagon papers, some of them post-Pentagon papers on questions relating, in one form or another, to the flow of information; bills by McGovern, Cooper, Humphrey, Roth, Fulbright, and Case.

Senator SCOTT. By Senator Stennis, too, I believe.

Senator EAGLETON. On war powers.

Senator SCOTT. On war powers.

Senator EAGLETON. I do not have at this point the answer to that provocative question which you raise, but I think it is one we have to keep in the back of our minds. All is not made utopian, to use Senator Aiken's phrase. There is a need for further followup legislation that provides for a regularized flow of information so that the Congress can make an intelligent participating decision.

Senator SCOTT. The reason I have come down a long road to a conclusion that we need some definition of the relative responsibility in the warmaking process is that, frankly, without some congressional statement I don't see how we are going to cut into this merry-go-round situation.

### UNWILLINGNESS TO SHARE INFORMATION WITH CONGRESS

The natural tendency of the advisers of any President is to retain as much secrecy as possible, to point where it threatens isolation and gets close to the point of suffocation of information, and it is natural to any President, it has no relation to one. This has happened in the whole history of our country, as I said earlier, it happened back in 1871. Therefore, there is an unwillingness to share with the Congress the information that led up to the decision.

At the same time, I think there is a valid reason for this. From the point of view of the Executive, there is the fear that legislators will talk too much or that they will leak too much to the papers. I am glad you mentioned the Pentagon papers because certainly the sum total of what all the Congressmen have said does not equal a single massive leak that the Pentagon papers are. The information is going to come out. It usually comes out belatedly, too long afterwards, after the fact, to do anybody any good.

I think we could define better what the Congress has a right to know, what the Congress has a right to do and wherein the Congress has a right to share.

The Executive never likes the Congress, no Executive likes the Congress to share in this most important of all powers under the Constitution, and I am making this statement because I think it is good for the Executive or any future Executive as well to know that the right is guarded by the Constitution and we have to work it out.

COMMITTING FORCES IN COMPLIANCE WITH TREATY OBLIGATIONS

In relation to the difference between your proposal and that of Senator Javits, I am concerned about the omission of the right of the President to commit forces without prior congressional approval in compliance with treaty obligations for this reason.

Take the Lebanon landings. I don't know whether that was a treaty obligation or not in the Middle East, but President Eisenhower landed forces in a completely bloodless coup which maintained peace in the Middle East for many years. I didn't know whether Congress ever did formally approve that. Perhaps they did.

Senator EAGLETON. Congress passed the Middle East resolution.

Senator SCOTT. I know that it was generally popular. They passed a resolution in advance, Senator Cooper said, before we went in, and so much the better.

Senator SPONG. But I think the record should show that the Eisenhower administration very pointedly made the fact they were not relying in any way upon that resolution in the Lebanon landing.

Senator EAGLETON. Yes, that was the case. Although there was a resolution in advance, President Eisenhower said he was not relying on it. Rather, he claimed to be acting under his inherent constitutional powers.

Senator SPONG. That is correct.

Senator SCOTT. That is why the colloquy is helpful—I think——

Senator EAGLETON. President Eisenhower did not claim to be acting pursuant to a treaty. He claimed to be acting in his inherent role as Commander in Chief and that I say is too broad an interpretation for that role.

Senator SCOTT. That is where we might possibly balk. It seems to me if this country makes a treaty, let's suppose the treaty antecedent to the passage of this law, and we have given our commitment to some other country, as in the treaty of 1950, whereby Great Britain and France and the United States promised to come to the aid of any country in the Middle East which was the victim of aggression from some other country in the Middle East. Now there was an agreement, and again I would have to be refreshed as to whether it was actually sent to the Senate in the form of a treaty. If it was not, it seems to me it would have been wise to do so. But in any event, suppose one country was assaulted by one of the other countries and some President finally wished to use the Armed Forces. Under Senator Bentsen's resolution I take it, he could, but under your omission could he or not? I am only seeking information. I don't know what the answer is.

Senator BENTSEN. No; Senator Scott. Under mine he could not and it has been the feeling that the Congress could not give away the right to declare war and could not do it by treaty.

That was my feeling and I felt it was too broad an authority. I have differed with Senator Javits' bill on that and share the same views as Senator Eagleton.

Senator SCOTT. You have the same views, Senator Eagleton?

### ARE TREATIES SELF-EXECUTING?

Senator EAGLETON. Yes, sir; the Stennis, Bentsen and Eagleton resolutions all say treaties are not self-executing. They require further authorization to effectuate the commitment of armed forces pursuant to a treaty.

Senator Javits declares treaties to be self-executing at the discretion of the President. I think Senator Bensten, from a constitutional point of view was correct. The Senate alone ratifies a treaty but the decision to go to war constitutionally must be shared by both Houses.

Senator SCOTT. Would not the decision to go to war on some treaties be implicit by virtue of the undertakings contained in the treaties themselves?

Senator EAGLETON. We cannot ignore the role of the U.S. House of Representatives in making the decision to go to war. The Constitution requires the participation of the House, and in my view the Senate cannot abrogate that responsibility by treaty.

Senator SCOTT. That is a good answer because I am frankly just seeking for a solution. I think it is time we found one.

Senator EAGLETON. All of the more recent treaties contain language as Senator Bentsen pointed out, that the commitment of force must be in "accordance with the constitutional processes" of the respective nations. And under our Constitution, Congress, both Houses of Congress, must initiate hostilities.

Senator SCOTT. I thank you very much.

Thank you, Mr. Chairman.

Senator SPARKMAN. Senator Cooper.

Senator COOPER. Thank you.

I go along with Senator Scott and others in saying, that by the introduction of your resolution, to establish some guidelines which Congress and the President would agree upon.

On this question to which Senator Scott just addressed himself, I think we are both in agreement. A treaty by itself cannot authorize the President to go to war without first coming to the Congress. I think we both agree with that.

Senator EAGLETON. Yes, we do.

Senator BENTSEN. Yes, we do.

Senator COOPER. Mr. Bickel pointed out yesterday first, that treaties are only an act of this Senate and do not involve both Houses and, second, that all but one of our security treaties carry the phrase "constitutional processes" as a condition necessary before carrying out whatever actions we undertake.

### PRESIDENTIAL AUTHORITY UNDER VARIOUS LEGISLATIVE PROPOSALS

Both of you have introduced a proposition which has not been introduced by any other Member of Congress in a resolution. In Senator

Bentsen's bill, subparagraph 3 on page 2, to prevent an imminent nuclear attack, or in article 2, to protect against an imminent danger of attack. You go beyond the proposition that the President has the authority to repel, protect the forces against imminent attack or to act to protect our country or its possessions against actual attack or the threat of imminent attack.

But I think you would provide for protectors against imminent future danger. Senator Eagleton has specifically provided that the President can take actions against forces with whom the United States is not engaged if there is a threat of attack. Am I correct that you have brought into consideration an element which is distinct from the other resolutions.

Senator BENTSEN. Senator Stennis' bill, I think, also provides for this.

Senator COOPER. What?

Senator BENTSEN. I think Senator Stennis' bill also provides for this.

Senator EAGLETON. Well, my resolution does not go as far, Senator, as does that of Senator Bentsen, Section 2 of Senate Joint Resolution 59 gives the President certain authority when the Armed Forces of the United States have already been legally committed by authorization or by declaration of war, to go a bit further, for instance, under sub (a) 1 in hot pursuit. But I do not have language that is as broad as Senator Bentsen's insofar as the right to commit unilaterally the Armed Forces of the United States in order to prevent against the possibility or the imminent danger of future attack. My section 2 pertains to what the President can do after he has been authorized to participate in some involvement in country X; about what he can do in "hot pursuit" on the border at country Y.

Senator COOPER. I think this provision is similar in pattern to the President's decision to go into Cambodia and to go into Laos to protect, as he said, against the possibility of a threat against our forces.

Senator EAGLETON. That would be covered under mine if he had been legally authorized to go into South Vietnam and he was in my judgment under the Gulf of Tonkin resolution. When authorized, the President could take the next step on the border to protect against imminent danger. But such a step could only be taken after an initial congressional authorization to the President.

Senator COOPER. I think there is already some basis for that in law. I believe, that an attack upon other forces who are in a neutral country, is permitted by the rules of warfare. Do you agree?

Senator EAGLETON. Yes, I think there can be, both by historical precedents and by law, an authorization to cross a border if the initial commitment was legally sanctified by authorization or declaration.

Senator COOPER. You would not extend this authority to go into another country which might be threatening our forces, or going into another country in support of that country without the authority of Congress.

Senator EAGLETON. I wouldn't extend it to the hypothetical that Senator Aiken raised that the President, feeling there might be some imminent danger from Lower Slobovia, would then commit troops to Lower Slobovia.

Senator BENTSEN. On the other hand, Senator——

Senator COOPER. Would you say, as distinct from the President's authority to attack forces in another country which threaten our force with imminent attack, even in a neutral country which is not at war with us, and I can understand that proposal, would you think he has the power, the authority, to go to the support of the armed forces of a third country without congressional authority?

Senator EAGLETON. I think he does not.

Senator COOPER. That is my position.

Do you think so, Senator Bentsen?

Senator BENTSEN. I think what we have done in this, Senator Cooper, we have put a checkrein on him by saying in 30 days the Congress must enact its will in deciding whether or not such forces would be allowed to remain there or not, and that that is a discipline that would be expected.

### IMPORTANCE OF HEARINGS

Senator COOPER. I will close by saying that I agree with practically every member of this committee, that these hearings we are holding upon the powers of the President and the Congress, is a very, very helpful one. I think that the whole problem between the President and the Congress is terribly important with regard to the war powers and the powers to commit forces to battle, as it is for the whole system of government. After all this is a rather delicate arrangement, the separation of powers, and we have to have some trust in each other and understanding, I believe. Would you say so?

Senator BENTSEN. I would agree wholeheartedly on that.

Senator COOPER. If we don't wish to tear each other apart, we have to find some ways to reach agreement—as far as we can—some agreement, some accommodation.

### AVAILABILITY OF FULL AND ADEQUATE INFORMATION TO CONGRESS

I come to the question of full and adequate information which you both have raised. I must say I think it is very difficult, even in these proceedings, to be able specifically to tie down every possible problem for the future, either in military operations or intelligence. We are in a gray area which I don't think we can exactly define.

You mentioned the bill which I introduced which would require the executive branch to submit to the appropriate committees and through those committees to other Members of the Congress the information—the basic facts and analysis—upon which the Executive makes his decisions. The bill was introduced on the thesis that Congress, too, has to make decisions in that same area and it should have the same information.

Senator EAGLETON. Precisely.

Senator COOPER. I think you both agree with that.

### NO CIRCUMVENTING OF PRESIDENTIAL ROLE AS COMMANDER IN CHIEF

Again, I think there is a problem that once a military operation is underway, I can understand that the Executive might say that the details and tactics of the operation are a secret matter until the tactical

measure is initiated. We might not agree with that view, but I think there is some validity in his position.

Senator EAGLETON. I don't think either of us by our resolutions tried to, nor would we have the authority to under the Constitution, to circumvent the role of the President as Commander in Chief once the undertaking had been authorized or declared. Of course, some limits can be put on it by the authorizing process of Congress itself. But we are not trying to circumscribe the Commander in Chief role once duly and legally authorized.

There is the big difference between viewing the Commander in Chief's authority as being sufficiently broad to commit the American Armed Forces any time, anywhere in the world, on the one hand and, on the other hand, to acknowledge a certain amount of discretion during hostilities authorized by Congress. They are two entirely different situations.

### S. 2224 BEST SOLUTION THUS FAR

Senator BENTSEN. Senator Cooper, I, too, want to share Senator Eagleton's comment about your bill as far as having the executive branch, the CIA, in particular, inform the germane committees as to such information, and I think that obviously our judgments are only as good as the information on which they are based, and to receive just filtered information isn't enough. I think that your bill is the best solution I have found thus far to the problem.

### INFORMATION GIVEN TO SENATE

Senator COOPER. I appreciate that. We have had situations where we have had some information, but not enough to know whether some new operation would be undertaken for what purposes and in support of that policy. In some cases, I think we could anticipate what was coming from the fragmentary information we had from the event itself, but we didn't know precisely.

In some other cases, last minute information has been given to a few Members of the Senate, in order to obtain support for an administration position, while those who may have opposed it were not furnished with this last minute information. It is very hard to answer the points raised on the basis of last minute information when you have not received it or had an opportunity to review the data at issue.

I thank you.

Senator SPARKMAN. Senator McGee.

Senator MCGEE. Thank you, Mr. Chairman. I am sorry to get in here late. I have been dealing with the Indian questions, that is U.S. Indians, and they affected Wyoming. But I did want to say that my two colleagues here have been very active in contributing to the dialog on this question and I applaud them.

### REAL WORLD PARTICIPATION OF CONGRESS AND EXECUTIVE TOGETHER

Where I still think we fall short is the question that continually eludes us on this committee as we look ahead, we are ducking the question very often by addressing ourselves to what went wrong in Southeast Asia, and we don't address ourselves sufficiently, and I don't

either, to how in the real world that is around us right now we are going to best protect the national interests in the participation of the Congress and the Executive together. As I read backward from where we are at this moment, a lot of things that happened, happened very largely by default on our part up here, not by somebody sneaking out and grabbing something or doing something. If the Congress has not maintained a role or an interest, somebody has to move in in the kind of world in which we live, and the Executive often did so.

I would suspect if things had gone differently in Vietnam that we in this committee would have been bragging how we have cooperated with the administration, whichever administration it would have been, to making foreign policy that worked.

The moment things go wrong we quickly disassociate ourselves from what happened. I don't think we have yet come up with the answer on how the Congress effectively participates in the nuclear age, in an age in which probably in our time they won't dare declare wars, but there may be steps required, hopefully short of war, that still could lead to shooting matches again.

It won't be like Vietnam, and I think we are still short of that. I hope we are edging toward it in the efforts that this committee has made, and I submit that we are still taking such a tiny step here, but I am not the advocate who knows what the giant step ought to be in this field.

I just don't think we are coming to grips policy-making-wise with the real problems that legislative participation permits for, I think, the hard fact of the last 20 years shows if things are going fairly smoothly so far as we know don't get very excited in the Senate. We would rather appropriate money for the Wyoming Indian Reservation. But the moment something goes wrong, we get real smart, that is real wise, and we want to reassert our role, and I think how we restructure that role is still eluding us in the political science sense of the term.

I think most of the time when we have had declarations of war under the old-fashioned days, it has been easy to define, but in a day and age when you have undeclared wars, but take steps that could lead into a war, as in Southeast Asia, it is quite an elusive area.

I simply wanted to add that to the comments both of you have made from time to time. As we are in quest of whatever this updated system ought to be, it has got to come. We don't want Presidential wars; we shouldn't have them. We have learned a lot of ways how not to do it. I don't think we have yet learned how to do it. I simply wanted to inject that, Mr. Chairman, at this time for a brief comment. But I don't feel you need to comment and take somebody else's time.

### S. 1880 FORCES DISCIPLINE UPON CONGRESS

Senator BENTSEN. Senator McGee, I would agree with you that most of the erosion of the powers of Congress has resulted from inaction by the Congress and that power always flows to a vacuum and in this situation it has been the Executive decision that has flowed to that vacuum, but this bill of mine attempts to force a discipline upon the Congress itself, and within 30 days after the action having been taken by the Chief Executive that the Congress must, in effect, bite the bullet

and make a decision as to whether they are going to back up the Chief Executive in this or not.

Senator EAGLETON. I would say that briefly I agree with a part of what the Senator said, although a very small part.

Senator MCGEE. I am grateful for that.

POSSIBLE NEED FOR CHANGES IN CONSTITUTION

Senator EAGLETON. We do live in a real world, supposedly under a real U.S. Constitution. The bills before this committee—the Javits, Stennis, Eagleton, and Bentsen bills—try to delineate the balance that the Constitution requires in the decisionmaking process insofar as how, why, when and where we go to war. The world has changed since 1776 and 1789 and the days of Madison and Hamilton. But the Constitution remains and it says what it says. As Senator Bentsen pointed out, of the constitutional debate, we know what Madison thought, and what Hamilton thought, and what others thought then. We have to obey the Constitution as written and hopefully devise a framework by which it can exist and function today.

Senator MCGEE. In coming to grips with the real problem of what you and I both called the real world, isn't one thing that we tend to veer away from whether we deal with the real world within the Constitution or whether the times may have changed so much that the rigidities of the Constitution might require some changes of the Constitution? I think we are not addressing ourselves quite enough in that direction. Maybe there is no answer. Maybe that isn't a solution. Maybe we can do it where we are now, but I think we are focusing, overfocusing, on where we are now rather than on how we ought to expand.

Senator EAGLETON. That is a preferable way to focus the issue. If the Constitution, as I think at one time Mr. Katzenbach thought, is inapplicable to real world or modern-day circumstances, then it should be changed by amendment. That is the way to come to grips with the problem rather than witnessing the ongoing amendment of the Constitution by accretion, inaction, or usurpation. I would rather see the problem confronted directly.

Senator MCGEE. If we face the reality of a different kind of potential war situation in a nuclear age where there can be steps taken that really aren't steps of war but conceivably could lead to one a bit at a time, which is a part of the story of the 1960's, then the problem, under our Constitution or under on amended Constitution, of how the Senate participates is a rough one. Do we have a big parade on the floor of the Senate? So we dialog this in televised hearings in the Foreign Relations Committee?

How do we do this? You see, at some place along that line there is a legitimate area of, I assume, of confidentiality in order to maximize your chances for heading off a situation that might become worse, and I am not satisfied that we have succeeded in either pointing toward those lines of definition or drawing those lines, whichever it requires.

This is where it still troubles me and why I kind of pull back a little bit, as Senator Cooper was saying, from hanging too many millstones around the neck of the Executive unless we are able to accompany it with something that does permit us in a realistic way to protect the national interests.

Senator SPONG. May I interrupt here?
Senator MCGEE. Yes.

CONSTITUTION CAN BE CHANGED THROUGH CONGRESSIONAL ACQUIESCENCE

Senator SPONG. I think this question of any constitutional amendment being necessary is not so important as the fact that this committee has come to the realization that another quarter century of what has taken place in the last quarter century would make something constitutional that is diametrically opposed to the original intent of the Founding Fathers.

No amendments are necessary. We just go on the way we are doing, and congressional acquiescence continues, then all of these things become constitutional.

The language used by President Eisenhower, Senator Scott, in Lebanon was that he had "the inherent power to protect American lives and property."

But over the evolution of time we find these inherent powers cropping out. If there is no congressional activity we will see something that would have been unconstitutional 50 years ago become very constitutional now.

Senator EAGLETON. That is what I meant by amendment by accretion.

DETERMINING AND PREPARING FOR SENATE'S ROLE IN TODAY'S WORLD

Senator MCGEE. I think it is a very valid point but still does not address itself really to my ultimate emphasis here, and that is even as we protect the Constitution so that we don't amend it inadvertently or by inattention or in some other way not deliberately intended, do we still then meet the national interest in the kind of world that we confront?

I want to make sure that we are not leaving out that next area and at least consciously attacking the area, measuring it and then deciding it does not make that much difference, but I don't think we have done that. I think we have so concentrated our energies on how to make sure we stay under the tent of 1787 that we have maybe not probed what the kind of world in which we live, a world without law, is going to demand of us decisionwise, and then figure out how the Senate of the United States can more realistically participate in that kind of role.

I don't think we have answered that question. I don't think we have even probed it in great depth. I think we have alluded to it and passed it over from time to time as we are doing now.

Senator BENTSEN. Senator, I don't think we have been insensitive to this problem, not at all. I don't believe we would have come up with a perfect solution to it or it would have been arrived at along time ago, but this represents our best efforts.

Senator MCGEE. I applaud that effort because it moves us ahead that much further. I simply want the record to show at least our frustrating doubts about how best we still are going to meet with these problems. They are not going to go away just because we may legislate in this area, but are begging for somebody much wiser than I to still keep crowding us along toward more ultimate answers. The times may require what we still have failed to produce. We may pray that the times don't demand of us the kind of decisions in the next decade that

I fear they will, and in which I think that our obsession with how we correct the mistakes of the 1960's may not at the same time prepare us for the 1970's.

I think we have a penchant in our history for correcting mistakes of the preceding war and very few of those corrections seem to relate to the next crisis that we come into. That is what we spent my college years doing in the 1930's, trying to prevent war with Kaiser Bill. We passed a whole passel of neutrality laws, all aimed at staying out of World War I, while Hitler was coming up in the other direction and Roosevelt was wrestling with the problem of how do you get public opinion around to where it will accept a war with Hitler, and it took the Japanese to do the job for him by attacking Pearl Harbor.

It is that problem I think we are still not coming to grips with so far as our Senate is concerned and I wish there were better answers.

I don't have them.

I think by pursuing the line you are pursuing we are keeping that door open so we have a better chance to worry about what those answers might or ought to be. I simply am suggesting that we are not there yet and not to relax if we accept your legislation or if we accept any other that has been submitted here.

Senator SPARKMAN. Senator Scott.

### PRESIDENT'S POWER TO ACT UNDER THREAT OF NUCLEAR ATTACK

Senator SCOTT. I would like to just very briefly open up one point that bothers me a little. I like the thought of inclusion of the exemption, the third exemption, to prevent or defend against an imminent nuclear attack on the United States by the forces of any government or power. Now currently under our present way of life, by comparison with the time of the Founding Fathers, the Russians are closer to us than Washington is to the home of Charles Carroll of Carrollton and the Chinese are closer to us than we are to Monticello in point of passage of time. That is why I think there is the desirability of the power of the President to act under the threat of nuclear strike, preemptive strike, with the right of the Congress, with the obligation conferred upon the Congress to act one way or the other after 30 days. What I want to open up here is another thing.

### EXISTENCE OF CONGRESS IN EVENT OF NUCLEAR ATTACK

Where will the Congress be? I was in England when the British House of Commons had been destroyed and they were meeting in "another place" as Churchill called it. I think it was the National Methodist Church auditorium or something, and the bombing was going on. It won't be that comfortable the next time around. In the event of a nuclear strike the Congress may have to assemble in another place somewhere, and there may not be a quorum. I think we have brushed under the rug too long this whole question of preserving the right of Congress to act under nuclear conditions. I think we ought to consider very seriously the importance of changing the whole requirement of a quorum and maybe if you can find about 28 Members of the House and 17 Members of the Senate, maybe they are the ones who would have to act in 30 days if they were so minded or physically able to do it.

I am raising this quite seriously because at one time we had lots of discussion about what to do with this quorum business in the event of a nuclear strike.

If Congress is to exist under the most awful, a-w-f-u-l conditions, that is something we have to consider in legislation. And meanwhile, as some sort of a stopgap, I like that particular provision in your bill and I just wanted you to comment. Do you have any comment, either of you, on the whole business of how the right of Congress to act may depend upon the ability of Congress to survive?

Senator BENTSEN. Senator Scott, I have not studied the problem of mechanics.

Senator EAGLETON. Well, I have not thought out the mechanics of it, but if it came to that, I doubt that the judgment of 28 surviving Members of the House or the 17 surviving Members of the Senate, regarding the constitutionality of an all-out nuclear exchange would be either important or relevant.

Senator SCOTT. I am thinking more broadly of the question of survival, the existence of Congress in some form or other might well supply the necessary unifying action and impetus to keep the country going during these most unthinkable situations.

Senator MCGEE. Has the Senator ever considered that might even take into account the seniority system?

Senator SCOTT. I think it would change the seniority system radically.

Thank you.

Senator SPARKMAN. Thank you very much, gentlemen.

Senator Cooper.

Senator COOPER. I would like to make a comment on this matter. Senator Scott, as I recall, stated if the Soviets launched a strategic nuclear ICBM attack, it would take about 25 minutes from the time we had radar warning until we were hit, until the warhead hit, but in that time the President would have to decide whether to fire before we were hit or wait until we were hit. I think everyone here has agreed and all those who have participated in our hearings agreed that we really would have to wait until they hit otherwise you might be countering with nuclear forces able to destroy much of the world and its people against what might be a nonnuclear attack.

### CONGRESS DIDN'T TAKE OPPORTUNITIES TO PREVENT PAST COMMITMENTS

At the time we were dealing with the National Commitments resolution many of us had occasion to reread the debates and the proceedings in the Foreign Relations Committee, and on one occasion in the Armed Services Commitee. I found that in everyone of those situations in the past when we committed forces there was the time to come to the Congress for the authority necessary. In every case, amendments were offered in committees, on the floor of the Senate dealing with these commitment in the Senate; all were rejected, as it turned out.

So my own judgment, after reviewing the history of past commitments is that the Congress had the opportunity, but didn't take it. I don't agree with the idea that our power has been wrenched away from us. I think we had the opportunity every time to prevent com-

mitments. I think the problem was whether, at the time we passed the resolution whether, there was enough informed debate, to say to the President "there are limits on this. We do not expect you to lead us into a general war unless it is absolutely necessary to protect this county." I think a study of all the treaties, and resolutions that were passed shows that in most of them amendments were offered to restrict the use of the President's power, and in every case we had the opportunity to do it, but that we did not limit his power.

Senator EAGLETON. Well, I agree with what the Senator says. I don't think the power has been wrenched away from Congress. I believe it has been a slow process of accretion, partially attributable to congressional inertia, congressional inaction, and part of it attributable to a lack of congressional information—the point that the Senator is addressing in his most recent bill 2224. Congress has not been in a position to make an intelligent decision insofar as to what is involved because for lack of information.

Senator SPARKMAN. Thank you very much, gentlemen.

The next witness is the Honorable George Ball, Lehman Bros. International, New York, N.Y.

### PROVISIONS NEEDED ON QUORUM AND ASSEMBLING

By the way let me comment on the suggestion made by Senator Scott. I remember back during World War II when Germany was quite powerful, we had a joint session of Congress one day. The President was there, the Vice President was there, every member of the Cabinet was there, the Supreme Court was there, and all of the Members of both Houses of Congress were there. The thought that someone got out then was what a dangerous situation that was, that it just might be possible that the bomber could come in. Of course in this nuclear age you don't have to be concerned about the bomber coming it. We know that nuclear weapons can get there within minutes.

Senator SCOTT. We need some provisions on this matter of quorum and assembling. The Senator will recall at the death of Senator Russell nearly all of the senior Members of the House and Senate, plus the Vice President, were on two planes and were caught in a very bad weather condition and were not even able to land there.

Senator SPARKMAN. I remember that quite well.

Senator SCOTT. There was quite some talk at that time of how it would have changed the chairmanship of the House and Senate, among other things. I think we ought to give consideration to the effective emergency, of disaster on the power, the functioning, of the Congress.

Senator SPARKMAN. We are very glad to have you, sir. We have your statement and, by the way, I said this to all of the witnesses, your statement will be printed in full in the record, and you may handle it as you see fit.

## STATEMENT OF GEORGE BALL, LEHMAN BROS. INTERNATIONAL, NEW YORK, N.Y.

Mr. BALL. Thank you, Mr. Chairman. In order to save the time of the committee I would like to read just a very small part of the statement and then add some more comments, if I may.

Senator SPARKMAN. You go right ahead.

EXTENSION OF FOREIGN POLICY INVOLVING TROOP DEPLOYMENT BY PRESIDENTS

Mr. BALL. Beginning notably with the Korean war the President has, a succession of Presidents have, staked out a strongly independent position with regard to that extension of foreign policy involving the depolyment of American forces.

Though President Eisenhower expressed a less assertive view than his predecessor and some of his successors, the last three Presidents have in practice used their claimed authority with considerable freedom particularly in Southeast Asia.

Now, we are suffering some of the consequences, as our protracted, unhappy exerience makes it everyday more emphatic that a democracy cannot fight a war in which the people do not believe without doing harm to its own integrity and authority.

ROLE OF CONGRESS

It is or should be therefore, as I see it, the special role of the Congress to assure that this does not occur again, since, on a day-to-day basis Congress stands as the best representative of the people's views and opinions.

Obviously the Congress is not an infallible instrument for that purpose, since it is not immune to the passions and excitements of the moment—but a Congress, aware of its power and sensitive to the responsibility that goes along with that power, should be able to ask the hard questions involved in an actual or threatened military operation with a certain degree of objectivity where—as recent experience has shown—the Executive may be so absorbed by operational problems—by tactics as opposed to strategy—that, instead of asking whether we should commit more forces to secure certain given objectives—or indeed whether those objectives are worth the cost already incurred, the Executive tends to ask how can be utilize more resources to do the job we have set out to do.

It is for this reason it seems to me essential that the executive and the Congress must work closely together not only in the actual conduct of a war but, even more, in shaping the policies that help create the situations that lead to conflict—and, finally, in the hard decision as to whether, when a crisis comes, the United States should react with military means.

I am, therefore, sympathetic with the desire of Congress to gain a major voice in the decisions that can—either step by step or abruptly—result in sending our young men to war.

U.S. CONCLUSIONS IN 1950'S AND EARLY 1960'S

In the 1950's and early 1960's when the cold war was at its chilliest many Americans consciously or subconsciously concluded that what appeared as an act of aggression or a challenge to established government anywhere in the world became almost automatically a matter of urgent American concern—at least to the extent that the aggressor or challenger might appear to be drawing support from one of the two major Communist powers. At the same time many—both in and out of the Government—came to believe that, given the superiority of our

power, there was almost no area outside the Iron Curtain where we could not by skillfully deploying our resources check what appeared as aggression or a challenge to existing government. In retrospect, I suppose it was inevitable that, sooner or later, we would try to apply our power where the terrain, both political and physical, made its effective application impossible. That has been the situation, as I see it, in South Vietnam. And it was probably a good thing that—if we had to learn by experience—we should encounter such a discouragement sooner rather than later; for our Vietnamese involvement is finally compelling us to reassess our responsibilities, test our working assumptions, and seek to redefine our role in a world that has substantially evolved from the world of 20 years ago, when we responded to aggression in Korea.

### WHAT COMMITTEE IS ATTEMPTING

What this committee is attempting to do here is part, as I see it, of this broader effort. By trying to assure congressional participation in the key decisions, it is attempting to erect a carefully designed procedural impediment to the kind of creeping involvement to which we succumbed in Vietnam. Yet, admirable as is the objective, it is a problem that must be approached with a great deal of caution and I think I somewhat share Senator McGee's feelings on this matter.

This immediate project represents an attempt to do what the Founding Fathers felt they were not wise enough to do: to give precision and automatic operation to the kind of legislative-executive collaboration which they deemed essential to prevent the unrestricted use of American forces by the Executive acting in the pattern of monarch, while at the same time assuring him sufficient flexibility to defend the country against any threats that might suddenly appear.

To be sure, since the drafting of the Constitution, we have had two centuries of experience, and, with this as a guide, Congress is perhaps now better equipped to make precise what the Founding Fathers chose to paint only with a broad brush. Yet, if experience encourages the Congress to go ahead with this attempt, it also underlines some of the dangers and difficulties of doing so; for, in seeking to provide precise guidelines to govern future situations, we must recognize that the world is in a state of rapid transformation and, as the Founding Fathers perceived, it is impossible to anticipate at any given moment the unlimited variations which the future is capable of presenting.

Thus, any legislation that is finally drafted should be developed only after the most exhaustive study and debate, making sure that it reflects something more than a transient situation in the life of our Nation or a momentary mood of the American people.

Mr. Chairman, as all of us here know very well, legislation is a blunt instrument. Like it or not, that is a fact from which there is no escape since it derives from the nature of legislative bodies and from the limited means through which they can express their decisions in permanent form.

### HISTORY OF NEUTRALITY LEGISLATION PASSED FROM 1935–37

I know of no better illustration of the dangers involved than the history of the neutrality legislation to which Senator McGee adverted

a few moments ago. Legislation which the Congress passed in the years from 1935 to 1937. This, like the legislation now before us, was a good faith effort to assure that the United States would not be drawn into another conflict like that of the First World War. It was legislation that reflected the prevailing mood—disillusion with our involvement in a conflict that had not solved the world's problems as we had innocently hoped and a conviction, borne of economic depression, that the United States should give priority to its pressing domestic problems and should, therefore, not involve itself too intimately in the affairs of other parts of the world.

By 1937, it is worth noting, public opinion polls were showing that a large majority of Americans believed our participation in the First World War had been a mistake, just as a large majority now believe that our involvement in South Vietnam was misbegotten. In January 1938, a piece of legislation called the Ludlow amendment, which would have required a popular referendum before a declaration of war, was defeated in the House by only 21 votes, in spite of a massive effort by the administration to mobilize a position against it.

Senator SPARKMAN. May I interrupt there, not only was it defeated by 21 votes but it was brought up by petition which, as Senator Scott well knows, having served there, must have a majority of the Members of the House on that petition. The Ludlow resolution had a majority of Members on the resolution when it was called up, and yet it was defeated even though by a narrow margin of 21 votes. I was there.

Mr. BALL. Thank you.

Senator SPARKMAN. And voted——

Senator SCOTT. Representative Louis Ludlow of Indianapolis.

Senator SPARKMAN. Yes. Indiana. I voted against it.

Senator SCOTT. I wasn't there, I think I came a year later.

Mr. BALL. The immediate background of the neutrality act legislation, as we all recall, was the disclosure by an investigating committee under Senator Nye, a man of deep isolationist convictions who died, I believe only last week. The Nye committee had just shown, to the satisfaction of a large body of American opinion, that the imperial ambitions of a few European leaders had caused the First World War and that the United States had been drawn into that war through insidious propaganda and the conspiracy of munitions makers—or what I suppose we would call in the modern vernacular, the military-industrial complex.

By passing a series of neutrality acts, Congress believed that it would forestall the repetition of such a disaster. Those acts were sweeping in scope, establishing rigid governmental control over the shipment of munitions abroad, prohibiting the export of arms to belligerent nations, forbidding private loans or credits to nations at war, and authorizing the President to forbid travel by Americans on the ships of warring states. Many experts were convinced and said very solemnly at the time, that no loophole had been left through which this country could again be drawn into conflicts with other nations.

We all remember the somber history of those congresisonal acts, and what an impediment they imposed to participation by the United

States in the timorous politics of Europe which paved the way for Hitler's conquests and another world catastrophe—a catastrophe which, as recent disclosures have made quite clear, could have very probably been averted if the United States had lent a steadying hand to reinforce the will of the flatulent statesmen who were then guiding European destinies.

I mention this incident not because it is in any way an exact parallel; certainly this committee is approaching its present task with far more sophistication and understanding than was displayed by Congress in the 1930's. But it is a cautionary tale that we should bear in mind in trying to answer the hard question we are discussing here today: how does one draft a statute that would make it possible for the Congress to contribute its wisdom, and play at least a coequal role with the Executive, in shaping fundamental decisions that may lead to war, without inhibiting the President in doing whatever is necessary in circumstances of crisis and emergency to protect the vital interests of our country? In seeking to answer that question, let us be quite certain that Congress does not let itself be influenced in the design of that legislation by the transient mood of disillusion and disenchantment which our Vietnamese embroilment has created, just as Congress in the 1930's was seriously misled by the revulsion of the American people against its then recent experiences with war and depression.

### WORKING ARRANGEMENT BETWEEN BRANCHES, NOT LEGISLATION, URGED

As one who has served in the executive branch of our Government five separate times over the last 38 years, I approach the present effort with uneasiness. Certainly, it would be far better if the Congress—and particularly the Senate—and, most important of all, this key committee of the Senate, could develop an effective modus operandi with the President, the Secretary of State and the other major figures in the executive branch who play a role in the decisions affecting our foreign affairs—a working arrangement that would assure the kind of participation which the drafters of the current legislative proposals have in mind without having to freeze the procedures in legislative aspic. In saying this, I am not trying to focus criticism on this committee, for much of the lack of easy rapport between the two ends of Pennsylvania Avenue results, in my judgment, from certain bad habits which the executive branch has acquired over the past two decades. But, if that is more than one can reasonably expect—and experience would suggest that it may be—then let us carefully test what is now proposed against our experience and design the necessary legislation with enough flexibility to make it workable.

### CRITICISM OF BILLS DRAFTED ON WAR POWERS

An examination of the series of bills that have been drafted on this subject discloses, as I see it, a progressive effort to narrow the area in which the President may act without advanced congressional authorization.

Well, as one who spent a good many years of his life practicing law before I defected from the law, I admire the artistry of the draftsmanship which has been displayed in the various pieces of legislation. I

find paradoxically enough that the most recent and most sophisticated versions are to me the least acceptable primarily because they are the most precise.

To attempt to define those situations in which the President may act in advance of congressional approval is, it seems to me, an exercise in prophecy which I don't think we should try to undertake. This is after all not a mortgage indenture we are drafting.

This is legislation which could affect the vital interests or indeed the very existence of the United States and the lesson one learns from the active practice of foreign policy is how often and at what critical times the totally unexpected event occurs to dominate and transform the scene. Having lived through a few major crises in positions of considerable responsibility, I certainly would not try to predict to the committee when and in what form a new crisis may occur to threaten the security of this country.

Reading both Senate Joint Resolution 59 and Senate Joint Resolution 95 and some of the earlier bills introduced, such as S. 731, I find in none of them an authorization for the President of the United States to react swiftly and incisively, as President Kennedy did, to repel such a dangerous act of Soviet adventurism as that, for example, which precipitated the Soviet crisis in October of 1962.

### WAR POWERS LEGISLATION MIGHT HAVE AFFECTED CUBAN MISSILE CRISIS

I doubt that the drafters of any of these projected pieces of legislation would have regarded the Soviet effort to place missiles in Cuba as an attack against the United States and thus within the terminology of some of the bills employed. Yet what would have been the situation during that fateful week in October of 1962, after the missiles had been discovered, if President Kennedy had been bound by any of these proposed bills.

I served as a member of the executive committee, the so-called Excom——

Senator COOPER. Pardon me, Mr. Chairman, would you pull the microphone just a little closer to you. I am having trouble hearing you.

Mr. BALL. I am sorry, sir.

I served during that period as a member of the so-called executive committee, what we came to call affectionately the Excom, that advised President Kennedy during that harrowing week when the policy of quarantine was painfully hammered out. So my own recollection of the fears and concerns we had then is very vivid.

Let us suppose that during the week, the following circumstances had prevailed. First, Congress was not in session. Second, several Soviet ships containing missiles were within very few hours of Cuba. Under the circumstances instead of announcing on that memorable Monday evening of October 22, that a quarantine had been instituted, the President had been compelled to say that he was calling Congress back so that within the next 2 or 3 days they might authorize a quarantine. Almost certainly the effectiveness of the action would have been far diminished, the Soviets would have felt under much less pressure, and it is at least possible that the Soviet reaction would have been very different from the reaction which indeed actually occurred.

I don't mention this with the idea of rehearsing once again the events of the missile crisis—the revisionist historians are already attempting to demonstrate that some Soviet missiles in Cuba would have been good for us—but permit me to make one simple point, that if the proposed legislation now before this committee had not authorized the President to deal effectively with the Cuban missile crisis, then there are very likely a dozen other situations which I cannot foresee, any one of which, one or more of which, might develop at any time which would similarly leave the President in a position less effective to defend the vital interests of the country than he is today, and I could not conscientiously favor any legislation that might have that effect.

PROVISIONS IN PENDING BILLS

Senator Stennis' bill provides that the President may use the Armed Forces to prevent or defend against an imminent nuclear attack. This is the matter which you, Senator Cooper and Senator Scott, have been discussing here this morning. But this provision is omitted from Senator Eagleton's bill. If the intent of the omission is to compel congressional authorization before the President uses nuclear or even conventional weapons to forestall a nuclear attack, then not only may we be risking considerable danger, but we may very well be undercutting the deterrent value of our whole nuclear arsenal.

But my objection to these proposed pieces of legislation is of a much broader range. I do not think, therefore, it would be useful for me to try to discuss the language of the key section that lies at the heart of most of these bills, that section which permits Presidential action without prior congressional authorization only in some very limited and narrowly defined situations. I think it extremely ill-advised to try to define in advance those situations in which the President might utilize our Armed Forces before obtaining congressional authorization.

On the other hand, let me be quite clear that I see very considerable merit in a common theme of these bills that if the President in his judgment considers it essential to use the Armed Forces before Congress acts, then he should be required within a fixed period of 30 days or even a shorter period, for that matter, to obtain congressional authorization or risk being compelled to withdraw the forces if Congress does not concur.

Now, I recognize that there is an element of unreality in this proposal since it is unlikely that there would be many circumstances in which Congress would withdraw American Forces once they were committed to combat. Yet there could well be some, and I think it could act very much as a precautionary provision which would tend to deter Presidents from using their powers to act urgently and immediately. And I would regard it as a healthy one.

RIGHT OF CONGRESS TO INFORMATION

Nor do I see any objection, but indeed a great deal of merit to provisions of the bills calling for the President to make periodic reports to Congress with regard to hostilities once they are started. In fact, I must say that I share some of the sentiments that have been expressed here this morning on the question of information. I think there is very

little information that Congress should ever be denied. I think that the myth of Executive privilege, and it is indeed a myth, for I find no constitutional basis for it, has tended to be greatly exaggerated, and I think it is something that if used at all should be used only very, very sparingly when the President himself makes the decision and indeed when the President himself communicates that decision to the Congress.

By and large, I think that the Congress, and particularly key committees such as the Senate Foreign Relations Committee, should be far better informed as a matter of practice than it has in fact been in the past, and I would hope that the hearings which the committee is now conducting, and the general mood which is building up in the Senate, will be brought very forcefully home to this administration and every administration that may be involved.

Thank you, Mr. Chairman.

(Statement follows:)

STATEMENT OF HON. GEORGE W. BALL, SENIOR MANAGING DIRECTOR, LEHMAN BROS., NEW YORK CITY

Mr. Chairman, this is a useful time to be considering the procedures for the exercise of the nation's war-making powers. For a long time we have been embroiled in a frustrating struggle in Indo China that has progressively lost the support of the American people, and today we are trying to extricate ourselves from a mess.

Although I think it necessary that we examine in an atmosphere freed from passion and anger the course of action that led us, by a succession of faltering steps, more and more deeply into Southeast Asia—and I hope this Committee will play a major role in that inquiry—it is even more urgent that we concentrate on the future.

For a long while it has been apparent that much of the Senate—and principally this Committee—have considered the Vietnamese war from a set of assumptions quite different from those held by three Administrations and this fundamental difference has served to impede the candid exchange that is indispensable if our constitutional arrangements are to work very well. What has occurred is, in essence, a constitutional breakdown—a failure of the system of checks and balances, that has left us with a conceptual argument as to where the authority to commit this nation to war may reside and how that power is to be properly exercised.

Flexibility, we have been constantly told, has, more than anything else, contributed to the survival of our constitutional system. When that flexibility derives from what I suspect was deliberate ambiguity on the part of the drafters of the constitution the result can be frustrating.

Certainly the Founding Fathers foreswore their normal clarity in defining the relation between Congress and the Executive in regard to the whole area of our foreign policy. Since what they wrote was in response to their experience under a monarchy, their principal preoccupation was more to prevent the despotic use of power than its efficient employment. The objective of the doctrine of the division of powers, as Mr. Justice Brandeis said in a famous dissent in *Myers* v. *United States*, was not, after all, "to avoid friction, but, by means of the inevitable friction incident to the distribution of powers among three departments, to save our people from autocracy." Given this constitutional concept, it was inevitable that the effective distribution of powers would be subject to periodic tidal flows, with authority shifting from one branch to the other and then back again to reflect not only changes in the objective situation that the nation faced, but the disparate personalities of the individuals who from time to time dominated each branch, as well as fluctuations in the mood of the country.

As every schoolboy knows—or might have been expected to know before we elevated basket-weaving above the study of history—the Constitution does not clearly delegate authority over foreign policy to either the President or the Congress. All it does is to confer on the President certain powers by which he can affect our foreign relations, while assigning certain other powers to the Congress and still others specifically to the Senate. The result is to encourage

a spirit of institutional free enterprise with active competition between the two coordinate branches. Sometimes that competition has been restrained or at least cushioned by the fact that the President and the leading personalities of the legislative branch approached the problems of our foreign relations from similar, if not identical, philosophical positions—sometimes not.

Beginning, notably, with the Korean War the President staked out a strongly independent position with regard to that extension of foreign policy involving the deployment of American forces; and, though President Eisenhower expressed a less assertive view, the last three Presidents have, in practice, used their claimed authority with considerable freedom—particularly in Southeast Asia. Now we are suffering some of the consequences, as our protracted unhappy experience makes it everyday more emphatic that a democracy cannot fight a war in which the people do not believe without doing harm to its own integrity and authority. It is—or should be—the special role of the Congress to assure that this does not occur again, since, on a day-to-day basis Congress stands as the best representative of the peoples' views and opinions. Obviously, it is not an infallible instrument for that purpose, since it is not immune to the passions and excitements of the moment—but a Congress, aware of its power and sensitive to the responsibility that goes along with that power, should be able to ask the hard questions involved in an actual or threatened military operation with a certain degree of objectivity where—as recent experience has shown—the Executive may be so absorbed by operational problems—by tactics as opposed to strategy—that, instead of asking whether we should commit more forces to secure certain given objectives—or indeed whether those objectives are worth the cost already incurred—he instead asks how can we utilize more resources to do the job.

It is for this reason it is essential that the Executive and Congress must work closely together not only in the actual conduct of a war but, even more, in shaping the policies that help create the situations that lead to conflict—and, finally, in the hard decision as to whether, when a crisis comes, the United States should react with military means.

I am, therefore, sympathetic with the desire of Congress to gain a major voice in the decisions that can—either step-by-step or abruptly—result in sending our young men to war.

In the fifties and early sixties when the Cold War was at its chilliest many Americans consciously or subconsciously concluded that what appeared as an act of aggression or a challenge to established government anywhere in the world became almost automatically a matter of urgent American concern—at least to the extent that the aggressor or challenger might appear to be drawing support from one of the two major Communist powers. At the same time many—both in and out of the government—came to believe that, given the superiority of our power, there was almost no area outside the Iron Curtain where we could not effectively use our power to check what appeared as aggression. In retrospect it was, I suppose, inevitable that, sooner or later, we would try to apply our power where the terrain, both political and physical, made its effective application impossible. That has been the situation in South Vietnam, and it was probably a good thing that—if we had to learn by experience—we should encounter such a discouragement sooner rather than later; for our Vietnamese involvement is finally compelling us to reassess our responsibilities, test our working assumptions and seek to redefine our role in a world that has substantially evolved from the world of twenty years ago when we dealt with the situation of Korea.

What the Committee is attempting to do here is a part of this broader effort. By assuring Congressional participation in the key decisions, it is an attempt to erect a carefully designed procedural impediment to the kind of creeping involvement to which we succumbed in Vietnam. Yet, admirable as is the objective, it is a problem that must be approached with a great deal of caution. In fact, I should point out that what this immediate project represents is an attempt to do what the Founding Fathers felt they were not wise enough to do: to give precision and automatic operation to the kind of legislative-executive collaboration which they deemed essential to prevent the unrestricted use of American forces by the Executive acting in the pattern of monarch, while at the same time assuring him sufficient flexibility to defend the country against any threats that might suddenly appear.

To be sure, since the drafting of the Constitution, we have had two centuries of experience, and, with this as a guide, Congress is perhaps now better equipped to make precise what the Founding Fathers chose to paint only with

a broad brush. Yet, if experience encourages the Congress to go ahead with this attempt, it also underlines some of the dangers and difficulties of doing so; for, in seeking to provide precise guidelines to govern future situations, we must recognize that the world is in a state of rapid transformation and, as the Founding Fathers perceived, it is impossible to anticipate at any given moment the unlimited variations which the future is capable of presenting. Thus, any legislation that is finally drafted should be developed only after the most exhaustive study and debate, making sure that it reflects something more than a transient situation in the life of our nation or a momentary mood of the American people.

In seeking to codify prevailing ideas as to the role of Congress in foreign policy, we must constantly bear in mind that legislation is a blunt instrument. Like it or not, that is a fact from which there is no escape, since it derives from the nature of legislative bodies and from the limited means through which they can express their decisions in permanent form.

I know of no better illustration of the dangers involved than the history of the Neutrality legislation, which the Congress passed in the years from 1935 to 1937. This, like the legislation now before us, was a good faith effort to assure that the United States would not be drawn into another conflict like that of the First World War. It was legislation that reflected the prevailing mood—disillusion with our involvement in a conflict that had not solved the world's problems as we had innocently hoped and a conviction, borne of economic depression, that the United States should give priority to its pressing domestic problems and should, therefore, not involve itself too intimately in the affairs of other parts of the world.

By 1937, it is worth noting, public opinion polls were showing that a large majority of Americans believed our participation in the First World War had been a mistake, just as a large majority now believe that our involvement in South Vietnam was misbegotten. In January 1938 a piece of legislation called the Ludlow Amendment, which would have required a popular referendum before a declaration of war, was defeated in the House by only twenty-one votes, in spite of a massive effort by the Administration to mobilize a position against it.

The immediate background of the Neutrality legislation was the disclosures of an investigating committee under Senator Nye, a man of deep isolationist convictions who died only last week. This Committee had just shown, to the satisfaction of a large body of American opinion, that the imperial ambitions of a few European leaders had caused the first World War and that the United States had been drawn into that war through insidious propaganda and the conspiracy of munitions makers—or what I suppose we would call, in the modern idiom, the "military-industrial complex."

By passing a series of Neutrality Acts, Congress believed that it would forestall the repetition of such a disaster. Those acts were sweeping in scope, establishing rigid governmental control over the shipment of munitions abroad, prohibiting the export of arms to belligerent nations, forbidding private loans or credits to nations at war, and authorizing the President to forbid travel by Americans on the ships of warring states. Many experts were convinced that no loophole had been left through which this country could again be drawn into conflicts with other nations.

We all remember the somber history of these Congressional acts, and what an impediment they imposed to participation by the United States in the timorous politics of Europe which paved the way for Hitler's conquests and another world catastrophe—a catastrophe which, as recent disclosures have made quite clear, could have very probably been averted if the United States had lent a steadying hand to reinforce the will of the flatulent statesmen then guiding European destinies.

I mention this incident not because it is in any way an exact parallel—certainly this Committee is approaching its present task with far more sophistication and understanding than was displayed by Congress in the 1930s. But it is a cautionary tale that we should bear in mind in trying to answer the hard question we are discussing here today: how does one draft a statute that would make it possible for the Congress to contribute its wisdom, and play at least a co-equal role with the Executive, in shaping fundamental decisions that may lead to war, without inhibiting the President in doing whatever is necessary in circumstances of crisis and emergency to protect the vital interests of our country? In seeking to answer that question, let us be quite certain that Congress does not let itself be influenced in the design of that legislation by the transient mood of disillusion and disenchantment which our Vietnamese embroilment has created, just as Congress in the 1930s was seriously mislead by the

revulsion of the American people against its then recent experiences with war and depression.

As one who has served in the Executive branch of our Government five separate times over the last thirty-eight years, I approach the present effort with uneasiness. Certainly, it would be far better if the Congress—and particularly the Senate—and, most important of all, this key Committee of the Senate, could develop an effective *modus operandi* with the President, the Secretary of State and the other major figures in the Executive branch who play a role in the decisions affecting our foreign affairs—a working arrangement that would assure the kind of participation which the drafters of the current legislative proposals have in mind without having to freeze the procedures in legislative aspic. In saying this, I do not mean to be critical of this Committee, for much of the lack of easy *rapport* between the two ends of Pennsylvania Avenue results, in my judgment, from certain bad habits which the Executive Branch has acquired over the past two decades. But, if that is more than one can reasonably expect—and experience would suggest that it may be—then let us carefully test what is now proposed against our experience and design the necessary legislation with enough flexibility to make it workable.

I would now like, Mr. Chairman, to make some very brief comments with regard to specific provisions of the legislation proposed in Senate Joint Resolution 59 and 95, the bills offered by Senators Eagleton and Stennis, which seem to me to represent the most carefully conceived proposals now before the Senate. These comments are not included in the statement I have submitted for the reason—for which I must apologize to this Committee—that I have been on a protracted overseas trip and did not prepare them in time for reproduction.

### CONSTITUTIONAL AUTHORITY FOR U.S. FORCES IN VIETNAM

Senator SPARKMAN. Thank you, sir. Let me ask you this question: With the repeal of the Tonkin Gulf resolution, by what constitutional authority do you now conceive our Armed Forces are in Vietnam?

Mr. BALL. I think it is a difficult question. As I understand it, the administration has taken the position that they still are acting under the terms of the SEATO treaty. The Southeast Asia Treaty provides that action is to be taken by the signatory states pursuant to their own constitutional processes. So I am not quite sure by virtue of what authority we may be there other than the various ratifications of our presence by legislation of one kind or another over a period of time. I think it is a rather unclear situation.

I never have really believed that any of our treaties were self executing to the extent that some people have suggested. As I recall, the NATO, North Atlantic Treaty is about the only one that does not contain language with regard to our constitutional processes but it contains language that says that the signatory powers must take, each power must take, such action as it deems necessary.

Senator SCOTT. Could I interrupt there? Mr. Marcy called my attention to the fact that even the North Atlantic Treaty in article 11, where it is pretty well buried, says that the treaty shall be carried out by the parties in accordance with their respective constitutional processes.

Mr. BALL. Yes.

Senator SCOTT. I didn't know that.

Mr. BALL. But in any event I would assume that had been implied by the provision that each signatory shall take such action as it deems necessary because it leaves the decision as to the action to be taken in the signatory even though presumably it would decide to act along the lines of planning which had been worked out on a collective basis, with the other members of the treaty.

But, I don't believe these treaties are self-executing and I think this is something which has been rather badly misunderstood.

Senator SPARKMAN. I would suppose that if the President acted with adequate authority under the Gulf of Tonkin resolution and did bring in the troops the repeal of that would not be void ab initio, and certainly it would be up to him to get the troops out as best he can. Wouldn't you think that was good?

Mr. BALL. I would think that is right, Mr. Chairman. I think this was a signal to the President. I don't think that the constitutional question is going to be determinative in any way.

Senator SPARKMAN. Senator McGee.

### PUBLIC OPINION

Senator MCGEE. It is nice to have you here this morning, George. You are always refreshing and instructive. It is sort of like being in a history seminar with you as the professor, and I can think of no higher credentials.

We are talking about a circumstance in which it is almost most unlikely to be a situation declaring a war. Thus the unreadiness of public opinion for whatever steps may be taken, hopefully not prefatory, but deterrent steps.

Mr. BALL. Right.

Senator MCGEE. I can't see this circumstance changing. I don't know how you are going to bring public opinion around to be on the eager stance where if necessary people are ready to unite and act.

I suppose we could have had declaration of war very easily, if I listen to some of our bombthrowers, over the *Pueblo* for all the wrong reasons. I suspect we are going to bet other crises like that which would be good excuses for somebody to try to mobilize public opinion, but for precisely the wrong reason. This is all the more why our problem of keeping our cool or our powder dry, as we say out West, becomes increasingly more difficult.

Does it mean we have got to do it like FDR did it, that is, to consciously deceive or at least to misrepresent along the way until you get public opinion up to a greater readiness?

### DANGER IN TRYING TO SPELL OUT FUTURE SITUATIONS

Mr. BALL. Senator McGee, that is frankly one of the problems that I find with trying to be too precise in legislation of this kind, in trying to anticipate future events. History never repeats itself with any precision, and it shows a capacity for infinite imagination, and I would think that there is a danger that if we tried to spell the limits or the situations out too precisely there is going to be an enormous pressure on the Executive, who feels it necessary to act in the interests of the country, to make some very ingenious but rather fantastic constitutional interpretations of his own, and to indulge in what you suggest, in loose subterfuge devices which is certainly not the healthiest way for the President to proceed, so I would think again that the Congress ought to be very careful before it tries to indulge in an exercise in prophecy and to spell out the situations that may arise in the future in which the President can act.

Congress can't tell; there is not enough wisdom in this room or in this Congress or in this country, in my judgment, to predict the kind of situations and the form they may take which may compel very urgent action by the President, utilizing the Armed Forces in one way or another, in order to protect the interests of the country.

GAP BETWEEN CONGRESS AND LEVEL OF PUBLIC OPINION

Senator McGee. If we were able to perform in this body as you express in your statement you hope we would be able to perform namely, that we have arrived at a higher level of sophistication about the world in which we live and are thus able to participate more wisely, I think it still fails to address itself to whatever the gap may be between the wise men up here in the Congress and the level of public opinion in these matters.

Mr Ball. Right.

Senator McGee. And I don't see that gap being closed. Therefore, it still leaves me deeply disturbed about how realistic we could be as participants in this.

I think that even though intentions here among my colleagues are to raise to our responsibilities in the world, not to be isolationist, we have already let the genie out of the bottle. I don't know that we can ever get it back in there. I think these surfacing moods in this country are so bitter and so disillusioned and so turned around now that the most skillful and the most articulate men of leadership would find it impossible to turn them around short of some catastrophic incident. This is why I think we are in this kind of bind. I find myself totally at a loss to know how best we must proceed. I think we have to proceed as a responsible leader in the world, with great power in the world; but I fail to come up with the answers about how we implement that leadership in a meaningful way. It is most disturbing.

FALLIBILITY OF CONGRESS

I must say, even though we are so wise up here in this new enlightened age, that the track record of the Senate Foreign Relations Committee isn't the greatest in the world. I remember President Wilson's difficulties for lots of mixed reasons, regarding the League of Nations. It was this committee that had a considerable hand in the lags that you and I both referred to in the 1930's. It was William E. Borah, I think, distinguished Senator from Idaho who——

Mr. Ball. Right.

Senator McGee (continuing). In 1939 when the President was saying there is a crisis in Europe, Europe is going to war, responded, "My intelligence is better than that of the Secretary of State and they tell me there will be no war in Europe this summer. Let's go home." Senator Borah and his colleagues went home and Europe went to war.

We are not infallible up here, and because somebody made a mistake or a series of mistakes or bad guesses, if you want to call them that, does not suddenly enshrine us. We have to be careful that we don't suddenly engulf a process, as you put it so well, and to another the chances for responsible decisionmaking. I am afraid we might be coming dangerously close to that if we don't watch ourselves.

That is why your warning, I think, is so appropriate here.
Thank you, Mr. Chairman.
Senator SPARKMAN. Senator Cooper.

### U.S. ENTRANCE INTO CONVENTIONAL WARFARE

Senator COOPER. We are indebted to Mr. Ball in many ways, now and in the past, but I think that you are a great help now because of your vast experience and your good mind.

I would like to ask this question: Do you think your remarks about the situation in Cuba, and President Kennedy's action in that respect, clash in any way with steps that might be taken by the legislature to prevent our entrance into a conventional warfare.

Mr. BALL. If it is a matter of conventional warfare, then I think the normal situation is that the President has the opportunity to go through the time-honored constitutional process, ask Congress for some kind of authority. Whether it actually takes the form of a declaration of war, as I recall we never really have declared war, we never have gone further than to declare the existence of a state of war in contradistinction to the action some of the European nations have taken, but whether it is that or it takes some other form of authorization doesn't seem to be very important. But I would think in the normal conventional situation the President certainly should resolve everything in favor of getting the constitutional authorization, simply because against the experience of the past, it is one way of assuring that public opinion is going to be with him and that the Congress is going to support him, and I would think that no matter what this committee does or what the Congress does with respect to the legislation now pending, that certainly the very fact that such attention has been given to it, and that there has been public discussion of the question, and that the administration witnesses have come up here and appeared, is going to be notice to the present administration that they had better act with big great circumspection and constitutional correctness.

Maybe a reminder of this kind is very necessary every 4 years or 8 years or whatever it may be, but I would hope that this is a matter where there could be reestablished an effective kind of working relationship between the Senate Foreign Relations Committee and the State Department and the White House and so on, so that over a period of time these things become a matter of informal resolution rather than otherwise.

Senator COOPER. I agree with what you said about the roles of Congress and the President at the time of Cuba and that would be applicable to almost any nuclear threat. But I agree with you I don't think with the exception of an immediate nuclear threat, that the situation would be so delicate that possible negotiations would be hindered by a meeting with Congress. I think most of the resolutions under consideration are directed toward conventional warfare. It seems to me there is always time to come to Congress unless there is a threat of nuclear war by a country which has the capability to destroy the United States.

### COMMUNICATIONS BETWEEN EXECUTIVE AND CONGRESS

You have emphasized the necessity of better communications between the Executive and the Congress, particularly with the Foreign

Relations Committee. I said a few minutes ago that our system depends upon understanding and trust between the two branches. I think it is a delicate system, and the whole system depends upon faith in its processes, as well as the responsibility to engage each other in full and frank discussion.

Can you amplify your proposal?

Mr. BALL. The problem, I think, Senator Cooper, is how does this committee and the Congress go about breaking the Executive of some very bad habits. And one of the bad habits of the Executive is to want to husband the information that it has and keep it very much to itself on the assumption that most of the things that are done or many of the things that are done in the foreign policy area are things which have to be done in the highest secrecy.

I think this is enormously overstated, and I would suppose actually that the feeling on the part of the Executive that it may have to account to the Congress more than it does would serve as a very useful deterrent to the Executive to be led into some practices which I don't think are necessarily very healthy for the country.

In that sense, while I deplore the circumstances under which this occurred, I rather think that this massive leak of the Pentagon papers has been a healthy thing, because, if nothing else, it may remind some of the people in the administration that the things that they are doing today are not necessarily going to be enshrined in the archives for the next 20 years, and rather than have the effect that many people have expressed concern about, rather than persuade people in Government not to be forthright and honest, I think it may persuade them to be a little more responsible, and if this is the case I am all for it.

NO CONSTITUTIONAL BASE FOR EXECUTIVE PRIVILEGE

So that I think this question of executive privilege, I am wholly in support of what the chairman said, I was just waiting for him to come in so I could say this. [Laughter.] I think there isn't any constitutional basis that I have ever been able to find for executive privilege, and I think it is something that——

Senator COOPER. Wasn't there some decision in the early days of the Supreme Court, quoting, I believe Washington?

Mr. BALL. I looked over the literature not very long ago. There is really nothing persuasive. It is something conjured up out of thin air and given a certain sanctity by experience but really it is very, very hard to make a constitutional case for it.

Now, this does not mean that there may not be the extraordinary circumstances where something might be withheld or at least withheld from the whole of the Congress or event from the whole of a particular committee. But I would think it would have to be the extraordinary situation and I think the proposal that the chairman has put requiring the President to face up to this, personally, is very useful.

Senator MCGEE. Perhaps the only executive privilege left is that of using profanity on the floor of the Senate which Washington is supposed to have done.

The CHAIRMAN (presiding). That I don't think involved, if I say so, really a constitutional question. It was a matter of manners. He was offended personally. I think he thought he had the privilege of not being insulted, like being kept waiting, things of that kind.

Senator COOPER. Let me ask you this question which is of very great concern to us. You know that the provisions of the National Security Act require the CIA to gather and collate intelligence from all the various intelligence gathering agencies and to provide to the Executive and the National Security Council intelligence which relates to questions which are of great concern to the foreign policy and national security of this country.

I know you have been in sessions in the National Security Council.

Now, would the provision of that same intelligence, the analysis, the facts—not the source—would that in your view in any way really obstruct, impede the operations of the Executive in matters which affect foreign policy or national security?

Mr. BALL. You mean if this were extended to the Congress?

Senator COOPER. Yes.

Mr. BALL. I would make some restrictions.

Senator COOPER. I am not talking of the problem of leaks of security. I think the question of security is not a great one. In fact there are far more leaks from the executive branch. But to go on to the main issue of giving Congress this information, do you think that this would be helpful or harmful?

Mr. BALL. Well, I have seen very little intelligence in the Government, and I think I used to have every clearance available, that couldn't have been made known on a selective basis to Members of the Congress.

Now let me underline why I say that.

Experience with press leaks is that they normally come about through one of two circumstances. Either because the person who leaks the information is not directly involved in the matter and, therefore, does not feel any sense of responsibility for something that is being undertaken. He only hears about it from a friend or he is only tangentially concerned with it. He doesn't know fully what is going on, he only knows part of the story. That is one situation. The other situation is where the individual is opposed to a particular policy and he leaks it in the hope that it will interrupt the policy from going forward, prevent it from going forward.

Now for that very reason I would make the same distinctions with regard to the Congress that I would make with regard to the Executive.

It is really on a kind of need-to-know basis. I would say the Senate Foreign Relations Committee, for example, has very specific responsibilities under the Constitution with regard to treaties, the approval of appointments, and so on. And, therefore, it presumably should be so engaged in the keeping closely in touch and helping to carry out foreign policy that it would be presumed to have the same sense of responsibility, and therefore have available to it the kind of intelligence that guides the executive branch, and I wouldn't make very many exceptions to that, I would think. But I think to say it should be made available to the Congress as a whole that is another matter.

Senator COOPER. That is all.

The CHAIRMAN. Before I call on Senator Spong, I want to say to Mr. Ball, who served here so long, that I was a witness myself on the executive privilege bill before Senator Ervin's committee. I

just finished testifying which is why I couldn't be here earlier this morning. That meeting was set a long time ago so I felt compelled to go there.

Senator Symington is testifying there now, which is one reason he could not be here. I am very much interested in your testimony, but in view of the fact I have not heard it, I would defer to Senator Spong who has been here. I will not go over the same matter, but I would like to ask a question after Senator Spong.

Senator Spong.

THREE PROPOSALS TO RESTORE BALANCE

Senator SPONG. Thank you very much, Mr. Chairman.

Mr. Ball, I think all of us who are participating in this legislation share the concerns you have expressed. In your statement, in main, you mention that period in our history prior to the Second World War. In American history that is a period of congressional negativism as far as these matters are concerned.

We don't want to return to that by any measure, but what we are seeking to do is to restore some balance. You are certainly in agreement with us that that seems desirable?

Mr. BALL. No question on that, Senator. I agree entirely.

Senator SPONG. There have been several suggested ways that this can be attained. You touched on one and I gather you agree there should be better reporting procedures and more reporting.

A second was in the national commitments report. The various joint resolutions which had been passed dealing with Cuba, Middle East, and Tonkin Gulf were open ended, to a large degree, and suggestions were made that any resolutions passed in the future by Congress should be more specific and perhaps have a time limitation so that they would be a matter of continuing review. Would you subscribe to that?

Mr. BALL. Yes, I think that is an excellent suggestion, sir.

Senator SPONG. A third proposal, and I think Professor Commager suggested this in his testimony early in our hearings, and it has been suggested by others in the past, that there be some sort of new congressional committee, some standing committee. In theory, they would have been available at the time of the Cuban crisis you mentioned. This committee would meet certain needs in reporting and consultation not presently being met.

I think I questioned Mr. Reedy about this when he testified. He did not seem to believe from his experience in the executive branch that this would be helpful.

Would you care to comment on the general proposition?

Mr. BALL. Well, I take it, I have not seen Professor Commager's suggestion, but I gather, that what he has in mind is something that either might be in the nature of a smaller subcommittee of the Senate Foreign Relations Committee or possibly a committee which would have its membership drawn from the, say, Armed Services as well as Foreign Relations Committee. I think this is a matter of internal Senate arrangements which something of this kind might be done. I don't think there is any magic in it, quite frankly, and I don't think it would make very much difference.

If this committee wanted to designate a smaller group to deal with certain types of intelligence which would itself make a judgment as to whether the parent committee should be privy to it, that is a matter that the committee ought to decide for itself.

Senator McGee. Wasn't one difference that he would have required that a majority of that committee be required to be in town at all times. They couldn't be absent from the city.

Senator Spong. That is correct.

Mr. Ball. You know, I really doubt if this would make very much difference. The normal practice of any President is to call the leadership together when he faces a crisis of this kind, and given the fact that jets move very quickly, and the White House has a fleet of them, why they can bring people in pretty fast.

But I would doubt that, say, returning to the events of October of 1962 that this would have made any very great difference. I think that the important thing was for the President to be able to astonish the world, to confront the world, and particularly confront the Soviet Union with a decision already made, and whether talking to four or five people, and a special permanent committee of the Senate, I don't think so, really.

### CONGRESSIONAL PARTICIPATION IN USE OF FORCE DECISIONS

Senator Spong. In your broad experience in the executive branch, I would like for you to give consideration to this question which the chairman submitted to Secretary Rogers for me in my absence one day. Can you recall that at any time since the Korean war where Congress has participated in a use of force decision before the fact?

Mr. Ball. Well, I guess the Middle East resolution was one, but it didn't involve any use of force because there was not any opposition at the time.

No, I really can't.

Senator Spong. I think it dramatizes probably the need for this restoration of balance we are talking about.

Now just as a historical footnote here, you mention the Cuban——

Mr. Ball. May I just comment on what you say there, Senator Spong. I think that one answer to why Congress has not participated in advance is that any situation that I can recall coming up since the missile crisis is one which would have been covered by one of the exceptions that was in every one of these bills. I mean the situation. the reason the troops were sent to the Dominician Republic in the first instance, because I happened to participate in that decision in a very immediate way, was because there were reports—right or wrong—that there were 400 or 500 Americans in the parking lot next to the Ambassador Hotel who were in danger of being liquidated at any moment. When a situation like that occurs you don't wait around, and so we sent some force in immediately.

Now the Dominican story is one where an invasion or an occupation or an intervention changed its character over the succeeding days but certainly the initial authorization for intervention was one that was squarely within the provision which I think is really what you can probably find the same answer with respect to every other case.

Senator SPONG. I don't know it is a question of whether you can do it, but whether you should have done it. I am not prepared to argue the Dominican situation this morning. I think what Congressmen are concerned about is there was no opportunity for collective judgment whatsoever because the consultation came after the fact.

Mr. BALL. Well, in the Dominican case I would be prepared to say two things quite categorically.

One, that had you been present with the President and two other people, including myself, when we got the succession of telegrams from the Dominican Republic, you wouldn't have had any hesitancy about committing force and the idea that somehow we had to get Congress into session and get some authorization for it, I think this was just totally unrealistic under the circumstances. So that I don't think, there may be other situations which may have occurred when there have been troops deployed when Congress may have come to a different conclusion but I would doubt it very much, but again action is taken on the basis of information then available.

Now it is terribly important that the information that is made available to the Congress when it goes to look at these things is the same information and all of the same information that is in the hands of the executive.

Senator SPONG. But when I asked about participation I was talking about consultation and reporting as opposed to authorization.

Mr. BALL. Right.

LEGAL BASIS FOR PRESIDENT KENNEDY'S ACTION IN CUBAN MISSILE CRISIS

Senator SPONG. This just by the way of history, you mention of what the situation may have been in Cuba. My understanding is that President Kennedy did not rely in any way upon the Cuban resolution as a legal basis for what he did. We had an earlier discussion today of President Eisenhower and the Middle East resolution. In that Cuban resolution there is this language in paragraph (b) "to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States."

So in that instant there was a legal basis if President Kennedy had chosen to rely upon it.

The CHAIRMAN. Will the Senator yield to me? I have a policy committee meeting, the last one before the recess, and I feel it is necessary for me to. I am sorry I missed your testimony, but I will read it.

Mr. BALL. Thank you, sir.

Senator SPONG. I finished my questions and I thank you very much for your testimony.

Senator SPARKMAN (presiding). This is a rank I never thought I would ascend to in this committee here.

Do you have a question, Senator Javits?

Senator JAVITS. Yes, Mr. Chairman. I believe the matters which have been testified to, for example, with respect to the Cuban missile crisis were testified to by McGeorge Bundy as well as by Professor Bickel. I have had friendly debates with Mr. Ball on several recent occasions so I think we have thoroughly explored each other's point of view. I will let the testimony stand therefore as is.

I would like, Mr. Chairman, if I may, to include at this point in the record a piece by Irving Brant, journalist and historian, entitled

"Nixon Versus Constitution in War Powers Debate," which was printed in the Washington Post, most appropriately, on July 4, 1971. I think it is illuminating on the thrust of my bill and the testimony we have had before the committee.

Senator McGee. Without objection it will be a part of the record.

(The information referred to follows:)

[From the Washington Post, July 4, 1971]

NIXON VERSUS CONSTITUTION IN WAR POWERS DEBATE

(By Irving Brant)

(Brant is a journalist and historian, a biographer of James Madison and a specialist on U.S. constitutional history.)

The Nixon administration's extraordinary attempt to halt publication of the Pentagon papers on Vietnam is entirely consistent with its recent opposition to congressional efforts to limit the power of Presidents to wage undeclared wars. In both confrontations, the administration has put deceptive secrecy at the heart of national war policy.

In his testimony before the Senate Foreign Relations Committee in May, opposing the bill presented by Sen. Jacob K. Javits (R-N.Y.) to make "rules respecting military operations in the absence of a declaration of war," Secretary of State William P. Rogers asserted that "the heightened pace, complexity and hazards of contemporary events often require rapid and clear decisions. The nation must be able to act flexibly and, in certain cases, without prior publicity.

"Unlike the presidency," Rogers continued, "the institutional characteristics of Congress have not lent themselves as well to the requirements of speed and secrecy in times of recurrent crises and rapid change."

The Javits bill does not challenge, but instead recognizes and regulates, the power of the President to initiate hostilities under certain circumstances inferentially sanctioned by the Constitution. Specifically, it affirms his power to repel sudden attack against American territory or armed forces, to protect the lives and property of American nationals abroad, and to comply with national commitments made by laws or treaties where immediate military action is required.

The bill requires that such unauthorized hostilities be reported promptly to Congress, and forbids their continuance beyond 30 days from their initiation, except as may be provided by Congress. Prompt committee action is compulsory and a final vote of both houses is required within the 30 days.

A PEACEFUL DEATH

Besides flatly opposing this bill as an attempt to "freeze" the allocation of war power between President and Congress (which it does, and rightly so), Rogers sought to dispose of it by recommending postponement to some quiet period "after the passions of Vietnam have faded into the past." That is, put it off until interest in it would have lapsed.

On the score of allocation of power, the Secretary's testimony was a partial re-run, in different tone, of the pugnacious remarks of former Under Secretary of State Nicholas Katzenbach in 1967, opposing the "National Commitments Resolution" to restrict the President's power to initiate war.

After listening to Rogers' argument, Chairman Fulbright and others accused him of taking the same stand as Katzenbach. This he vigorously denied; he differed completely with the former under secretary. And so he did—in tone and method—but they came to identical conclusions regarding the constitutional war powers of the Chief Executive and of Congress.

The Constitution vests "all legislative power" in Congress and grants the following specific powers in the military field: "To lay and collect taxes . . . to . . . provide for the common defense. . . . To declare war . . . To raise and support armies . . . To provide and maintain a Navy. . . . To make rules for the government and regulation of the land and naval forces."

Bearing also on the war power are these clauses concerning the President: "The executive power shall be vested in a President of the United States of America. . . . The President shall be Commander in Chief of the Army and Navy of

the United States . . . He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur" (and shall appoint ambassadors).

GRADUAL USURPATION

The excessive swelling of presidential power is an outgrowth of his blended functions as Commander in Chief and general manager of foreign affairs. Historically, in England, the king had sole power to declare and make war, subject only to Parliament's holding of the purse strings. The framers of our Constitution saw great danger in this. Kings had plunged the American colonies into ruinous wars with France. So they transferred the warmaking power to Congress, except, by implication, in situations of extreme emergency, leaving the President, as Commander in Chief, to conduct military operations.

However, the sweeping grant of executive power, and more specifically the power to negotiate treaties and to appoint and receive ambassadors, have made the President the primary formulator of foreign policy. Aided by technological developments, the result has been that the President has gradually combined his role as Commander in Chief (supervisor of operations) with his role as the formulator of foreign policy, to the derogation of Congress. Undeclared wars, initiated by the President without congressional authorization, have shifted from emergency measures into instruments of foreign policy.

All this is in clear violation of the constitution separation of powers and in defiance of specific provisions of the fundamental charter. The relative ease and speed of one-man action, compared with the deliberative process of legislation, have helped to produce this usurpation.

There is universal agreement that Congress can halt any American military operation, either instantly or by ultimate effect, by refusing to appropriate money for its continuance. That remedy, however, is too drastic in its consequences for practical use, unless in the gravest emergency. It is also universally agreed, based on debate in the framing of the Constitution, that the President has legitimate power to repel invasion or resist any sudden attack on the United States without a prior declaration of war by Congress.

Beyond this, all in contention, with a histoical record of gradual and progressive extension of presidential prerogative. So far has this been carried that Katzenbach was able to say in 1967, with a measure of historical support but wholly without constitutional warrant, that declarations of war are "outmoded in the international arena." Hence comes the implied corollary that the President can initiate hostilities at his own discretion, under virtually any circumstances, without a declaration of war by Congress.

The position taken by Katzenbach in 1967, and by Secretary Rogers in 1971, is supported by a chain of events culminating in the Korean and Vietnam wars and the invasions of Cambodia and Laos. Taken together they add up to this fallacious maxim: "The habitual exercise of unconstitutional power makes it constitutional."

WHAT'S AN EMERGENCY?

In this contest for power the President has a decided advantage. As Commander in Chief, constitutionally charged with the conduct of military operations, he can bull things through by mere possession of the power to do so. That, in effect, is what Katzenbach told the Foreign Relations Committee in 1967, offering virtually no constitutional argument except precedent.

Secretary Rogers takes a different tack. Instead of bluntly declaring that declarations of war are obsolete, he undertakes to find constitutional warrant for this extension of presidential power. The result is a mountain of claims unsupported by so much as an anthill of evidence.

All that Rogers demonstrated, from the historical record, was that the framers of the Constitution reshaped the clause on making war to give the President emergency power to defend the country against sudden attack. Who denies such an emergency power? To prove his point, the Secretary actually cited the one explicit action in the Federal Convention of 1787 that completely disproves his contention. Said the Secretary of State to the Foreign Relations Committee (italics added):

"The Committee of Detail submitted to the general convention a draft article which gave the Congress the power 'to make war.' Pursuant to a motion by Madison and Gerry, this was amended to the power 'to declare war.' This change in wording was not intended to detract from Congress' role in decisions to en-

gage the country in war. Rather it was a recognition of the need to preserve in the President an *emergency power*—as Madison explained it—*'to repel sudden attacks'* and also to avoid the confusion of 'making' war with 'conducting' war which is the prerogative of the President."

That is exactly what is claimed by those who seek to limit presidential war power to accord with the Constitution. Elaborating, Secretary Rogers said that "the necessity to repel sudden attacks" was the only situation cited by the framers in which, in 1787, "it was evident that emergency action was required." He believed, however, that the power extended beyond the cited reason for it:

"But I submit that the rationale behind the concept is broader—that is, that in emergency situations the President has power and a responsibility to use the armed forces to protect the nation's security."

This conclusion, he said, was borne out by subsequent practice and judicial precedents, extending from 1801, when President Jefferson sent a naval squadron to protect American shipping from the Barbary pirates of North Africa, down to the Vietnam War.

The key word in all this—the word that wrecks the Rogers analysis—is "emergency." Grant that the President has power both to repel sudden attack and to protect the nation's security, in an emergency, by initiating hostilities against a foreign nation. How does that furnish constitutional warrant for American entry into the Vietnam War? That entry was discussed for years between the White House and the Pentagon. The war was decided upon and expanded with slow deliberation, contention, and doubt. In no sense was the initiation of hostilities an emergency action.

The only reason for not referring the Vietnam decision to Congress was fear that the answer would be negative. The pseudo-approval obtained later, in the Gulf of Tonkin Resolution, was based on false representation and artful wording, designed to deceive Congress and build up an unconstitutional executive ploy.

Thus was initiated the longest war in American history, fought on the other side of the world, "justified" by the now-discredited "domino theory" of little nations automatically collapsing into communism without internal reason for it—a war built up soldier by soldier through the years until American casualties rose to the tens of thousands.

### DEFAULT BY CONGRESS

What brought this about? Chairman Fulbright asked that question and gave the answer after that 1967 session with the rambunctious Under Secretary Katzenbach: "The fact that Congress has acquiesced in, or at the very least has failed to challenge, the transfer of the war power from itself to the executive, is probably the most important single fact accounting for the speed and virtual completeness of the transfer."

Nothing like this was dreamed of in 1787, and for decades after the Constitution was adopted, declarations by American statesmen took the restrictive line on executive initiative. In 1796 Madison denied that the treaty power was unlimited, for that would mean that the President and Senate, acting together, could put the United States into war. President Jefferson in 1805 sent these words to Congress about a diplomatic crisis with Spain:

"Considering that Congress alone is constitutionally invested with the power of changing our condition from war to peace, I have thought it my duty to await their authority for using force in any degree which could be avoided."

Wrote President Monroe in 1824: "The President has no right to compromit the nation in any question of war."

Said Secretary of State Daniel Webster in 1851, rejecting a Hawaiian appeal for protection against threatened French aggression: "I have to say that the war-making power rests entirely with Congress; and that the President can authorize belligerent operations only in the cases expressly provided for by the Constitution and the laws."

Does not every word of that statement apply with full force in support of the Javits bill? That bill specifies the cases, sanctioned by the Constitution, in which the President can authorize belligerent operations to cope with an emergency. It retains the basic authority of Congress in relation to war and peace. It regulates the authorized deviations from the general constitutional rule. It does not interfere in the least with the handling of any emergency, from minor property damage to nuclear holocaust.

Rogers declared that although the Javits bill requires congressional action within 30 days, this would not ensure such action. Said he: "This raises another

constitutional issue, that is whether the President's authority under the Constitution—for example, to protect the nation against sudden attack—could be limited or terminated by congressional action or inaction."

For sheer inanity, that is hard to surpass. Imagine Congress, with the nation under sudden attack by a foreign enemy, violating its own law in order to paralyze military resistance to that attack! To say that such a possibility points to the Javits bill's unconstitutionality goes beyond the bounds of reason. It is almost equivalent to arguing that the President has constitutional power, in an emergency, to lay and collect taxes for the common defense because there is no conclusive assurance that Congress will levy them.

The Javits bill gathers up the loose ends of divided governmental authority and puts them in order, in harmony with the intent of the framers and with the security and welfare of the nation. That is precisely what President Nixon does not want. Speaking through his Secretary of State, he seeks to subordinate Congress to the Executive in the exact spot where congressional authority should be paramount.

Secretary Rogers, of course, is in an almost impossible situation. He has to defend a Nixon concept of presidential power that surpasses the indefinite sweep exercised by Lyndon Johnson. The latter's Under Secretary of State, Nicholas Katzenbach, told the Foreign Relations Committee in 1967 that the Gulf of Tonkin Resolution was "as broad an authorization for the use of armed forces for a purpose as any declaration of war so-called could be in terms of our internal constitutional process." President Nixon consented to have the Tonkin Resolution repealed because, he said, he has ample authority for all his current and prospective actions without it. These include the Cambodian and Laotian "withdrawals by escalation" and threats of renewed bombings of North Vietnam on a huge scale.

With that limitless Nixonian concept in the background, Rogers evaded a question put to him by Sen. Frank Church (D-Idaho). The senator restated it:

"My question was what limits do you see the President's unilateral authority as Commander-in-Chief to make war in foreign lands without congressional consent?"

Rogers: "Well, I am not really prepared to discuss hypothetically constitutional questions because it is too risky and unwise. In order to pass judgment on these matters you have to know all the facts."

Church persisted:

"What are the limits? There are no limits in this 40-page statement; Mr. Secretary, and you say you are not prepared to suggest any limits."

To which Rogers replied:

"The limits, it seems to me, are that in any situation that is not an emergency situation, or one such as Cambodia and Laos involving a war that has been going on for a long time, the President should come to Congress, consult with the Congress, and get its authorization for the initiation of war."

Except for the reference to Cambodia and Laos, that statement could have come from Chairman Fulbright. It was equivalent to saying that the Vietnam War, which did not begin in an emergency situation, properly required a congressional declaration of war. The Cambodian and Laotian invasions were regarded as legitimate only in the context of pre-existing war.

Sen. Claiborne Pell (D-R.I.) pushed the question farther. If the Javits bill had been in effect in 1965, he remarked, we would not be in this hassle because "'we would have set forth policy before and you would be following it out. Would that not be a correct statement?"

Rogers replied: "I do not think I can answer that, Senator." Why not? Because, one must conclude, the only possible answer would be "yes."

### A WAR IS A WAR IS A WAR

Running all through the Johnson-Nixon line of thought, but not explicitly affirmed by Secretary Rogers, is the idea that a nonemergency *limited war*, of limited scope for limited purposes, does not require a declaration, even though that action would be required for a full-scale conflict. Katzenbach in 1967 differentiated the Tonkin Resolution from a full declaration of war. Said he: "We did not declare war. Our objectives are limited. We are there for a limited purpose."

The committee, in its comments on the hearing, refused to "accept the view that 'limited' wars can be undertaken by the executive without the consent of

Congress." Justice Samuel Chase, in 1800, placed the whole subject under the legislative branch when he wrote in Bas v. Tingey, a case growing out of the limited naval war with France:

"Congress is empowered to declare a general war, or Congress may wage a limited war; limited in place, in object, in time." The distinction Chase saw was that a general war was restricted only by the international laws of war, while "if a partial war is waged, its extent and operation depend on our municipal laws."

Municipal (domestic) laws do not give rise to presidential power. The fallacy of the Johnson-Nixon position is easily demonstrated. Bomb Hanoi, bomb Haiphong, bomb the rice-field dikes of North Vietnam (as many have advocated) and the limited war in Vietnam would become a general war. Such an expansion, under the concept of presidential power to initiate only limited war, would require a declaration of hostilities by Congress. Has any such thought ever been expressed by either Mr. Johnson or Mr. Nixon, or any of their spokesmen? Not a hint of it.

Broadly speaking, Secretary Rogers takes the stand that, "except in emergency situations," decisions to involve the country in armed conflict should be arrived at "jointly" by the President and Congress. Does that mean by a congressional declaration of war? Perhaps so, yet he persistently gives Congress a minor role. Thus he says:

"There are few significant matters which can be accomplished by presidential order alone. The essence of presidential power is the ability to enlist public support for national policy, and in this the President needs the cooperation of Congress."

This means that in the matter of going to war, Congress is to serve as a sounding board for presidential policy.

Senator JAVITS. I thank the witnesses very much for giving very informative testimony.

Senator MCGEE. Thank you very much, Mr. Ball.

The next witness is Mr. William Rogers and, Bill, you come up here. Proceed in whatever way you prefer. In any case, your prepared remarks will be inserted in the record.

## STATEMENT OF WILLIAM D. ROGERS, ARNOLD & PORTER, WASHINGTON, D.C.

Mr. ROGERS. Well, let me just say a word or two of summary about them, Mr. Chairman, since I know the committee would like to move on to real matters of substance.

Senator MCGEE. Like lunch, that is a substantive matter.

### PLEA TO COMMITTEE TO ACT

Mr. ROGERS. Like lunch. My own analysis is essentially in two parts. No. 1, a plea to the committee to act and, with respect to that question I would like to comment on Mr. Ball's statement in one respect. It is this: He naturally points to the problem of precision, and our wisdom to anticipate the future. Necessarily this is a difficult question in legislation of this sort.

But I would urge the committee to think in these terms. That almost any legislation, as imprecisely drafted as it might be, is better than the present situation. That is to say, the President now acts in most cases without any authority from this Congress, without any congressional authorization at all. The efforts before the committee here are efforts in the first instance to clothe him with explicit legislative authority to act in certain specific situations.

It is quite conceivable that you may not, indeed it would be incredible if you could, anticipate all situations in which the President might act. But to the extent that you give him half the authority that he may require, he will be to that extent legitimatized to do what he may do in the future, and this, it seems to me, is why the committee ought to take, must in fact indeed take, the risk that Mr. Ball pointed out, and that is attempt to foresee at least certain circumstances in which this committee is now prepared to say "you, Mr. President, are authorized."

EFFECT ON OTHER NATIONS OF PASSING LEGISLATION

Senator JAVITS. Mr. Rogers, may I ask you a question in that connection? It is my view, and I would greatly appreciate your critical judgment on this, that if we do pass a law it will result in strengthening rather than weakening the feeling of resolution by other nations who deal with us. The argument is made that if we do pass a law such as we are considering it will put other nations in doubt that we really will perform on our commitments.

Mr. ROGERS. Yes. I should like to embrace that idea, Senator Javits. In fact it is reflected in my written statement.

It seems to me that part of the argument that is made in favor of the present uncertain state of the Presidential authority is that it allows him flexibility but, by the same token, it does raise, it seems to me, a profound question in the mind of the leaders of other nations with whom we are dealing as to whether or not the country is with the President, it is a regrettable fact of life today that the extent to which past Presidents have acted unilaterally has substantially raised this question in the minds of foreign leaders. So that by this Congress acting the way it has proposed to act will not reduce the President's credibility in foreign affairs, it will enhance that credibility, in my judgment.

No foreign leader is unaware of this committee's analysis and consideration of this problem. It exists. A solution, therefore, it seems to me, is essential in terms of strengthening the President's hand by the kind of authority you propose giving him here.

Now, the second part——

AUTHORITY GIVEN PRESIDENT BY WAR POWERS LEGISLATION

Senator MCGEE. Isn't that still problematical though, Mr. Rogers? We still have to prove up here, that is, we don't know that is going to be the followup yet. Suppose we discover in the process that we, as Senators, with our best intentions are still not able to carry along public opinion or persuade public opinion or lead the public in the ways the times require. That still could have this negative impact. But you are suggesting that is the chance we must take and try to rise to it and prove it out.

Mr. ROGERS. Yes; let me try to illustrate the point, Senator McGee. It seems to me if you prescribe an area in which you say a President is authorized to act unilaterally but must report and then Congress will act within 30 days, if you prescribe such an area in which the President is authorized to act in a particular way but you fail to particularize some other situation, the problem is no worse than it is now.

Because at the present time the President has no authority from Congress in any situation. In the Dominican Republic first level situation of rescuing American citizens abroad, he has no authority now from this Congress.

You are, in a sense, giving him something he does not now have, the authorization of this Congress.

### LEGAL BASIS FOR QUARANTINE IN CUBAN MISSILE CRISIS

Now, with respect to the problem that Mr. Ball properly pointed out, and that is the case of the Cuban missile crisis which is in a sense a kind of paradigm case of the alleged need for Executive flexibility. In that situation I would say two things. No. 1, do not forget that the legal underpinnings for the President's quarantine action were two resolutions by the Council of the OAS.

Now, this is very clear, and it was precisely recited in the President's announcement. That was the legal basis on which he was instituting the quarantine.

I have always felt a little uncomfortable with the notion that the President had the time to go to the OAS for two resolutions and not time to come to the Congress for any.

### REDRAFTING OF PROPOSED BILLS SUGGESTED

The second point is, it seems to me, that the question is best answered by some redrafting of the proposed bills before you. As I set forth in my prepared testimony, I would suggest that the provisions with respect to preauthorization, if you will, could be slightly changed and amended, I think, somewhat along the lines that Senator Javits and Professor Bickel discussed yesterday. That is, to reword the crucial provisions with respect to preauthorization to allow him, and here I quote my own language, which is essentially a combination of some of the language before the committee, "to repel or forestall an actual or imminent attack on the United States or the Armed Forces of the United States."

Now that, together with the power to protect the lives of the American citizens abroad, does incur risks because of our inability to foresee all possibilities. But I think such language still necessarily clothes the President with new authority which he does not now have and hence—excuse me, Senator, go ahead.

### DISTINCTION BETWEEN FUTURE AND IMMINENT ATTACK

Senator SPONG. But you are distinguishing imminent attack from future attack.

Mr. ROGERS. Yes.

Senator SPONG. Now you know the word "future" is used in the Stennis and Bentsen legislation.

Mr. ROGERS. Future nuclear, I think.

Senator SPONG. Future attack. He can act to repel what he believes to be future. I think there is a distinction here. Imminent, I look at as something much more likely to occur.

Mr. ROGERS. Oh, yes, absolutely, and as I say in my testimony if there is any question about that it ought to be clear that what the

Congress is saying the President can do is respond to an attack as to which the only question is not whether but when.

PROVISION FOR CONGRESSIONAL ACTION WITHIN 30 DAYS

Senator JAVITS. Mr. Rogers, I agree with you, you know we may have some ideas about language but just as I agree with Professor Bickel I am working on some things and we will all have a chance to think about it, in an effort to meet that contingency. Could you tell us now or at your convenience, this concept of illegality after 30 days without congressional action. That it seems to me is the essential of what we are doing.

We can fill in the details. Would you agree with that or do you see some other aspect of this problem which represents the key, the fulcrum of a solution?

Mr. ROGERS. You know, I think that is one of two essential aspects of the legislation, Senator. The first, it seems to me, is giving the President congressional authority he does not now have to act in emergencies, and the second thing is the provision that Congress should act within 30 days with respect to emergency actions.

Now, I think there are two things to be said about that. No. 1, of course, Congress always has the authority in new situations to do what it did in the Formosan Straits case, the Lebanon case, the Cuban missile crisis, whatever. You can always enact additional authority to the President when you anticipate new crisis situations.

The second thing, however, it seems to me, is a deficiency if you will allow me to say so, Senator Javits, which exists in your bill and bothers me in the other legislation and I think may be cured in the Eagleton resolution. Let me see if I can make this point, it is very simple.

That is, the legislation that you introduced provides that Congress must decide the issue within 30 days. This may have certain parliamentary problems to it which I don't purport to be expert on but it does seem to me quite essential that if the Congress is going to engage itself fully in the cooperative exercise of the warmaking powers under the Constitution, it cannot keep open for itself the capacity to pocket veto an initiative by the President.

Senator JAVITS. Mr. Rogers, if you would allow me, may I observe that I have provided for that specifically, and that both Eagleton and Stennis bills do me the honor of picking it up practically haec verba. In other words, we are very much aware of that problem, and, we believe, solve it using the analogy which we have in the reorganization statute and, as a matter of fact, even more sharply limiting the time factors which are involved, so much so that there has been certain question about it.

Senator Sparkman, for example, said yesterday he thought it was too summary. Any suggestion that you have on that score would be more than welcome. I think it is significant that in essence the other bills have picked up the procedures of my own bill.

Mr. ROGERS. Well, I perhaps did not read it with the knowledge of this body's practices that I should have. I am gratified to know, Senator, that, if I understood you correctly, your bill does foreclose the possibility of deauthorizing the President by inaction.

Senator JAVITS. I think it does, Mr. Rogers. Although the Congress could, of course, decline to extend the President's authority.

Mr. ROGERS. Good.

Senator JAVITS. But again nobody is more thirsty for knowledge, suggestions. If you find some hole in it please tell us, you will be doing us a great service.

Mr. ROGERS. I should look at it again with that in mind, Senator Javits.

### DISTINCTIONS AMONG WAR POWERS RESOLUTIONS AND BILLS

Senator SPONG. Your statement in main alludes to some distinction between the Eagleton resolution and the Javits bill.

Mr. ROGERS. Yes; I also mentioned, for example, my view about the treaty question which has been discussed at length before the committee. It is very simple and is that I don't think the language of the various mutual security treaties in any form constitute domestic internal authorization by this Congress to the President to take what action this Nation needs to take to execute its commitments.

I think that problem is easily solved by some amendment to the legislation before the committee.

I also might note my view that I think on balance the Stennis definition of hostilities covered by this legislation is perhaps the most desirable of the variations before the group.

I also point out that I think there may be some merit to considering as a companion piece to whatever Senate legislation you propose, House Joint Resolution 1, which, as you know, would require constant reporting of all new deployments of military forces abroad, and major changes in force levels. I think that is a nice companion piece. It does not require congressional approval of those kind of things but it fits rather neatly, it seems to me, with the various other bills before you.

### IMPLICATIONS OF NEW OBLIGATIONS AND BURDENS ON CONGRESS

Finally, I would like to close, if you would allow me, Mr. Chairman, upon one precautionary note. It seems to me that the legislation now before the committee does look forward to a very much more solemn, serious, and active role for the Congress in the making of those decisions which approach toward war. I regard this as very good but I also regard it as essential that you understand, and that it be made clear, that this will impose very new obligations and burdens on the Congress, the House, and the Senate, and in my judgment, and here perhaps I come closer to some of the other notions that have been put before the committee, the Congress is not now equipped to handle these burdens. I think your procedures are inadequate. I think your staffing is inadequate, I think you do not have the capacity to receive, digest, and analyze the kind of information that will be brought to you pursuant to this sort of legislation.

I think it is profoundly desirable. But I would urge if you really are going to take up the foreign affairs responsibility, which I think the Constitution mandates for the Congress, you cannot rest with the legislation before you now.

(The statement follows:)

TESTIMONY OF WILLIAM D. ROGERS

Mr. Chairman, I am honored to appear before the Committee again.

I shall address myself for the most part to the specifics of the bills before the Committee.

THE NEED FOR LEGISLATION

First, however, I would like to add my voice to the others urging this Committee to act.

What are proposed are a variety of measures—some better than others—the purpose of all of which is to regulate the exercise of the War Powers. These are rules of practice. No redistribution of power is contemplated. You are not rewriting the Constitution. These proposals seek merely to say how Congress' constitutional responsibilities shall be engaged and discharged—its supreme responsibility to declare war, and its less extraordinary powers to tax (to raise, support, provide, and maintain armies and navies and to govern and regulate the armed forces of the United States. The Necessary and Proper Clause is ample authority for this.

It is wrong as a matter of constitutional law, and a misreading of practical affairs, to think of Congress' area of responsibility and the Commander-in-Chief mandate of the President as mutually exclusive or antagonistic. They are not. There is not a certain point where the one stops and the other begins. Properly conceived, the constitutional War Powers—taken with other powers bearing on the conduct of our external relations—are overlapping powers. They must be exercised in a coordinated fashion. These proposals would assure that in the future that be done.

Witness after witness has reminded this Committee (and your colleagues in the House) of the imperative of engaging the Congress on the question of war. I think the best summary of the point they made was something Corwin said years ago:

"It was clearly the original understanding of the Constitution that under it all measures of hostility toward another government not justifiable immediately as acts of self-defense, must have the sanction of Congress." (Corwin, The Constitution, p. 60 n. 100 (7th Ed. 1941).)

Yet, so far as I can tell, this is the first time Congress has attempted to lay down general regulations under the Necessary and Proper Clause by which the President and the Congress are to cooperate to bring about that "sanction".

The time for this is now ripe.

Furthermore, I should think you might even find some encouragement to act from the Administration. I realize that the Secretary did not exactly applaud these bills when he testified. But I note that he also turned his back on the Katzenbach view that Congressional declarations of war are outmoded: I take this as a disavowal, at least, of the doctrine of inherent presidential power first put forward in connection with Korea and the dispatch of U.S. troops to NATO which held sway until a few years ago. Now the tide is rapidly receding from this high-water mark of asserted presidential authority. Secretary Rogers favors "balanced executive-legislative participation in decisions regarding the use of military force." (64 Dept. State Bull. 727), and a "shared responsibility for the exercise of the war powers" (Id. at 732). This, it seems to me, is just what the proposals before you establish.

The Secretary merely counselled against legislation now. Vietnam tempers should cool a bit.

That was two months ago. Since then Mr. Kissinger has met with Mr. Chou. The President is going to Peking within the year.

If Vietnam tempers have improved enough to permit a rational discussion between the White House and the Forbidden City, can it be that a sensible dialogue on the War Powers is still not possible along Pennsylvania Avenue?

This is a good time to act, in my view.

PRESIDENTIAL FLEXIBILITY

What of the major criticism leveled against the legislation. It is said—by Secretary Rogers, Professor Moore and others—that to lay down a catalog of cases in which the President may act and then to declare that he may not do so in other cases, limits his "flexibility".

On first reading, this argument has its appeal, particularly to the law-trained mind steeped in the ad hoc tradition of the common law. But I do find it persuasive.

In the first place, it proves too much. Congress can always stop a President by cutting off the funds (though this is a very inefficient way to manage foreign affairs). The purpose of this legislation is to make Congress face up to its responsibilities affirmatively and at the outset.

Furthermore, internal constraints aside, the nation cannot make war at will anyway. It is checked by international law. The United States has solemnly renounced the use of force against the territory of any other state (UN Charter, Article 2 (4)), saying only "the inherent right of individual or collective self-defense." [1] The UN Charter is analogous to the proposals before the Committee. These proposals also say that in some cases the President may act—but he must then place the question before the Congress.

Furthermore, even when the President does act he often needs the concurrence—essentially, the authorization—of other entities. In the Cuban Missile Crisis, for example, often cited as the paradigm case for executive dispatch, the quarantine had to await Secretary Rusk's advocacy of not one but two consecutive resolutions before the OAS Council on October 23, 1962. If we paused long enough for OAS Council action in that extraordinary instance—and if we could abide similar OAS action in the Dominican case—it hardly seems too much to require the sanction of Congress as well.

But it is also said that the President really should have the utmost freedom and scope if he is effectively to manipulate force and the threat of force in conducting world affairs in this age. War is only an extension of policy, so the analysis goes. The President must have the same option to resort to violence as he does to employ the lesser instruments of diplomacy, trade and propaganda. The possibility that he may do so—and may even do so irrationally—is sure to constitute a factor restraining other nations.

I find this the least appealing of the arguments in favor of flexibility, and the one which comes closest to earlier suggestions of "inherent" Presidential power. The answers to it are several. In the first place, Congress can assemble and act more quickly now than in earlier times. Secondly, law and good sense counsel that, though the President must manage the everyday affairs of our diplomacy, the closer that diplomacy brings us to a national commitment to violence, the more intimately the Congress must be involved, since the more its other responsibilities will then be engaged and the greater the likelihood of events which would vastly ncrease the costs and burdens throughout society. Modern war is so utterly ominous to the nation that it cannot be left to the President and the President's party alone.

Finally, the foreign offices of the world are scarcely unaware of the debate in this country over the real limits of the President's power. So that now, a procedure for insuring congressional participation does not reduce the President's credibility. It enhances it. This legislation would not inhibit, it would strengthen US foreign policy in the post-Vietnam era. Congressional endorsements on Presidential due bills have been used before.[2] After Vietnam, they will be doubly essential.

So it seems to me that the procedures proposed in the bills before you are much in order.

Let me now turn to those bills.

## THE DEFINITION OF "HOSTILITIES"

My analysis has three parts:

(1) What actions are covered by the bills;

(2) What actions covered by the bill may the President take without congressional sanction; and

(3) What of the procedures for engaging the Congress?

As to the first, the Eagleton and Stennis Bills contain definitions of hostilities, the Javits and Taft Bills do not.

I do not think that the omission results in an ambiguity; even without a definition, the Javits Bill would be pretty well understood to reach conventional

[1] And a state invoking the right of self-defense under Article 51, must report "immediately" to the Security Council and the Security Council may then exercise its own authority under the Charter.

[2] The Formosan Straits Resolution, of course, is the nearest and best example. There is ample room for such pre-arrangements under the Eagleton/Stennis bills, at least.

military actions, and only such actions. But I do think the omission of a definition has an important consequence. The Stennis and Eagleton versions use the definitional clauses to broaden the coverage of the legislation. They reach deployments which have a risk of combat and the use of advisers in combat, as well as actual hostilities involving US forces. Such action would require the sanction of the Congress. Under Javits, presumably the President could order deployments and dispatch advisers at his discretion.

The wider net is the better. War is the final act of a tragedy. Congress should have its hand in the writing of what goes before.[3]

THE IMMINENCE OF COMBAT

But as between Eagleton and Stennis, as I read them, there is an interesting difference in the "hostilities" definition. Both reach advisers who go into battle, and this is to the good. But Eagleton otherwise includes only deployments in circumstances of "imminent combat"; Stennis is triggered by a deployment which gives rise to a "reasonable possibility" of the "use of arms."

The difference, I think, may be very important. Stennis, as I read it, would require the President to obtain congressional authorization for many deployments not covered by Eagleton; the first stationing of troops in Europe in 1950, for example, would strike me as creating a "reasonable possibility" of combat, but not an "imminent" one.

One must draw the line somewhere. My preference, on reflection, is for Stennis. It would permit congressional consideration before crises have matured. The President will know earlier rather than later if he has the country with him. Foreign leaders will be clear as to the constancy of our purpose and the coherence of our national will. This, in my view, would best achieve the purpose of the legislation: the full and responsible engagement of the Congress in the ultimate issue of war which has such a central effect on all the other issues of our society and on the other deliberations of this legislature.

In this regard, Stennis strikes me as a nice companion to the H.J. Res. 1. H.J. Res. 1 would require the reporting of all new troop deployments or substantial changes in force levels. Under it and Stennis together, all decisions to commit troops for the first time, or to change force levels, would be reported, and all deployments involving a "reasonable possibility" of combat would require affirmative congressional approval.

There is another consideration in support of the Stennis test. Under Eagleton, only imminent hostility cases need be submitted to the Congress. This means that a President who invoked Eagleton would be saying that there was a very good chance of shooting. Unless the Chief Executive wanted to whip up the passions of war, he might be reluctant to label a crisis in this way, for fear of pronouncing a self-fulfilling prophecy. Under Stennis, a request for congressional action signifies something less critical.

THE TREATY QUESTION

I now turn to what these bills say about what the President may do in the combat situations covered by the bills.

All four give the President limited authorizations to use force in certain emergencies. Congress is giving its sanction, as the Constitution says it should.

But the list of authorizations in Javits and Taft are not quite to my taste.

In the first place, both say that he may carry out commitments, including treaty commitments. The language is very ambiguous. The National Commitments Resolution of last year was designed to make it clear that an international obligation comes into being only under very special circumstances. The Javits bill enlists that language for quite different domestic constitutional law purposes. Anything that creates a commitment abroad evidently also constitutes an intramural authorization by Congress to the President to do everything necessary to carry out that commitment. The Javits bill could become a pre-dated declaration of war.

International commitments are and can be created by treaty. But the authorization to the President to engage in hostilities is for congressional legislation. The distinction was nicely illuminated by this Committee's action last week pro-

[3] Such rule-making is well within the Congress' powers to govern the armed forces and to make law necessary and proper to the discharge of its ultimate war-declaring responsibility, as well as its power to legislate what is necessary and proper to carry into execution the President's power as commander in chief.

posing to revoke the Formosa Straits Resolution, but leaving untouched our mutual security treaty with Formosa.

To claim that such mutual security treaties have such domestic law significance is to invent a senatorial purpose and intent which did not, I think, exist at the time those treaties were here for consideration. For the most part, the language of the various mutual security treaties engaged the United States—and each other party—"to meet the common danger in accordance with its constitutional processes."[4] This left wide open the issue of how the constitutional process would be carried out. The Senate could not have suspected that in giving its advice and consent to that language it was giving the President blank check power to go to war as well.

It is conceivable that the Congress could be persuaded to authorize the President unilaterally and without further resort to the Congress to take such action as he might deem necessary to fulfill international mutual security treaty commitments.

I would counsel against it. But if Congress wants to do it, it should do it with an authorization clearly aimed to that purpose, and not through the Javits formula.

The Eagleton Resolution correctly recites that treaties (past and future) cannot do service as domestic law authorizing the President to act. Stennis does not contain this provision. The Eagleton restriction is highly desirable. It would not, of course, dilute the authorization to the President in Section 6 of the United Nations Participation Act of 1945.

### PROTECT LIVES AND PROPERTY

There is another significant difference between Eagleton/Stennis, on the one hand, and the Javits Bill, on the other, relating to the President's emergency powers. All three state that he may use troops abroad to protect American lives. This is both new and good. Even though international law is not quite so clear, I think it desirable to settle the domestic law issue with a clear-cut prior authorization, so long as it is carefully restricted as it is in the Eagleton legislation, which I think superior to other formulations in this respect .

Javits also declares that the President may use the armed forces in an emergency to protect American property abroad. Such a pre-authorization to the President would be taken in Latin America as a threat by Congress to revert to gunboat diplomacy—and at a particularly delicate moment in our Hemisphere relations when questions of US property expropriation in Chile, Peru and Bolivia are on everyone's mind. The suggestion that the Congress sanction the President to send Marines to protect Anaconda's copper mines in Chile would be terribly misunderstood, as I gather Senator Javits now may have concluded.

### THE PROBLEM OF THE IMMINENT ATTACK

Both Eagleton and Stennis wisely say that the President may act in the cataloged emergencies only to the extent necessary to meet the specific threat. He may not deploy troops to rescue Americans and then go on to full-scale war. He may not repel a minor attack and then insist on unconditional surrender. This principle of measured response is fundamental.

However, I think the lists of what the President may do in both the Eagleton and Stennis bills can be improved. Stennis admits of a preventive first strike, but only if the threat is nuclear. It also contains a puzzling inconsistency between what the President can do after repelling an attack on the United States and what he can do about an attack on the Armed Forces; in the latter, his action against imminent future attacks must be "concurrently," for reasons which have so far escaped me.

Furthermore, neither bill satisfactorily solves the question of other imminent attacks. Both seem to say that the President may unilaterally move to forestall another "imminent" attack by a nation which has already made one attack, but that he may not forestall an imminent attack by a nation whose record is without prior blemish. The reason for this "one bite" rule is not clear.

I think I would be inclined to substitute an authorization to—". . . repel or forestall an actual or imminent attack on the United States or the Armed Forces of the United States."

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[4] Southeast Asia Collective Defense Treaty and Protocol Thereto, September 8, 1954, Article IV.

This would broaden the Eagleton/Stennis formula a bit, in authorizing the President—or the Commander of another *Pueblo*—to move and not want to wait for an attack to be launched. And if it be thought that an "imminent attack" authorization might become a loophole, I would say that the Committee should make it clear that the words mean an attack as to which there is only the question of when—not whether. If the President is certain—but only if he is certain—about the attack, he may respond and need not wait.

### THE CAMBODIA CASE

Eagleton provides that if US forces are engaged in lawful combat, the President has "further authority"—apparently in spite of anything Congress may do to limit that power—to send troops into a country with which the U.S. is not engaged in hostilities 1) if they are in hot pursuit of enemy forces, or 2) if an attack by enemy forces from that country is imminent. Stennis does not address itself to this question.

I think Eagleton is wrong as to Congress' incapacity to legislate about the conduct of a war, but otherwise right as to the limitations on hot pursuit and self-defense. As I have stated elsewhere,[5] I disagree with the broader theory, advanced by the Administration in justification of the Cambodian incursion, that the President, as Commander-in-Chief, can go practically where he will if he does so for the avowed purpose of protecting US troops. This is a most dangerous principle. For this reason, I am sympathetic with the Eagleton effort to lay to rest such an extension of the Commander-in-Chief power.

Yet you may not want to include the point after all. Little would be lost if it were dropped, as in the Stennis bill.[6] In laying down procedural rules for the exercise of the War Powers for the first time in two centuries, you could limit yourself to the initiation of hostilities. There will be other opportunities to consider the ways in which these hostilities are to go forward.

### THE NATURE OF CONGRESSIONAL AUTHORIZATION

So much for what these bills authorize the President to do. Each goes on to provide that in all other respects congressional action is required. And Eagleton and Stennis add an important provision, to the effect that congressional authorization must be incorporated in specific legislation, and is not to be inferred from acts directed to other purposes. Appropriation bills are explicitly mentioned. Doubtless, selective service legislation, foreign aid and other sorts of congressional enactments would also be excluded.

Though I am not certain about the precise effect of such a provision in future litigation, I am persuaded that it is desirable, at least as a guide to future congressional practice as a warning to the White House and as a public declaration for all to see as to how these great issues should be regulated in the future. If the President is to claim that he is acting under a congressional authorization, the Congress must be clear-headed about what it is authorizing. For Congress to think it is doing one thing, and later to find that it was doing something quite different and more far-reaching is no way to exercise these shared War Powers. I commend this provision of the Eagleton and Stennis bills.

### THE 30-DAY PROVISION

The Taft proposal is deficient in omitting any time frame and providing merely that an authorized emergency action will terminate when Congress gets around to de-authorizing the President.

The other three have limits. But the Eagleton bill, as I read it, is an improvement on the Javits model in the provision for congressional ratification of presidential emergency action. Javits and Stennis would require that the hostilities stop on the 30th day unless Congress has acted. Eagleton seems instead to require that the question of whether to go on be resolved by the 30th day.

As I read the Eagleton bill, Congress will be forced to decide in 30 days. This is much better. Legislation which left open the possibility of a kind of congressional pocket veto of a presidential initiative through inaction induced by in-

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[5] Rogers, The Constitutionality of the Cambodian Incursion, 65 Am. J. Int. Law 26 (1971).

[6] There is something to be said for limiting one's objectives. For this reason, I think the Taft bill goes too far in trying to settle Vietnam issues.

transigence, confusion, or obstruction would be irresponsible. Congress must be compelled to act, up or down, within the time period.

THE REFORM OF CONGRESS

This brings me to my final thought.

Many of us who have dealt with Congress on foreign affairs in the past think that you have tried to have it both ways. When we acted without consultation and things went badly, you criticized us for not consulting you beforehand and complained that we had over-committed the nation; when we asked for your consent, you sent us off with the reminder that it is for the Executive and not the Legislature to run things. You have simply not lived up to your responsibilities in the foreign field. It is not difficult to understand the reasons for the development of the doctrine of unchecked executive power over the past thirty years.

I hope you will enact the legislation before you—but only if you are also ready to institute some changes here as well. This legislation will compel Congress to face up to its responsibilities. If you adopt the legislation before you along with H.J. Res. 1, you will be advised as to all foreign deployments when they occur—you will be asked to vote up or down with respect to any such action which contains the seed of potential violence—and you will be forced to vote yea or nay as to any emergency action by the President within thirty days of that emergency action.

This is a very large package of new tasks. It will require you to master a large body of new information. I am frank to say that I do not think your present procedures are equal to it. Your staffing is woefully inadequate. Your organization is wrong. Your ways of doing business are outmoded. And your conventional habits and practices are in need of fundamental reform. If you are really going to take up the foreign affairs responsibilities the Constitution mandates for the Congress, you cannot rest with this legislation.

PROBLEM OF CONGRESS ITSELF

Senator McGee. I want to say, Mr. Rogers, I think this has been a superb point. Some of us have made it from time to time and it explains our deep concern; namely, the situation that we know best, the one we work in now, has provoked me to have very deep doubt about whether the Congress can rise to this. I argue that it must, but I have very serious doubts that it can. I don't like executive authority. Very often in this decisionmaking it was a matter of finally repeating your own judgment with the lesser of two rather very serious alternatives, with obvious limitations or dangers attached to them. That is why we continue to harp on trying to find this formula that will involve the legislative in a responsible way.

I think this is where our great blind spot is. One of the essays on this whole question 10 or 11 years ago put it very well in saying the real problem was the Congress itself. The average Member of Congress couldn't tell you within several thousands of square miles what the problem was or really what the policy situation was. There were some that worked very hard in this but, as a procedural mechanism, Congress has its acute limitations at the present time. If that were resolvable, or if we could rise to it with some adjustments and modernizations upward, then I would feel much easier about this participation. I do think this is a very substantive "if" in this process. I think without that that the chances of pinning the responsibility for any decision on the Congress are nil. I mean we didn't do it on the Foreign Relations Committee. The Senate didn't do it. The Senate didn't do it, the House did it or the Supreme Court did it or I have bad advice from some staff member. But with the President, the Executive making the decision, as Harry Truman used to say, the buck stops here. You still could pin

the responsibility. There was something to be said for that and I think there still is. I think if we could make it responsible so that it can be pinned where this process takes place, including this committee, I think it would be a very large step forward.

I still am a little uncertain as to how we are going to do that. I think your suggestion, both regarding the procedures of Senators themselves and the Executive's greater depth and strength in staff, which gives them greater leeway and more recourse capabilities than we Senators sometimes permit, would all contribute to this. But I think it still has to go much further than that.

Mr. ROGERS. I agree, Mr. Chairman. I think I spent a fair amount of time testifying to various committees of this Congress, and I must say, I think so much of foreign affairs legislation or policymaking at this end of Pennsylvania Avenue has been through the appropriation, authorizing process which I think is a very backdoor way to do it, No. 1.

No. 2, I do think Congress has tried to have it both ways on so many foreign affairs issues over the past number of years that this has generated a feeling that Congress is an enemy of Executive policymaking, and is to be avoided if at all possible. And there is a very good basis in your past practices and procedures and in your capacities to handle these kinds of problems that justifies that Executive reaction. So I think there has to be some reform up here as well as in the procedures and rules for the joint sharing of the warmaking powers.

Senator MCGEE. Senator Spong.

Senator SPONG. Senator Javits.

### COMMENDATION OF WITNESS

Senator JAVITS. I have just been running through Mr. Rogers' testimony and I really think he has done an admirable job, I may not agree with all the particular details, but I like what you have done. What I hope to do myself, now that we have the summation of the testimony, is to do my utmost to find the best possible solutions and offer them to the committee, and to pose the alternative, the option, and offer those to the committee.

I feel you certainly have helped us very materially in that regard and I am very grateful to you for the obvious time, interest, and expertise which has gone into this testimony.

### CONSTITUTIONALITY OF JAVITS PROPOSAL OR SIMILAR PROPOSALS

Senator SPONG. I agree that this is a very helpful critical analysis of these proposals. I am familiar with your testimony before the House last year, but I would like the record of these hearings to reflect your answer. You find nothing in the Javits proposal or similar proposals that gives you any problems insofar as its constitutionality is concerned?

Mr. ROGERS. Oh, no. No. On that issue it seems to me perfectly clear. I might say this is unprecedented legislation. I don't think for 200 years, although the Congress has had the war declaring responsibility and has had the authority under the necessary and proper clause to lay down legislation with respect to the exercise of the President's

commander in chief power, that Congress has ever enacted general rulemaking or general regulation governing the joint exercise of the executive and legislative war powers.

But the necessary and proper clause seems to me crystal clear in terms of your authority to do this.

Senator SPONG. Thank you very much.

Senator MCGEE. I have no more questions, Mr. Rogers, but there may be some questions submitted to you that you might respond to.

Mr. ROGERS. Yes, I will be glad to do that.

Senator MCGEE. Thank you very much.

Sorry for the crowding here, but you have been very constructive.

(Whereupon, at 1 p.m., the committee was adjourned, subject to the call of the Chair.)

# WAR POWERS LEGISLATION

WEDNESDAY, OCTOBER 6, 1971

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
*Washington, D.C.*

The committee met, pursuant to notice, at 10 a.m., in room 4221, New Senate Office Building, Senator J. W. Fulbright (chairman) presiding.

Present: Senators Fulbright, Pell, Spong, Aiken, Case, Cooper, and Javits.

The CHAIRMAN. The committee will come to order.

## OPENING STATEMENT

Today's hearing on the war powers legislation now before the Foreign Relations Committee will conclude the set of war power hearings begun last spring. During the course of the hearings we received testimony from a number of professors and past and present administration officials dealing with the broad scope of constitutional, historical, and political questions raised by the pending bills.

To conclude the hearings, today we shall first hear from the distinguished Senator from Mississippi, Senator John Stennis, sponsor of Senate Joint Resolution 95. Senator Stennis will be followed by Senator Lawton Chiles for Florida.

(The text of Senate Joint Resolution 95 follows:)

[S.J. Res. 95, 92d Cong., first sess.]

JOINT RESOLUTION Relating to the authority of the President to use the Armed Forces of the United States in armed conflict

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That except as provided in sections 2 and 3 of this joint resolution, the President may not use the Armed Forces of the United States in any armed conflict.

SEC. 2. The President may, in the absence of a specific authorization by law as provided in section 3 of this joint resolution, use the Armed Forces of the United States in conflict to the extent reasonably necessary—

(1) to repel any armed attack on the United States by the forces of any foreign government or power and to take action that will protect the United States against future armed attacks by such foreign government or power;

(2) to repel an armed attack on the Armed Forces of the United States by forces of any foreign government or power and, concurrently, to protect the Armed Forces of the United States against any imminent danger of future attacks by the forces of such foreign government or power;

(3) to prevent or defend against an imminent nuclear attack on the United States by the forces of any foreign government or power, but only if the President has clear and convincing evidence that such attack is imminent; and

(4) to evacuate citizens of the United States from any foreign country in which they are located when such citizens are in such country with the express or tacit consent of the government of such country and their lives are being subjected to an imminent threat by such government or by persons or forces beyond the control of such government.

SEC. 3. The President is authorized to use the Armed Forces of the United States in armed conflict pursuant to a declaration of war or other specific statutory authority, but authority to use the Armed Forces of the United States in armed conflict shall not be inferred from any provision of law, including any provision contained in any appropriation Act, unless such provision specifically authorizes the use of such forces in armed conflict.

SEC. 4. (a) Whenever the Armed Forces of the United States are used in armed conflict under any of the circumstances described in section 2 of this joint resolution, the President shall promptly report that fact to the Congress and shall include in such report a detailed account of the reasons for so using the Armed Forces of the United States, his estimate of the scope of the armed conflict, and the justification for the use of such forces under section 2 of this joint resolution. Upon receiving any such report, the Congress shall decide, within thirty days after the first day on which Armed Forces of the United States were committed to armed conflict, whether the authority to so use the Armed Forces shall be extended or terminated. The following procedures shall be applicable to any such question:

(1) Any bill or resolution, authorizing the continued use of the Armed Forces in armed conflict under authority of section 2 of this joint resolution shall, if cosponsored by one-third or more of the total number of Members of the House of Congress in which such bill or resolution originates, be considered reported to the floor of such House no later than one day following its introduction; unless the Members of such House determine otherwise by yeas and nays; and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such committee within one day after it is referred to such committee, unless the Members of the House referring it to committee determine otherwise by yeas and nays.

(2) Any bill or resolution reported pursuant to paragraph (1) of this subsection shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall determine otherwise by yeas and nays.

(b) In no case shall the Armed Forces of the United States be used in any armed conflict under any of the circumstances described in section 2 of this joint resolution for any period exceeding thirty days after the first day on which such forces were first engaged in such conflict unless the Congress has specifically authorized the use of such Armed Forces in such conflict for a longer period.

SEC. 5. Whenever Armed Forces of the United States are engaged in armed conflict in any foreign country, the President shall, so long as such forces continue to be so engaged, report to the Congress periodically on the status of the armed conflict as well as on the scope and expected duration of such conflict, but in no event shall he report to the Congress less often than every six months.

SEC. 6. The provisions of this joint resolution shall not apply to—

(1) the armed conflict in the Republic of South Vietnam in which the Armed Forces of the United States were engaged on the date of enactment of this joint resolution; or

(2) military activities carried out against the military forces of North Vietnam, or against forces allied with North Vietnam, in North Vietnam, Laos, Cambodia, or the waters surrounding the Indochina Peninsula, so long as such military activities are directly related to the conflict referred to in paragraph (1) above.

SEC. 7. As used in thisjoint resolution, the term "armed conflict" includes (1) land, air, and naval actions taken by the Armed Forces of the United States against the military forces or civilians of any foreign country or government, (2) the deployment of the Armed Forces of the United States outside of the United States under circumstances that present a reasonable possibility of the use of arms against the military or civilian forces of a foreign country or government, and (3) the assignment of members of the Armed Forces of the United States to accompany, command, coordinate, or participate in the movement of regular or irregular military forces of any foreign country or government when such military forces are engaged in any form of combat activity.

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We are pleased to have with us the former Justice and Ambassador Arthur J. Goldberg. Justice Goldberg served as Secretary of Labor under the Kennedy administration from 1961 to 1962. He was appointed in 1962 to serve as an Associate Justice on the Supreme Court, until 1965, at which time former President Johnson appointed him as the U.S. Ambassador to the United Nations where he served until 1968.

At the present time Justice Goldberg is practicing law.

We are pleased to have all of you with us this morning.

The Senator from Virginia had requested to make a short statement at the beginning. He has to attend another meeting. Senator Spong?

## STATEMENT OF HON. WILLIAM B. SPONG, JR., U.S. SENATOR FROM VIRGINIA

Senator SPONG. Thank you, Mr. Chairman.

As a cosponsor of the Javits bill, one of the proposals to codify the war powers which this committee has under consideration, I was asked to testify at the beginning of these hearings.

At that time I declined to do so.

### WITNESS' ARTICLE IN UNIVERSITY OF RICHMOND LAW REVIEW

In the intervening months I have been engaged in the preparation of an article for the University of Richmond Law Review on the war powers. This article was published this week and I would ask that it be included in the record of these hearings.

Basically, the article discusses (1) the intent of the Founding Fathers in relation to the war powers as revealed in the debates and proceedings of the Constitutional Convention and the correspondence of the Convention's delegates; (2) the historical development of the exercise by the President and Congress of the war powers, which falls into three easily identifiable periods of our history; and (3) the legislation which has been proposed regarding war powers.

Constitutionally, the war power is a shared power; both Congress and the President have major responsibilities for hostilities in which the United States is involved. In recent years, however, the Congress, largely by inaction and acquiesence, has allowed the President and the executive branch of the government to assume an undue authority over foreign policy and the use of military forces abroad.

I believe we should act to reverse the trend toward Executive domination of war policies. Constitutionally, the arguments sustain this. Pragmatically, it seems only reasonable that the legislative body should have a major role in determining when to commit troops to conflict on foreign soil.

Furthermore, in view of the divisiveness which the current conflict in Southeast Asia has engendered, the representative body of this Government has the responsibility to participate in future troop deployment decisions and to seek to avoid in upcoming years unfortunate involvements which might similarly divide the Nation.

I do not believe that we can legislatively and in advance supply the answers to all the questions which may arise in the decades ahead. I do believe we can establish procedures which will facilitate Congress in exercising its constitutional responsibility in the initiation of hostilities.

In the conclusion of the article, it is noted, and I quote:

> The effort must be to reinvest Congress with a role in use of force policy without compromising the ability of the President to act absent congressional concurrence in emergency situations, including imminent nuclear attack. This would require that Congress have a voice in the deployment of troops.

Mr. Chairman, I believe we are capable of writing legislation which will cover these points and I am hopeful that the committee can proceed in that direction. Thank you.

(The article by Senator Spong follows:)

# CAN BALANCE BE RESTORED IN THE CONSTITUTIONAL WAR POWERS OF THE PRESIDENT AND CONGRESS?

*By*

WILLIAM B. SPONG, JR.

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# CAN BALANCE BE RESTORED IN THE CONSTITUTIONAL WAR POWERS OF THE PRESIDENT AND CONGRESS?

*William B. Spong, Jr.**

THE CAMBODIAN incursion of April, 1970, brought forth renewed observations from constitutional scholars, eminent and amateur, that the war-making power of Congress had been eroded and the checks and balances system for the initiation and conduct of hostilities by American troops, as contemplated by the Founding Fathers, rendered almost inoperative. Debates on the National Commitments Resolution[1] and the Cooper-Church Amendments, as well as events following adoption of these measures, appear to sustain such conclusions. How has this happened? What, if anything, can be done to restore some balance in this crucial area of public policy? Should there be an effort by Congress to re-create such balance, particularly in view of the emergency nature of nuclear and conventional conflict and the changing world in which we live?

What follows is an attempt to provide some answer to these questions. There are excellent recent articles available on the constitutional authority of Congress and the President to commit American forces to foreign combat.[2] The scholarship and objectivity in these works is more

* United States Senator from Virginia; Member of the Senate Foreign Relations Committee; Lecturer in International Law, College of William and Mary; LL.B., University of Virginia, 1947.

1 S. Res. 85, 91st Cong., 1st Sess., 115 CONG. REC. 17245 (1969). This enactment provides that a national commitment exists only when evidenced by prior congressional action.

2 Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR COLLEGE REV. 28 (1969); Reveley, *Presidential War-making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243 (1969); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968).

appreciated when one considers the present high level of emotion attendant to the United States' prolonged participation in the war in Indochina. The reader will not find herein an in depth treatment of the subject of congressional and presidential war powers. Rather, the purpose of this article is to provide a general background against which to weigh the merits of certain suggestions presently before Congress. Readers should be mindful, as is this writer, that the present struggle between the executive and legislative branches of our government over many facets of foreign policy—commitments, treaties, executive agreements and legislative limitations on the Executive—may not be the ideal backdrop for objectivity from one in the eye of the storm. Nevertheless, the mission here is to review and comment with a view toward determining the advisability of action or legislation in prospective rather than to evoke quarrels over past events and present policy.

## I. The Constitution and War Powers

What did the Founding Fathers intend to be the respective roles of Congress and the President in regard to war-making?

Article I, section 8 of the Constitution gives to Congress power to provide for the common defense; to declare war; to raise and support (for periods of no more than two years at a time) an Army and Navy; to make rules which will regulate and govern the military forces; to provide for calling out the militia to enforce laws, suppress insurrection, and repel invasion.

Article II, section 2 describes the President as "Commander-in-Chief of the Armed Forces as well as the State Militia, when it is called into service for use by the federal government."

As is well known, the original draft submitted to the Constitutional Convention of 1787, consistent with the Articles of Confederation, gave to Congress the power to "make war." James Madison's notes on the debate over this particular clause provide insight into the intent and near unanimity of the framers. In the course of those debates, Charles Pinckney of South Carolina expressed his belief that the Senate would be the ideal depositary of the war power inasmuch as each state had an equal interest in the security of the nation, and because the Senate was better ". . . acquainted with foreign affairs, and most capable of proper resolutions." [3]

[3] Madison, Notes of the Debates in the Federal Convention of 1787, at 475-76 (1966).

On the other hand, Pierce Butler, also of South Carolina, believed Senate deliberations to be too slow and cumbersome. He preferred vesting the war power in the President, who "will not make war but when the Nation will support it." [4]

As to the extent of authority the President should possess, Mr. Madison and Mr. Elbridge Gerry of Massachusetts moved to insert "declare" in the place of "make" war, ". . . leaving to the Executive the power to repel sudden attacks." [5] Although this change was objected to as providing the President with the authority to commence war, it was agreed to by a vote of eight to one.[6]

Alexander Hamilton, recognized as perhaps the leading advocate of a strong Presidency, later undertook to explain the role of the President as Commander-in-Chief in *The Federalist*, when he wrote:

> In this respect his (the President's) authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration would appertain to the legislature.[7]

Later, in 1801, while attacking Jefferson for his timidity against the Barbary pirates, Hamilton wrote:

> That instrument has only provided affirmatively, that, "The Congress shall have power to declare war"; the plain meaning of which is, that it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only, *to go to war*. But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary.[8]

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4 *Id.* at 476.
5 *Id.*
6 *Id.*
7 THE FEDERALIST No. 69, at 417-18 (C. Rossiter ed. 1961) (A. Hamilton).
8 8 THE WORKS OF ALEXANDER HAMILTON 249-50 (H. Lodge ed. 1904).

James Madison, regarded as the father of the Constitution and its most authoritative interpreter, wrote in 1793 of the executive power to make war:

> Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is *fully* and *exclusively* vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite and proper. . . .[9]

Patrick Henry, perhaps the most eloquent of those opposing ratification of the Constitution, was a voice for many who feared assumption by the President of any part of the war-making powers. In the Virginia Convention, Henry presaged with alarm the concept of the President in the field, leading an army into battle.[10]

Thomas Jefferson, evidently assured that the war-making powers of the President had been limited, wrote to Madison in 1789: "We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." [11]

A careful reading of the ratification debates and the analysis offered by *The Federalist* leads to certain conclusions. First, the framers drew a distinction between offensive and defensive hostilities. Involvement of the nation in any type of war, other than one of self-defense, was to be solely the responsibility of Congress. If the nation were suddenly attacked or invaded, the President would respond to repel the attack, but Congress would decide the nature of the action to follow—action which should come only after a collective judgment had been made by those directly elected as representatives of the people. Second, the President's only role in the war-making process was, as Commander-in-

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9 6 THE WRITINGS OF JAMES MADISON 174 (G. Hunt ed. 1910).

10 *See* DEBATES AND OTHER PROCEEDINGS OF THE CONVENTION OF VIRGINIA, CONVENED AT RICHMOND, ON MONDAY THE 2ND DAY OF JUNE 1788 (W. Prentis ed. 1789).

11 15 THE PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed. 1955).

Chief, to direct operations as the executive arm of the Congress. Mindful that a great majority of the colonists had an aversion to standing armies and the power politics of Europe that had allowed sovereigns to go suddenly to war, the framers sought to distinguish between war-conducting and war-making.

Hamilton's criticism of Jefferson's policy toward the Barbary pirates, included in the former's views regarding defensive wars, has been used to justify presidential war-making in later years. But this came ten years after the constitutional debates. There is scant evidence that the Founding Fathers intended to grant any war-making power to the President other than to defend against invasion when Congress was not in session. Nevertheless, in later years the enlarged role of the President as the initiator of foreign policy, an expansion of the concept of the President's defensive powers, the creation of standing armies and a broader interpretation of the Commander-in-Chief clause of the Constitution, have resulted in an inferior role in the war-making process for Congress. This result is contrary to the concept of checks and balances through which the Founding Fathers sought to insure against the growth of disproportionate power in any one of the three branches of government. It is also contrary to public view and expectation that the Constitution assures and requires its elected representatives to have a voice in the initiation of military hostilities abroad.

## II. Historical Background of an Unbalanced War Power

To explore the methods by which balance in the war powers between the legislative and executive branches might be restored, one should review the historical background of how it was lost. To facilitate this review, three stages in the country's history might be identified.[12] The first stage is a period from 1776 until the end of the nineteenth century. Despite many minor involvements in which the President employed force abroad, this period should be regarded as one of collaboration between Congress and the President.

After the years during which the earliest Presidents deferred to Congress in the making of war, acceptance of an "act of war" theory, which allowed the President to deploy military forces so long as they

12 Senate Comm. on Foreign Relations, 91st Cong., 1st Sess., Report on National Commitments (Report No. 91-129) 11-26 (Comm. Print 1969) [hereinafter cited as 1969 Senate National Commitments Report]; Reveley, *Presidential War-making: Constitutional Prerogative or Usurpation?*, 55 Va. L. Rev. 1243 (1969).

58-809 O - 72 - 43

were not used to commit "acts of war," represented a slight move toward presidential power. A review of the many occasions during the nineteenth century when Presidents used force abroad supports a general conclusion that the dividing line between legislative and executive authority was flexible enough for the President to use military force in insignificant circumstances, while preserving the role of Congress in decisions of greater gravity.[13]

The second period, which began with this century, is one during which collaboration between the President and Congress became the exception. Presidents seldom consulted Congress before using military forces abroad. On the other hand, Congress rarely gave evidence of willingness to be other than a negative force in the shaping of foreign policy. During the earliest years of this century Presidents Theodore Roosevelt, Taft, and Wilson used armed forces in many parts of Latin America. These actions were in contravention of the "act of war" theory because they were against sovereign states.

The negative influence of Congress was quite evident during the Wilson and Roosevelt Administrations in the years preceding the two World Wars. This period cannot be called one of either presidential or congressional domination. It is marked for its lack of cooperation between the legislative and executive branches.

The third period, which may or may not be drawing to a close, must be associated with the Cold War and the attendant atmosphere of constant crisis. Until recently, Congress—concerned for national security, unsure of its own role and that of the nation in an era of unsurpassed power and commitment abroad, and undoubtedly sensitive to charges of obstruction[14]—has deferred to the presidential use of military forces abroad with or without legislative authority.

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[13] Russell, The United States and the Power to Use Military Forces Abroad 242-43 (1967) (unpublished thesis in Fletcher School of Law and Diplomacy).

[14] Undoubtedly, Congress became sensitive to charges of lack of vision in foreign policy during the Wilson and Franklin Roosevelt Administrations. President Wilson armed merchant vessels in 1917 for defensive purposes after being denied congressional authority by a filibuster. After the war, the Senate rejected membership in the League of Nations.

Also, there is obliged to have been a later realization of the legal and factual gymnastics President Roosevelt was forced to undertake in the years prior to our entry into World War II. The Neutrality Acts of 1935, 1936, and 1937, forced Roosevelt to act unilaterally in 1940 in the exchange of destroyers for bases with Great Britain, to occupy Greenland and Iceland in 1941, and to provide convoys for supplies to Britain. The convoys led to an undeclared naval war in the Atlantic months before Pearl Harbor.

The sending of armed forces to Korea in 1950 by President Truman without congressional authorization or consultation is the first instance of a President claiming an inherent power to act "in the broad interest of American foreign policy." [15] This action was not without its congressional defenders.[16]

Soon after the Korean intervention came President Truman's decision in 1951 to send four additional divisions to Europe as a potential deterrent against Russian aggression. Never had a President committed comparable military forces to an area not in a state of war. Despite lengthy debate in both Houses, President Truman ultimately deployed the troops as he deemed necessary.[17]

Secretary of State Dean Acheson, expressing the view of the Truman Administration, stated in response to congressional inquiry into the President's proposed deployment of troops: "We are in a position in the world today where the argument as to who has the power to do this, that, or the other thing is not exactly what is called for from America in this very critical hour." [18]

After Korea, there began a decade during which congressional resolutions involving the potential use of military forces abroad were adopted. President Eisenhower, while stating that he had certain inherent powers as Commander-in-Chief to take whatever emergency action was necessary to protect the rights and security of the United States, asked for presidential authority in 1955 to use American armed forces for the protection of Formosa and the Pescadores. The President stated that a suitable congressional resolution would clearly and publicly establish that authority.[19]

Subsequent to the adoption of the Formosa Resolution, the Middle East Resolution of 1957 was adopted during the Eisenhower Administration, the Cuba Resolution of 1962 was adopted during the Kennedy Administration, and the Gulf of Tonkin Resolution of 1964 was adopted during the Johnson Administration. Each of these resolutions, with the

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15 23 U.S. DEP'T OF STATE, BULL. No. 578, at 173-77 (1950).

16 96 CONG. REC. 9647-49 (1950) (remarks of Senator Douglas).

17 H.R.J. Res. 9, 82d Cong., 1st Sess. (1951) stipulated that no funds should be appropriated for sending or maintaining troops abroad without the prior consent of Congress. S. Res. 99, 82d Cong., 1st Sess. (1951) concerned the number of troops which the President might send to Europe. *See* 97 CONG. REC. 3062-104, 3145-94, 3254-83, 3293 (1951).

18 *Hearings on S. Con. Res. 8 Before the Senate Comms. on Foreign Relations and Armed Services*, 82d Cong., 1st Sess., at 92-93 (1951).

19 101 CONG. REC. 601 (1955) (remarks of President Eisenhower).

exception of the one concerning Cuba,[20] is subject to an interpretation that it concedes inherent war initiating powers to the President as Commander-in-Chief. All were adopted in moments of national urgency when the constitutional questions posed were apparently obscured.[21]

Not only did these resolutions, except for the Cuba Resolution, concede inherent war power to the President, but they granted in advance broad and undefined war-making powers. When President Eisenhower, a year after adoption of the Middle East Resolution, ordered 14,000 American troops to Lebanon, no reference was made to the resolution of the previous year. Similarly, in October of 1962 when the Cuban missile crisis occurred, President Kennedy did not refer to the Cuban Resolution for his authority in establishing a naval quarantine. Unlike the other resolutions, the Tonkin enactment has often been cited as authority for extensive and far-reaching military activity. It has also been represented by former Undersecretary of State Nicholas Katzenbach to be "the functional equivalent" to a declaration of war when combined with the SEATO Treaty.[22]

Both Presidents Johnson and Nixon have, however, asserted inherent powers to act in Vietnam without reliance upon the Tonkin Gulf Resolution. The Nixon Administration so advised the Senate Foreign Relations Committee by letter from the State Department.[23] In reviewing the circumstances of the adoption and language of the resolutions, one has these impressions: (1) none of the Presidents of the post World War II years believed the resolutions were essential for them to have power to commit troops abroad without the consent of Congress; (2) the crisis atmosphere that attended consideration of the resolutions probably inhibited any detailed discussion of the constitutional questions

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20 The original resolution expressed the sense of Congress that the President possessed the authority to deal with Cuba "by whatever means may be necessary, including the use of arms." Senator Richard Russell of Georgia opposed this, stating that the resolution as originally worded made a constitutional assertion that the President had the right to declare war. The resolution as adopted was quite different.

21 The Gulf of Tonkin Resolution was enacted even though Senator Morse argued eloquently that its passage gave to the President an unconstitutional power—the power to make war without a declaration of war. 110 CONG. REC. 18442-49 (1964) (remarks of Senator Morse).

22 *Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess., at 82 (1967).

23 *Hearings on Vietnam Policy Proposals Before the Senate Comm. on Foreign Relations*, 91st Cong., 2d Sess., at 175 (1969).

presented; and (3) the spirit of national unity in time of crisis resulted in the adoption by Congress of general words of support that also gave undefined war initiating powers to the President for unlimited periods of time.

President Johnson's view of his war-making power as a constitutional prerogative might best be demonstrated by his sending of American forces into the Dominican Republic on April 28, 1965. Although there was brief consultation with Congress, this was accomplished after the decision had been made,[24] and the troops were dispatched without referrence to any congressional act or resolution—as had been done by President Truman in Korea and by President Eisenhower in Lebanon.

Therefore, the evolution of an unbalanced war power unfolds—first, a period of collaboration between Congress and the Executive; then, a period of unilateral presidential action and congressional obstruction from the beginning of this century to World War II and the emergence of the United States as a dominant world power; and, lastly, a period of presidential dominance of the war-making power, exemplified by the "faits accomplis" of Korea, Lebanon, Cuba, Vietnam, Dominican Republic, Cambodia, and Laos.

This last period had its beginning with President Truman's unilateral deployment of troops in Korea without formal congressional consent. Although Presidents Truman, Eisenhower, Kennedy, Johnson, and Nixon have sought to give an appearance of consultation or collaboration with hurried crisis meetings and general congressional resolutions, all believed they possessed an inherent power as Commander-in-Chief to deploy armed forces abroad without congressional consent if they deemed it in the national interest. Undoubtedly, all recognized they might receive greater public support with an appearance of collaboration, but were not prepared to show the deference or risk the obstruction that hindered the Wilson and Roosevelt Administrations in the years preceding the two World Wars.

## III. Analysis of Presidential Hegemony in Decisions to Employ the Armed Forces

### A. *Few Formal Declarations of War*

At the risk of over-simplification there are several observations that might readily be made at this juncture. First, that a formal declaration

[24] N.Y. Times, Apr. 29, 1965, § 1, at 1.

of war has rarely preceded the initiation of hostilities by American forces. The United States has only declared war five times in its history.[25] So what is presently in need of definition is whether the Constitution mandates a role for Congress in the making of decisions to commit military forces without a declaration of war.

### B. *Failure of Congress to Adapt*

A second observation is that Congress has played a major role in the demise of its war powers. The Senate Committee on Foreign Relations painfully stated this:

> The committee is well aware—and has expressed its awareness several times in these pages—that one of the reasons for the flow of the war power out of the hands of Congress and into the hands of the President has been the failure of Congress to adapt its power over the armed forces to the circumstances of the nuclear age. Tacitly acknowledging a lack of confidence in its ability to make that adaptation, Congress has permitted its war power to be transferred to the hands of an executive which, though less susceptible to self-doubt than the Congress, is no less susceptible to error.[26]

In addition to the uncertainty of the nuclear age and the reaction to congressional negativism of the periods prior to the First and Second World Wars, there is legitimacy to the claim that Congress has often preferred to second guess the President. Former Undersecretary of State Nicholas Katzenbach recently referred to this as Monday morning quarterbacking.[27]

However, there have been occasions during debates on foreign policy resolutions when Senators have voiced constitutional objections to language delegating responsibility for the declaration of war to the President. A consistent prophet of what the resultant effect to the war powers might be should this ominous trend continue, was the late Senator Robert A. Taft. It is somewhat ironic that often Senator Taft

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[25] The five declarations of war involved the War of 1812, the Mexican War, the Spanish-American War, World War I and World War II. There have been approximately 150 other military operations involving our armed forces.

[26] 1969 SENATE NATIONAL COMMITMENTS REPORT, *supra* note 12.

[27] Before the Society of Newspaper Editors in Washington, D. C., on April 16, 1971, Mr. Katzenbach said: "I have a feeling that in the area of foreign affairs the majority of Congress would rather call the signals on Monday morning than on Sunday afternoon."

was in sympathy with the Executive's policy aims, but objected to methods that ignored congressional concurrence. Senator Taft on the subject of the sending of American troops to Iceland by President Franklin Roosevelt in 1941 wrote:

> Mr. President, on Monday the President of the United States notified the Senate that forces of the United States Navy had already arrived in Iceland in order to supplement, and eventually to replace, the British forces now stationed there. This action was taken in accordance with an understanding reached by the President with the Prime Minister of Iceland, frankly inspired, however, according to the Prime Minister, by the British Minister to Iceland, who explained to him that British forces in Iceland were required elsewhere, and suggested that he apply to the United States for forces. The Prime Minister stressed the fact that the United States forces must be strong enough to meet every eventuality; and the President promised that the Government of the United States would immediately send troops, apparently including the United States Army as well as the Navy, to supplement, and eventually to replace, the British forces now there. Judging from the various press reports, it is likely that 80,000 American boys are in course of being sent to Iceland 2400 miles from any American territory, and substantially a part of the continent of Europe.
>
> In my opinion, the President has no legal or constitutional right to send American troops to Iceland. It is not an agreeable task for me to question the authority of the President to take any action which he has taken in the name of the Government of the United States; but I believe it would be most unfortunate if the Senate of the United States should acquiesce without protest in acts of the President which might nullify for all time the constitutional authority distinctly reserved to Congress to declare war.
>
> It would be a tremendous stretching of the Constitution to say that without authority from Congress the President of the United States can send hundreds of thousands of American soldiers to Europe when a war is raging over that entire Continent, and the presence of American troops would inevitably lead to war. The President cannot make aggressive war. Neither can he intervene in a war between two other nations, because such intervention, even though it does not immediately involve a physical attack on one of the combatants, is clearly the making of war.
>
> There has been no attack on the United States and no threat of attack. The action of the President is not only beyond the powers

> which the Constitution has granted to him, but it is a deliberate violation of his pledge to the American people.[28]

It was Senator Taft who questioned the intervention in Korea by President Truman. Senator Taft wrote:

> My conclusion, therefore, is that in the case of Korea, where a war was already under way, we had no right to send troops to a nation, with whom we had no treaty, to defend it against attack by another nation, no matter how unprincipled that aggression might be, unless the whole matter was submitted to Congress and a declaration of war or some other direct authority obtained.[29]

The high-water mark of congressional resistence during the years since World War II was the "Great Debate" of 1951, following an announcement by President Truman in September of 1950 that he intended to send additional ground troops to Europe as part of a NATO buildup. The debate began with a speech by Senator Taft in the Senate on January 5, 1951, and ended in April with the adoption of a resolution approving what had taken place, but calling for "future congressional approval" if more than four divisions should be sent to Europe.[30] Senator Taft viewed adoption of the resolution as a victory.[31] Others saw it as a draw between the President and Congress.[32] The resolution was never tested and the "Great Debate" in retrospect seems hardly more than a pause in the sequence of events from Korea to Cambodia and Laos during which the power of the President to determine, without congressional authority, the necessity for committing military forces abroad has come to be regarded as almost absolute.

### C. *Limited Judicial Guidance*

One might ask what judicial interpretations have been placed upon the war powers of Congress and the President under the Constitution. The Supreme Court has not often taken the opportunity to define or limit the war-making power. There is little disposition by the Court

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28 R. TAFT, A FOREIGN POLICY FOR AMERICANS 30-31 (1951).

29 *Id.* at 33.

30 S. Res. 99, 82d Cong., 1st Sess., 97 CONG. REC. 3282 (1951).

31 R. TAFT, *supra* note 28, at 36.

32 HOUSE COMM. ON FOREIGN AFFAIRS, 91ST CONG., 2D SESS., BACKGROUND INFORMATION ON THE USE OF UNITED STATES ARMED FORCES IN FOREIGN COUNTRIES 22 (1970).

to consider "political questions," [33] and one may safely predict that if balance is to be re-created in the war-making process, it will be without benefit of judicial guidance.

The Supreme Court has denied certiorari in many cases challenging the validity of the war in Vietnam.[34] It left standing a ruling by Chief Justice Burger, then Judge of the Circuit Court of Appeals for the District of Columbia, in which the Court stated:

> The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive.[35]

There are, however, decisions that should be noted—most of them in the early years of the nation. In *Penhallow v. Doane*[36] the Supreme Court suggested that the war power was not dependent upon the specific provisions in the Constitution.

In *Bas v. Tingy*,[37] the Court held that Congress could declare war as a public or perfect war or as a limited or imperfect war, a thought expounded a year later in *Talbot v. Seeman*[38] when Chief Justice John Marshall wrote:

> The *whole powers* of war being, by the Constitution of the United States, vested in Congress, the *acts of that body alone* can be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that *Congress may authorize general hostilities*, in which case the general laws of war apply to our situation; or *partial hostilities*, in which case the laws of war, so far as they actually apply to our situation, must be noticed.[39] (Emphasis added.)

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33 For recent treatments of this subject see Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 U.C.L.A.L. Rev. 1135 (1970); Note, *The Supreme Court as Arbitrator in the Conflict Between Presidential and Congressional War-making Powers*, 50 Bost. U.L. Rev. 78 (1970).

34 Mora v. McNamara, 387 F.2d 862 (D.C. Cir.), *cert. denied*, 389 U.S. 934 (1967); Luftig v. McNamara, 373 F.2d 664 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); Mitchell v. United States, 369 F.2d 323 (2d Cir. 1966), *cert. denied*, 386 U.S. 972 (1967).

35 Luftig v. McNamara, 373 F.2d 664, 665-66 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967).

36 3 U.S. (3 Dall.) 54 (1795).

37 4 U.S. (4 Dall.) 37 (1800).

38 5 U.S. (1 Cranch) 1 (1801).

39 *Id.* at 28.

In *Little v. Barreme*,[40] the Court held that President John Adams was limited as Commander-in-Chief by the restrictions enforced by Congress. The three cases mentioned above all arose as a result of the undeclared naval war with France. In these opinions, the Court observed that Congress was expected to play the predominant role in the initiation and prosecution of war. The opinions compliment views of the war-making powers as expressed by the writings of the framers of the Constitution.

The few cases concerning the war powers heard in later years have, for the most part, tended to strengthen the hand of the Executive and broaden his powers. A large number of the military actions not involving a formal declaration of war have concerned the protection of the lives and property of citizens of the United States.

In *Durand v. Hollins*,[41] the Court sustained President Pierce's order in 1854 to bombard Greytown, Nicaragua, because of the refusal of local officials to pay reparations for an attack upon the American consul.[42]

In the *Slaughter House Cases*,[43] the Court said in 1873:

> Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States.[44]

Other cases have sustained the right of the President to use the armed forces abroad for the protection of American lives and property.[45] These precedents probably aided President McKinley in his decision to send troops to China without congressional authorization in the Boxer Rebellion of 1900-1901.

It is of interest that President Eisenhower's justification for sending troops to Lebanon in 1958 was his inherent constitutional power to protect American lives and property,[46] rather than the Middle East

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40 6 U.S. (2 Cranch) 170 (1804).

41 8 F. Cas. 111 (No. 4186) (C.C.S.D.N.Y. 1860).

42 *See* 7 J. MOORE, A DIGEST OF INTERNATIONAL LAW § 1093, at 112-16, § 1168 (1906).

43 83 U.S. (16 Wall.) 36 (1873).

44 *Id.* at 79.

45 *In re* Neagle, 135 U.S. 1 (1890); Perrin v. United States, 4 Ct. Cl. 543 (1868), *aff'd*, 79 U.S. (12 Wall.) 315 (1870).

46 104 CONG. REC. 13903-04 (1958) (statement of President Eisenhower).

resolution of 1957.[47] Protection of lives and property was likewise the supposed basis for President Johnson's dispatching of Marines to the Dominican Republic in 1965.[48]

The constitutional power of the Executive to repel sudden attacks without congressional authorization has always been acknowledged. This power to wage defensive war was expanded in *Martin v. Mott*[49] when Justice Story said:

> The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. . . . But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, *or of imminent danger of invasion.* If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? . . . We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union.[50] (Emphasis added.)

Earlier reference was made to Alexander Hamilton's view of presidential war powers as expressed in 1801.[51] This expanded view of defensive war was reflected in President Polk's initial instructions to General Taylor, authorizing him to attack first in defense as soon as the Mexicans crossed the Rio Grande and to enter Mexican territory in the pursuit of the invaders.

The Hamilton view that once the country is attacked, the President may take action without further authorization from Congress, received approval during the War Between the States when, in *The Prize Cases*,[52] the Supreme Court held valid President Lincoln's proclamation of a blockade of the South. Of the President's powers, the majority opinion said: "He does not initiate the war, but is bound to accept the

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47 *See* p. 8 *supra.*
48 *See* p. 9 *supra.*
49 25 U.S. (12 Wheat.) 19 (1827).
50 *Id.* at 29-30.
51 *See* p. 3 *supra.*
52 67 U.S. (2 Black) 635 (1863).

challenge without waiting for any special legislative authority." [53]

In *United States v. Sweeny*[54] the Supreme Court said that the purpose of the Commander-in-Chief clause ". . . is evidently to vest in the President the supreme command over all the military forces—such supreme and undivided command as would be necessary to the prosecution of a successful war." [55]

The case most often cited as a restriction upon the President's war powers is *Youngstown Sheet & Tube Co. v. Sawyer*.[56] Justice Jackson said that the President "has no monopoly of 'war powers,' whatever they are." [57] This decision was prompted by President Truman's seizure of the steel plants during the Korean War—an action which the Supreme Court held invalid. It should be noted, however, that this case questioned the President's power over a domestic issue—labor-management relations—rather than the conduct of hostilities or the commitment of troops.[58]

In addition to the Court decisions that recognized an expanded executive power in the protection of American lives and property, and an expanded definition of defensive war, there also emerged a theory of inherent presidential right under the Constitution to protect national interests.[59] This received judicial recognition in the case of *In re Neagle*[60] inasmuch as the Supreme Court ruled that the power of the President to enforce the laws extends to obligations growing out of America's international relations. But there have been few recent decisions on the constitutional war powers,* and almost none involving a

[53] *Id.* at 668.

[54] 157 U.S. 281 (1895).

[55] *Id.* at 284.

[56] 343 U.S. 579 (1952).

[57] *Id.* at 644 (Jackson, J., concurring).

[58] Concurring opinions relied upon the fact that several laws concerning labor disputes had been enacted by Congress which had the effect of withholding the power of seizure. 343 U.S. 579, 604-09 (Frankfurter, J., concurring), 655-60 (Burton, J., concurring), 662-65 (Clark, J., concurring).

[59] U.S. CONST. art. II, §§ 1, 3. *See also* Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1775-77 (1968).

[60] 135 U.S. 1 (1890).

**Editor's Note*—This article was completed prior to the publication of the Pentagon Papers by the New York Times and the Washington Post, and the subsequent court test of the injunction obtained by the Government to restrain publication. In the resulting Supreme Court decision of *New York Times Co. v. United States*, 39 U.S.L.W. 4879 (U.S. June 29, 1971), which vacated the injunction, Mr. Justice Douglas, joined by Mr. Justice Black, briefly addressed himself by way of dicta to the balance in war powers dictated by the Constitution:

confrontation between legislation and presidential action. One concludes that what has come to be regarded as an inherent power is more the result of presidential action and congressional acquiescence than judicial blessing.

### D. *Nuclear Age and the Cold War*

Unquestionably, the nuclear age and the cold war created a climate of emergency that prompted Presidents to take action without congressional concurrence where earlier Executives may have hesitated. Since the time of entry into Korea, Presidents have moved without congressional authorization, and legal precedents have been cited to support their actions.[61] Those who have evoked the Founding Fathers as the constitutional authority for congressional participation in the war-making process have often been brushed aside.[62]

What relevance has an eighteenth century document drafted in the days of sailing vessels and limited cannon range to an age of instant communication, of nuclear warheads and intercontinental missiles? This question is implicit in the minority views on the National Commitments Resolution filed by Senator Gale McGee, who wrote: "The machinery of policy decisions assembled nearly two centuries ago simply has not been able to keep pace with the changing requirements of present-day realities." [63]

Two foreign policy developments of recent years should be noted. One is the increased use of the executive agreement as a method of making foreign commitments without having a treaty ratified by the Senate. This had its genesis with President Franklin Roosevelt's transfer of fifty destroyers to the British, and began the increased use of commitment by executive agreement. Today there are almost four

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The power to wage war is "the power to wage war successfully." See *Hirabayashi v. United States*, 320 U.S. 81, 93. But the war power stems from a declaration of war. The Constitution by Article I, § 8, gives Congress, not the President, power "to declare war." Nowhere are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have. New York Times Co. v. United States, U.S. , (1971).

61 U.S. DEP'T OF STATE, *The Legality of United States Participation in the Defense of Vietnam*, 54 DEP'T OF STATE BULL. 474 (1966); Address by William H. Rehnquist, "The President's Constitutional Authority to Order the Attack on the Cambodian Sanctuaries," Society of International Law, June 16, 1970; Statement of Secretary of State William P. Rogers, Senate Comm. on Foreign Relations, May 14, 1971.

62 *See* note 18 *supra*.

63 1969 SENATE NATIONAL COMMITMENTS REPORT, *supra* note 12, at 38.

times as many executive agreements as treaties.[64] Another development was the extensive execution of multilateral treaties and the emergence of the thesis of collective self-defense. During the Truman and Eisenhower Administrations, the United States entered into a series of multilateral and bilateral treaties which sought to encircle and contain the Communist nations.[65] These treaties represented commitments for military assistance all over the world. Although not self-executing, they broadened our commitments to a degree that Presidents had a ready basis for military assistance and, in some instances, for the making of war.[66]

And so, in varying degrees, obsolescence of the formal declaration of war, congressional acquiescence, lack of judicial interpretation of the war powers, and the cold war have all contributed to the atmosphere of a period during which presidential hegemony over the war powers has emerged. Without arguing the merits of troop commitments made by Presidents Truman, Eisenhower, Kennedy, Johnson and Nixon, it can be argued that the public believes there has been far greater congressional participation in the decisions that led to Korea, Lebanon, Vietnam, the Cuban blockade, the Dominican Republic, Cambodia, and Laos, than has actually occurred.[67] If the intent of the Founding Fathers is to be fulfilled and the public's expectations of what the Constitution requires are to be realized, there should be congressional participation in decisions committing the nation to hostilities other than of an emergency nature. How can this be accomplished?

## IV. Corrective Proposals Advanced by Congress

### A. *In General*

Suggestions for re-establishment by Congress of a more influential role in the exercise of war powers may be divided into three categories:

[64] In 1930, the United States concluded 25 treaties and 9 executive agreements. As of January 1, 1969, the United States had a total of 909 treaties and 3,973 executive agreements.

[65] Those treaties were the Rio Treaty, the North Atlantic Treaty, the ANZUS Treaty, the SEATO Treaty, and bilateral treaties with the Philippines and the Repulic of China on Formosa, Korea and Japan.

[66] *See* note 22 *supra*.

[67] *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1971). Note therein the following testimony and the questions asked the witnesses by the author: Senator Barry Goldwater (April 23, 1971); Mr. George Reedy (April 26, 1971); Secretary of State William Rogers (May 14, 1971).

(a) that future resolutions be deliberated carefully and defined clearly as to the scope of congressional authorization, (b) that there be standard procedures enacted for reporting and consultation between the President and Congress, and (c) that by legislation the circumstances under which the President might initiate hostilities in the absence of a declaration of war be defined by rule.

The broad and undefined nature of the powers granted in past resolutions has been noted herein. Recommendations for consideration of future resolutions have been made by the Senate Committee on Foreign Relations. They are as follows:

> (1) Debate the proposed resolution at sufficient length to establish a legislative record showing the intent of Congress;
>
> (2) Use the words "authorize" or "empower" or such other language as will leave no doubt that Congress alone has the right to authorize the initiation of war and that, in granting the President authority to use the Armed Forces, Congress is granting him power that he would not otherwise have;
>
> (3) State in the resolution as explicitly as possible under the circumstances the kind of military action that is being authorized and the place and purpose of its use; and
>
> (4) Put a time limit on the resolution, thereby assuring Congress the opportunity to review its decision and extend or terminate the President's authority to use military force.[68]

There have been numerous proposals for establishing consultation with Congress before forces are deployed. Professor Alfred DeGrazia of New York University proposed that at each session Congress establish a force committee[69] to share with the President the responsibility of determining when armed forces will be used without a declaration of war. Professor Henry Commager recently testified on the war powers before the Senate Committee on Foreign Relations and, among other things, suggested:

> . . . that the Senate meet the argument of emergency, hypothetical as it is, by creating a permanent committee, a quorum of whose members would remain permanently in Washington, with authority to require that the President consult with the Senate or the Congress

[68] 1969 SENATE NATIONAL COMMITMENTS REPORT, *supra* note 12, at 33.

[69] *Hearings on Separation of Powers Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 163-79 (1967).

> before taking any action that might involve the Nation in armed conflict. Such a committee could be counted on to respond to a genuine emergency just as promptly as would the President, and counted on, too, to present the case for caution. . . .
>
> that the Senate create a standing committee to consult with the President on all executive agreements, and with authority to designate those of sufficient importance to require submission to the Senate as treaties.[70]

Congressman Frank Horton of New York has introduced legislation that would create a joint committee on national security. This new committee would be designated by Congress as the panel authorized to consult with the President and his national security advisors in situations where congressional powers are involved and where congressional ratification of military actions is required.[71]

Congressman Clement Zablocki of Wisconsin has introduced a resolution which would require the President upon (a) committing military forces to armed conflict, (b) committing military forces equipped for combat, or (c) substantially enlarging military forces already located abroad, to submit a written report to the Speaker of the House and the President of the Senate. The report is to set forth the circumstances necessitating the action; the constitutional, legislative and treaty provisions giving authority for the action; the reasons for not seeking specific prior congressional authorization; the estimated scope of activities and such other information as the President may deem useful to Congress in the fulfillment of its constitutional responsibility.[72]

### B. *Senate Proposals for Restoration of a Balanced War Power*

There are three resolutions and a bill presently before the Senate designed to limit or define the President's constitutional war powers. The bill S. 731 was introduced by Senator Jacob Javits.[73] The three resolutions are S.J. Res. 18, introduced by Senator Robert Taft, Jr.;[74] S.J. Res. 59, introduced by Senator Thomas Eagleton,[75] and S.J. Res. 95, introduced by Senator John Stennis.[76]

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[70] *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67, at 17 (March 8, 1971).

[71] *Id.* (April 23, 1971).

[72] H.R.J. Res. 1, 92d Cong., 1st Sess. (1971). *See* appendix 1.

[73] S. 731, 92d Cong., 1st Sess. (1971). *See* appendix 2.

[74] S.J. Res. 18, 92d Cong., 1st Sess. (1971). *See* appendix 3.

[75] S.J. Res. 59, 92d Cong., 1st Sess. (1971). *See* appendix 4.

[76] S.J. Res. 95, 92d Cong., 1st Sess. (1971). *See* appendix 5. Senator Lloyd Bentsen

Should a war powers measure be enacted at this session of Congress, it is likely to be a hybrid of these proposals. If it is the sense of the Senate Foreign Relations Committee that such a measure should be reported, it must be decided whether it is to be in the form of a bill or a resolution. The author is a co-sponsor of the Javits bill, but is unaware of any operative difference between a bill and a joint resolution. Nor is there any difference between their legal force and effect. Each requires the signature of the President, and both are subject to veto by the President.

Each of the four measures defines the circumstances under which the President may or may not commit the armed forces to hostilities. While legislative enactments that seek to interpret the Constitution have traditionally been in the form of a joint resolution rather than a bill, the two forms are now being used interchangeably to the extent that there has ceased to be any operative, or even theoretical, difference between them. Either type of enactment would place the President on notice of the circumstances under which he may expect to be supported by Congress if he initiates hostilities.

The legislation offered by Senators Eagleton, Javits, and Stennis have a common characteristic—a requirement that there be advance congressional authorization for the commitment of the armed forces to hostilities by the President, except in certain designated emergency situations. In any of the defined situations, the President may commit the armed forces to combat for a period not to exceed thirty days unless explicitly authorized by Congress. Senator Taft's resolution, while defining the emergency circumstances under which the President may initiate hostilities without authorization, allows the President to continue using the armed forces until or unless the authorization is terminated by Congress. All four proposals require that the President report to Congress after he has initiated hostilities. All but the Taft resolution require continuing periodic reports. The Taft resolution requires only notification to Congress within twenty-four hours after deployment or commitment to combat.

The Javits bill[77] authorizes the President, in the absence of a declaration of war, to commit the armed forces to hostilities to repel a sudden

of Texas later introduced a bill similar to the Stennis resolution, and testified on it before the Senate Foreign Relations Committee on July 27, 1971. He delivered his first speech on the Senate floor on his bill on July 28, 1971.

[77] *See* appendix 2.

58-809 O - 72 - 44

attack on the United States or its armed forces, to protect the lives and property of United States' nationals abroad, and to comply with a national commitment resulting exclusively from affirmative action taken by Congress as well as the President. Military hostilities initiated for these purposes would be reported promptly to Congress and could not be sustained beyond thirty days unless authorized by Congress. Congress by joint resolution could terminate hostilities in less than thirty days. The bill also contains provisions for the expedition of committee and floor action on any authorization for the continuation or determination of military hostilities. Finally, the Javits bill would exclude from its operation any hostilities already undertaken prior to enactment.

The Eagleton resolution[78] states that the President may commit the armed forces to hostilities to the extent authorized by Congress through a declaration of war, statute, or joint resolution, but states that authorization may not be inferred from legislative enactments, including appropriations bills, which do not specifically include such authorization. It is also specified that no treaty may be construed as authorizing armed action without future congressional authorization. The resolution further authorizes the President, during any authorized hostilities, to enter, invade or intrude upon neutral countries when in hot pursuit of an enemy or when a clear and present danger exists of an imminent attack on United States armed forces by enemy troops located in the neutral country.

Similar to the Javits bill, the Eagleton resolution authorizes the President, in the absence of advance congressional authorization, to commit the armed forces to hostilities in order to repel an attack on the United States or its armed forces. Also, the President is authorized to remove American citizens from any country in which such citizens are being subjected to an imminent threat to their lives. There is no provision in the Eagleton resolution for the protection of the property of American nationals nor is there authorization for military action to comply with a national commitment.

As in the Javits bill, the Eagleton resolution requires that any hostilities undertaken by the President be promptly reported to Congress and that the question of terminating or continuing the hostilities be decided by Congress within thirty days.

Analogously to the Javits bill, the Eagleton resolution excludes from its authority hostilities commenced prior to its enactment and, also, con-

78 *See* appendix 4.

tains provisions for the expedition of legislative action in committee and on the floor. The Eagleton resolution also requires the President to report periodically to Congress on the status of any authorized hostilities as well as the extended scope and length of such hostilities. The Eagleton resolution offers a definition of the term "hostilities."

The Stennis resolution[79] is similar to the Eagleton resolution in many respects. For instance, it also states that authorization may not be inferred from any provision of law, including appropriations bills, but must be specified. As in the Javits and Eagleton proposals, the Stennis resolution would authorize the President to use the armed forces to repel an attack on the United States or its armed forces. The Stennis resolution would also authorize action to protect the United States or its armed forces against the danger of future attacks, and to prevent or defend the United States against an imminent nuclear attack. As found in the Eagleton resolution, there is also a provision to allow the President to take action to evacuate United States citizens from any country in which their lives were in danger.

The Stennis resolution also requires prompt notification to Congress of any military action undertaken and requires further, with provisions for the expedition of committee and floor action, a decision within thirty days by Congress whether the authorization to use the armed forces would be extended or terminated. During hostilities, the President would be expected to report to Congress at least every six months.

While the Javits and Eagleton proposals simply exclude any hostilities begun prior to enactment, the Stennis resolution specifically excludes the armed conflict in the Republic of South Vietnam and all military activities carried out against North Vietnam or its allies in North Vietnam, Laos, Cambodia or the waters surrounding the Indochina Peninsula. Finally, the Stennis resolution contains a definition of "armed conflict" closely resembling the Eagleton definition of "hostilities."

The Taft resolution[80] states that the armed forces will be committed to combat abroad only with the prior authorization of Congress except in the following circumstances: (1) when the President finds that the territory or armed forces of the United States are under attack or under imminent threat of attack; (2) when he finds that deployment of the armed forces is necessary to fulfill a treaty obligation; or (3) when he finds that deployment is necessary to exercise the inherent right of self-

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79 *See* appendix 5.

80 *See* appendix 3.

defense. In any of the foregoing circumstances, the Taft resolution authorizes the President to commit the armed forces to combat at his sole discretion, but he must notify Congress within twenty-four hours of any military action.

Congress may terminate the authorization to use the armed forces by concurrent resolution. The Taft resolution contains no provision compelling termination of military action after thirty days unless Congress authorizes its continuation.

Unlike the other proposals which exclude the current war in Indochina, the Taft resolution specifically authorizes the continued deployment of armed forces of the United States for such time, and in such a manner, as the President, as Commander-in-Chief, shall deem necessary and appropriate to accomplish a withdrawal of such armed forces and the assumption by the South Vietnamese Army at the earliest feasible date of responsibility for the defense of the territory of South Vietnam.

Since the Taft resolution includes a statement of policy concerning Indochina, the Foreign Relations Committee will have an opportunity to decide whether war powers legislation is a desirable vehicle for congressional expression of what policy in Indochina is, or should be. Many, including the writer, believe that repeal of the Gulf of Tonkin resolution left a vacuum in which there should be a congressional expression. However, prospects for unemotional consideration of war powers legislation would be enhanced if the legislation is limited to future hostilities. Senators Eagleton, Javits, and Stennis all stated this when introducing their respective proposals.

The delineation of circumstances under which, in the absence of a declaration of war, the President may initiate hostilities must not give or take away powers presently acknowledged under judicial interpretation of the Constitution. The Founding Fathers certainly intended for the President to have authority to repel sudden attacks.[81] Early decisions have sustained the President's right to use the armed forces to protect the lives and property of United States nationals abroad.[82] The power to act in anticipation of imminent attack would appear established under interpretation of the war powers.[83]

It has been argued that adoption of Item A(4) of the Javits bill[84]

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81 *See* note 3 *supra*, at 476.

82 *See* notes 41-45 *supra*.

83 *See* notes 49, 50 *supra*.

84 *See* appendix 2.

or paragraph 2 of Part I, of the Taft resolution,[85] stating that the President has power to deploy and commit to hostilities the armed forces to fulfill a treaty obligation, would give the President more constitutional authority than he presently possesses.[86] President Truman relied upon America's obligations under the United Nations Charter to send troops to Korea without congressional authorization. The rather oblique reliance upon the SEATO Treaty as a partial basis for our involvement in Indochina has heretofore been noted.[87]

It is agreed that none of the present multilateral treaties are self-executing.[88] An example of questions presented in consideration of these sections is illustrated by commitments in Europe under the NATO Treaty. Should American forces in Europe be attacked, there is no question that the President is empowered to act. However, should one of the NATO allies be attacked, would the President have power to act without congressional approval under the pending legislation? Does he have that power now? While the answers might vary with particular circumstances, the questions go to the merits of these proposals, as well as the credibility of the United States' present policy of "flexible response" in Western Europe.[89]

The questions also relate to Section 1 of the Eagleton resolution, which reads as follows:

> Except as authorized in section 2 or section 3 of this resolution, the President shall not commit the Armed Forces of the United States to hostilities. No treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further Congressional authorization. It is specifically recognized that such treaties as the Charter of the United Nations, the North Atlantic Treaty, and the Southeast Asia Collective Defense Treaty do not authorize or require the President to commit the Armed Forces of the

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[85] *See* appendix 3.

[86] *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67. See therein Memorandum of Lawyers Comm. on American Policy toward Vietnam.

[87] *See* note 22 *supra.*

[88] *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67. See therein testimony of Senator Taft, Senator Goldwater and Secretary of State Rogers.

[89] Briefly, the doctrine of "flexible response" anticipates a conventional response by the NATO alliance to a conventional attack upon a NATO nation that would provide at least a period of two to three days for negotiation and determination of the necessity or advisability of using nuclear weapons.

United States to engage in hostilities without a further authorization from both the Senate and the House of Representatives.[90]

While this language would appear constitutionally pure and in accordance with the present view of the State Department that the treaties are not self-executing, NATO obligations raise delicate political and legal questions in considering the war powers proposals. Does the Javits bill give more power to the President than he already has under the Constitution and the *Neagle* decision?[91] Conversely, does the Eagleton resolution take anything away from the President?

Section 2 of the Eagleton resolution and Section 3 of the Stennis resolution each specify that authorization to commit the Armed Forces of the United States to hostilities may not be inferred from legislative enactments, including appropriations bills, which do not specifically authorize the use of such forces in armed conflict. A section of this type should be included if legislation is enacted. Congress is reluctant to raise the issue of authorization in connection with military appropriations. Once the men are in the field, there is the understandable concern that denial of appropriations would deprive the troops of weapons and supplies needed, but approval of appropriations should not imply authorization to deploy or commit military forces unless specifically stated.

The Stennis resolution–Section 2, item (3)–gives the President authority to "prevent or defend against an imminent nuclear attack on the United States by the forces of any foreign government or power, but only if the President has clear and convincing evidence that such an attack is imminent; . . . ." Thus, the question of a preemptive nuclear first strike will be considered as part of these proposals. Does the President already have the power to act without authorization by Congress? Does not the type of weaponry involved and the nature of the decision to be made limit the opportunity for seeking authorization? Does the expanded view of the President's defensive war powers give the President the power to act in anticipatory self-defense?[92] Is this power implicit in Part 1, item (1) of the Taft resolution or Section 2, item (b) of the Eagleton resolution?

Each of the proposals contains a provision requiring prompt notification to Congress of any action taken under the authority spelled out

90 *See* appendix 4.

91 *See* notes 59, 60 *supra*.

92 *See* notes 49-53 *supra*.

in the bill or resolution. Some require periodic reports to Congress as long as hostilities are in progress. These measures, hopefully, would promote cooperation between the executive and legislative branches. The requirement in the Stennis, Eagleton and Javits proposals that Congress take action within thirty days to authorize or terminate hostilities would assure congressional participation, and place upon Congress the burden of sharing some measure of responsibility for war-making decisions with a lessened opportunity to second guess.

If a hybrid of the Javits, Eagleton, Taft and Stennis proposals is enacted, there should be included a definition of "hostilities" as in the Eagleton resolution or "armed conflict" as in the Stennis resolution, depending upon the term used in the earlier sections.

Perhaps the most compelling arguments heard against legislation which seeks to codify the war powers, are that the problems of war-making do not easily lend themselves to an attempt at generalized prospective codification.[93]

For this reason, legislation enacted should not be drafted to anticipate every conceivable type of military situation in which force could be employed, but define only those war powers which the Constitution grants the President. While many believe the sole objective of war power legislation is to limit the President's powers, it has been suggested that any codification of the President's war powers could result in expanding those powers.[94]

Though constitutional objections have been raised, the weight of opinion is that the proposals are constitutional.[95] Also, it is conceded that should war powers legislation be enacted and result in a confrontation between the President and the Congress, there is little chance of judicial interpretation.[96]

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[93] *Hearings on Congress, the President, and War Powers Before the House Comm. on Foreign Affairs*, 91st. Cong., 2d Sess. (1970). Note therein statements of Dr. Alexander M. Bickel (June 23, 1970) and Dr. W. T. Mallison, Jr. (June 23, 1970). Dr. Bickel later spoke more favorably concerning efforts to codify the war powers, endorsing with reservations the Javits bill. *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67 (March 8, 1971).

[94] *Id.* at 303.

[95] *Id.* at 49-50. See therein statements of Henry S. Commager (March 8, 1971); Richard B. Morris (March 9, 1971); Alfred H. Kelly (March 9, 1971); Alpheus T. Mason (March 25, 1971); Alexander M. Bickel (July 26, 1971); William D. Rogers (July 27, 1971).

[96] *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67. Note therein testimony of Senator Goldwater and John N. Moore.

In preceding paragraphs, the four legislative proposals presently before the Senate Foreign Relations Committee are reviewed. If a resolution, rather than a bill, is to be enacted, the recitals as set forth in the preamble to the Eagleton resolution reflect an accurate summary of the conclusions reached in preparation of this paper. The Javits bill sets forth with clarity, supported by weight of law, the rules by which the President, as Commander-in-Chief, may use the armed forces in military hostilities without a declaration of war with two possible exceptions. First, it is questionable that the protection of American property is of sufficient cause for emergency action. Second, as heretofore noted, there are questions concerning the power of the President to act alone to comply with existing treaty commitments.[97] Any enactment should include provisions of notification and reporting to Congress, and for expedition of congressional authorization or disapproval. Also, any enactment should include sections similar to those in the Stennis and Eagleton resolutions, which: (1) state that authority to use the armed forces is not to be inferred from any provision of law, including appropriations acts, unless specifically authorized; and (2) define the terms "hostilities" or "armed conflict."

The four legislative proposals before the Senate reflect thoughtful consideration of the problems inherent in codification of the war powers. Their introduction has provoked perhaps the most enlightened discussion of constitutional war powers in American history.

Of overriding importance in determining which, if any, of these proposals to enact is whether the enactment would serve long-term national interests. The ultimate objective of any legislative implementation of the Constitution must be protection of the country's well-being, especially when the legislation deals with matters directly affecting national security.

## V. Conclusion

It has been suggested that the way for Congress to resume control over the foreign and war policy of the United States is merely to resume

[97] *See* notes 86, 88, 89 *supra*. Also, the argument has been advanced that if a President, as Commander-in-Chief, acts to deploy for combat pursuant to a treaty, this action should be reviewed by Congress and either approved or condemned. The theory is that the Senate, by consenting to a treaty, cannot constitutionally bind the House to render an automatic war decision. *Hearings on Congress, the President, and War Powers*, *supra* note 93, at 391.

it—that the balance may be restored by affirmative action.[98] What type of action?

It is probable that there will be legislation enacted by Congress concerning the exercise of war powers. Should war powers legislation not be enacted, however, a desirable alternative would be more consultation with Congress by Presidents before troops are committed or hostilities initiated. Secretary of State Rogers' recent testimony before the Senate Committee on Foreign Relations indicated that this cooperation will be forthcoming. The Secretary expressed a willingness to explore ways of helping Congress reenforce its own information capability on issues involving war and peace. He also acknowledged the need for effective consultation between Congress and the President. It is of interest to note that the Secretary could recall only one instance since the end of the Second World War when Congress has participated in the making of a use of force decision.[99]

One may predict that future resolutions authorizing hostilities will not contain open-ended features, but will follow the suggestions of the National Commitments Report.[100]

There have been several suggestions for special or standing committees for the purpose of immediate and constant consultation with the President on the hostile use of military forces.[101] While these suggestions have appeal, it should be possible for consultation to take place with the leadership and committees of Congress as presently constituted. It will, of course, be necessary for the President to be willing to involve Congress in the decision making process.

During the lengthy war powers hearings held last year in the House, and this year in the Senate, there has been almost unanimous support for a reporting requirement. Should proposals which codify the war powers not receive sufficient support, it is probable that a separate resolution or bill will be enacted requiring presidential reports to Congress spelling out details of any troop commitments.[102] As aforestated, the overriding consideration in determining the advisability of enacting more complex war powers legislation is long-term national interests. It has been suggested that, in attempting to codify the war powers, Con-

[98] *Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59, supra* note 67, at 48 (testimony of Dr. Alexander M. Bickel).

[99] *Id.* (testimony of Secretary of State William Rogers).

[100] *See* p. 19 *supra.*

[101] *See* notes 68-70 *supra.*

[102] *See* appendix 1.

gress may fall into the old trap of trying to deal with the future by legislating the past. Also, one must ask if Congress is capable of acting with the speed, expertise, wisdom, and secrecy required today of decisions involving the war powers.

Much more is involved than a determination of war power prerogatives under the Constitution. It would hardly serve the long-term interests of the nation if any enactment resulted in a return to the congressional negativism and obstruction of the early years of this century. Nor would long-term interests be served if legislation were enacted that lacked credibility. It is doubtful if the public or the President would accept a measure subject to an interpretation that the President could not act to prevent or defend against a nuclear attack if there were clear evidence that such an attack was imminent.

Has the world so changed that the intent of the Founding Fathers is no longer viable? If so, what is our course if we are persuaded that presidential hegemony over the war powers is in the national interest and no legislation is desirable? The Constitution can be amended or the present constitutional quandary can continue, in which neither the intent of the Founding Fathers nor public expectation that elected representatives participate in the war-making process are being realized. Another quarter century of presidential hegemony, assuming the unlikely probability of continued congressional acquiescence would, through usage, make clear and constitutional something diametrically opposed to the intent of the Founding Fathers.

Either a Constitutional amendment spelling out Presidential hegemony or continued Congressional acquiescence is ill-advised. If there was cause in the 18th century to fear concentration of the power to make war in the hands of one man, surely more is at stake today.

The effort must be to reinvest Congress with a role in use of force policy without compromising the ability of the President to act absent Congressional concurrence in emergency situations, including imminent nuclear attack. This would require that Congress have a voice in the deployment of troops.

The probability of war is closely related to the deployment of troops. The decisions of the past thirty years that have resulted in the commitment of United States forces—sometimes to hostilities—have seldom been made with congressional participation. The deployment of troops often increases the chances for conventional war and conventional war increases the prospect for nuclear reliance.

Would the enactment of war powers legislation, similar to the proposals before the Senate, serve the long-term interests of the nation? There are many factors that lead one to conclude that it would, particularly if the possibilities of obstruction and negativism are reduced by a requirement of immediate consideration and action by Congress, and if the legislation is limited to future hostilities. The nation's interests would be served if congressional action initiated a fourth period of war powers history, an era of greater consultation and collaboration between the President and Congress. National unity is desperately needed in the wake of the long and divisive war that has focused so much attention upon this constitutional dilemma. Moreover, the chances of preventing an unnecessary war seem better if the decision to make war is, as the constitutional framers intended, a responsibility to be shared by Congress and the President.

If Congress will enact a war powers measure that takes into account the national security realities of the age in which we live, while at the same time giving effect to the Founding Fathers' intent, and to the public expectation rooted in their intent, that elected representatives participate in war-making decisions, this will restore balance to the war-making process and very probably serve the long-term best interests of the nation.

## Appendix 1

92D CONGRESS

1ST SESSION

## H. J. RES. 1

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IN THE HOUSE OF REPRESENTATIVES

JANUARY 22, 1971

MR. ZABLOCKI introduced the following joint resolution; which was referred to the Committee on Foreign Affairs

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### JOINT RESOLUTION

Concerning the war powers of the Congress and the President.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress reaffirms its powers under the Constitution to declare war. The Congress recognizes that the President in certain extraordinary and emergency circumstances has the authority to defend the United States and its citizens without specific prior authorization by the Congress.

SEC. 2. It is the sense of Congress that the President should seek appropriate consultation with the Congress before involving the Armed Forces of the United States in armed conflict, and should continue such consultation periodically during such armed conflict.

SEC. 3. In any case in which the President without specific prior authorization by the Congress—

(1) commits United States military forces to armed conflict;

(2) commits military forces equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, repair, or training of United

States forces, or for humanitarian or other peaceful purposes; or

(3) substantially enlarges military forces already located in a foreign nation;

the President shall submit promptly to the Speaker of the House of Representatives and to the President of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating his action;

(B) the constitutional, legislative, and treaty provisions under the authority of which he took such action, together with his reasons for not seeking specific prior congressional authorization;

(C) the estimated scope of activities; and

(D) such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

SEC. 4. Nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties.

## Appendix 2

92D CONGRESS

1ST SESSION

## S. 731

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IN THE SENATE OF THE UNITED STATES

FEBRUARY 10 (legislative day, JANUARY 26), 1971

MR. JAVITS introduced the following bill; which was referred to the Committee on Foreign Relations

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**A BILL**

To make rules respecting military hostilities in the absence of a declaration of war.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That use of the Armed Forces of the United States in military hostilities in the absence of a declaration of war be governed by the following rules, to be executed by the President as Commander in Chief:

A. The Armed Forces of the United States, under the President as Commander in Chief, may act—

1. to repel a sudden attack against the United States, its territories, and possessions;

2. to repel an attack against the Armed Forces of the United States on the high seas or lawfully stationed on foreign territory;

3. to protect the lives and property, as may be required, of United States nationals abroad; and

4. to comply with a national commitment resulting exclusively from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment, where immediate military hostilities by the Armed Forces of the United States are required.

B. The initiation of military hostilities under circumstances described in paragraph A, in the absence of a declaration of war, shall be reported promptly to the Congress by the President as Commander in Chief, together with a full account of the circumstances under which such military hostilities were initiated.

C. Such military hostilities, in the absence of a declaration of war,

shall not be sustained beyond thirty days from the date of their initiation except as provided in legislation enacted by the Congress to sustain such hostilities beyond thirty days.

D. Authorization to sustain military hostilities in the absence of a declaration of war, as specified in paragraph (A) of this section may be terminated prior to the thirty-day period specified in paragraph (C) of this section by joint resolution of Congress.

SEC. 2. (A) Any bill or resolution, authorizing continuance of military hostilities under paragraph C (section 1) of this Act, or of termination under paragraph D (section 1) shall, if sponsored or co-sponsored by one-third of the Members of the House of Congress in which it originates, be considered reported to the floor of such House no later than one day following its introduction, unless the Members of such House otherwise determine by yeas and nays; and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such committee within one day after it is referred to such committee, unless the Members of the House referring it to committee shall otherwise determine by yeas and nays.

(B) Any bill or resolution reported pursuant to subsection (A) of section 2 shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall otherwise determine by yeas and nays.

SEC. 3. This Act shall not apply to military hostilities already undertaken before the effective date of this Act.

## Appendix 3

92D CONGRESS

1ST SESSION

## S. J. RES. 18

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IN THE SENATE OF THE UNITED STATES

JANUARY 27 (legislative day, JANUARY 26), 1971

MR. TAFT introduced the following joint resolution; which was referred to the Committee on Foreign Relations

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### JOINT RESOLUTION

To define the principles which shall govern the deployment of the Armed Forces of the United States by the President, to express United States foreign policy objectives in Southeast Asia.

Whereas wide discussion and differences of opinion have arisen among the members of the body politic with respect to the power of the President as Commander in Chief to deploy the Armed Forces of the United States beyond its territorial limits and to commit such Armed Forces to combat, and

Whereas the Congress has, through acquiescence and overt action, sanctioned on numerous occasions the deployment of the Armed Forces of the United States beyond its territorial limits and commitment of such Armed Forces to combat without prior express authorization of a declaration of war by the Congress, and

Whereas in order to eliminate the confusion caused by the previous acquiescence and overt actions by Congress, there is a need for a clear statement of policy by the Congress as to the foreign policy of the United States in Southeast Asia, the deployment of Armed Forces by the President generally, and specifically their deployment in fulfillment of such foreign policy: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

PART I

The deployment and commitment to combat of the Armed Forces

of the United States in, within the territorial waters of, or over the territory or territorial waters of any other nation is authorized and shall be undertaken only with specific prior authorization of Congress by law; except that the President, as Commander in Chief, is authorized to deploy and commit to combat such Armed Forces at his sole discretion:

(1) When he finds that the territory or the Armed Forces of the United States are under attack or imminent threat of attack; or

(2) When he finds that such deployment is necessary to fulfill a treaty obligation of the United States not qualified by constitutional or treaty contained limitations of conditions; or

(3) When he finds that such deployment is necessary to effectuate a declaration of war acted on by the Congress; or

(4) When he finds that such deployment is necessary to exercise the inherent right of self-defense of the Nation or its nationals pursuant to established principles of international law or article 51 of the Charter of the United Nations,

The President shall notify the Congress within twenty-four hours after any such finding of all action he has taken at his sole discretion pursuant to any such finding. In the event the Congress is not in session, then the President shall convene the Congress in an extraordinary session and so notify the Congress within forty-eight hours after such finding. This authorization shall terminate upon the passage of a concurrent resolution to that effect by both Houses of Congress.

PART II

The Congress hereby declares that it is the policy of the United States that each of the several free Southeast and South Asian nations should have the primary responsibility for the defense of its own

58-809 O - 72 - 45

territorial integrity: *Provided, however,* That it is the policy of the United States where requested and where needed to furnish economic and military material assistance to such nations whose territorial integrity is threatened by armed aggression. The Congress specifically authorizes the continued deployment of the Armed Forces of the United States in the territorial limits of the Republic of South Vietnam for such time and in such manner as the President, as Commander in Chief, shall deem necessary and appropriate to accomplish a responsible and irreversible withdrawal of such Armed Forces of the United States and the assumption by the Armed Forces of the Republic of South Vietnam at the earliest feasible date of the responsibility for the defense of the territorial integrity of the Republic of South Vietnam: *Provided further,* That the Armed Forces of the United States should not be deployed or committed to combat in Indochina in territory other than that of the Republic of South Vietnam, except as provided in part I hereof. This declaration of policy and authorization shall terminate upon the passage of a concurrent resolution to that effect by both Houses of Congress.

## Appendix 4

92D CONGRESS

1ST SESSION

## S. J. RES. 59

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IN THE SENATE OF THE UNITED STATES

MARCH 1 (legislative day, FEBRUARY 17), 1971

Mr. EAGLETON introduced the following joint resolution; which was referred to the Committee on Foreign Relations

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### JOINT RESOLUTION

Regarding the powers of the Congress and the President to commit the Armed Forces of the United States to hostilities.

Whereas the framers of the Constitution of the United States intended the separation of powers doctrine to apply to the initiation of hostilities as a means for insuring collective judgment, whenever possible, before the Armed Forces of the United States were committed to such hostilities; and

Whereas the power to declare war was assigned to the Congress and this power authorizes the Congress to initiate, define, and limit the scope of hostilities involving the Armed Forces of the United States; and

Whereas the power to make rules regulating and governing the Armed Forces of the United States was assigned to the Congress, and this power authorizes the Congress to enact laws respecting the raising and use of such Armed Forces including their deployment in any foreign country; and

Whereas the power to appropriate moneys to support the Armed Forces of the United States was also assigned to the Congress, and this power authorizes the Congress to allocate funds so as to circumscribe the overall scope of hostilities and the uses of the Armed Forces of the United States; and

Whereas the Commander in Chief and Chief Executive powers were assigned to the President and those powers authorize the President to conduct hostilities initiated by the Congress and to respond to, and repel, attacks on the United States (including its territories and possessions), its Armed Forces, and, under certain circumstances, to rescue endangered citizens of the United States located in foreign countries: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled,* That:

SECTION 1. Except as authorized in section 2 or section 3 of this resolution, the President shall not commit the Armed Forces of the United States to hostilities. No treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further Congressional authorization. It is specifically recognized that such treaties as the Charter of the United Nations, the North Atlantic Treaty, and the Southeast Asia Collective Defense

Treaty do not authorize or require the President to commit the Armed Forces of the United States to engage in hostilities without a further authorization from both the Senate and the House of Representatives.

SEC. 2. The President may commit the Armed Forces of the United States to hostilities to the extent authorized by Congress through a declaration of war, statute, or joint resolution, but authorization to commit the Armed Forces of the United States to hostilities may not be inferred from legislative enactments, including appropriation bills, which do not specifically include such authorization. The Congress recognizes that during such authorized hostilities against an enemy country or enemy forces, the President's powers as Commander in Chief and Chief Executive provide him with the further authority, regardless of the limitations contained in the specific declaration of war or other authorizing statute or resolution, to order the Armed Forces of the United States to deliberately enter, invade, or intrude upon the territory or airspace of a country with which the United States is not then engaged in hostilities:

(a) when in hot pursuit of fleeing enemy forces who have attacked, or engaged in battle with, the Armed Forces of the United States and then retreated to the territory or airspace of such country, to the extent necessary to repel such attack or complete such battle, or

(b) when a clear and present danger exists of an imminent attack on the United States or the Armed Forces of the United States by enemy troops located in such country, to the extent necessary to eliminate such danger.

SEC. 3. In the absence of a governing congressional authorization described in section 2, the President may commit the Armed Forces of the United States to hostilities, to the extent reasonably necessary to:

(a) repel an attack on the United States by military forces with whom the United States is not engaged in hostilities at the time of such attack and to eliminate or reduce the effectiveness of any future attacks by such military forces which are committing the attack being repelled; and

(b) repel an attack on the Armed Forces of the United States by military forces with whom the United States is not engaged in hostilities at the time of such attack and concurrently to eliminate or reduce any clear and present danger of future attacks by the military forces which are committing the attack being repelled; and

(c) withdraw citizens of the United States, as rapidly as possible, from any country in which such citizens, there due to their own volition and with the express or tacit consent of the government of such country, are being subjected to an imminent threat to their lives, either sponsored by such government or beyond the power of such government to control: *Provided*, That the President shall make every effort to terminate such a threat without using the Armed Forces of the United States: *And provided further*, That the President shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States.

SEC. 4. The commitment of the Armed Forces of the United States to hostilities pursuant to section 3 of this resolution shall be reported promptly by the President to the Congress, together with a full account of the circumstances under which such hostilities were initiated, the estimated scope of such hostilities, and the consistency of such hostilities, with the provisions of section 3. The question of continuing or terminating any such hostilities shall be decided upon by the Congress

as soon as possible and not more than thirty days from the day on which hostilities were initiated, under the following procedures:

(a) any bill or resolution, authorizing the continuance or termination of military hostilities if sponsored or cosponsored by one-third of the Members of the House of Congress in which it originates, shall be considered reported to the floor of such House no later than one day following its introduction, unless the Members of such House otherwise determine by yeas and nays; and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such committee within three days after it is referred to such committee, unless the Members of the House referring it to committee shall otherwise determine by yeas and nays; and

(b) any bill or resolution reported pursuant to subsection (a) of this section shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall otherwise determine by yeas and nays.

SEC. 5. In any case where the Armed Forces of the United States have been committed to authorized hostilities, the President shall, while such hostilities are in progress, report to the Congress periodically on the status of such hostilities, as well as on the estimated scope and length of such hostilities.

SEC. 6. For purposes of this resolution, the term "hostilities" includes land, air, or naval actions taken by the Armed Forces of the United States against other armed forces or the civilian population of any other nation, the deployment of the Armed Forces of the United States outside of the United States under circumstances where

an imminent involvement in combat activities with other armed forces is a reasonable possibility, or the assignment of members of the Armed Forces of the United States to accompany, command, coordinate, or participate, in the movement of regular or irregular armed forces of any foreign country when such foreign armed forces are engaged in any form of combat activities.

SEC. 7. This resolution shall not apply to hostilities commenced before the enactment of the resolution.

## Appendix 5

92D CONGRESS

1ST SESSION

## S. J. RES. 95

IN THE SENATE OF THE UNITED STATES

MAY 11, 1971

Mr. STENNIS introduced the following joint resolution; which was referred to the Committee on Foreign Relations

### JOINT RESOLUTION

Relating to the authority of the President to use the Armed Forces of the United States in armed conflict.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That except as provided in sections 2 and 3 of this joint resolution, the President may not use the Armed Forces of the United States in any armed conflict.

SEC. 2. The President may, in the absence of a specific authorization by law as provided in section 3 of this joint resolution, use the Armed Forces of the United States in conflict to the extent reasonably necessary—

(1) to repel any armed attack on the United States by the forces of any foreign government or power and to take action that will protect the United States against future armed attacks by such foreign government or power;

(2) to repel an armed attack on the Armed Forces of the United States by forces of any foreign government or power and, concurrently, to protect the Armed Forces of the United States against any imminent danger of future attacks by the forces of such foreign government or power;

(3) to prevent or defend against an imminent nuclear attack on the United States by the forces of any foreign government or power, but only if the President has clear and convincing evidence that such attack is imminent; and

(4) to evacuate citizens of the United States from any foreign country in which they are located when such citizens are in such country with the express or tacit consent of the government of such country and their lives are being subjected to an imminent threat by such government or by persons or forces beyond the control of such government.

SEC. 3. The President is authorized to use the Armed Forces of the United States in armed conflict pursuant to a declaration of war or other specific statutory authority, but authority to use the Armed Forces of the United States in armed conflict shall not be inferred from any provision of law, including any provision contained in any appropriation Act, unless such provision specifically authorizes the use of such forces in armed conflict.

SEC. 4. (a) Whenever the Armed Forces of the United States are

used in armed conflict under any of the circumstances described in section 2 of this joint resolution, the President shall promptly report that fact to the Congress and shall include in such report a detailed account of the reasons for so using the Armed Forces of the United States, his estimate of the scope of the armed conflict, and the justification for the use of such forces under section 2 of this joint resolution. Upon receiving any such report, the Congress shall decide, within thirty days after the first day on which Armed Forces of the United States were committed to armed conflict, whether the authority to so use the Armed Forces shall be extended or terminated. The following procedures shall be applicable to any such question:

(1) Any bill or resolution, authorizing the continued use of the Armed Forces in armed conflict under authority of section 2 of this joint resolution shall, if cosponsored by one-third or more of the total number of Members of the House of Congress in which such bill or resolution originates, be considered reported to the floor of such House no later than one day following its introduction; unless the Members of such House determine otherwise by yeas and nays; and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such committee within one day after it is referred to such committee, unless the Members of the House referring it to committee determine otherwise by yeas and nays.

(2) Any bill or resolution reported pursuant to paragraph (1) of this subsection shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall determine otherwise by yeas and nays.

(b) In no case shall the Armed Forces of the United States be used

in any armed conflict under any of the circumstances described in section 2 of this joint resolution for any period exceeding thirty days after the first day on which such forces were first engaged in such conflict unless the Congress has specifically authorized the use of such Armed Forces in such conflict for a longer period.

SEC. 5. Whenever Armed Forces of the United States are engaged in armed conflict in any foreign country, the President shall, so long as such forces continue to be so engaged, report to the Congress periodically on the status of the armed conflict as well as on the scope and expected duration of such conflict, but in no event shall he report to the Congress less often than every six months.

SEC. 6. The provisions of this joint resolution shall not apply to—

(1) the armed conflict in the Republic of South Vietnam in which the Armed Forces of the United States were engaged on the date of enactment of this joint resolution, or

(2) military activities carried out against the military forces of North Vietnam, or against forces allied with North Vietnam, in North Vietnam, Laos, Cambodia, or the waters surrounding the Indochina Peninsula, so long as such military activities are directly related to the conflict referred to in paragraph (1) above.

SEC. 7. As used in this joint resolution, the term "armed conflict" includes (1) land, air, and naval actions taken by the Armed Forces of the United States against the military forces or civilians of any foreign country or government, (2) the deployment of the Armed Forces of the United States outside of the United States under circumstances that present a reasonable possibility of the use of arms against the military or civilian forces of a foreign country or government, and (3)

the assignment of members of the Armed Forces of the United States to accompany, command, coordinate, or participate in the movement of regular or irregular military forces of any foreign country or government when such military forces are engaged in any form of combat activity.

The CHAIRMAN. Thank you, Senator Spong.

Senator JAVITS. Mr. Chairman, I wish to thank Senator Spong. I shall say no more now because I know Senator Stennis is under a great deal of time pressure.

The CHAIRMAN. Senator Stennis, we are very pleased to have you this morning. I don't know why you should be under any pressure. You have the Senate completely under control to do exactly what you want. You can stay here as long as you want and you will still get 95 percent of the votes, so you shouldn't be under any pressure.

## STATEMENT OF HON. JOHN STENNIS, A U.S. SENATOR FROM MISSISSIPPI

Senator STENNIS. I can't do anything like that; there are Fulbright, Mansfield, and several more——

The CHAIRMAN. Four or five are all you don't control.

Senator STENNIS. Very small, no. I thank you, Mr. Chairman.

May I say just a word off the record?

(Discussion off the record.)

Senator STENNIS. I will be a little briefer than I otherwise would and I will endeavor to answer any questions that might come in, but I will have to ask you to let me do it a little later because Senator Mansfield has already sent for me.

I am most grateful, Mr. Chairman and members of the committee, to come before your committee, especially on this important question of congressional war powers. I will not make a long statement today. My views on this matter have been spelled out in speeches and in the resolution, Senate Joint Resolution 95, which I have proposed.

In the course of reviewing some of the testimony which has been given before this committee and considering the matter further, however, there are several points that I would like to emphasize.

### NO WAR WITHOUT MORAL SANCTION OF AMERICAN PEOPLE

First of all, I believe the overriding issue is that we must insure that this country never again go to war without the moral sanction of the American people. This is important both in principle and as practical politics. Vietnam has shown us that by trying to fight a war without the clear-cut prior support of the American people we not only risk military ineffectiveness but we also strain, and can shatter, the very structure of the Republic.

### DECISION TO USE FORCE BELONGS TO LEGISLATIVE BRANCH

The President is faced with difficult day-to-day decisions in the executive branch in the field of foreign policy and the temptation is great to rely upon the threat of military force against a particularly troublesome or recalcitrant opponent. But the Constitution has placed the responsibility for deciding whether or not that force is to be used in the hands of the legislative branch. Thus it is not only our right, but our constitutional duty to insist that the President obtain the sanction of the Congress, the people representatives, before he actually involves the Nation in war.

CERTAIN POTENTIAL CONFLICTS INTENTIONAL IN CONSTITUTION

Witnesses from the executive branch have argued that this may make the execution of foreign policy by the executive more difficult. To some extent we can limit these difficulties by the specific terms of any action which we take. But this difficulty is inherent in the Constitution. Certain potential conflicts, checks and balances, were intentionally written into that document in order to insure that some actions would be taken by the Federal Government only after careful deliberation followed by a clear-cut decision. The decision to go to war is one of these actions.

BALANCE CAN BE RESTORED ONLY WITH SUPPORT OF PEOPLE

I believe we can begin to re-establish the balance required by the Constitution in the field of war powers. But I want to point out that more important than legislation is a commitment by the people that they must decide in the future whether or not to go to war. The most important balance to be restored is the balance in the minds of the Nation's citizens, both those who are inclined to surrender their own responsibilities of decision to the executive, as many in the Congress have too often done, and those who believe that no cause is worth fighting for. For, as with most things, the truth lies somewhere between these extremes and the people of the United States must understand that the health of our constitutional system as well as our physical security depends upon their own willingness to help make the difficult choice of peace or war, if and when the question arises for us again. We of the Congress are nothing more than their representatives and without their support no balance can be restored. Thus, although I believe legislation in this field is useful—if it is the right kind of legislation—I believe it is of secondary importance.

LEGAL JUSTIFICATION FOR U.S. INVOLVEMENT IN VIETNAM

But, on the other hand, one of the reasons why it may be highly important to clarify the distribution of war powers by legislation is that there has been so much confusion over the legal justification for the war in Vietnam. For example, President Kennedy, in writing to President Diem of South Vietnam on December 14, 1961, based U.S. assistance on the Geneva accords of 1954, although he sometimes offered other rationales as well.

Secretary of State Dean Rusk was particularly given to emphasizing the importance of the SEATO treaty as the primary legal justification for U.S. involvement in Vietnam.

President Johnson would often refer to the Gulf of Tonkin resolution as showing congressional support for the war; but he said on August 18, 1967, "we repeat now, we did not think the resolution was necessary to do what we did and what we are doing."

Under Secretary of State Nicholas Katzenbach, on the other hand, often pointed to the Gulf of Tonkin resolution as the decisive legal justification. He testified before a subcommittee of the House Foreign Affairs Committee on July 28, 1970, that "in my opinion, the constitutional authority to use our Armed Forces in Vietnam rests squarely on Tonkin and cannot otherwise be constitutionally justified."

President Nixon stated on July 1, 1970, that "the legal justification is the one I have given, and that is the right of the President of the United States under the Constitution to protect the lives of American men." It is constitutionally and politically unsound to allow confusion of this magnitude to persist.

I point out again I am not making any reference to who is to blame for the war—getting into the war or not getting out, or anything any President has said. We want to approach this matter and get something put on the books apart from the war and who might be to blame, so I make that point for emphasis again.

### CONGRESSIONAL POWER TO LEGISLATE IN WAR POWERS AREA

I do not believe that it can be questioned that Congress has the power to legislate in this area. In excellent testimony before this committee on July 26 of this year, Alexander M. Bickel, professor of law at Yale University, compared the "bare and summary" provisions of the Constitution relating to the President's power in this area, declaring that he should be Commander in Chief and authorizing him, with the advice and consent of the Senate, to make treaties and appoint ambassadors—with the full roster of congressional powers.

### POWERS GIVEN CONGRESS BY CONSTITUTION

Congress has the power to declare war, to raise and support armies provided that no appropriation for such use shall be for a longer term than 2 years, to make rules for the government and regulation of armies, and to provide for calling forth the militia and for organizing, arming and disciplining it.

Most importantly, Congress was given the power not only to make all laws which shall be necessary and proper for carrying into execution its own powers but also all laws which shall be necessary and proper for carrying into execution "all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

This last provision of the "necessary and proper" clause is particularly significant in the field of foreign affairs. I believe that it unquestionably gives to the Congress the power to give form and shape to the powers of the executive branch, within reasonable limits even in the field of foreign and military policy. This power was pointed out by Mr. Justice Jackson in his famous concurring opinion in *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U.S. 579 (1952). It was there pointed out that there is "a zone of twilight in which the President and Congress may have concurrent authority," such as in the area which we are discussing. He also said that "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

But precisely because our power in this area is clear, and the substance of any legislatiton would have such an important potential impact upon our national security, I believe it is imperative that we approach the task of legislating with humility and caution.

DEFINITION OF "HOSTILITIES" SHOULD RECEIVE PARTICULAR ATTENTION

First of all, it is important for the President to be able to deploy certain forces, our aircraft carriers, for example, in areas where they would be ready for use if an emergency arose. We do not want to draft legislation which would require our Navy to forsake control of the sea to a potential enemy merely because the possibility of hostilities exists. I believe that the definition of "hostilities" should be given particular attention by this committee when it is marking up this legislation.

DELINEATION OF CIRCUMSTANCES LEADING TO PRESIDENTIAL ACTION

Second, I believe that all of the bills and resolutions so far introduced are important chiefly because they attempt to delineate between those circumstances in which the President can first act unilaterally and those in which prior authority by Congress is required before armed forces can be used. The teeth in any legislation will be in this delineation. I believe it is extremely important, for example, that legislation not assume that our mutual defense treaties are self-executing. I think that is where a lot of the trouble arose, Mr. Chairman. I think a lot of the rest of it arose through our inability to try to think through meeting the crisis that could come by the threatened use of nuclear weapons. But we just have to clothe that in the best kind of legislation that we can; it is not insurmountable. I just think we have to accept it.

Since these treaties implicitly or explicitly require the operation of constitutional processes of the signatory nations, I believe that it is clear that we should insist on prior congressional authority before U.S. Armed Forces are used pursuant to them.

On the other hand, all the resolutions, including my own, provide in detail for subsequent congressional review of Presidential use of the Armed Forces in emergency situations.

I do not believe the details of these provisions are extremely important, since in a case of an attack or an imminent attack on the United States or on the U.S. forces the President's powers as Commander in Chief are really not effectively subject to Congress purview. It is important, however, for any legislation to make clear that the use of force by the President must be made only in a way which is directly responsive to the immediate threat to our territory or our forces.

CAREFUL CONSIDERATION BY COMMITTEE URGED

I know that the committee will consider the legislation before it very carefully in making a recommendation to the Senate. I hope that I have been able to be of some small assistance in this undertaking, and I feel a sense of personal as well as official obligation and gratitude to those many Members of our body and others who have worked on this question. I believe we are going to be able to do something about it.

I caution against rushing too much because I believe we have got to make the people understand fully that something must be done.

I want to make just a point or two here off the cuff for emphasis.

QUESTION NOT PRIMARILY LEGAL

I want to emphasize that this is not primarily a legal question, not at all. When I came to the Senate fresh from years of practicing as a lawyer, and some years as a trial judge, I thought perhaps it was a great legal question, but the practicalities and my experience here have changed that view altogether and the realities of the thing—I have been here and have seen these things happen, two wars came since World War II; I know something about how it is a President can be pushed along inch by inch, day after day, and month after month. But I go back to emphasize there is no question as to the fact that the President is authorized to repel an attack, actual or really imminent, I think, or to protect citizens, either under the rule of commonsense or as Chief Executive or as Commander in Chief.

The Congress is authorized, as I see it, to pass laws enabling him if he thinks it is necessary to carry out that authority. But for any actual committal of the Nation to war, a committal of the Nation's manpower, resources, integrity, and moral forces, certainly the words of the Constitution, "Congress shall have the power to declare war," words have a meaning and a purpose—and that meaning is just what the words say, an actual committal to war can come only through the exercise of that power, and that is the way the people feel about it at heart and should feel about it.

Say what we will, this responsibility then lies with us, the congressional membership; but, as I have said, I don't want us to be led off, and a lot of fine people are led off, that this is a great legal question and it has to be decided solely on that basis. There is plenty of law here, plenty of law for us to act on and carry out this responsibility.

PEOPLE MUST FEEL CAUSE AND PURPOSE OF WAR

Now, a word about the morality of this question, gentlemen, about being committed to war.

I realize now the people must be morally behind the move, wherever it comes from, whatever office or circumstance; the people must be morally behind it and in some way they must sense or feel the cause and the purpose of a war. And that can only come really to their hearts and minds and understanding, I think, by their Representatives and Senators in Congress. Many of them know us individually; many of them know us by our first name. Most feel that we do speak for them to a degree. Most of them feel that we will try to exercise our best judgment.

So I think that is the matter and nothing short of that makes them realize that they are committed, and that they are bound and also that their safety and the integrity of our Nation is at stake.

As I look down the years, we are going to have to have immense military power until great changes can be brought about. It will be easier and easier to go to war, to get pushed into war by a series of decisions. As I see it, one man—wise as he may be—after he gets so far cannot back up; and he is further along the line than he realizes, maybe.

So that is where the saving grace of our system and powers is, and the responsibilities are what I emphasize.

PRESIDENT HAS SOME RESPONSIBILITY TO ACT ALONE

I want to make clear, though, that I think the President has some power to act alone. I don't want him to sit there like a dummy, of course. Send carriers to the Mediterranean, yes; yes, there has to be some kind of influence. The Gulf of Tonkin—resist a display of force there, yes, resist it but not commit fully, not commit fully the Nation to war on an incident like that. And that is the line of cleavage, beyond instances of that kind, that I think you are going to have to carefully study and phrase and rephrase. The important wording is that line between the power to repel an attack, the power to protect our people, our forces, and the power to commit them abroad. But something can be found that will supply that need.

EFFECT OF ENACTING LEGISLATION ON WAR POWERS

Just the placing of an act on the books, I think, Mr. Chairman and members of the committee, that itself will be the signal to the people. It is not a matter of trying just to restrict a President altogether; but I do want him to have the consciousness that he is going to be accountable for what he does, and I am not talking about just the next election.

We have something here that will show he is going to be accountable to the Congress within a few days, without waiting for the election, but he is going to have to stand muster and be accounted for and approved or disapproved. That within itself will be a great help to the President.

I want to thank you very much for this time.

The CHAIRMAN. Thank you, Senator Stennis.

WAR POWERS POLITICAL RATHER THAN LEGAL MATTER

I was very impressed by your observation that you came here thinking this was a legal matter. You used to be a judge, I believe?

Senator STENNIS. That's right.

The CHAIRMAN. But now that you have been here, taking it, you mean it is a political matter more than legal; is that right?

Senator STENNIS. Oh, yes, yes; I think so.

The CHAIRMAN. I think I am inclined to agree with you. The Constitution is not self-executing. Whether or not the President is responsive to the Constitution is primarily involved in the political realm and that means primarily what the Congress' attitude toward the President is. The Congress is the one agency which might influence the President to abide by the Constitution; is that not correct? Is that not what you are saying?

Senator STENNIS. It is certainly a part of the picture there that I just discussed. He is accountable to that Congress, whether it is his party or not. We are not using that in any political or partisan sense.

The CHAIRMAN. What has happened in the last 25 years is that the Congress has acquiesced in the President's assuming all the powers, practically; has it not?

Senator STENNIS. Well, particularly in this field, a great deal of it, and I feel a sense of guilt along with the rest. I never did really buy the idea; I am not hiding behind "we had agreements, mutual agree-

ments, which were self-executing." I always thought it was a matter for us to decide and our responsibility to decide.

The CHAIRMAN. I am agreeing with you. I am trying to just enlarge a little bit.

Senator STENNIS. Yes.

The CHAIRMAN. I agree with you that the sanction for the Constitution being abided by, the real sanction, is political, and that to a great extent is the attitude of the Congress as to whether or not they wish to hold any President to the requirements of the Constitution. If we overlook the provisions and go along with him, why then, there is really no sanction. Most of these problems very rarely get into the courts, and when they do, they usually involve private parties or something. In really important political questions, the courts very often say, "Well, that is a political matter," and they don't want to get involved. If it involves an individual's private property rights or something of this kind, strikes or something, they will get into the courts occasionally. But so often it isn't that.

COULD PRESIDENT JUDGE IMMINENT ATTACK WITHOUT CONSULTATION?

One provision in your bill raises a question which you touched on, and I would like for you to comment on it. I am referring to where you say, "To prevent or defend against an imminent nuclear attack on the United States by the forces of any foreign government or power, but only if the President has clear and convincing evidence that such attack is imminent."

This raises a very difficult question, but while you are here, I would like you to comment on it.

Does this mean that the President would be the sole judge, if he thought that it was a dangerous situation, and that we might be attacked, then he has the right under this to launch a first strike—would he not, without consulting anybody?

Senator STENNIS. Yes, under those conditions, and it is a matter of wording and a matter of degree, but I think the law of necessity is operating there, and you just have to yield to it. That issue has held us back from dealing with this overall problem heretofore.

The President would ordinarily have a lot of fine counsel. We know about the experience on that. But the power, I think, the ultimate power, you would have to leave it with him.

The CHAIRMAN. I don't know what that counsel is. He doesn't counsel with the Senate to any extent that I know of. I don't know with whom he counsels other than Mr. Kissinger.

Senator STENNIS. Well, we had the Cuban crisis, so-called, and there was certainly a lot of counseling done there.

The CHAIRMAN. Not with the Senate.

Senator STENNIS. Well, I think so, Senator. I was not called to the White House.

The CHAIRMAN. I was called there 2 hours before they made the public announcement, but the decision was long since made. It wasn't consultation. We are often informed shortly before——

Senator STENNIS. Yes.

The CHAIRMAN (continuing). The decision is public, but I don't call that consultation.

Senator STENNIS. Well, I think some were called in, Senator.

The CHAIRMAN. It is my feeling that if we should incorporate into the law without any consultation at all required that if he thinks that the country is in danger he may launch a nuclear war, I think this is something that deserves very serious consideration. I don't know whether that is what you interpret that section to mean or not. I was just inquiring whether that is what you think it means.

Senator STENNIS. Yes, that is virtually what I think it means.

The CHAIRMAN. You think it does?

Senator STENNIS. I think we have got to meet that problem, and we won't get legislation if we don't, I feel. You can modify it, of course, requiring some advisers or some commission or something else; but I think we have got to meet it.

The CHAIRMAN. Personally, I would rather leave it vague, let it be uncertain, rather than to give him authority by law. I think I would prefer that, if I have to choose between having a bill that says "Yes, you may do this," and just leaving it as it is as to where he is uncertain, but certainly responsible for his actions.

Senator STENNIS. Yes.

CONSTITUTIONAL LIMITATIONS ON APPROPRIATIONS FOR MAKING WAR

The CHAIRMAN. One other thing: You mentioned yourself or reminded me of a fact I just read within the day about the limitations on provision by the Congress, and this is a limitation specifically in the Constitution, of appropriations for the making of war to 2 years.

I read in a piece within the last day or two that there are now appropriations primarily, if not wholly, within the military field that had been funded, no year funds, of $259 billion. This looks to me as if again by acquiescence of the Congress we have appropriated far beyond any 2-year limit. This could go, at least to the present state, $80 billion a year—you have got 3 or 4 years already in the till.

Senator STENNIS. You don't mean that much on hand unspent.

The CHAIRMAN. Yes; that is right; that is exactly what I mean.

Senator STENNIS. I think that must be an error.

The CHAIRMAN. It is a research project. I have it available for your consideration.

Senator STENNIS. I would be glad to have it.

The CHAIRMAN. It is, I think, accurate because of the credentials of the man who wrote it, at least, and the circumstances.

Senator STENNIS. That much money on hand unused but appropriated?

The CHAIRMAN. That's right, appropriated and unspent.

Senator STENNIS. We can get into that later, Senator, if you don't mind.

The CHAIRMAN. I only mentioned it to show again how the Constitution has all these fine provisions and here, again, it is the congressional default in this. I mean it is not the President. We appropriated the money. It is only a further example of it, and I thought these illustrate the question that you presented that these are not legal matters. I don't know how you can present this to the court; what the Congress has done is a political matter.

REPRESENTATIVE CHARACTER OF CONGRESS

One last observation I will make: You show great confidence in the representative character of the Congress.

A recent poll by Mr. John Kraft indicated that there is a great diversity between the feelings of the majority of the people of this country and the present attitude of the Congress regarding the war. This poll showed that a clear majority of the people favored the ending of the war by the end of this year, which is expressed in the Hatfield-McGovern amendment and yet the Congress takes directly the opposite attitude.

Senator STENNIS. Yes.

The CHAIRMAN. So it does raise a very serious question as to whether or not in the field of foreign policy, as distinguished from, we will say, the welfare bill or something that is very intimate and close knowledge of the people here, there is a representative character between the Congress and the people.

Senator Spong, do you wish to ask any questions?

LEGISLATION SHOULD REQUIRE BETTER REPORTING PROCESS BY EXECUTIVE

Senator SPONG. I know Senator Stennis is under pressure of time. I would like to say that I was impressed when Senator Stennis spoke in Mississippi several months ago about the need for this type of legislation. He followed it up with the introduction of his resolution.

I agree that this is not primarily a legal question.

Senator STENNIS. Yes.

Senator SPONG. I believe that the public thinks that Congress has participated and been consulted a great deal more concerning foreign and war policies than they have. I would hope that whatever legislation is enacted would in some way assure or require a much better reporting process on the part of the Executive.

Just one thing about your first question, Mr. Chairman.

Senator STENNIS. Excuse me. I heartily agree with that. I think on this nuclear threat any President would consult extensively with the Congress as they have in the past.

WHETHER TO MAKE EXPLICIT POWER REGARDING IMMINENT NUCLEAR ATTACK

Senator SPONG. Senator Fulbright asked you specifically about section 2, paragraph (3) of your bill where it is explicit with regard to imminent nuclear attack.

Senator STENNIS. Yes.

Senator SPONG. In talking with Senator Eagleton when he testified here, I questioned whether that power is not implicit in the resolution he introduced. I believe it is implicit also in the one Senator Taft introduced. I think the problem for the committee is going to be whether or not to consider spelling this power out. I appreciate your testimony here this morning.

Senator STENNIS. Yes.

Senator SPONG. Thank you very much.

Senator STENNIS. Thank you very much.

The CHAIRMAN. Senator Javits?

Senator JAVITS. Thank you very much, Mr. Chairman.

HISTORIC IMPORTANCE OF WAR POWERS LEGISLATION

First, Senator Stennis, may I say that personally I regard this as the most important legislative initiative I have ever taken. I think it is that important to the history of our country, and I cannot tell you how gratified I am that Senator Spong has taken the interest in it that he has in joining me, and you have, as chairman of the Armed Services Committee, recognized its historic importance. Beyond that, any differences between us are really insignificant in my judgment.

The family of bills which have now been introduced essentially adopt the framework which was laid out in the bill I first introduced on June 15, 1970, and reintroduced on February 10, 1971. Upon that we agree—the 30-day framework, the emergency authority given the President in specific circumstances, the reporting requirement, and the expediting action by the Congress and, especially, the statutory assertion of the constitutional powers of Congress in article 1.

POINTS OF DIFFERENCE BETWEEN S.J. RES. 95 AND NEW DRAFT BILL

There are three points of differences between your bill and the new draft bill which Senator Eagleton has joined me in sponsoring. You have a copy of this redraft. I would like to have your comments for the record. You have already told me you would not be in a position to do it this morning because of your other duties, but I would greatly appreciate it if you would review carefully what Senator Eagleton and I have agreed on and let us have your views. It will be most valuable for the committee as we mark up a bill (See pp. 763–765.)

Senator STENNIS. I certainly will do it, Senator, and if you give me those questions this weekend, I would like to do it for you. Under the circumstances, though, now, I feel almost absolutely compelled to ask you to excuse me because Mansfield has called me.

Senator JAVITS. May I just make one point, Senator Stennis? One, the nuclear question has already been raised by the chairman. Your resolution speaks of a declaration of war as being one of the statutory authorities by which we could enable the President to proceed after 30 days. Your testimony puts emphasis on the declaration of war.

I would hope you would review that again in the light of not highlighting what is the real deficiency in the present situation, to wit: that we don't want to be forced into a declaration of war. History has shown that the real problem lies in the undeclared war situation—the grey area, short of all-out war. We need more than a stark, "either/or" choice.

Senator STENNIS. Yes.

Senator JAVITS. Finally, your exclusion clause pinpoints everything in Indochina. Our bill excludes hostilities in being at the time of enactment. One is a geographic approach, the other is a "time" approach.

Senator STENNIS. Yes.

Senator JAVITS. I would hope you would give us your views on the practicalities of alternative approaches. Other than that, I think

we have accommodated all the key additions that you have raised in your bill.

Senator STENNIS. Well, we will just have to exclude Indochina to find a starting place for legislation; we will just have to let the past be the past.

WHEN LEGISLATIVE ACTION SHOULD BE TAKEN

Senator JAVITS. Senator Stennis, before leaving will you answer for the record one additional, important question? Your remark of May 11, in which you said this thing ought to be considered, "I do not mean passed within a week or a month. I think this matter should be pending for a year or more," has been used by Secretary Rogers in his testimony here to ask us to postpone action "until after passions of Vietnam have faded into the past."

Now, would you say that your definition was different from his, and would you be satisfied if, let us say, we acted at the end of this year or early next year?

Senator STENNIS. Oh, yes; certainly.

Senator JAVITS. I thank you.

Senator STENNIS. I just didn't want precipitously to go into it; I thought it would fail to pass.

Senator JAVITS. Thank you.

The CHAIRMAN. Senator Cooper?

Senator COOPER. I will just take a few moments.

Senator STENNIS. That is all right, Senator.

CONSTITUTIONAL POWER OF PRESIDENT AND CONSTITUTIONAL PROCESS

Senator COOPER. First, I think you made this point very clear that the constitutional powers of the President not requiring the authority of the Congress are to repel an actual attack or to act against imminent danger of attack, imminent danger.

I think that is very important because without the word "imminent"——

Senator STENNIS. Yes.

Senator COOPER (continuing). Without the word "imminent" the President could find that almost any situation which might lead to an attack.

Senator STENNIS. Yes.

Senator COOPER. Second, I think you would agree now and have always agreed that "constitutional process" when there is no attack or if there is not an imminent attack means that the President must come to the Congress for authority?

Senator STENNIS. Absolutely, yes; and he will be a large part in the decision and should be.

Senator COOPER. I just make one other comment: In this committee at the time they were considering the SEATO Treaty that same question I have asked you was asked Secretary Dulles.

Senator STENNIS. Yes.

Senator COOPER. And Secretary Dulles replied that, first, it would be a matter of national policy and, second, constitutional process meant coming to the Congress.

QUESTION RAISED BY WITNESS DURING DEBATE ON KOREAN TREATY

I make one further point that during the debate on the Korean Treaty, Senator Stennis raised on the Senate floor the question of what constitutional process means and he argued very strongly there——

The CHAIRMAN. Who did?

Senator COOPER. Senator Stennis on the Senate floor during the debate on the Korean Treaty—questioned the then chairman of the committee, Senator Wiley, very strongly about what constitutional process means. Senator Stennis, you argued that it meant, absent from this question of imminent attack or immediate attack, the President had to come to the Congress for authority. You were a forerunner of this.

Senator STENNIS. For a declaration of war, yes, come to the Congress for a declaration of war.

Senator COOPER. Yes, I ask unanimous consent to place a speech I made on the floor of the Senate on December 8, 1970, which places that colloquy in the perspective of the present consideration of the warmaking powers in the record at this point. You were looking far ahead.

(The information referred to follows:)

STATEMENT OF SENATOR COOPER

[From the Congressional Record, Dec. 8, 1970]

Mr. COOPER. Mr. President (Mr. Spong), I do not intend to repeat the arguments made many times in the early part in the Cooper-Church-Mansfield-Aiken amendment. It was said at the time that the amendment we offered was an unusual amendment and without precedent. In my statement I have noted the many reasons, on which this question has been raised and considered by the Senate in previous years.

In 1954, the debates show, on the question of the Korean security treaty, a colloquy between the distinguished Senator from Mississippi and then chairman of the Committee on Foreign Relations. Mr. Wiley, and myself, in which the Senator from Mississippi raised this question of the "constitutional process" provided in that treaty, as necessary to implement the treaty—to provide for the argument of the United States in war.

Since that time, the Senate has looked into the question and the Foreign Relations Committee, under Senator Fulbright, examined them rigorously. The subcommittee under the Senator from Missouri (Mr. Symington), reviewing U.S. commitments, in action last year taken on the national commitments resolution, approved by the Senate, the approval of an amendment which I offered to the defense authorization bill, which was stricken in conference; later, the amendment which Senator Mansfield and I offered to the defense appropriation bill, which was modified by the effective work of Senator Church —and that is the beginning of our work together on later amendments—and the Senator from New York (Mr. Javits), the Senator from Colorado (Mr. Allott), the Senator from Michigan (Mr. Griffin), and others, a limitation upon the use of troops in Laos and Thailand was accepted by Congress and by the administration.

The action which has been taken by the Committee on Appropriations follows a long line of precedents.

I appreciate very much, and I know my colleagues do, the action of the Appropriations Committee.

Mr. President, over the past 2 years the Senate has rigorously examined the constitutional framework of policymaking for foreign affairs and national security matters. A very important application of the responsibilities of the Senate in these areas was the debate over Cambodia. A decisive statement of the majority view of the Senate is found in the pending bill, the Department of Defense appropriations bill, 1971. Section 843 provides:

"SEC. 843. In line with the expressed intention of the President of the United States, none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos, Thailand, or Cambodia."

The committee report states that the committee's recommendation for the inclusion of Cambodia in section 843 of the bill is based upon the earlier action of the Senate with respect to the defense authorization bill on December 15, 1969, and the Cooper-Church amendment to the foreign military sales bill, H.R. 15628, was adopted by the Senate, 58 to 37.

This clear affirmative action by the Appropriations Committee marks another important step in the effort by the Senate to fulfill its constitutional responsibilities in the joint making of foreign policy, particularly with respect to engagement in war over a period of years—certainly since 1954.

The primary purpose of the Cooper-Church amendment was to assert the view of the Senate that the United States should not become involved in a new war in Cambodia, a country to which it has no commitments, without the expressed approval of the Congress. Underlying their purpose is an attempt to resolve the continuing and contentious problem of whether a decision to enter into a war should be made by the President alone or by the President and the Congress, and whether the involvement of the United States in a war is necessary for the Security of the United States and its people. These are issues which have troubled the Congress and the people during the life of the Republic, but more particularly since World War II.

The Constitution provides that the Congress has the authority to declare war, to make rules and regulations for the Armed Forces and to raise and support armies and a Navy, to suppress insurrection and repel invasion. The Constitution provides that the President shall be Commander in Chief of the Army and the Navy of the United States and the militia when called into service of the United States. While the notes of members of the Constitutional Convention distinguished the power of the President from that of the King of England who had the power to declare war and to raise armies and to make war, the exact and distinctive war powers of the President and the Congress have never been determined.

There has never been any doubt, nor is there now, in the event of sudden attack upon the territory of the United States or upon U.S. forces, the President has the authority and duty to repel attack. But since World War II, the way in which the Government of the United States—the Congress and the Executive—decide upon whether war is necessary for our security, has been continually at issue.

On January 26 of 1954 in the debate on the Korean security treaty, the distinguished chairman of the Armed Services Committee, Mr. Stennis, and I, engaged in a colloquy with the then chairman of the Foreign Relations Committee, Senator Wiley of Wisconsin. The issue was over the meaning of "constitutional processes" and I am going to place in the Record at the conclusion of my remarks the full colloquy—a colloquy which I believe throws much light on the issue that has been so heatedly debated over the past 2 years. At this point I would like to quote the following portion. Senator Stennis is questioning Senator Wiley then chairman of the Foreign Relations Committee about the meaning of "constitutional processes":

"Senator STENNIS. If the language does not mean the President can act without the action of the Congress, then what does it mean and why include such language?

"Mr. WILEY. To put it in a little different way, let me say the language simply means that if there is an overt attack by an aggressor upon one of our allies, the United States will simply take whatever action is determined by the President and the Congress to be advisable under the circumstances, having in mind the obligations of this Treaty, if it is ratified.

"Mr. STENNIS. The Senator says, 'the President and the Congress.' He means does he not, that the language did require affirmative action by Congress before the United States could enter into armed conflict or into a war?"

A few moments later in the debate, Senator Stennis, seeking further clarification of the war-making powers of the President and the Congress, said as follows:

"Mr. STENNIS. Of course, we protect our troops wherever they may be. However, apart from that, does the Senator from Wisconsin agree that before we would

be called on to act under this Treaty, affirmative action by the Congress as well as the President would be required? Does the Senator agree to that?"

Mr. Wiley replied:

"Very well, I think that if the circumstances were such as I have suggested, namely, if there had been an overt act of aggression but our troops were not involved or if there had not been an attack of our own troops but simply an attack of our allies, it would necessarily follow under Article III [of the UN Charter], that we would act to meet the common danger; and our action at that time would be in accordance with Constitutional processes. If it did not mean consultation, or something familiar, with respect to which the Executive has the power, and if it meant utilization of the armed forces, I believe that Congress would and should have to decide.

"Mr. WILEY. I agree. . . .

"Mr. COOPER. The Senator from Mississippi has raised the most searching question that can be addressed to this treaty. As the Senator from Wisconsin has said, it is the age-old constitutional question, "Under what circumstances can the President of the United States take action which, as a practical matter, may have the effect of committing this Nation to war without a congressional declaration of war?"

"The phrase, 'constitutional processes' must imply the power of both President and Congress. Under the Constitution the President of the United States can assert under certain circumstances—such as our troops being attacked or our physical area being invaded—his constitutional power as Commander in Chief to take action for the security of that country. Such action could, of course, lead to war.

"The important language in the article, it seems to me, in addition to the phrase "constitutional processes," which is difficult of interpretation, is the language defining the area, and conditions in which the United States would be morally committed to take some action under its constitutional processes.

"I believe the distinguished Senator from Wisconsin has said that he did not intend to make a statement which would interpret in any way the words "constitutional processes" to exclude the constitutional power of the President of the United States as Commander in Chief to act, under certain circumstances which he might think proper, to protect the security of the United States. Is that correct?

"Mr. WILEY. Yes, of course. Again we get into a field which has been the subject of discussion for some 165 years, as I have said. However, I believe that with the understanding which has been appended as a result of the suggestion of the Senator from Georgia [Mr. George] there can be no question as to what the meaning of the treaty is. As I have stated, there is nothing in the treaty which would delimit the constitutional power of either Congress or the President.

"Mr. COOPER. We seem simply to speak in a circle and come back to where we started. What does "constitutional processes" mean?

"Mr. WILEY. It is not a Bricker amendment, if that is what the Senator has in mind.

"Mr. COOPER. We come back to the question: What are the constitutional powers of the President and Congress with respect to taking steps toward war? I believe that the distinguished Senator from Wisconsin has said that, in the absence of such circumstances as demanded the protection of the security of the United States, we would certainly expect that Congress would determine whether the United States should go to war."

The debate I have quoted from 1954 concerned Korea. However, the problem of national commitments was very much the principle at issue then as it is now.

The history of the past 25 years provides many significant examples of the processes of progress involvement to war without any express prior commitment by our Government. It could, occur again and in situations where our national security and interests are not actually threatened.

The collapse of Nazi Germany brought the Soviet armies into Eastern Europe where they still remain. The fall of Nationalist China, the attack upon South Korea, and the possibility of a takeover of Southeast Asia by Communist China, caused the United States to construct a wide ranging series of bilateral and multilateral mutual defense agreements designed primarily to contain the Soviet Union and Communist China. They are eight in number and include 43 nations. Among them are NATO, SEATO, and ANZUS and American multilateral treaties with Japan, Korea, the Philippines, and Nationalist China.

While these treaties differ in certain respects, particularly NATO, which states that an attack upon any part of a large area designated by the treaty,

shall be considered as an attack upon all the parties—they are similar in substance. In essence, the treaties affirm that armed attack against any part to the treaty would endanger the safety of all and that each party would act to meet the danger "in accordance with its constitutional processes." The term "constitutional processes" isnot defined or spelled out in the teraties. Does "constitutional processes" mean that the President acting as Commander in Chief could commit the forces of the United States to the military assistance of another treaty country? Or does it mean that the President shall consul with the Congress to determine whether the use of American forces is essential to the security of the United States as well as the other country and that he will not commit forces until the Congress has given its approval, either by a declaration of war or by a joint resolution of the Congress?

In fact, as the situation exists today, with the presence of our Armed Forces in a number of other countries, there is obviously a great danger that we could become engaged in a war without "constitutional processes" ever being exercised by joint action by the President and the Congress. For in addition to Vietnam, American troops are stationed in large numbers in Korea, Japan, the Philippines, Thailand, Nationalist China, and Western Europe.

Senator Symington's subcommittee of the Senate Committee on Foreign Relations has made a very thorough examination of our forces commitments around the world and has asked many basic questions about the necessity for their continued presence. The administration is making a similar examination. Both branches are seriously examining the possibility of the withdrawal of our forces from other countries consistent with our security.

This is a worthwhile and necessary inquiry, for it is evident that the mere presence of sizable forces in other countries is a significant factor that could lead to war without "Constitutional processes." Our involvement in war in Vietnam began with a limited military training program to the Government of South Vietnam. In 1962, the United States expanded its forces in South Vietnam as the Vietcong and the North Vietnamese enlarged the war against the Government of South Vietnam. Gradually, our forces grew from 650 in 1962 to about 17.000 in 1963, to a peak of 535,000 in 1969. When our forces were fired upon, our involvement in a major war was irretrievably determined. This involvement was approved by the Congress in August of 1964 with the Tonkin Bay Resolution, but the many small but increasingly binding decisions had been made over a period of at least 10 years.

I do not believe that any of the Presidents who have been involved with Vietnam, Presidents Truman, Eisenhower, Kennedy, Johnson, or President Nixon, foresaw or desired that the United States would become involved in a large scale war in Asia. But the fact remains that a steady progression of small decisions and actions over a period of 20 years had forestalled a clear-cut decision by the President or by the President and Congress—decision as to whether the defense of South Vietnam and involvement in a great war were necessary to the security and best interest of the United States. In the light of the experience in Vietnam, a basic change in attitude has taken place. In constitutional terms, the recognition that "Constitutional processes" become difficult if not irrelevant once engaged in a war, has underlined the urgency of the debate of the past few years over Cambodia.

Of course, economic difficulties and severe social problems at home, the desire to change our priorities, are factors in congressional concern, but most important, I submit, is a growing awareness on the part of the Congress that it must carry out its constitutional responsibilities to share the burden of decision-making and judgment on vital issues of policy and national security.

On June 25, 1969, by a vote of 70 to 16, after several years of thought and consideration, the Senate approved the national commitments resolution. In brief, the resolution states that the use of Armed Forces of the United States or the promise of their use to another country upon the territory of another country, shall not be deemed a national commitment of the United States unless explicitly agreed to by the President and the Congress by a treaty, statute or resolution.

Building upon this principle, I introduced an amendment on August 12, 1969, to the defense authorization bill denying funds for the use of American forces in support of Laos or Thailand. This amendment was approved 86 to 0 on September 17, 1969, but was deleted in conference with the House. Later, on December 15, Senator Mansfield and I introduced an amendment for the same purpose to the defense appropriations bill. It was modified by Senator Church and thus marked the beginning of our association on Cooper-Church—and supported by Senators

Javits, Allott, and Griffin, among others, denying the use of funds for American ground forces in Laos. It was passed by the Congress and approved by the President and remains the law of the land. The intended effect of these amendments was to insure that before American forces could be committed to the defense of these countries in war, the President must secure the approval of the Congress.

The Cooper-Church amendment to the military sales bill which passed the Senate by a vote of 58 to 37 on June 30, 1970, had a similar purpose: That is, to require that before any future commitment to a country with which we have no obligation that any new commitments must be the result of a joint decision on the part of the Executive and the Legislature.

I was very pleased that the Senate Appropriations Committee has accepted the basic principles of the Cooper-Church amendment and incorporated it as a part of the bill. Senator Church and I are extremely grateful to Senator Russell, Senator Ellender, and Senator Stennis and others for their careful consideration of our written request to the Appropriations Committee that Cambodia be a part of the prohibition for U.S. ground combat troops along with Laos and Thailand.

The action of the Appropriations Committee is an affirmation of the constitutional principle that the President cannot commit troops to war in support of another country without the approval of the Congress.

The debate of the past several years and this most recent action by the Senate Appropriations Committee is in no sense a derogation of the President on the constitutional authority of the President. On the contrary, it is a clear expression of the reestablishment of the proper relationship between the Congress and the President with respect to the warmaking powers.

This effort to reestablish a proper constitutional relationship has in no way restricted the President's powers to protect our forces—to respond to an attack upon U.S. forces or upon the United States itself. In these actions, the President does not require the approval of Congress but he cannot take the United States into war unless the threat to our security is immediate, without the consent of the Congress. And in the event of an action to meet some immediate threat the Congress has the right to cut off funds for such actions if the Congress after due deliberation decides that continued action is not essential to U.S. security.

There has been suggested by some commentators that the process of the past several years to reestablish the congressional role in the making of foreign policy, and security affairs is a part of a movement toward neoisolationism. Comparisons have been made with the battle over the Bricker amendment in the early 1950's. This is a false analogy. The Bricker amendment largely concerned the issue of the overriding of domestic law by treaties and conventions. It would have provided that domestic law could not be superseded except by a statute approved by the Congress. The Bricker amendment was part of a larger conflict between those who advocated a major international role for the United States and the isolationsists.

There are very few Members of Congress who desire a return to fortress America kind of isolationism. What is at issue is not whether we should be involved in the world but rather, how our power should be used to best further our interests. It is my belief that the debate of the past few years in the Senate and the Congress over Indochina and the review of our other commitments has strengthened the ability of the legislature to make the joint decisions called for by the Constitution. The action of the Appropriations Committee on section 843 is an important declaration of this new institutional strength.

Mr. President, I ask unanimous consent to insert into the Record at this point the debate that took place January 26, 1954, in the Senate.

There being no objection, the debate was ordered to be printed in the Record, as follows:

"MUTUAL DEFENSE TREATY KOREA

"The Senate, as in Committee of the Whole, resumed consideration of the treaty, Executive A (83d Cong., 2d sess.), a Mutual Defense Treaty Between the United States of America and the Republic of Korea, signed at Washington on October 1, 1953.

"Mr. ROBERTSON. Mr. President, will the Senator from Wisconsin yield?

"Mr. WILEY. I yield to the Senator from Virginia.

"Mr. ROBERTSON. Mr. President, I preface my question by saying if anyone who is interested in knowing why the Bricker amendment was presented, will take the trouble to read the debate in the Senate in 1945, when the Senate, unanimously, with the exception of only one Member, voted to ratify the charter of

the United Nations, he will find that the people of the Nation, and almost every Senator, were so imbued with the thought that the charter of the United Nations would be the instrumentality of preventing another world war that the hope was expressed by many, including Members of the Senate who discussed the charter, that posterity would look upon that action as it did upon the work of the Philadelphia Convention of 1787, when the Nation was formed.

"Some very eloquent and wonderful speeches were made on the floor of the Senate at that time, but only one minor part of the charter was discussed, and that was done by the distinguished Senator from Michigan (Mr. Ferguson), who raised the question as to what kind of agreement would be involved if the Security Council called on the President of the United States to send troops abroad in the event of another war, or to stop an aggression which might lead to a major conflict. The Senator from Michigan hazarded a guess that in such a case a treaty would have to be submitted to the Senate. That viewpoint was challenged, primarily on the ground that the Security Council was only a part of the United Nations, that the United Nations was not a super sovereign government, and that never in the past had we negotiated a treaty except with a sovereign nation.

"At the time of the debate there was no discussion of the fact that an international FEPC was involved in the United Nations Charter, and also the question of human rights, which some persons claim can, if acted on in a certain way change our Bill of Rights. So, as I say, without any mature consideration of what the Charter meant, but in an impulsive way, all but one Member of the Senate voted for its ratification.

"In 1948 we find the Senate Committee on Labor and Public Welfare considering an FEPC bill. That committee reported a bill, with a substantial number of Senators signing their names to the report, stating that, regardless of whether such a bill could be authorized by our Constitution, it was authorized by the Charter of the United Nations.

"Again, when a President of the United States seized the steel companies without any apparent authority, so far as the average lawyer or Member of Congress knew, the Chief Justice of the United States and two other judges who agreed with him held that, even if the President did not have the power he claimed under the Constitution, he had it under the Charter of the United Nations. Consequently, many of us felt that it would be quite appropriate to insert in the Constitution, a clear definition of what all good constitutional lawyers said had been the law all the time—and I agree with that viewpoint—that no treaty which violates the Constitution of the United States can be valid and effective.

"Another treaty is now brought before the Senate, a treaty with Korea. I find in the report of the committee that the heart of the treaty is aricle III, which recites:

"'ARTICLE III

"'Each party recognizes that an armed attack in the Pacific area on either of the parties in territories now under their respective administrative control, or hereafter recognized by one of the parties as lawfully brought under the administrative control of the other, would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes.'"

"The question I desire to ask my friend, the distinguished chairman of the Foreign Relations Committee, which reported the treaty, is this: Will he be good enough to make it crystal clear to us in his explanation of the treaty to what extent under this treaty we are being committed to a future war on the mainland of Asia? The article of the treaty to which I have just referred provides that our aid will be rendered in accordance with constitutional processes.

"Mr. WILEY. That is correct.

"Mr. ROBERTSON. So that, certainly, would clear up the question raised by the Senator from Michigan (Mr. Ferguson) with reference to constitutional processes in connection with the United Nations.

"We all know that when the United Nations voted to enter the Korean war to try to stem the communistic aggression of North Korea, the President of the United States furnished troops, and Congress, to this day, has never been asked to vote or given the privilege of voting on the question whether the Congress should carry out the provision of the Constitution that the Nation cannot make war except by an act of Congress.

"I wish the distingiushed chairman of the Foreign Relations Committee would discuss this particular aspect of the treaty. Will we be committed to war if, at

the end of the stalled negotiations in the Far East, the President of Korea decides he has had enough of such tactics, that North Koreans are in the territory of South Korea, as indeed they are, and that situation justifies South Korea to make war. In that event will we also be at war, under this provision? If that is what we are being committed to, certainly we should not go to war until Congress so votes.

"Mr. President, I hope the distinguished chairman of the committee will not leave in doubt any provision of the treaty. Most of us have had little opportunity to consider it. We are all busy with other committees. I had four committee meetings today, and could not attend them all, and from now on there will be constant meetings of the Committee on Banking and Currency. I am on five subcommittees of the Appropriations Committee, and they will be in constant session. Of necessity I must rely upon the members of the Foreign Relations Committee, when that committee reports a treaty, to explain it fully in order that I may vote intelligently. I frankly admit that I am not one who wants to confess to the Nation that the Senate is incapable of analyzing treaties which it is called upon to ratify. If I thought that such was the case I would say, Change the Constitution and let the House of Representatives approve treaties.

"I have pointed out that we ratified the most far-reaching treaty in the form of a charter in our history. We did not know what was in it. We do not yet know everything that is in it in its full application. That is the reason why a change in the Constitution is now being proposed. If something comes out of that treaty which is clearly in violation of our Constitution, I want to be sure that it is not going to be the overriding law of this land.

"So I call on my distinguished colleague with reference to this and all other treaties that may come before the Senate for approval to make sure that we are fully advised of what we are doing.

"Mr. STENNIS. Mr. President, will the Senator from Wisconsin yield for a brief question?

"Mr. WILEY. Mr. President, I yielded for a brief question a quarter of an hour ago, and my Jeffersonian friend from Virginia delivered quite a speech which was very challenging. I wou'd prefer to carry on with my statement, and I am sure the answer to the question which was finally propounded by the distinguished Senator from Virginia will be as complete as the English language can make it.

"Mr. STENNIS. If the Senator would rather proceed with his speech I shall withhold my question.

"Mr. WILEY. Mr. President, in order that it may appear in the Record more clearly, I ask unanimous consent at this time that the very brief Mutual Defense Treaty between the United States and the Republic of Korea be printed at this point in my remarks.

"The PRESIDING OFFICER (Mr. Payne in the chair). Without objection, it is so ordered.

'The treaty is as follows:

"'MUTUAL DEFENSE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF KOREA

"'The parties to this treaty,

"'Reaffirming their desire to live in peace with all peoples and all governments, and desiring to strengthen the fabric of peace in the Pacific areas,

"'Desiring to declare publicly and formally their common determination to defend themselves against external armed attack so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific area.

"'Desiring further to strengthen their efforts for collective defense for the preservation of peace and security pending the development of a more comprehensive and effective system of regional security in the Pacific area.

"'Have agreed as follows:

"'ARTICLE I

"'The parties undertake to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat of use of force in any manner inconsistent with the purposes of the United Nations, or obligations assumed by any party toward the United Nations.

" 'ARTICLE II

" 'The parties will consult together whenever, in the opinion of either of them, the political independence or security of either of the parties is threatened by external armed attack. Separately and jointly, by self-help and mutual aid, the parties will maintain and develop appropriate means to deter armed attack and will take suitable measures in consultation and agreement to implement this treaty and to further its purposes.

" 'ARTICLE III

" 'Each party recognizes that an armed attack in the Pacific area on either of the parties in territories now under their respective administrative control, or hereafter recognized by one of the parties as lawfully brought under the administrative control of the other, would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.

" 'ARTICLE IV

" 'The Republic of Korea grants, and the United States of America accepts, the right to dispose of United States land, air, and sea forces in and about the territory of the Republic of Korea as determined by mutual agreement.

" 'ARTICLE V

" 'This treaty shall be ratified by the United States of America and the Republic of Korea in accordance with their respective constitutional processes and will come into force when instruments of ratification thereof have been exchanged by them at Washington.

" 'ARTICLE VI

" 'This treaty shall remain in force indefinitely. Either party may terminate it 1 year after notice has been given to the other party.

" 'In witness whereof the undersigned Plentipotentiaries have signed this treaty

" 'Done in duplicate at Washington, in the English and Korean languages, this 1st day of October 1953.

" 'For the United States of America :

" 'JOHN FOSTER DULLES.

" 'For the Republic of Korea :

" 'Y. T. PYUN.' "

"Mr. WILEY. Mr. President, on Thursday, January 21, the Committee on Foreign Relations reported the Mutual Defense Treaty With Korea—Executive A, 83d Congress, 2d session—signed at Washington on October 1, 1953, unanimously recommending that the Senate give its advice and consent to ratification at an early date.

"When his body gave its approval to the security pact between the United States and Japan in 1951, one of the primary elements which motivated our decision was the conviction that while such a pact was essential to preserving the safety of this country in the Far East, it was also a prerequisite to the restoration of Japan as a free nation in a divided world community. For we knew, and we know now, that if the Soviet Union and a Sovietized China could encompass Japan within their sprawling, expanding orbit, then the power of world communism in the Pacific, buttressed by Japan's great industrial potential, would directly and gravely menace the security of the United States in the westward approaches to this continent.

"Parenthetically, Mr. President, I might say that most of us realize that we are no longer living in yesteryear. This little world has changed considerably, even since the beginning of the Second World War, and has become very small, indeed. We have airplanes that can travel a thousand miles an hour. We now have the A-bomb and the H-bomb. We are now able to cross our own continent in a manner of 4 hours, and we cross the Atlantic in 4 hours, if it is necessary. The result is that every nation is in every other nation's backyard, speaking figuratively and realistically.

"I was speaking a moment ago about Japan. Virtually the same considerations are valid with respect to the Mutual Defense Treaty with Korea which the Senate now has before it. If we learned in the Second World War that the Pacific Ocean was a pathway for Japan to attack our westernmost possessions, we have learned,

and we should now realize, that the security of Japan depends upon our preserving a free and independent Korea in the territory across the Sea of Japan—territory which points as a bayonet at the heart of the island empire.

"The security of Korea is therefore a matter of the most vital concern to the United States, the United Nations, and the free world. One treacherous attempt has already been made to lay hands upon this bastion of freedom, which came perilously close to succeeding. Have we forgotten the ordeal of Pusan? Have we forgotten what the position of Japan and of our forces stationed there would have been had the Communists from North Korea driven the defenders of the republic into the sea?

"Many who are experienced in world affairs are convinced that this aggressive attack against Korea, conceived, prepared, and armed by an outside power, might never have been unleashed had the enemy been advised in advance—and this is important—that it could expect the United States to react with immediate and vigorous means in aid to the victims. One of Secretary of States Dulles' principal preoccupations has been to avoid this repetition of past error, that we do not again permit a would-be violator of free territory to miscalculate the intentions of the United States. In the words of Mr. Dulles:

" 'I believe, as one looks back at the wars of this century, that it can be said with a high degree of probability that if the aggressors had known in advance what we would do, that probably they would have not committed the acts of aggression.

" 'I think it is absolutely clear as to what we would do, if Korea were again invaded from the north. We would do what we did before.

" 'The important thing is to let that be clearly known. Then, I think it is not likely to happen, but if there is doubt about that, then it is likely o happen.' "

In short, the primary value of this treaty consists in giving the Communists notice, beyond any possibility of misinterpretation, that if they embark upon another aggression in Korea, the United States will not sit idly by, but that we can be expected to take prompt and adequate measures to meet it. At the same time, the treaty constitutes an additional link in the system of mutual security thus far developed in the Pacific. It fills a gap in the fabric of treaties which have already been concluded between the United States, on the one hand, and the Philippines, Australia and New Zealand, and Japan. Like the other security treaties with these countries, the Korean Treaty provides for consultation and, when necessary, appropriate action. And it reaffirms the belief of the United States that the greatest measure of security is to be found in collective measures.

The provisions of this treaty evidence our desire for peace. It is not a threat to any nation, but rather further proof of our will to live in peace, and to work toward that end through collective action for the protection of the free nations in the Pacific. This is clearly recognized in the preamble, which proclaims the determination of the parties to defend themselves against external armed attack, and to strengthen their efforts for collective defense pending the development of a more effective system of regional security in that area. It is also confirmed in article I, under which the parties undertake to settle by peaceful means any international dispute in which they may be involved, and to refrain in their international relations from the threat or use of force inconsistent with the purposes of the United Nations, or obligations assumed by any party toward the United Nations.

Whenever either party is of the opinion that the political independence or security of either is threatened by external armed attack, the parties are required, under article II, to consult together. This article, which, as will be noted, incorporates the principle of the Vandenberg resolution—Senate Resolution 239, 80th Congress—obliges the parties, separately and jointly, to undertake, through self-help and mutual aid, to maintain and develop appropriate means to deter armed attack and to implement the treaty.

The heart of the treaty, as was said by the distinguished Senator from Virginia [Mr. Robertson], who recently asked me a question, is contained in artcle III, which received a most careful examination in the committee. It is worded as follows:

"Each party recognizes that an armed attack in the Pacific area on each of the parties, in territories now under their respective administrative control, or hereafter recognized by one of the parties as lawfully brought under the administrative control of the other, would be dangerous to its own peace and safety and declares that it would act to meet the danger in accordance with its constitutional processes."

The unusual phraseology of this article relative to territory under the administrative control of one of the parties, was drafted to take cognizance of the fact that at present the Republic of Korea has effective control only over a part of the peninsula, and to anticipate the day when a settlement unifying the country would be reached through processes recognized as lawful by the United States.

It should be emphasized that the treaty does not become operative unless one of the parties is the victim of an external armed attack. It does not extend to the case of large-scale domestic riots or disturbances instigated by an outside power, nor does it apply to the violent overthrow of the Government or to a coup d'etat. An armed attack initiated by one of the parties to the treaty falls outside it's scope. The instrument, in other words, is not an offensive alliance.

More significant, it does not apply to territories not now under the administrative control of either party, nor to territory which is not at some future time recognized by the United States as having been lawfully brought under the administrative control of the other party. In order to eliminate all possible doubts on this score, it was suggested by the Senator from Georgia [Mr. George] that there be included in the Senate resolution giving its advice and consent to ratification an interpretative clause worded as follows:

"It is the understanding of the United States that neither party is obligated, under article III of the above treaty, to come to the aid of the other except in case of an external armed attack against each party; nor shall anything in the present treaty be construed as requiring the United States to give assistance to Korea except in the event of an armed attack against territory which has been recognized by the United States as lawfully brought under the administrative control of the Republic of Korea."

The suggestion was adopted in the committee. Such an understanding is altogether consistent with the intention of the parties at the time the agreement was being negotiated; for Secretary Dulles indcated to the committee at the hearings that this very point was emphasized to the representatives of the republic when article III was drafted. The United States, under the treaty, reserves for itself the right to determine whether territory not now under the administrative control of Korea has lawfully been brought under such control.

There can be no question, therefore, of the United States becoming involved under this treaty in hostilities resulting from a unilateral attempt to the Government of Korea to unify the country by forceful means or by any other means not regarded as lawful by the United States. Whatever the practical consequences of such action by the other party would be, we are not warranted in assuming that the Republic of Korea will do other than to abide by the terms of the armistice agreement to which they and we have solemnly subscribed.

Mr. President, I believe it is important to call attention to one other element in the formula of article III, which recognizes that the armed attack referred to would be dangerous to the peace and safety of the parties. Any action we take pursuant thereto would then, under this article, be determined in accordance with our constitutional process.

Mr. STENNIS. Mr. President, will the Senator from Wisconsin yield for a question at that point?

The PRESIDING OFFICER (Mr. Payne in the chair). Does the Senator from Wisconsin yield to the Senator from Mississippi?

Mr. WILEY. I yield.

Mr. STENNIS. The Senator from Wisconsin has quoted from article III the phrase "in accordance with its constitutional processes."

Will the Senator explain fully, exactly what it meant by the phrase "in accordance with its constitutional processes," and also give his opinion as to whether or not constitutional processes were met at the time the United States went to war in Korea?

I ask the question in all good faith, and not in criticism of anyone. I was a Member of the Senate at the time the United States went to war in Korea. I did not raise any objection at the time we sent our troops there. However, I believe we have learned something in a practical way about what the clause can mean, and what it did mean, because it is to be found in article 43 of the United Nations Charter, which is on the subject of the use of troops and force.

So I shall appreciate the opinion, conclusion, and assurance of the Senator from Wisconsin as to what is meant by the phrase "in accordance with its constitutional processes," as used in article III of the Mutual Defense Treaty between the United States of America and the Republic of Korea.

Mr. WILEY. My reply to that question would be that any action we take under the terms of article III would then be determined in accordance with our con-

stitutional process. This approach follows the principle of the Monroe Doctrine, rather than the "attack upon one is an attack upon all" principle of the North Atlantic Treaty. I think it will be agreed that the Korean treaty approach, which was previously formulated by Mr. Dulles in the Philippine and Australian-New Zealand pacts, has some advantages over the North Atlantic Treaty formula; and it avoids the constitutional question marks which seem to have been suggested by the latter.

The proposed treaty does not change in any way the constitutional relationship between the President and the Congress with respect to the use of the Armed Forces of the United States. What we do will be in accordance with the constitutional processes.

If the Senator will refer to page 5 of the report he will find this language under the headline "'Monroe Doctrine' Formula," paragraph 6:

"The second element to be noted in the formula of article III is its replacement of the specific commitment language used in the North Atlantic Treaty—

Which I have just read—

"By what Secretary Dulles has called the Monroe Doctrine principle. Thus, each party, in article III, recognizes that the armed attack referred to therein would be dangerous to its own peace and safety. The action to be taken would then be determined in accordance with its constitutional process. By contrast, the North Atlantic Treaty formula makes an attack upon one tantamount to an attack upon all, so that such an attack, which might not take place against the United States itself, is nevertheless so regarded."

That is, in the North Atlantic Treaty.

"Because of the constitutional issues which the approach suggests, for example, whether an attack upon anothr gives the President the same inherent right to act as an attack upon United States territory, the language of President Monroe was regarded by Secretary Dulles as preferable when he negotiated the Philippine and Australia-New Zealand Pacts, and is reproduced in the Korean Treaty.

"In short, the phraseology of article III of the Korean Pact permits the United States to take any action we deem appropriate by our constitutional processes, and gives adequate assurance of support to the other country which may be the victim of an attack. It has the additional advantage of never having been challenged throughout our history, from the constitutional standpoint, as altering the balance of power between the President and Congress."

Mr. STENNIS. Mr. President, will the Senator from Wisconsin yield for another question?

Mr. WILEY. I yield.

Mr. STENNIS. Specifically the clause we are discussing means that before the United States can resort to force or use troops, before it can go to war, it will be necessary that the matter be brought before the Congress. Is that correct?

Mr. WILEY. I think the constitutional process in the case referred to by the Senator from Mississippi would call for a declaration of war by the Congress. I am not so naive as to say, however, that something might not happen which would be in the nature of an attack upon our forces or upon a part of our territory. In such a case we would not wait for a declaration of war; we would go into battle. Constitutional process might also include, withdrawing our ambassador, by the President, issuing of an Executive warning, cutting off aid, and so forth.

Mr. STENNIS. If the Senator will yield further, regardless of what particular circumstances might exist at the time the question may arise, are we committing ourselves now, in agreeing to this treaty, to go to war if Korea is attacked, without any declaration by the Congress?

Mr. WILEY. In my opinion, very definitely the answer is no, but we enter into an undertaking that if there is an overt act by an aggressor upon our ally, then we will do that which we think is advisable and in accordance with our constitutional processes.

Mr. STENNIS. Who is "we"? Is that the Congress, or is it the President?

Mr. WILEY. It is the Congress and the President who have to determine that question.

Mr. STENNIS. Under that interpretation, then, an act of Congress would be required before American forces could be used, or the United States could go to war under the treaty, as the Senator has explained it. Is that correct?

Mr. WILEY. As I understand the question, I agree that if an overt act is committed by an aggressor upon an ally, it then rests with the constituted authority,

to wit, the Congress, to decide whether or not we shall regard such aggression as a basis for going to war.

Mr. STENNIS. That is the interpretation the Senator from Wisconsin places upon the pact the Senate is considering today; is it?

Mr. WILEY. That is correct.

Mr. STENNIS. And on article III?

Mr. WILEY. Yes.

Mr. STENNIS. Will the Senator say that, in his opinion, that was the opinion of the committee which has reported the treaty, and which he represents on the floor today, the Committee on Foreign Relations?

Mr. WILEY. Supplementing what I have said, I would state that of course the President, as Commander-in-Chief, would undoubtedly come to the Congress, he would undoubtedly submit to the Congress a statement of the facts, and Congress would make the decision as to whether it would make a declaration war.

Mr. STENNIS. It is the opinion of the Senator that that is as far as the treaty or pact goes, and that it does not authorize an attack by us or obligate use to make an attack unless the Congress so declares?

Mr. THYE. Will the Senator yield for a question at that point?

The PRESIDING OFFICER. The Senator from Wisconsin has the floor. Does the Senator from Wisconsin yield?

Mr. WILEY. I desire to have the Senator from Mississippi to restate the question, because I wish to be very clear about the facts stated in the question. I might say that we always have to be very sure of our facts. As I have said many times, until one obtains the facts, one had better not apply a principle; otherwise one may apply the principle to the wrong set of facts.

Mr. STENNIS. Mr. President, I am very glad to try to restate my question, because I think it is a very vital question before the Senate. I am referring to article III. The last clause therein reads: "in accordance with its constitutional processes."

Applying that to the United States, and assuming that an attack might be made on Korea, my question is, Would the consent of the Senate to the ratification of the pact, or treaty, authorize the President of the United States to act without action by Congress, and to respond to an attack on Korea by force and send Korea aid, by the use of the Army, the Navy, or airpower, or to go to war?

Mr. WILEY. My answer is that there is nothing in the treaty which would change, delimit, or add to the powers of the President of the United States.

Mr. STENNIS. I know the Senator does not mean to be evasive. However, I am asking the Senator to go as far as he can in stating what he thinks the treaty means. The Senator is presenting the treaty to the Senate and asking for its ratification. In my opinion, merely to say that the treaty does not change the authority of the President of the United States does not go far enough to answer the question fully and directly.

Is the treaty a committal by the United States to go to war even though Congress does not so declare?

Mr. WILEY. I think I have answered the question. There is a certain angle to the question of the Senator which has been debated for almost 165 years. The President, as the Executive and as the Commander in Chief, under certain circumstances, in a number of instances, in our relations with countries in South America, has assumed the right and has exercised the power when there was a question of American rights being invaded.

Let me try to be so clear in this matter that there shall not be any suggestion whatsoever that I am trying to evade the issue. I have said that the treaty does not in the slightest add to or attempt to control or delimit the right of the constitutional power of the President of the United States. In substance, it becomes an agreement with an ally that if and when an aggressor attacks that ally, we will go to the aid of the ally only if and when constitutional processes are followed.

Mr. STENNIS. Mr. President, if the Senator from Wisconsin will yield further——

The PRESIDING OFFICER. Does the Senator from Wisconsin yield further to the Senator from Mississippi?

Mr. WILEY. I yield.

Mr. STENNIS. Then, Mr. President, let us suppose that such a condition arose that the President honestly felt justified and required the United States to go to war, but that Congress though to the contrary, or perhaps was not in session. Then we would be directly confronted with the question, What is the President's authority?

I should like to raise a further point for the consideration of the Senator from Wisconsin. This exact language is in article 43 of the United Nations Charter. This language leads most interested citizens to believe that it means the question would have to come before Congress, and that Congress would have to vote a declaration of war, before the United States could go to war. That would be my interpretation of the language, but there is a precedent to the contrary.

Now it is proposed that we reenact the same language. I think we are entitled to know the bottom rock opinion of every member of the Foreign Relations Committee in regard to exactly how far we are committed, before we vote on the treaty. That is why I am pressing for an answer to this question.

I fully appreciate the very fine sentiments of the chairman of the Foreign Relations Committee, and I know he is sincere in what he says.

Mr. WILEY. Of course, the courts have held that the United Nations Charter is not self-executing; and, of course, in the case of any obligation which we have undertaken under the United Nations, the meaning is simply that we are obligated to handle it under our own constitutional processes. This, to me, at least, is very clear. I believe it means—as I have said several times—that we have entered into an arrangement with an ally to protect that ally if she is attacked. Otherwise, there is no obligation whatever. But if our ally is attacked, still it will be up to our appropriate constitutional authorities to-wit, the Congress and the President, to determine how the United States will live up to the agreement. If a resort to war is indicated, then clearly Congress will have to take action.

Mr. THYE. Mr. President, will the Senator from Wisconsin yield to me at this point?

Mr. WILEY. I yield.

Mr. THYE. The question which has been raised is that before the United Nations can commit us to use our troops, the United States Congress have a right to act upon a resolution which might be before the Security Council, and we have a right to exercise a veto in the event such a resolution is adopted by the Security Council, and therefore we have that safety insofar as the United Nations is concerned. In the case of the treaty now before the Senate, of course we have a right to examine the various questions.

The only part of the Korean Treaty which seems to me to be dangerous is the part which might affect the troops we now have in Korea. Of course we expect to have them there for some months to come. In the event a conflict between the South Koreans and the North Koreans should arise, our troops would be in the center of the conflict. Then the President would have to have the right and the courage to proceed to protect our troops at the very moment when shellfire broke out. But I believe that within the United Nations we do have the security of having a resolution considered by the Security Council; and we have the right to veto that resolution if we must.

Mr. STENNIS. Mr. President, if the Senator from Wisconsin will yield further to me, I should like to boil down the question, repeating only a part of it: So far as language is concerned, virtually the same language is in the United Nations Charter; and a precedent was established under that language at the beginning of the Korean war.

It seems to me to be good logic and commonsense that if now we reenact virtually the same language, we reinforce the precedent which already has been established, we approve it, and we read into this language the meaning which has been given it. That is very clear; it is both law, logic, and precedent. Therefore, I am raising that particular point. I am not referring to all the conditions now existing in Korea.

As the Senator from Minnesota (Mr. Thye) has said, we already are at war in Korea. It is true there is a truce there now, but it is merely a temporary truce; and if a treaty of peace is not concluded, of course it is possible that our troops will have to resume the fighting. I am not trying to cover that point at all. Certainly our men will be protected.

But now the Congress is asked to legislate for the future, hoping at the same time that the present situation and condition will clear up. We are proposing to legislate for the longtime future, and it is proposed that we establish a precedent in the case of the continent of Asia. All the other agreements or arrangements were in relation to various islands in the Pacific, which at least can be surrounded by our aircraft carriers, submarines, and airpower.

But now we are proposing to deal with the continent of Asia and with a pact which will operate for an indefinite time in the future, unless terminated under its terms.

Therefore, I think this is the very heart of the question. If the language does not mean that the President can act without action by Congress, then what does it mean, and why include such languge?

Mr. WILEY. To put it in a little different way, let me say the language simply means that if there is an overt attack by an aggressor upon one of our allies, the United States will simply take whatever action is determined by the President and Congress to be advisable under the circumstances, having in mind the obligations under this treaty, if it is ratified.

Mr. STENNIS. The Senator says "the President and the Congress." He means, does he not, that the language would require affirmative action by Congress before the United States could enter into armed conflict or into a war?

Mr. WILEY. I think it means before we could get into a full-scale war; I am sure of that.

But I agree fully with the statement of the distinguished Senator from Mississippi, namely, that, regardless of wherever our troops may be, if they are attacked, they will not await action by the President in calling Congress into session: if an attack were made on any of our territory, the President would be obligated, as Commander in Chief, immediately to take the steps which would be advisable under the circumstances.

In that connection, I think the declaration of the 16 nations relating to the armistice is very significant, and I now ask unanimous consent to have it printed at this point in the Record.

There being no objection, the declaration was ordered to be printed in the Record as follows:

"DECLARATION OF THE 16 NATIONS RELATING TO THE ARMISTICE, JULY 27, 1953[1]

"We, the United Nations members whose military forces are participating in the Korean action, support the decision of the Commander in Chief of United Nations Command to conclude an armistice agreement. We hereby affirm our determination fully and faithfully to carry out the terms of that armistice. We expect that the other parties to the agreement will likewise scrupulously observe its terms.

"The task ahead is not an easy one. We will support the efforts of the United Nations to bring about an equitable settlement in Korea based on the principles which have long been estabelished by the United Nations, and which call for a united, independent, and democratic Korea. We will support the United Nations in its efforts to assist the people of Korea in repairing the ravages of war.

"We declare again our faith in the principles and purposes of the United Nations, our consciousness of our continuing responsibiilties in Korea, and our determination in good faith to seek a settlement of the Korean problem. We affirm, in the interests of world peace, that if there is a renewal of the armed attack, challenging again the principles of the United Nations, we should again be united and prompt to resist. The consequences of such a breach of the armistice would be so grave that, in all probability, it would not be possible to confine hostilities within the frontiers of Korea.

"Finally, we are of the opinion that the armistice must not result in jeopardizing the restoration or the safeguarding of peace in any other part of Asia."

Mr. WILEY. Mr. President, I shall read a part of the declaration of the 16 nations. It relates to the United Nations members whose military forces are participating. I read the following:

"We affirm in the interest of world peace that if there is a renewal of the armed attack, challenging again the principles of the United Nations, we should again be united and prompt to resist. The consequences of such a breach of the armistice would be so grave that in all probability it would not be possible to confine hostilities within the frontiers of Korea.

"Finally, we are of the opinion that the armistice must not result in jeopardizing the restoration or the safeguarding of peace in any part of Asia."

Mr. STENNIS. Mr. President, will the Senator from Wisconsin yield at this point for a brief question?

Mr. WILEY. Yes; I yield.

Mr. STENNIS. Of course, we protect our troops wherever they may be. However, apart from that, does the Senator from Wisconsin agree that before we

[1] U.N. Document S/3079, August 7, 1953, made public August 7, 1953.

would be called on to act under this treaty, affirmative action by the Congress, as well as by the President, would be required? Does the Senator agree to that?

Mr. WILEY. The Senator from Mississippi now speaks, does he, about the use of force?

Mr. STENNIS. Yes; the use of force.

Mr. WILEY. Very well. I think that if the circumstances were such as I have suggested, namely, if there had been an overt act of aggression, but our troops were not involved, or if there had not been an attack upon our own troops, but simply an attack upon the troops of our allies, it would necessarily follow, under article III, that we would act to meet the common danger; and our action at that time would be in accordance with constitutional processes. If it did not mean consultation, or something similar, with respect to which the Executive has the power, and if it meant utilization of the Armed Forces, I believe that Congress should and would have to decide.

Mr. STENNIS. I thank the Senator very much.

Mr. Cooper and Mr. Humphrey addressed the Chair.

The PRESIDING OFFICER. Does the Senator from Wisconsin yield, and if so, to whom?

Mr. WILEY. I have only a little left of my statement, and then I shall be glad to open myself to general questions, if that is agreeable.

Article IV of the Treaty grants to the United States the right to dispose United States land, air, and sea forces in and about the territory of the Republic of Korea, as determined by future mutual agreement. By contrast with the corresponding provision of the Japanese Mutual Security Treaty, the United States is under no obligation under the Korean Treaty to participate in the internal security of the Korean Republic, or, as I have already noted, to take any military measures as a result of a revolution within Korea. We can, in fact, pull out all our Armed Forces from that area any time we desire to do so; not that there is any such intention. The existing military situation in Korea makes it more than likely that the stationing of United States forces there will be in our national interest for some time.

As a consequence, a supplementary agreement to implement the terms of article IV will be needed to regulate the presence of our Armed Forces on Korean soil. Our committee has been assured that we will be consulted by the Department of State concerning the terms of the anticipated agreement.

The treaty is to remain in force indefinitely, although either party may terminate it 1 year from the date that it gives notice thereof to the other party.

Now, Mr. President, let me say just a few words about the United Nations. In our treaties with the Philippines, and with Australia and New Zealand, the parties agree to report to the Security Council any action taken to repel an armed attack. This language has been omitted from the Korean Treaty. Does this mean that the United States is disregarding its obligations under the U.N. Charter?

I want to dispel any doubts Senators may have on this point. The facts of the matter are these. Article 51 of the United Nations Charter, which relates the fundamental right of states to defend themselves against attack, specifically refers to members of the U.N. Since South Korea is not a member of the United Nations, it was deemed desirable, during the negotiations, to omit any reference to the Security Council in this treaty. This in no way reflects any change in the warm support of the present administration for the United Nations.

Mr. President, this is not a one-sided treaty. It is not a gesture of altruistic deference to the Korean people; but it is an instrument which is eminently in the best interests of both the United States and Korea. The Korean Army has been tested and tempered in the crucible of battle. It has proven itself to be a valiant, fearless, and able ally. In testimony before our committee, Gen. Matthew Ridgway referred to instances in the history of our operations which demonstrated that Korean troops, under Korean leadership, fought with much the same effectiveness as our own. According to General Ridgway the Korean soldier, if provided with proper training, equipment, and leadership, will fight with very great gallantry and very great efficiency. This military reservoir, which is not negligible, complements the deterrent effect which is the primary purpose of the treaty—to put the world on notice that we intend to defend the peace in Korea.

Prompt ratification of the treaty will prevent doubts from arising in the minds of those who covet the soil of Korea as to just what our intentions are. The treaty itself will be a stabilizing factor in an area which has known little stability for so many years.

Mr. President, the Korean Mutual Defense Treaty is a testimonial to a gallant people, a long-suffering people who bear the scars of a terrible scourging endured through 3 years of misery, 3 years of indescribable devastation, and its accompanying sorrow and hunger, disease, and death. Victims of a cruel and premeditated aggression carefully prepared by the Communist enemies of civilization, they fought a desperate struggle, at first inadequately armed and inadequately supplied but richly endowed with a spiritual resource that enabled Korea to bear up proudly under any adversity which would have humbled others in more fortunate circumstances and blessed with greater advantages.

We have been proud to call the Koreans our ally; and we are proud to have fought and worked with them. And we should be proud to join with them in this instrument of mutual faith and confidence, which will serve the cause of peace and freedom, and strengthen our Pacific defenses.

I strongly urge the Members of the Senate to accept the recommendations of the Committee on Foreign Relations, and to give their advice and consent to the ratification of this treaty, subject to the understanding which has been described.

In our discussion in the committee there followed, as a result of the contribution made by the Senator from Georgia (Mr. George), the understanding, which is made a part of the resolution of ratification. The understanding reads as follows:

"It is the understanding of the United States that neither party is obligated under article III of the above treaty, to come to the aid of the other except in case of an external armed attack against such party; nor shall anything in the present treaty be construed as requiring the United States to give assistance to Korea except in the event of an armed attack against territory which has been recognized by the United States as lawfully brought under the administrative control of the Republic of Korea."

I now yield to the Senator from Kentucky.

Mr. COOPER. I thank the Senator from Wisconsin for yielding.

The PRESIDING OFFICER. Is the Senator from Wisconsin yielding the floor, or yielding for a question?

Mr. WILEY. I yield for a question.

Mr. COOPER. I have been very much interested in the searching questions asked by the distinguished Senator from Mississippi (Mr. Stennis). I should like to say, first, that I do not believe that the wording of the United Nations Charter has relevancy in this situation.

I ask the Senator from Wisconsin if it is not true that the United Nations, contrary to popular belief held by some, has no power whatsoever to commit this Nation to war.

Mr. WILEY. That is correct.

Mr. COOPER. There is only one situation in which the United Nations might have any power to commit our troops. If under the Charter nations have made available to the Security Council of the United Nations fixed and permanent military forces, consenting in advance for their use to maintain peace, there would be authority to commit the forces. As this has not been done by the United States or any other nation, I say and I am sure the Senator from Wisconsin will agree—that there is absolutely no power in the United Nations, to commit this Nation to war.

Mr. WILEY. I agree.

Mr. COOPER. The Senator from Mississippi has raised the most searching question that can be addressed to this treaty. As the Senator from Wisconsin has said, it is the age-old constitutional question, "Under what circumstances can the President of the United States take action which, as a practical matter, may have the effect of committing this Nation to war without a congressional declaration of war?"

The phrase, "constitutional processes" must imply the powers of both President and Congress. Under the Constitution the President of the United States can assert under certain circumstances—such as our troops being attacked or our physical area being invaded—his constitutional power as Commander in Chief to take action for the security of the country. Such action could, of course, lead to war.

The important language in this article, it seems to me, in addition to the phrase "constitutional processes," which is difficult of interpretation, is the language defining the area, and conditions in which the United States would be morally committed to take some action under its constitutional processes.

I believe the distinguished Senator from Wisconsin has said that he did not intend to make a statement which would interpret in any way the words "constitutional processes" to exclude the constitutional power of the President of the United States as Commander in Chief to act, under certain circumstances which he might think proper, to protect the security of the United States. Is that correct?

Mr. WILEY. Yes, of course. Again we get into a field which has been the subject of discussion for some 165 years, as I have said. However, I believe that with the understanding which has been appended as a result of the suggestion of the Senator from Georgia [Mr. George] there can be no question as to what the meaning of the treaty is. As I have stated, there is nothing in the treaty which would delimit the constitutional power of either Congress or the President.

Mr. COOPER. We seem simply to speak in a circle and come back to where we started. What does "constitutional processes" mean?

Mr. WILEY. If it is not a Bricker amendment, if that is what the Senator has in mind.

Mr. COOPER. We come back to the question; What are the constitutional powers of the President and Congress with respect to taking steps toward war? I believe that the distinguished Senator from Wisconsin has said that, in the absence of such circumstances as demanded the protection of the security of the United States, we would certainly expect that Congress would determine whether the United States should go to war.

Mr. WILEY. I believe that expresses very forcefully the position I take as to what the language means. However, I cannot help but say that, as we discuss the treaty, which relates to a small country, a mere dot on the perimeter of the earth, so to speak, we cannot close our eyes to the fact that in the day in which we are living—and I say his very thoughtfully—I am sure if we could foresee any danger of a third world conflict which would make it advisable for the President not to convene Congress in Washington, where we could be immediately blown out of existence by a bomb, but himself to take the steps which were necessary under the circumstances, Congress should provide the machinery to make it possible to vote, if necessary, by television or in any other way, so that that which happened to Hiroshima could not happen to Washington.

The story has been told that the Commander in Chief was consulted on the wisdom of dropping the A-bomb on Tokyo, and he said, "If we do so, we will kill the Emperor, and kill all the high government officials in Japan. We cannot do that to Japan, because we need the Emperor, around whom the people can gather when we take over."

There will be nothing like that in a third world war. The object will be to paralyze at one time the entire Government—Congress, the Executive, and the courts. Consequently, there should be adequate machinery available whereby Congress could vote by long distance on the subject.

Mr. COOPER. Mr. President, will the Senator yield?

Mr. WILEY. I yield further to the Senator from Kentucky.

Mr. COOPER. I thank the Senator from Wisconsin. I know I share the hope of every Senator that there will be no resumption of the Korean war, but if there should be, there will be opportunity for Congress to take proper constitutional action.

But we cannot take away from the President his constitutional powers to protect our security, and I do not believe we ought to give to this treaty any interpretation which would permit any assumption that he would not act to protect our forces or to meet further aggression in Korea.

Mr. HUMPHREY. Mr. President, will the Senator yield?

Mr. WILEY. I yield to the Senator from Minnesota.

Mr. HUMPHREY. I feel that the questions which the Senator from Mississippi (Mr. Stennis) has asked and the probing he has done are of such significance that those of us who served on the Committee on Foreign Relations at the time of the discussion of the treaty should make our own positions quite clear.

First of all, I concur in the general analysis and interpretation of the treaty as given by the Senator from Kentucky (Mr. Cooper). When we mention the phrase "constitutional processes" we must remember that in article III of the Korean treaty, which is now under discussion, the phrase is preceded by the language: "would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes."

The Government of the United States would determine the action in the area which would be dangerous to its own peace and security.

The truth of the matter is that "constitutional processes" relate to two sections of our Constitution. The phrase relates to article I, dealing with the legislative authority of Congress to declare war. It also relates to article II, the Executive authority, in which article the President is made the Commander in Chief of the Armed Forces of the United States. He takes an oath of office to defend the Republic and uphold the Constitution.

It seems to me that to argue the question of constitutional processes is beyond the point. The fact is that the courts have interpreted, and the President, by effective Executive action, has made it clear and unmistakable, that the Executive, the President of the United States, under the Constitution, within the constitutional processes, can take the action he deems to be necessary in order to protect the peace and safety and security of the Nation.

The only reason we are entering the treaty at all is because we feel it is in the interest of the security of the United States to do so.

I asked the Secretary of the Army, Mr. Stevens, and General Ridgway whether it was their feeling that the defense of Korea was important to our national security. The answer is to be found in the hearings. General Ridgway answered unmistakably, as did the Secretary of the Army, that the defense of South Korea against armed attack was absolutely essential to the safety and jurisdictional integrity of the United States.

I want my friend, the Senator from Mississippi (Mr. Stennis) to know that I do not interpret the term "constitutional processes" to mean necessarily that there would be an open declaration of war by Congress.

I would hope that the preceding section of article II, which refers to consultation by the parties in case of an impending attack, would give the President time to come before Congress. However, it is entirely possible, as we sit here today, now at this very minute, that an attack could be launched against American installations in Okinawa or in the Philippines or in Korea. Surely under such circumstances we would expect the President to take effective action, as the Commander in Chief, to protect our forces and our interests. I want that point to be absolutely clear in light of the important questions which the Senator from Mississippi has asked.

It is important to bear in mind that we have a flexible defense structure, under which, as the Secretary of State and the Secretary of Defense stated, in answer to questions by Senators, it is the policy of the United States not necessarily to restrict action, in case of aggression in Korea or in other areas, to the immediate geographical area where the combat is occurring, but to pick and choose as we please.

I asked questions along that line of the Secretary of Defense and of General Ridgway, when they appeared before the committee. I asked General Ridgway the question: "Would we be limited under the treaty to confine our military action to South Korea?" His answer was that we would not be so limited, but that we would be able to pick and choose. He did not say where we would pick and choose, but he said that we would use our forces where we saw fit to use them.

I think we all ought to understand that fact that when we vote on the treaty, as we should understand what we are voting for I shall vote for the ratification of the treaty.

Mr. STENNIS. Mr. President, will the Senator from Wisconsin yield?

Mr. WILEY. I was about to yield to the Senator from Utah [Mr. Watkins]. I am perfectly willing to sit down and permit the Senator from New Jersey to speak on the treaty.

Mr. WATKINS. Mr. President will the Senator yield?

Mr. WILEY. I yield.

Mr. WATKINS. I did want to ask a question of the Senator from Wisconsin, but inasmuch as the Senator from Minnesota has made his statement I believe it is only fair to give the Senator from Mississippi [Mr. Stennis] an opportunity to make a statement.

Mr. STENNIS. Mr. President, the Senator from Minnesota [Mr. Humphrey] referred to the Senator from Mississippi, and I should like to have the opportunity or replying on the time of the Senator from Wisconsin, if he does not object.

Of course, if our troops were attacked in Korea or in Okinawa, or anywhere else, the President of the United States could immediately act to defend them. That, however, is entirely apart from the argument today. The question before the Senate today goes far beyond the sphere of activity of the United States Government in protecting American troops. It goes to the question of saying to a foreign nation: "If you are attacked, under any circumstances, we will come right into the fray."

That is the question before us. I ask now: By constitutional processes is it meant that Congress will be ignored? The Senator from Wisconsin has been very honest and has stated how Congress would enter the picture. Others may be just as honest and yet disagree. However, let us keep our eye on the ball. The question is whether, in certain circumstances, we will commit ourselves unconditionally to go into a foreign country. It is a new policy. The question is, What does "constitutional process" mean? If it does not mean that Congress is involved, why have that clause in the treaty? It it does not mean that Congress is to declare war, then I believe it is included argumentatively, and I say let us strike it out so that it may be clearly defined and a two-thirds majority of the Senate may give an interpretation. I think we should include the action of the Congress. We are treading on dangerous ground when we commit our selves to take action thousands of miles from home without giving Congress an opportunity to participate in the decision.

Mr. SMITH of New Jersey. Mr. President, will the Senator from Wisconsin yield for a moment?

Mr. WILEY. I will yield shortly. I do not think there is a great amount of difference between the two Senators who have spoken on the other side of the aisle. The treaty contemplates that an overt act of aggression being committed on South Korea—that is the single fact we will take into consideration—and that event there is no question in my mind that the phrase "constitutional processes" means action by the Congress. I have said so 3 or 4 times in different ways, but I again refer to the understanding which is made a part of the treaty:

"It is the understanding of the United States that neither party is obligated, under article III of the above treaty, to come to the aid of the other except in case of an external armed attack against such party; nor shall anything in the present treaty be construed as requiring the United States to give assistance to Korea except in the event of an armed attack against territory which has been recognized by the United States as lawfully brought under the administrative control of the Republic of Korea."

That expresses what we think the treaty means in relation to an overt attack by any nation upon South Korea.

Let us assume, as has been suggested, an attack upon Okinawa or upon our Armed Forces in Hawaii, and it comes to the knowledge of the President. He cannot permit our forces to be sitting ducks. His duty is to be alert and to be ready for any emergency, and the forces under him must be ready.

I do not think I can say anything more than I have said, that the treaty does not delimit the power of the Executive or the power of the Congress. Everything remains as is provided for in the Constitution. We are saying to an ally. "You remain at home. If an aggressor attacks you, then, pursuant to congressional authority or constitutional process, we will decide what we are going to do."

Mr. HUMPHREY. Mr. President, will the Senator from Wisconsin yield at that point?

Mr. WILEY. I yield.

Mr. HUMPHREY. The Senator's comments about the interpretative clause I think should be clearly understood to involve two things: First, to define the scope of the treaty, as the Senator has pointed out; second, if the Government of South Korea should start a unilateral action and try to defend Korea by military means, which was the subject of interrogation of witnesses, under this treaty, because of such unilateral action within the peninsula of Korea, started let us assume, by our partner to the treaty, we would be under no obligation to furnish military defense. This does not rule out the possibility that, as a result, it may be necessary for us to take action within the area to defend our own installations, our own interests, but it makes it clear that this treaty can be interpreted in no way as binding the United States to aid in some expedition on the part of Dr. Rhee.

I should like to make it clear, Mr. President, because we are at a point in foreign affairs where we must be mature and, I should say, somewhat bold and frank, that this treaty does not make mandatory a declaration of war on the part of the Congress of the United States. It does, however, require that the President of the United States, following constitutional processes in article I and article II, defend the security, the peace, and the interests of the United States.

Mr. President, I should like to quote what General Ridgway had to say. I said to General Ridgway in questioning him:

"Senator HUMPHREY. Do you consider the southern half of Korea as essentially necessary, or essential to our defense in the Pacific—to the defense of our own security and territorial responsibilities that we have in the Pacific?

"General RIDGWAY. Positively; yes, sir."

That is a clear-cut answer.

So, finally, it seems to me that the chairman of the committee has given, the only answer that can be given; namely, it bears upon the situation, and the President can surely come to the Congress if it is humanly possible, particularly if the hostilities are of great dimension; but no Congress would want to tie the President's hands in doing what is necessary for the fundamental interests and security of the Nation.

Mr. WILEY. We will determine the action for consultation, well and good. But if we should find ourselves in a situation similar to that at Pearl Harbor, where our country took action before it declared war, and the President asked later for a declaration of war under this treaty or any other treaty, we would not expect the President of the United States to stand idly by and see the security of our own country threatened and not take positive action.

I desire to make clear that the military authorities have said they believe the defense of South Korea is essential to our own security.

Mr. WILEY. Mr. President, I said I would yield to the Senator from Utah.

Mr. WATKINS. Suppose a situation exists in which the war which has been raging in Korea is settled, and a peace treaty is entered into. This treaty, I understand, extends beyond such a period.

Mr. WILEY. That is correct.

Mr. WATKINS. It goes on indefinitely.

Mr. WILEY. That is correct.

Mr. WATKINS. Suppose Korea were again threatened. Am I to understand that Congress would be required to act before the President could send forces to defend against another attack?

I notice the Senator from Minnesota [Mr. Humphrey] is shaking his head. I totally disagree with his interpretation of the powers of the President.

Mr. WILEY. If I understand the Senator's statement as referring to a threatened attack, does he mean there has actually been an overt attack?

Mr. WATKINS. Suppose another nation should attack Korea and the situation which we now have did not exist——

Mr. WILEY. I read, and I thought the Senator from Minnesota also referred to this language:

"Nor shall anything in the present treaty be construed as requiring the United States to give assistance to Korea except in the event of an armed attack against territory which has been recognized by the United States as lawfully brought under the administrative control of the Republic of Korea."

I think that if an armed attack occurred, it would be up to the President of the United States to submit the matter to Congress.

Mr. WATKINS. That is my understanding.

Mr. WILEY. I have said that 50 times.

Mr. WATKINS. I wanted to be certain. I desired to ascertain what would happen if we were enabled to get out of the present condition, which has never been legally declared to be war, but actually is war. When that situation has passed and there is peace again in the world, then, in the event of another attack upon Korea, or upon South Korea—let me put it that way—under this treaty, what would be the constitutional processes the United States would go through to become a party to that conflict or to decide not to become a party to the conflict?

Mr. WILEY. It would be necessary to follow the constitutional processes. The President would undoubtedly report the situation to Congress and in such a case, if the attack was simply an isolated attack upon South Korea by an aggressor, I think the language of the treaty is very plain.

Mr. WATKINS. That Congress would have to make the decision whether the United States would go to war or would not go to war?

Mr. WILEY. The Senator is correct.

Mr. WATKINS. That is what I wanted to have made clear.

Mr. BUTLER of Maryland. Mr. President, will the Senator yield?

Mr. WILEY. I yield.

Mr. BUTLER of Maryland. I am sorry I have not had an opportunity to follow the debate as closely as I should have. My question may already have been answered.

I wish to ask the distinguished Senator from Wisconsin if it is the desire of the contracting parties to leave the matter to their own individual constitutional

processes within their own countries, why does the treaty provide that we shall perform acts to meet dangers, instead of following the formula as laid down by the Atlantic Pact, which makes it optional as to whether we shall?

Mr. WILEY. I do not have any question in my mind that it is made optional, entirely depending on the act of Congress. Article II provides:

"ARTICLE II

"The parties will consult together whenever, in the opinion of either of them, the political independence or security of either of the parties is threatened by external armed attack. Separately and jointly, by self help and mutual aid, the parties will maintain and develop appropriate means to deter armed attack and will take suitable measures in consultation and agreement to implement this treaty and to further its purposes."

Then article III sets forth:

"ARTICLE III

"Each party recognizes that an armed attack in the Pacific area on either of the parties in territories now under their respective administrative control, or hereafter recognized by one of the parties as lawfully brought under the administrative control of the other, would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes."

In order to make it absolutely clear—and I have read this three times previously—the distinguished senior Senator from Georgia [Mr. George] submitted an understanding to be appended to the treaty, and all members of the Committee on Foreign Relations agreed that it should be appended. It reads as follows:

"It is the understanding of the United States that neither party is obligated under article III of the abov etreaty, to come to the aid of the other except in case of an external armed attack against such party; nor shall anything in the present treaty be construed as requiring the United States to give assistance to Korea except in the event of an armed attack against territory which has been recognized by the United States as lawfully brought under the administrative control of the Republic of Korea."

As we said by the distinguished Senator from Minnesota [Mr. Humphrey], the committee debated very clearly the issue: Suppose Syngman Rhee started the battle. Would there be any obligation on the part of the United States? The answer was, "No, there would be no obligation whatsoever."

Does that answer the question of the Senator from Maryland?

Mr. BUTLER of Maryland. I think the Senator has answered my question.

Mr. CHAVEZ. Mr. President, will the Senator yield?

Mr. WILEY. I yield.

Mr. CHAVEZ. I wish to clear up a point in my own mind. I am in accord with what the United States has done in the case of South Korea. But I see Korea divided into South Korea and North Korea. Suppose Syngman Rhee, possibly feeling as did Abraham Lincoln about our own country, that it should not be divided into South United States and North United States, decided to go to war about the division of Korea? What would be the obligation of the United States under the treaty?

Mr. WILEY. There would be no obligation.

Mr. CHAVEZ. The Senator will remember that once upon a time Lincoln took the United States to war on the question of a divided country, and many men from Wisconsin and every other State of the Union north of the Mason and Dixon's line fought in battle against those who lived south of the Mason and Dixon's line, who felt the other way about the question. If Lincoln was right, would Syngman Rhee, likewise, be right, if he declared a war to unite Korea?

I think I am asking a fair question. Should there be a South Korea and a North Korea?

Mr. WILEY. I shall be very happy to try to answer the Senator's question. First, if Syngman Rhee should precipitate a war, there would be no obligation upon the United States under this treaty.

Mr. CHAVEZ. That is the point.

Mr. WILEY. There would be no obligation whatsoever upon our Government.

Second, when Lincoln said there should be one nation, indivisible, he recognized that if the South should win, it would have been the beginning of "dividitis," and the United States would have been merely another country of the Balkan type.

Mr. CHAVEZ. What about Korea?

Mr. WILEY. So Abraham Lincoln was right.

Third, so far as Syngman Rhee is concerned, so far as the United Nations is concerned, and so far as the United States is concerned, we have said that we will take steps, and we are trying to take steps, to bring about a unification of Korea, but we will not go too far for that purpose. I think that policy is definite and certain. I think all of us sympathize with Syngman Rhee and with Korea. All of us hope that if and when the world conflagration simmers down, Korea can again be united and be one people. But that is some distance in the future.

The philosophy of this treaty was stated better than I myself could state it by our distinguished colleague, Mr. Dulles, who is now Secretary of State. The purpose is to serve notice upon those who caused the devastation in Korea that if they attempt to take South Korea, then we will take such steps, pursuant to our congressional processes, as we deem advisable.

Furthermore, as I have said, the United Nations has said substantially the same thing. Sixteen of the United Nations have declared that to be their policy.

Mr. CHAVEZ. I wish to thank the Senator from Wisconsin for his indulgence. The only point I wished to make, and I think the Senator from Wisconsin has answered my questions correctly, is that by our preachments we try to sell our ideas of government to other countries. But once in a while I become very much confused. I see South Korea, and I see North Korea. Yet we have the example of Lincoln, who was a peaceful man, permitting Americans to be killed in order to hold the United States together. I do not know for certain, but it seems to me that once in a while we are willing to have people of the same type and kind divided.

Mr. WATKINS. Mr. President, will the Senator yield?

Mr. WILEY. I yield.

Mr. WATKINS. I wish to ask the Senator from Wisconsin why a treaty is needed when we already have the United Nations operating. The United Nations is supposed to protect the interests of all the small nations of the world, and that covenant has still a long time to run.

Will the Senator explain why this treaty is needed, even though the United Nations has been and is supposed to be continuing to fight to defend the integrity of South Korea?

Mr. WILEY. I believe I answered the inquiry of the Senator in my opening remarks. I showed quite clearly that the reasons for the treaty was given by Secretary Dulles, and by the other witnesses who testified at the hearings. I think he will find the answer to his question.

My own conclusion is that, among other things, we have been precipitated into leadership in the world, and that we ought to enter into the treaty. I felt that in view of the treaties into which this country had entered with Japan, the Philippines, Australia, and New Zealand, it was necessary to serve notice upon the Kremlin that we would do what is set forth in the pending treaty. After all, the Kremlin is pulling the strings. The Kremlin pulled the strings when we were involved in hostilities with North Korea. After we defeated the North Koreans, the Kremlin induced General Mao and the Chinese Communists to enter the conflict. We fought the Chinese Communists and succeeded in halting them. About 2 million lives were lost in the conflict. We are stating to the Kremlin now, "If you start again, what follows may not necessarily have to be a limited war"—and it may not be a limited war.

In the opinion of that branch of Government which spearheads foreign policy, it was thought that to enter into the pending treaty would be in the interest of peace and security.

In the course of my remarks I called attention to the fact that if South Korea were defeated by the Communists, that country would become a spearhead right into the very heart of Japan. If the Kremlin could gain control of Japan, with its great industrial capacity, it would mean that all of Asia would be lost to the Communists, including the southeast. That area would include Japan, Formosa, the Philippines, Australia, New Zealand, and the rest of that vital area of the world.

I think it is the judgment of the best military brains—and I do not claim to be one of them—that it is necessary to cover into this treaty with Korea in the interest of America. I think that underlying that foreign policy is the basic principle if self-preservation, the preservation of the Nation itself. When steps are taken such as will be taken in consenting to the treaty. I think it will be the judgment of those who claim to know, who claim to have facts of which we have only a part, that the treaty is vital to the security of this country.

Mr. WATKINS. Mr. President, will the Senator yield for another question?

Mr. WILEY. I yield.

Mr. WATKINS. Is not the making if this treaty another confession that the United Nations does not have adequate power to do what it was created to do, and that the United Nations has substantially failed to protect all the smaller countries, and that that failure has required the United States to enter into a series of treaties in the Pacific, as well as to enter into the North Atlantic Pact?

Mr. WILEY. I do not think that the United Nations had, from the nations which constituted that organization, the authority to undertake the job. The United Nations is but an adventure in seeking to create some kind of unity at a crossroads of the world, where the black, white, red, and yellow men can meet and exchange ideas. However, there is no real power in the United Nations as yet. Perhaps when nations begin thinking alike, and dreaming a little more about fundamental spiritual factors, the United Nations may become a truly international force.

I might add the treaty is made pursuant to article 51 of the United Nations Charter, relating to the right of states to defend themselves. In the case of NATO in Europe, an organization of nations was built up for that very purpose. As a matter of fact, the United Nations Charter contemplates just such an organization.

Mr. COOPER. Will the Senator from Wisconsin yield for a question?

Mr. WILEY. I yield to the Senator from Kentucky.

Mr. COOPER. While we have an interest in the defense of smaller states against aggression, is it not true that one of the reasons behind the making of the treaty is as stated in article 3, a concern for the peace and safety of this country?

Mr. WILEY. Korea is not a member of the United Nations.

Mr. COOPER. Is it not true that we consider it important to the security of our own country?

Mr. WILEY. The Senator is correct.

Mr. COOPER. Mr. President, I remember that a year or two ago there were those who stated that the failure of the Government to announce that Korea was of interest to the United States and important to the peace and security of the United States was an invitation to invasion by the Communists and, in fact, helped precipitate the Korean war. Today we are considering a treaty which takes the day opposite course, and which gives effective notice to the Communist aggressors that Korea is important to our peace and security. Unfortunately, some of those who complained a short while ago that the United States had not given notice of its intentions now find fault with this treaty which makes it clear.

Mr. WILEY. I thank the Senator. The Senator is stating what I believe is one true reason for the negotiation of the treaty.

Mr. STENNIS. Mr. President, will the Senator from Wisconsin yield?

Mr. WILEY. I yield to the Senator from Mississippi.

Mr. STENNIS. As the Senator from Mississippi has indicated to the Senator from Wisconsin, I have a few more questions to ask. Some might be involved so far as the time taken to propound them is concerned, and if the Senator will be on the floor of the Senate at some later date in the debate, I should be glad to defer to him now for his lunch hour, and we can take these questions up here.

Mr. WILEY. If the Senator has something to ask, he had better ask it now.

Mr. STENNIS. Very well. Will the Senator yield?

Mr. WILEY. I am happy to yield.

Mr. STENNIS. I wish to preface my questions by saying that since early childhood I have had a very high respect for the Korean people. I know a little about some of the Christian missionaries who have gone among those people. I have had a most profound respect for the present Ambassador from Korea, and have found him to be a very intelligent and patriotic gentleman. Therefore my remarks will not reflect anything but praise and admiration for the Korean people.

As I understand, it is frequently said in a segment of the press that a promise was made to Syngman Rhee that the pending pact or treaty, or one similar, would be entered into, and that that promise was made to him before he would ever agree to the cease-fire. I was very much disturbed when Syngman Rhee released certain prisoners, and, as I understand, that delayed the cease-fire several weeks, during which times lives were lost.

As I have understood, through segments of the press and otherwise, before the cease-fire was finally obtained, a promise was made that the pending treaty would be consummated. Does the Senator know anything about that, and will he tell the Senate the facts on that point?

Mr. WILEY. The only information I have on the subject is that when Secretary Dulles went to Korea he entered into this agreement, but he said he would have

to submit it to the Senate, and that it would then be up to the Senate. He did comply with that promise, and submitted the treaty to the Senate, and the Senate Committee on Foreign Relations held hearings.

As to the other matters referred to in the Senator's question, about what he has read in the press, I have consulted with Dr. Wilcox, of our committee, and we have no distinct recollection about those facts.

There appears in the hearings a letter from President Eisenhower to President Syngman Rhee, in response to a letter from President Rhee. President Eisenhower's letter is dated May 30, 1953, and is found on page 53 of the hearings. In that letter President Eisenhower said:

"You speak of a mutual-defense pact. I am prepared promptly, after the conclusion and acceptance of an armistice, to negotiate with you a mutual-defense treaty along the lines of the treaties heretofore made between the United States and the Republic of the Philippines, and the United States and Australia and New Zealand. You may recall that both of these treaties speak of 'the development of a more comprehensive system of regional security in the Pacific area.' A security pact between the United States and the Republic of Korea would be a further step in that direction. It would cover the territory now or hereafter brought peacefully under the administration of the ROK. Of course, you realize that under our constitutional system any such treaty would be made only with the advice and consent of the Senate. However, the action which the United States has heretofore taken, and the great investment of blood and treasure which has already been made for the independence of Korea, are certainly clear indications of American temper and intentions not to tolerate a repetition of unprovoked aggression."

That confirms everything we have said before.

Mr. STENNIS. What the Senator from Wisconsin has said confirms, then, the article in the New York Times, dated January 22, in which the flat statement is made that—

"The mutual defense treaty with Korea was signed by the two Governments on October 1, 1953, and transmitted to the Senate for approval 11 days ago.

"The treaty was one of the conditions demanded by President Syngman Rhee, of South Korea, for his agreement to the Korean armistice. That demand, said the committee report, reflected the legitimate concern on the part of South Korea for its security in the postarmistice period."

Mr. WILEY. I cannot agree that that can be read into the President's letter. I think there were negotiations; and I can imagine that Syngman Rhee, under the conditions confronting him, should have had assurances. The President said in his letter:

"However, the action which the United States has heretofore taken, and the great investment of blood and treasure which has already been made for the independence of Korea, are certainly clear indications of American temper and intentions not to tolerate a repetition of unprovoked aggression."

Now let us back up the President and ratify the treaty.

Mr. STENNIS. But these representations were made, at least partly, in order to obtain a "cease fire." My point is that if the "cease fire" was obtained in that way, in a measure the Senate was largely committed to ratify this treaty.

My question is, Should not there have been some consultation? Of course, there might have been. I shall ask the question whether there was any consultation before this treaty was agreed upon, in substance. Was there any prior consultation with the Senator from Wisconsin or with any other member of his committee, so far as he knows?

Mr. WILEY. Yes; and in that connection I read from page 2 of the committee report:

"3. COMMITTEE ACTION

"Assistant Secretary Robertson, on his return from the preliminary negotiations with President Rhee, appeared before the committee on July 16, 1953, and gave a full report on the course of the negotiations, on the problems encountered, and on proposed future negotiations. This was supplemented by several consultations between the Secretary of State and the members of the Far Eastern Subcommittee during the negotiations."

The Senator from New Jersey [Mr. SMITH] was the chairman of that subcommittee.

I read further from our report, on page 2:

"In the light of these consultations, and the fact that the treaty was made public almost 2 months before it was signed and 5 months before it was trans-

mitted to the Senate, the committee felt that adequate opportunity for a full consideration of all the issues involved had been offered. Consequently, the committee proceeded to consider the treaty soon after its reference to the Senate.

"On January 13, 1954, public hearings began with testimony by Secretary of State John Foster Dulles, who discussed in detail the foreign-policy aspects of the treaty. The hearings concluded the following day with testimony by Secretary of the Army Robert T. Stevens and the Chief of Staff of the Army, Gen. Matthew V. Ridgway, who addressed themselves to the military aspects of the treaty. The committee considered the treaty in executive session on January 19, 1954, and voted without objection to report the treaty to the Senate with an understanding, which is discussed below.

"The committee wishes to commend the executive branch for its attempts to keep the committee informed during the course of the negotiations. Such consultations, properly timed as they were, can do much to build a spirit of cooperation between the two branches of the Government."

Mr. STENNIS. I have no particular complaint about that. My point is this: In order to obtain the cease-fire, in order that American boys might be spared the hardships of further military action, we had to make a promise for a mutual security pact of some kind, substantially like this one. Is that a fair statement of the situation?

Mr. WILEY. I do not think it is fair, because the President stated in his letter that he would enter into the treaty; and in the letter he also said:

"Of course, you realize that under our constitutional system any such treaty would be made only with the advice and consent of the Senate."

Mr. STENNIS. Yes; I am sure that point was made clear.

My question is this: Was not the agreement originally made—I refer to the agreement to negotiate this treaty through constitutional processes—under duress or semi-duress, in order to obtain a cease-fire, after we had been on the verge of a cease-fire a few weeks previously, but suddenly that possibility seemed to be blown up, so to speak, by the release of the prisoners?

Mr. WILEY. I have no information by which I can affirm or disaffirm that statement. But by consulting with the State Department, I imagine the Senator from Mississippi can obtain a very definite answer on that subject. I will say that no such statement was made before the committee.

Mr. STENNIS. Of course, in large part the Senator from Wisconsin is my consulter with the State Department, because I know he keeps up with these matters, and I know he will give us an honest report.

Mr. President, will the Senator from Wisconsin yield for another question?

Mr. WILEY. Certainly.

Mr. STENNIS. The committee report mentions a regional security pact in the Pacific area. It mentions it as a possibility and as something which the committee thinks is perhaps a desirable step. Does the committee have in mind, for the regional pact, a specific pact to which the United States would be a party?

Mr. WILEY. I remember distinctly asking the question whether there was under contemplation a NATO for the Pacific; and I remember distinctly, also, that the Secretary of State spoke on that subject. We include the following in our report:

"The committee, therefore, raised the question of a Pacific pact or Pacific NATO with the Secretary of State. Although he felt that such a development would have certain advantages, the Secretary pointed out that the Pacific counries have cultural and political differences in addition to physical separation, which distinguished that area from Europe.

"'I think it would be very fortunate if a Pacific security system could be developed and it certainly is a possibility which we have very much in mind, but it does not seem as though that could be achieved at any early predictable date.'

"The committee, while concurring in the Secretary's evaluation of the prospects for a Pacific pact, wishes nonetheless to express its belief that such a pact is a desirable ultimate objective of United States policy in the Pacific and hopes that the Department of State will continue to encourage such a development. The security of the Pacific area would be measurably enhanced if the nations of that region would join and work together for their regional and collective self-defense."

Of course, he went into detail, and, of course, what he said was correct. Those nations are somewhat in the same position as the one France and Germany have been in. Their approach to any degree of unity can be brought about, I believe, only by means of the very thing which we hope will bring about unity in Europe,

namely, the tremendous pressure of the Communists, which would require those nations to unite in order to save their own skins.

Mr. STENNIS. Mr. President, if the Senator from Wisconsin will yield further, let me say that brings us to another question: Instead of calling on the United States of America alone to enter into a pact with Korea to guarantee Korea against attack, why not make a real effort to obtain adherence to such a pact by some of the other Pacific nations that are close by Korea and certainly are as much bound up with Korea's future as are countries many thousand miles away? Why not make an earnest effort to have such nations join in a pact of that sort—if not in a Pacific pact, then at least in a group in which we would have some helpful standbys.

Mr. WILEY. I have no question that that group has been canvassed. The Secretary of State has said that such a pact does not seem possible in the predictable future. However, I do not think that prevents a future administration or the present administration from trying to bring about an agreement on the part of states which could constitute a real barrier to Communist advance in Asia.

But, again, dealing with that problem is like dealing with the problem now existing between France and Germany, and the Kremlin.

Mr. STENNIS. Mr. President, I thank the Senator from Wisconsin for his answers. I shall not detain him further.

Mr. WILEY. Mr. President, I thank all the Senators who have asked questions. I am sure their questions have been directly to the point, and I am sure they have brought into the picture considerable light which I failed to bring in during the course of my discussion.

Mr. SMITH of New Jersey. Mr. President, I have just had a brief discussion with the Senator from Mississippi [Mr. Stennis]. I told him there were a few matters which I wished to bring to his attention in reply to his questions. He would like an opportunity to go to lunch. I have a prepared speech on the Korean Treaty. I shall deliver that first and, if he will return to the Chamber after lunch, I shall be glad to discuss further with him the question which he has raised. In the meantime I shall deliver my prepared speech, which takes up some of the points. Later I shall be glad to discuss further the questions raised by the Senator from Mississippi. I shall try to make proper reply to them.

Mr. President, I rise to second and support the convincing argument made by the chairman of the Foreign Relations Committee, the able Senator from Wisconsin, in favor of the Korean Mutual Defense Treaty.

The future security of the Republic of Korea is a matter of definite concern, and immediately related to the security of the United States. The Secretary of State, when he appeared before our committee testified that our security interests extended to the Pacific island chain of Japan, the Ryukyus, Okinawa, Formosa, the Philippines, Australia, and New Zealand, a chain anchored by two land bases: Korea and Indochina. He pointed out that we have a security tie with all of these areas.

I may say parenthetically that I have just been to that area, as chairman of the Far Eastern Subcommittee of the Committee on Foreign Relations. At a later date I shall make a report to the Senate on that trip.

The Republic of Korea has demonstrated by its valiant and stouthearted stand against the Communists that it is a firm and dependable link. The magnificent fight put up by the South Korean troops against the northern invaders will not be forgotten by the free world. South Korea's anticommunism is tested and unquestionable. This brave country is a valuable ally for the United States and for the free nations.

So far I have spoken of what the United States will gain from this alliance. Let me say now, that the Republic of Korea will gain a much needed and well-deserved sense of security from the treaty. Concerned and appalled as we have been about casualties among American forces in Korea, our losses do not compare with the suffering during the past 3 years of the people of South Korea. Their land has been ravished, their homes destroyed, their sons and husbands killed, their families scattered. South Korea has paid a heavy price for its resistance to Communist aggression. And although the fighting has ceased, under an uneasy armistice, the Republic of Korea has no assurance that it will not be asked to pay the same price again next month or next year.

This brings me to the main point that I wish to stress about this treaty, its deterrent effect upon potential aggression in Korea. I believe that few Senators will quarrel with me if I say that had the Communists known in advance in 1950 that the United States and the United Nations would take firm action to

oppose their attacks, they would never have crossed the 38th parallel. A recurrence of this sort of aggression is exactly what this treaty is designed to prevent by giving the Communists a clear warning about United States reaction to such a venture.

I may say that this is one of a number of treaties which we have made with countries in that area to emphasize this warning. We have a treaty of mutual defense with Japan. We have such a treaty with the Philippines, with Australia, and with New Zealand, and now we have before us a treaty with Korea. It is part of a pattern which we are developing in order to give warning to the Kremlin that something will happen if there are any further aggressions in this area. The Communists will be in no doubt about our retaliatory action. The treaty says:

"Each party recognizes that an armed attack * * * either of the parties * * * would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes."

We have been discussing that provision for some time.

Article III was prepared with the greatest care. After considering a similar provision in the security alliances which we developed in West Europe under the NATO plan, we decided that, because under the NATO plan the treaty said an attack on one would be considered an attack on all, a difficulty was created, which occasioned a great debate when that instrument was before the Senate for consideration.

The question was whether, if there should be an attack, the President could act without constitutional processes, so we decided upon a different provision. I was in consultation with Secretary Dulles when the treaties with Australia and other countries were being negotiated. It was decided not to adopt the NATO pattern, namely, that an attack on one would be considered an attack on all, but the pattern of the Monroe Doctrine. So if we are now asked the question as to what would happen if one of those treaties were violated by an attack, we can well ask anyone who raises the question, "What would we do if there were an attack in some area of South America protected by the Monroe Doctrine? What are the constitutional processes which apply to such a situation?"

The same principle applies in connection with the treaty now before us. We have simply said, by this treaty and similar treaties with other countries, that we are giving a warning that we look upon the Pacific area as an area of danger to us—not to anyone else—comparable to the danger we saw when the Monroe Doctrine was first enunciated. Let me make that point clear.

Besides our unilateral guaranty to act to meet the common danger, Secretary Dulles pointed out that the Republic of Korea has also the guaranty of 16 United Nations members having troops in Korea that a violation of the armistice agreement will be met with countermeasures not necessarily confined to Korea.

It has been brought out very properly today that, of course, the present situation, with danger of a possible violation of the truce, is an immediate problem, and that we have very little doubt as to what we would do under those conditions. The United Nations is also committed as to what it would do.

The Korean Treaty looks beyond that, years ahead, and assumes that the Korean situation is to be cleared up. In this treaty we have the declaration of the Monroe Doctrine, that we would view with alarm a threat to our peace and security if there were any attack in the far eastern area.

Secretary Dulles said:

"What we mean by this is, we would no longer feel limited by the boundaries of North Korea and the Yalu River, no longer would there be a privileged sanctuary, as General MacArthur called it, north of which attacks against our forces could be mounted. We would feel free to extend hostilities to areas beyond Korea, if those areas were in fact being used as a base for attack against our forces in Korea."

In other words, we are serving a warning that something definite will happen in case there is a breach of the present truce.

A precise definition of our future action, such as that given by the Secretary of State, should be the greatest possible deterrent to anyone plotting further aggression in that area.

Between these two guaranties Korea can rest secure in the knowledge that it will not face renewed aggression alone.

One guaranty is the United Nations guaranty, with respect to which I have just quoted the Secretary. The other is the mutual-defense arrangement which we are setting up in the treaty with Korea. Korea can rest secure in the knowledge that it will not face renewed aggression alone.

When I was in Korea 2 months ago I observed that the conclusion of an armistice there and the 16-nation declaration had given South Korea a measure of relief and stability. The pledge contained in the mutual-defense treaty will increase this measure and, in my opinion, give Korea a sufficient sense of security to enable it to go forward with the enormous task of reconstruction without the enervating fear of an attack from the north.

This has not been possible yet.

Korea needs a breathing spell desperately to put its homeland in order again.

It is my belief that the Communists will probably not renew their aggression in Korea in the near future. The signs show that they are digging in for a prolonged armistice—an uneasy truce—and not preparing for a renewal of the fighting. In spite of these signs of course, we must remain on our guard in Korea. I may say that we are remaining on our guard in Korea.

I should like to devote a few minutes of my time now to stress the things that the treaty does not do.

The treaty does not compel the United States to come to the aid of President Rhee should he attempt to reunite Korea by force.

My distinguished colleague, the Senator from Wisconsin (Mr. Wiley), read the treaty in the Committee on Foreign Relations, on the motion of the Senator from Georgia (Mr. George), in order to protect us by reassurance against any suggestion that we might be called upon to act in case South Korea attempted to move unilaterally to bring about unification of Korea by force.

Much as we can sympathize with President Rhee's desire to see his country united, we cannot allow ourselves to become a party to an unlawful act such as unification by military might. As a nation, we stand on record as striving wholeheartedly for the peaceful unification of Korea, and we will continue to bend our every effort toward that goal, remote as it may seem to some people at the moment. A violent unification, however, is against the principles and purposes of the United Nations of which we are a member, and against the truce terms. In the event that President Rhee should try such an action, the treaty will not come into play. Article III, which I have already quoted, limits action to an armed attack on either of the parties "in territories now under their respective administrative control, or hereafter recognized by one of the parties as lawfully brought under the administrative control of the other." I have emphasized the word "lawfully" in order to focus the attention of the Senate to this limitation.

In other words, if Korea is united by lawful means—by agreement or treaty or by other means—then the whole of Korea becomes subject to the treaty, and we would be prepared to help defend the whole of Korea. However, we would take no part in uniting it by forceful means.

During the hearings held by our committee, I asked the Secretary of State specifically whether the wording or article III would deter President Rhee from unilateral action to reunite Korea. He answered me, stating that it makes clear to President Rhee that "if he does that, he would then be alone." So we are repeating again and again exactly the limitations of the treaty.

I might add at this point, that when I was in Korea I had a long talk with President Rhee. I feel that it has been made entirely clear that the United States must oppose any attempt on his part to go it alone. For myself, I believe that he will not violate the truce.

I may say parenthetically that I am one of those who are very sympathetic with his situation, and on the floor of the Senate I have stated that he has dedicated himself to see his country reunited.

One can understand how he felt, in a state of turmoil, when he thought we were going to settle on the 38th parallel or some other place, and leave Korea divided. We are sympathetic, Mr. President, but we are trying to persuade him not to act with force, and we are trying to persuade him that his best chance of uniting Korea is to work with his friends and with his allies, especialy the United States, to bring about the unification of Korea by peaceful means.

The second thing this treaty does not do is to run counter to our obligations under the U.N. charter. The treaty was negotiated under article 51 of the Charter, which preserves for each nation the right of individual and collective self-defense against an armed attack. The only obligation imposed by that article in connection with an armed attack upon members, is that the measures taken to repel such an attack shall be reported to the Security Council. If we do take measures, we must report them to the Security Council, but we definitely do not have to ask the Security Council whether we can take the measures.

We are, therefore, not dependent upon a green light from the United Nations before we can come to the Republic of Korea's assistance in case she is attacked

again. This means that a Soviet veto in the Security Council cannot stall prompt action on our part. We are free to do what we think is right and necessary under the circumstances. In the even of another attack, I am sure that our Government would work with the U.N. and report to the Security Council on any action taken.

Finally, the treaty does not go beyond the genera type of commitment which we have made in our other Pacific-area security treaties. To those treaties I have already referred.

In providing, as it does, that an armed attack on either party would be regarded by the other as dangerous to its own peace and safety and would be met, by each party, in accordance with its constitutional processes, the treaty remains squarely within the four corners of the Constitution, and is on all fours with the Monroe Doctrine, which has been in effect for a long time and which deals with any possible encroachment by European nations on South America.

So I suggest to my friends who are troubled that they ask themselves: What would be the constitutional process in case there was a threatened attack on South America by a European or other country? That is exactly the same question we have before us.

Mr. WATKINS. Mr. President, will the Senator yield? I should like to ask him to outline what those processes are.

The PRESIDING OFFICER. (Mr. Kuchel in the chair). Does the Senator from New Jersey yield to the Senator from Utah?

Mr. SMITH of New Jersey. I would prefer to wait until I have concluded my remarks. Then I shall be very happy to yield.

Secretary of State Dulles, who devised this formula when he negotiated the Japanese, Philippine, and Australia-New Zealand treaties, has characterized it as the Monroe Doctrine approach. It uses the exact words of President Monroe in his historical warning to European nations that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. The Monroe Doctrine has stood unchallenged on constitutional grounds throughout our history.

Before I close, I would like to refer briefly to the debate in the Senate last Friday during which a member of my distinguished colleagues on the other side of the aisle took issue with the administration's military strategy. Let me say to them that this question was also raised during the Foreign Relations Committee's consideration of the Korean Mutual Defense Treaty. The committee, in deciding to report the treaty, carefully explored with administration witnesses the defensive capacity of the United States in order to determine whether we have the military strength to shoulder this additional commitment. We, too, had read of the announced withdrawal of two American Army divisions from Korea, of military reductions, and of contract cancellations. I want to pass on to the Senate the assurances we received on that score. General Ridgway told us that the withdrawal of the two divisions would not weaken our position over there. "In fact," he said, "I think it would add to our flexibility."

I would also like to quote Secretary Dulles on this point:

"If we had to try to maintain ground forces, let us say, in Asia, to meet an attack by ground forces at any place where the enemy chooses to attack, then I believe that we are virtually subservient to the enemy.

"What we must do is to make cear that if there is such an attack, which involves our vital interests, our reaction will be, as I said last night, at places and by means of our own choosing. We will not necessarily allow the enemy to pick the rules of battle and the place of battle and the conditions of battle which best suit his purposes.

"By making that clear, as has been done in relation to Korea, in relation to Indochina. In relation to our vital interests in the Pacific, it is possible for us to protect our vital interests without an overextension."

That is the end of the quotation from Mr. Dules in explaining the withdrawal of troops and the principle of flexibility and retaliation.

Speaking for myself, I believe that the President's program ensures us sufficient military strength to meet our commitments as well as the new one in Korea that we are considering today. As for the so-called "new" strategy, it is tailored, in my opinion to meet the world situation confronting us, in which we need the utmost flexibility within our economic and military means, to react to any new threat of aggression.

In conclusion, I would like to express some thoughts on the Pacific area in general. Over the past years, I have become familiar with that region through periodic visits there—I made three visits there on three different occasions—and as chairman and formerly as ranking minority member, of the Far Eastern Con-

sultative Subcommittee of the Foreign Relations Committee. Over those years, I have noted an improvement in the situation there from the dark days of 1949 when China fell to the Communists. I believe that the nations of that area are becoming more alert to the threat of communism and that our military, economic, and technical assistance has given them a helpful start toward being able to meet that threat effectively. But I also believe that more can be done to encourage the idea of collective security in the Far East.

Mr. THYE. Mr. President, will the Senator from New Jersey yield?

Mr. SMITH of New Jersey. I would prefer to wait until I have finished with my remarks. Then I shall be happy to yield.

I hope the free nations of the Pacific will soon forget their differences and make common cause in a regional security arrangement, which in my judgment should be similar to the so-called American Monroe Doctrine and which would recognize that an attack anywhere in the Far East would affect the safety and security of all of us.

In making this statement I am not unaware of the great cultural, racial, and political differences which exist between the various nations in the Pacific, and I should state that we found that there would be difficulties in bringing about a regional pact among those nations at this time. However, we are still working on it. I am hopeful that their mutual aspirations and interests will override those differences.

Until the time that such a regional agreement is possible, the web of mutual defense and security treaties that we have negotiated with the Philippines, Australia, and New Zealand, Japan, and now the Republic of Korea, offers the best insurance against future aggression in that area so important to us. I therefore strongly urge the Senate to give its overwhelming advice and consent to this treaty and put the Communists on notice.

I shall be glad now to yield for questions.

Mr. Watkins rose.

The PRESIDING OFFICER (Mr. Kuchel in the chair). Does the Senator from New Jersey yield to the Senator from Utah?

Mr. SMITH of New Jersey. I yield.

Mr. WATKINS. While the Senator was delivering his address I asked him if he would outline the various steps in the constitutional process.

Mr. SMITH of New Jersey. We all agree that so far as a declaration of war is concerned, that is a congressional function, but we have two different situations existing. One is the present truce which is a precarious truce, with our men on the line in jeopardy in case of attack. We emphasized previously that in case of attack by the South Koreans, without any action by us, we would have nothing to do with it.

Mr. WATKINS. What would we do if South Korea provoked an attack?

Mr. SMITH of New Jersey. I discussed that with General Taylor at great length. He will have to be governed by the circumstances of the situation. It is very difficult to know just what to do. Before I discuss an attack under those circumstances, I want to consider an attack the other way. The question is, What are our constitutional processes?

Mr. WATKINS. Yes. What steps are we to take?

Mr. SMITH of New Jersey. With our troops in jeopardy I have no doubt that the President of the United States could move immediately. The Senator would agree with that, I am sure.

Mr. WATKINS. I should think so, because of the previous conflict which had been going on, and the temporary truce being only a breathing spell in it.

Mr. SMITH of New Jersey. If it precipitated a war, I would myself urge that the matter be immediately brought to the Congress, as I urged President Truman to do when the first attack was made. He should have done that. But the President may be on the spot. Confronted with a sudden danger to our peace and safety that he cannot now foresee, I would say that if the Monroe Doctrine principle came into effect, he would have to act immediately and rely on the Congress to back him up by a declaration of war.

Mr. WATKINS. Suppose there is peace in that area; suppose the armistice results in a peace treaty. This treaty will run on indefinitely. Suppose, then, an attack were made upon South Korea. What, then, would be the situation? Would the President have the power to order our troops into action there before coming to the Congress, or would he make the decision as to whether we should go war?

Mr. SMITH of New Jersey. We have a great many troops in the area. The Senator is not speaking about the troops being in jeopardy, is he?

Mr. WATKINS. Where the troops have been withdrawn, as they would be if a peace treaty were made.

Mr. SMITH of New Jersey. What does the Senator conceive to be the duty of the President in case of a violation of the Monroe Doctrine in South America? What has the President done in the past? He has certainly issued stern warnings. He would have to be prepared to move in, and there would be a declaration of war if the situation should reach such a serious stage. President Cleveland issued a stern warning that we were going to stand by the Monroe Doctrine. Great Britain at that time was the one causing the trouble, if I correctly remember my history. The circumstances would be about the same in this case. The President should be prepared to issue a stern warning and have Congress back of him and ask for the support of Congress. I think President Truman should have done that on the occasion when South Korea was invaded by North Korea.

Mr. WATKINS. I agree with the Senator. I think it is an important right for the men who are going to do the fighting and the dying to have a voice in the matter.

Mr. SMITH of New Jersey. Through the Congress?

Mr. WATKINS. Yes; through their representatives.

Mr. SMITH of New Jersey. I agree.

Mr. WATKINS. No President would have the right, unless we were attacked, to order our forces into action.

Mr. SMITH of New Jersey. I agree with the Senator, and I cannot see why the situation cannot be handled in that way. Under our constitutional processes we would handle it in that way. When we debated the NATO pact the question very properly came up as to whether it covered an attack on Paris, for instance, and whether the President, acting alone, could move to defend Paris. We said, "The language is too broad; it is too uncertain. Let us use the words 'constitutional processes' so that everyone will know that there will be at least that approach to the question."

That is my position.

Mr. WATKINS. The Senator asked me what I would say the process should be in the event some nation threatened to attack a South American nation, I would say that the issuance of a warning by the President would be one of the first steps, but before he ordered out the Armed Forces I would say that the President, by all means, should come to the Congress to get the power to take that action.

Mr. SMITH of New Jersey. I could not agree more thoroughly with the Senator. I agree absolutely with all the Senator has said. I cannot conceive of a situation where it would not be possible to do that.

Mr. WATKINS. In the case of the NATO agreement it was stated that there was an attempt to increase the war-making powers of the President. What I objected to was that by agreement we were attempting to increase the war-making powers of the President to order our forces into action. In the debate we finally got the legislative history of what occurred when the North Atlantic Pact was drafted. As I remember, the Senator from Georgia (Mr. GEORGE), who was present a few moments ago, said that article 11 was drafted in the committee itself, and that he was responsible for article 11 which provided, in effect, that the treaty would be ratified and its provisions carried out by the parties according to constitutional processes. That is, in substance, what was provided. That meant, it was said, that all steps in implementing the treaty should be by the Congress, and particularly the decision as to a declaration of war should be made by the Congress as should the decision with reference to sending troops outside United States territory in time of peace.

Mr. SMITH of New Jersey. I agree with the Senator. I have been advised by the chief of our Foreign Relations Committee staff that in the report on the NATO Treaty we made it clear that it was not intended in any way to enlarge the President's powers in the matter of declaring war. That was in the report which was made at the time.

Mr. WATKINS. Many persons have taken the position, and apparently the Truman administration took the position, that we sought in the NATO Treaty, to give additional power to the President, so that he could order out the troops without the approval of the Congress. In fact, there never has been approval by the Congress to sending troops to Europe under the NATO Treaty. The Senate alone passed an advisory resolution that the President should consult the Congress first.

Mr. SMITH of New Jersey. I wish to read to the distinguished Senator from Utah a quotation from the report of the Committee on Foreign Relations, when the NATO Treaty was presented to the Senate. I read from a volume entitled "A Decade of American Foreign Policy Basic Documents, 1941–49, 81st Congress, 1st Session, Published by the Committee on Foreign Relations":

"The committee does not believe it appropriate in this report to undertake to define the authority of the President to use the Armed Forces. Nothing in the treaty, however, including the provision that an attack against one shall be considered an attack against all, increases or decreases the constitutional powers of either the President or the Congress or changes the relationship between them."

That was in the report when the NATO Treaty was submitted to the Senate for action.

Mr. WATKINS. When I offered my reservation which required the adoption of a resolution by Congress to put us into a war in the event that any of the nations included in the treaty were attacked, or to send our forces abroad, the reservation was rejected. It was said by the chairman of the Committee on Foreign Relations at that time that to accept the reservation would be to cut the heart out of the treaty. But all it attempted to do was to say, in specific terms, that before such actions were taken, Congress should have the right to make the decision. Of course, I became suspicious of the whole proposal, and my suspicious were justified when the President did attempt to send troops abroad under the treaty without any authorization from Congress.

Mr. SMITH of New Jersey. That gave rise to the troops-to-Europe issue and to the long debate on the subject. That was the reason for the specific approach to this treaty, which we hoped would provide a sense of collective security in other dangerous areas. We did not use the NATO formula, but we used the Monroe Doctrine formula, which throughout the years we felt had proved to be constitutional and safe.

Mr. WATKINS. I might observe, in connection with this subject, that that presents a far difficult picture than we had in connection with the NATO Treaty.

Mr. SMITH of New Jersey. I hope the distinguished Senator from Utah feels that we have leaned over backward to try to provide the protections which he was anxious to have, and which all of us are anxious to have, namely, constitutional processes in our difficult, serious international relations.

Mr. WATKINS. I am happy to hear the Senator make that statement. I am glad we finally stopped the trend of attempting to increase the war-making power of the Executive by way of treaty. I may say that that was one of the things that gave rise to the proposed Bricker amendment.

Mr. SMITH of New Jersey. All of us are aware of that .We may have more debate on that subject before we finish with the general discussion on this subject.

Mr. WATKINS. I thank the Senator from New Jersey for his courtesy.

Mr. SMITH of New Jersey. Mr. President, I observe that the Senator from Mississippi [Mr. Stennis] is on the floor. I promised him that at the end of my address, I would be glad to answer any questions he might wish to ask. I yield to the Senator from Mississippi.

Mr. STENNIS. I appreciate the Senator from New Jersey yielding. I did not have the advantage of being here during all the time he was making his remarks. At the expense of repetition, may I ask him what is his answer to the question I propounded to the Senator from Wisconsin [Mr. Wiley] with reference to the interpretation of the phrase, "in accordance with its constitutional processes," as contained in article III.

Mr. SMITH of New Jersey. I may say to the distinguished Senator from Mississippi that I have discussed that question at some length with the Senator from Utah. I should be glad to refer the distinguished Senator to the RECORD, or I shall be glad to restate my position.

Mr. STENNIS. Does the Senator from New Jersey agree with the Senator from Wisconsin that it would require, as the Senator from Wisconsin repeatedly said, an affirmative act of Congress for the United States to use force?

Mr. SMITH of New Jersey. I called attention to the fact that there were two situations. One was the uneasy truce which now exists. If there were a violation of the truce, I believe the President would be justified in acting to protect our troops and, as a part of our obligation in the United Nations, to protect the troops of the United Nations. I assume the distinguished Senator will agree with that statement.

Mr. STENNIS. I do agree with that statement.

Mr. SMITH of New Jersey. Assuming that we pass the Korean truce stage, and that there is a new attack in the future, what I then called attention to was the fact that under this treaty we are virtually, by article III, putting our position in the Far East in the same situation as in the Western Hemisphere under the Monroe Doctrine. We say in article III:

"ARTICLE III

"Each party recognizes that an armed attack in the Pacific area on either of the parties in territories now under their respective administrative control, or hereafter recognized by one of the parties as lawfully brought under the administrative control of the other, would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes."

As we include the same clause in all our treaties, we are practically saying we are approaching the far-eastern situation in the same spirit as did President Monroe, when he warned the other countries of the world that aggression against the Western Hemisphere would be a matter of concern to the United States. As we know, down through our own history, the Monroe Doctrine has helped to prevent an outbreak of wars in this hemisphere.

We are seeking here the same approach as the Monroe Doctrine approach. Whatever constitutional processes would be required in the case of a violation of the Monroe Doctrine on this continent, I would say the same processes would be followed under this treaty, namely, the requirement of a declaration of war by Congress, except in some emergency in which the President had to act quickly in order to protect the safety of some our citizens.

Mr. STENNIS. I appreciate the answer of the Senator from New Jersey on that point. Then, unless it were necessary to protect some of our own citizens, including the protection of our own soldiers or servicemen who would be in the theater of danger, the Senator is not committing himself in this treaty to any obligation except through the process of a declaration of war by Congress?

Mr. SMITH of New Jersey. The Senator is correct.

Mr. STENNIS. The Senator is not going any further than that?

Mr. SMITH of New Jersey. No.

Mr. STENNIS. The Senator does not think the United States is committed to go any further than that, does he?

Mr. SMITH of New Jersey. Not as I see it.

Mr. STENNIS. Does the Senator from New Jersey agree with the Senator from Minnesota [Mr. Humphrey] in this point?

Mr. SMITH of New Jersey. I was not sure I thoroughly understood what was the real difference.

Mr. THYE. Mr. President, will the Senator yield?

Mr. SMITH of New Jersey. I yield.

Mr. THYE. I wanted to be certain that the reference by the Senator from Mississippi to the Senator from Minnesota was not a reference to me.

Mr. SMITH of New Jersey. I understood the Senator from Mississippi to be referring to the junior Senator from Minnesota [Mr. Humphrey].

Mr. STENNIS. The junior Senator from Minnesota is a member of the Committee on Foreign Relations.

Mr. SMITH of New Jersey. I was not entirely certain what the difference was between the junior Senator from Minnesota and our distinguished chairman of the Foreign Relations Committee, but my position in the matter is very clear.

I thought probably the Senator from Minnesota had reference to something that might happen unexpectedly, as to which we could not be too critical of the President if he used his discretion. That may be true. But fundamental constitutional processes mean that we follow the Constitution; and under the Constitution, Congress must declare war, if war is to be declared.

Mr. STENNIS. Did the Senator from New Jersey in his address cover the idea of a regional security agreement in the Pacific area, an agreement that might be called a Pacific NATO? Did the Senator speak on that point in his main address?

Mr. SMITH of New Jersey. I discussed the approach of NATO, and the Monroe Doctrine approach, quite extensively. I pointed out that in the negotiation of this treaty I had the privilege of cooperating with Mr. Dulles and with our Far-Eastern Subcommittee in the discussion of these approaches. We considered that we could not adopt the NATO formula, because to do so would cause difficulty on the floor of the Senate, with respect to understanding what was meant by the statement that an attack on one meant an attack on all. In other words, under the NATO formula, would an attack on Paris mean an attack on New York, and could the President act in such a situation? We leaned over backward to use the language of the Monroe Doctrine in formulating the far-eastern treaties, with the result that it is necessary for us to observe our constitutional processes.

Mr. STENNIS. I wish to ask 1 or 2 further questions. Did the Senator consider asking some of the other Asiatic nations to come forward and pledge themselves to the security of Korea? Was that considered by the Senator?

Mr. SMITH of New Jersey. I shall be glad to answer that question, because I have taken part in the discussions of that question, too. I have been to the Far East with Secretary Dulles and his associates. I have discussed the question at length with him and with Walter Robertson, Assistant Secretary of State for Far Eastern Affairs. I think there is not one of us who would not favor a collective security pact among all the Asiatic nations, but we have discovered there are differences between those countries. There are difficulties today that cannot be surmounted all at once. Some steps will have to be taken toward security before we can get the whole group into a mutual security pact. There is still very serious friction between the Philippines and Japan and serious friction between Japan and Korea. It will be found that there are some strained feelings between some of the countries which I have visited, as, for instance, between Indochina and Burma. W ecannot accomplish our purpose all at once, but we are working sincerely to the end of bringing about a security setup among those nations themselves, which will bear upon that area in the sense that the Monroe Doctrine bears upon the areas of this hemisphere.

Mr. STENNIS. Does the Senator from New Jersey contemplate that the United States would become a member of a so-called Pacific NATO?

Mr. SMITH of New Jersey. I have urged that the initiative should come from those countries themselves. They should set up such a mutual security organization among themselves. If the United States can be of help to them, well and good. But I do not believe we should take the initiative by trying to tell them what to do for their own defense. We can advise them, but we should not try to lead them into a pact by insisting that they join in it.

Mr. STENNIS. Does the Senator suggest or think that the United States of America should become a party to it?

Mr. SMITH of New Jersey. I think that the treaties which we have entered into were definitely wise, because the treaties reflect our sense of fear and apprehension about the Far Eastern area. I do not think we can avoid our share of the responsibility or avoid going at least as far as the statement in article III, which states that each party recognizes that an armed attack in the Pacific area would be dangerous to its own peace and safety.

In other words, if there were to be an armed attack in the Pacific area, this country would be alerted and alarmed, and would have to do something about it, and do it quickly. If there were an attack on Indochina by the Chinese Communists, as Secretary Dulles has given the warning, we will be right there, and the consequences which follow will have to be borne. We have warned aggressors that we are going to be alert to any aggression anywhere in that area, which means so much to our own peace and security.

Mr. STENNIS. Lest the Senator be misunderstood, is it correct that the Secretary favors a Pacific NATO in which we would be a party?

Mr. SMITH of New Jersey. I am opposed to a Pacific NATO. I am opposed to anything further than saying that an attack on a nation in that Pacific area would be dangerous to our own peace and safety. I am in favor of saying that we would be glad to consult with a nation which is so attacked, and to take such action as is provided under our constitutional processes and to do what we can to meet the aggression.

This is the Monroe Doctrine approach. At Rio we enlarged the conception of a unilateral Monroe Doctrine into a multilateral Monroe Doctrine. In the Far East we should be thinking of a multilateral Monroe Doctrine.

Mr. STENNIS. The Senator would extend to all other nations of Asia the pact we are now entering into with Korea, would he?

Mr. SMITH of New Jersey. I would not even say that. With regard to some, I would, and with regard to others, I would not. We would have to explore the situation which obtained as to each one of the nations. We began with our natural allies, Australia and New Zealand. The Philippines were, in a sense, a ward of ours. The Japanese are, in a similar sense, a ward of ours. Korea, which has become an essential ward of ours, is the last one. As to whether we enter into such a pact with other nations would have to be determined on the merits of each individual case.

Mr. STENNIS. There are at least a few nations of Asia to which the Senator would extend the same pact which we now propose to extend to Korea?

Mr. SMITH of New Jersey. No; I would not without investigating each one on its own merits. I would not want to be committed to that policy, because I do not know what the effects would be. I do say that we should be convinced that an attack on any country in Asia would be a danger to our own peace and security. We have given a warning ahead of time, and we would be alerted to it. Anyone starting hostilities would have to take the consequences.

Mr. STENNIS. If I may ask the Senator one more question, referring to the discussion with Syngman Rhee, it was stated in the papers that some promises were made with reference to a pact, subject to ratification by Congress, of course. Does the Senator know whether or not the proposal was made that the United Nations or some other nations should give this guaranty, either without the United States or including the United States, and that it was stated that Syngman Rhee refused to agree, and stated that it would be with the United States or no one?

Mr. SMITH of New Jersey. I cannot answer that at all, but I can refer the distinguished Senator to the Senate document in which appears the message of President Eisenhower on the Korean Treaty. On page 5 of the message of the President of the United States, there is a joint statement by Secretary of State Dulles and President Syngman Rhee. It is erroneously dated October 8, 1953, in the print. Actually, it was released August 7, 1953. I shall read only the beginning of it. If the Senator wishes, I suggest that he read all of it.

I also suggest that the Senator read the statement on page 7 of the message from the President of the United States, which was issued by the Secretary of State after the original initialing of the treaty by Secretary Dulles and President Rhee, on October 1, 1953.

I am now reading in part from what is called the joint statement by Secretary of State Dulles and President Syngman Rhee. The correct date on which it was released is August 7, 1953:

"Following is the text of a joint statement by President Syngman Rhee and Secretary of State John Foster Dulles following the conclusion of their talks at Seoul, Korea."

The distinguished Senator from Mississippi will remember that just as the Congress was adjourning last summer there was a plan to have some of the Members of the Senate go to Korea. The Senator from California (Mr. Knowland) and I were to go as Members on the Republican side, and two of our colleagues were to go from the Democratic side. We were to go to Korea to discuss the matter with President Rhee. We could not go because of the pending business in the Senate, and because of the lamentable death of our colleague, Senator Taft. However, Secretary Dulles, Ambassador Henry Cabot Lodge, Assistant Secretary Walter Roberts, and a number of others did go. They discussed the matter with President Syngman Rhee, following which the statement I am about to read was issued. I quote the beginning:

"Our friendly and understanding consultations demonstrate clearly the determination of the United States and the Republic of Korea to stand together in cordial cooperation to achieve our common objectives, including the reunification of Korea."

Of course, what was troubling Dr. Rhee was the question of the reunification of Korea. President Rhee felt that if Korea were divided at the 38th parallel, or any other parallel, it would be permanently divided. He was greatly disturbed that we were not going to carry on until a unification was brought about. In view of those facts our representatives went to Korea to discuss that matter.

The joint statement continues:

"We have today initialed a draft of a mutual defense treaty. That treaty is designed to unite our nations in common action to meet danger and it will cement the ties which have brought us together to combat in Korea the menace of Communist aggression.

"Our two Governments will actively proceed with the constitutional processes necessary to bring this treaty into full force and effect. These constitutional processes, in the case of the United States, require that the United States Senate consent to the ratification. The United States Senate, having adjourned this week, will not again be in regular session until next January. However, United States Senate leaders have been kept fully informed of the exchange of views which have led to the action we have taken today and it is our sincere hope that this will lead to prompt and favorable United States Senate action."

Mr. President, I shall not read further, but if the distinguished Senator will read the remainder of the statement, he will see what has been accomplished.

Mr. STENNIS. The Senator from Mississippi was confused as to the date of the report. Which is the correct date?

Mr. SMITH of New Jersey. The correct date in August 7, 1953. The date in the document is a misprint.

Mr. STENNIS. I thank the Senator from New Jersey.

Mr. SMITH of New Jersey. I have had called to my attention by Dr. Wilcox the discussion contained in the printed hearings. In appendix II there is contained an exchange of letters between President Rhee and President Eisenhower. The first is a letter from President Rhee to President Eisenhower, dated May 30, 1953, the next is a letter from President Eisenhower to President Rhee, dated June 6, 1953. The next is a letter from President Rhee to President Eisenhower, dated June 19, 1953.

I have not read the letters recently, but, as I recall, they did not involve any commitment or coercion; President Rhee wanted assurance that he would not be left alone with a divided Korea.

Mr. President, I yield the floor, and I thank the Senator from North Dakota for yielding until I could finish the colloquy.

## BARRING AMERICAN FORCES IN CAMBODIA

Mr. CHURCH. Mr. President, I rise to commend the distinguished Senator from Louisiana (Mr. Ellender), floor manager of this defense appropriations bill, and the members of the Senate Appropriations Committee, for the amendment the committee adopted to section 843 of the measure.

This is a very important action, consistent with the declared objective of the present administration to disengage American combat troops from Southeast Asia. It is an action, moreover, which implicity recognizes that spending money for military purposes in a foreign land readily leads to the involvement of American personnel and then to the commitment of American troops.

To avoid just such a sequence of events in Laos and Thailand, the Senate adopted last December an amendment in the nature of a substitute, which I offered to an original amendment proposed by the distinguished Senator from Kentucky (Mr. Cooper). This amendment, adopted by a vote of 73 to 17 on December 15, 1969, prohibited the use of any funds in last year's defense appropriation bill to finance the introduction of American ground combat troops into either Laos or Thailand.

The following morning, at a Cabinet meeting, President Nixon indicated his willingness to accept the amendment, acknowledging it to be in accordance with his announced intentions. White House spokesmen indicated, at the time, that the restriction was consistent with the President's own objective of keeping the United States out of a wider war on an expanding front in Indochina.

But the amendment, as adopted, represented something more than an affirmation of Presidential policy. It was also, in a very real sense, a reassertion of congressional control over the spending of public money in countries neighboring on the war front in South Vietnam. It was more than the expression of the sense of Congress that the United States should not become involved in a spreading war in Southeast Asia; it was an exercise of congressional power denying funds for such a purpose, insofar as the use of American ground combat troops were concerned.

On October 14, 1970, Senator Cooper and I addressed a letter to the distinguished chairman of the Senate Appropriations Committee (Mr. Russell) asking that the committee give consideration to extending the prohibition in the law to include Cambodia, along with Laos and Thailand.

I ask unanimous consent that the text of the letter be printed at this point in the record.

There being no objection, the letter was ordered to be printed in the record, as follows:

OCTOBER 14, 1970.

Hon. RICHARD B. RUSSELL,
*Chairman, Committee on Appropriations, U.S. Senate,*
*Washington, D.C.*

DEAR MR. CHAIRMAN: As you well know, we submitted an amendment to the Defense Appropriations bill last year, which was modified on the Senate floor on December 15th, barring the use of U.S. funds to introduce American ground combat troops into Laos or Thailand. We are happy to note that this same language is included in this year's bill, H.R. 19590.

Because of the recent debate over American operations in Cambodia, we are requesting that Section 843 be amended in Committee by adding "or Cambodia" to the present wording. Hence, the Section would read:

Sec. 843. In line with the expressed intention of the President of the United States, none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos, Thailand or Cambodia.

Thank you for your consideration of this matter, and we look forward to hearing from you in the near future.

Sincerely,

JOHN SHERMAN COOPER.
FRANK CHURCH.

Mr. CHURCH. Mr. President, it is most gratifying that the committee has responded affirmatively to this request. In doing so, the committee has taken cognizance of the majority decision of the Senate on a subsequent Cooper-Church amendment, approved by this body on June 30 of this year by a vote of 58 to 37. Had that amendment become law, more extensive restrictions would have applied to military spending in Cambodia than a simple prohibition against introducing American ground combat troops.

So the action the committee has taken with respect to the pending bill is altogether in line with the previous judgment of the Senate.

In amending section 843, the committee has used the language of last year, which the President approved, adding only the words, "or Cambodia." Once more, this goes hand in hand with the President's declared objective that, in the future, Asian governments must rely on their own armed forces—rather than ours—for their self-defense.

The section, as amended, now reads:

Section 843. In line with the expressed intention of the President of the United States, none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos, Thailand, or Cambodia.

I trust that the Senate will uphold the committee's decision; and I hope that, once passed by the Senate, the amendment will be retained in conference, and signed into law by President Nixon.

As part of the law, the amendment would help enforce the President's own declared resolve to prevent the United States from being drawn into a larger war, a goal that has the overwhelming support of all the American people.

Moreover, as part of the law, the amendment would constitute a further expression of the right of Congress to determine where and how public money is spent. Should the time come in the year ahead when the President decides we should send American combat troops into Laos, Thailand, or Cambodia, he would be obliged to come to Congress first for its consent. This is what the Constitution intended.

For all these reasons, Mr. President, I commend the Senate Committee on Appropriations for the statesmanlike action it has taken.

I ask unanimous consent that pages 10 and 11 of the Committee on Appropriations report—No. 91-1392—to the Department of Defense appropriations bill, 1971, be printed in the Record.

There being no objection, the excerpt was ordered to be printed in the Record, as follows:

PROHIBITION AGAINST THE USE OF FUNDS FOR THE INTRODUCTION OF AMERICAN GROUND FORCES INTO LAOS, THAILAND AND CAMBODIA

Section 843 of the bill as it passed the House provides that none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand. The committee recommends that this provision be amended to include Cambodia, so as to read as follows:

"SEC. 843. In line with the expressed intention of the President of the United States, none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos, Thailand, or *Cambodia.*"

This matter was debated at length by the Senate earlier in this Session in connection with an amendment to the Foreign Military Sales Bill (H.R. 15628), and the Senate adopted, on a roll call vote of 58 yeas to 37 noes, an amendment which reads as follows:

"Sec. 7. The Foreign Ministry Sales Act is further amended by adding at the end thereof the following new section:

"'Sec. 47. Limitations of United States Involvement in Cambodia.—In concert with the declared objectives of the President of the United States to avoid the involvement of the United States in Cambodia after July 1, 1970, and to expedite the withdrawal of American forces from Cambodia, it is hereby provided that unless specifically authorized by law hereafter enacted, no funds authorized or appropriated pursuant to this Act or any other law may be expended after July 1, 1970, for the purposes of—

"'(1) retaining United States forces in Cambodia;

"'(2) paying the compensation or allowances of, or otherwise supporting, directly or indirectly, any United States personnel in Cambodia who furnished military instruction to Cambodian forces or engage in any combat activity in support of Cambodian forces;

"'(3) entering into or carrying out any contract or agreement to provide military instruction in Cambodia, or to provide persons to engage in any combat activity in support of Cambodian forces; or

"'(4) conducting any combat activity in the air above Cambodia in direct support of Cambodian forces.'

Nothing contained in this section shall be deemed to impugn the constitutional power of the President as Commander-in-Chief, including the exercise of that constitutional power which may be necessary to protect the lives of United States Armed Forces wherever deployed. Nothing contained in this section shall be deemed to impugn the constitutional powers of the Congress including the power to declare war and to make rules for the Government and regulation of the Armed Forces of the United States."

The committee's recommendation for the inclusion of Cambodia in this provision is based on this earlier action of the Senate.

Senator STENNIS. Well, that is the way I felt about it, Senator, and Senator Wiley agreed that it would take a declaration of war to commit us——

Senator COOPER. Not as strongly as you seemed to propose.

Senator STENNIS. Well, maybe not as strongly.

Mr. Chairman, I have a copy here of the speech I made on the floor on the subject matter of the resolution. May I ask that it be inserted in the record?

The CHAIRMAN. We would indeed.

I wanted to congratulate you. I remember a speech you made in Mississippi; it was along the same line, wasn't it, about war powers?

Senator STENNIS. Yes.

The CHAIRMAN. And it was referred to a moment ago.

Senator STENNIS. This is more of an elaboration. I made this on the floor of the Senate May 11, 1971.

The CHAIRMAN. We will certainly be glad to have it.

Senator STENNIS. Well, thank you.

(The speech referred to follows:)

[From the Congressional Record, May 11, 1971]

(By Mr. Stennis)

S.J. Res. 95. A joint resolution relating to the authority of the President to use the Armed Forces of the United States in armed conflicts. Referred to the Committee on Foreign Relations.

Mr. STENNIS. Mr. President, my remarks at this time will concern the power and the responsibility of Congress, under the Constitution, regarding a declaration of war. I shall discuss a constitutional and policy question that has concerned me for many of the years that I have been privileged to be a Member of this body. I do not believe it is an exaggeration to say that this policy question is the most important and fundamental to face us during this decade. The question is whether or not we shall return to that constitutional mandate found in the original text of our Constitution, as adopted in 1787, which provides that Congress

shall have the power to declare war. I strongly favor following this mandate, and I am today introducing a resolution which reaffirms the constitutional power and duty of the Congress to pass on the question of a declaration of war, and which proposes regulations concerning our use of armed forces in emergencies.

My remarks today are prompted solely by a conviction of many years—that our Nation should not be committed to a war except by a declaration of war by the Congress.

My remarks and my action today have nothing whatsoever to do with the handling of the war in Indochina, by President Nixon, or by any preceding President, I shall not try to place blame for the fact that we got into this war, nor criticize in any way the methods used in the conduct of the war now or in the past. The resolution I shall introduce expressly provides that it shall not apply to the present war in Indochina.

Neither are my remarks in any manner a criticism of Congress, or any Member thereof for events of the past. I was a Member of the Senate when the Korean war started. In 1954, when we first sent troops into South Vietnam, I vigourously opposed such action, but along with others, I did not sufficiently oppose it in 1965. I fully assume my part of the responsibility for what happened in 1965. But regardless of how it began, this war is being wound down by the President, and I support him in his efforts to that end.

I know that had the Congress debated a declaration of war rather than a measure such as the Tonkin Gulf resolution, the subject matter of which has been of so much concern to the membership of the entire Congress, it would have been passed on only after exhaustive consideration and debate. The people of the entire Nation would have been alerted, aroused, and rightfully greatly concerned, had this been a proper declaration of war. Some say that we must abolish the draft in order for the Congress to establish its rightful role in the balance between the executive and legislative branches. I do not believe this is true. I believe that Congress should assert its role in this type of decision directly through a declaration of war itself based on provocation. The Congress should not approach the problem indirectly.

In debates in the Senate regarding the proposed adoption of the mutual defense treaties, I repeatedly raised the point that we were not to be committed to war except through constitutional processes, and that these processes included the step of congressional action, which meant a declaration of war by Congress. Many other Members of the Senate, other officials and leaders, made the same point before committees and on the Senate floor. I claim no special credit for these positions, but point to my record in the years past solely to show that my basic position now is the same as it was many years ago.

Some of the Senate speeches and colloquies to which I have referred can be found in the following places in the CONGRESSIONAL RECORD: First, a colloquy with Senator Wiley on January 26, 1954, printed in the RECORD December 8, 1970, by Senator COOPER at page S19695; Senator Wiley was then chairman of the Senate Foreign Relations Committee and was submitting a treaty to the Senate; second, a speech and colloquy with Senate and late President John F. Kennedy on March 9, 1954, at page S2902; and, third a speech and colloquy with Senator LONG of Louisiana on May 11, 1954, at page S6359.

I refer today to the pesent war only for the purpose of taking a new starting point and seeing what lessons we can learn from experience. Mr. President, I have learned, and I believe millions of American people have learned, that we must return to the original safeguard before our Nation can be committed to a state of actual war with any nation; that is, the Congress, representing the people, must so declare.

We have also learned, Mr. President, that unless this course is followed, the people as a whole do not feel committed; thy do not and cannot have a full sense of personal commitment and personal obligation. This is no reflection on any President and, further, I give all Presidents full credit for the utmost good faith in dealing with these momentous problems, including events prior to and during the present war.

Mr. President, I have not been one of the principal advisers to the Presidents. However, in this period that the statement covers, I did have personal contact with all of these Presidents, more than once, beginning with the late President Eisenhower, then the late President Kennedy, former President Johnson, and then President Nixon. I can say that they were dealing in the utmost good faith, surrounded as they were by these tremendous problems, a complete solution to which no one could find. So, I mention that as a background that might add a little value to things I might say.

The fact of the matter is that the decision to make war is too big a decision for one mind to make and too awesome a responsibility for one man to bear. There must be a collective judgment given and a collective responsibility shared. That is exactly the tone, the letter, and the spirit of the Constitution of the United States.

Let no one say, Mr. President, that this is a contest between the legislative and the executive branches of our Government, this matter of a declaration of war.

The very opposite is true. The judgment and the responsibility on the grave question of declaring war has to be shared by both the executive and the legislative members. As a practical matter, no congressional declaration of war will ever be made without the President's having great weight in the decision, and a major part of the leadership in that decision. That would, of course, be proper and any other course would be improper.

Mr. President, this is not merely a theoretical concern. I believe the absence of a declaration of war has harmful practical effects. I would even say that I do not believe the United States could expect to prevail in a conventional war in the foreseeable future which was not declared by Congress. Although we have accompished much in Southeast Asia—and I have never discredited what we have accomplished—the scars on our society are deep and public support for any future hostilities in an undeclared war should not be taken from granted. That is one of the lessons of Vietnam. That is one of the lessons of post-World War II. The state of future hostilities in an undeclared war should not be taken for granted.

The chances for peace for our Nation are far better, I think, if there is compliance with the following two policy positions.

I am thinking of the future and not thinking of past wars. The chances for peace for our Nation are far better. I think, if there is compliance with the following two policy questions:

One, that we be militarily prepared to defend our own security by meeting a major military thrust of any kind that might be thrown against us. Further, we must have sufficient military strength for us to be able to do our part in carrying out our commitments. By being militarily prepared, I always include the condition of having more strength available than that which is barely enough. We must have a preponderance of military strength, and that means having a sufficiency of the very best weapons, with ample numbers of highly qualified men, trained and ready to go. The qualifications and the training are far more important than the numbers.

The second position is to have the firm policy that our Nation will not be committed to a war unless there is a declaration of war by Congress. As I shall point out the President should be permitted certain emergency authority to respond to an attack upon us. But under the Constitution the decision of whether we are to go to war belongs, in the final analysis, to the elected representatives of the people. It is they who are directly responsible to the people and who have to answer on a personal and official basis for the exercise of their very best judgment. It is they who must personally assume responsibility in a yes or no vote on the question of whether our Nation shall declare a state of war to exist with another nation, or nations.

The pressures are simply too great to be carried by one man and one mind alone. Matters that lead to a prospect of war almost always happen step by step, day by day, week by week, and month by month.

I call that to the especial attention of the Members of this fine body who have not been here but a few years. No man, no Chief Executive, feels free to back up when his action could be interpreted as a sign of weakness on his part. Furthermore, there are tremendous pressures—the pressures of politics, and the pressures of advisers. There is pressure from professional military advisers and from civilian advisers in th White House, the Department of State, and the Department of Defense and other advisers. These advisers are naturally proud of the capabilities they control and for which they are responsible. They want to serve the President loyally and give him forceful advice. They are serving their country loyally and they are highly qualified in their field. But, with all deference to them, they should not have the last word with reference to whether or not we inch forward and go to war. Our constitutional system places that decision in another forum—among those of us who, as Mr. Thoreau once said, may hear a different drummer.

These are my fundamental beliefs and conclusions based on years of experience here in the Senate. I remember I was standing at the desk which is behind me

now when the news came into this Chamber that troops had been ordered to land in Korea. I knew that that was the first time in our history a deliberate decision had been made to land troops, an Army, in a war against another nation without a declaration of war by the Congress of the United States. I am not being critical of the man who gave that order. There had been skirmishes and battles at sea and the repelling of force with force, as at Pearl Harbor, but I knew then and there, and I never forgot how I felt about that commitment. I was salved in a way by thinking, "It is the United Nations Security Council which ordered this, and that to a degree is a committal of us." I pushed it aside for the time being, but I have never forgotten that a principle was involved. I have already referred to the developments in the present war. I am not blaming anyone, but I know that inch by inch, foot by foot, step by step, and crisis by crisis we were in, and yet we have never stood up here and said that in our judgment we ought to go to war.

We debate back and forth here day after day things that seem so small by comparison with the fundamental question we are up against: What are we going to do in the future?

Even though the present war is not over, and I am supporting the President as he copes with the problems involved, nevertheless, I feel that to a degree we are already in the postwar era. That is why I have been thinking about this matter. The subject has been brought up and advocated by others, and I, of course, welcome the discussion. Personally, I might have put it off a little longer—I am speaking of the postwar policy—but I am afraid we are emphasizing and thinking too much about the past, and I am not speaking with respect to this bill that is now pending at this time. Let us look to the future.

With policies and courses of action for the future being considered and formulated, I, therefore, feel that this resolution is presently in order and should be passed, after thorough understanding and debate.

I do not mean passed within a week or a month. I think this matter should be pending for a year or more. It must be understood in every facet and the people must understand fully the question that is involved.

Mr. COOPER. Mr. President, will the Senator yield?

Mr. STENNIS. I yield.

Mr. COOPER. I do not wish to interrupt the Senator; I know how deeply he feels about these great constitutional decisions of peace and war. That the Senator has come to this day and time is of tremendous consequence in our country and in Congress.

I have not read all of the Senator's speech, but his proposal should be considered and debated thoroughly by the Senate.

I recall that in 1954 when the subject of the approval of the bilateral treaty with Korea was before the Senate, the Senator from Mississippi raised the question of constitutional process, which was the great question connected with that treaty. I can remember he argued at that point that Congress should make the decision.

I hope the Senator will forgive me for interrupting him, but I did wish to make that point.

Mr. STENNIS. I express my appreciation and gratitude to the Senator from Kentucky for his fine service and for what he has meant to me in my efforts in trying to fulfill my office.

Mr. President, I shall now discuss briefly the history and background of this provision of our Constitution.

At the Philadelphia convention where the Constitution was written, the framers made a distinction between declaring war and making war, changing proposed wording that gave Congress the power to make war to wording which gave Congress the power to declare war, article I, section 8, 11. The President, it was agreed, should have the power to repel sudden attacks. The President's explicit power, as stated in the Constitution, is as Commander in Chief; his implicit power is that "he shall take care that the laws be faithfully executed—article II, section 2, 1, 3. Together, these statements give him the power to make war after it has been authorized by Congress. Congress was also given general appropriations power, with military appropriations limited to 2 years at a time—article I, section 8, 12. This power of appropriations enables Congress to cut off the funds if it disapproves of the war that is being waged. But the power of appropriations is not the best instrument, or even an appropriate instrument, to prevent involvement in wars or to stop wars that have already been started. What is needed is an assertion of the power and responsibility of Congress before the fact of involvement.

It has sometimes been argued that the constitutional balance in the war powers is a dead letter because of the erosion in congressional prerogatives over the years. I do not believe that this is true, not by any means. I think there is some confusion, and it is vital that the role of Congress be made clear. For example, I believe it is deceptive to assert that the large number of unapproved force commitments in the past ties our hands in the future. First, some of these conflicts were very small matters, perhaps not appropriate for congressional concern. Second, it does not follow that just because there have been some cases of significant U.S. force commitments without congressional approval, that this has been desirable or should continue. These incidents do not constitute binding precedents. They have not made law, and this practice is most certainly not in concordance with the Constitution. The last declared war ended in 1945, but the United States has been involved in armed conflicts—undeclared wars—many years since June 1950. I think we should take a close look at this problem with respect to history, but more particularly with an eye to the ftuure. I am concerned that we not again allow the United States to slip gradually into a major conflict without authorization by Congress.

A word about these precedents. A great many cases are decided by the courts. Rulings are made by the diplomatic agencies of our Government. Findings are made by our Secretaries of State. In almost 200 years we have accumulated a whole roomful of precedents. One can find authority for almost any position he wants to take. Many of these decisions were made to back up facts that had already happened. That has not changed the basic law, but even if it has, we ought to take a new start. We must take a new start.

Some may argue that such a mechanism would be an undue restraint on the President's power to conduct foreign relations and on his power as Commander in Chief. If a mechanism is properly designed, I do not believe this would be true. I believe that we in the Congress can summon the skill to design a mechanism which will restore to Congress the power to declare war without impeding the due exercise of Presidential authority.

As a contribution to our joint efforts in the Congress toward this end, I would like to start first the principles around which I believe such a mechanism should be designed:

First. The President should be permitted the freedom to deploy U.S. forces to meet certain immediate contingencies without seeking prior congressional ap-approval.

For example, the President should clearly be able to move quickly to repel an attack on U.S. territory or U.S. forces and to protect the lives of U.S. citizens abroad. These exceptions include events like Pearl Harbor. I believe that he should also be free to prevent an imminent nuclear attack on the United States of which he has clear evidence. I do not believe that other possible circumstances, such as an attack on a country with whom the United States has an executive agreement or a mutual defense treaty, should justify a prior commitment of U.S. forces to armed conflict without congressional authorization. The mutual defense treaties all recognize that each nation will take action in accordance with its constitutional processes. Our Constitution does not place the right to decide such matters solely in the hands of the executive branch.

Even in the very special cases in which the President would be authorized to take action quickly. I believe that after an appropriate amount of time for congressional debate this action should either be ratified by the Congress or it should cease.

That is important ground, and this matter is so urgent and demanding, and communications and Senate attacks have such broad possibilities, that there is no way to lay down the final word or final rule.

Second. U.S. military personnel should not engage in combat, or serve in significant numbers as advisers to foreign armies engaged in combat, prior to congressional approval.

There may arise conditions of a complex not now imaginable in which we will have to fight to protect the peace. It would be fruitless to try to state these conditions now in detail. The only reasonable solution to this problem is to require prior congressional authorization at the time except in those specific cases mentioned above and to establish the machinery for prompt congressional action.

Third. There should be a reasonably well-defined point at which all can agree beforehand that any situation will be considered sufficiently serious to require authorization.

One difficulty I have had in understanding how some other proposals on this general subject would operate is that it is hard to determine how any agreement

could be reached on the key question: When do hostilities begin? If one looks to our Vietnam experience, it is clear that involvements of this type rarely have a clear beginning. Reasonable men may differ by as much as a dozen years over when the United States began being involved in hostilities in Vietnam. If Congress is to vote within a certain number of days after some occurrence, it is vital that we are all able to agree on what that occurrence is. I have examined this issue in some detail, and have thought about it for a long time, and I do not believe there is any simple answer. But I believe that if we leave the matter vague and, for example, merely provide that the initiation of "hostilities" shall mark the beginning of the time within which Congress shall act, we are creating potential conflict and confusion for those who follow us. A specific criterion, such as a fixed number of U.S. combat fatalities within a given period, has much to recommend it. But on balance I believe that such a formula would be too mechanistic, and I believe a specific definition of events such as that designed by the distinguished Senator from Missouri (Mr. EAGLETON) in his resolution, is the most reasonable solution.

I have taken the liberty of incorporating a definition of this type and other suggestions of his in my proposal.

Fourth. The question of authorizing future conflicts should be separated from our discussion of the current war in Southeast Asia.

I emphasize again that after we got in it and were committed and our boys were fighting, I supported that war in every way I possibly could, and I intend to do so as long as I am convinced, as I am now, that President Nixon, with his fine intelligence and courage, is doing all he can to bring this war to what I think is a respectable, livable termination. I emphasize that again to keep whatever thought I have on this subject of the maze of the present war we are in.

I believe that it is important that we not permit consideration of this constitutionally important resolution, which could be vital to the maintenance of our form of government in the years to come, to be affected by the current disagreements in the Congress over the war in Southeast Asia. I believe that it would be unwise, for example, to use this mechanism to authorize specifically some current hostilities, such as those within South Vietnam, and to exclude others. On the other hand, a simple exclusion of all "current hostilities" from the provisions of the resolution is such a general provision it could lead to later disagreements. In my resolution I propose to exclude from the requirements of the resolution the use of all types of U.S. forces within South Vietnam and other military activities elsewhere in Indochina which are directly related to the war in South Vietnam. This exclusion simply permits us to debate the operations in Indochina in other contexts.

Mr. President, I believe that we can and should act now, effectively, to first admit, and then clearly restore, as a matter of policy, the constitutional war powers of the Congress. I offer this proposal in hopes that it will contribute to that end.

Mr. President, this matter is so complex that I wish to commend other Senators who have worked on it recently, particularly the Senator from New York (Mr. Javits), the Senator from Missouri (Mr. Eagleton), and the Senator from Ohio (Mr. Taft).

As to my resolution, Mr. President—and I do not refer to theirs in this context—I suppose one could find a hundred reasons why it should not be adopted—a hundred reasons with some logic behind them. But, Mr. President, we can find a thousand reasons why something along this line should be adopted. And we do not have to have but one reason. The major reason is this: The people, by and large, the so-called "little people"—I never use that term—but by and large, the people everywhere put up the blood to fight a war. Those people need a direct voice. They need a voice here in the legislative halls to represent them. Many of them personally know individual Members of this Congress.

That is the primary reason for sponsoring this resolution, as we move, now, undoubtedly into another era. The end of this war will bring us into a new era.

Mr. President, with all deference to everyone—and I was present, as I have already said—this Tonkin Gulf Resolution that was brought in here, debated briefly, and passed, if it had been a declaration of war, would have received the most intense, exhaustive consideration and concern by the Members of this body and by the people at large. And it would not have been passed until there was a firm, solemn judgment that it should be passed. But as it was, again with all deference, that resolution was passed, not altogether as a routine matter, but at least partly so; and it was pointed to later by a President of the United States, in good faith—and I know how former President Johnson wrestled with all

these matters; I do not join in any criticism of him—but later, that resolution was pointed to by the former President as authority for his acting. And then the next President said we did not need it in order to honor our commitment.

Mr. President, I could not find any argument more convincing than that. Right here in this Chamber these things have happened. I do not put blame anywhere. But I say we can find a better way, we can find a better policy, and I want the people to take notice at this time that now, as this war is winding down, we can make a new start. We cannot afford any longer, Congress cannot afford any longer, to let this issue lie unresolved, and I do not believe the people want us to.

So let us launch out into the future. According to the Bible, Jesus admonished his disciples to launch out in the deep and let down their nets. Let us launch out into the future and cut a new path, a clear course, as clear as we can make it, through the forest and into that future for our young generations and the other generations that will follow. Let us not spend all our time arguing about the past, or about things that are not essential. But let us move forward, and try to find that peace that we seek, and that it is absolutely necessary that we attain.

I say necessary because I speak with knowledge about what the nations have that are against us, and how their strength is accumulating. I could speak with knowledge of our own power to retaliate, but what is that power going to be worth? Maybe not too much. We have got to rethink and work hard, and I believe we will find a way, a way with which the world will be in sympathy.

I am no pacifist. I have stated strongly here that we have to have strength, military strength for our time and beyond. We must have enough of it. And to have enough, we have to have what many people call too much.

I am no wise man, but I have lived awhile, and I remember, after World War I, how that pendulum swung. I remember when we sank those battleships, and when we got down to the very nub. We finally passed the Selective Service Act of 1940 with the understanding that it was for 1 year, and the next year it passed by only one vote in the House of Representatives. Pearl Harbor came 60 days later.

Then I remember in 1945, and beyond that. No one was more enthusiastic about the United Nations that I, and I do not discredit it now, but we were trying to take in the whole world. We were going to have an automatic formula for peace.

We moved on, then, and rearmed. We have fought two wars now, and are heavily armed, and are arming more, particularly with nuclear weapons.

But this is post-Vietnam. What are we doing now? I think we must continue to be well prepared militarily. I think we must realize now we cannot undergird and defend the whole world. I think we must realize that to have successful wars, we must fight to win; and that is the only posture the people are going to understand and be fully behind.

We can take a long step forward here toward restoring, as far as we can, the congressional responsibility of the declaration of war, and help in that way to find a way to the future.

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. STENNIS. If I may make one other point, I shall be glad to yield in a moment to the Senator from New York. The Senator has worked hard on this matter, and has made a significant contribution.

Mr. President, I have not tried to write this resolution, or have it written, so that it will be referred to the committee of which I am chairman. This resolution ought to go, and it will go, to the Committee on Foreign Relations. That is where all such resolutions belong, and that is where I want this one to go.

I yield now to the Senator from New York.

Mr. JAVITS. Mr. President, this is a historic moment. I know the Senator from Mississippi, I know his philosophy, and I know how profound are his convictions. I say we are witnessing a miracle. It is both a miracle of the human personality and a miracle of this Chamber.

What is so hard for the onlooker to understand is that men in this Chamber can differ deeply, based on the convictions of a lifetime, on subject A, and come together on subject B, and that it is a completely rational, understandable, acceptable, and honest fact. That is exactly what has happened here today.

To me, all my life, the proudest words in the language have been the words "I am persuaded." When I first broached this subject last year, the Senator from Mississippi electrified me by expressing an interest. He has pursued that interest diligently and carefully, and he has now come up with his own prescription, based, surely, upon the fundamental framework which I introduced—but his own

prescription, responding to his own ideas and his own vast experience in the defense field as well as in public affairs.

The significance of Senator Stennis' action today derives from his exceptional knowledge and experience with regard to military affairs, and the great prestige and influence he commands in the Senate with respect to these matters. As chairman of the Senate Armed Services Committee he has dealt for years with the great decisions and issues respecting our Nation's capacity to make war. He is in a somewhat unique position to judge the issues regarding the exercise of the basic war powers—the life and death decisions that must be made whether or not our Nation shall make war in a given situation.

I note that Senator Stennis has also adopted in his measure some of the suggestions contained in a bill introduced by Senator Eagleton. Senator Eagleton's bill also follows closely the conceptual and procedural framework contained in the bill I first introduced last year, and reintroduced again this year on February 10. I welcomed Senator Eagleton's bill as a useful and thoughtful contribution which adds to and modifies certain of the provisions of my bill.

Senator Stennis' introductory statement is one which commands great attention and reveals the depth and earnestness of his consideration of the great national and constitutional issues which are involved in basic war-powers legislation.

I am confident that Senator Stennis' decision to sponsor basic war powers legislation will have an important impact on the thinking of the Nation and—I hope—of the administration. Secretary Rogers is scheduled to testify before the Foreign Relations Committee on Friday, May 14, respecting my bill and the other measures before the committee. With Senator Stennis now joining those of us who feel that it is essential to our Nation that the Congress reassert its constitutional powers respecting war there can be no doubt left as to the seriousness and earnestness of the Senate sponsors in this respect.

It would be demeaning of what I consider to be a historic moment as between two Senators of such widely divergent views and background, and of this Chamber, if I now tried to analyze differences, or individual points, or anything else, and I would not dream of doing it. We will have plenty of time for that. Suffice it, for the moment, to express one of the deepest satisfactions I have ever felt, either in or out of this Chamber, in having come to a basic agreement on principle with so distinguished and patriotic an American on a matter which I believe will turn the course of history for our people from a course which has led us into far more wars than we should have had—not that we could have avoided them all, by any means—into a course which will give the people the deep assurance that, so far as human contrivance and human machinery can provide, we will avoid future wars wherever possible.

Mr. STENNIS. I thank the Seantor for his kind words, and I again thank him for the assistance I received from his resolution.

Mr. JAVITS. I thank the Senator.

Mr. MATHIAS. Mr. President, will the Senator yield?

Mr. STENNIS. I yield.

Mr. MATHIAS. Mr. President, we like to think that rational men react in a rational way to facts. This ought to be one of the constant rules of human behavior, but unhappily it is not. However, I think that by what we have heard from the distinguished Senator from Mississippi today—we know the proposal he has made and has brought to the Senate today—we can see that he is in the highest sense exercising the rational faculties of the human race.

In the great committee over which he presides, he has inevitably become involved in the cost of armed conflict. While I know that he is determined, and I am determined, that we will maintain our defenses at the kind of level which will deter armed conflict, what he would like to see and what I would like to see and what the Senator from New York has been working for is the prevention of our once again getting on the sliding board and slipping down without the kind of controls and the kind of thoughtful policy decisions that should be made.

I am sure this has not been an easy decision for the Senator from Mississippi. I thank him for the very thoughtful consideration he has given this matter, and I salute the leadership he has demonstrated. I hope to join him in moving in the direction of setting up a framework of rules so that a government of law will apply to the issues of war and peace and life and death as well as to other aspects of our society.

Mr. STENNIS. I thank the Senator very much for his remarks. There is plenty for all of us to do.

I do want to state that I had intended to deliver this speech some weeks ago, but in the last several weeks I have been busy with the pending bill, the hearings, and other matters.

Mr. President, I introduce the joint resolution and ask unanimous consent to have it printed in the RECORD.

There being no objection, the joint resolution was ordered to be printed in the RECORD, as follows:

(See p. 655.)

The CHAIRMAN. I want to say with your assistance, and I certainly am delighted you have taken this attitude, I predict we may have some success on the floor of the Senate. If you would bring your forces in behind it, we will pass some bill.

Senator STENNIS. Well, I have no forces, but I am vitally concerned.

RESEARCH PAPER: "PRESIDENTIAL SPENDING DISCRETION AND CONGRESSIONAL CONTROLS"

The CHAIRMAN. I want to ask you, would you like a copy of this paper? This was prepared by Mr. Louis Fisher of the Congressional Research Service of the Library of Congress. I can assure you it is not some fly-by-night. It is a very responsible paper, and I will see that you get a copy as it is about this $259 billion that is in the pipeline. If you didn't know about it, you are the one man I can think of who ought to know about it.

Senator STENNIS. Well, I know there is a good deal of money in the pipeline. I don't believe there is that much.

The CHAIRMAN. That is what he says: He says, specifically, and I quote:

Despite these legislative restrictions a huge volume of funds continues to flow from one year to the next. The budget for fiscal 1972 shows an estimated $259.5 billion in unspent authority available from prior years. Of that amount, only $87.4 billion is expected to be spent in fiscal 1972 with the remainder carried forward once again to later years.

Senator STENNIS. Does it say unspent funds or unspent authority?

The CHAIRMAN. The language here is unspent authority. In the preceding paragraphs, I think it makes it quite clear that these are unobligated appropriated funds.

Senator STENNIS. Yes. Well, that is what I was surprised at, the figure.

The CHAIRMAN. I was too. I was greatly surprised.

Senator STENNIS. I will follow up on that.

You did recall that this can go in?

The CHAIRMAN. Most certainly; we are delighted to have it.

(See p. 754.)

COMMENDATION OF WITNESSES

Senator STENNIS. May I commend Senator Spong too, Mr. Chairman, for the fine article in the law review.

The CHAIRMAN. Well, we do commend him and we commend you for taking an interest in this matter.

Senator JAVITS. Mr. Chairman, may we have authority to insert in the record any interchange between Senator Stennis and myself on the new draft which I have worked out along with Senator Eagleton?

The CHAIRMAN. You mean that you expect——

Senator JAVITS. We are going to communicate with the Senator and he will reply.

The CHAIRMAN. Oh, yes, we will be pleased to have it.

(The information referred to follows:)

U.S. SENATE,
*Washington, D.C., November 17, 1971.*

Hon. JOHN C. STENNIS,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR STENNIS: I am writing with reference to our meeting of November 15 concerning war powers legislation. The enclosed text, redrafted jointly by our respective staffs pursuant to our meeting, embodies what I understand to be a mutually agreeable text. As such, it incorporates, in my judgment, the best features of the original Javits, Stennis and Eagleton proposals, and many excellent suggestions made by the distinguished witnesses who testified before the Foreign Relations Committee.

It would be most appreciated if you could indicate in reply your acceptance of this new joint text. You will recall that agreement was reached at the close of your testimony on October 6 to incorporate in the record an exchange of correspondence between us. Our exchange of correspondence concerning the enclosure would accordingly complete the record of the Foreign Relations Committee hearings.

With best regards,
Sincerely,

JACOB K. JAVITS.

[S. ———, 92d Cong., first sess.]

A BILL To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SHORT TITLE

SECTION 1. This Act may be cited as the "War Powers Act of 1971."

PURPOSE AND POLICY

SEC. 2. It is the purpose of this Act to fulfill the intent of the framers of the Constitution of the United States, and ensure that the collective judgment of both the Congress and the President will apply to the initiation of hostilities involving the Armed Forces of the United States, and to the continuation of such hostilities. Under Article I, Section 8, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also "all other powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." At the same time, the Act is not intended to encroach upon the recognized powers of the President, as Commander-in-Chief, to conduct hostilities authorized by the Congress, to respond to attacks or the imminent threat of attacks upon the United States, including its territories and possessions, to respond to attacks or the imminent threat of attacks gainst the Armed Forces of the United States, and, under proper circumstances, to rescue endangered citizens of the United States located in foreign countries.

EMERGENCY USE OF THE ARMED FORCES

SEC. 3. In the absence of a declaration of war by the Congress, the Armed Forces of the United States shall be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only—

(a) to repel an attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack;

(b) to repel an attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;

(c) to protect while evacuating citizens of the United States, as rapidly as possible, from any country in which such citizens, there with the express or tacit consent of the Government of such country, are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control: Provided, that the President shall make every effort to terminate such a threat without using the Armed Forces of the United States: And provided further, that the President shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States; or

(d) pursuant to specific statutory authorization, but authority to use the Armed Forces of the United States in hostilities shall not be inferred from any Treaty or provision of law, including any provision contained in any appropriation act, unless such Treaty or provision specifically authorizes the use of such Armed Forces in hostilities and exempts the use of such Armed Forces from compliance with the provisions of this Act. Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such forces are engaged, or there exists an imminent threat that such forces will become engaged, in military hostilities. No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the use of the Armed Forces of the United States in hostilities, within the meaning of this section.

REPORTS

SEC. 4. The use of the Armed Forces of the United States in hostilities pursuant to Section 3 of this Act shall be reported promptly in writing by the President to the Speaker of the House of Representatives and the President of the Senate, together with a full account of the circumstances under which such hostilities were initiated, the estimated scope of such hostilities, and the consistency of such hostilities with the provisions of Section 3. Whenever Armed Forces of the United States are engaged in hostilities outside of the United States, its territories and possessions, the President shall, so long as such forces continue to be engaged in such hostilities, report to the Congress periodically on the status of such hostilities as well as the scope and expected duration of such hostilities, but in no event shall he report to the Congress less often than every six months.

THIRTY-DAY AUTHORIZATION PERIOD

SEC. 5. Hostilities commenced pursuant to Section 3 of this Act shall not be sustained beyond thirty days from the date of their initiation except as provided in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.

TERMINATION WITHIN THIRTY-DAY PERIOD

SEC. 6. Hostilities commenced pursuant to Section 3 of this Act may be terminated prior to the thirty-day period specified in Section 5 by statute or joint resolution of Congress.

CONGRESSIONAL PRIORITY PROVISIONS

SEC. 7. (a) Any bill or resolution, authorizing the continuation of hostilities under Subsections (a), (b), or (c) of Section 3 of this Act, or the termination of hostilities under Section 6 of this Act shall, if sponsored or cosponsored by one-third of the Members of the House of Congress in which it is introduced, be considered reported to the floor of such House no later than one day following its introduction unless the Members of such House otherwise determine by yeas and nays; any such bill or resolution referred to a committee after having passed

one House of Congress shall be considered reported to the floor of the House referring it to Committee within one day after it is so referred, unless the Members of the House referring it to committee shall otherwise determine by yeas and nays.

(b) Any bill or resolution reported to the floor pursuant to Subsection (a) shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after it has been reported, unless such House shall otherwise determine by yeas and nays.

EFFECTIVE DATE

SEC. 8. This Act shall take effect on the date of its enactment but shall not apply to hostilities already undertaken before the effective date of this Act.

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
*Washington, D.C., November 24, 1971.*

Hon. JACOB K. JAVITS,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR JAVITS: Thank you for your letter of November 17.

I believe that the draft of the War Powers legislation enclosed with your letter represents a reasonable compromise and a good first effort toward drafting this difficult legislation. I am sure that there are places in which the Resolution's wording could be improved, but I believe the principles are clear and that the broad outlines are sound ones.

I have enjoyed working with you, Senator Eagleton, and the many other Senators who have expressed interest in this type of legislation and I hope that we will be able to see some version of it enacted into law in the near future.

Sincerely,

JOHN C. STENNIS.

Senator STENNIS. Will you excuse me now?

The CHAIRMAN. Thank you very much.

Senator Chiles is here now. Come up, Senator Chiles, and sit by Mr. Goldberg.

Do you wish to make a formal statement now, Senator Chiles, or answer questions?

## STATEMENT OF HON. LAWTON CHILES, U.S. SENATOR FROM FLORIDA

Senator CHILES. Yes, sir; I had a statement, but, Mr. Chairman, at your discretion I will wait until after the Justice.

The CHAIRMAN. The tradition is that Senators are supposed to precede even distinguished guests, but you may proceed as you like. Presumably, you have other things you have to do, but if you don't, why that is your prerogative.

Senator CHILES. Sure.

The CHAIRMAN. Go ahead, Senator Chiles.

### CONSTITUTION COMMANDS WAR COMMITMENT IS CONGRESSIONAL DECISION

Senator CHILES. Mr. Chairman and members of the committee, I requested permission to appear before you this morning in order to express my deep interest in setting ground rules to reiterate and elaborate upon the Constitution's command that the Nation's forces be committed to war only by decision of Congress. By abdicating its constitutional responsibilities and by acquiescing in the exercise of

real or asserted Presidential power, Congress has helped create a belief that the demands of the nuclear age are such that the Constitution is obsolete and that problems of foreign affairs and warmaking must necessarily be left to the President. I do not believe that to be true.

LEARNING FROM MISTAKES IN SOUTHEAST ASIAN INVOLVEMENT

I recognize the need that legislation on this topic necessarily exclude our Southeast Asian involvement. Still we can look at our situation there to learn from our mistakes—one of those mistakes was to lose our sense of constitutional balance—of responsibility sharing with the President. This constitutional balance assumes what its name implies, a constitutional balance between a strong and independent Congress and the Executive. Roles may shift between the legislature and executive in time of crisis or war, but the system is flexible to allow for expansion, revisions, et cetera. This sharing of responsibility reflects itself in Government by consensus. I feel it is in the Congress where consensus must be and is formed. Presidents come and go but the Congress should be the forum for the making of a consensus because it is more directly responsible to the people and more frequently returns to the people for a mandate.

One of our most serious mistakes concerning the Vietnam situation was allowing one man to bear the burden for policymaking and control. The inaction of Congress, the failure of Congress in this area left it in a situation where responsibility for military commitment was not shared between the Congress and the President, where no opportunity for national debate or public forum existed, where four individual men and their administrations decided a foreign involvement policy instead of the President with the deliberative will of the people expressed through the Congress.

Separation of powers has introduced a unique element into the relationship between Congress and the Executive. That is, that by and large nowhere in our Government can any agency operate irresponsibly for long in important matters. Always it is required and must expect, to justify its action and its proposals before its constitutional equal.

Though our involvement in Southeast Asia is not yet over, our efforts must already be directed to post-war problems, a major one of which is the problem of more specifically defining the President's warmaking powers in an effort to avoid another similar tragedy.

POWERS VESTED IN CONGRESS AND PRESIDENT BY CONSTITUTION

The Constitution, in article I, section 8, vests power in Congress to levy taxes to provide for the common defense, to regulate commerce with foreign nations, to define and punish offenses against the law of nations, to declare war, to raise and support armies (although appropriations for this purpose are limited to terms of 2 years), to provide and maintain a navy, to make rules to govern the land and naval forces and to organize a militia. Article II vests executive power in the President, makes him Commander in Chief of the Armed Forces and gives him power, by and with the advice and consent of the Senate, to make treaties with foreign nations.

INTENT OF FRAMERS OF CONSTITUTION

An understanding of the power to declare war is basic to the issues we deal with today. During the Constitutional Convention, the wording of that clause was changed from "make war" to "declare war," and consequently it is sometimes argued that the power is a mere formality allowing Congress to declare that a state of hostilities amounts to war, but not allowing it to exercise control over the Nation's becoming involved in those hostilities.

Records of the Convention indicate, however, that such was not the intent of the Framers. The consent of Connecticut to the change from "make" to "declare" was obtained through explanation that the word "make" might be construed to mean "conduct," and would thus conflict with the President's function as Commander in Chief. The power granted Congress was that of initiating war; the President was given no power to initiate war, but was limited to exercise of his veto power in a congressional declaration of war, to conducting a war legally begun, and perhaps to repelling sudden attacks. President Thomas Jefferson interpreted the document as follows:

> Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided. (Message to Congress, December 6, 1805.)

Alexander Hamilton interpreted the clause similarly:

> It is the peculiar and exclusive province of Congress when the nation is at peace to change that state into a state of war. (Works of Alexander Hamilton, 746, 1951.)

It is over the war powers and specifically the question of "undeclared" war that the area of conflict between the Congress and President is centered. What we are exploring here is not solely legislation seeking to limit the President's power, but the setting of guideposts for the Congress reassertion of its own rightful, Constitutional powers, as well; and I think its Constitutional duties.

Congress has learned, I believe, from the Korean and Southeast Asian experiences that it must design a new means to insure its own exercise of the war powers reserved to it in article I, section 8, of the Constitution. No one man can be expected to bear the burden of committing this Nation to war with only tacit authorization of the legislature. No Congress can constitutionally allow one man to determine policy war powers, powers given to the Congress in the Constitution.

What is needed is shared responsibility, continuity of policy, the shared responsibility of the President and the Congress using their balanced constitutional powers and the continuity over which Congress, through its particular structure, has a special advantage.

LEGISLATION NEEDED GIVING DETAILED EXPLANATION OF WAR POWERS

What is needed, I think, is legislation giving a detailed explication of the war powers of Congress and the President, specifically citing rules and procedures that ought to be followed in circumstances where hostilities are to be initiated without congressional declaration of war.

Let me make clear that I am not solely referring to conditions peculiar to the present administration, but rather calling my colleagues'

attention to an historical evolution of unchecked power that cannot be allowed to contined under any administration.

A reaffirmation of faith in the doctrine of separation of powers and the present constitutional provision for checks and balances entails a simultaneous reaffirmation of faith in the people themselves. Conditions in the modern world do not render obsolete the devices built into our Constitution by the framers to avoid tyranny; neither do these conditions impel us to give the President additional authority. What these conditions do encourage is the wholehearted effort to reestablish constitutional balance, reassert congressional responsibility and rededicate ourselves to the principle of separation of powers complemented by checks and balances.

Mr. Justice Jackson's words capsulize my testimony here this morning:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving, free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.

### CONGRESS MOST NEARLY REPRESENTS POPULAR WILL

The principle underlying the decision to vest in Congress the power to declare war is that such decision is properly exercised by those most nearly representing the popular will. As a representative of American veterans told this committee last April, "We have come here, not to the President, because we believe that this body can be responsive to the will of the people." Because the deliberative will of the people was provided a channel for expression through representative government in the Congress we have the duty to be responsive to that deliberative will, a duty to make those decisions for which we have been given the power and the responsibility.

The CHAIRMAN. Thank you, Senator Chiles.

I wonder if we might proceed to hear Justice Goldberg's statement and then we will have both of you—you stay there. Can you remain for questions?

Senator CHILES. Yes, sir.

## STATEMENT OF ARTHUR J. GOLDBERG, ESQ., FORMER U.S. AMBASSADOR TO THE UNITED NATIONS

Mr. GOLDBERG. Thank you, Mr. Chairman, and gentlemen of the committee.

I appreciate and indeed I welcome the opportunity to express my views on the question of war power under the Constitution.

### COMMENDATION OF COMMITTEE FOR ADDRESSING SUBJECT

I want to commend this committee for addressing itself to this subject. All matters of public concern are important. In light of our national experience, not only in the Vietnam war but in the Dominican Republic and elsewhere, however, this matter goes to the fundamentals of our Constitution. It is my firm conviction that the proper allocation of the power to make war is a subject second to none in the panoply of great concerns which affect all of our citizens.

The resolution of the controversy that has developed between the Executive and Congress on this subject necessitates consideration of certain basic constitutional principles which I deem controlling.

CONSTITUTION, NOT PRACTICE AND TRADITION, CONTAINS ANSWER

Much of the testimony not only in recent hearings but dating back to Secretary Nicholas D. Katzenbach's presentation before this committee has dealt with practice and tradition throughout many years of our national existence. It is this practice and tradition which—erroneously in my view—led Mr. Katzenbach to conclusions which, in my view, are clearly unsupportable under our Constitution. I also believe that past practice and tradition have been given too much weight in the testimony of some other of the witnesses whose conclusions have differed from Secretary Katzenbach. Since I believe the answer is found in the Constitution, I do not accord to past practice the significance that other witnesses have.

This conclusion of mine is not a personal one; it is grounded upon the philosophy of decisions of the Supreme Court of the United States dealing with the role of precedent in cases involving constitutional adjudication.

In *Burnet, Commissioner of Internal Revenue*, v. *Coronado Oil and Gas Company*, decided in 1932, Justice Brandeis, in a famous dissenting opinion, dealt with this subject in these words, and I quote it:

> State decisis is usually the wise policy because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare *National Bank* v. *Whitney*, 103 U.S. 99, 102, 26 L. Ed. 443. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overuled its earlier decisions.

This was not a new view. The same view was expressed many years previously in 1849 by Chief Justice Taney in the *Passenger* case, 7 How. 283, 283, 470:

> I—am willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.

Now, strictly speaking, these quotations pertain only to the role of precedents where the Supreme Court is deciding a constitutional point. But it would seem that their rationale applies all the more strongly where unadjudicated constitutional practice—as in the presidential assertions of an inherent power to commit the country to war—is at issue and the usual role of stare decisis which is a judicially fashioned doctrine does not have the same force.

I therefore would like to commence my analysis with the Constitution, which is the supreme law of the land and which past practices at variance therewith cannot change. At best what can be said of past practice is that it may be a guide to interpreting an ambiguous constitutional provision. But it cannot justify a departure from a plain constitutional mandate.

CONSTITUTIONAL PROVISIONS FOR WAR POWER

And the Constitution speaks in very plain language about the war power.

Article I, section 11, of the Constitution provides that Congress shall have power "to declare war."

One does not have to be a jurist or a lawyer or a political scientist to understand these explicit words. Nor, with due respect, does one have to be an historian.

The Constitution by this language vested the power to sanction the use of the sword in Congress.

And it confirmed that this is so by article I, section 12, which provides that Congress shall have power "to raise and support armies" and "to provide and maintain a Navy," and it is further confirmed by the necessary and proper clause.

Mr. Chairman, in your remarks this morning you have pointed out a further limitation in the Constitution on Executive authority by the 2-year restrictions on appropriations for the Armed Forces.

It is true, as several witnesses have pointed out, that article II, section 2, provides that "the President shall be Commander in Chief of the Army and Navy of the United States."

Here again, however, the writing itself is explicit. If Congress declares war, obviously Congress, as a collective body, cannot wage the war so declared by committee, select or of the whole, although it has sometimes attempted to do so. The President after a proper declaration of war, being the Chief Executive, is entrusted with the function of waging the war, conducting the war, declared by Congress, although Congress' other powers, such as its control over appropriations, vests in Congress a continuing check on executive action.

It is also true the Constitution empowers the President to lead our foreign policy, not necessarily to make our foreign policy exclusively, although this too is often misunderstood, but executive authority over foreign affairs is subject to important restrictions and I cite some: The Senate must under article 2, section 2, advise and consent to the President's making of treaties and to his appointment of ambassadors. Further, as I have just said, Congress is given the power to pass laws to raise the revenue both for military and foreign affairs activities. Congress has the power of the purse as well as the sword.

CONCEPT OF INHERENT POWER REJECTED

It has been argued before this committee that, in light of modern times and exigencies, inherent power must be recognized in the President to avoid national catastrophe, if not destruction.

I reject this concept of inherent power. When serving on the Supreme Court, I said for the Court that our Constitution was not a suicide pact. I have not changed my views in this regard. But this is a far cry from recognizing the President's unfettered power to plunge us into a war without congressional sanction as distinguished from the President's power to repel a surprise attack.

PREEMPTIVE NUCLEAR FIRST STRIKE BETTER NOT TOUCHED BY LEGISLATION

Mr. Chairman, if I may digress, I agree with what you said in your exchange with Senator Stennis on a preemptive nuclear first strike. It is far better that that subject not be touched at all in the legislation under consideration rather than embarking upon a path that requires separate considerations.

PRESIDENTIAL ACTION IN EXERCISE OF NATIONAL SELF-DEFENSE

There is in the treatment of this subject a great confusion which should be put to rest. Obviously, the President, as Commander in Chief, in the exercise of national self-defense may take immediate action to repel an invasion or respond to an armed attack by means limited to the emergent need.

President Roosevelt did so in the surprise attack at Pearl Harbor. But all will recall that President Roosevelt immediately after this "day of infamy" submitted to Congress the question of the state of war between us and our attacker.

I believe that our future salvation and even survival depends upon return by President and Congress to these plain and explicit constitutional safeguards and provisions.

DETERMINING WHEN WE ARE AT WAR

A great deal has been said in the testimony about the difficulties of determining when we are in a war as against "brush fires or limited hostilities"—as though any hostilities in these days can be very limited.

Here, too, I have a viewpoint which some may regard as simplistic, but I do not believe so. It is one thing to capture a Barbary pirate—scarcely a war by definition; but even here, as I think this committee has reported, President Thomas Jefferson acted with great restraint. He empowered our naval squadron in the Mediterranean only to take defensive action and not offensive action in that regard and promptly reported what he did to Congress. But it is another thing to deploy in combat more than 500,000 troops in Vietnam—obviously a war by any definition. All difficult matters are matters of degree, but this line can and must be drawn if all concerned—the Executive and Congress—are faithful to the mandates of our Constitution.

In reading the testimony before this committee where this difficulty was explored, I am reminded of a statement of Mr. Justice Stewart in an unrelated case, one of the obscenity cases. This is what he said:

> I shall not today attempt further to define it. But I know it when I see it.

*Jacobellis* v. *Ohio*, 378 U.S. 197 (1964).

And indeed you know when you are engaged in a war.

We have been engaged in scores of wars initiated by the President. If there is one thing the Constitution does not contemplate it is presidential wars. It contemplates that Congress shall be the agency that puts us into a war.

Now I am not oblivious to the problems and difficulties in this area. Nevertheless, I do not depart from my basic conviction that our coun-

try has a far better chance to unite and survive by observing our Constitution than by breaching it.

In this connection, I must frankly express the conviction that all recent Presidents and all recent Congresses—I include past ones as well—bear equal measure of responsibilities for our present soul searching in this area. But in fairness I should say that under the leadship of this committee, we are now attempting to return to our basic constitutional principles. Perhaps out of the tragedy of Vietnam both Presidents and Congress will act as the Constitution requires.

### RESISTANCE TO RETURN TO CONSTITUTION

Frankly, Mr. Chairman, I do not know why this is so resisted by Presidents. It has been resisted by Democratic and Republican presidents; and while Secretary Rogers recent testimony was more cautious than Secretary Katzenbach's, there is nevertheless the thread that we must be flexible, the world is very complicated and therefore to return to the Constitution is really not very practical.

To this there is an answer. If our Constitution does not adequately permit what has to be done in a modern age to protect our security, our Constitution ought to be amended to permit it. I myself conceive that the Constitution does not have to be amended, that if there is appropriate regard for the Constitution we will stay out of more wars than in the many wars in which we have been engaged.

### U.S. TREATY OBLIGATIONS

It is true that we have treaty obligations, some of which make an attack upon the allies an attack upon us. I believe in observance of our treaty commitments. The supremacy clause of our Constitution, article VI, section 2, plainly says that "This Constitution, and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made, under the authority of the United States shall be the supreme law of the land * * *."

But treaties of alliance, as I have examined them, do not call automatically for the waging of war by the United States without a further appropriate declaration by Congress. Indeed they generally and perhaps universally provide that we shall intervene only subject to our constitutional processes, which translated means subject to appropriate action by Congress. They cannot mean anything else.

Lest it be thought that our treaty commitments will be made meaningless by the necessity for adhering to our Constitution, an argument which has been made before this committee, I have no doubt that Congress will honor commitments solemnly entered into by the United States in treaties ratified by the requisite majority of the Senate.

### CHARACTER OF CONGRESSIONAL PROCEDURES

Mr. Chairman, much of the argument revolves around the cumbersome character of congressional procedures, the thought being that Congress cannot respond to an emergency. If you will tolerate an excursion into domestic matters, that argument has been made with reference to the Labor-Management Relations Act and particularly the national emergency provisions which provide that when a Taft-

Hartley injunction expires after its 80 days and the dispute remains unsettled the matter is remitted to Congress. If we look back at our recent history, Congress has acted and acted very promptly, to prevent our country from experiencing a real national emergency where we have such a domestic crisis.

### DISTINCTION BETWEEN TREATIES AND EXECUTIVE AGREEMENTS

A distinction must be drawn between treaties and executive agreements, agreements concerning which I saw little reference in the prior testimony before this committee. I do not believe, under our Constitution, that the President is empowered by an executive agreement to wage war without consent of Congress; and, by the way, I noted this morning a reference to the President's warmaking powers. The President has no war—constitutionally has no warmaking powers except perhaps to repel, as I have said earlier, a surprise attack, an emergency, following which he must immediately go to Congress.

If it is so, then an executive agreement obviously cannot confer such power upon him since an executive agreement is one made by the Executive without reference to Congress.

The view that the President has such powers flies in the face of the Constitution.

Now, Mr. Chairman, I was listening this morning and read some of the testimony, and I know that some would say that Congress may declare war without using these exact words, and the Tonkin Gulf resolution is quoted as a case in point.

Now, I do not say that an action of Congress equivalent to a declaration of war may not be a declaration of war, but I issue you a caveat which I think the Tonkin Gulf resolution best illustrates. And I do this by saying, to paraphrase Justice Holmes, that the words are the skin of living thoughts and that the solemnity of a document entitled a "Declaration of War" must inevitably lead to a more deliberate conception of the enormity of what Congress is doing than a resolution, purporting as in the Tonkin Gulf resolution, to defend ourselves against an allegedly "unprovoked attack" by a few gun boats.

### MISGIVINGS AS TO EFFICACY OF RESOLUTIONS

Now, turning briefly to the resolutions before this committee, they are all designed to reassert before this committee, they are all designed to reassert congressional authority in this area, long overdue and therefore they are to be welcomed. Yet I confess to misgivings as to the efficacy of resolutions which would cut off support to deployment and hostilities after a given number of days unless Congress ratifies the President's actions in entering upon a war.

My reasons are that while I think Vietnam has taught us some painful lessons, nevertheless, if a President has precipitated us into a war it is extremely difficult for Congress after the fact to meet the traditional arguments which any President is bound to advance after taking such action, and these are the arguments and we have all heard them:

A crisis is at hand.

The President must be free to act.

The minimum possible reaction has been ordered.

We seek no wider war.

Aggression must be stopped and prevented.

Now, with success in our grasp, all that is needed is national unity and support for the Commander in Chief.

Congress will be kept fully informed.

The leadership approves.

Further questions now will jeopardize the safety of our troops committed to combat.

If I have misgivings on this point, then it is only fair to ask what do I suggest.

What I suggest may be very impractical. My answer is to return to the constitutional language and principles which I have cited.

Let the President not make further wars without seeking congressional approval.

Let Congress face up to its responsibilities in this area and insist upon being adequately informed before sanctioning a war and then doing what the Constitution requires, either declare it or refuse to declare it. And let Congress not pass the buck to the President by ratifying undeclared wars through appropriations to wage them.

Let the public which has been all too inclined in the past to forget that our democracy depends upon the consent of the governed, insist that the Constitution be observed.

This is a prescription. It is a very difficult prescription to be followed in—I think you said, Mr. Chairman—political terms, and yet it is the prescription required by our Constitution.

### CONGRESS MAY LEGISLATE IN WAR POWER AREA

Yet, despite my misgivings about the efficacy of the resolution before you, the trauma of the Vietnam war is such and our past practices have so far departed from the Constitution, that legislation adopting the best features of the various resolutions before you may be helpful in returning us to our Constitution. But, again, I issue you a caveat: There is no question that under the necessary and proper clause Congress may legislate in this area. I thought Professor's Bickel's paper on this point, and Mr. Rogers' excellent paper—the Rogers who is not Secretary of State—is pretty conclusive in dealing with the authorities on this question.

### QUESTION OF WHETHER WAR POWER IS JUSTICIABLE ISSUE

I have one reservation about Mr. Bickel's paper, although I have regard and respect for him. In his paper he said that this is not a justiciable issue and would and should not be decided in the courts. Well, he and others said the same thing about reapportionment but it became a justiciable issue and was decided by the courts. The courts have gone way beyond the concept that there are certain constitutional issues which are political, whatever that term means, and therefore not justiciable. It is very interesting that with respect to applications made in the Vietnam war justices who are normally regarded to have differing opinions, Justice Stewart and Justice Douglas in one application for certiorari thought that the Supreme Court ought to review the question of the war powers of the President.

The temper of the modern times is such that many questions that were formerly regarded to be nonjusticiable are now regarded to be the subject of appropriate judicial scrutiny since the individual rights and liberties of American citizens are involved.

I am not as confident as Professor Bickel that a matter such as this, in face of plain constitutional provisions, may not be decided by the courts.

I recall that review of reapportionment was rejected for many, many years by the Court and that only after the Court became convinced that Congress was not going to act that the Justices felt that they had the obligation to act in this regard. It would be far better if a law were passed by Congress with the approval of the Executive settling these problems than that Justices decide them. But, nevertheless, we have a Constitution; we have a system of judicial review; and we cannot accept the concept that cases involving unconstitutional wars, which involve citizens, may not at some point be decided by our highest judicial tribunal. This is not the best way to handle a situation of this character, I readily agree, but I do not exclude the notion that it may happen not today or tomorrow but at some time in the future, if the present impasse is not resolved by appropriate legislation.

BASIC CONCEPT UNDERLYING LEGISLATION WELCOMED

I will be glad to respond to questions about particular aspects of the various resolutions. I think they all contain the germ of an essential thought, and that is that Congress should enact legislation on the question; and I think that they represent a major return to the letter as well as the spirit of the Constitution. That is why I have said, although I have doubts about the efficacy of resolutions which cut off support for a war after the President has committed the Nation to engage in one, nevertheless I welcome and support the basic concept underlying the legislation being considered by this committee.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you, Justice Goldberg.

IS LEGISLATION REGARDING WAR POWERS NEEDED?

If I understand you correctly, in principle no legislation regarding the war powers is needed, in your view? We only have to abide by the Constitution, but that since we have not abided by it then these bills may tend to reassert the requirement that we do abide by it; is that about what you mean?

Mr. GOLDBERG. That is correct.

The CHAIRMAN. That substantively we don't need it, but since we have departed from it, then this would be persuasive in persuading the Congress and the President to abide by the Constitution?

Mr. GOLDBERG. That is correct.

DENIAL OF CERTIORARI IN CASES ON VIETNAM WAR LEGALITY

The CHAIRMAN. In your last reference there about the court refusing to take jurisdiction, are your referring—I believe it is to the cases regarding the legality of the Vietnam war?

Mr. GOLDBERG. That is correct.

The CHAIRMAN. And the court there said it was not a justiciable issue?

Mr. GOLDBERG. The Supreme Court has thus far denied certiorari in such cases, but I want to point out the denial of certiorari is discretionary. It does not necessarily mean that the court is convinced that the constitutional question is without merit.

Under act of Congress the Supreme Court is empowered with discretion to deny certiorari. This is what the Court has done in the cases on this question which to date have been presented to it. It does not mean that in another day the Court may say:

> In the exercise of our discretion we now believe that the Constitution has been so violated that it is necessary for us to provide the corrective.

The CHAIRMAN. What did the lower court hold in that, that it was not a justiciable question?

Mr. GOLDBERG. That is correct.

The CHAIRMAN. And that stands?

Mr. GOLDBERG. That stands, but it stands not as a decision which because the Supreme Court denied certiorari represents a Supreme Court affirmation of that decision. It merely means that exercising discretionary power vested in it by Congress and rules of the Court. The Court used its discretion and said, "We will not pass upon it."

The CHAIRMAN. Is it fair to say there the lower court's decisions meant that the war was constitutional or just that it is a political—what does it mean?

Mr. GOLDBERG. I don't exactly know, since many questions decided by the Court may be termed political. I surmise the Court or at least a majority were of the view that judges are not the best people to pass upon this, but that it should be resolved by Congress and the President.

Now, I am not in essential disagreement with this because the courts should be the last bodies to pass upon such a question; but I do believe that if constitutional rights are disregarded over long periods of time, in my opinion, then there must be a corrective. If constitutional action is not found in the Executive and the legislature, then the courts are almost compelled to give relief.

### CARTOON ON ELECTION IN SOUTH VIETNAM

The CHAIRMAN. Speaking of—you keep talking about the reapportionment—did you see the cartoon with reference to the election in South Vietnam on Sunday—that one man, one vote? What could be more democratic?

Mr. GOLDBERG. Yes; I did.

The CHAIRMAN. Do you think that was in accord with the Court's decision?

Mr. GOLDBERG. No. [Laughter.]

### PRACTICE REGARDING EXECUTIVE AGREEMENTS

The CHAIRMAN. You raise one other question which I want to ask about, and then I want some of the other members to ask you questions. I won't detain you, but they have a very special interest. About

this question of executive agreements, there has grown up a practice in recent years to reverse the traditional practice in this area. In the old days, rather insignificant, routine matters were accepted as proper for executive agreement. All matters of real importance certainly involving war were considered to be sufficiently important and of great dignity to require a treaty. That has been reversed. Now they do the most important things in executive agreements and submit the most trivial things as treaties. This is not just now; I mean for the last 20 years. Is that not true in your experience?

Mr. GOLDBERG. Yes. I hope that the national commitment resolution, which this committee formulated and submitted to the Senate, will reverse this practice.

The CHAIRMAN. One of its main purposes was to do that. It again was performing the function of trying to persuade the Government to abide by that principle.

I will allow the other members to ask questions.

Senator Pell, do you have any questions?

Senator PELL. Thank you, Mr. Chairman.

COMMENDATION OF WITNESS

The CHAIRMAN. First, I want to say it is an excellent statement; it is a great contribution and I appreciate your coming here.

Senator PELL. I join in that welcome and am delighted to see you.

POWERS OF EXECUTIVE

I have one general inquiry and one more specific one.

I am not a lawyer, much less a former Justice, so I am very much a student here, but when we were at school we used to be taught that there were three branches of Government: the judiciary, which judged; the legislative, which passed the laws, and policies of the land; and the executive, whose job it was to carry out the policies of the legislature. As in business, you have a board of directors who gives their instructions to the principal executive officer and if he does it well, fine. If he doesn't, he doesn't survive. With us, with a 4-year term, he has got a fixed survival, but is that concept that so many of us studied at school, in your view, as a great constitutional lawyer, is that a correct view or does the executive have inherent, original power, policy-making powers, or do his powers derive from the legislature?

Mr. GOLDBERG. The executive has only those powers derived from the Constitution of the United States and those which are necessarily implied from the express grant of powers vested in the Constitution. That is what Chief Justice Marshall said in the early days and the Court has reaffirmed and indeed reaffirmed vigorously lately. Some of the cases which have been called to your attention where broad language was used about inherent powers, et cetera, have not stood the test of time.

More recent cases of the Supreme Court, as the *Steel Seizure* case, in which I participated as an advocate, reaffirmed the view that the authority of the President to act in that instance to seize steel plants was not inherent authority and there, too, he was acting as Commander in Chief. It was there decided that neither the Constitution nor an act of Congress created this inherent authority.

Senator PELL. But in essence, then, it is up to the Congress to lay out the broad policy ranges under the Constitution that are carried out by the Chief Executive Officer?

Mr. GOLDBERG. That is correct, except as the Constitution directly vests authority in the President.

BRICKER AMENDMENT

Senator PELL. Going back a few years, I think of the Bricker amendment which, if put up today, I think, would be voted overwhelmingly by all of us. I was not in the Congress at the time. Those who were opposing it in those days—the Bricker amendment carries out to a greater degree these resolutions that we are putting forward and studying today.

What do you see as the broad line of history or change so that all agree those who are internationalists and liberals and objected to the Bricker amendment 20 years ago would now probably support it; what has happened in this case?

Mr. GOLDBERG. Well, first of all, the Bricker amendment encompassed areas which we are not now discussing. Without expressing a judgment on this we must never elevate consistency above what is right. On the basic problem, which is the adherence to constitutional standards, I don't think there should be very much argument. And, as I have said, I think the Executive ought to cooperate with Congress in laying down standards in the area of war powers. It is an awesome responsibility to act alone; and a President acting alone in this area has a responsibility which is too great for any President. He ought to share it with Congress as the Constitution mandates.

Senator PELL. I agree with you. I think it was Emerson who said consistency is the hobgoblin of small minds; but we certainly are not small minds in the way we look at these problems.

NECESSITY OF PASSING SOME LEGISLATION

Senator Javits has introduced a particular proposal here, cosponsored by both Senator Spong and myself in the committee. I am wondering from your testimony if the conclusion is that while you regret the necessity of passing this legislation, is it necessary—or some legislation like it?

Mr. GOLDBERG. The answer is "Yes."

Senator PELL. The answer is "Yes." Thank you very much.

The CHAIRMAN. Senator Aiken?

COMMENDATION OF WITNESSES

Senator AIKEN. Mr. Chairman, to me the testimony of the witness makes good sense. Actually, I cannot find any part of it that requires questioning or criticism; therefore, I would prefer to have the cross-examination conducted by the distinguished members of this committee who will not, like myself, be laboring under such a handicap that they can't find anything to criticize in an absolutely sound statement. I am sure they can.

That is all. [Laughter.]

The CHAIRMAN. Senator Spong?

Senator SPONG. First, Mr. Chairman, I would like to commend Senator Chiles for his testimony here this morning. Hopefully this committee will report some form of war powers legislation; and I know that all of us who have been interested in such legislation are pleased that Senator Chiles also feels that this should be done.

CONSTITUTIONALITY OF LEGISLATION AIMED AT CODIFYING WAR POWERS

Now, Justice Goldberg, I am delighted at one of the last things you said, that you had no problems about legislation aimed at codifying the war powers insofar as its constitutionality is concerned. I think that is very helpful to the record. The only testimony we have heard which posed any constitutional question was from Secretary of State Rogers; but the great weight of evidence before this committee is that there is no constitutional prohibition against legislation of this type. Do you concur in that?

Mr. GOLDBERG. Yes, I do. Under the Necessary and Proper Clause it seems to me very clear that Congress may enact laws which relate to this subject.

Senator SPONG. I want to preface my next comment to you by saying you and I are on the same side on this legislation.

Mr. GOLDBERG. Yes. I have before me, Senator, the very fine article that you wrote which has recently been published in a prestigious law review.

Senator SPONG. Thank you.

Mr. GOLDBERG. And I have read it with great interest and profit.

COURT ACTIONS IN WAR POWERS AREA

Senator SPONG. Thank you. I certainly hope that some legislation will be forthcoming.

You mentioned that the Court has thus far been reluctant to act in the war powers area, and they have.

You also stated that the Constitution gave no warmaking powers to the President. The Supreme Court has given the President some warmaking powers though, although they have been reluctant in recent years to rule on the legality of any war. In the *Prize* cases which approved the blockade of the Confederacy, as you remember, the Court did, in a sense, agree with what Hamilton said when he criticized Jefferson during the Barbary wars. It seems to me as if the Court were saying there were times when the President had a responsibility without Congress to go forward. I would observe that the Courts in limited decisions have handed down warmaking powers to the President that have made it easier for recent Presidents to act and to claim inherent power.

Mr. GOLDBERG. Senator, if I recall correctly, in your article you yourself commented on some more recent developments in the Court on that subject.

There are two things I would like to say about the Prize cases which arose during the Civil War. Domestic insurrections are governed by somewhat different rules.

Senator SPONG. I won't comment on that. [Laughter.]

Mr. GOLDBERG. As a part-time resident of Virginia, perhaps I ought not to also.

Senator SPONG. All right. [Laughter.]

Mr. GOLDBERG. But there are two aspects to that. There was broad language in the *Prize* cases; but there were other matters in those cases. There was a congressional enactment which the Court also relied upon in that case to support the President's actions.

Second, in *Zemel* v. *Rusk*, a more recent decision, in recent years, the Court has cast out upon the broad, sweeping language of the *Prize* cases so that I think the trend of modern decisionmaking decisions is to revert to the language and spirit of the Constitution as written.

Senator SPONG. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Cooper?

COMMENDATION OF WITNESSES

Senator COOPER. I will be brief because I think Senator Javits, the author of one of the leading resolutions, and now he has joined with others in working out a new resolution to go to the floor, should ask questions.

I would like to join Senator Spong in saying I think we are indebted to Senator Chiles. I think his testimony here is a good contribution. In this Congress Senator Chiles, Senator Gambrell, Senator Bentsen—new Members of the Senate—on the majority side; Senators Mathias, Saxbe, and others on the minority side, although they are newer members, have addressed themselves to this problem, which is a good thing.

Senator CHILES. Thank you, Senator.

Senator COOPER. I always like to hear our former Justice testify because he is clear; he is explicit; he believes what he says and what he says is easy to understand. I don't think what you have said is simplistic, as you suggest yourself now and then.

CONSTITUTIONAL PROCESSES PROVISION IN TREATIES

I will address myself to three points in your testimony: First, about your statement that treaties as they are the law of the land, of course, should be observed, ought to be observed, by the Congress and the people.

I would recall that the treaties that the United States has entered into since World War II, bilateral and multilateral treaties, with the exception of one or two—NATO—all provide in the event of an aggression against one of the parties that each, the United States, shall take action according to its constitutional processes.

Mr. GOLDBERG. Yes, Senator Cooper, you are entirely correct in your statement

Senator COOPER. That is a large question, and that is the reason a few minutes ago when Senator Stennis was testifying I referred to the Senate debates at the time of the Korean war. Senator Stennis argued so strongly at the time the Korean treaty was before the Senate that constitutional processes mean that the President had to come to the Congress and get its authority not by consultation but authority to legislative action before going to war.

You hold that provision in these treaties—you believe they do hold that the President has got to come to Congress for explicit authority before going to war?

Mr. GOLDBERG. Yes, I do, Senator; that is what the Constitution means in letter and spirit.

Senator COOPER. As a former ambassador, and a great one, to the U.N., you will recall that the U.N. Charter provides in the enforcement of various provisions that countries shall act according to the constitutional processes?

Mr. GOLDBERG. That is correct.

Senator COOPER. With one exception, that is if we enter into agreements to establish a U.N. army, which we haven't?

Mr. GOLDBERG. That is correct.

Senator COOPER. I want to say, that your testimony shows how thoroughly you have read the testimony of others before this committee. Earlier in these hearings, Professor Bickel held that a treaty, in his view, would not suffice because the Constitution calls for a declaration of war by the Congress, and that a treaty only involves the action of the Senate. It is a very interesting point.

Mr. GOLDBERG. Yes, it is, but whether constitutionally a treaty itself——

Senator COOPER (continuing). Which becomes the law of the land.

Mr. GOLDBERG (continuing). Can supersede a provision of the Constitution which requires action by both houses.

Senator COOPER. The authority to engage U.S. forces in hostilities which has been granted to the President on a number of occasions, the Tonkin Gulf, the Middle East, Lebanon, were in the nature of a resolution passed by the Congress.

### CAN CONGRESS DELEGATE ITS POWERS TO PRESIDENT?

Also, Professor Bickel argued that Congress couldn't delegate its powers to the President, that his authority was an act itself.

What do you think of that?

Mr. GOLDBERG. I don't entirely agree with Mr. Bickel in this particular statement. If Congress in its wisdom decides upon a delegation, if it were, for example, to say explicitly as it has done in domestic litigation—I refer to the national emergency provisions of the Taft-Hartley Act, that the President may, if he finds certain circumstances met, deploy and commit our forces without further reference to Congress—I would presume if Congress wants to do this that Congress may so act. That, in my opinion, would not be delegation run riot, which the Supreme Court says is impermissible.

I do not commend this procedure, however, I think that Congress should not say "We have the authority to declare war but we unqualifiedly transfer that authority to the President under guidelines which may turn out to be general in character."

### 30 DAY LIMITATION PROVISION

Senator COOPER. This is the last question I will ask, because I think it pertains to the basis for Senator Javits' resolution; that is the constitutional authority of the Congress is to establish "rules and regulations" for the Armed Forces, but assume the President enters into mili-

tary activities and that, whether 30 days pass or not he holds a position that "as Commander in Chief, it is my duty to protect the troops, that I cannot be bound constitutionally by a 30-day limitation," in that case what can you do except to cut off funds? Anything else?

Mr. GOLDBERG. Not much more, that is why I have a degree of skepticism about the efficacy of the resolutions.

Nevertheless, I still welcome the resolutions because perhaps they will restore us to the real constitutional path.

Senator COOPER. I thank you, and I yield to Senator Javits.

EFFECT OF SUCCESSFUL VETO OF BILL

The CHAIRMAN. Would the Senator allow me to ask a question that came out of that last question? I am afraid I will forget it.

Supposing the committee passed this bill that we all agree on and it passes the Congress; and the President vetoes it and the veto is upheld—would this then confirm all of the expansive powers that the President has been exercising? Would you say that is a confirmation of all his allegations of inherent power?

Mr. GOLDBERG. No, Mr. Chairman.

The CHAIRMAN. What would be the effect, in your opinion, of a veto, a successful veto, of a bill such as the one being considered?

Mr. GOLDBERG. I would not think it a good thing, but the President, by veto, cannot change the Constitution of the United States.

The CHAIRMAN. Politically, and you agreed a moment ago the sanction for all this is political, what then do you do about it? It is the political reaction of the Congress and the country which is about all you can do about it.

Mr. GOLDBERG. That is why I say in my testimony that the people have a responsibility; it is not only the responsibility of their representatives in Congress.

The CHAIRMAN. It is just a point I wanted to clear up—what is the effect of a veto of a bill that attempts to establish the principles?

Mr. GOLDBERG. Well, a President's veto cannot change the Constitution of the United States in any extent.

The CHAIRMAN. In academic circles I agree, but in political circles I am not so sure.

Mr. GOLDBERG. I agree, Mr. Chairman. The remedy practically, is political unless, of course, the Supreme Court acts.

The CHAIRMAN. Senator Javits?

Senator JAVITS. Thank you, Mr. Chairman.

COMMENDATION OF WITNESS

First, I, too, would like to join my colleagues in thanking you, Senator Chiles, for your testimony which, I think, is very strong and very supportive. I join Senator Cooper in observing our newer members like Senator Spong, who has taken such a lead in this—Senator Chiles, Senator Bentsen, who introduced a resolution himself; Senator Taft, who introduced a resolution; Senator Mathias who has joined in my resolution—are all very pertinent as indicating not what really we are trying to reach which is a deep disquiet which Justice Goldberg has identified with Vietnam.

May I ask you, Senator Chiles, whether you would like to have a look at the latest version I have worked out with Senator Eagleton, which Senator Spong has approved?

Senator CHILES. I would like to, Senator.

Senator JAVITS. Would you like to do that?

Senator CHILES. Yes.

### POSSIBLE DEFIANCE OF LAW BY PRESIDENT

Senator JAVITS. Now, turning to some of the legal points which Mr. Justice Goldberg made, isn't it a fact that qualitatively there would be no difference between the President denying this act by just going ahead and saying, "Look, I have committed troops; I think I have the right to do it. I am going to do it. I don't care what your old legislation says; I am not going to stop. If you want to cut off my money that is too bad," and doing the same thing with respect to our appropriating $2 billion for poverty? He could equally say, "I don't care about your poverty drive; I am going to use it to arm the marines."

Really, if the President is going to defy the law, he is going to defy any law, this one or any other one. Our only recourse would be to impeach him, or make his life very miserable which we can certainly do. He can defy this or any other statute.

Mr. GOLDBERG. Yes, past Presidents have done so as we know, in past history both with respect to Congress and the Supreme Court, but I would hope that the President of the United States would, if Congress acts, comply for two reasons: (1) it is obvious that the bitter experience of Vietnam has penetrated somewhat, not fully, and Presidents will be more restrained in conducting what I and Justice Black have called Presidential wars; and the second reason is that I believe that we have had too many confrontations between the coordinate branches of Government.

Congress can only do what is its responsibility. The President, of course, must discharge his.

### REDRAFT OF BILL CONTAINS AUTHORITY TO MEET EMERGENCIES

I do not regard this legislation to invite a confrontation. In this connection I have read your reversed bill. I think it is a fine piece of work.

Senator JAVITS. Thank you.

Mr. GOLDBERG. I don't agree with every sentence but I think it is a fine piece of work. But I would hope that we do not from all of this get into a constitutional confrontation between the executive and the legislative; and I hope we do not for a very simple reason: the redraft of the bill contains plenty of authority to meet emergencies. Perhaps, as Chairman Fulbright has suggested, maybe too much, and that, I think, ought to be studied by the committee.

I cannot see any good reason why a President should feel that he is unduly restrained from being a President and Commander in Chief and leading our foreign policy by what is contained in your amended bill.

Senator JAVITS. Thank you very much, Justice Goldberg.

One other question and I shall not detain you.

LEGAL RATIONALE

I would like you to understand our legal rationale and comment on it, if you will. We considered the declaration of war to be archaic and perhaps inadequate to the full range of situations because it triggers by its sheer title—and I like your reference to Justice Holmes in saying why you have to use words no matter how you please, because it proves that point—a declaration of war triggers so many aspects of international law and other relationships. We have mutual defense agreements; we have regional security agreements. It really is not fully practicable except in a situation if you are really going to have a world war. So we had to because of our research and political judgment, to come to some other formulation.

Now, the other formulation, Mr. Justice, is contained in sections 5, 6, and 7. You will notice, and I am going to be very particular because it is very important, you will notice that 5 relates to the basic authorizing legislation to permit the President to then carry on a war situation after 30 days. And it says: "Specific legislation enacted for that purpose and pursuant to the provisions thereof." In other words, he not only has to have specific legislation enacted for that purpose but also act as that resolution or law specifies.

Now we contemplate a possibility of a prior authority. It is possible, but we are very careful; and now I come to section 7, to negate the claim that anything like that in the way of a treaty is on the books now. So we kill off any idea that he has authority now to proceed directly into war beyond 30 days, and construe whatever is on the books, including the NATO Treaty where the question has really come up in an important way, to be his "specific legislation."

Now, in order to terminate the hostilities in less than 30 days, we saw in section 6 that we may do it by statute or joint resolution of Congress. That is obviously post facto and obviously the classic congressional statute.

This is the legal basis upon which we proceed, and the reason why we do not take the suggestion that whatever is done must be authorized by a declaration of war. I would greatly appreciate your comments.

Mr. GOLDBERG. May I make a comment on that, Senator?

Senator JAVITS. Yes.

Mr. GOLDBERG. I said earlier that obviously if you declare a war, and that is what is involved legally, it is not necessary to entitle the matter "declaration of war." But I have also said in my testimony that I think declaring it a declaration of war arouses the Congress and the people to what is involved.

When Congress passed the resolution on the Tonkin Gulf it was a resolution basically to meet an allegedly unprovoked attack, not to wage a widespread war.

The CHAIRMAN. It was alleged to be to prevent a war.

Mr. GOLDBERG. Yes, to keep the peace and to prevent us from getting into a big scale engagement.

The CHAIRMAN. That's right.

REVIEW OF LAWS SUGGESTED

Mr. GOLDBERG. Now, I am aware of what you say, Senator Javits, that there are a lot of laws on the books about the what happens if "we

declare war." These laws ought to be reviewed. Some of them date from World War I. I think Congress ought to review all this legislation, which is now being relied upon in varying circumstances to justify different types of action.

I have emphasized the desirability of returning to the constitutional language much because of what Senator Stennis said earlier. We depend upon the consent of the governed. If you are to have their consent, the people are entitled to know what you are doing. It is hard for people to know all that our Government is doing. They certainly knew when President Roosevelt went to the Congress and said, "We were attacked; I ask Congress to declare that a state of war exists."

If I remember correctly, that is the way he phrased it because we were attacked.

Senator JAVITS. That's right.

Mr. GOLDBERG. So that I think, Senator Javits, I understand why you feel as you do. The matter is very complicated and it does require an extensive review.

### MEANING OF "CONSTITUTIONAL PROCESSES" IN TREATIES

But I do think this: the argument that is made—and it certainly will be made against my testimony—it is neoisolationist. I think such a charge would be without foundation since I am a true internationalist, but I also believe in our Constitution. When we enter into treaties that say that, "We will do this in your support; an attack against you is an attack against us and we will come to your aid subject to our constitutional processes," I believe candor requires that we explain that means congressional sanction. I have no doubt that Congress will support our Government treaty commitments. Congress is not an irresponsible body and is not composed of neoisolationists. It knows that we are in the world; we need alliances, but I would believe that it would be better to explain what our constitutional processes are to our friends and others. This would be better than the tendency on the part of chief executives to ignore treaties which have been made by Congress requiring recourse to Congress.

The CHAIRMAN. The Dominican did.

### QUESTION OF DECLARATION OF WAR

Mr. GOLDBERG. Yes, I emphasize the question of declaration of war, because looking at Vietnam, the war crept up on us. It started as advisers. Well, who can object to a few advisers? It developed into more advisers, then became 50,000 troops; then it became 250,000; then it became 500,000; then it became 560,000. Now that is what I would like to guard against, and I would hope Congress would guard against, by reverting to constitutional principles.

Senator CASE. Will the Senator permit me to raise a question here?

Senator JAVITS. Could I finish my thoughts? So the record may be complete for my colleagues who will have to pass on this matter, it is my view, to sustain our position, that your observation of Tonkin Gulf resolutions is based upon the absence of such a statute as we would pass. In the presence of such a statute where the whole world knew that Congress had the power to stop it, if they then passed a resolution to continue it then I don't think you would have to label it "declara-

tion of war" and incur liabilities that would go with it for the people to hold them to account for the fact that this was, in fact, a declaration of war.

Mr. GOLDBERG. I still am rather a strict constructionist, to use a popular term, and I think that the Constitution says what ought to be done and I would follow the Constitution.

Senator JAVITS. There are many additional war powers in article 1. I yield to the Senator.

Senator CASE. I thank the Senator from New York. I can't tell you how much I regret I was unable to be here for the prepared testimony; I read it; and I am not surprised. It is of your usual quality; clear and helpful. I am not sure if you have not backed away somewhat. Are you saying that without a specific declaration of war by Congress, then it would be illegal for the United States to enter hostilities?

Mr. GOLDBERG. I am not backing away.

Senator CASE. And this is very important.

Mr. GOLDBERG. I am not backing away from what I said.

Senator CASE. No; I don't mean that you are, but I am trying to get you to extend it a little further.

Mr. GOLDBERG. I have said the Constitution contemplates if we get into a war Congress shall declare that we are getting into a war. Now, that is what the Constitution says.

Senator CASE. It would suggest, would it not—excuse me.

Mr. GOLDBERG. I have already said that using those precise constitutional words are important. I have said that if you say, for example, and I will give an illustration—if you say that, "We, the Congress of the United States, say that because of a danger to our national security we have to go to war against a foreign enemy, and we affirm," I will avoid the use of declare—"we affirm that we authorize the commitment of our troops in a war against so-and-so," I presume it amounts more or less to the same thing. But I still believe that there is virtue in labeling a declaration of war as such, as against what is the other example—the Tonkin Gulf resolution which I have before me, which talks about repelling aggression, meeting an unprovoked attack, et cetera.

That is not in the public mind a declaration of war.

Senator CASE. And whether it is legal or not, you would say it is very undesirable to have that kind of a resolution?

Mr. GOLDBERG. That is correct.

Senator CASE. And you would even suggest that possibly you would regard it as unconstitutional?

Mr. GOLDBERG. That is correct as authority to engage in a widespread war.

Senator CASE. I think it is well to have that point of view brought out.

Mr. GOLDBERG. I agree.

### TROOP DEPLOYMENT WITHOUT CONGRESSIONAL AUTHORITY RAISES CONSTITUTIONAL QUESTIONS

Senator CASE. Because it is an insidious thing when the President comes up to Congress and says, "Old pals, we are in trouble here and I need your help. We had better get together and you should author-

ize me to do this," or "you should authorize me to do something quite specific." It isn't just a question of a grant of authority by the Congress to the President; but it is a question of whether the Congress is acting itself in a constitutional fashion.

Mr. GOLDBERG. Yes, Senator Case. I agree with that. The situation is complicated by the fact that I have not gone into it at length here, but there are situations other than a declaration of war where I also think the President needs authority to deploy large forces of troops abroad. I am not talking about what Congress has ratified, like the NATO Treaty. Widespread deployments of troops without explicit congressional authority raises to me constitutional questions because of the danger of it leading to war, and that is covered by the resolution Senator Javits has been working out with Senator Eagleton.

Senator JAVITS. Right.

Mr. GOLDBERG. Deployment is a great problem and I believe Congress is the body to authorize substantial deployment of troops. I don't believe that that power is vested in the President by his role as Commander in Chief.

Senator JAVITS. If I may pursue that for a minute, Senator Case.

Senator CASE. Thank you.

Senator JAVITS. There is nothing in the Constitution about "undeclaring" war, is there?

Mr. GOLDBERG. No.

LEGISLATION COULD SET LIMITS NOT IN DECLARATION OF WAR

Senator JAVITS. I mean, having declared war, the only way for Congress to terminate it is by a resolution terminating the state of war which I have had experience with in 1950 in the House or by ratifying a peace treaty. That is correct; is it not? You lose the fine tuning and power to set limits.

Mr. GOLDBERG. That is correct.

Senator JAVITS. So, again, to have the whole argument before our committee, in view of the concept of limited hostilities—these are all relative concepts—we contemplated a legislative action of Congress which could do what a declaration of war cannot do. It could set limitations upon what we expect the President to do and for how long we expect him to do it, which we couldn't do by a declaration of war.

Mr. GOLDBERG. Yes.

Senator JAVITS. You see, the power would be—the initiative would be taken away from us to frame the conditions under which we are allowing him to continue to use troops if we just declared war. Our role might be then argued to be over, finished.

Mr. GOLDBERG. Yes; but Senator Javits, would you not agree with me that the bill that you are offering is not a declaration of war. The bill you are offering is a bill to keep the peace.

Senator JAVITS. That is exactly right.

Mr. GOLDBERG. And that is a matter of urgency; and I happen to believe that if under your guidelines substantially—as I said, I cannot agree with every word—there is less danger of war than the present situation.

Senator JAVITS. Well, I thank the chairman and Justice Goldberg very much.

USE OF EXECUTIVE AGREEMENT IN SPANISH BASES QUESTION

The CHAIRMAN. Mr. Goldberg, one matter you raised there on the deployment, we recently had this question with the Spanish bases. This committee was very active in trying to dissuade the Executive from—first, I think, many of us—from continuing that operation, which is very expensive; and, next, after we decided they were determined to do it, we suggested making it a treaty because it does involve deployment of substantial numbers of troops in Spain, besides large undertakings financially.

They flatly refused to do it. They executed it as an executive agreement after we had implored them to make it a treaty. This is one recent example of what I said a moment ago. What is the remedy for that?

Mr. GOLDBERG. As I have said earlier, and I repeat again, both Congress and our people are going to have to act to correct departures from the spirit and letter of the Constitution. One would have to be someone who is uninformed about foreign affairs and the possibilities of being drawn into a war not to know that if you deploy large elements of troops and establish bases, that that enters into the area of the warmaking power. Otherwise, why are you doing it?

Now, it may be necessary, and I again repeat I don't think the Constitution is a suicide pact. I think we have to have alliances, but let us make alliances constitutionally.

The CHAIRMAN. I agree with that. And in this instance, one of the generals who was negotiating the agreement—I think it was General Wheeler, Chairman of the Joint Chiefs at that time—I think to calm the apprehensions of the Spaniards, in one of the papers said that the circumstance of our deployment and so on gave them greater assurance than would a treaty. In other words, that the very fact that we were there and we were doing what we were doing with all the equipment, was a greater assurance to them than a treaty.

Mr. GOLDBERG. I do not agree with General Wheeler, with all respect.

The CHAIRMAN. He meant as a practical matter. He didn't mean as a constitutional, legal matter. He just meant we create a situation from which we would be impelled to come to their defense more positively than even if we had a treaty.

Mr. GOLDBERG. I think there is more assurance to other countries if the Senate acts by a treaty than if it is done unilaterally by authority of the President without recourse to Congress.

The CHAIRMAN. I would. Goodness knows, I thoroughly disapprove of that. I was only saying it to illustrate their views as to what they were doing.

Mr. GOLDBERG. Yes.

The CHAIRMAN. I thoroughly disapprove of that as well as of its being an executive agreement.

TROOP AND NUCLEAR WEAPONS DEPLOYMENTS ABROAD SHOULD BE CONGRESSIONALLY AUTHORIZED

Senator CASE. Would the chairman yield on that?

Aren't there two questions in regard to matters that came up in the Spanish bases: (1) Our decision to put troops there, which is not

directly related to the agreement; and (2) the agreement with the country where they are put, which permits, in effect, our stationing them there. Even if we had the legally obtained permission of a country such as Spain, there would still be a question of whether we ought to put troops in massive numbers abroad. I think the deployment of nuclear weapons is a matter of such significance that it, too, ought to be subject to congressional authorization.

The CHAIRMAN. Ought to be?

Senator CASE. Ought it not, in your judgment, Mr. Justice, be included in congressional authorization?

Mr. GOLDBERG. One of the reasons why I support this legislation, although I have my doubts about its efficacy, is because it restores us to our constitutional safeguards.

We must remember that Congress has on various occasions, I think as recently as 1940, enacted legislation about deployment of troops abroad. It seems to me, in so enacting legislation, it was acting, discharging its constitutional mandate; and for those who think that we are disarmed and incapable of doing anything, if I recall correctly, Australia and New Zealand had a provision that they could not deploy conscripts, for example, abroad in World War II. And as one who served in World War II, I can bear witness that Australians and New Zealanders fought well in World War II and had substantial forces abroad.

### LEGISLATION REQUIRING EXECUTIVE AGREEMENTS BE REPORTED TO CONGRESS

The CHAIRMAN. May I ask you about your view about a bill by Senator Case, S. 596, which requires that all executive agreements be reported to Congress? Now they are not even reported; I mean not necessarily. They sometimes tell us about them in general, but they don't bring them certainly for our approval. Would that be a step in the right direction?

Mr. GOLDBERG. Yes, Senator.

Mr. Chairman, I think they all ought to be reported, and if there is a grave question that some executive agreement will violate some secrecy or confidential character, the security of such documents can be worked out with appropriate committees of the Congress, and the Congress.

The CHAIRMAN. We have a hearing, I believe, scheduled on that bill for the 20th.

Senator CASE. I appreciate the chairman's bringing that up. On executive agreements of a sensitive nature, my bill provides that the information should only be divulged to the appropriate committees of Congress and not to the public.

Mr. GOLDBERG. Yes, subject to what I have said.

The CHAIRMAN. Of course, this raises a further question. The executive branch has come into the habit of thinking everything is delicate, as illustrated in the publication of the Pentagon papers.

Mr. GOLDBERG. Mr. Chairman and gentlemen of the committee, is it not interesting as you reflect upon the Pentagon papers—they were not in the first instance, at least, revealed by Congress? They were revealed outside of Congress.

The CHAIRMAN. Yes.

DISTRUST OF CONGRESS BY EXECUTIVE

Mr. GOLDBERG. I think we have to overcome this distrust of Congress by the Chief Executive.

The CHAIRMAN. The distrust only arises out of the fact that we don't agree very obsequiously to everything they propose. As long as you agree with them, they trust you. They don't believe in the adversary condition, that it is necessary for debate. If you debate their issues, then they don't trust you. You will find the committees which accept every proposal they make, they have great trust in them; but, of course, that is another matter. But to me this is completely a denial of what the whole democratic process is about. I assumed that the existence of the legislature and the court impliedly contemplated adversary discussion and criticism, otherwise there was no reason.

Senator CASE. Mr. Chairman——

The CHAIRMAN. Let me add one more thing, and I will turn it back to you.

Senator CASE. I have a question on one matter that you raised on the treaty question.

IS TREATY SUFFICIENT WHEN AGREEMENT INVOLVES NUCLEAR WEAPONS?

If an agreement such as the one for Spanish bases also involves nuclear weapons, would ratification of the agreement as a treaty be sufficient? Since the placing of nuclear weapons abroad could create a possible warlike situation, would it also require approval by the House of Representatives?

Mr. GOLDBERG. You have to draw the line.

Senator CASE. Yes; I know that.

Mr. GOLDBERG. Everything is a matter of degree. If deployment of forces are deployed just to be on your guard without an imminent danger but a sensible arrangement, then it would seem to me it could be done by the treaty power. If it involves imminent danger, and this is a very hard line to draw, then, of course, that is another matter. I would say that the treaty power is broad enough to cover deployment of forces under circumstances when there is no imminent danger.

However, I want to point out that deployment of forces carries with it great significance, and we ought not to do it unilaterally by the President. At least he ought to have the benefit of congressional support.

Senator CASE. Thank you, Mr. Chairman.

The CHAIRMAN. I have one question. It really isn't relevant, but I hope you won't mind my asking it.

Mr. GOLDBERG. No.

ADMISSION OF ERRORS BY SUPREME COURT, CHIEF EXECUTIVE

The CHAIRMAN. But since you have been—we very rarely have a man who has been in both the judicial branch and the executive branch. I mentioned earlier and it occurred to me then, you mentioned how the Supreme Court has several times admitted it was in error; it changed its view; did you not?

Mr. GOLDBERG. Yes, I did.

The CHAIRMAN. In your prepared statement. Can you recall any Chief Executive ever admitting error?

Mr. GOLDBERG. Not while he is actively functioning.

The CHAIRMAN. Isn't it odd that, how is that, the Chief Executive can have this aura of infallibility although the Court does not?

Senator CASE. Maybe he needs it more.

The CHAIRMAN. Or assumes it. What is your explanation? It is just curious to me why it has become impossible for a Chief Executive to say the country has made a mistake when the Court—which in many respects people regard as the highest of tribunals as an intellectual and moral mentor of the country—is not loath to admit it is subject to error? Why is that?

Mr. GOLDBERG. I suppose it is because the Supreme Court does not have to run for reelection and the President does.

The CHAIRMAN. That is a very odd, very simplistic explanation, I think.

Senator SPONG. May I ask one last question?

The CHAIRMAN. Yes, indeed.

PROVISIONS IN JAVITS-EAGLETON DRAFT

Senator SPONG. Justice Goldberg, I am pleased that you discussed the deployment of troops in response to Senator Javits' question and then subsequently. Many of the deployments have been justified on the basis of protection of American lives and property. Do you believe that the latest proposal in the Javits-Eagleton draft—I think you said you have it before you—do you believe adoption of that language would help insofar as the future is concerned?

Mr. GOLDBERG. Well, first of all, it is an improvement over the original draft by Senator Javits. It leaves out property.

Senator SPONG. Right.

Mr. GOLDBERG. And I take it we are no longer going to engage in gunboat diplomacy, no matter how we are aggrieved, and justifiably aggrieved very often, by expropriation actions by other governments. This is subject now to other very grave restraints. For example, the World Bank will not make loans to countries that expropriate without observing the rule of international law of fair and prompt compensation which I subscribe to.

Now, about protecting American citizens abroad. I believe they ought to be protected. I believe that our basic protection ought to be our diplomatic influence rather than military. There may be occasions where physically we may have to go to get people out, send marines and so on to evacuate citizens. But I would hope—although I have not studied the new draft intensively, I just got it last night—I would hope it would be so limited that we would understand that to act to evacuate our citizens is for this is the limited purpose. It would not constitute an umbrella under which we engage in continuing hostilities.

Senator SPONG. Because despite all the resolutions that were passed this was the legal basis given for——

Mr. GOLDBERG. Yes.

Senator SPONG (continuing). For many of them?

Mr. GOLDBERG. Yes, and much abused. We all take risks in the world and one of the risks we now take, if we go abroad, is what may happen if we are abroad.

For example, I did not object myself to sending a few planes into the Congo to evacuate our citizens. We were not declaring war. We sent a few planes over because regular airlife was not available to evacuate our citizens who were threatened by conditions in the Congo. But this was a far cry from sending combat troops into the Congo.

Senator SPONG. We have had expert testimony here that under this legislation that could not be done.

Mr. GOLDBERG. Send a few planes over to evacuate American citizens?

Senator SPONG. In the Congo.

Mr. GOLDBERG. Well, I can't say without further study. I think that Congress should authorize the use of our noncombatant airlift capacity for humanitarian reasons, to take out citizens.

Now, whether it ought to be done is, of course, also a political-diplomatic question.

Senator SPONG. Thank you very much.

The CHAIRMAN. Well, there is a vote. Could I ask you one other question not on this subject?

Mr. GOLDBERG. Surely.

EXECUTIVE PRIVILEGE

The CHAIRMAN. Since you are here, you know we have a bill pending on executive privilege. Since that bill was first introduced and since the hearings were held earlier, the President has pleaded executive privilege, asserted it, with regard to documents relating to the foreign aid bill which, I believe, I think, the law very clearly says should be supplied to the committee. The basic law of the foreign aid bill says all relevant information in the executive department, relevant to the subject, and so on, should be made available to the Congress.

Yet we are met with this executive privilege.

Would you comment very briefly if you might about your ideas about executive privilege, because this is not too far removed from the same problem we are talking about.

Mr. GOLDBERG. No, executive privilege, like classification, is much abused. We are overclassified and I don't know whether it is grammatical but we are over executive privileged. There, too, if there is a matter of executive action which requires confidence, means can be worked out to preserve it. This committee does that constantly, and the Armed Services Committee does it. There are ways by which that can be protected.

Executive privilege was intended to protect the President; he is not to be hauled before Congress by interrogation; I think everybody would agree with that. I believe executive privilege should protect the President's conversations with his key aides, but I think we have an intolerable situation now where basic issues of foreign policy are formulated by many people in the executive branch of the Government, often not even in the State Department, and Congress is denied the opportunity to explore the facets of the foreign policy of our country. Executive privilege, from my experience, need be invoked very rarely, very rarely.

The CHAIRMAN. Could you indicate in your view as briefly as you can the limits of it, I mean, what type of situation do you think it is legitimately applied to, if any?

Mr. GOLDBERG. The method, the area which I would apply it would be this: We cannot broadcast to the 6 o'clock news the negotiations day by day that are going on on the SALT talks. But that does not mean that the committees of Congress——

The CHAIRMAN. I am not talking about broadcasting; I mean responding to the legislature.

Mr. GOLDBERG. I was going to add but that does not mean that the relevant committees of Congress who have to approve the final result are not to be informed about what is going on. So I see no reason why the Congress cannot be told what is going on.

Now, the worry is always about leaks, but again I want to point out the leaks which recently occurred, which caused the administration great embarrassment did not come from the Congress. It must have come from someone in the administration. So I think that executive privilege is much abused.

I would really confine it very narrowly to what the President himself needs to talk to his key aides and advisers and get their advice and hear their arguments, but on substantive matters of concern I do not believe that the privilege ought to exist.

The CHAIRMAN. That is what I wanted your views about. It struck me if there is any validity to executive privilege it is of a personal nature, the personal communications between the President and a Secretary and his personal advisers.

You said a moment ago everything is a matter of degree. When that is extended to a great bureaucracy of 500 or 1,000 or 5,000 men, it seems to me it makes it an absurdity.

Mr. GOLDBERG. It does and it is unnecesary.

The CHAIRMAN. It seems to me in the old days when you had a Colonel House or a Harry Hopkins, you would think, well, he is an intimate; he really was not confirmed by the Senate, just an intimate associate who everybody likes somebody like that to confer with. But members of the Cabinet and members of the bureaucracy of the National Security Council, where I think you have now over a hundred or so, this goes beyond any reason at all to say they are all immune from even responding to any congressional committee.

Mr. GOLDBERG. Well, I agree with that entirely.

The CHAIRMAN. It seems to me this is reducing the whole thing to an absurdity.

Mr. GOLDBERG. You will recall, Senator, that I had this problem in two areas. When I was Secretary of Labor, I never invoked it; and when I was at the U.N. I never invoked it. I felt it was my obligation to appear here and testify frankly about our policies and what we were doing.

Now, you never—members of this committee—never asked me "What did you discuss with the Ambassador of this country yesterday about this problem." After all, we have got to assume, which I don't think is assumed, that Congress has a sense of responsibility, and I think that is the basic thing which affects the conduct of our affairs.

The CHAIRMAN. Well, thank you.

Senator Case. Would the Senator permit me just this interjection because it seems to me that the McCarthy era had a rather bad result in this respect.

The CHAIRMAN. In all respects.

Senator CASE. Because of the excesses of Senator McCarthy in his inquiry, there was a tendency on the part of the newspapers and a lot of thoughtful people to say, "It is outrageous for Congress to make certain kinds of inquiries and executive privilege should protect subordinates in the executive branch of government."

I am not sure that is the purpose of executive privilege. I understand the need for the President to be advised by people who need not fear later reprisals, but that ought to be a very small group, it seems to me, and not the vast bureaucracy.

Mr. GOLDBERG. I agree with that but also we cannot have a perfect situation. There will be abuses and there will be problems but we have to pay a price for the larger question which is adequate information to Congress so that Congress can perform its constitutional duties.

The CHAIRMAN. Yes.

Thank you very much, Mr. Justice. We have a vote pending. I appreciate you taking the time. You are very generous with your time.

(Whereupon, at 12:30 p.m., the hearing was adjourned, subject to the call of the Chair.)

# APPENDIX

STATEMENT SUBMITTED BY HON. JONATHAN B. BINGHAM, A MEMBER OF THE HOUSE OF REPRESENTATIVES FROM NEW YORK

I wish to thank you, Mr. Chairman, and the Members of this Committee, for providing me this opportunity to present my views on proposed legislation dealing with the war powers of the President and the Congress. As a Member of the Foreign Affairs Committee of the House of Representatives, and of the Subcommittee on National Security Policy and Scientific Affairs, I have had occasion to study in considerable detail the numerous legislative proposals in this area. As you undoubtedly are aware, the Resolution on Presidential War Powers passed by the House on August 2, 1971 (H.J. Res. 1), requires only that the President report to the Congress should he commit American troops without specific prior approval by the Congress. I certainly feel that that resolution does not go far enough in clarifying the President's responsibility to the Congress. On the other hand, I am deeply disturbed about certain provisions of more comprehensive war powers legislation that was considered by the House and which this Committe is now considering. The main purpose of my statement today is to alert this Committee to a number of serious difficulties and dangers in the proposals before the Senate—dangers which I feel have not been sufficiently recognized or dealt with in the already lengthy national debate on this issue.

First, I am forced to conclude that it is quite futile and unwise to attempt specifically to prescribe the circumstances under which the President may engage in hostilities in the absence of a declaration of war. If the criteria stated are sufficiently broad, they amount to no restraint at all. This is especially true since successive Presidents have shown themselves quite capable of interpreting Congressional prescriptions to suit their own needs and to justify their actions. Surely, the Gulf of Tonkin Resolution is a striking illustration. Highly restrictive prescriptions, on the other hand, could interfere with the President's capacity for quick, flexible response under circumstances that could prove tragic. The Javits bill (S. 731), for example, in my view would have inhibited or prevented President Truman from responding as he did to the invasion of South Korea. Similarly, the Javits bill could make it difficult for a President to respond adequately to a sudden Soviet-Arab attack in the Middle East. So it seems to me that any effort to prescribe circumstances in which the President is authorized to deploy combat forces is destined to fail either by imposing, in effect, no real restraint on the President or too much.

Second, it is my judgment that any deadline on Presidential or Congressional action is ill-advised and probably unworkable. The thirty-day provision of the Javits, Eagleton, and Stennis bills, after which Presidential action would have to be terminated unless continued by Congress, could well force the Congress into a premature decision or terminate Presidential action before a full assessment could be made of the situation. Similarly, any time limit is likely to be arbitrary and none can hope to suit every circumstance.

There is also the procedural problem of determining when the specified time period commences. To base a time limit on a Presidential report of troop deployment has grave drawbacks. As recent experience indicates, Presidents can be slow to report to Congress, especially when foreign involvement occurs gradually, rather than through decisive action. How long after we became involved in Vietnam, for example, did the Congress receive a clear report of that fact from the President? When would we have started counting off thirty days with regard to our Vietnam involvement? Such questions seems to me to raise serious doubts about the practicability of any time limit on Presidential intervention.

Third, I believe Congress should not be placed in a position where it must act in order for Presidential action to continue. If the Congress does act, then

the President receives a blank check to proceed as he sees fit from there on out, and the Congress is all too likely to be swept up in the enthusiasm of the moment, giving the President authority that it might later regret having given. Again, our dismal experience under the Tonkin Resolution should be a warning. Rather, the responsibility and authority which the Congress now has—through the "power of the purse"—to restrict or terminate Presidential action should be spelled out clearly. What is now a blunt and awkward tool should be sharpened so that it can be used with more precision.

Mr. Chairman, I hope and trust that the distinguished Members of this Committee and of the full Senate will give careful consideration to these difficulties with pending Senate legislation before taking further action. It is my feeling that an entirely different approach is required than is offered by any of the Resolutions pending before this Committee. Specifically, it is my conclusion that the authority to carry on hostilities in the absence of a declaration of war should continue only so long as the President has at least tacit approval of both houses of Congress: in other words either house, acting alone, should be able to "blow the whistle" on the President at any time. Each house fully represents the American public, and the first body to reach a majority in opposition to Presidential action should be able to terminate it. There is clear precedent for such an approach in the Executive Reorganization Act, which stipulates that rejection by either house of the Congress is sufficient to kill a Presidential effort to reorganize the Executive Branch.

The approach I am suggesting as an alternative to those before the Senate is embodied in legislation I submitted in the House but which has not, to my knowledge, been introduced in the Senate, and I submit the text of that resolution to follow my remarks in the record of these hearings.

HOUSE JOINT RESOLUTION 669

*Resolved by the Senate and House of Representatives of the United States of America in Congress Assembled*, That use of the Armed Forces of the United States in military hostilities outside the territory of the United States in the absence of a declaration of war shall be unlawful following the adoption by either House of the Congress of a resolution disapproving continuation of such use. Any such resolution of disapproval shall, if sponsored or cosponsored by one-third of the Members of the House of Congress in which it originates, be considered reported to the floor of such House no later than one day following its introduction, unless the Members of such House otherwise determine by yeas and nays. Any resolution so reported shall immediately become the pending business of the House to which this reported, and shall be voted upon within three days after such report, unless such House shall otherwise determine by yeas and nays.

Upon the adoption of any such resolution of disapproval, the President shall proceed at once to effectuate the immediate withdrawal to the United States or any territory subject to its jurisdiction of the United States forces involved, having due regard to the need to protect such forces from attack while in the process of withdrawal.

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UNIVERSITY OF VIRGINIA,
SCHOOL OF LAW,
*Charlottesville, Va., June 10, 1971.*

Senator J. W. FULBRIGHT,
*Chairman, Committee on Foreign Relations, U.S. Senate, Washington, D.C.*

DEAR SENATOR FULBRIGHT: Thank you very much for your letter of May 11, 1971, inviting me to submit a statement to be included in the public record of the Committee hearings on pending war powers legislation. In lieu of such a statement, I would appreciate your placing this letter in the record.

At the outset, let me state emphatically that I believe that legislation is needed in this area, and that the bill submitted by Senator Javits and others, S. 731, is an excellent model for such legislation. It puts in proper perspective the historical allocation of competence between the executive and legislative branches in this vital area. The constitutionality of such legislation, in my opinion, cannot be seriously questioned.

As an international lawyer, however, I naturally have read the bill against the requirements of international as well as constitutional law, and here I have

one serious reservation with respect to clause A(3), which authorizes the President to act unilaterally "to protect the lives and property, as may be required, of force against the territorial integrity or political independence of any state." President has and should have the power to protect Americans abroad, a serious question exists whether such action remains valid under international law in view of the provision in Article 2(4) of the United Nations Charter that states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."

Professor Friedmann of the Columbia Law School has pointed out recently that "intervention for the sake of the protection of nationals can be justified only in times of internal chaos and within strict limitations." Friedmann, *Intervention and International Law*, 25 International Spectator 40, 58 (1971). My own views are in accord. *See* Lillich, *Intervention to Protect Human Rights*, 15 McGill Law Journal 205 (1969). It should be noted, though, that a substantial body of scholarly opinion interprets the Charter to preclude unilateral intervention by states to protect their nationals. *Cf.* Falk, *Legal Order in a Violent World* 324 (1968). Such action hsould come. they argue, through the United Nations. *See* Brownlie, *Humanitarian Intervention*, to be published as a Chapter in a forthcoming book of essays sponsored by the American Society of International Law and edited by Professor John Norton Moore.

While the propriety of intervening to protect lives is questioned, what is common ground to all parties to the above debate is that intervention to protect property is absolutely forbidden now. Surely this issue was settled by Suez. Hence, the reference in S. 731 to endangered "property" as a basis for the President's invocation of his war making power should be removed from the bill if it is to be consistent with the dictates of international law. It is my understanding that this issue was discussed at the hearings on March 24, when Senator Javits stated he would be willing to delete the term "property," and I would hope that such deletion would be made.

In sum, I support S. 731 subject to the deletion of the phrase "property" in clause A(3) and the revision of this clause to underscore the fact that the power could be invoked by the President only in rare emergency situations, and then only if directed toward the rescue of Americans and not, as you yourself have so eloquently pointed out in the Dominican Republic situation, primarily to effect the outcome of domestic political controversies within the state against which the intervention is directed. The New York Times of September 19, 1970, for instance, reported that during the Jordanian crisis the President was prepared to act to insure "the political survival of King Hussein's regime, *even if protection of American lives was given as the primary pretext for action*." (emphasis added) S. 731 as it now stands would have authorized such unilateral action, and for this reason should be revised along the lines suggested above.

Sincerely,

RICHARD B. LILLICH,
*Professor of Law,*
*Director, Procedural Aspects of International Law Institute.*

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COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,
DEPARTMENT OF HISTORY,
*New York, N.Y., April 6, 1971.*

Hon. THOMAS F. EAGLETON,
*U.S. Senate,*
*Washington, D.C.*

DEAR SENATOR EAGLETON: Thank you for your letter of March 18th, defining the difference between S. 731 and S.J. Res. 59, and inviting my comments. I must say that I am heartened by the efforts of Senator Javits and yourself to clarify the inherent war powers of Congress and to define the authority of the Executive branch to commit the country to undeclared wars.

Let me give my reactions to the questions you raise, repeating your questions for clarity:

(1) Does the Constitution require that hostilities be undertaken only with Congressional authorization—except in certain limited circumstances—or does it permit broad Presidential action with only retrospective Congressional control?

The Constitution restricts undeclared war in two ways: by Art. I, sec. 8, it vests in Congress the power to declare war and to raise and support armies. Thus, the President cannot take the nation into a "war" without the consent of

Congress. On the other hand, under Art. II, sec. 2, the President as commander in chief is empowered to repel invasion and suppress insurrection. It seems clear by implication that the President has the right to employ the armed forces of the country to defend its physical security, subject to the limitation that Congressional appropriations may be restricted to a maximum of two years. Presidents have acted on such authority in the past, notably President Lincoln, who exercised the war powers to issue a series of far-reaching proclamations, calling out the militia, calling for volunteers, and announcing a blockade of the rebellious states. When the President exceeds his explicit Constitutional authority, Congress may legally curtail or cut off military appropriations for hostilities, as was done in the undeclared naval war with France, 1798–1800, and, in the event that the clear intent of Congress is defied by the President, institute impeachment proceedings. Significantly, impeachment proceedings have never been instituted on such grounds.

(2) In which of the following instances can the President act unilaterally and under what Constitutional power or legal precedent:

(*a*) to repel an attack on the United States? to prevent an imminent attack on the United States? to prevent an imminent attack on United States troops legally deployed abroad?

There is no question that under the Constitution the President has the authority to repel an attack on the United States. Whether "invasion" can be stretched to cover "imminent attack" on the United States is indeed a moot point which needs to be clarified, and even more moot is the proposition that the President's authority covers "imminent attack" upon United States troops legally deployed abroad. The two last categories may be construed to be within the powers of the President as commander-in-chief, but to do so would leave to the President an enormous degree of discretion as to what constitutes an "imminent attack." Was the Tonkin Gulf episode an "imminent attack," for example? Or the sinking of the "Maine" by persons unknown?

(*b*) to repel an attack upon the forces of the United States? If so, to what extent without further Congressional authorization?

If the President has the Constitutional power to repel invasion, he would assuredly have the power to repel an attack on the forces of the United States at home and probably legally deployed abroad. Here, though, it seems necessary to spell out just how far the President may go. Could he, for example, authorize hot pursuit of the attacking forces into a third or neutral nation?

(c) to protect American civilians abroad? to protect American property abroad?

Numerous precedents exist for the use of the military forces by the President to protect American civilians and property abroad. In all cases such forces were used in relative weak and unstable states, not against great powers. Indeed, such Presidential actions provide the basis for the charge of neocolonialism levied against the United States by critics of our intervention, notably between 1865 and the inauguration of the Good Neighbor Policy by Franklin Delano Roosevelt, with a few controversial examples in recent years.

(*d*) to protect "national security interests" abroad?

Apart from a treaty, and lacking Constitutional mandate, the President has no authority to act on his own to protect anything so vague as "national security interests" abroad. Such actions have, of course, been taken. The convoying of British ships by Franklin Delano Roosevelt is an outstanding example that comes to mind.

(3) Should any treaty to which the United States is a signatory and which is presently in effect—including NATO—be viewed as self-executing from a legal standpoint? Can the President act unilaterally without further Congressional authorization to fulfill a United States treaty commitment without further Congressional authorization? If it is to be viewed as self-executing and/or pre-dated authorization for unilateral Presidential action, how is it consistent with the Constitutional provision that both Houses must "declare war"?

When the Senate ratifies a treaty involving a military commitment, it has, subject to express limitations within the treaty, entrusted its enforcement to the Executive Arm. I might add that the effect could conceivably be mischievous were Congress at this time to decide, for example, that NATO was not self-executing. Such a resolution might encourage the aggressive forces in Europe who would no longer see in NATO an effective deterrent to their expansionist aims. Should Congress unilaterally modify the terms of a treaty in a substantial way it would be necessary to submit the codicil to all parties thereto for an exchange of ratifications.

The issue of whether treaties of the order of NATO are self-executing remains moot to this day, as does the role of the House in implementing treaties. In the issue raised by the Jay Treaty the House of Representatives finally disclaimed any part in the treaty-making power, but insisted upon its right to originate appropriations. Its vote by a thin margin in favor of an appropriation to implement the Jay Treaty left moot the issue of the inherent right of the House to deliberate on the expediency of carrying a treaty into effect, an issue that seems to have been laid to rest until now by the defeat of the Bricker Amendment.

With the notion of Congressional control of executive agreements involving military commitments which bypass the Constitutional role of the Senate in treaty-making I am in thorough accord.

(4) Can appropriations, without an explicit statement of authorization to engage in hostilities, an and of themselves be construed as a legitimate grant of authority for the President to conduct hostilities?

I think it would be necessary for Congress expressly to limit or define the use of military appropriations. Otherwise the President as commander in chief may use them to conduct hostilities to repel invasion or suppress insurrection. He could not construe the mere voting of appropriations as a blanket grant of authority to conduct general hostilities.

(5) Can Congress, consistent with the Constitution:

(*a*) restrict deployment of troops abroad?

Yes, it has done so, as in the case of the winding down of the undeclared war with France, 1798–1800.

(*b*) limit the type of activity of United States troops legally deployed abroad?

Yes, by its power over appropriations.

May I add, and I believe from Senator Javits' own remarks at the session of the Senate Committee on Foreign Relations, at which I testified, that the omission of "property" from S.J. Res. 59 from instances cited authorizing the President to act unilaterally is a prudent and well-conceived proposal, which I strongly endorse.

Sincerely yours,

RICHARD B. MORRIS,
*Gouverneur Morris Professor of History.*

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STATEMENT OF LEON FRIEDMAN, SPECIAL COUNSEL, AMERICAN CIVIL LIBERTIES UNION ON SENATE JOINT RESOLUTION 59, A JOINT RESOLUTION REGARDING THE POWER OF THE CONGRESS AND THE PRESIDENT TO COMMIT THE ARMED FORCES OF THE UNITED STATES TO HOSTILITIES, AND RELATED MEASURES

On behalf of the American Civil Liberties Union. I appreciate the opportunity to communicate our views to the members of this Committee on the pending bills and resolutions relating to the powers of the Congress and the President to commit the armed forces of the United States to hostilities.

The American Civil Liberties Union believes that the circumstances surrounding the decision to begin and to continue American participation in the war in Vietnam documents clearly the need for Congressional reassertion of its traditional powers and responsibilities in this area. All the resolutions pending before this Committee have the beneficial effect of requiring explicit Congressional approval before the President may start and continue hostilities. All recognize the right of our military forces to defend themselves from attack and to protect American citizens abroad.

Of the proposals before this Committee, the ACLU has concluded that S.J. Res. 59, the Eagleton resolution, affords the best protection against unilateral exercise of the war power by the President. We, therefore, urge that it be reported favorably by this Committee.

EAGLETON RESOLUTION PREFERRED

Our reasons for preferring S.J. Res. 59 are as follows:

1. *It makes clear that existing treaties do not by their own authority permit the President to initiate hostilities in defense of treaty signatories.*

The SEATO treaty has often been cited as the authority for our involvement in Vietnam, but by its own terms it requires that a treaty member must act "in accordance with its constitutional processes." This language is contained in most of our existing defense treaties. It can only mean that the Congress must ex-

plicitly authorize military action before hostilities can legally commence. The Javits bill is ambiguous on this point and should be clarified.

2. *It also makes clear that appropriations acts are not to be considered an exercise of the war power.* Specific, separate authorizing language is necessary. We think this is an important point since the courts have interpreted defense spending bills as authorizing military action.

3. *It also defines "hostilities" very specifically to include the deployment of American troops only under circumstances where an imminent involvement in combat activities with other armed forces is of a reasonable possibility.* Some such definition is desirable since otherwise the President may deploy troops or send military advisors abroad to places where they are sure to be fired upon. At that point the President should not be permitted to start a full scale war on the claim that he is defending American troops in the field.

4. *The Eagleton resolution contains very specific limiting language on what constitutes "defensive action."* In this day when both sides call the other an aggressor, it is desirable to try to define what is or is not "defense."

5. *The Eagleton resolution also limits the President's ability to use military force to defend American property abroad.*

SUMMARY OF SUPPORTING REASONS

In support of our endorsement of the Eagleton resolution, we would like to cover three areas:

First we would like to comment on the civil liberties aspect of this problem, an area which we believe has thus far been overlooked. There can be no doubt that, in time of war, great restrictions are placed upon the freedoms of the people and their exercise of First Amendment rights. Under those circumstances the decision to go to war must be made by as broad a consensus as possible. It should not be left to the President alone.

Secondly, we will discuss briefly the Constitutional restrictions on Executive exercise of the war power. It is our position that not only do the Constitutional text and the debates make clear that the President cannot wage war on his own authority, but that our entire military history supports the notion that Congress must be the body to decide whether we begin a war—a position recognized by Congress, the President and courts alike since the beginning of our history.

Thirdly, we would like to bring to the attention of the Committee recent judicial decisions in cases initiated by the American Civil Liberties Union which we believe, give some urgency to the need for legislation to define the way the Congress will exercise its military powers under the Constitution. A federal Court of Appeals in New York has within the past few weeks held that any Congressional support or recognition of a Presidentially-initiated war, whether through appropriations or extensions of the draft law, amounts to an exercise of the war power. *Orlando* v. *Laird*, Nos. 477 & 478 (April 20, 1971). This decision makes absolutely necessary a more precise delineation of responsibility between the President and Congress with respect to the war powers. We have attached a copy of the *Orlando* decision as Appendix A to this statement.

A. *Civil Liberties Problems*

The importance of prior Congressional authorization of any military activity is not an abstract constitutional problem. The smallest military adventure may lead to an unforeseen confrontation between the superpowers. An unanticipated excursion into enemy territory by an erring plane, an overeager response by a radar station and atomic missiles may be launched.

Even if the danger of an atomic holocaust could be kept to a minimum, any major military action by the government immediately produces severe curtailments of civil liberties. Men must be drafted for the Army. Any criticism of the Administration for its war policy may be punished by the government as giving aid and comfort to the enemy. A spirit of national fear and hysteria may bring about even more restrictions on personal rights.

In the face of this erosion of personal rights in time of war, the decision to go to war must be made by as broad a consensus as possible. It is unthinkable that the President alone can start the nation on this deadly and dangerous path without the consent of the people's legislative representatives. The people will not only bear the financial weight of the war through increased taxes, but sons and husbands will have to fight in the war. The civil liberties of all will be seriously curtailed. Their approval, expressed through Congress, is absolutely necessary before war can begin.

We have only to look at the wars in this century to see how war affects personal rights. During World War I many groups in this country opposed our participation in the war and the conscription of the nation's youth to fight in Europe. Innocent meetings called to protest the draft law were broken up by police and vigilante groups, the participants beaten, arrested, and often sentenced to long jail terms. Socialist literature suggesting the illegality of conscription was seized by the police and denied mailing privileges by the Post Office Department. Statements of opposition to the war lead to indictment under the Espionage Act as encouragement to draft evaders.

During World War II, there was also a breakdown in the protection of personal rights guaranteed by the Constitution. More than 100,000 American citizens of Japanese extraction were moved from their homes on the West Coast and sent to detention centers for the course of the war. Merely because of their racial background, these citizens were forced to live in concentration camps for years. These actions resulted from wartime hysteria and the unthinking fears and hatreds produced by the pressures of World War II.

In addition, the Army took over the administration of Hawaii, declared martial law, and ruled it as if it were a military base for most of the war. The civil courts were closed and Army court martials tried civilians for any and all criminal offenses. The Supreme Court did not declare this procedure unconstitutional until the war was over. *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946).

The Korean war exacerbated the great civil liberties crisis of McCarthyism. Unsubstantiated charges of communist-affiliation led to loss of government jobs for hundreds of professional men and women who had spent years in their positions. For the same reason, teachers were fired from their posts. Writers, scientists and artists found themselves on employer blacklists so that they could not be gainfully employed. Military personnel were given less than honorable discharges from the Army because of alleged communist activities by their parents or relatives. Numerous restrictions on personal rights were enacted into law in the McCarran Act, the Subversive Activities Control Act and many others.

The Vietnam war has also led to a serious curtailment of the people's civil liberties. The military involvement of this country in a war opposed by a large part of our society has had a highly detrimental effect on the enjoyment of these personal rights.

The present draft system, with its severe deprivation of personal liberty and its administrative inequities, still continues. The right of non-obstructive dissent by service personnel and civilians who oppose the war has been curbed, often by harsh measures. Because of their anti-war activities a group of East Coast intellectuals including Dr. Benjamin Spock, were indicted for conspiring to counsel young men to refuse service in the Army—a sad throwback to the World War I indictments under the Espionage Act. Dissident groups in this society who vigorously fight against the war and other social evils find themselves indicted for conspiracy to cross state lines to incite a riot or are subpoenaed to appear before federal grand juries to tell of their involvement in anti-war activities. The threat of criminal prosecution hangs over the heads of young men and women for various forms of peaceful expression and symbolic speech, such as flag offenses and draft card burning. Freedom of the press has been undermined by subtle and not-so-subtle threats by high government officials who do not like the growing anti-war criticism in the newspapers and television networks. Wiretaps, electronic surveillance and police spies, techniques employed widely to gather information on anti-war activists, all intrude upon the people's right to privacy.

Many of these actions have been taken to blunt the impact of the anti-war movement, as the government attempts to create an illusion of national unity while it wages an unwanted war in Vietnam. Worse still, the basic values of this society are torn apart and the legitimacy of its institutions seriously questioned because the war continues over the opposition of growing numbers of Americans. As Senator Sam Ervin said on the floor of Congress:

> The consequences of this failure to observe the Constitution are all too evident. True, no Supreme Court decision has adjudged the war in Vietnam as unconstitutional on the grounds that Congress adopted no formal declaration of war and because the Senate gave no effective advice and consent. Instead, the declaration of unconstitutionality has come from the judgment of the people. We see the decree everywhere. For the first time in our memory, an incumbent President was forced from office. Young men whose fathers and brothers volunteered to serve their country now desert to Canada and Scandanavia rather than bear arms in the country's cause. Thousands march on Washington and picket the White House, the Capitol, and the Pentagon.

> Now we have riots and violence in our university campuses. ROTC programs are being forced out of schools, and there is dissension and antiwar activity even among those in uniform.
>
> Perhaps not all the anarchy we see today has been caused by the Vietnamese war and the way in which we became involved. No one can say. But no one can say that the war was not the cause, or at least the catalyst. And I cannot shake the feeling that ultimately the reason so many are now disrespectful and unresponsive to authority is because authority was disrespectful and unresponsive to the Constitution in the making of our policy in Vietnam. 115 *Cong. Rec.* 17217 (June 25, 1969).

The best way to mitigate against the problems outlined by Senator Ervin is to make sure that the people's approval of war is secured through their representative in Congress, to insure that a national consensus exists to launch any military action.

*B. Constitutional Limitations on Presidential War Power*

We think it important to note at the outset of this part of our statement that the limitations on the Presidential war-making power outlined in the bills and resolutions before this Committee are already contained in the Constitution. Nevertheless, we believe it highly desirable to articulate them more fully by legislation.

Professors Commager, Kelly and Mason have already testified about the historical purpose of the war powers clause and why the power was universally considered legislative in nature. The debates at the Constitutional Convention leave little doubt that the President was not to be allowed to start war on his own. Over one hundred years ago, Justice Joseph Story, the great Supreme Court justice and legal scholar, made the following comments about the war power in his *Commentaries on the Constitution:*

> . . . the power of declaring war is only the highest sovereign prerogative, but that it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. . . . The representatives of the people are to lay the the taxes to support a war, and therefore have a right to be consulted as to its time, and the ways and means of making it effective. The co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others. § 1171 (5th ed. 1891) p. 92.

The meaning of the war power clause, and its specific application to concrete situations, has been faced numerous times in our history. It has become recognized that the Executive has the power to initiate certain limited forms of military activities, along with the more general power to repel direct attacks on the United States. Included in the limited emergency instances are numerous cases where the President used military force to protect American citizens or property located in foreign countries, or to commit reprisals against politically unorganized bandits or pirates.

Beyond these very limited powers, it has been recognized, declared and accepted by President, Congress and Court alike that the Executive has no power to initiative or prosecute hostilities without having been first authorized to do so by by Congress. Set out in Appendix B to this testimony are the statements of Presidents Jefferson, Madison, Jackson, Polk, Buchanan, Lincoln, Grant, Arthur, Taft, Roosevelt and Eisenhower all of which confirm the recent National Commitments Report of this Committee to the effect that:

> The founders of our country intended decisions to initiate either general or limited hostilities against foreign countries to be made by the Congress, not by the executive. Far from altering the intent of the framers, as is sometimes alleged, the practice of American Presidents for over a century after independence showed scrupulous respect for the authority of the Congress except in a few instances. The only uses of military power that can be said to have legitimately accrued to the executive in the course of the nation's history have been for certain specific purposes such as suppressing piracy and the slave trade, 'hot pursuit' of fugitives, and, as we have noted, response to sudden attack. Only in the present century have Presidents used the Armed Forces of the United States against foreign governments entirely on their own authority, and only since 1950 have Presidents regarded themselves as having authority to commit the Armed Forces to full-scale and sustained warfare. Senate Report No. 91-129 to accompany S. Res. 85, 91st Cong., 1st Sess. April 16, 1969, p. 31.

The power of Congress to declare war has also followed the pattern described above. As it has evolved, the power has not been restricted to an inflexible and mechanistic requirement that the talismanic words "We declare war" be uttered, but rather a flexible instrument to be used by Congress to give precise authorization to the President to set guidelines as to the purpose and scope of military hostilities to be conducted by the President.

Congress has declared war five times: to begin the War of 1812 (2 Stat. 755), the Mexican War of 1846 (9 Stat. 9), the Spanish American War of 1898 (30 Stat. 738), World War I (40 Stat. 1) and World War II (55 Stat. 795). It also gave the President unlimited powers to meet the emergencies of the Civil War (12 Stat. 326).

In numerous other cases Congress has authorized the Executive to involve the nation in military hostilities of a secondary nature, involving a less than maximum commitment of the nation's military resources. *Even in these secondary military commitments, falling far below the level of commitment reached in the Vietnamese conflict, explicit Congressional approval was sought and forthcoming.*

For example, the naval war with France, waged from 1798–1801, was authorized by explicit Congressional resolution, 1 Stat. 561; 1 Stat. 572, extended 2 Stat. 39 (April 22, 1800); 1 Stat. 574; 1 Stat. 578; 1 Stat. 743; see discussion in *Bas* v. *Tingey*, 4 Dall. 37 (1800); *Talbot* v. *Seeman*, 1 Cranch 1 (1801). The naval war against Tripoli (1802) was authorized by explicit Congressional resolution. 2 Stat. 129. The naval war against Algiers (1815) was authorized by explicit Congressional resolution. 3 Stat. 230 (March 3, 1815).

In 1839 Congress specifically authorized the President "to resist any attempt on the part of Great Britain to enforce, by arms, her claim to exclusive jurisdiction over that part of Maine, which is in dispute . . . and for that purpose to employ the naval and military force of the United States 5 Stat. 355. By joint resolution of June 2, 1958, President James Buchanan was authorized by Congress to use such force as "may be necessary and advisable" to settle differences with Paraguay, 11 Stat. 370. The President was also empowered to initiate hostilities against Venezuela in 1890 after three American steamships had been seized, 26 Stat. 674. Following the capture of eight Americans sailors by the Mexican Army in 1914, Congress permitted President Wilson to employ the "armed forces to enforce his demands for unequivocal amends for affronts and indignities committed against the United States," 38 Stat. 770.

All of these declarations, laws and resolutions show Congress, acting under its constitutional powers, working swiftly in collaboration with the Executive to meet threats or difficulties abroad. None of the supposed problems concerning legislative cooperation with the Executive occurred—there were no endless deliberations or weakening vacillations or compromises, nor were there two governmental voices speaking to the world on behalf of the United States. The constitutional collaboration planned by the framers worked as they foresaw.

*C. Recent Judicial Decisions on the War Power*

This view of the scope of the Executive's war power is confirmed by a series of recent decisions on the Vietnam War. The Second Circut Court of Appeals wrote in *Berk* v. *Laird*, 429 F. 2d 302, 305 (2d Cir. 1970):

> If the executive branch engaged the nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for some mutual participation by Congress in accordance with Article I, section 8.

Federal District Judge John Dooling wrote in *Orlando* v. *Laird*, — F. Supp. — (E.D.N.Y. 1970):

> Neither the language of the Constitution nor the debates of the time leave any doubt that the power to declare and wage war was pointedly denied to the presidency. In no real sense was there even an exception for emergency action and certainly not for a self-defined emergency power in the presidency. The debates, so often strangely—to our ears—devoid of respect for and alive with fears of the presidency that the Convention was forming are clear in the view that (as Wilson put it) the power to make war and peace are legislative.

However, despite the clear authority for the proposition that Congress must act to authorize a war, the courts have nevertheless upheld the legality of the Vietnam war. They have done so for reasons that should be of particular concern for this Committee as it formulates its war powers resolution.

The most authoritative decision on the scope of the Presidential war powers was decided last month, on April 20, 1971, by the Second Circuit Court of Appeals in New York in the case of *Orlando* v. *Laird*. (Appendix A) It held that Congress *has* exercised its war powers in Vietnam and has thus authorized the war, by the Gulf of Tonkin Resolution, by the military appropriations bills passed for Vietnam and by extension of the draft law:

> The Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations. The Tonkin Gulf Resolution . . . was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia, and as might be required in the future 'to prevent further aggression.' Congress has ratified the executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia and by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill 'the substantial induction calls necessitated by the current Vietnam buildup.'

The Court concluded:

> There is, therefore, no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war. Both branches collaborated in the endeavor, and neither could long maintain such a war without the concurrence and cooperation of the other . . . The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia.

In short, the Court has said that instead of a declaration of war or an explicit authorizing resolution, the mere fact that there is "continuing mutual participation in the prosecution of the war" by Congress and the President is sufficient to satisfy the Constitution.

We think that this decision is wrong and it will be appealed to the United States Supreme Court. It is wrong because the Court of Appeals totally ignored the repeal of the Gulf of Tonkin resolution and because the Court misconstrued the legal effect and legislative history of the military appropriations bills which were never meant to ratify what the President was doing in Vietnam. However, until the Supreme Court reverses, the *Orlando* decision appears to be the most authoritative decision on this problem.

What the decision means as a practical matter is that Congress cannot wash its hands of its responsibilities under the war power clauses of the Constitution. It cannot say, this is a matter for the Executive to decide. As soon as any hostilities have begun by the President, there will come a time when Congressional participation will become necessary. Most obviously this will happen when funds are requested for the Defense Department, when a conscription act is passed or when provision is made for veterans rights or when foreign aid of the ally we are helping is provided by Congress. Once Congress gets into the picture by taking any steps in furtherance of the Presidentially-inhibited war, or in recognition of it, the logic of the *Orlando* case would indicate that those steps are an exercise of the war power and that the war thereby becomes legal. In other words Congress cannot sit idly by when a war begins. Its responsibility is thrust upon it by the Constitution and it must assert its power explicitly or it will find that it has exercised that power without ever making a conscious choice to do so.

The *Orlando* case would require that Congress must stop a war once the President has initiated it. But whatever the powers if Congress might be, the framers did not intend that Congress would have to take the positive step of exercising them in order to stop a Presidential war. They explicitly commited the initial war power to Congress, requiring the concurrence of a majority of legislators in both houses before war could begin. Any rule which undermines that power or subjects it to extraneous pressures, whether practical or political, runs directly counter to the wishes of the Constitution's framers.

The best way of stopping a war is to deny funds for the military establishment. But is this a realistic alternative? How many Congressmen or Senators can vote to deprive American soldiers in the field of the necessary guns and supplies that they need to defend themselves? The practical pressures on Congress

to "support our boys" in the field may become irresistible after the war has been raging for some period of time. Imposing such a burden in the legislature would in effect facilitate the commencement of a Presidential war, directly contrary to the expressed wishes of the founders.

Indeed, imposing such a requirement on Congress makes it far easier for the President to initiate a large war rather than a small one. The greater the step taken by the President, the more troops he commits to combat, the stronger is the pressure on Congress to vote for their continued support. The legislature might be willing to cut off funds for a small expeditionary force, knowing that the President can easily extricate them. But it would find it impossible to do when hundreds if thousands of troops are committed to battle.

In addition, the President may insist that any restriction on funds hampers his negotiating capacity and that he should be given a free hand to terminate the war in accordance with military requirements. Obviously the Congress would be reluctant to intervene in the face of such assertions.

In short, once a war is begun by the President, the need to protect the men in the field, combined with the judicial reasoning shown in the *Orlando* case effectively denies the Congress any power to restrict the war-making ability of the President until the war winds down of it own accord.

## CONCLUSION

All of the above points to the inescapable conclusion that the Eagleton resolution, the Javits bill or one of the other pending resolutions is of crucial constitutional importance. They require that Congress' participation must be established initially through an express authorization, rather than being inferred by ambiguous appropriations bills passed after the war has begun. Without clear, explicit legislation, a Presidential-initiated war will be illegal. They thus would make express what we believe is constitutionally required—that the Congress ratify any Presidential proposal to go to war at the outset.

The Vietnam adventure has taught us that the dangers of war are too serious to be left to the President and his immediate staff. There are reasons why the framers of the Constitution insisted that the broadest consensus must be established before we go to war. We have tried to show that those reasons are still with us. The most horrible result of the Vietnam war may not be the terrible toll in lives and the devastation and destruction in that country. It would be even more horrible if we do not now take corrective action to insure that it will not occur again. We urge this Committee to take the steps necessary to prevent that from happening.

## APPENDIX A

### PRESIDENTIAL STATEMENTS ACKNOWLEDGING NEED FOR EXPLICIT CONGRESSIONAL EXERCISE OF THE WAR POWER

During Jefferson's first administration, Tripoli attacked American vessels in the Mediterranean. After an American schooner, The Enterprise, had crippled an enemy cruiser, Jefferson reported to Congress:

> Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. *I communicate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively* their judgment may form itself on a knowledge and consideration of every circumstance of weight. 1 *State of the Union Messages of the Presidents* 59 (Israel ed. 1966) (emphasis added).

Jefferson also asked for Congressional authority in settling the dispute with Spain on the Florida border:

> That which they have chosen to pursue will appear from the documents now communicated. They authorize the inference that it is their intention to advance on our possessions until they shall be repressed by an opposing force. *Considering that Congress alone is constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await their authority for using force in any degree which could be avoided.* I have barely instructed the officers stationed in the neighborhood of the

aggressions to protect our citizens from violence, to patrol within the borders actually delivered to us, and not to go out of them but when necessary to repel an inroad or to rescue a citizen, or his property; and the Spanish officers remaining at New Orleans are to depart without further delay. . . .

But the course to be pursued will require the command of means which it belongs to Congress exclusively to yield or to deny. To them I communicate every fact material for their information and the documents necessary to enable them to judge for themselves. To their wisdom, then, I look for the course I am to pursue, and will pursue with sincere zeal that which they shall approve. 1 *Messages and Papers of the Presidents*, 389–90 (Richardson Ed. 1908) (emphasis added).

When English vessels increased their raids on American commerce immediately before the war of 1812, President James Madison specifically asked Congress for guidance. In his message of June 1, 1812, he said:

Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or, opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty Disposer of events, avoiding all connections which might entangle it in the contests or views of other powers, and preserving a constant readiness to concur in an honorable re-establishment of peace and friendship, is a *solemn question which the Constitution wisely confides to the legislative department of the Government*. Quoted in Putney "Executive Assumption of the War Making Power" 7 *National University Law Review*, 1, 9 (May, 1927) (emphasis added)

President Andrew Jackson similarly asked Congress for authority to protect American shipping in South American waters. In his third annual message Jackson said:

In the course of the present year one of our vessels, engaged in the pursuit of a trade which we have always enjoyed without molestation, has been captured by a band acting, as they pretend, under the authority of the Government of Buenos Ayres. I have therefore given orders for the dispatch of an armed vessel to join our squadron in those seas and aid in affording all lawful protection to our trade which shall be necessary, and shall without delay send a minister to inquire into the nature of the circumstances and also of the claim, if any, that is set up by the Government to those seas and aid in affording all lawful protection to our trade which shall be necessary, and shall without delay send a minister to inquire into the nature of the circumstances and also of the claim, if any, that is set up by the Government to those islands. In the meantime, I submit the case to the consideration of Congress, to the end that they may clothe the Executive with such authority and means as they may deem necessary for providing a force adequate to the complete protection of our fellow-citizens fishing and trading in these seas. 1 *State of the Union Messages*, 352

In the same message, Jackson commented about troubles with Spain:

* * * I have therefore dispatched a special messenger with instructions to our minister to bring the case once more to his (i.e. the King of Spain) consideration, to the end that if (which I cannot bring mself to believe) the same decision (that cannot but be deemed an unfriendly denial of justice) should be persisted in, the matter may before your adjournment be laid before you, the constitutional judges of what is proper to be done when negotiations for redress of injury fails. *Ibid.* 349

In 1848 President James K. Polk referred the problem of Yucatan to Congress:

I have considered it proper to communicate the information contained in the accompanying correspondence, and I submit it to the wisdom of Congress to adopt such measures as in their judgment may be expedient to prevent Yucatan from becoming a colony of any European power, which in no event could be permitted by the United States. . . 4 *Messages of the Presidents*, 583

Ten years later President James Buchanan reiterated this view of the war power:

Under our treaty with New Granada of the 12th December, 1846, we are bound to guarantee the neutrality of the Isthmus of Panama, through which the Panama Railroad passes, "as well as the rights of sovereignty and property which New Granada has and possesses over the said territory." This obligation is founded upon equivalents granted by the treaty to the Government and people of the United States. Under these circumstances I recommend to Congress the passage of an act authorizing the President, in case

of necessity, to employ the land and naval forces of the United States to carry into effect this guaranty of neutrality and protection. 1 *State of the Union Messages*, 953.

In his annual message of December 6, 1858, the same President said:

> The executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It cannot legitimately resort to force without he direct authority of Congress, except in resisting and repelling hostile attacks. *Ibid.*, 988

Buchanan had occasion in his third annual message to repeat these views:

> It will not be denied that the general "power to declare war" is without limitation and embraces within itself not only what writers on the law of nations term a public or perfect war, but also an imperfect war, and, in short, every species of hostility, however confined or limited. Without the authority of Congress the President cannot fire a hostile gun in any case except to repel the attacks of an enemy. *Ibid.*, 1018

Abraham Lincoln took a similar view of the Presidential war powers. Writing at the time of the Mexican War, Lincoln said:

> * * * Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such a purpose and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much power as you propose . . .
>
> The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us. But your view destroys the whole matter, and places our President where kings have always stood. 2 *Writings of Abraham Lincoln*, 52 (Lapstez ed. 1905)

President Ulysses Grant recognized that he would have to come to Congress for authority to act abroad. In commenting on the situation in Cuba in 1875, he said:

> Persuaded, however, that a proper regard for the interests of the United States and of its citizens entitles it to relief from the strain to which it has been subjected by the difficulties of the questions and the wrongs and losses which arise from the contest in Cuba, and that the interests of humanity itself demand the cessation of the strife before the whole island shall be laid waste and larger sacrifices of life be made, I shall feel it my duty should my hopes of a satisfactory adjustment and of the early restoration of peace and the removal of future causes of complaint be, unhappily, disappointed, to make a further communication to Congress at some period not far remote, and during the present session, recommending what may then seem to me to be necessary. 2 *State of the Union Messages*, 1302.

Chester Arthur also called for Congressional authority to wage even limited war:

> A recent agreement with Mexico provides for the crossing of the frontier by the armed forces of either country in pursuit of hostile Indians. In my message of last year I called attention to the prevalent lawlessness upon the borders and to the necessity of legislation for its suppression. I again invite the attention of Congress to the subject. 2 *State of the Union Messages*, 1455.

President William Howard Taft refused to move into Mexico in 1911 despite the danger to American interests in that country:

> It seems my duty as Commander in Chief to place troops in sufficient number where, if Congress shall direct that they enter Mexico to save American lives and property, an effective movement may be promptly made. . . .
>
> The assumption by the press that I contemplate intervention on Mexican soil to protect American lives or property is of course gratuitous, because I seriously doubt whether I have such authority under any circumstances, and if I had I would not exercise without express congressional approval. 3 *State of the Union Messages*, 2447–48.

More recently when Germany overran France in May and June 1940, Premier Paul Reynaud of France wired President Roosevelt for material assistance on June 10, 1940. President Roosevelt responded on June 15, 1940 that material and supplies would be sent in ever-increasing quantities and kinds. He continued:

> I know that you will understand that these statements carry with them no implication of military commitments. *Only the Congress can make such commitments. The Public Papers and Addresses of Franklin D. Roosevelt*, 1940, 267 (emphasis added)

President Dwight D. Eisenhower said in a press conference on March 10, 1954: "There is going to be no involvement of America in war unless it is the result of the Constitutional process that is placed upon Congress to declare it. Now let us have that clear."

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 477 and 478—September Term, 1970.

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(Argued March 3, 1971, Decided April 20, 1971.)
Docket Nos. 35270 and 35535

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SALVATORE ORLANDO, Plaintiff-Appelant, v. MELVIN LAIRD INDIVIDUALLY AND AS SECRETARY OF DEFENSE OF THE UNITED STATES; AND STANLEY R. RESOR, INDIVIDUALLY AND AS SECRETARY OF THE ARMY OF THE UNITED STATES, DEFENDANTS-APPELLEES

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MALCOLM A. BERK, PLAINTIFF-APPELLANT, v. MELVIN LAIRD, INDIVIDUALLY, AND AS SECRETARY OF DEFENSE OF THE UNITED STATES, STANLEY R. RESOR, INDIVIDUALLY, AND AS SECRETARY OF THE ARMY OF THE UNITED STATES, AND COL. T. F. SPENCER, INDIVIDUALLY, AND AS CHIEF OF STAFF, UNITED STATES ARMY ENGINEERS CENTER, FORT BELVOIR, DEFENDANTS-APPELLEES

Before: Lumbard, Chief Judge; Kaufman and Anderson, Circuit Judges.

Appeal by plaintiff Berk from summary judgment in favor of the defendants and dismissal of his action in the United States District Court for the Eastern District of New York, Orrin G. Judd, *Judge*, and appeal by plaintiff Orlando from denial of his petition for a preliminary injunction in the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge*, in actions in which both plaintiffs challenged the constitutional sufficiency of the authority of the executive branch to wage war in Vietnam, Affirmed.

Leon Friedman, Esq., New York Civil Liberties Union, N. Y., N. Y. (Burt Neuborne, Esq., Kunstler, Kunstler & Hyman, Norman Dorsen, Esq., and Kay Ellen Hayes, Esq., New York, N. Y., on the brief), *for Plaintiff-Appellant Orlando.*

Norman Dorsen, Esq., N. Y. U. School of Law, N. Y., N. Y. (Leon Friedman Esq., Burt Neuborne, Esq., New York Civil Liberties Union, Theodore C. Sorensen, Esq., Kay Ellen Hayes, Esq., and Marc Luxemberg, Esq., New York, N. Y., on the brief), *for Plaintiff-Appellant Berk.*

Edward R. Neaher, United States Attorney, Eastern District of New York (Robert A. Morse, Chief Assistant U. S. Att'y. David G. Trager, Esq., Edward R. Korman, Esq., and James D. Porter, Jr., Esq., Assistant U. S. Attorneys, Eastern District of New York, on the brief), for *Defendants-Appellees.*

ANDERSON, *Circuit Judge:*

Shortly after receiving orders to report for transfer to Vietnam, Pfc. Malcolm A. Berk and Sp. E5 Salvatore Orlando, enlistees in the United States Army, commenced separate actions in June, 1970, seeking to enjoin the Secretary of Defense, the Secretary of the Army and the commanding officers, who signed their deployment orders, from enforcing them. The plaintiffs-appellants contended that these executive officers exceeded their constitutional authority by ordering them to participate in a war not properly authorized by Congress.

In Orlando's case the district court held in abeyance his motion for a preliminary injunction pending disposition in this court of Berk's expedited appeal

from a denial of the same preliminary relief. On June 19, 1970 we affirmed the denial of a preliminary injunction in *Berk* v. *Laird*, 429 F.2d 302 (2 Cir. 1970), but held that Berk's claim that orders to fight must be authorized by joint executive-legislative action was justiciable. The case was remanded for a hearing on his application for a permanent injunction. We held that the war declaring power of Congress, enumerated in Article I, section 8, of the Constitution, contains a "discoverable standard calling for *some* mutual participation by Congress," and directed that Berk be given an opportunity "to provide a method for resolving the question of when specified joint legislative-executive action is sufficient to authorize various levels of military activity," and thereby escape application of the political question doctrine to his claim that congressional participation has been in this instance, insufficient.

After a hearing on June 23, 1970, Judge Dooling in the district court denied Orlando's motion for a preliminary injunction on the ground that his deployment orders were constitutionally authorized, because Congress, by "appropriating the nation's treasure and conscripting its manpower," had "furnished forth the sinew of war" and because "the reality of the collaborative action of the executive and the legislature required by the Constitution has been present from the earliest stages." *Orlando* v. *Laird*, —— F. Supp. ——, —— (E.D.N.Y. 1970).

On remand of Berk's action, Judge Judd of the district court granted the appellees' motion for summary judgment. Finding that there had been joint action by the President and Congress, he ruled that the method of congressional collaboration was a political question. *Berk v. Laird*, ——— F. Supp. ——, —— (E.D.N.Y. 1970).

The appellants contend that the respective rulings of the district court that congressional authorization could be expressed through appropriations and other supporting legislation misconstrue the war declaring clause, and alternatively, that congressional enactments relating to Vietnam were incorrectly interpreted.

It is the appellants' position that the sufficiency of congressional authorization is a matter within judicial competence because that question can be resolved by "judicially discoverable and manageable standards" dictated by the congressional power "to declare War." See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962); *Powell* v. *McCormack*, 395 U.S. 486 (1969). They interpret the constitutional provision to require an express and explicit congressional authorization of the Vietnam hostilities though not necessarily in the words, "We declare that the United States of America is at war with North Vietnam." In support of this construction they point out that the original intent of the clause was to place responsibility for the initiation of war upon the body most responsive to popular will and argue that historical developments have not altered the need for significant congressional participation in such commitments of national resources. They further assert that, without a requirement of express and explicit congressional authorization, developments committing the nation to war, as a *fait accompli*, became the inevitable adjuncts of presidential direction of foreign policy, and, because military appropriations and other war implementing enactments lack an explicit authorization of particular hostilities, they cannot, as a matter of law, be considered sufficient.

Alternatively, appellants would have this court find that, because the President requested accelerating defense appropriations and extensions of the conscription laws after the war was well under way, Congress was, in effect, placed in a strait jacket and could not freely decide whether or not to enact this legislation, but rather was compelled to do so. For this reason appellants claim that such enactments cannot, as a factual matter, be considered sufficient congressional approval or ratification.

The Government on the other hand takes the position that the suits concern a non-justiciable political question; that the military action in South Vietnam was authorized by Congress in the "Joint Resolution to Promote the Maintenance of Internal Peace and Security in Southeast Asia"[1] (the Tonkin Gulf

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[1] The two district judges differed over the significance of the Tonkin Gulf Resolution, Pub. Law 88-408, 78 Stat. 384, August 10, 1964, in the context of the entire course of the congressional action which related to Vietnam. Judge Judd relied in part on the Resolution as supplying the requisite congressional authorization; Judge Dooling found that its importance lay in its practical effect on the presidential initiative rather than its constitutional meaning.

Although the Senate repealed the Resolution on June 24, 1970, it remained in effect a the time appellants' deployment orders issued. Cong. Record S. 9670 (June 24, 1970). The repeal was based on the proposition that the Resolution was no longer necessary and amounted to no more than a gesture on the part of the Congress at the time the executive had taken substantial steps to unwind the conflict, when the principal issue was the speed of deceleration and termination of the war.

Resolution) considered in connection with the Seato Treaty; and that the military action was authorized and ratified by congressional appropriations expressly designated for use in support of the military operations in Vietnam.

We held in the first *Berk* opinion that the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine. *Baker* v. *Carr, supra; Powell* v. *McCormack, supra.* As we see it, the test is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question. The evidentiary material produced at the hearings in the district court clearly disclose that this test is satisfied.

The Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations. The Tonkin Gulf Resolution, enacted August 10, 1964 (repealed December 31, 1970) was passed at the request of President Johnson and, though occasioned by specific naval incidents in the Gulf of Tonkin, was expressed in broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia, and as might be required in the future "to prevent further aggression." Congress has ratified the executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia [2] and by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill "the substantial induction calls necessitated by the current Vietnam buildup." [3]

There is, therefore, no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war. Both branches collaborated in the endeavor, and neither could long maintain such a war without the concurrence and cooperation of the other.

Although appellants do not contend that Congress can exercise its war-declaring power only through a formal declaration, they argue that congressional authorization cannot, as a matter of law, be inferred from military appropriations or other war-implementing legislation that does not contain an express and explicit authorization for the making of war by the President. Putting aside for a moment the explicit authorization of the Tonkin Gulf Resolution, we disagree with appellants' interpretation of the declaration clause for neither the language nor the purpose underlying that provision prohibits an inference of the fact of authorization from such legislative action as we have in this instance. The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia.

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[2] In response to the demands of the military operations the executive during the 1960s ordered more and more men and material into the war zone; and congressional appropriations have been commensurate with each new level of fighting. Until 1965, defense appropriations had not earmarked funds for Vietnam. In May of that year President Johnson asked Congress for an emergency supplemental appropriation "to provide our forces [then numbering 35,000] with the best and most modern supplies and equipment." 111 Cong. Rec. 9283 (May 4, 1965). Congress appropriated $700 million for use "upon determination by the President that such action is necessary in connection with military activities in Southeast Asia." Pub. L. 89–18, 79 Stat. 109 (1965). Appropriation acts in Vietnam. The 1967 appropriations act, for example, declared Congress' "firm intention to each subsequent year explicitly authorized expenditures for men and material sent to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam" and supported "the efforts being made by the President of the United States . . . to prevent an expansion of the war in Vietnam and to bring that conflict to an end through a negotiated settlement. . . ." Pub. L. 90–5, 81 Stat. 5 (1967).

The district court opinion in *Berk* v. *Laird*, —— F. Supp. —— (E.D.N.Y. 1970), sets out relevant portions of each of these military appropriation acts and discusses their legislative history.

[3] In H. Rep. No. 267, 90th Cong., 1st Sess. 38 (1967), in addition to extending the conscription mechanism, Congress continued a suspension of the permanent ceiling on the active duty strength of the Armed Forces, fixed at 2 million men, and replaced it with a secondary ceiling of 5 million. The House Report, recommending extension of the draft concluded that the permanent manpower limitations "are much lower than the currently required strength." The Report referred to President Johnson's selective service message which said, ". . . that without the draft we cannot realistically expect to meet our present commitments or the requirements we can now foresee and that volunteers alone could be expected to man a force of little more than 2.0 million. The present number of personnel on active duty is about 3.3 million and it is scheduled to reach almost 3.5 million by June, 1968 if the present conflict is not concluded by then." H. Rep. No. 267, 90th Cong., 1st Sess. 38, 41 (1967).

The choice, for example, between an explicit declaration on the one hand and a resolution and war-implementing legislation, on the other, as the medium for expression of congressional consent involves "the exercise of a discretion demonstrably committed to the . . . legislature," *Baker* v. *Carr*, *supra* at 211, and therefore, invokes the political question doctrine.

Such a choice involves an important area of decision making in which, through mutual influence and reciprocal action between the President and the Congress, policies governing the relationship between this country and other parts of the world are formulated in the best interests of the United States. If there can be nothing more than minor military operations conducted under any circumstances, short of an express and explicit declaration of war by Congress, then extended military operations could not be conducted even though both the Congress and the President were agreed that they were necessary and were also agreed that a formal declaration of war would place the nation in a posture in its international relations which would be against its best interests. For the judicial branch to enunciate and enforce such a standard would be not only extremely unwise but also would constitute a deep invasion of the political question domain. As the Government says, ". . . decisions regarding the form and substance of congressional enactments authorizing hostilities are determined by highly complex considerations of diplomacy, foreign policy and military strategy inappropriate to judicial inquiry." It would, indeed, destroy the flexibility of action which the executive and legislative branches must have in dealing with other sovereigns. What has been said and done by both the President and the Congress in their collaborative conduct of the military operations in Vietnam implies a consensus on the advisability of *not* making a formal declaration of war because it would be contrary to the interests of the United States to do so. The making of a policy decision of that kind is clearly within the constitutional domain of those two branches and is just as clearly not within the competency or power of the judiciary.

Beyond determining that there has been *some* mutual participation between the Congress and the President, which unquestionably exists here, with action by the Congress sufficient to authorize or ratify the military activity at issue, it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is a political question. The form which congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions. *Baker* v. *Carr*, *supra*, at 217; *Powell* v. *McCormack*, *supra*, at 518.

The judgments of the district court are affirmed.

KAUFMAN, *Circuit Judge* (concurring):

In light of the adoption by Congress of the Tonkin Gulf Resolution, and the clear evidence of continuing and distinctly expressed participation by the legislative branch in the prosecution of the war, I agree that the judgments below must be affirmed.

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THE AMERICAN LEGION,
*Washington, D.C., October 7, 1971.*

Hon. J. WILLIAM FULBRIGHT,
*Chairman, Senate Committee on Foreign Relations,*
*New Senate Office Building,*
*Washington, D.C.*

DEAR CHAIRMAN FULBRIGHT: Enclosed is a copy of resolution No. 499 adopted by the National Convention of The American Legion last month which is self-explanatory.

I would appreciate your including this resolution in the transcript of the hearings your Committee is presently holding on S. 731, S.J. Res. 18 and S.J. Res. 59.

Sincerely yours,

HERALD E. STRINGER,
*Director, National Legislative Commission.*

RESOLUTION

Whereas, continuation of U.S. current troop commitments to the North Atlantic Treaty Organization and the unrestricted deployment and use of such troops

by our Commander-in-Chief, the President of the United States, is necessary for the continued security and welfare of Free Europe and in the best interest of the United States; and

Whereas, efforts have recently been made by some members of the U.S. Senate to compel the President of the United States to reduce, unilaterally, American military forces in NATO by one-half and to restrict and limit his Constitutional authority as Commander-in-Chief of our Armed Forces; Now, therefore, be it

*Resolved*, By The American Legion in National Convention assembled in Houston, Texas, August 31–September 1, 2, 1971, that we oppose and condemn such efforts on the part of members of the U.S. Congress, and we wholeheartedly approve and support the action of the majority of the United States Senate in defeating this proposal; and, be it further

*Resolved*, That we call upon the Congress of the United States to support the President in the discharge and execution of his Constitutional duties as Commander-in-Chief of our Armed Forces.

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## Congress and the War Power

(By Louis Fisher, Congressional Research Service, The Library of Congress)

A paper presented to the Center for the Study of Democratic Institutions, Santa Barbara, California, July 28, 1971. Copyright 1971, Center for the Study of Democratic Institutions.

More by tradition and pre-emption than from a reading of the Constitution, foreign policy has tended to become a Presidential preserve. For the past several years this historic shift of power has been challenged by an unusual alliance, including conservatives and liberals, Republicans and Democrats. Indeed, it is the "high flying prerogative men" (Professor Edward Corwin's phrase to describe those who defended Truman's dispatch of troops to Korea, without prior congressional approval) who have recently become the most vociferous critics of Presidential war powers.

Arthur Schlesinger, Jr., for instance, in an address before the American Enterprise Institute in 1966, counseled that "something must be done to assure the Congress a more authoritative and continuing voice in fundamental decisions in foreign policy." In February 1967, Henry Steele Commager appeared before the Senate Foreign Relations Committee to urge that there be "a reconsideration of the relationship of the executive and the legislative branches," particularly the President and the Senate in the conduct of foreign relations. In March 1969, at the Congressional Conference on the Military Budget and National Priorities, scholars and scientists from both parties called upon Congress to reassert its control over defense spending and the scope of international commitments. Senator J. W. Fulbright, who had written in the Fall 1961 issue of the *Cornell Law Quarterly* that "for the existing requirements of American foreign policy we have hobbled the President by too niggardly a grant of power," now finds himself in the forefront of those who are trying to place limits on the President.[1]

The time is certainly long overdue for reassessing Congress' role in the war power and in foreign policy generally. Holbert Carroll, in his study on Congress and foreign affairs, estimated that the proportion of bills concerning international matters in 1925 was not more than one in twenty-five. The situation since World War II has been radically different, with about half the standing committees now playing some role in international affairs. Not only the Senate but also the House must assume new responsibilities. Dean Acheson has remarked that the "time has passed when the Senate monopolized the congressional function in this field, since it is the execution of policy, calling for legal authority, funds, and men, which is the ultimate test of success or failure."[2]

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[1] Arthur M. Schlesinger, Jr. and Alfred de Grazia, *Congress and the Presidency: Their Role in Modern Times* (Washington, D.C.: American Enterprise Institute, 1967), p. 28; Commager's testimony: *Changing American Attitudes Toward Foreign Policy*, hearings before the Senate Foreign Relations Committee, 90th Cong., 1st Sess., p. 21 (1967); March 1969 Conference: "The Power of the Pentagon," *The Progressive* (June 1969) and *American Militarism: 1970*, ed. Erwin Knoll and Judith Nies McFadden (New York: The Viking Press, 1969); J. William Fulbright, "American Foreign Policy in the 20th Century Under an 18th-Century Constitution," 47 *Cornell L. Q.* 1, 2 (Fall 1961).

[2] Holbert N. Carroll, *The House of Representatives and Foreign Affairs* (Boston: Little, Brown, 1966), p. 20; Dean Acheson, *A Citizen Looks at Congress* (New York: Harper & Bros., 1956), p. 83.

If the President chooses to ignore Congress while acting in external affairs, his domestic and foreign programs become targets for reprisal. The feeling among legislators that President Johnson overreached himself in Southeast Asia, and failed to treat Congress as a coequal branch, produced a voting record marked by negativism and defiance. Unable to control the President's policy in Vietnam, liberal legislators turned against other Administration programs. Deep slashes in foreign aid, for example, were interpreted by Senator Joseph Clark in 1967 as a method of "getting back at the President for the conduct of the war in Vietnam." When President Nixon delivered a broad-brush attack on critics of the military in a June 1969 address, his foreign aid program was immediately placed in jeopardy by legislators who found the speech offensive.[3]

The Senate's rejection of Clement F. Haynsworth, Jr. and G. Harrold Carswell also reflects a reassertion of legislative prerogatives. President Nixon, in a letter to Senator William Saxbe, contended that Senate opposition to his choice of nominees was somehow a usurpation of his constitutional responsibilities. Two rejections in a row should have convinced the President that the Senate also has responsibilities and is willing to discharge them. Senator Frank Church said that the Senate had "pulled off the shelf its all-but-atrophied confirmation power" as one step in restoring a better balance between Congress and the President. After the Senate confirmed Judge Harry A. Blackmum, Senator Marlow Cook declared that Senatorial assertion against "an all-powerful Executive, whoever he may be, whether it is in foreign affairs or in Supreme Court appointments, is good for the country." [4]

## II.

The claims by recent U.S. Presidents to a virtual free hand in conducting foreign affairs owe much in constitutional law to a landmark Supreme Court decision of 1936, *United States* v. *Curtiss-Wright*. Justice Sutherland, speaking for the Court, said that legislation in the international field must often accord the President "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." All that was necessary, in this particular case, was for the Court to uphold the right of Congress to delegate embargo powers to the President. Instead, Justice Sutherland added several pages of *obiter dicta* on the far-reaching dimensions of executive power in international affairs, referring to "this vast external realm, with its important, complicated, delicate and manifold problems," and stating that the President, not Congress, has "the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war." [5]

These sweeping assertions have since been used to justify an expansion of Presidential war powers, based not on new powers delegated by Congress but rather on inherent executive powers. In fact, Sutherland's remarks should be taken as *dicta* and nothing more. Their source is not in the Constitution but in Sutherland's own political philosophy. He had earlier served on the Senate Foreign Relations Committee and was a forceful exponent of the use of American power abroad. His biographer, Joel Francis Paschal, has written that Sutherland had "long been the advocate of vigorous diplomacy which strongly, even belligerently, called always for an assertion of American rights." Many of the arguments in Sutherland's book, *Constitutional Power and World Affairs* (1919), were to reappear two decades later in the Curtiss-Wright decision.[6]

Sutherland's ironclad distinction between foreign and domestic problems seems increasingly artificial to most observers today. Actors taken on behalf of "national security" can easily overwhelm basic domestic freedoms. It was Justice Jackson, in the 1950 *Knauff* v. *Shaughnessy* decision, who said that "Security is like liberty in that many are the crimes committed in its name." More recently, in the *New York Times* decision, Justice Black joined with five members of the Court to strike down the Government's effort to prevent publication of the Pentagon papers. "The word 'security', he wrote, "is a broad, vague generality whose con-

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[3] *U.S. Commitments to Foreign Powers*, hearings before the Senate Foreign Relations Committee, 90th Cong., 1st Sess., p. 105 (1967); *The New York Times*, June 12, 1969, 1:7.

[4] Letter to Saxbe: *Wkly. Comp. of Pres. Doc.*, Vol. 6, No. 14, p. 467 (April 1, 1970); Church: 116 Cong. Rec. S6333 (daily ed., April 30, 1970); Cook: 116 Cong. Rec. S7203 (daily ed., May 15, 1970).

[5] *United States* v. *Curtiss-Wright*, 299 U.S. 304, 319–320.

[6] Joel Francis Paschal, *Mr. Justice Sutherland: A Man Against the State* (Princeton: Princeton University Press, 1951), p. 93; George Sutherland, *Constitutional Power and World Affairs* (New York: Columbia University Press, 1919).

tours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." [7]

In addition to retaining this artificial distinction between foreign and domestic affairs, we attribute to the executive branch a number of imaginary qualities. The properties of the executive anticipated by the Founding Fathers—unity, expertise, secrecy and speed—are not always to be found in our sprawling bureaucracy today. Instead of "unity, we find the apparatus for foreign policy-making splintered within the State Department as well as between it and other executive agencies competing for control. The interservice rivalries of the postwar period were supposedly remedied by "unification" of the military services and by the coordinating apparatus of the National Security Council, yet scholars pointed to the type of logrolling and vote-trading that persisted within the executive branch. Arthur Maass, in studying how the Budget Bureau conferences resolved policy and legislative disputes, concluded that the conferences "avoid the basic issues and compromise, through a game of give and take . . ." Samuel P. Huntington observed that "Just as Congress often wrote tariff legislation by giving each industry the protection it wanted, the N.S.C. and the Joint Chiefs make decisions on weapons by giving each service what it desires." [8]

Henry Kissinger, in *No More Vietnams?*, spoke of a "sort of blindness in which bureaucracies run a competition with their own programs and measure success by the degree to which they fulfill their own norms, without being in a position to judge whether the norms made any sense to begin with." A vivid example of what Kissinger had in mind came to light in June 1969 when former Budget Director Charles Schultze appeared before the Joint Economic Committee. He described the effort of the Budget Bureau to select an optimum continental air defense system. Various alternatives were studied before selecting the system that was "more effective at slightly lower cost than most." An impressive exercise in program budgeting, and yet what the Budget Bureau had failed to ask, Schultze said, was whether we needed an air defense system of that magnitude at all. Other basic questions, such as the need to spend $5 billion a year on the Chinese contingency, also received far too little attention.[9] While it has been customary to regard the Budget Bureau as the unifying, coordinating element in the executive branch, it is evident that military spending has received less scrutiny than domestic spending.[10]

The foreign-policy bureaucracies, in the view of many congressmen and Federal officials, have often become juggernauts, each operating on its own momentum, sustained by its own special-interest constituency, and propelled toward narrow objectives. Decisions on defense spending offer the most graphic illustration of this. In hearings before the House Government Operations Committee, in April 1969, an Air Force colonel admitted that evidence of cost-overrun problems on the C–5A cargo plane had been withheld from Congress. For what reason? Because disclosure might have jeopardized the contractor's position in the financial market.[11] In another instance of public operations acquiring a quasi-private character, five Air Force officers who had worked on the Minuteman missile contract for the Government later retired and went to work for the contracting company.[12]

Thus, instead of an adversary relationship between the Pentagon and private contractors, with the buyer seeking the lowest cost and the seller the highest profit, officers and contracting personnel have been operating under the "team concept"—apparently a euphemism for collusion. Gordon W. Rule, a top-ranking naval procurement official, put the matter bluntly to the Joint Economic Committee in June 1969: "We play games. We know that if we tell the DOD across the river how much something is really going to cost, they may scrub it. And they

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[7] *Knauff* v. *Shaughnessy*, 338 U.S. 537, 551 (1950); *New York Times Co.* v. *United States*; *United States* v. *The Washington Post Co. et al.* (1971).

[8] Arthur Maass, "In Accord With the Program of the President?," 4 *Public Policy* 77, 81 (1953); Samuel P. Huntington, "Strategic Planning and the Political Process," 38 *Foreign Affairs* 285, 291–2 (Jan. 1960).

[9] Richard M. Pfeffer, ed., *No More Vietnams?* (New York: Harper & Row, 1968), p. 11; *The Military Budget and National Economic Priorities* (Part 1), hearings before the Joint Economic Committee, 91st Cong., 1st Sess., p. 72 (1969).

[10] *Ibid.*, p. 54; 115 Cong. Rec. E2242 (daily ed., March 20, 1969); 115 Cong. Rec. E5466 (daily ed., July 1, 1969).

[11] *Government Procurement and Contracting* (Part 4), hearings before the House Committee on Government Operations, 91st Cong., 1st Sess., pp. 1179–84 (1969).

[12] *The Military Budget and National Economic Priorities, op. cit.*, (Part 2), p. 503; 115 Cong. Rec. S7089 (daily ed., June 25, 1969).

know that if they tell the Congress how much it is really going to cost the Congress may scrub it. So you start in with both sides knowing that it is going to cost more. And that is not an overrun, because we know." [13] In what way do such procedures serve the national interest?

How easy it is now to understand Hubert Humphrey's prescient and ironic warning, written in the July 1959 issue of *Foreign Affairs*. Congress could not, he said, submit to the Executive will even if it wanted to, because "there is not one Executive will, but a number of conflicting wills which have not yet surrendered to the authority of an overriding national purpose." If modern Presidents have often been unable to master their own bureaucracies, there is ample reason for congressional concern and reassertion of its own lapsed constitutional powers.

III.

A close look at the administrative record in defense procurement and military operations justifies the skepticism of the Senate Foreign Relations Committee when it speaks of the "cult of executive expertise." [14] Although the executive branch has access to vast quantities of information, there are too many instances in which it resorts to "selective declassification" or outright doctoring of information in an effort to sustain its position. A series of deceptive announcements and maneuvers helped discredit the Johnson Administration: conflicting and contradictory explanations of the Tonkin incident and the Dominican intervention; a host of unreliable estimates on Vietnam spending, civilian casualties, and the number of refugees; a dreary succession of various "turning points" and "lights at the end of the tunnel." Executive expertise did not prevent blunders in the production of Cheyenne helicopters and Main Battle Tanks, nor did it eliminate gross mismanagement in the Minuteman and C–5A programs. Executive officials may be "expert" and at the same time deceptive. Moreover, it is the strong and often justified suspicion of many congressmen that the deceptions are used to conceal incompetence. Testimony by executive officials before congressional committees betrays a lack of that professional objectivity which is the hallmark of true expertise.

In the October 1969 issue of *Foreign Affairs*, Representative Jonathan Bingham offered a revealing story of how the Pentagon juggled figures in trying to exaggerate the extent of the Soviet threat. In a presentation comparing Soviet and U.S. strengths in submarines, the Navy deducted a certain percentage from the U.S. figure to allow for vessels confined to home port at any given time. When a civilian systems analyst asked what percentage had been deducted from the Soviet figure for the same reason, "the answer was that no deduction had been made; the incredible excuse was that 'we don't know what their lay-up percentage is.'" [15] Senator Proxmire disclosed how the Air Force shifted figures in an effort to conceal the magnitude of cost overruns on the C–5A. [16] Sophisticated cost-benefit studies can be manipulated simply by underestimating the cost of a weapons system and overstating its benefits.

This brings up another vaunted property of the executive branch: "economy and efficiency." During the past few years Congress has unearthed some bizarre practices in military procurement; DOD personnel harassed by their superiors for telling Congress about fuel pilferage in Thailand and cost overruns on the C–5A (as payment for his candor and expertise, the Pentagon abolished A. E. Fitzgerald's job); billions of dollars of Government plant and equipment used by private industry for commercial purposes instead of for work on defense contracts; a perennial fleeing of the Government in its procurement of small parts; and estimates of "fat" in the military budget ranging from $10 billion and up.

The theory of executive "expertise" suffered an ignominous setback in 1969 when the Gore Subcommittee conducted its own analysis of the Safeguard ABM system. Secretary Laird, after claiming that the Soviets were "going for a first strike capability," later had to admit that he had in mind a much more modest definition of first-strike capability than initially indicated, and that his statement rested not on hard evidence but simply reflected his "belief." Deputy Secretary Packard's effort to convince the Subcommittee that Safeguard had undergone independent analysis—from scientists outside the Pentagon—back-

[13] *The Military Budget and National Economic Priorities, op. cit.*, p. 510; see also p. 504.
[14] *National Commitments*, Senate Report No. 129, 91st Cong., 1st Sess., p. 16 (1969).
[15] Jonathan B. Bingham, "Can Military Spending be Controlled?," 48 *Foreign Affairs* 51, 59–60 (Oct. 1969).
[16] 115 Cong. Rec. S5253 (daily ed., May 16, 1969).

fired several times when the facts showed otherwise. Within the space of a few weeks the Administration had to acknowledge that Safeguard would cost about $4 billion more than originally announced (of course the cost has continued to climb since then). Laird's assertion that technological problems for Safeguard were essentially solved was grossly overstated. Packard ran afoul of his own figures in trying to persuade the Gore Subcommittee that the President would indeed have time to retain control over the firing of Spartan and Sprint missiles. Under persistent questioning he was forced to correct his estimate of the warning time from "about 15 to 20 minutes" to "something under 10 minutes." Other details of Safeguard's ragged rationale are included in my article for *The Progressive* in November 1969.

IV.

American Presidents have historically invoked three main doctrines to justify waging war on their own initiative, the doctrines of self-defense, protection of American lives and property, and hot pursuit. The first of these rationales, that of "defensive war," knows few boundaries today, however, well-defined a concept it may have seemed in 1787. An attack on the United States includes our bombers in constant flight, ships in the Mediterranean and Pacific (as well as Tonkin Gulf and Wonsan Bay), and other elements of our far-flung defensive system.

In a note to the Philippine Foreign Secretary in 1954, Secretary of State Dulles said that our air and naval installations in that country were such that "an armed attack on the Philippines could not but be also an attack upon the military forces of the United States. As between our nations, it is no legal fiction to say that an attack on one is an attack on both." In a 1964 communique, President Johnson maintained that "any armed attack against the Philippines would be regarded as an attack against United States forces stationed there and against the United States and would instantly be repelled."[17] The Dulles and Johnson language, giving a unilateral executive guarantee, seems an extension of the earlier Senate-approved language of the North Atlantic Treaty, which provides that an armed attack against one or more of the parties in Europe or North America "shall be considered an attack against them all." The Rio Treaty extends a similar kind of commitment to the nations of the Western Hemisphere. In both these cases, a President's right to wage defensive war has been given great scope.

The decision of the Johnson Administration in 1964 to transfer B–57 bombers from the Philippines to Bien Hoa in South Vietnam was followed by Viet Cong mortar attacks on the air base. The result: substantial damage to U.S. troops and aircraft and a further upward twist in the escalation of the Vietnam war. Some of our bases agreements elsewhere, the Senate Foreign Relations Committee warns, form a "kind of quasi-commitment, unspecified as to their exact import but, like buds in springtime, ready, under the right climatic conditions, to burst into full bloom."[18]

The geographic sweep of "defensive war" was dramatized by several crises of the past decade. In 1962, President Kennedy announced the sending of additional U.S. forces to Thailand. He claimed that a threat to Thailand was of "grave concern to the United States" and emphasized that the sending of U.S. military forces was a "defensive act." After the discovery of missile site in Cuba, he declared that the Western Hemisphere ("as far north as Hudson Bay, Canada, and as far south as Lima, Peru") was in danger. He gave notice that the launching of any nuclear missile from Cuba, against any nation in the Western Hemisphere, would be regarded "as an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the Soviet Union."[19]

When President Johnson requested the Tonkin Resolution two years later, he maintained that a threat in Southeast Asia "is a threat to all, and a threat to us." A number of congressmen elaborated on that theme, calling Southeast Asia our first line of defense and arguing that enemy attacks on American forces in that region were essentially the same as enemy attacks on America itself.[20] Under such generous definitions the President's power to wage defensive war is virtually open-ended.

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[17] *United States Security Agreements and Commitments Abroad* (Part 1), hearings before the Senate Committee on Foreign Relations, 91st Cong., 1st Sess., pp. 6–7 (1969).

[18] *National Commitment*, Senate Report No. 129, 91st Cong., 1st Sess., p. 28 (April 16, 1969).

[19] *Public Papers of the Presidents, 1962*, p. 396 (May 15, 1962) and p. 485 (Oct. 22, 1962).

[20] *Public Papers of the Presidents, 1963–1964*, II, p. 931 (Aug. 5, 1964); 110 Cong. Rec. 18084, 18551 (Aug. 5–7, 1964).

Another open-ended prerogative—the right to use armed force to protect American lives and property—has been invoked by Presidents four times in the past dozen years. Protection of life provided a semblance of constitutionality for our military intervention in Lebanon in 1958. President Eisenhower announced that U.S. forces were being used "to protect American lives and by their presence there to encourage the Lebanese government in defense of Lebanese sovereignty and integrity." When President Johnson ordered troops into the Dominican Republic in 1965, he was able to claim later, despite all the fears of a Communist takeover, that "99 percent of our reason for going in there was to try to provide protection for these American lives and for the lives of other nationals." [21] On April 30, 1970, President Nixon explained that he was sending troops into Cambodia because enemy actions "clearly endanger the lives of Americans who are in Vietnam now and would constitute an unacceptable risk to those who will be there after withdrawal of another 150,000." [22] On February 8, 1971, after the Nixon Administration had provided support for the South Vietnamese invasion of Laos, the State Department justified the action, in part, on the grounds that it would "protect American lives." [23]

The doctrine of "hot pursuit" offers yet another opportunity for the President and his military commanders to initiate war or expand hostilities without congressional approval. In the Korean war, the original objective of the United States was defined by the Security Council resolution of June 25, 1950, which called for North Korean forces to cease hostilities and withdraw to the 38th parallel. Later, after the North Koreans had been pushed back and the *status quo* was restored, the Administration enlarged the objective to seek the establishment of "a free, independent and unified" Korea.[24] General MacArthur's push into North Korea was followed by Chinese intervention and the start of a much broader, longer-lasting conflict. For the past several years, U.S. troops have been crossing the Laotian border from South Vietnam in hot pursuit of the enemy—or what the Pentagon calls "protective reaction" missions.

Disillusioned with the Vietnam war, the reacting to the dubious constitutionality of executive military initiatives abroad, Congress has for several years been reasserting its responsibilities in foreign affairs. An important—if largely symbolic—benchmark was the National Commitments Resolution, adopted by the Senate in June 1969 by the lopsided vote of 70 to 16. While not legally binding on the President, the resolution was intended as a restraint on his power to dispatch troops abroad without congressional approval. The actual meaning and scope of the National Commitments Resolution is subject to varying interpretations. When Senator Fulbright introduced it, he explained that it was not meant to prevent the President from responding "immediately and appropriately" to an attack on the United States.[25] But how is one to define "defensive wars"? In its report on the resolution, the Senate Foreign Relations Committee said that it would not alter "existing treaties, acts of Congress including joint resolutions, or other past actions or commitments of the Government of the United States." [26] That does not even exclude Administration communiques or policy statements issued in previous years.

The House of Representatives has also tried its hand at resolutions in an effort to control Presidential war powers. A war powers resolution, passed in November 1970 by a vote of 288 to 39, recognized that the President "in certain extraordinary and emergency circumstances has the authority to defend the United States and its citizens without prior authorization by the Congress." The resolution did not try to define when the President could, and could not, act. Instead, it sought to introduce new procedures. First, the President should consult with Congress "whenever feasible" before involving U.S. forces in armed conflict. And second, in the event that the President commits U.S. forces without prior authorization of Congress, he is to submit a report to Congress "promptly" (that is, within several days), citing the circumstances that necessitated his action; the constitutional, legislative, and treaty provisions authorizing his action, together with his reasons for not seeking specific prior congressional authorization; and describing the estimated scope of activities. The Senate, however, did not act on the measure.

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[21] *Public Papers of the Presidents, 1958*, p. 549 (July 15, 1958); *ibid., 1965*, II, p. 616 (June 1, 1965).

[22] *Wkly. Comp. of Pres. Doc.*, Vol. 6, No. 18, p. 597 (April 30, 1970).

[23] *The New York Times*, Feb. 9, 1971, 17:6.

[24] See Martin Lichterman, "To the Yalu and Back," Inter-University Case Program No. 92 (Indianapolis: Bobbs-Merrill, 1963).

[25] 115 Cong. Rec. S1238 (daily ed., Feb. 4, 1969).

[26] *National Commitments*, Senate Report No. 129, 91st Cong., 1st Sess., p. 6 (1969).

V.

If Senate and House resolutions turn into mere parchment barriers, because of inescapable ambiguities in our language, what concrete actions are needed for legislative reassertion in foreign affairs? Congress must first of all take part in the early stages of foreign policy-making when options are still open and positions have yet to harden. At the time of the Tonkin crisis in 1964, Congress could do little else but follow along in the footsteps of the President. The time for influence was during the prior decade, when our involvement in Vietnam was beginning to take shape and when Congress was appropriating the funds to make that involvement possible. It could, of course, have used its power of the purse to withhold funds at that time. But the long prevailing faith in executive "expertise" in the field of national security, combined with the postwar tradition of "bipartisan" foreign policy, had accustomed the legislature to accept rather uncritically most Presidential definitions of military need.

Short of slashing executive fund requests—essentially a negative reaction—Congress can and should participate more than has been its tradition in the formation of specific foreign policies. I am not suggesting that it participate in each detail of executive policy-making. Yet it will have to ignore the traditional division of labor that limits itself to "broad policy" questions while delegating "day-to-day" decisions to the executive branch. Congress must monitor policies *and* operations. Day-to-day decisions, upon accumulation, have a way of forming policy—what the Senate Foreign Relations Committee has called "a process of commitment by accretion." [27] Congress will have to organize itself to influence policy at the formative stage and maintain close review thereafter.

A few examples will suggest how Congress can begin to play a more positive and influential role. An amendment to the defense appropriations bill in December 1969, sponsored by Senator John Sherman Cooper, specified that no funds were to be used by the President to introduce ground troops into Laos or Thailand. Cooper said that "In bluntest terms, the amendment is offered with the purpose of preventing, if possible, the United States from moving step by step into war in Laos or Thailand, as it did in Vietnam." [28]

As it turned out, however, the Nixon Administration took its first military initiative not in Laos or Thailand but rather in Cambodia. The Cooper-Church Amendment, aimed at barring the retention of U.S. troops in Cambodia after July 1, 1970, recognized the close relationship between "tactical maneuvers" in the field and larger policy questions affecting the whole of Southeast Asia. The Special Foreign Assistance Act of 1971, enacted this past January, stipulates that none of the funds authorized or appropriated in that act, or any other, "may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia." [29] In its bombing operations in Cambodia, and in the latest "incursion" into Laos, the Administration has interpreted air power in such broad terms as to circumvent some of the earlier legislative restrictions. When helicopter gunships are capable of patrolling at tree-top level, the distinction between "air power" and "ground troops" begins to disappear.

Congress can also continue to use its traditional right to inform itself, and the public, by questioning the executive and conducting its own studies and inquiries. The most recent example of this is the continuing series of hearings held by the Symington Subcommittee on United States Security Agreements and Commitments Abroad. During the last Congress, the two man staff of the Subcommittee travelled to 23 countries for on-the-scene investigations. Subsequent hearings examined U.S. policies and operations in 13 countries, plus NATO. The Subcommittee pressed the executive bureaucracies to defend and explain their policies, secured the declassification of must non-sensitive information which an overzealous officialdom had labeded "secret," and was able to shed new light on some of the 2,200 U.S. overseas bases in 33 countries. A number of these bases, the hearings suggested, were products of bureauratic inertia, anachronous relics dating back to the 1940s but unnecessary to the 1970s. In much the same spirit, Senator Mike Mansfield has been pushing for substantial troop reductions of U.S. forces stationed in Europe, arguing that the era of occupation, cold war, and one-sided financial preeminence of the United States are things of the past. In another effort to change outmoded policies, Senator

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[27] *Ibid.*, p. 26.
[28] 115 Cong. Rec. S10732 (daily ed., Sept. 17, 1969).
[29] 84 Stat. 1943 (Jan. 5, 1971).

Charles McC. Mathias, Jr. has called for the repeal of resolutions granting emergency powers to the President: the 1955 Formosa Resolution, the 1957 Middle East Resolution, the 1962 Cuban Resolution, and the 1964 Tonkin Gulf Resolution. The latter was finally repealed in January 1971. Senator Lawton Chiles has introduced a bill to repeal an emergency proclamation that has been in effect ever since it was issued by President Truman on December 16, 1950.[30]

On December 2, 1970, Senator Clifford Case introduced a bill to require that all international agreements, other than treaties, be transmitted to Congress within 60 days of their execution. He referred to the findings of the Symington Subcommittee, the atrophy of the Senate's advice-and-consent role, and the long-standing executive "credibility gap." Under Case's proposal, if an executive agreement is one whose immediate disclosure would prejudice national security, it is to be transmitted to the Senate Foreign Relations Committee and to the House Foreign Affairs Committee, under an injunction of secrecy removable only by the President. Senator Case has reintroduced his proposal in this Congress, while Representative Bradford Morse is sponsoring a similar measure in the House.[31]

Congress has also been reexamining some of our foreign policy principles. Senator Alan Cranston introduced a resolution in May 1969 on our recognition policy, stipulating it to be the sense of the Senate that recognition of a foreign government does not imply that we necessarily approve of the form, ideology, or policy of that government. Cranston said that our "self-righteous and moralistic" recognition policy led to military intervention in Mexico and Nicaragua in earlier decades, while nonrecognition of Communist China contributed to miscalculations and a widening of the Korean war: "perhaps we would have marched to the Yalu River even if we had been well-informed—but the price we paid and the losses we suffered would have been far less if we had been prepared for China's violet reaction."[32] The Senate Foreign Relations Committee adopted the Cranston Resolution unanimously and it passed the Senate, on September 25, 1969, by a 77–3 margin.

## VI

Structural and procedural reforms are needed *within* the legislative branch, however, before Congress can begin to achieve the greater effectiveness in foreign affairs it seeks. Much of the legislative decline in influencing foreign policy, James A. Robinson has written, "must be attributed to the profound change in the requirements of public policy-making and to the failure of Congress to alter its organization to cope with the new demands made upon it."[33]

For instance, it is clear that the crowded schedules of Senators and Representatives do not permit effective oversight of Administration policies. The late Senator Dirksen, at one time a member of more than a dozen committees and subcommittees, used to claim that he needed roller skates to get to all the meetings. During debate on the Legislative Reorganization Act of 1970, Senator Lee Metcalf remarked that one Senator in the previous session of Congress had 39 separate committee assignments.

Steps are being taken to ease this pressure and to streamline procedures. The Legislative Reorganization Act of 1970, by projecting a reduction in the size of a number of Senate committees, promises junior Senators a greater opportunity to develop expertise and to hold leadership positions earlier in their careers. The tight schedules of Representatives may be relieved somewhat once the House installs electronic voting equipment. During 1970, the House consumed 238 hours for roll calls and quorum calls—about 28 percent of the time the House was in session. Electronic voting should cut the half-hour vote to a 15-minute voting period. One result might be an increased use of record votes, thus making legislators more responsive and accountable to their constituents.

Another mechanical innovation is the Senate amplification system now being installed. That is not without substantive importance. Even during crucial

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[30] Mansfield: 115 Cong. Rec. S15164 (daily ed., Dec. 1, 1969); Mathias: S.J. Res. 166, 91st Cong., 1st Sess. (Dec. 8, 1969); Tonkin repeal: 84 Stat. 2055, sec. 12 (Jan. 12, 1971); Chiles: S.J. Res. 70, 92d Cong., 1st Sess. (March 11, 1971).

[31] Case: 116 Cong. Rec. S19190 (daily ed., Dec. 2, 1970), S. 4556, 91st Cong., 2d Sess.; reintroduced as S. 596, 92d Cong., 1st Sess. (Feb. 4, 1971); Morse: 117 Cong. Rec. H254 (daily ed., Jan. 29, 1971), H.R. 2503, 92d Cong., 1st Sess.

[32] 115 Cong. Rec. S5670–72 (daily ed., May 27, 1969).

[33] James A. Robinson, *Congress and Foreign Policy-Making*, rev. ed. (Homewood, Ill.: The Dorsey Press, 1967), p. 176.

debates, such as on the 1964 Tonkin Resolution, it frequently happens that one Senator cannot hear what another is saying. In January 1969, when a resolution was introduced for an amplification system, Senator George Murphy remarked on the anomaly of hearing astronauts a quarter million miles from earth, while at the same time "we in this Chamber are denied the opportunity to hear our colleagues." [34]

Larger, more expert staffs are also needed on Capitol Hill. Stewart Udall, former Congressman and Secretary of the Interior, told the Joint Economic Committee in June 1969 that one of the things that struck him in moving from the legislative to the executive side was now "pathetically" understaffed the Congress was. Senator Proxmire commented on the fact that there were only two or three staff members assigned to the Senate subcommittee on defense appropriations. Senator Barry Goldwater added that the Senate Armed Services Committee, on which he sits, lacked the time to scrutinize Pentagon requests: "We need help on it." [35]

With smaller committee aided by bigger professional staffs, Congress will be better able to conduct its own background studies and check the accuracy and consistency of executive statements. The Legislative Reorganization Act of 1970 increases the number of professional staff members for each standing committee and makes available to the committees cost-effectiveness analysts from the General Accounting Office. The Congressional Research Service (formerly the Legislative Reference Service) will help committees evaluate legislative proposals in order to determine the merits of bills, to estimate their probable results, and to evaluate alternative means of accomplishing the same results.

A number of other provisions in the Legislative Reorganization Act of 1970 will increase the visibility and accountability of legislative actions. However, increased staffing, along with better floor and committee procedures, will not overcome the unrepresentative composition of committees, with military types dominating the committees and subcommittees that authorize and appropriate funds for the Defense Department. Part of that ideological bias is in fact caused by liberals who concentrate their interests on such committees as Senate Foreign Relations, Senate Labor and Public Welfare, and House Education and Labor. Surely a seat on Armed Services is important for urban constituencies, in terms of establishing a balance between military and domestic spending.

Ideological bias also results from the conservative cast of the Senate and House committees responsible for making committee selections. New appointments have liberalized the structure of the Senate Steering Committee, while efforts are underway in both houses to make committee chairmen more responsive and sensitive to party caucuses. Subcommittee chairmanships and ranking minority positions are being distributed to a broader spectrum of legislative leaders. Partly as a result of the limitation on subcommittee chairmanships adopted by the House Democratic Caucus early in 1971, four subcommittee chairmanships were made available on the House Foreign Affairs Committee. The new chairmen—Representatives Fraser, Rosenthal, Culver, and Hamilton—are all distinctly of a liberal outlook.

Other techniques are available for broadening congressional participation. In hearings held in 1969, the Senate Foreign Relations Committee conducted an intensive inquiry into the Safeguard ABM system, anti-submarine warfare, and MIRVs—items normally considered to be on the agenda of the Armed Services Committee. This form of encroachment was made possible when the Foreign Relations Committee scrutinized those weapons systems within the larger context of arms control and the Nonproliferation Treaty. From 1968 to 1970, the Joint Economic Committee held hearings on "Economics of Military Procurement," "The Military Budget and National Economic Priorities," and "The Acquisition of Weapons Systems." Those hearings contributed important insight into deficiencies within the executive branch. Extensive hearings in the area of government procurement, held by the House Committee on Government Operations in 1969, helped uncover additional defects in the management of defense contracts.

Still another technique for broader participation is the bicameral, bipartisan group known as Members of Congress for Peace Through Law. Its special subgroup on military spending offered for the past three years. The Democratic Study Group in the House has also prepared a separate analysis of the defense

[34] 115 Cong. Rec. S735 (daily ed., Jan. 22, 1969).
[35] *The Military Budget and National Economic Priorities* (Part 1), hearings before the Joint Economic Committee, 91st Cong., 1st Sess., pp. 258, 268; *ibid.* (Part 2), p. 471.

budget, supplying a fact sheet on the bill reported out by House Armed Services and comparing the bill to the Senate version and to the original Administration request. Private groups, such as the Brookings Institution, publish studies on the range of options that are available for trategic nuclear forces and general purpose forces.

As another means of providing independent, technically qualified evaluations of Defense Department programs, Representative Abner Mikva has introduced a bill to establish an Office of Defense Review. As a permanent agency of Congress, the Office would be trained in systems analysis, cleared to deal with material of the highest security classification, and held responsible for such fundamental questions as strategic planning, the validity of planning assumptions, the relationship between military planning assumptions and overall U.S. foreign policy goals, and the contribution of individual weapons systems to U.S. national security. As Mikva noted, those are the fundamental questions that neither congressmen or the committees have had time to explore.[36]

VII.

Legislative reassertion is not in itself, of course, a foolproof antidote for future Vietnams and large defense budgets. Congress' past record of partnership with the military is plain enough. But neither is there hope in legislative acquiescence to a hypothetically all-wise, omnipotent and beneficial President. When Presidential power is used in a furtive and dissembling manner, when executive expertise becomes another word for incompetence and deceit, when we reach the point where an invasion is called on incursion and a retreat is called mobile maneuvering, and when Presidential policies have such calamitous results on our citizens and on peoples in distant lands, then surely it is time for the constitutional pendulum to swing.

That is why Congress has begun to build an independent expertise to monitor and question foreign commitments, which all too often have been the personal understandings of the President, supported by the bureaucracy, rather than commitments by Congress and the nation as a whole. To complement this new congressional expertise there must be a new temperament and set of attitudes: a courage to resist being stampeded into granting power simply because the President waves the flag; and ability to distinguish between a need for speed and mere recklessness; a strength and resolve to defer to no one in the exercise of independent judgment. Most important: a determination to treat "reassertion" not as a temporary phenomenon, needed to restore constitutional balance, but as a permanent, nondelegable legislative responsibility. Congress has demonstrated rather impressively that it can change its attitudes and procedures and contribute intelligently to foreign policy-making. The larger question is whether it has the will and the staying power to contribute from one year to the next, in times of crisis as well as relative calm, without reverting to its former acquiescence to the President.

LAWYERS COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM,
*New York, N.Y., February 18, 1971.*

*To the Members of the Senate Committee on Foreign Relations:*

The Administration's argument that Congressional restrictions on the use of American ground combat troops in Laos and Cambodia authorize, by implication, the air war in those countries is sheer sophistry War, under our Constitution, cannot be authorized by implication; military operations are validly only by *affimative* action by Congress. In the present constitutional crisis, members of Congress have seemingly overlooked the National Commitments Resolution overwhelmingly adopted (70 to 16) by the Senate on June 25, 1969. This Resolution states (so far as here pertinent):

> "*Resolved*, That (1) a national commitment for the purpose of this resolution means the *use of the armed forces of the United States* on foreign territory, * * * and (2) it is the sense of the Senate that a national commitment by the United States *results only from affirmative action* taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both houses of Congress specifically providing for such commitment."

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[36] 115 Cong. Rec. H9440 (daily ed., Oct. 13, 1969), H.R. 14318, 91st Cong., 1st Sess.; H.R. 3641, 92d Cong., 1st Sess. (Feb. 4, 1971).

It is indisputable that the President's use of American armed forces (warplanes, helicopter gunships, etc.) in Laos and Cambodia has not been authorized by any treaty, statute or concurrent resolution (specifically providing for such use). Indeed, our Government has solemnly signed the 1962 Geneva Accords, agreeing to respect the neutrality and territorial integrity of the Kingdom of Laos. The President's actions in ordering American armed forces into Laos and Cambodia flagrantly contravenes the National Commitments Resolution which was adopted to preclude such Presidential unilateral action.

In the absence of affirmative action taken by Congress specifically authorizing military measures, the President's constitutional powers under the commander-in-chief clause do not authorize him to wage war. The Founding Fathers vested in Congress alone the sole power to commit our armed forces to hostilities abroad—to safeguard our nation against unchecked executive decisions to commit our country to a trial of force. The commander-in-chief clause merely placed the President at the top of the pyramid of military command—making him, in Alexander Hamilton's words, "first general and admiral of the Confederacy."

President Nixon cannot even rely on the Tonkin Gulf Resolution on which President Johnson relied as a legal basis for waging war in Vietnam for that Resolution has been repealed and indeed the repealer was signed by President Nixon himself. There is therefore not a vestige of Congressional authorization for committing American forces to hosilities on foreign territory (Laos, Cambodia).

The national commitments resolution reflected an accurate description of the constitutional responsibilities of the President and Congress, adopted toward the end of restoring the proper constitutional balance. We believe the Foreign Relations Committee should take all measures necessary to assure compliance with national commitments resolution and to bring to a halt the violation thereof.

Since Congress has not authorized military hostilities in Southeast Asia, President Nixon, in continuing to wage war in Indochina, has been violating the Constitution. President Nixon's constitutional powers, as Commander-in-chief, to protect the lives of American troops do not authorize him to wage war, but are limited and restricted to measures necessary to the same and expeditious withdrawal of these troops. Two years are far too long a period within which to have fulfilled that constitutional responsibility. The best way to protect the lives of American troops is to remove them from Vietnam—not to retain them to continue military operations.

Madame Binh, Foreign Minister of the Provisional Revolutionary Government of South Vietnam, has officially proposed at the Paris Conference that if President Nixon will establish and abide by a date for the complete withdrawal of all U.S. troops, the P.R.G. will assure the safe withdrawal of our troops as well as immediate discussion for the release of prisoners of war. President Nixon has failed to explain why he rejects this offer and prefers instead a policy that jeopardizes the lives of our troops and postpones indefinitely the release of American prisoners of war. President Nixon's refusal to establish a timetable for complete U.S. withdrawal makes continuation of the war inevitable—as does his persistent support for Thieu and Ky, who have emphatically stated their opposition to the withdrawal of American military support. They wish to retain their present position as heads of a narrowly constituted military regime maintained by a massive foreign presence. But as Ambassador Harriman has so pointedly said, "Why should we give Thieu the right to dictate American policy? I can't conceive why anybody should give a veto to a foreign potentate no matter who he is." (*Look*, November 17, p. 39)

Congress, in enacting the Cooper-Church amendments, made clear that, whatever the asserted powers of the President as Commander-in-chief, no ground troops or advisers were to be sent into Laos or Cambodia. The Cooper-Church amendments were intended to restrict American involvement in Indochina not to exacerbate it.

The air war being waged in Laos and Cambodia is contrary to the intent and spirit of Congressional restrictions as pointed out by Senator Mansfield in the T.V.-Radio program, "Face the Nation" (Jan. 24).

Since President Nixon lacks any constitutional power to wage war in Indo-China, Congress should act to halt such unconstitutional activities. If the President persists in violating the Constitution, it is the Congress' responsibility to institute impeachment proceedings. Andrew Johnson was impeached for acts much less iniquitous.

We have been told that we are defending American honor; but many Americans and most of the world's nations feel that the spectacle of the enormously destructive U.S. military arsenal, especially in the case of the virtually unchallengeable power of the U.S. Air Force, arrayed against peasant soldiers, has defiled American honor as never before in our history.

We urge the Foreign Relations Committee to forthwith endorse legislation prohibiting all offensive military action in Southeast Asia and setting an early deadline in 1971 for the withdrawal of all American forces.

We believe it would be a mistake to adopt the Javits bill designed to "regulate undeclared war" for under the guise of "protecting American lives" it could be construed to place a stamp of approval upon the military operations in Laos and Cambodia. In our view, it detracts from the force of the national commitments resolution.

Lamentably, too many members of Congress have accepted as valid the insidious false notion projected by the Administration that the President is authorized under the Commander-in-chief clause to do "anything, anywhere" merely by pronouncing the magic words—"for the protection of our troops". In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 641–42 (1952), the Supreme Court rejected similar claims made by the Executive as to—the scope of power conferred by the Commander-in-chief clause. The Administration's claims would confer upon the President unlimited executive power to wage war—an evil which the Founding Fathers decided to exercise when they vested the war making powers in the Congress—in the body most broadly representative of the people. The tragedy in Southeast Asia bespeaks the calamitous price we have paid for the Presidential transgression of our Constitution. We urge this Committee to take the action we have proposed.

Respectfully,

JOSEPH H. CROWN,
WILLIAM L. STANDARD,
*Cochairmen.*

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LAWYERS COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM

*New York, N.Y.*

*To the Members of the House of Representatives and the Senate:*

The Administration's argument that Congressional restrictions on the use of American ground combat troops in Laos and Cambodia authorize, by implication, the air war in those countries is sheer sophistry. War, under our Constitution, cannot be authorized by implication; military operations are valid only by *affirmative* action by Congress. In the present constitutional crisis, members of Congress have seemingly overlooked the National Commitments Resolution overwhelmingly adopted (70 to 16) by the Senate on June 25, 1969. This Resolution states (so far as here pertinent):

> "*Resolved*, That (1) a national commitment for the purpose of this resolution means the *use of the armed forces of the United States* on foreign territory, * * * and (2) it is the sense of the Senate that a national commitment by the United States *results only from affirmative action* taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both houses of Congress specifically providing for such commitment."

It is indisputable that the President's use of American armed forces (warplanes, helicopter gunships, etc.) in Laos, Cambodia and Vietnam has not been authorized by any treaty, statute or concurrent resolution. Indeed, our Government solemnly pledged that it would "refrain from threat or use of force to disturb" the 1954 Geneva Accords and solemnly signed the 1962 Geneva Accords, agreeing to respect the neutrality and territorial integrity of the Kingdom of Laos. The President's actions in ordering American armed forces into Laos and Cambodia violates these obligations and flagrantly contravenes the National Commitments Resolution which was adopted to preclude such Presidential unilateral action.

In the absence of affirmative action taken by Congress specifically authorizing military measures, the President's constitutional power under the commander-in-chief cuase do not authorize him to wage war. The Founding Fathers vested in

Congress alone the sole power to commit our armed forces to hostilities abroad—to safeguard our nation against unchecked executive decisions to commit our country to a trial of force. The commander-in-chief clause merely placed the President at the top of the pyramid of military command—making him, in Alexander Hamilton's words, "nothing more than . . . first general and admiral of the Confederacy."

President Nixon cannot even rely on the Tonkin Gulf Resolution on which President Johnson relied as a legal basis for waging war in Vietnam for that Resolution has been repealed and indeed the repealer was signed by President Nixon himself. There is therefore not the slightest vestige of Congressional authorization for committing American forces to hostilities on the foreign territory of Laos, Cambodia or any other territory in Southeast Asia.

The National Commitments Resolution reflected an accurate description of the constitutional responsibilities of the President and Congress, adopted toward ending the Presidential usurption of the war-making power vested in the Congress. Since Congress has not authorized military hostilities in Southeast Asia, President Nixon, in continuing to wage war in Indochina, has been violating the Constitution. President Nixon's constitutional powers, as Commander-in-chief, to protect the lives of American troops (whose presence in Indochina is illegal) do not authorize him to wage war, but are limited and restricted to measures necessary to the safe, systematic and prompt withdrawal of these troops. Two years are far too long a period within which to have fulfilled that constitutional responsibility. The best way to protect the lives of American troops is to remove them forthwith from Vietnam—not to retain them to continue military operations.

Madame Binh, Foreign Minister of the Provisional Revolutionary Government of South Vietnam, has officially proposed at the Paris Conference that if President Nixon would establish and abide by a date for the complete withdrawal of all U.S. troops, the P.R.G. will assure the safe withdrawal of our troops as well as immediate discussion leading to the release of prisoners of war. President Nixon has failed to explain why he rejects this offer and prefers instead a policy that jeopardizes the lives of our troops and postpones indefinitely the release of American prisoners of war. Senator McGovern has accurately observed that "Vietnamization" is a policy which "would leave those prisoners languishing in prisons into the indefinite future. The administration deplores their plight but ignores the course that would return them and our troops to their homes and families." (Cong. Rec. Jan. 27, 1971, S. 325–6).

President Nixon's refusal to establish a timetable for complete U.S. withdrawal makes continuation of the war inevitable—as does his persistent support for Thieu and Ky, who have emphatically stated their opposition to the withdrawal of American military support. They wish to retain their present position as heads of a narrowly constituted military regime maintained by a massive foreign presence. But as Ambassador Harriman has so pointedly said, "Why should we give Thieu the right to dictate American policy? I can't conceive why anybody should give a veto to a foreign potentate no matter who he is." (*Look*, November 17, p. 39).

Congress, in enacting the Cooper-Church amendments, made clear that, whatever the asserted powers of the President as Commander-in-chief, no ground troops or advisers were to be sent into Laos or Cambodia. The Cooper-Church amendments were intended to restrict American involvement in Indochina not to exacerbate it. The air war being waged in Laos and Cambodia is contrary to the intent and spirit of Congressional restrictions as pointed out by Senator Mansfield in the T.V.-Radio program, "Face the Nation" (Jan. 24).

Since President Nixon lacks any constitutional power to wage war in Indochina, Congress should act to halt such unconstitutional activities. In view of the President's persistent violation of the Constitution, it is the Congress' responsibility to institute impeachment proceedings. Andrew Johnson was impeached for acts much less iniquitous.

We have been told that we are defending American honor; but many Americans and most of the world's nations feel that the spectacle of the enormously destructive U.S. military arsenal, especially in the case of the virtually unchallengeable power of the U.S. Air Force, arrayed against peasant soldiers has defiled American honor as never before in our history. Senator McGovern has solemnly stated that the massive bombing of Indochina by the United States was "the most barbaric act committed by any modern state since the death of Adolph Hilter."

We urge the members of the Congress to forthwith adopt (A) the Vietnam Disengagement* Act of 1971 (S. 376; H.R. 4101) which would constitute a commitment to complete withdrawal of American armed forces by December 31, 1971; and (B) the Mondale-Saxbe bill (S. 974) to prohibit both an invasion of both Vietnam by U.S. ground forces and U.S. combat air support for a South Vietnamese invasion of the North.

Senator Mondale noted on the floor of the Senate (Cong. Rec. Feb. 26, 1971, S. 2109) that "there are disturbing new reports that President Thieu is not only predicting an invasion, but has also asked the South Vietnamese general staff to draw up detailed plans for an American-supported attack across the borders of North Vietnam."

Lamentably, too many members of Congress have failed to challenge the insidious false notion projected by the Administration that the President is authorized under the Commander-in-chief clause to do "anything, anywhere" merely by pronouncing the magic words—"for the protection of our troops." In *Youngstown Sheet & Tube Co.* v. *Sawyer* 343 U.S. 579, 641–42 (1952), involving the seizure of steel plants by President Truman during the Korean war, the Supreme Court rejected similar claims made by the Executive as to the scope of power conferred by the Commander-in-chief clause.

Commenting on President Nixon's news conference of February 17th, Tom Wicker, Washington correspondent of *The New York Times*, in a moving article entitled *A Slaughter of Innocents* (Feb. 21, 1971) observed:

> "Mr. Nixon was careful at every turn to lay down, as a basis for an unlimited air war, the doctrine that he would be acting only to protect the lives of American ground troops. This blatant deception was used to justify the Cambodian invasion and is being used to justify the current extension of the ground war into the Laotian panhandle. But it was exposed as a fraud by Mr. Nixon himself, who claimed that the fighting in Cambodia had cut one North Vietnamese "lifeline" and then said of the march into Laos:
>
> "This action would either cut or seriously disrupt the other pipeline or lifeline . . . the Ho Chi Minh Trail into the north half of South Vietnam. Therefore, we expected the North Vietnamese to fight here. They have to fight here or give up the struggle to conquer South Vietnam, Cambodia, and their influence extending through other parts of Southeast Asia." "

And Tom Wicker spelt out the cost of President's "Vietnamization" policy in these terms:

> "It is a policy of indiscriminate aerial warfare and blind firepower on the ground that means death and destruction wholesale, not just body counts of enemy dead, but a slaughter of innocents—women and children and old people—villages destroyed, the earth ravaged, refugees in their miserable thousands wandering homeless and hungry. For the people of Indochina, it is a wanton lie that this Administration is "winding down" the war; it is spreading the war like a holocaust.
>
> "In a forthcoming article in The New York Review of Books, Daniel Ellsberg cites Senate reports showing that more than a million Cambodian refugees have been "generated" in the last nine months; that in Mr. Nixon's first year in office about 50,000 civilians were killed, and in his second, more than 70,000. No one knows how many there will be in his third, or what number of innocents will die in Laos, or how many more will be made refugees.
>
> "But they will be many, and every one an ineradicable stain upon the once-proud name of the United States of America."

You, as a member of Congress, charged with upholding the Constitution, should take to heart—and act upon—Senator McGovern's moving statement that the massive bombing of Indochina by the United States was "the most barbaric act committed by any modern State since the death of Adolph Hitler." In closing the debate on the Amendment to End the War, Senator McGovern movingly observed: "Every Senator in this Chamber is partly responsible for sending 50,000 young Americans to an early grave. This Chamber reeks with blood." Members of Congress, though possessing the constitutional power have declined to halt the slaughter of the innocents and have routinely appropriated the massive funds for prosecuting this illegal and immoral war and hence must

*In late January the Gallup Poll showed 73% of Americans in favor of total withdrawal from Vietnam.

share responsibility for the death and destruction in Indochina. How much longer will the Congress allow the slaughter to continue?

Respectfully,

JOSEPH H. CROWN,
WILLIAM L. STANDARD,
*Co-Chairmen.*

MARCH 1971.

NB: We oppose the Javits Bill as it contravenes the thrust of the National Commitments Resolution.

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LAWYER'S COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM,
*New York, N.Y., May 18, 1971.*

Hon. J. W. FULBRIGHT,
*Chairman, Committee on Foreign Relations,*
*Washington, D.C.*

DEAR SENATOR FULBRIGHT: In examining S.J. Res. 95 introduced by Senator Stennis, we are gravely concerned with the implications—unintended, we feel certain—of Section 6 thereof which declares that the provisions of the Joint Resolution shall not apply to the conflict in South Vietnam or the military activities carried out against the military forces of North Vietnam (or its allies) in North Vietnam, Laos, Cambodia, or the waters surrounding the Indochina Peninsula. Section 6, by articulating with particularity the geographical scope of the excluded hostilities, might thus imply that all such military activities were authorized by the Congress—an implication not warranted, particularly in light of the repeal of the Gulf of Tonkin Resolution. Section 6, we feel, might be construed as a "declaration of war, by implication." We are aware that Senator Stennis was concerned that a simple exclusion of all "current hostilities" could lead to later disagreements, but his formulation of the exclusion has ominous implications. One need only recall the implication drawn by the Administration from the Cooper-Sherman amendments.

While we believe that the rules respecting military hostilities in the absence of a declaration of war should be applicable to the Indochinese war, if it is desired to make such an exclusion, we suggest language to the following effect, to preclude unintended implications:

"This resolution shall not apply to hostilities commenced before the enactment of the resolution. The preceding sentence, however, shall not be deemed in any manner to confer upon the President any authority to use the Armed Forces of the United States not otherwise conferred upon the President under the Constitution or other provision of law."

While we have other reservations vis-a-vis S.J. Res. 95 which will be developed in the comprehensive statement we are presently preparing on war-powers legislation, we have felt constrained to comment upon this particular provision at the earliest moment.

Respectfully yours,

JOSEPH H. CROWN,
*Co-Chairman.*

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LAWYERS COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM,
*New York, N.Y., March 12, 1971.*

Dr. CARL MARCY,
*Chief of Staff, Senate Committee on Foreign Relations,*
*Senate Office Building,*
*Washington, D.C.*

DEAR DR. MARCY: In line with yesterday's telephone conversation, I am sending on to you a copy of the article (in two parts), written by Assistant Attorney General William H. Rehnquist, entitled "The President and Cambodia: His Constitutional Authority" which appeared in the June 8-9, 1970 issues of the New York Law Journal. I also enclose a critique thereof prepared by Hoch Reid, Research Director of our Committee, and myself. The former article is, we believe, the most authoritative legal analysis advanced by the Administration on this subject and, with due modesty, the critique thereof is as definitive a reply as we have seen. We hope that the Foreign Relations Committee will find it appropriate to incorporate these articles in the record of the hearings on the War Powers proposals.

We also request an opportunity, on behalf of our Committee, to testify at such hearings towards the end that the proposals under consideration by the Foreign Relations Committee be debated as comprehensively as possible.

We await further word from you.

Respectfully yours,

JOSEPH H. CROWN,
*Co-Chairman.*

[From the New York Law Journal, New York, Monday, June 8, 1970]

THE PRESIDENT AND CAMBODIA: HIS CONSTITUTIOAL AUTHORITY

*The question of President Nixon's constitutional authority in ordering the attack by American armed forces on the Cambodian sanctuaries has divided legal opinion throughout the country. This article, based on an address by the author, an Assistant Attorney General of the United States, at the annual Hammarskjold Forum of the Association of the Bar of the City of New York, presents a defense of the President's authority.*

(By William H. Rehnquist)

[This is the first of two parts]

In discussing the legal basis for the President's action in ordering American armed forces to attack Communist sanctuaries inside the border of Cambodia I will develop answers to several questions which I believe lie at the root of the matter. After having explored these questions in their historical context, I will make an effort to apply what seem to me to be the lessons of both history and constitutional law to the Cambodian incursion.

First, may the United States lawfully engage in armed hostilities with a foreign power in the absence of a congressional declaration of war? I believe that the only supportable answer to this question is "yes."

Second, is the constitutional designation of the President as commander in chief of the armed forces a grant of substantive authority, which give him something more than just a seat of honor in a reviewing stand? Again, I believe that this question must be answered in the affirmative.

Third, what are the limits of the President's power as commander in chief, unsupported by congressional authorization or ratification of his acts? It is scarcely a novel observation to state that the limits of the power are shadowy indeed. But I submit to you that one need not approach anything like the outer limits of his power, as defined by judicial decision and historical practice, in order to conclude that it supports the action that he took in Cambodia.

Before turning to a more detailed discussion of these three questions, let me advert briefly to the provisions of the constitution itself with respect to the war power, and to the debates of the framers on this subject.

Article 1, section 8, provides that Congress shall have the power "to declare war." Article 2, section 2, designates the President as commander in chief of the armed forces. This textual allocation of authority readily suggests that a division of the nation's war power between the President and Congress was intended. An examination of the proceedings of the Constitutional Convention confirms that suggestion.

Such an examination also indicates that the farmers did not intend to precisely delimit the boundary between the power of the executive branch and that of the legislative branch. While rejecting the traditional power of kings to commit unwilling nations to war, they at the same time recognized the need for quick executive response to rapidly developing international situations.

It is interesting to note that the proposal called up before the convention on Friday, Aug. 17, 1787, was cast in terms of conferring upon Congress the power "to make war," rather than "to declare war." During the debate Charles Pinckney urged that the warmaking power be confided to the Senate alone, while Pierce Butler asked that the power be vested in the President. James Madison and Elbridge Gerry then jointly moved to substitute the word "declare" for the word "make," thus in their words "leaving to the executive the power to repel sudden attacks." Rufus King supported the substitution of the word "declare," urging that the word "make" might be understood to mean "conduct war," which latter he believed to be an executive function.

With only New Hampshire dissenting, it was agreed that the grant to Congress should be of the power to "declare" war. Pinckney's motion to strike out the whole clause, and thereby presumably leave the way open to vest the entire war-making power in the executive, was then defeated by a voice vote.

The framers here, as elsewhere in the constitution, painted with a broad brush, and it has been left to nearly 200 years of interpretation by each of the three coordinate branches of the national government to define with somewhat more precision the line separating that which the President may do alone from that which he may do only with the assent of Congress.

1. It has been recognized from the earliest days of the Republic by the President, by Congress, and by the Supreme Court, that the United States may lawfully engage in armed hostilities with a foreign power without a congressional declaration of war. Our history is replete with instances of "undeclared wars," from the war with France in 1798 through 1800 to the Vietnamese war. The Fifth Congress passed a law contained in the first book of the Statutes at Large authorizing President Adams to "instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or eleswhere, on the high seas. . . ."

The President proceeded to carry out congressional instructions, and such naval seizures were not uncommon during the period of the undeclared war with France. The Supreme Court, in a case arising out of this undeclared war, recognized the differences between what it called "solemn war," which required a declaration by Congress, and "imperfect" war, which did not, in *The Eliza* (4 Dall 37).

It simply will not do, then, either as a matter of constitutional law or as a matter of historical practice, to say that armed hostilities engaged in by the United States in the absence of a declaration of war by Congress are unlawful. To say this by no means answers the question as to what the President may do without congressional authorization, but it does focus the discussion on substance rather than form.

2. The designation by the constitution of the President as commander in chief of the armed forces confers upon him substantive authority in that capacity. This conclusion is supported by not merely countless examples from our nation's history, but by more than one judicial comment on the subject.

Chief Justice Marshall, writing for the court in *Little v. Barreme* (2 Cranch 170) spoke of the power of the President to order the seizure of a ship on the high seas in a situation where Congress has not specified the procedure:

"It is by no means clear that the President of the United States whose high duty it is to 'take care that the laws be faithfully executed' and who is Commander in Chief of the Armies and Navies of the United States, might not without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce" (2 Cranch at 177).

Justice Grier, speaking for the Supreme Court in its famous decision in the *Price Cases* (2 Black 635), likewise as being a substantive source of authority on which he might rely in putting down rebellion:

"Whether the President in fullfilling his duties, as Commander in Chief, in supressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided *by him* and tihs court must be governed by the decisions and acts of the political departments of the government to which this power was entrusted. 'He must determine what degree of force the crisis demands' " (2 Black, 635, 670).

Lest it be thought that Chief Justice Marshall and Justice Grier are not relevant to the 20th Century, Justice Jackson, concurring in *Youngstown Sheet and Tube Co., v. Sawyer* (343 U.S. 579, 645, 1952), expressed a similar thought:

"We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. . . . "

Presidents throughout our history have sent American armed forces into conflict with foreign powers on their own initiative. They have also deployed American armed forces outside of the United States on occasion in a way which invited hostile retaliation from a foreign power. Presidents have likewise exercised the

widest sort of authority in conducting armed conflict already authorized by Congress.

These activities represent three separate facets of the historical exercise of the power as Commander in Chief by various Presidents—the power to deploy armed forces outside of the United States; the power to engage United States armed forces in conflict with a foreign nation; and the power to determine how a war, once initiated, shall be conducted.

Congress has on some of these occasions acquiesced in the President's action without formal ratification; on others it has ratified the President's action; and on still others it has taken no action at all. On several of the occasions, individual members of Congress, and, at the close of the Mexican War, one House of Congress on a preliminary vote, had protested executive use of the armed forces.

While a particular course of executive conduct to which there was no opportunity for the legislative branch to effectively object cannot conclusively establish a constitutional precedent in the same manner, as it would be established by an authoritative judicial decision, a long continued practice on the part of the executive, acquiesced in by the Congress, is itself some evidence of the existence of constitutional authority to support such a practice. As stated by Justice Frankfurter in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer* (343 U.S. 579, 610):

"The consitution is a framework for government. Therefore the way the framework is consistently operated fairly establishees that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the constitution or legislation, but they give meaning to the words of the text or supply them" (343 U.S. at 610).

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THE PRESIDENT AND CAMBODIA: HIS CONSTITUTIONAL AUTHORITY

*The question of President Nixon's constitutional authority in ordering the attack by American armed forces on the Cambodian sanctuaries has divided legal opinion throughout the country. This article, based on an address by the author, an Assistant Attorney General of the United States, at the annual Hammarskjold Forum of the Association of the Bar of the City of New York, presents a defense of the President's authority.*

(By William H. Rehnquist)

[This is the second of two parts]

Historical examples have been marshaled in numerous recent studies of the President's power (relative to President Nixon's constitutional authority to order the attack on the Cambodian sanctuaries), and I will summarize some of them briefly. President Jefferson, in 1801, sent a small squadron of American naval vessels into the Mediterranean to protect United States commerce against the Barbary pirates. He was of the view that for these ships to take offensive, as opposed to defensive, action congressional action would be necessary.

In 1845 President Polk ordered military forces to the Coast of Mexico and to the western frontier of Texas in order to prevent any interference by Mexico with the proposed annexation of Texas to the United States. Following, annexation, Polk, ordered General Zachary Taylor to march from the Nueces River, which Mexico claimed as the southern border of Texas, to the Rio Grande River, which Texas claimed as her southern boundary, and beyond. While so engaged, Taylor's forces encountered Mexican troops, and hostilities between the two nations commenced on April 25, 1946.

There had been no prior authorization by Congress for Taylor's march south of the Nueces. Justice Grier in his opinion in *The Prize* cases, commented on this fact, stating:

"The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized 'a state of war as existing by the act of the Republic of Mexico'" (2 Black 634).

In 1854 President Pierce approved the action of the naval officer who bombarded Greytown, Nicaragua, in retalliation against a revolutionary government that refused to make reparations for damage and violence to United States citizens. This action was upheld by Judge Samuel Nelson, then a judge of the Southern District of New York and later a justice of the Supreme Court of

the United States, in Durand v. Hollis (4 Blatch, 451, 1860). In his opinion in that case, Judge Nelson said:

"The question whether it was the duty of the President to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there, was a public political question, in which the government, as well as the citizens whose interests were involved, was concerned, *and which belong to the executive to determine;* and his decision is final and conclusive, and justified the defendant in the execution of his orders as Secretary of the Navy" (4 Blatch. 454–455; emphasis supplied).

In April, 1861, President Lincoln called for 75,000 volunteers to suppress the rebellion by the southern states, and proclaimed a blockage of the Confederacy. These actions were taken prior to their later ratification by Congress in July, 1861. The Supreme Court upheld the validity of the President's action in proclaiming a blockade in the *Prize Cases.*

In 1900 President McKinley sent an expedition of 5,000 United States troops as a component of an international force during the Boxer Rebellion in China. While Congress recognized the existence of the conflict by providing for combat pay, it neither declared war nor formally ratified the President's action.

Similar incidents in Central America took place under the administrations of Presidents Theodore Roosevelt, Taft and Wilson. Naval or armed forces were sent to Panama, Nicaragua and twice to Mexico in the first two decades of the twentieth century. On none of these occasions was there prior congressional authorization.

Prior to the Vietnam conflict, the most recent example of presidential combat use of American forces without congressional declaration of war was President Truman's intervention in the Korean conflict. In many senses, this is undoubtedly the high water mark of executive exercise of the power of commander in chief to commit American forces to hostilities.

Following the invasion of South Korea by the North Koreans in June, 1950, and a request for aid by the United Nations Security Council, President Truman ordered air and sea forces to give South Korean troops cover and support and ordered the Seventh Fleet to guard Formosa. Ultimately 250,000 troops were engaged in the Korean War, which lasted for more than three years.

President Truman relied upon the United Nations Charter as a basis for his action, as well as his power as commander-in-chief. The fact that his actions were authorized by the United Nations Charter, however, does not reduce the value of the incident as a precedent for executive action in committing United States armed forces to extensive hostilities without a formal declaration of war by Congress.

The United Nations Charter was ratified by the Senate and has the status of a treaty, but it does not by virtue of this fact override any constitutional provision (Geofroy v. Riggs, 133 U.S. 258; Reid v. Covert, 351 U.S. 487). If a congressional declaration of war would be required in other circumstances to commit United States forces to hostilities to the extent and nature of those undertaken in Korea, the ratification of the United Nations Charter would no obviate a like requirement in the case of the Korean conflict.

Presidents have likewise used their authority as commander-in-chief to deploy United States forces throughout the world. Critics of President Wilson claimed that his action in arming American merchant vessels in early 1917 precipitated our entry into World War I. Similarly, President Roosevelt's critics have asserted that various actions he took to aid the allies in 1941 played a part in our involvement in the second World War. Whatever substance there may be to these criticisms, the presidential actions stand as the constructions placed by those two Presidents on their power as commander-in-chief of the armed forces.

The third facet of the power of commander-in-chief is the right and obligation to determine how hostilities, once lawfully begun, shall be conducted. This aspect of the President's power is one which is freely conceded by even those students who read the commander-in-chief provision least expansively. Indeed, it has seldom, if ever, been seriously challenged. Chief Justice Chase, concurring in ex parte Milligan (4 Wall. 2, at 139), said:

"Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes with the command of the forces and conduct of campaigns. That power and duty belongs to the President as Commander in Chief*" (emphasis supplied).

In the first World War, for example, it was necessary to make the tactical decision whether the United States troops in France would fight as a separate command under General Pershing, or whether United States divisions should be incorporated in existing groups or armies commanded by French or British generals. President Wilson and his military advisors decided that United States forces would fight as a separate command.

In the second World War, not only similar military decisions on a global scale were required but also decisions that partook as much of political strategy as they did of military strategy. I would briefly mention a number of these: Should the United States concentrate its military and material resources on either the Atlantic or Pacific fronts to the exclusion of the other, or should it pursue the war on both fronts simultaneously? Where should the reconquest of Allied territories in Europe and Africa which had been captured by the Axis powers begin? What should be the goal of the Allied powers?

It will readily be recalled by many of us that decisions such as these were reached by the Allied commanders-in-chief, and chief executive officers of the Allied nations, without any formal congressional participation. The series of conferences attended by Presidents Roosevelt and Truman ultimately established the Allied goals in fighting the second World War, including the demand for unconditional surrender on the part of the Axis nations.

Similar strategtic and tactical decisions were involved in the undeclared Korean War. Questions such as whether the United States forces should pursue Korean forces into North Korea and as to whether American Air Force planes should pursue Communist planes north of the Yalu River were made by the President as commander-in-chief without formal congressional participation.

While these examples help outline the contours of the President's power as commander in chief in the absence of congressional authorization, it is clear that Congress can, by authorizing presidential action, remove any doubt as to its constitutional validity. Thus, when the Gulf of Tonkin Resolution was enacted Congress noted that whatever the limits of the President's authority in acting alone might be, whenever the Congress and the President act together "there can be no doubt" of the constitutional authority (House Report 1708, 88th Congress, 2d Session, 4).

Congress may, of course, authorize presidential action by declaration of war. But it is abundantly clear that its authorization of presidential action may take other forms. From the example of the Fifth Congress' delegation to President Adams of the power to stop French vessels on the high seas, through the legislative acts authorizing President Eisenhowewer to use troops in Lebanon and in Formosa, and authorizing President Kennedy to use armed forces in connection with the Cuban missile crisis, to the Gulf of Tonkin Resolution in 1964, both Congress and the President have made it clear that it is the substance of congressional authorization, and not the form which that authorization takes, which determines the extent to which Congress has exercised its portion of the war power.

The notion that an advance authorization by Congress of military operations is some sort of an invalid delegation of congressional war power is untenable in the light of the decided cases. While *Schechter Poultry Corporation* v. *United States* (295 U.S. 495, 1935), held that Congress in delegating powers dealing with domestic affairs must establish standards for administrative guidance, this principle does not obtain in the field of external affairs. The Supreme Court in *United States* v. *Curtiss-Wright Corporation* (299 U.S. 304), made this clear:

"Whether if the Joint Resolution has related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the Resolution is to affect a situation entirely external to the United States, and falling with the category of foreign affairs . . . 299 U.S. at 315).

"It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality" (299 U.S. at 318).

The situation confronting President Nixon in Vietnam in 1970 must be evaluated against almost two centuries of historical construction of the constitutional division of the war power between the President and Congress. It must also be evaluated against the events which had occurred in the preceding six years.

In August, 1964, at the request of President Johnson following an attack on American naval vessels in the Gulf of Tonkin, Congress passed the so-called Gulf of Tonkin Resolution. That resolution approved and supported the determination of the President "to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."

It also provided that the United States is "prepared as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom."

While the legislative history surrounding the Gulf of Tonkin Resolution may be cited for a number of varying interpretations of exactly what Congress was authorizing, it cannot be fairly disputed that substantial military operations in support of the South Vietnamese were thereby authorized.

Steadily increasing numbers of United States Armed Forces were sent into the Vietnamese combat during the years following the passage of the Gulf of Tonkin Resolution. American Air Force planes bombed not only South Vietnam, but North Vietnam.

When President Nixon took office in January, 1969, he found nearly half a million combat and supporting troops engaged in the field in Vietnam. His predecessor, acting under the authorization of the Gulf of Tonkin Resolution, had placed these troops in the field, and I, for one, have no serious doubt that Congress and the President together had exercised their shared war power to lawfully bring about this situation.

President Nixon continued to maintain United States troops in the field in South Vietnam, in pursuance of his policy to seek a negotiated peace which will protect the right of the South Vietnamese people to self-determination. He has begun troop withdrawals, but hostile engagements with the enemy continue.

He has an obligation as commander-in-chief to take what steps he deems necessary to assure the safety of American armed forces in the field. On the basis of the information available to him, he concluded that the continuing build-up of North Vietnamese troops in sanctuaries across the Cambodian border posed an increasing threat to both the safety of American forces, and to the ultimate success of the Vietnamization program.

He also determined that, from a tactical point of view, combined American-South Vietnamese strikes at these sanctuaries had a very substantial likelihood of success. He therefore ordered them to be made.

The President's determination to authorize incursion into these Cambodian border areas is precisely the sort of tactical decision traditionally confided to the commander-in-chief in the conduct of armed conflict.

From the time of the drafting of the constitution it has been clear that the commander-in-chief has authority to take prompt action to protect American lives in situations involving hostilities.

Faced with a substantial troop commitment to such hostilities made by the previous Chief Executive, and approved by successive Congresses, President Nixon had an obligation as commander-in-chief of the country's armed forces to take what steps he deemed necessary to assure their safety in the field. A decision to cross the Cambodian border, with at least the tacit consent of the Cambodian government, in order to destroy sanctuaries being utilized by North Vietnamese in violation of Cambodia's neutrality, is wholly consistent with that obligation. It is a decision made during the course of an armed conflict already commenced as to how that conflict shall be conducted, rather than a determination that some new and previously unauthorized military venture shall be taken.

By crossing the Cambodian border to attack sanctuaries used by the enemy, the United States has in no sense gone to "war" with Cambodia. United States forces are fighting with or in support of Cambodian troops, and not against them. Whatever protest may have been uttered by the Cambodian government was obviously the most perfunctory, formal sort of declaration.

The Cambodian incursion has not resulted in a previously uncommitted nation joining the ranks of our enemies, but instead has enabled us to more effectively deter enemy aggression heretofore conducted from the Cambodian sanctuaries.

Since even those authorities least inclined to a broad construction of the executive power concede that the commander-in-chief provision does confer substantive authority over the manner in which hostilities are conducted, the President's decision to invade and destroy the border sanctuaries in Cambodia was clearly authorized under even a narrow reading of his power as commander-in-chief.

## The President's Usurpation of the War Power—A Critique of "The President and Cambodia: His Constitutional Authority"

William H. Rehnquist has written (NYLJ June 8, 9, 1970) a stimulating and provocative essay (1) in defense of the President's authority in ordering American armed forces into Cambodia an issue which has "divided legal opinion throughout the country", as the Journal's editor has noted. The essay was sufficiently provocative to impel us to explore in depth the soundness and totality of the arguments advanced. The Assistant Attorney General deploys copious arsenals of extensive armaments—the debates of the Constitutional Convention, historical precedents, and judicial decisions. At the threshold he observes that he has sought to apply "the lessons of both history and constitutional law to the Cambodia incursion." Our examination will seek to determine whether he has made a correct application.

### MR. REHNQUIST'S ARGUMENT

In discussing the President's constitutional authority to order the invasion of Cambodia, Mr. Rehnquist posed three questions. First, whether the United States may engage in armed hostilities with a foreign power without a congressional declaration of war; second, whether the designation of the President as Commander-in-Chief grants him substantive authority; and third, what are the limits of the President's power as Commander-in-Chief unsupported by congressional authorization.

We have no quarrel with the affirmative answer to the first and second questions. The crucial issue lies in the third question which Mr. Rehnquist never really answered at all. He merely says that the limits of the President's power as Commander-in-Chief are shadowy indeed, but that the action taken in Cambodia does not approach the outer limits of his power. He cites several cases of a President employing military force without congressional authorization, but no cases which define the limits of presidential authority. No one can judge whether the President exceeded his lawful powers in Cambodia without knowing what the limits of those powers are.

The the Constitution is to mean anything when it says in Article 1, Section 8, that Congress shall have power to declare war, it must mean that there is an area in which the President does not have power to act without a declaration of war by Congress. Mr. Rehnquist gives us no clue as to what this area is other than a reference to Thomas Jefferson who, he said, "was of the view that for the [U.S.] ships to take offensive as opposed to defensive action, congressional action would be necessary."(2)

He arranged his discussion around what he calls "three separate facets of the historical exercise of the power as Commander-in-Chief by various Presidents:—the power to deploy armed forces outside of the U.S.; the power to engage U.S. armed forces in conflict with a foreign nation; and the power to determine how a war, once initiated shall be conducted."

The Rehnquist article gives only brief reference to the proposition that the President has power to deploy troops around the world. It points out that the acts of Presidents Wilson and Roosevelt may have hastened our entry into World War I and World War II. The relevance to Cambodia is not developed. If there is a parallel, it should be noted that both President Wilson and President Roosevelt saw fit to go to Congress for the final decision to go to war, though, Roosevelt, at least, could have taken the position that we were already at war when the Japanese attacked Pearl Harbor.

As examples of the exercise of the power to engage in armed conflict without congressional authority, the article then discusses the dispatch of troops into Mexico by President Polk in 1845 before war was declared by Congress; a naval bombardment of Greytown, Nicaragua in 1854; President Lincoln's acts to suppress the rebellion by the southern states prior to ratification by Congress; President McKinley's expedition of American troops as part of an international force during the Boxer Rebellion; and finally the Korean War. There was no attempt to show why these precedents are claimed to be authority for the President's right to engage U.S. forces in Cambodia. No attempt was made to draw parallels between the facts surrounding those cases and Cambodia. No argument was made that the Presidents in those five cases acted within their constitutional powers beyond stating that they acted.

If this type of argument were to succeed, the result would be the nullification of the constitutional provisions regarding the war making powers of Congress,

and investing in the President the absolute power to make war any place in the world at any time he may, in his sole discretion, deem it advantageous to do so.

Mr. Rehnquist lays considerable stress on the third and final point, that the President, by virtue of his power as Commander-in-Chief, has the right and obligation to determine how war shall be conducted, once it has been lawfully commenced. The proposition is indisputable, but the relevance to Cambodia is not so clear and the argument is ambiguous. It is based on two premises, first, that the Cambodian invasion was part of the Vietnam War. While on the one hand the Nixon administration disclaims responsibility for the commencement of the war and professes to be reversing the policy of the previous administration, on the other hand it must rely on the legal commencement of the war to justify its extension into Cambodia.

For this purpose, Mr. Rehnquist relies largely on the Gulf of Tonkin Resolution while the President, in his public statements, has disclaimed reliance on that Resolution and supported, or at least acquiescend, in its repeal. The Assistant Attorney General admits that the legislative history supports varying interpretations of what the Resolution authorized, but concludes that at least some military action was authorized and he dismisses, rather summarily, the notion that the Tonkin Resolution contained an unconstitutional delegation of legislative power. To rebut the delegation argument he refers to a statement by Justice Sutherland in U.S. v. Curtis Wright Corporation (299 U.S. 304) to the effect that the rule against delegation of legislative power applies to internal affairs but not to external affairs. More will be said later about the delegation argument, but we would point out here, that the delegation approved in the Curtis Wright case would not be a precedent for the Gulf of Tonkin Resolution. Tonkin gave the President an option to act or not to act "as the President determines" while the legislation in the Curtis-Wright case gave him power only to determine whether certain facts exist.

The Rehnquist argument then proceeds on the assumption that the war was legally initiated and that the President had the power as Commander-in-Chief to decide how the war should be conducted. It states that the decision to invade Cambodia is "precisely the sort of tactical decision traditionally confided to the Coommander-in-Chief". He calls it a decision "made during the course of an armed conflict already commenced, as to how the conflict should be conducted, rather than ** [one to engage in] some new and unauthorized military venture**".

The reasons given for this contention, however, are somewhat ambiguous, as if the administration were not quite sure which of two horses to ride in justifying action taken by impulse without regard to its legality. On the one hand he argues that the invasion of Cambodia was not a new military venture, emphasizing that we went in with "at least the tacit consent of the Cambodian government" (which is belied by contemporary newspaper reports). He says that it was in pursuance of the military objectives of the Vietnam war, namely "the ultimate success of the Vietnamization program", and that the President "determined that from a tactical point of view *** [it] had a very substantial likelihood of success". On the other hand he says that the action was "necessary to assure the safety of American armed forces in the field". If the latter were true, there would be no need to make the former argument.

If the facts actually supported the claim that the safety of the American armed forces was at stake, the President as Commander-in-Chief would be empowered to repel an attack to protect American troops, but he would not be authorized to invade Cambodia. When the Constitutional Convention decided to give the Congress the power to declare war, it left (in the words of James Madison and Elbridge Gerry) "to the Executive the power to repel sudden attack". This power may be exercised to defend U.S. citizens in a foreign country if they are subject to a sudden attack. But neither the facts reported in the press, nor any facts stated by President Nixon or Mr. Rehnquist indicated either the existence or imminent threat of a sudden attack on U.S. forces from Cambodia. There had been talk of a build-up of troops that might threaten the success of the Vietnamization program and of capturing supplies or a mythical command headquarters, but no sudden attack.

Whether or not the action was militarily, tactically, or politically justified has no relevance to the constitutional question. If it was not action to repel a sudden attack on U.S. forces, the decision was one to be made by Congress, not the President.

Nor will the other argument (no new military venture) withstand close scrutiny. Cambodia was an independent neutral nation. The Lon Nol regime not

only did not consent to the invasion of its territory, it was not advised in advance by the United States and its immediate reaction was a protest. (3) It may have been powerless to make its protest more than perfunctory. The struggling regime was weak, faced with threat of rebellion from within as well as the pressures of external forces. Even acquiescence under the circumstances would not amount to a valid legal authorization for American troops to conduct massive military action in a defenseless neutral country. It does not do to say, as President Nixon did, that the Cambodian army is not our enemy. The chief victims of our fire power were the Cambodian peasants who were killed and whose homes and farms were destroyed. They did not consent to the invasion and did not regard their country as part of the Vietnam theater of war.

Let us examine further the implications of this argument. If the invasion of Cambodia to capture military supplies was merely a decision by the Commander-in-Chief as to the conduct of a war already commenced, are there no limits on the extent of the Commander-in-Chief's power? If he can invade Cambodia without congressional authorization, can he invade China? Can he take military action against any neutral country that is selling or furnishing military supplies to North Vietnam? If the President has power as Commander-in-Chief to take any action anywhere in the world which he thinks may advance his military objectives in Vietnam he might well see fit to bomb Soviet or other ships on the high seas, supply lines through China or otherwise to carry the war to Moscow, Stockholm or any other nation supplying North Vietnam. Under the administration's theory of the President's power advanced by Mr. Rehniqust, international boundaries mean nothing of the President deems it advantageous to ignore them and carry the war to another nation. Such a broad power in the hands of one man is exactly what the framers of our constitution sought to avoid when they gave the war making power to Congress.

In Mr. Rehnquist's defense, it may be said that he made as strong an argument for the constitutionality of the President's acts as could be made under the circumstances. He must necessarily base his argument upon the statements of fact and military objectives maed by the President and his military advisers without scrutiny. Some of the rhetoric is made wth an eye on what will support the President's legal authority to do what he may have already decided to do without consulting his legal advisers.

In the very comprehensive article "*Cambodian Decision: Why the President Acted*", which appeared in *The New York Times* of June 30, 1970 Hedrick Smith notes:

"State Department lawyers were not told to prepare the legal case for invasion until four days after it began" (p. 14).

Although the President as Commander-in-Chief may believe that the initiation of hostilities without consulting Congress may be in the best interests of the country, the Constitution has not committed that question to the judgment of the Commander-in-Chief; it commits it to Congress. Our Constitution requires that the basic decisions on making war be submitted to Congress, to obtain the consensus of a deliberative body in a democratic manner. That is what our Constitution intends and without the protection of such constitutional procedures we will find that America has become a military dictatorship.

Let us now turn from a discussion of the Rehnquist arguments to an affirmative discussion of the President's constitutional powers in the course of which we shall comment on various points and arguments advanced by Mr. Rehnquist. As we stated earlier, it is not possible to arrive at a conclusion as to whether the President's action in Cambodia violates the Constitution without knowing the limits of his constitutional powers as Commander-in-Chief.

## THE CONSTITUTION

The Constitution (Article I, Section 8) vested in Congress, in addition to the power to declare war, the power to raise and support armies; and to guard against a presidential prospect of a military dictatorship, "no appropriation of money to that use shall be for a longer term than two years." It was Congress which was authorized exclusively to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia of the states to execute the laws, suppress insurrections, and repel invasions; to provide for organizing, arming and disciplining the militia; and to exercise exclusive legislative authority over "forts, magazines, arsenals, dockyards, and other needful buildings."

In contrast to the broad and extensive powers vested in the Congress in this field, only one of the powers in military affairs mentioned in the Constitution was vested by the framers in the President alone. The President was to be the Commander in Chief of the army and navy. (Article II Section 2.)

THE CONSTITUTIONAL CONVENTION

Mr. Rehnquist sketches some of the highlights of the debate on the war-making power in the Constitutional Convention. While his references and quotations indicate his familiarity with Madision's notes (4) of the debate on Friday, August 17, 1787, his citations are indeed selective, ignoring many references which accent the limited role ascribed to the President. Thus to Pierce Butler's suggestion that the war power be vested in the President "who will have all the requisite qualities, and will not make war but when the Nation will support it," Elbridge Gerry rejoined that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." James Madison and Gerry then moved "to insert 'declare', striking out 'make' war; leaving to the Executive the power to repel sudden attacks." That was the limited role assigned to the President—"to repel sudden attacks." Roger Sherman agreed that "the Executive should be able to repel and not to commence war"; and George Mason "was against giving the power of war to the Executive, because not safely to be entrusted with it; or to the Senate because not so constructed as to be entitled to it. He was for clogging rather than facilitating the war; but for facilitating peace." With that clear exposition of the limited Presidential power, Mason "preferred 'declare' to 'make' ". Rufus King also supported the substitution of the word "declare", stating that the word "make" might be understood to mean "conduct" war, "which was an Executive function." And in the light of that illuminating debate, the motion to insert "declare" in place of "make" was adopted by a vote of eight states to one.

The Convention then granted to Congress the power to "make rules concerning captures on land and water"; and to "grant letters of marque and reprisal." Thus was rounded out the war clause vesting in the Congress—and not in the President—the authority to initiate war either by a declaration of general war or authorization of specific hostile actions such as those described in the last mentioned clauses. The President's power was restricted to repelling sudden attacks.

In the light of the fullness of the debate on the war power, it simply will not do to say, as the Assistant Attorney General has said, that "the framers did not intend to precisely delimit the boundary between the power of the executive branch and that of the legislative branch." John Bassett Moore, the distinguished authority on international law would be shocked by this statement. Moore said:

"There can hardly be any room for doubt that the framers of the Constitution, when they vested in Congress the power to declare war, never imagined they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, so long as he refrained from calling his action war or persisted in calling it peace." (5)

The framers did indeed intend to precisely delimit that boundary (6) although the Assistant Attorney General seems bent on obfuscating and blurring that boundary. And this blurring technique is again evident in his statement: "While rejecting the traditional power of Kings to commit unwilling nations to war, they at the same time recognized the need for *quick executive response to rapidly developing international situations.*" Not so. The framers recognized the need for quick executive response—to repel sudden attacks upon the United States; but there is no constitutional warrant to expand that need to the broad open-end category of "rapidly developing international situations". This proposition is made crystal clear in Alexander Hamilton's explanation of the war clause:

"'The Congress shall have the power to declare war'; the plain meaning of which is, that it is the peculiar and exclusive duty of Congress, when the nation is at peace, to change that state into a state of war; whether from calculations of policy, or from provocations or injuries received; in other words, it belongs to Congress only to go to war. But when a foreign nation declares or openly and avowedly makes war upon the United States, they are then by the very fact already at war, and any declaration on the part of Congress is nugatory; it is at least unncessary." (7)

When Gerry and Madison ascribed to the President the power to repel sudden attacks upon the United States, they did not attribute to him a discretionary right to institute a state of war or to initiate hostilities. They were, of course, cognizant that a foreign nation could introduce a state of war; that when a foreign nation attacks the United States, war exists—and the President as Comrmander-in-Chief is authorized to—indeed must—wage such war.

Thomas Jefferson, who knew something of the respective roles assigned to the Congress and the President in war-making, commented in a letter written in 1789:

"We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay." (8).

The President's powers as Commander-in-Chief were acutely defined by Alexander Hamilton in *The Federalist:*

"The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy, while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all of which by the Constitution under consideration, would appertain to the legislature." (9).

The President's constitutional powers as Commander-in-Chief are thus akin to those of the first General and Admiral of the Confederacy—a role vastly subordinate to the policy-making role of Congress to determine when hostilities should be initiated—when war is to be initiated. Extrapolating into modern terminology Alexander Hamilton's description of the President's powers as Commander-in-Chief, the President may be viewed as a 6-Star General and First Admiral of the Fleet. The President may well believe that the peace and safety of the United States require him to drop nuclear weapons on the Chinese mainland without consulting Congress, but our Constitution does not legally authorize him to take such a decision—that decision is vested in Congress and exclusively in Congress. And it is the mark of wisdom and of foresight of our Founding Fathers that they deliberately denied the decision as to war and peace to a single man and entrusted it instead to a broadly representative body.

In the light of the definitive views articulated by the framers of the Constitution on the war power, it is somewhat beguiling, if not deceptive, to remark—as does the Assistant Attorney General— that "the framers here, as elsewhere in the Constitution, painted with a broad brush." It is really not cricket to depict only the barest outline of an artist's work and then to portray the artist as one who paints "with a broad brush." On the contrary, the framers of the Constitution etched in sharp, graphic lines the war-making power and drew a sharp boundary between the Congressional realm and the Presidential realm. Barring a sudden attack upon the United States, the decision to initiate hostilities was committed to the Congress—not to the President. The President, as Commander in Chief, is charged with the conduct of hostilities after they are legally commenced.

## "UNDECLARED WARS"

Mr. Rehnquist observes that "our history is replete with instances of 'undeclared wars', from the war with France in 1798 through 1800 to the Vietnamese War." It is true that we have engaged in armed conflict, even to the point of war on certain occasions, without a Congressional declaration. We will attempt an analysis of some examples of such hostilities, which is essential to an understanding of the limits of the President's power as Commander-in-Chief.

First we must point out that the example Mr. Rehnquist gives of an undeclared war, that with France from 1798 to 1800, was not an undeclared war at all. It is an example of the fact that a war declared by Congress need not be a general or total war, but may consist of limited hostilities authorized by Congress in specific terms. In the *Eliza* case (4 Dall. 37) cited in the Rehnquist article, the Supreme Court did not decide that a limited war need not be "declared" or authorized by Congress as Mr. Rehnquist indicates. It held that the conflict with France was in fact a war, though limited in nature and specifically authorized by Congress.

Justice Chase, in his opinion in the *Eliza* case (also cited as *Bas* v. *Tingey*) said:

"Congress is empowered to declare a general war or Congress may wage a limited war; limited in place, in object, in time . . . What then is "the nature of the contest subsisting between America and France? In my judgment it is a limited or partial war. Congress has not declared war in general terms; but Congress has authorized hostilities on the high seas by certain persons in certain cases." (10)

The precedent is authority for the exact opposite of that for which it is cited by the Assistant Attorney General. Before the President acted, Alexander Hamilton on May 17, 1798, had advised President Adam's Secretary of War, James McHenry, against Presidential action:

"In so delicate a case, in one which involves so important a consequence as that of war, my opinion is that no doubtful authority ought to be exercised by the President." (11)

President Adams heeded Hamilton's advice and took no action against French depredations on American vessels until Congress passed a series of acts authorizing him to protect American commerce as well as enacting a number of statutes providing for belligerency.

In 1801 a conflict with Tripoli, one of the Barbary States, began. Tripoli had been marauding American shipping, in an attempt to exact a payment of tribute. President Jefferson sent a squadron of ships to the Mediterranean but instructed them to defend themselves and other American vessels, but not to initiate hostilities. The Navy captured a Triponlitan ship, but after disarming it released it. In his annual message to Congress, on December 8, 1801, President Jefferson declared:

"Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries. I communciate all material information on this subject, that in the exercise of this important function confided by the Constitution to the Legislature exclusively their judgment may form itself on a knowledge and consideration of every circumstance of weight." (12)

Congress responded to President Jefferson's message by passing on February 6, 1802 an act authorizing the President to arm American vessels, commission privateers, and "to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require." (2 Stat. 129)

Thus in the first two limited wars in which the new nation found itself, both Presidents Adams and Jefferson declined to initiate hostilities until authorized by Congressional action, even though American shipping was being seriously interfered with by foreign powers. Although both Presidents had the means to order retaliatory action which might have gained a temporary military advantage, President Adams and Jefferson felt that the decision to commit American forces was not constitutionally theirs to make.

### ARMED CONFLICT PRECEDENTS

The cases in which the Executive has engaged U.S. forces in armed conflict without Congressional authorization fall into several categories.

One class of cases involved punitive or retaliatory action prompted by acts of piracy or attacks on United States citizens by persons who were not acting on behalf of a government. The Executive ordered naval action against various Pacific Islands, the West African coast and Central American countries.

Perhaps the most controversial of such cases was the attack by a United States Naval vessel on Greytown, Nicaragua in 1854. There were two rival companies set up to conduct travelers across the isthmus. One held a charter from the Nicaraguan Government and was favored by the United States. The other claiming a charter from the "Mosquito King" established what they called the sovereign state of Greytown. Incidents occurred between the two companies and an American Minister was slightly injured by mob action and American property damaged. A United States Naval vessel was sent to the scene to obtain redress and an apology for the attack on the Minister. After demanding indemnity and an apology from Greytown, the Commander bombarded the town resulting in its almost complete destruction.

The action was denounced from many sources in this country (including the New York Times) and abroad. The navy commander may have exceeded his orders but President Pierce finally decided to justify the action in a report to Congress, by claiming that it was not an act of war because Greytown did not

constitute an "organized political society" but a "piratical resort of outlaws or a camp of savages depredating on emigrant trains or caravans . . .".(13)

Mr. Rehnquist and others before him have cited the *Greytown* case as an example of the constitutional power of the President to take military reprisals against nations without authority of Congress. The case, however, has only a very limited application. John Bassett Moore, in denouncing Wilson's occupation of Vera Cruz as an unauthorized act of war, said:

"The Greytown incident which has often been cited to prove that such a proceeding would not be war or an act of war, cannot properly be invoked as a precedent, since Greytown was a community claiming to exist outside the bounds of any recognized state or political entity, and the legality of the action taken against it was defended by President Pierce and Secretary Marcy on that express ground." (14)

There have been a number of other cases where United States forces have been ordered to pursue bandits or pirates who had taken shelter in such countries as Cuba, Spanish Florida, Mexico and Nicaragua. In some cases United States marines have been landed by order of the Executive to protect United States citizens from mob action. This happened in China, Egypt, Argentina, Uruguay and a number of Caribbean countries.

With a few exceptions these cases may be explained on the basis of the President's authority to protect United States citizens. Action to protect U.S. citizens in another country, sometimes referred to as "interposition" is distinguished from intervention in the internal or political affairs of another country. According to more than one authority, interposition to protect citizens is within the powers of the Executive under the Constitution while intervention is an act of war and may be legally undertaken only on the authority of Congress. (15)

The right of the Executive to use force to protect citizens abroad, however, does not extend to reprisals or punitive action. Secretary of State Henry Clay said in 1827:

"The employment of force is justifiable in resisting aggressions before they are complete. But when they are consummated, the intervention of the authority of government becomes necessary if redress is refused by the aggresser." (16)

Thomas Jefferson, then Secretary of State, had this to say about the power of the Executive to make reprisals:

"The making of a reprisal on a nation is a very serious thing. . . . it is considered an act of war, and never failed to produce it in the case of a nation able to make war; besides, if the case were important and ripe for that step. Congress must be called upon to take it; the right of reprisal being expressly lodged with them by the Constitution, and not with the Executive." (17)

To say that there are cases of U.S. forces being used in foreign countries without congressional authorization does not necessarily mean that the action was lawful. When Commodore Paulding invaded Nicaragua in 1857 to capture a pirate, President Buchanan confessed to Congress that Paulding's action was improper but insisted that he acted with good intentions. There was bitter criticism of Buchanan in Congress. U.S. forces pursued bandits into Mexico a number of times, the last of which was when President Wilson sent a force in pursuit of Pancho Villa in 1916, bringing a protest from Mexico. In these cases the President exceeded his constitutional authority since the action was punitive in nature rather than strictly defensive.

In some cases the Executive has embarked upon a military venture for an ostensible purpose that provided a constitutional basis for the action but went on to use that as an excuse for further action that was not authorized under the Constitution. A notorious example of this was President Johnson's invasion of the Dominican Republic in 1965. There was a rebellion by a portion of the army against the military junta and former President Bosch was asked to return from exile. The military junta asked for assistance from the United States to prevent what they termed a communist takeover. In order to obtain the requested help the military junta was advised by American officials that it was necessary to advise the United States that American lives were in danger. President Johnson thereupon sent in 21,000 troops. When the American citizens were evacuated the troops did not leave but remained as an act of political intervention by the United States carried out by the Executive without Congressional authority.

Senator Fulbright commented on this as follows:

"Four months later, after an exhaustive review of the Dominican crisis by the Senate Foreign Relations Committee in closed sessions, it was clear beyond reasonable doubt that although saving American lives may have been a factor

in the decision to intervene on April 28, the major reason was a determination on the part of the United States government to defeat the rebel, or constitutionalist, forces whose victory at that time was imminent." (18)

Such action by President Johnson constituted a perversion of the Presidential power to protect United States citizens and certainly does not establish his right under the Constitution to take the nation to war in Vietnam.

Among the "historical examples" cited by Mr. Rehnquist is President McKinley's dispatch of 5,000 United States troops at the time of the Boxer Rebellion in China in 1900. This venture began as an allied effort to rescue citizens in Peking and ended as a war with the government of China. This incident was an intervention initiated for the protection of citizens against a mob and thereafter converted into a war with the government of the state which was invaded. The unconstitutionality of this misadventure was compounded when China was obliged to sign a protocol, which was never submitted to the Senate, promising to pay an indemnity of $330 million of which $24 million was to be paid to the United States.

Whatever may be the President's right to send troops into a foreign country to protect United States citizens in actual danger, it does not extend to situations where only future danger may be involved. President Taft was presented with this problem in 1911 when a popular uprising threatened to overthrow the government of President Diaz in Mexico. He was advised by his Ambassador to Mexico that 40,000 American residents in Mexico, as well as large American investments, would be endangered by an uprising. President Taft assembled troops along the border of Mexico and ships along the coast, but he did not take the initiative to invade the country. He said:

"It seems my duty as Commander in Chief to place troops in sufficient number where, if Congress shall direct that they enter Mexico to save American lives and property, an effective movement may be promptly made....

"The assumption by the press that I contemplate intervention on Mexican soil to protect American lives or property is of course gratuitous, because I seriously doubt whether I have such authority under any circumstances, and if I had I would not exercise it without express congressional approval . . ." (19)

Thus Mr. Rehnquist's reference to incidents that took place under President Taft's administration hardly supports President Nixon's constitutional authority to order the invasion of Cambodia. Nor is his case in any way supported by his reference to President Lincoln's calling up 75,000 volunteers to suppress the rebellion by southern states, or his proclamation of a blockade of the Confederacy in April 1861. President Lincoln did, in fact, have statutory power to call up the militia, but he had no statutory authority to issue his two proclamations on April 19 and April 27, 1861 for the blockade of the Confederacy. However, the blockade was proclaimed on the theory that a state of general war already existed by virtue of the Southern attacks on Federal property; war having been initiated by the South, the President, as Commander-in-Chief, was authorized to use any means of belligerency permitted by the international law of war, which includes the proclamation of a blockade.

Now it is significant that on July 4, 1861 President Lincoln asked a special session of Congress to ratify his actions, "whether strictly legal or not"(20)—a ratification never sought by President Johnson or President Nixon for their actions and never an intimation that their actions might not have been "strictly legal." Important, too, is the point that on August 6, 1861 Congress declared that Lincoln's orders to the army and navy and his calling up militia and volunteers "are hereby approved and in all respects legalized and made valid . . . as if they had been issued and done under the previous express authority and direction of the Congress." (21)

The Assistant Attorney General notes that the Supreme Court upheld the validity of the President's action in proclaiming a blockade in the *Prize Cases*. The implication here is that the *Prize Cases* support the Assistant Attorney General's basic contention that President Nixon possesed constitutional authority to order American armed forces into Cambodia. What did the Supreme Court say in the *Prize Cases*? Let the text of the opinion speak for itself:

"By the Constitution, Congress alone has the power to declare a national or foreign war. . . . The Constitution confers on the President the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander in chief of the armed services and the militia of the several States when called into actual service. He has no power to initiate or declare a war against a foreign nation or domestic State....

"If war be made by invasion from a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. Whether the hostile party be a foreign invader, or States organized in rebellion, it is nonetheless an act of war, even if the declaration be 'unilateral.'

* * * * * * *

"Whether the President in fulfilling his duties, as commander in chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. 'He must determine what degree of force the crisis demands.' The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case." (22)

Adverting to the Congressional ratification, Justice Grier, writing for the majority noted:

"Without admitting that such an act was necessary, it is plain that if the president had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, . . . the ratification has operated to perfectly cure the defect." (2 Black 635, at 671)

Lincoln was reacting to actual attacks by the South. As Commander-in-Chief, he was suppressing an insurrection. Is this comparable to Cambodia? Not even President Nixon has claimed that North Vietnamese had invaded South Vietnam from Cambodia and had attacked American troops. The remarkable thing about the Lincoln situation is that despite the clear constiutional authority in President Lincoln, as Commander-in-Chief, to suppress the insurrection, acts of war having been initiated by the South, Lincoln nonetheless asked the Congress to ratify his actions and was honest enough to say "whether strictly legal or not". If President Johnson had followed the Lincoln example, there may never have been a war in Vietnam. And Lincoln would have been the last man to have justified an invasion as the one undertaken in Cambodia.

Mr. Rehnquist vigorously presses as a precedent President Truman's intervention in the Korean conflict which he characterizes as "undoubtedly the high water mark of executive exercise of the power of commander in chief to commit American Forces to hostilities." War broke out in Korea on Sunday, June 25, 1950. The next day (Monday) President Truman decided to enter the war.

"When the fateful presidential decision was made that Monday night, however, the Security Council had merely charged North Korea with a breach of the peace, called for withdrawal of the North Korean forces, and asked for assistance in the execution of that very limited resolution. The appalling fact is that the President plunged the United States into the war without a shred of authority from the Constitution or the laws or treaties and without so much as a request for military help from the United Nations. At that time the Security Council had not yet decided that any kind of sanctions would be desirable or necessary. The order to General MacArthur was given even before the South Korean government had asked officially for American aid.

"The day after the President had put the Navy and Air Force into the war his action was reported to the Security Council in New York along with a declaration that it was "the plain duty of the Security Council to invoke stringent sanctions to restore international peace." The Council approved a resolution offered by the United States Ambassador recommending that ". . . the members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area." * * *

Nevertheless, President Truman sought to justify his commitment of the United States to war by what the Security Council had done. * * *

The implication that he had sent American forces into the war after the Security Council had called for military assistance to South Korea is an inexcusable distortion. No doubt he assumed that the appearance of going to war under the U.N. banner would take the curse off his unilateral action. When history is written without varnish, however, we must add to Mr. Truman's usurpation of the war power a deceptive statement which seemed to say that the United States

had responded to a U.N. call for the use of military force when in fact the U.N. at that time had issued no such call." (22a)

Such was the judgment of Merlo J. Pusey, Pulitzer Prize winner, author of "The Way We Go To War." President Truman's unilateral action was, moreover, a violation of the United Nations Participation Act of 1945 (23) which explicitly required approval by Congress of any agreement to supply troops to the United Nations. President Truman neither sought nor received any Congressional authorization.

President Truman's action was clearly a usurpation of the war-making power of Congress. There are other examples of Presidents engaging in military operations without Congressional authority but most of them can be distinguished from the Indochina War in some manner. Many were for the protection of American citizens or property; some were acts of reprisal or the suppression of piracy. Most of them invlved little or no violent collision with the forces of another state.

One of the most comprehensive and authoritative treatises on the war powers of the President was written by Francis D. Wormuth, Professor of Political Science at the University of Utah. (24) He discussed a statement made by the Legal Adviser to the State Department (25) to the effect that "there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization * * *."

Professor Wormuth said:

"Most of the State Department's 125 purported precedents for the Vietnamese War were interventions for the protection of citizens; a few were acts of reprisal and there were a few others. The mere fact that they occurred does not establish their legality. If this were true, the frequency with which banks are robbed would establish the legality of bank robbery. The analogy is worth pursuing. Just as a bank robber acts only when he thinks he can escape apprehension, so on most occasions when Presidents have usurped the war power there has been little likelihood of complaint or political retribution. Landings on the soil of states that had no navies, and acts of violence against defenseless distant ports, disturbed no domestic interest. They were more likely to produce applause than censure." (26)

The fact that President Truman usurped the power of Congress in committing the nation to a major war in Korea does not make it legal. It is the most paraded precedent even though President Truman's unilateral action disregarded the Constitution and the explicit requirements of the United Nations Participation Act of 1945. But even the Korean War has its point of distinction. It purported to be a peace keeping action of the United Nations, and, no doubt, many people in Congress and the nation who might otherwise have protested on constitutional grounds were reluctant to do anything that would weaken the authority of the United Nations. However, constitutional procedures are not in opposition to the nation's obligation to support the United Nations. They merely provide the means by which the nation is to give that support. When that support consists of going to war, it is for the Congress not the President to make the decision.

The bedrock of the Assistant Attorney General's case rests on the "historical examples" of which he makes particular reference to President Jefferson's dispatch of naval vessels against the Barbary pirates; President Polk's dispatch of troops into Mexico in 1845; the naval bombardment of Greytown, Nicaragua in 1854 during President Pierce's administration; President Lincoln's acts to suppress the rebellion by Southern States prior to congressional ratification; President McKinley's dispatch of troops during the Boxer Rebellion; and President Truman's intervention in the Korean War.

President Jefferson in sending the squadron instructed the ships not to initiate hostilities and expressly requested congressional authorization which was granted for offensive measures. President Polk's intervention in Congress was censured by the House as a war "unnecessarily and unconstitutionally begun by the President of the United States." Greytown, paraded by the Assistant Attorney General as an illustration of the constitutional powers of the President, is a precedent to be shunned rather than followed. President Lincoln's suppression of the rebellion and the *Prize Cases* mentioned by the Assistant Attorney General offer not a gossamer thread of support for President Nixon's *constitutional* authority vis-a-vis the Cambodian invasion. President McKinley's intervention in the Boxer Rebellion was a perversion of Presidential authority. The array of historical examples marshalled by Mr. Rohnquist is, to put it most charitably, threadbare.

Manifestly, an unconstitutional act by one President does not make it constitutional for another. If a usurpation of power that goes unchallenged encourages a repetition of the unconstitutional act by another President, it illustrates the importance of eternal vigilance to protect our constitutional safeguards.

The claim by the Johnson adminstration that we have been engaged in "collective self defense" in Vietnam, even if it had validity under international law, would not authorize the President, from the standpoint of constitutional law, to engage in hostilities without Congressional action. President Johnson claimed that South Vietnam had been attacked by North Vietnam at the close of 1964. (27) While the President may have the power to defend Americans who are subject to attack, on his own authority, that does not extend to the protection of Vietnamese, regardless of the urgency. In 1851 Daniel Webster, as Secretary of State, spoke forcefully on the subject, in relation to a dispute between France and Hawaii (then an independent nation). He said:

"By these [the Constitution and the law] no power is given the Executive to oppose an attack by one independent nation on the possessions of another. We are bound to regard both France and Hawai as independent states, and equally independent, and though the general policy of the Government might lead it to take part with either in a controversey with the other, still, if this interference be an act of hostile force, it is not within the Constitutional power of the President;"(28)

When President Nixon sent troops into Cambodia on April 30, 1970 he attempted to justify it as action to save American lives. But it was not protective action in response to an attack on American soldiers. The lack of any urgency is evidenced by the fact that the enemy had left the sanctuary areas, and the fact that the enemy bases he sought to destroy were said to have existed for several years. The President ordered the army to invade a country whose neutrality we attack" on any of the territory covered "in accordance with its constitutional processes." But in August 1964—at the time the Tonkin Gulf Resolution had been submitted to the Congress there was no claim that an "armed attack" by North Vietnam on South Vietnam had occurred and Congress made no such finding in passing the Resolution. Hence, in August 1964, the SEATO Treaty could not have been invoked as a basis for unilateral military action by the United States.

The preamble of the Tonkin Gulf Resolution made reference to "a deliberate and systematic campaign of aggression that the Communist regime of North Vietnam has been waging against its neighbors. . . ." But this reference was to "subversion" and not an an "armed attack". The SEATO Treaty provides that, in the case of subversion and other threats short of armed attack, members pledge to "consult immediately" in order to agree on what measures should be taken. No such consulation was held.

Neither section of the SEATO Treaty could in any circumstances have given the President authority to commit the country to war. The requirement that in the event of an "armed attack" each signatory would act "in accordance with its constitutional processes" was intended to leave to Congress the decision as to whether war was essential. Secretray of State Dulles, the architect of SEATO, told the Senate Foreign Relations Committee during its hearings on the Treaty in 1954 that the Treaty created "an obligation for consultation . . . not an obligation for action."(34a) Senator H. Alexander Smith, were obligated to respect. While he claimed to do so on a temporary basis and in support of the government he did not claim to have obtained the consent of that government or to have informed it of his intentions.

The sanctity of political boundaries has long been recognized in relation to the war powers of the President. In 1805 the United States was involved in a dispute with Spain over the boundary between Louisiana and Florida. President Jefferson sent a special message to Congress advising of the intent of Spain to advance on American territory. He said:

"Considering that Congress alone is Constitutionally invested with the power of changing our condition from peace to war, I have thought it my duty to await thier authority for using force in any degree which could be avoided. I have barely instructed the officers stationed in the neighborhood of the aggressions to protect our citizens from violence, to patrol within the borders actually delivered to us and not to go out of them but when necessary to repel and inroad or to rescue a citizen or his property."(29)

The language of Abraham Lincoln with respect to the sanctity of boundaries is especially significant. Lincoln was a member of Congress when President Polk sent an army into Mexico in 1846 before a declaration of war was made by Congress. Polk was severely criticized by Lincoln and other Congressmen who voted for a resolution critical of the President for "unconstitutionally" commencing the war—the Resolution was indeed adopted by the House by a vote of 85 to 81 on January 3, 1848. Lincoln wrote to his friend Herndon:

"Let me first state that I understand to be your position. It is that if it shall become necessary to repel invasion, the President may, without violation of the Constitution, cross the line and invade the territory of another country, and that whether such necessity exists in any given case the President is the sole judge. . . .

". . . . Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you allow him to do so whenever he may choose to say he deems it necessary for such a purpose, and you allow him to make war at his pleasure. Study to see if you can fix any limit to his power in this respect, after having given him so much power as you propose. . . .

"The provision of the Constitution giving the war-making power to Congress was dictated, as I understand it, by the following reasons: Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us. But your view destroys the whole matter and places our President where Kings have always stood." (30)

If then the President may not invade a *neighboring* nation "whenever he shall deem it necessary to *repel an invasion*," how specious is the claim that the President was authorized to send armed forces into Cambodia—hardly a "*neighboring nation*" and hardly "necessary *to repel an invasion*" of the United States.

### LEGAL SIGNIFICANCE OF TONKIN GULF RESOLUTION

We have noted earlier that Mr. Rehnquist lays considerable stress on the point that the President, by virtue of his power as Commander-in-Chief, has the right and obligation to determine how war shall be conducted, once it has been lawfully commenced. This proposition is based on two premises: first, the Vietnam War was lawfully commenced, and second, that the Cambodian invasion was part of the Vietnam War. As to the first premise, he relies largely on the Tonkin Gulf Resolution although the President, in his public statements, has disclaimed reliance on that resolution, while Mr. Rehnquist admits that the legislative history supports varying interpretations of what the resolution authorized.

We quite agree that the legislative history of the Tonkin Gulf Resolution supports varying interpretations of what the resolution authorized. (31) But we contend that it clearly did not authorize the large scale war that followed and, even if it could be construed to give the President the authority to do what he did, it would have been an unconstitutional delegation of legislative power.

The message (32) sent by President Johnson on August 5th, 1964 to the Senate recited that "Our purpose is peace"; and emphasized that "the United States intends no rashness, and seeks no wider war." The Congressional debates on the resolution indicate that Congress did not intend to authorize the President, in his sole discretion, to fight a large scale war in Vietnam although there are also statements that the language of the resolution would indeed authorize the President to use such force as could lead into war. There was no suggestion anywhere in President Johnson's message that he anticipated large scale American military operations in Vietnam. Indeed, his plea was for continuation of the United States' "basic policy of assisting the free nations of the area to defend their freedom"; and that the United States desired only that the peoples of Southeast Asia "should be left in peace to work out their own destinies in their own way."

The Resolution, after noting that the maintenance of peace in Southeast Asia was vital to our national interest, declared that "Congress approves and supports the determination of the President as Commander-in-Chief, to take all measures necessary to repel any armed attacks against forces of the United States and to prevent further aggression," and that "the United States is, there-

fore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom. (33)

The first part of the Resolution does nothing more than recognize the President's constitutional power to repel armed attack against American vessels on the high seas. The second part purports to invoke the SEATO Treaty.(34) It must be remembered that under the SEATO Treaty, the United States and each of the other signatories had agreed in the event of an armed attack against any of the parties or against any of the protocol states, "to meet the common danger in accordance with its constitutional processes." Our representative, Senator Smith, who signed the Treaty on behalf of the United States in Manila in 1954, had testified: (35)

"Under this treaty, each party recognizes that an armed attack on any country within the treaty area would endanger its own peace and safety. Each party, therefore, agrees to meet the common danger *in accordance with its constitutional processes.* That means, by implication, that if such an emergency as is contemplated by the treaty should arise in that area it would be brought before the Congress by the President . . . and will be considered (Underscoring indicates italics).

The only valid interpretation of the second part of the Gulf of Tonkin Resolution would be that it is a declaration of the readiness of the United States to take such action as is necessary, *in accordance with its constitutional processes.* That is, a warning to the world with no legal effect.(36) Regardless of its interpretation, however, the validity of the Resolution is doubtful in view of the circumstances surrounding its adoption.

The representations made in August 1964 to the Senate Foreign Relations Committee by Secretaries Rusk and McNamara in support of the Tonkin Gulf Resolution later came under severe scrutiny. The second round of hearings(37) held by the Committee in February 1968 it developed that the Foreign Relations Committee had been misled. The 1968 hearings revealed that the Maddox was a spy ship collecting intelligence to assist the South Vietnamese, a point denied in the 1964 hearings. The 1968 hearings also established that the Maddox was in the Tonkin Gulf in connection with a South Vietnamese attack on two North Vietnamese islands—a point categorically denied by Secretary McNamara in the 1964 hearings. And although in the 1964 hearings Secretary McNamara insisted that the Maddox had at no time departed from international waters, he did admit in the 1968 hearings that the Maddox had been no closer than eight nautical miles from the North Vietnamese coastline and no closer than four miles from any offshore island. He insisted that this was not a violation of territorial waters because, he said, North Vietnam had made no public claim to a twelve mile limit until after the Tonkin Gulf incident. Curiously though, the United States was very careful to respect China's twelve mile limit and most Communist countries (though not all) claim a twelve mile limit. Little wonder then that Senator Fulbright, Chairman of the Foreign Relations Committee, observed, after the 1968 hearings, that the Tonkin Gulf Resolution was a nullity because procured by misrepresentation.(38)

In the face of this record, the lawfulness of President Johnson's placing troops in Vietnam is, indeed, in serious doubt. And one is left to wonder whether President Nixon's disclaimer of reliance on the Tonkin Gulf Resolution and his acknowledgment of reliance on his powers as Commander-in-Chief—is not rooted in the judgment that the Tonkin Gulf Resolution did not legally authorize the use of American forces abroad.*

If the Tonkin Resolution is to be construed as giving the President the power to use the armed forces "*as the President determines*" at any time in the future that assistance may be requested, and without further action by Congress, then it would be invalid as an unconstitutional delegation of the war power—a legislative power. There is a good deal of history and a good deal of law behind the proposition that the war power cannot be delegated.

In 1831 France agreed by treaty to make payment of claims suffered by Americans for injuries to American shipping during the Napoleonic Wars. However, the French Chamber refused to vote the necessary funds. And so on December 9, 1834, President Andrew Jackson addressed a message to Congress wherein he made the following request:

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*The Tonkin Gulf Resolution has since been repealed and hence affords no legal basis for American intervention in Southeast Asia.

"I recommend that a law be passed, authorizing reprisals upon French property, in case provision shall not be made for the payment of the debt at the approaching session of the French Chambers." (39)

In response to President Jackson's request, Representative Claiborne took the floor in the House that very same day and declared:

"If this power be conferred upon him, it will be virtually conferring upon the President unconstitutional power—a power to declare war. . . . Gentlemen have read history to little effect, if they are ready to clothe a single individual with the power of making war."(40)

On January 6, 1835, Henry Clay, on behalf of the Senate Foreign Relations Committee, submitted a report to the Senate which urged the rejection of President Jackson's request:

"The framers of our Constitution have manifested their sense of the nature of this power [reprisals] by associating it in the same clause with grants to Congress of the power to declare war, and to make rules concerning captures on land and water. . . .

"In the first place the authority to grant letters of marque and reprisal being specially delegated to Congress, Congress ought to retain to itself the right of judging of the expediency of granting them under all the circumstances existing at the time when they are proposed to be actually issued. The committee are not satisfied that Congress can, constitutionally delegate this right. It is true that the President proposes to limit the exercise of it to one specified contingency. But if the law be passed as recommended, the President might, and probably would, feel himself bound to execute it in the event, no matter from what cause, of provision not being made for the fulfillment of the treaty by the French Chambers, now understood to be in session. . . . Congress ought to reserve to itself the constitutional right, which it possesses, of judgment of all the circumstances by which such refusal might be attended; of hearing France, and of deciding whether, in the actual posture of things as they may then exist, and looking to the condition of the United States, of France, and of Europe, the issuing of letters of marque and reprisal ought to be authorized, or any other measure adopted." (41)

On the basis of Clay's report, the Senate unanimously rejected President Jackson's request. Although President Jackson was naturally disappointed, it is of historic interest that the controversy with France was adjusted in 1836—without resort to armed force, negotiations having been successful. Thus, in the formative days of constitutional development, the Senate accepted the rule that the war power could not be constitutionally delegated to the President.

It is important to grasp that Clay argued not only that Congress could not constitutionally delegate the war power to the President, but that the Congress itself could not make a declaration of war to take effect at a future time, because war must be decided "in the actual posture of things as they may then exist." The Tonkin Gulf Resolution shows how far Congress has strayed.

During President Buchanan's administration the Congress was very zealous in safeguarding the war power and on repeated occasions refused President Buchanan's requests to use the land and naval forces to protect transit over the Isthmus of Panama, on the ground that compliance would involve the delegation of the war power. After Congress had denied two requests made in his messages of December 8, 1857 and December 6, 1858, President Buchanan sent a special message repeating his request on February 18, 1859. After noting that there had been interruptions of peaceful transit over the Isthmus and that American vessels had been seized and confiscated, his message declared:

"The executive governments of Great Britain, France, and other countries, possessing the war-making power, can promptly employ the necessary means to enforce immediate redress for similar outrages upon their subjects. Not so the executive government of the United States.

"If the President orders a vessel of war to any of those ports to demand prompt redress for outrages committed, the offending parties are well aware that in case of refusal the commander can do no more than remonstrate. He can resort to no hostile act. . . . The remedy for this state of affairs can only be supplied by Congress since the Constitution has confided to that body alone the power to make war." (42)

His message concluded with a request that Congress pass a law authorizing the President to protect the lives and property of American citizens in the situation, arguing:

"Such a grant of authority, thus limited in its extent, would in no just sense be regarded as a transfer of the war-making power to the Executive, but only

as an appropriate exercise of that power by the body to whom it belongs. . . ." (43)

On the day the message was delivered, Senator Seward rose in the Senate and delivered a memorable speech which should be required reading for every member of Congress.

"It was thought, seventy years ago, that it was a great improvement, conducive to peace, essential to the permanent stability of republican institutions, that the Executive should be destitute of the power to make war, and that this last final remedy for national grievance should never be resorted to in any case without the deliberate consent and determination of the nation itself. . . . The President of the United States now regrets that those nations living under arbitrary forms of government are safer than we are who live under this, as we thought, improved system.

"But, sir, I am unable to understand the logic which brings the President of the United States to the conclusion that this application to us will not be a surrender of the war-making power. He tells us that it would not be a surrender of the war-making power; but that we should be making war ourselves. Could anything be more strange and preposterous than the idea of the President of the United States making hypothetical wars, conditional wars, without any designation of the nation against which war is to be declared; or the time, or place, or manner, or circumstance of the duration of it, the beginning or the end; and without limiting the number of nations with which war may be waged? No, sir. When we pass this bill we do surrender the power of making war or preserving peace, in each of the State named, into the hands of the President of the United States." (44)

Senator Seward's warning was heeded by the Congress and both the Senate and the House declined President Buchanan's request. (45)

In connection with domestic legislation, Congress may enact contingent legislation whose provisions are to come into effect upon the occurrence of recited circumstances, and the President invokes the law when those circumstances eventuate. Thus in *Field* v. *Clark*, (143 U.S. 649) a landmark case decided in 1892, the Supreme Court sustained a grant of power to the President to remove certain items from the free list in the case of an exporting nation levying duties on American goods which "he may deem to be reciprocally unequal and unreasonable"; and upon the President's making such a finding, the duties recited in the statute were to come into operation. Said the Court:

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution. The act of October 1, 1890, in the particulars under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. . . . Nothing involving the expediency or the just operation of such legislation was left to the determination of the President. . . . As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. . . . He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."

The rule governing the delegation of legislative power is therefore clear. Congress acts as the principal in framing the general policy to be pursued, and the President acts as its agent "to ascertain and declare the event upon which its expressed will was to take effect." It is Congress which determines the policy which is to come into effect upon the happening of the recited circumstances—and it authorizes the President to invoke the law when those circumstances occur. Congress, however, may not pass contingent legislation without specifying the circumstances in which it is to be invoked, nor may it grant the President an option to act or not to act.

Mr. Rehnquist relies upon the Supreme Court's decision in *United States* v. *Curtiss-Wright Corp.* (299 U.S. 304) for the proposition that the rule against delegation of legislative power does not obtain in the field of external affairs.

It is true that the opinion of Justice Southerland contains such a statement but it could have been decided on a narrower ground. We must consider the soundness of the opinion and its application to the Tonkin Gulf Resolution.

The case did not involve the war power, but the power over foreign commerce. The salient facts were these: in 1934 Congress had passed a joint resolution under which the President, if he should find that the prohibition of the sale of arms in the United States to the belligerents in the Gran Chaco War would contribute to the restoration of peace, was to prohibit such sale by proclama-

tion. The violation of such prohibition was made a crime. Curtiss-Wright was subsequently indicted for conspiring to sell arms to Bolivia. It challenged the validity of the resolution arguing that it unconstitutionally delegated the legislative power to the President.

If the Court had applied the orthodox test governing the delegation of legislative power, the resolution could have been readily sustained as contingent legislation since the scope of the discretion given to the President was extremely narrow. However, Justice Southerland chose to introduce a bizarre theory into constitutional law. The joint resolution, he said, was not subject to attack under the rule forbidding a delegation of the law-making power because its purpose was "to effect a situation entirely external to the United States, and falling within the category of foreign affairs."

This was so, Justice Sutherland maintained, because sovereignty was of two parts, external and internal; that at the Revolution the external sovereignty of the British Crown passed to the United States while internal sovereignty passed to the several states; and by adopting the Constitution, the several states transferred a portion of their internal sovereignty to the Union, but the Constitution had no effect upon the external sovereignty which the Union already possessed. Hence, concluded Justice Southerland, the constitutional rule against the delegation of legislative power could not apply to exercises of external sovereignty.

The fallacy of Justice Sutherland's theory is lucidly stated by Prof. Wormuth as follows: (46)

"The notion that 'the states severally never posessed international powers' would have surprised the signers of the Declaration of Independence, for that document reads:

"We therefore, the representatives of the United States of America, in General Congress, assembled, . . . do . . . solemnly publish and declare, that these united colonies are, and of right ought to be free and independent states; . . . and that as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do.

"Sutherland's theory is not only historically but theoretically unsound. The notion that sovereignty can come in two parts is absurd, for the reason Sutherland himself gives: "A political society cannot endure without a supreme will somewhere." As Hans Kelsen puts it, a coherent legal order must deprive from a single *Grundnorm*; to use another figure, it must rise pyramidally to a single apex. For us, the *Grundnorm* is the Constitution, and even for Justice Sutherland, for he says that external sovereignty remained in the Union "save in so far as the Constitution entirely qualified its exercise. It created the several organs of national government and assigned powers to each. It apportioned the powers of "external sovereignty"—treaties and war and foreign commerce. War and foreign commerce it assigned to Congress in Article I of the Constitution, which begins with the words which forbid the delegation of Congressional power: "The legislative power herein granted shall be vested in a Congress."

"But even if Sutherland's reasoning would hold water the *Curtiss-Wright* case would not be a precedent for the Tonkin Gulf Resolution. The joint resolution involved in the *Curtiss-Wright* case did not give the President a choice. If he found that a prohibition on the sale of arms would help restore peace, he was required to proclaim the prohibition. The Tonkin Gulf Resolution, after stating the objective, provides for action only at the President's option. Nothing in Sutherland's opinion in the *Curtiss-Wright* case suggests that when the Congress has specified the goal the President is free to pursue it or not as he chooses." (47)

Thus we see that the Assistant Attorney General is relying on a lean reed in resting his argument on the *Curtiss-Wright* decision. Moreover, the Formosa Resolution and the Middle East Resolution, which the Assistant Attorney General cites along with the Tonkin Gulf Resolution, all suffer from the same constitutional defect. Each of these resolutions provides for action only at the President's option. Under the Formosa Resolution, the President is "authorized to employ the Armed Forces"—to wit, he can choose war or not—"as he deems necessary". Under the Middle East Resolution, there is to be war "if the President determines the necessity thereof." And under the Tonkin Gulf Resolution armed forces may be used "as the President determines"—so that the choice between war and peace, the choice between general war and limited war—even the choice of adversary—were left to the determination of the President. (48)

To meet the tests governing the delegation of legislative power, the resolutions would have to eliminate presidential discretion by making war absolutely automatic when the President finds that some future specified event has occurred. This would be a hazardous course for Congress to follow which underscores the wisdom of Henry Clay's position that Congress itself appraise the immediate circumstances before the nation voluntarily commits itself to a state of war and that the final decision must be taken by Congress.

THE CLAIM OF RATIFICATION BY APPROPRIATION

It is sometimes claimed that by appropriating funds for the Vietnam War, Congress clothed the President's acts with authority equivalent to that which would have resulted from a declaration of War. The Assistant Attorney General has not raised the question probably because there have been no appropriations for the Cambodian operation. However, since he rests his case for Cambodia, in part, at least, upon the legality of the Vietnam War, it is useful to explore the ratification argument.

The rule is well settled that it is possible to ratify executive actions of dubious validity by means of an appropriation act,(49) but the standards of ratification prescribed by the Supreme Court are very exacting. A landmark case in this area is *Ex parte Endo* (323 U.S. 283), decided by the Supreme Court in 1944. During World War II, the Relocation Authority had, without statutory authority, adopted a policy of detaining citizens of Japanese origin whose loyalty had been satisfactorily established in relocation centers if they refused to go to an approved place of residence upon release. Confronted with a habeas corpus action, the Relocation Authority contended that Congress had ratified this policy by appropriating funds for the continued operation of the relocation centers. Justice Douglas, writing the opinion of the Court, said:

"It is argued . . . that there has been Congressional ratification of the detention of loyal evacuees . . . through the appropriation of sums for the expenses of the Authority. . . . It is pointed out that the regulations and procedures of the Authority were disclosed in reports to the Congress and in Congressional hearings. . . . Congress may of course do by ratification what it might have authorized. . . . And ratification may be effected through appropriation acts. . . . But the appropriation must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump sum appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program." (50) (Emphasis added)

Let us consider whether the military appropriation acts for the Vietnam War meet the tests laid down in *Ex parte Endo* that to constitute a ratification "the appropriation must plainly show a purpose to bestow the precise authority which is claimed."

On May 4, 1965, several months after President Johnson had initiated combat operations in Vietnam and had begun his air attacks on North Vietnam, he asked Congress for a supplementary appropriation of $700,000,000. His message mentioned that the armed forces in South Vietnam had been increased to 35,000; that marines and airborne troops had been sent into two important areas; that helicopter activity in South Vietnam had been increased; that sorties in South Vietnam had begun and had been increased as well as the number of sorties against North Vietnam. However, the President did not ask for ratification of these concrete actions:

"I do not ask complete approval for every phase and action of your Government. I do ask for prompt support of our basic course: resistance to aggression, moderation in the use of power, and a constant search for peace. Nothing will do more to strengthen your country in the world than the proof of national unity which an overwhelming vote for this appropriation will clearly show. To deny and delay this means to deny and delay the fullest support of the American people and the American Congress to those brave men who are risking their lives for freedom in Vietnam."(51)

Within a few days Congress adopted a joint resolution which authorized the Secretary of Defense "upon determination by the President that such action is necessary in connection with military activities in Southeast Asia" to transfer $700,000,000 from unappropriated funds to any existing military account. There was not the slightest intimation in the joint resoluion that it was intended in any manner whatsoever to offer a legal status for any prior event. This coupled with

the expressed denial of President Johnson that he was asking for "complete approval for every phase and action of your government" dissipates any claim that the appropriation constitutes a ratification of any particular action. It had the legal effect of an appropriation measure—no more; no less.

In passing he Supplementary Defense Appropriations Bill which the Congress considered in 1967, the following amendment was passed by both houses on March 8, 1967:

"The Congress hereby declares:

"(1) Its firm intentions to provide all necessary support for members of the armed forces of the United States fighting in Viet Nam:

"(2) its support of efforts being made by the President of the United States and other men of good will throughout the world to prevent an expansion of the war in Viet Nam and to bring that conflict to an end through a negotiated settlement which will preserve the honor of the United States, protect the vital interests of this country, and allow the people of South Viet Nam to determine the affairs of that nation in their own way; and

"(3) its support for the convening of the nations that participated in the Geneva Conferences or any other meeting of nations similarly involved and interested as soon as possible for the purpose of pursuing the general principles of the Geneva accords of 1954 and 1962 and for formulating plans for bringing the conflict to an honorable conclusion." (52)

The first paragraph of the Congressional declaration is merely a statement of Congress's intention to pass other appropriation acts. The other two merely endorse the general principles of bringing an end to the war through negotiations on the basis of the Geneva Accords. Hence the amendment adopted by the Congress can in no way be considered a ratification of the presidential war initiated by the President. We know of no other appropriation acts which contain any language that could properly be regarded as a ratification of the war.

### CAMBODIA AND THE POWERS OF THE COMMANDER-IN-CHIEF

What powers does President Nixon possess as Commander-in-Chief where troops have been placed unconstitutionally in the field in Vietnam? This question is pertinent because of the reliance by Mr. Rehnquist on the power of the Commander-in-Chief to defend American troops deployed abroad regardless of how they got there. The duty and responsibility of the Commander-in-Chief is to remove such troops as safely and as expeditiously as possible. He is not authorized to continue to wage an illegal war to achieve any objective ("Vietnamization," etc.) other than the safe and expeditious removal of American forces from Southeast Asia. To continue to wage war is to continue to compound the illegality.

In announcing the invasion of Cambodia to the American public on April 30th, President Nixon made no attempt to justify the invasion under our Constitution or under international law. In his speech he repeated several times that the purpose of the invasion was to destroy North Vietnamese sanctuaries to protect American lives thereby giving it the color of constitutionality. But he did not say that he was repelling an attack.

He seemed to emphasize future danger rather than any *immediate* threat to the safety of American lives, saying: "Unless we indulge in wishful thinking, the lives of Americans in Vietnam after our next withdrawal of 150,000 would be gravely threatened." (53) And this focus of his return was made even clearer at a news conference on the evening of May 8th, when he said: "I found that the action that the enemy had taken in Cambodia would leave 240,000 Americans who would be there a year from now without any combat troops to help defend them, would leave them in an untenable position. That is why I had to act." (54) (Department of State Bulletin, Vol. LXII May 25, 1970, page 643.) Thus according to the President, the stated purpose of the President's action in Cambodia was to protect American troops against the danger of attacks a year in the future. The Cambodian invasion was therefore a pre-emptive attack which the Constitution does not authorize the President to make without Congressional authority.

There is considerable doubt that the President's stated objective, designed to lend a color of constitutionality, was the true reason for ordering the invasion. The alleged sanctuaries had been there for years. Military intelligence, as reported in the newspapers, had indicated that substantial quantities of supplies had lain within the Cambodian jungles for many months. The only recent

development in Cambodia was the deposing of Prince Sihanouk by Lon Nol and the political changeover, which made an invasion less likely to stir up effective adverse reaction from the Cambodian government. Indeed, in a virtually unreported speech given by Deputy Secretary of Defense David Packard, to the Rotary Club in Fort Worth, Texas, Mr. Packard said: "With the downfall of Sihanouk, there was no longer any reason to believe that the action by South Vietnam or the United States in the occupied border areas would be objectionable to the government of Cambodia." (55)

The inside story of how the President arrived at his decision to invade Cambodia belies any claim that there was an imminent threat to the security of American forces in Vietnam. A leading journalist, after exhaustive research, concluded in his New York Times article (56) that "President Nixon's venture into Cambodia . . . was launched for the broader purpose of rescuing Cambodia from sudden communist domination . . ." The article reports: "Starting April 13, enemy forces were detected moving westward into Cambodia from the border areas, cutting roads, blowing up bridges, harassing military posts and towns. "* * * Secretary of Defense Laird was impressed with Gen. Abrams' argument that "with a third of the enemy forces moved *west*, the risks of American casualties were reduced." And, noted the article, "The President's assertion that the enemy was massing in the sanctuaries to attack South Vietnam, contradicted Secretary Laird's support of the American assault because of the enemy's movement the other way. It also contradicted the latest intelligence that the enemy forces had sensed that was coming and were dispersing faster than before with some of their arms caches."

Thus any notion that the Cambodian invasion was dictated by any imminent threat to the security of American forces in Vietnam is threadbare indeed—woven of gossamer threads. And the Constitutional Convention delegates' insistence that unilateral presidential response *even in defense of the country* be predicated upon an attack so "sudden" that resort to Congress is militarily precluded must be grounded upon hard facts, not on mere assertions or intimations, presidential or otherwise. It would be a travesty if the constitutional safeguards intended by the Founding Fathers on the supreme issue of war could be circumvented by a claim of imminent threat having no basis in reality.

In view of the unconstitutional character of the President's actions in ordering the invasion of Cambodia, it is unfortunate that the Cooper-Church amendment failed to criticize vigorously such actions. This amendment specifies that without congressional consent the President may spend no funds to retain American troops in Cambodia, to provide foreign military advisers or mercenaries to aid the Cambodian forces. In the face of the President's repeated affirmations that he was relying solely on his powers as Commander-in-Chief—and not relying (57) on the Tonkin Gulf Resolution which is the sole congressional "authority" which even purports to legalize the war—it is the height of legal effrontery to read that the "Nixon Administration strongly urged Congress today to drop the Senate's Cooper-Church amendment restricting military action in Cambodia, on the ground that, if enacted, it would infringe on the President's 'lawful responsibilities' as Commander-in-Chief." (*New York Times*, July 17, 1970.)

## CONCLUSION

It is popular to discount constitutional safeguards as relics of an older age when men had more leisure. The President is impatient with the legislative process. The Legal Adviser to the State Department says that in the 20th Century the world has grown too small to give the Constitution the meaning which the Constitutional Convention intended. (58)

On the contrary it is remarkable how adaptable the Constitution is to the changed conditions of modern times. The key to the President's war-making power from the beginning has been the word "urgency." When the United States is attacked the President must respond immediately using his powers as Commander-in-Chief. There is no time for Congress to act and none is necessary because we are at war as a result of the attack. The same urgency justifies Presidential action to protest citizens abroad when there is no time to go to Congress. The changed conditions in the nuclear age may increase the number of cases when such urgency exists. However, the basic principle remains the same. When an attack on the United States has been set in motion, the President has the power to and must respond. When there is time to go to Congress for a decision on war without jeopardizing the safety of the nation or citizens subject to attack, the President is obligated to do so. (59)

No such urgency has ever existed in Vietnam or Cambodia and none is claimed by the Executive.

There is another side to the changed conditions argument. The horrors of nuclear war are so great that the safeguards to prevent it should be tightened, not relaxed. The New York Times editorial on May 5, 1970 is in point:

"Until very recently in the present era Congress has generally acquiesced in a secondary, rubber-stamp role on the theory that modern warfare demands prompt, decisive action by an informed leader, unfettered by parliamentary restraints.

"This theory has been profoundly shaken by the nation's recent experience in Southeast Asia, where a series of rash actions in pursuit of dubious goals has demonstrated the falibility of Presidential judgments and secret intelligence on which they have been allegedly based. It has become clear that modern warfare, with its vast desctructive power and threat of ultimate annihilation, requires more than ever the checks and balances against human error that the Founding Fathers prudently wrote into the United States Constitution."

Is it too late for Congress to act? The danger, of course, is that the continued acquiescence of Congress in the usurpation of the war-making power by the Executive will result in the atrophy of the power of Congress. Congress has not always been so subservient.

The War with Mexico in 1846 was a highly controversial one as the Vietnam War has been. President Polk, without any authority from Congress, sent an army into Mexico which engaged in battle with Mexican forces in a dispute over territory. Congress then made a declaration of war upon representations that Mexico initiated the war. The next year Congress inquired into the circumstances of the commencement of the war. Then, in 1848, the House passed a resolution to the effect that the war had been "unnecessarily and unconstitutionally begun by the President of the United States." In other words, even the declaration of war by Congress did not exculpate the President from his prior illegal action.

Today the President's invasion of Cambodia has rallied the opposition in Congress to again assert its power by several proposals to cut off money for the war in Cambodia or in Vietnam within certain specified times. Efforts to bring the issue of the legality of the war into the courts which are continuing have met with obstacles. The chief hope of surviving this constitutional crisis seems to lie in Congress which is now beginning to reassert its prerogatives. The Senate's adoption of the Cooper-Church Amendment to cut off money for Cambodia and its resolution to repeal the Gulf of Tonkin resolution are heartening. The Amendment to End the War, sponsored by Senators McGovern, Hatfield, Goodell, Cranston, Hughes, and a host of other Senators, would, if enacted, be a dramatic reassertion of the constitutional power and responsibility of Congress.

Without some such reversal of the trend characterized by the usurpation of power by the executive we could lose those freedoms that the founding fathers sought to protect by wise constitutional safegaurds.

July 1970.

JOSEPH H. CROWN.
HOCH REID.

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25. Memorandum of March 4, 1966 entitled *The Legality of United States Participation in the Defense of Viet-Nam* submitted to the Senate Committee on Foreign Relations (Congressional Record Vol. 122 No. 43 pp. 5274–5279 and reproduced in *Vietnam and International Law* by Consultative Council of Lawyers Committee on American Policy Toward Vietnam, O'Hare Books, 1967 pp. 113–130).
26. Wormuth, p. 32.
27. The Johnson Administration claimed that the 325th Division [9,000–10,000 Troops] of the North Vietnamese Army had moved into South Vietnam in November, December, January over the turn of the year 1964–1965. See testimony of Secretary of State Rusk at Senate Foreign Relations Committee hearings in January–February 1966. Theodore Draper, *Abuse of Power* (New York: Viking Press, 1967), pp. 73–75. This testimony was completely contrary to Secretary of Defense McNamara's statement, made on April 27, 1965, that "evidence accumulated within the last month" that is, since late March 1965, had confirmed the presence in northwest sector of South Vietnam of the 2nd Battalion of the 325th Division of the regular North Vietnamese Army," adding that the size of the battalion was "on the order of 400 to 500 men." Ibid., p. 77. American attacks on North Vietnam commenced early in February, 1965.
28. Moore, *Digest of International Law*, op. cit. Vol. 7, p. 163.
29. Richardson, op. cit. Vol. 1, p. 389.
30. Arthur B. Lapsley, ed. *The Writings of Abraham Lincoln*, (Putnam's, 1905) Vol. 2, pp. 51–2.
31. *Cong. Rec.* Vol. 110, Part 14, 88th Cong., 2d Sess., (Aug. 5, 1964), pp. 18403 et seq.
32. Ibid., p. 18132.
33. 78 Stat. 384 (1964).

34. *United States Treaties and Other International Agreements* (Washington: Govt. Printing Office, 1955), Vol. 6, Pt. 1, pp. 82–88. The treaty is reproduced in *Vietnam and International Law* by the Consultative Council of the Lawyers Committee on American Policy Towards Vietnam (Flanders, N.J.: O'Hare Books, 1967), pp. 152–4.
34A. Hearings, The Southeast Asia Collective Defense Treaty, Senate Foreign Relations Committee, 83d Cong., 2d sess., Nov. 11, 1954, p. 25.
35. Quoted by Pete Hamill, *New York Post*, June 30, 1970, p. 43.
36. "Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty."
37. Merlo J. Pusey, *The Way We Go To War*, (Houghton Mifflin Co., Boston: 1969), pp. 116–133.
38. See also Senator Fulbright's statement at Hearings on Vietnam Policy Proposals, Senate Foreign Relations Committee, 91st Cong., 2d sess. (Government Printing Office, 1970) where, alluding to Tonkin Gulf Resolution, he said: "If such a joint resolution is disguised as a reaction to an unprovoked attack upon us and obtained by what I believe to have been deceptive and misstated fact * * * " (p. 315); See The Gulf of Tonkin, The 1964 Incidents, Hearings, Sen. Comm. Foreign Relations, Feb. 20, 1968; also Part II, Dec. 16, 1968.
39. Congressional Globe, 23d Cong., 2d Sess. (Dec. 9, 1834), p. 23.
40. Moore, op. cit. p. 127–8.
41. Ibid., pp. 126–7.
42. Ibid., pp. 539–40.
43. Ibid., p. 540.
44. Congressional Globe, 35 Cong., 2d Sess. (Feb. 18, 1859), p. 1120.
45. It is tragic that in August, 1964 Congress failed to heed the warnings of Senator Wayne Morse which echoed Senator Seward's argument. Only Senator Ernest Gruening joined Senator Morse in voting against the Tonkin Gulf Resolution.
46. Wormuth, op. cit. p. 52.
47. *The Vietnam War: The President versus the Constitution*, op. cit., pp. 52–3.
48. This brings to mind Justice Cardozo's colorful description of the National Industrial Recovery Act: "This is delegation running riot". *Schechter Poultry Company* v. *U.S.* 295 U.S. 495, 551.
49. *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139; *Fleming v. Mohawk*, 331, U.S. 111.
50. 323 U.S. at 303n.
51. Cong. Rec., Vol. 111, Pt. 7, 89th Cong. 1st Sess. (May 4, 1965), p. 9284.
52. Congressional Quarterly Weekly Report, Vol. 25, No. 10 (March 10, 1967), p. 337.
53. *The New York Times*, May 1, 1970.
54. Department of State Bulletin, Vol. LXII, May 25, 1970, p. 643.
55. Address by David Packard, Department of Defense News Release, May 15, 1970, p. 5.
56. Hedrick Smith in collaboration with Max Frankel, *Cambodian Decision: Why the President Acted*, incorporating reports by 9 other newsmen, New York Times June 30, 1870 p. col. 7& p. 14.
57. ". . . this Administration has not relied on or refrered to the Tonkin Gulf Resolution of August 10, 1964 as support for its Viet-Nam policy". Letter, dated March 12, 1970 of H. G. Torbert, Jr., Acting Assistant Secretary for Congressional Relations, addressed to J. William Fulbright, Chairman, Committee on Foreign Relations; reproduced in *Hearings on Vietnam Policy Proposals*, op. cited, pp. 310–313, at p. 312.
58. See Point IV A of *The Legality of United States Participation in the Defense of Viet-Nam*—Memorandum from the Department of State, Office of the Legal Advisor, March 4, 1966, submitted to the Senate Committee on Foreign Relations and published in Congressional Record, Vol. 112, No. 43, March 10, 1966, pp. 5274–5279, and reproduced in appendix of *Vietnam and International Law* by Consultative Council, Lawyers Committee on American Policy Towards Vietnam, (O'Hare Books 1967) pp. 123–124.
59. "The debates [of the Constitutional Convention] suggest that one of the prerequisites for unilateral presidential response even in defense of the country is that the attack be so 'sudden' that resort to Congress is militarily precluded". Note, *Congress, the President, and the Power to Com-*

*mit Forces to Combat*, 81 Harv. L. Rev. 1771–1805 (1968); vide Hamilton's statement in *The Federalist* No. 69: "The President will have only the occasional command of such part of the militia of the Nation as by the legislative provision may be called into the actual service of the Union.

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MEMORANDUM OF LAWYERS COMMITTEE ON AMERICAN POLICY TOWARD VIETNAM ON WAR POWERS LEGISLATION

This memorandum is submitted to the Committee on Foreign Relations of the United States Senate to discuss the merits of certain proposed legislative measures designed to define or limit the exercise by the President of his constitutional war powers. We have specific reference to S.J. Res. 18 introduced by Senator Taft, S.J. Res. 59 introduced by Senator Eagleton, S. 731 introduced by Senator Javits and S.J. Res 95 introduced by Senator Stennis. The views herein expressed are those of the Executive Board of the Lawyers Committee on American Policy Toward Vietnam, a group of practising lawyers who, with the aid of a consultative council of distinguished academic authorities, have produced and published several treatises on legal questions relating to the war in Indo-China.[1]

As a background for the comments in this memorandum, reference is made to a memorandum [2] of law written by the authors of this memorandum, entitled "The President's Usurpation of the War Power" and introduced into the record of of these hearings. That memorandum discusses the division of the powers with respect to war, between the executive and legislative departments, the objectives and intent of the framers of the Constitution and the interpretation accorded to the constitutional provisions over the years.

FORM AND FUNCTION OF THE PROPOSALS

A question as to the form of the legislation is raised by the fact that three of the proposals are joint resolutions and one is a bill. A decision on the form is related to the function that the legislation is designed to perform. The proposals define the circumstances under which the President may or may not commit the armed forces to hostilities, provide for reporting his actions to Congress and for action to be taken thereafter by Congress to authorize the continuance or termination of hostilities. In so far as the proposed legislation defines what the President may or may not do, it must be considered as a Congressional interpretation of the Constitution, since no statute can either decrease or increase the President's constitutional powers. For this reason the President might be expected to veto it if it is passed in the form of a bill to be signed by the President.

We view the proposals as a Congressional plan for co-ordination between the two branches of government in the exercise of their respective war powers. The Congress has many war-related powers under the Constitution (Article I, Section 8), including the power to declare war (either general or limited), to raise armies, to make rules for their regulation, to call forth the militia to suppress insurrections and repel invasions, etc.

The President was given only one power, that of Commander in Chief, which, the Constitutional Convention agreed, gave him the power to repel a sudden attack. While he may use military force for this purpose without Congressional authority, he still must depend on Congress to raise and support those forces. Therefore, the function of the proposed legislation is to set forth circumstances under which the President may expect to receive the support of Congress if he engages in hostilities and the procedures to be followed by him to obtain that support.

This is a constructive purpose because it will tend to avoid a repetition of the awkward situation growing out of the Vietnam War when Congress was never presented with an opportunity to either affirm or disaffirm the hostilities and was reluctant to raise the issue in connection with military appropriations. In view of the nature of the legislative purpose, it is appropriate that the proposal to be in the form of a resolution and not a bill.

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[1] See American Policy vis-a-vis Vietnam, Cong. Rec. 89th Congress September 23, 1965; Undeclared War and Civil Disobedience, Lawrence R. Velvel, Dunellen Co., 1970; Vietnam and International Law, John E. H. Fried, Rapporteur, O'Hare Books, 1967.

[2] See p. 833.

THE RECITATION OF CONSTITUTIONAL WAR POWERS

The Eagleton resolution starts with a recital of the war powers granted to Congress and the President by the Constitution. We believe these recitals correctly state the constitutional plan for the separation of powers with respect to war. Abraham Lincoln expressed the underlying reason for this separation as follows:

"Kings had always been involving and impoverishing their people in war, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us."

The next three recitals correctly list the war powers assigned to Congress by the Constitution and the necessary implications to be drawn from those powers, including the power to limit the scope of hostilities, to regulate the use of the armed forces, including their deployment in any foreign country, and the power to allocate funds so as to circumscribe the scope of hostilities. In this connection it should be noted that the clause giving Congress the power to declare war adds the words "and to grant letters of marque and reprisal . . . "which were specific limited acts of war short of general war, commonly in use in the early days of the Republic.

It should also be noted that the Constitution gives Congress the responsibility of reviewing the use of funds for war purposes and exercising its legislative authority at least every two years. It provides that no appropriation for the support of armies shall be for a period of longer than two years. Thus, Congress is charged with the duty of exercising judgment independent of the executive with respect to the use of the armed forces.

The recitation of the President's powers as Commander in chief correctly sets forth the scope of that power as the Constitution has been interpreted through the years, except it omits the word "sudden" when it speaks of repelling attacks on the United States. The phrase always used in defining the President's powers from the debates in Constitutional Convention to the present day is "to repel sudden attacks".

We therefore suggest that the word "sudden" be inserted before the word "attacks" in the last "Whereas" clause.

THE PROVISIONS LIMITING THE PRESIDENT'S POWER TO ACT

The Eagleton, the Taft and the Stennis proposals all contain clauses to the effect that the President shall not commit the armed forces to hostilities except as provided in the resolutions. The Javits proposal merely states that the use of the armed forces shall be governed by the rules of the resolution which then sets forth when the armed forces may be used in the absence of a declaration of war.

It is true that the Constitution itself is the final authority on the presidential powers, but the resolution, as the Congressional interpretation of those powers should, we believe, be couched in language that specifically states that armed forces shall not be committed except in conformity with the resolution. We also believe that it is most important for the resolution to specifically negate the inference of any authorization to use the armed forces from any legislation including military appropriations, unless the legislation specifically authorizes the President to commit the armed forces. The language which we believe adequately covers this point is in the first sentence of Section 2 of the Eagleton Resolution and in Section 3 of the Stennis Resolution.

THE CIRCUMSTANCES UNDER WHICH THE PRESIDENT IS AUTHORIZED TO ACT

We will now give our views as to the relative merits of the lists contained in each proposal of the circumstances under which the President may commit the armed forces to hostilities. We refer first to the provisions of Section A of the Javits Bill, Section 2 if the Eagleton Resolution, Section 2 of the Stennis Resolution and Paragraphs 1 through 4 of Part I of the Taft Resolution.

The classical language to describe the basic power of the Commander in chief to engage in hostilities in the absence of a declaration of war is contained in the Javits Bill. it is:

> "1. To repel a sudden atack against the United States, its territories and possessions."

The phrase "to repel a sudden attack" was used in the Constitutional Convention and has been used countless times by the courts and other auhorities. We believe it more accurately describes the President's constitutional authority than any other language. Accordingly, we would reject the phrase "armed attack" or the word "attack" without "sudden" which are in the other proposals. We also would reject any description of the forces making the atack such as those contained in the Stennis and the Eagleton Resolutions. We believe such descriptions are superfluous and possibly unduly limiting and therefore of doubtful constitutionality. We also would reject the language that extends the power to the prevention of future attacks as possibly exceeding the President's constitutional powers. Action to prevent future attacks can generally wait for Congress to act upon a request by the President for specific auhority.

The second circumstance under which the President has the power to engage in hostilities has to do with an attack on the armed forces of the United States outside of this country. Here again we believe that the language which most accurately sets forth the President's constitutional authority is contained in paragraph 2 under A. of the Javits Bill, except for the fact that we believe that the word "sudden" should precede the word "attack". Thus, we believe that the best language would be:

> "2. To repel a sudden attack against the armed forces of the United on the high seas or lawfully stationed on foreign territory."

The third specification of the Presiden't authority has to do with the protection of citizens abroad. This power has also been recognized and has been exercised a number if times by the Executive throughout history as a legitimate interpretation of the constitutional power of the Commander in chief. However, the authority to take such action wihout a declaration of war is limited to situations in which the citizens may be protected or evacuated by brief military action. A military engagement designed to defend the right of United States citizens to remain safely in a foreign country is more likely to result in an extended engagement and we therefore believe that it would be more appropriate to have the protective action contemplate the evacuation of the citizens who are endangered in a foreign country.

Both the Stennis proposal and the Eagleton proposal refer to the evacuation or the withdrawal of citizens abroad and the Javits proposal uses only the word "protect". The Javits proposal also refers to the protection of property, as well as the lives of the United States nationals abroad. We believe that the commitment of armed forces abroad to protect property without Congressional authority is beyond the Constitutional power of the President and that it should, therefore, not be included in the resolution. We also believe that the language of the Javits proposal is too broad in that it does not limit the protective action to circumstances in which there is an imminent threat to the lives of the citizens. Accordingly, we believe that the language that more accurately expresses the Constitutional authority that the President has would represent a combination of the language of the three proposals and we recommend that it read as follows:

> "3. To protect the lives of and to evacuate citizens of the United States who are in any foreign country if their lives are being subjected to an imminent threat."

We believe that any language describing the source of the threat such as that contained in the Stennis or the Eagleton proposals is unduly limiting. It would, however, be in order and not inconsistent with the Constitution to add the clause contained in the Eagleton proposal as follows:

> "provided that the President shall make every effort to terminate such a threat without using the armed forces of the United States."

We believe that the foregoing constitutes all of the circumstances under which the President is authorized by the Constitution to engage in miliary hostilities under his Commander in chief powers without specific authorization from Congress. Therefore, it would be improper to include in the resolution several other provisions that are contained in the various proposals. The first such provisions which we believe to be dangerous and beyond the President's Constitutional power is listed as Item (3) under Section 2 of the Stennis Resolution, which would give the President authority to "prevent or defend against an imminent nuclear attack on the United States * * *" This purports to give the President the power to make a "first strike" against a potential enemy if he believes that that enemy intends to attack the United States. The extent of the President's constitutiona! power is "to repel a sudden attack." If Item 3 is intended to grant greater au-

thority to the President it is an unconstitutional delegation of Congressional power. It is highly dangerous to give any one person the power to launch a nuclear attack, if it is not an exercise of the power "to repel a sudden attack." Therefore, we believe that this specification of power should be omitted.

Another specification is contained in Item 4 under A. of the Javits Bill, which refers to compliance with a national commitment resulting from a treaty, convention or other legislative instrumentality where military hostilities are required. A similar provision is contained in paragraph (2) of Part I of the Taft Resolution which refers to deployment of armed forces necessary to fulfill a treaty obligation. We believe that no legislative act or treaty, whether or not ratified, can constitutionality authorize the President to engage in hostilities without a declaration of war, at some time in the future to be determined by him. If the provision of the Taft Resolution is intended to be limited to deployment of armed forces abroad, rather than committing them to combat, then it would be proper for Congress to grant him such a power. However, when it comes to actually commencing hostilities in the absence of an attack on the United States, Congress itself must make the decision, and not delegate the authority to the President. The decision must be made by Congress in the actual posture of things as they then exist. Therefore, we believe that it would be improper to include paragraph 4 under A. of the Javits Bill.

REPORTING TO CONGRESS BY THE PRESIDENT AND ACTION BY CONGRESS

Each of the proposals contains a provision requiring the President to notify Congress promptly of any military action taken by him pursuant to the authority set forth in the Resolution or Bill. We believe that such a provision is highly desirable in order to promote cooperation between the two branches of government and that it is reasonable and not unconstitutional for Congress to require such reporting. It is also advisable to require that Congress take action within thirty days to either authorize or terminate the hostilities which have been commenced. We believe that the language of Section 4 of the Stennis Resolution adequately states the most desirable procedure for dealing with the reporting by the Executive and subsequent action by Congress.

Section 5 of the Stennis Resolution also contains a continuing reporting requirement for the duration of any armed conflict in which the forces of the United States are involved. We believe that this requirement is highly desirable and that it promotes the kind of exchange between the two branches of government which are necessary to the smooth functioning of any military operation in which the co-ordinated efforts of both branches are necessary. The Section refers to reportitng "periodically * * * but in no event, less often than every six months". We believe the true cooperation between the branches would require reportitng more frequently than every six months and would suggest that it read "every thirty days".

EXCLUSION OF THE APPLICATION TO EXISTING HOSTILITIES

The Javits Bill and the Eagleton and Stennis Resolutions all contain clauses to the effect that their provisions shall not apply to the present hostilities in Southeast Asia. Javits and Eagleton simply state that they shall not apply to hostilities commenced or undertaken before the enactment of the legislation. The Stennis Resolution is much more extensive. It refers not only to the hostilities in which the United States is presently engaged, but also military activities carried out against any of the nations of Indo-China directly related to the existing hostilities. We believe that this provision is dangerously broad and constitutes in effect an authorization for the President to engage in additional hostilities in his sole discretion without further authority from Congress. The attempt to grant such power would, as indicated above, be an unconstitutional delegation by Congress of its war powers.

While we can understand that there may be a valid political reason for eliminating the present hostilities from the application of these Resolutions, we believe that by doing so Congress is merely again avoiding its responsibility to take action either to authorize or terminate the existing hostilities. The inclusion of such an exception in the Resolution would give rise to the claim that Congress had specifically authorized the President to continue the existing hostilities indefinitely. Many members of Congress who approve the objective of the proposed Resolutions might very well prefer not to approve the indefinite continuance of the existing hostilities.

The Taft Resolution deals with the problem in a more direct manner. It authorizes the President to continue the deployment of armed forces in the territory of South Vietnam as long as he deems it appropriate "to accomplish a responsible and irreversible withdrawal of such Armed Forces of the United States and the assumption by the Armed Forces of the Republic of South Vietnam at the earliest feasible date of the responsibility for the defense of the territorial integrity of the Republic of South Vietnam." It also prohibits the deployment of the forces outside of South Vietnam except as otherwise authorized (which includes a threat of attack on the Armed Forces of the U.S.)

While we would prefer a specific limited authorization rather than the back handed approach of the other proposals, we believe that the Taft Resolution goes too far in granting wide discretion to the President. In effect it affirms his Vietnamization policy and gives him full authority to continue the war as long as he deems it necessary. It would also give him discretion to repeat the Cambodian operation or a similar one in another country. We believe that such action by Congress would be contrary to the desires of the vast majority of United States citizens and contrary to the best interests of the nation.

We believe that the time has come for Congress to face the issue honestly, assume its responsibilities and direct the termination of the American participation in the hostilities within a specific time limit.

DEFINITION OF "HOSTILITIES" OR "ARMED CONFLICT"

The Eagleton and the Stennis Resolution each contain a definition which help to delineate the area of application of the resolutions. While there are differences in language, the meanings of the two are substantially the same. They include within the definitions, not only land, air and naval actions taken, but also the deployment of forces under circumstances where combat is a reasonable possibility, and also the assignment of American forces to accompany the forces of another country engaged in combat. We believe that such a definition is highly desirable as a step in avoiding situations where the Executive creates a condition likely to result in hostilities without the authority of Congress.

May 18, 1971.

JOSEPH H. CROWN, *Co-chairman*,
HOCH REID, *Director of Research*.

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DRAFT RESOLUTION PREPARED BY LAWYERS COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM TO CONFORM TO ACCOMPANYING MEMORANDUM

[S.J. Res. —, 92d Cong., first sess.]

JOINT RESOLUTION Regarding the powers of the Congress and the President to commit the Armed Forces of the United States to hostilities

Whereas the framers of the Constitution of the United States intended the separation of powers doctrine to apply to the initiation of hostilities as a means for insuring collective bargaining whenever possible, before the Armed Forces of the United States were committed to such hostilities; and

Whereas the power to declare war and to grant letters of marque and reprisal was assigned to the Congress and this power authorizes the Congress to initiate, define, and limit the scope of hostilities involving the Armed Forces of the United States; and

Whereas the power to make rules regulating and governing the Armed Forces of the United States was assigned to the Congress and this power authorizes the Congress to enact laws respecting the raising and use of such Armed Forces including their deployment in any foreign country; and

Whereas the power to appropriate moneys to support the Armed Forces of the United States was also assigned to the Congress with the requirement that no such appropriation shall be for a period of longer than two years thereby assigning to the Congress the responsibility of reviewing the use of funds for war purposes and exercising its legislative authority at least every two years, and this power authorizes the Congress to allocate funds so as to circumscribe the overall hostilities and the uses of the Armed Forces of the United States; and

Whereas the Commander in Chief and Chief Executive powers were assigned to the President and these powers authorize the President to conduct hostilities initiated by the Congress and to respond to, and repel, sudden attacks on the

United States (including its territories and possessions), its Armed Forces, and, under certain circumstances, to rescue endangered citizens of the United States located in foreign countries: Now, therefore, be it

*Resolved*, By the Senate and House of Representatives of the United States of America, in Congress assembled, that:

SECTION 1. Except as authorized in section 2 or section 3 of this resolution, the President shall not commit the Armed Forces of the United States to hostilities. No treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the Armed Forces of the United States to engage in hostilities without further Congressional authorization. It is specifically recognized that such treaties as the Charter of the United Nations, the North Atlantic Treaty, and the Southeast Asia Collective Defense Treaty do not authorize or require the President to commit the Armed Forces of the United States to engage in hostilities without a further authorization from both the Senate and the House of Representatives.

SEC. 2. The President is authorized to commit the Armed Forces of the United States to hostilities to the extent authorized by Congress through a declaration of war or other specific statutory authority, but authorization to commit the Armed Forces of the United States to hostilities shall not be inferred from legislative enactments, including appropriation bills, which do not specifically include such authorization.

SEC. 3. In the absence of a governing congressional authorization described in section 2, the President may commit the Armed Forces of the United States to hostilities, to the extent reasonably necessary to:

(a) repel a sudden attack against the United States, its territories, and possessions; and

(b) repel a sudden attack against the Armed Forces of the United States on the high seas or lawfully stationed on foreign territory; and

(c) protect the lives of and to evacuate citizens of the United States who are in any foreign country if their lives are being subjected to an imminent threat: *Provided*, That the President shall make every effort to terminate such a threat without using the Armed Forces of the United States: *And provided further*, That the President shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States.

SEC. 4. The commitment of the Armed Forces of the United States to hostilities pursuant to section 3 of this resolution shall be reported promptly by the President to the Congress, together with a full account of the circumstances under which such hostilities were initiated and the reasons for initiating such hostilities, the estimated scope of such hostilities, and the justification for initiating such hostilites under the provsions of section 3. The question of continuing or terminating any such hostilities shall be decided upon by the Congress as soon as possible and not more than thirty days from the first day on which Armed Forces of the United States were committed to hostilities, under the following procedures:

(a) any bill or resolution, authorizing the continuance or termination of military hostilities, if sponsored or cosponsored by one-third of the Members of the House of Congress in which it originates, shall be considered reported to the floor of such House no later than one day following its introduction, unless the Members of such House otherwise determine by yeas and nays; and any such bill or resolution referred to a committee after having passed one House of Congress shall be considered reported from such committee within one day after it is referred to such committee, unless the Members of the House referring it to committee shall otherwise determine by yeas and nays; and

(b) any bill or resolution reported pursuant to subsection (a) of this section shall immediately become the pending business of the House to which it is reported, and shall be voted upon within three days after such report, unless such House shall otherwise determine by yeas and nays; and

(c) In no case shall the Armed Forces of the United States be committed to hostilities under any of the circumstances described in section 3 of this joint resolution for any period exceeding thirty days after the first day on which such forces were first committed to hostilities unless the Congress has specifically authorized the use of such armed forces in such hostilities for a longer period.

SEC. 5. In any case where the Armed Forces of the United States have been committed to authorized hostilities, the President shall, while such hostilities are in progress, report to the Congress periodically on the status of such hos-

tilities, as well as on the scope and expected duration of such hostilities, but in no event shall he report to the Congress less often than every thirty days.

SEC. 6. For purposes of this resolution, the term "hostilities" includes land, air, or naval actions taken by the Armed Forces of the United States against other armed forces or the civilian forces of any other nation, the deployment of the Armed Forces of the United States outside of the United States under circumstances that present a reasonable possibility of the use of arms against the military or civilian forces of a foreign country or government or the assignment of members of the Armed Forces of the United States to accompany, command, coordinate, or participate, in the movement of regular or irregular military forces of any foreign country when such foreign military forces are engaged in any form of combat activity.

SEC. 7. The provisions of this joint resolution shall become operative upon its enactment; *Provided*, That on and after the date of enactment of this resolution, the activities of the Armed Forces of the United States in and over Vietnam shall be limited to the accomplishment only of the following objectives:

"(1) To bring about the orderly termination of military operations there and the safe and systematic withdrawal of remaining American armed forces by December 31, 1971;

"(2) To insure the release of prisoners of war;

"(3) To arrange asylum or other means to assure the safety of South Vietnamese who might be physically endangered by withdrawal of American forces; and

"(4) To provide assistance to the Republic of Vietnam consistent with the foregoing objectives."

N.B. If the preference be for excluding "current hostilities" from the operation of the Joint Resolution, we suggest that Sec. 7 be recast along the following lines (to preclude unintended implications):

"SEC. 7. This resolution shall not apply to hostilities commenced before the enactment of the resolution. The preceding sentence, however, shall not be deemed in any manner to confer upon the President any authority to use the Armed Forces of the United States not otherwise conferred upon the President under the Constitution or other provision of law."

Senate Joint Resolution regarding the use of the armed forces of the United States in hostilities in the absence of a declaration of war by the Congress, proposed by Senator John Sherman Cooper to accompany S. 731 or to be incorporated in S. 731 as a separate section.

JOINT RESOLUTION Regarding the use of the Armed Forces of the United States in hostilities in the absence of a declaration of war by the Congress

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever, in the absence of a declaration of war by the Congress, the President uses the Armed Forces of the United States in armed hostilities in any foreign country or whenever he believes that circumstances exist that make the use of such Armed Forces in a foreign country imminent, he shall immediately notify the Congress, if the Congress is in session, or shall immediately notify the President pro tempore and the majority and minority leaders of the House of Representatives, if the Congress is not in session, of the use or imminent use of such Armed Forces, as the case may be.

SEC. 2. Whenever the Congress has been notified by the President, or whenever the Congress has been convened under section 3 of this joint resolution after notification to those officers of the Congress referred to in the first section of this joint resolution, both Houses of the Congress shall proceed immediately to the consideration of the question of whether the Congress shall authorize the use of the Armed Forces of the United States and the expenditure of funds for purposes relating to those hostilities or imminent hostilities regarding which the Congress (or its officers) has been notified.

SEC. 3. Whenever the President pro tempore of the Senate and the Speaker of the House of Representatives receive notification from the President under the first section of this joint resolution and the Congress is not in session at the time of such notification, they shall (1) have authority to reconvene the Senate and the Houes of Representatives, respectively, for consideration of the question referred to in section 2 of this joint resolution, and (2) reconvene such Houses, after notice to all Members of Congress, not later than twenty-four hours after the President has notified the President pro tempore and the Speaker of the

House of Representatives under the first section of this joint resolution.

SEC. 4. Sections 2 and 3 of this joint resolution are enacted by Congress—

(1) as an exercise of the rule-making power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, and they supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

[H.J. Res. 1, 92d Congress first sess.]

JOINT RESOLUTION Concerning the war powers of the Congress and the President

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Congress reaffirms its powers under the Constitution to declare war. The Congress recognizes that the President in certain extraordinary and emergency circumstances has the authority to defend the United States and its citizens without specific prior authorization by the Congress.

SEC. 2. It is the sense of Congress that the President should seek appropriate consultation with the Congress before involving the Armed Forces of the United States in armed conflict, and should continue such consultation periodically during such armed conflict.

SEC. 3. In any case in which the President without specific prior authorization by the Congress—

(1) commits United States military forces to armed conflict;

(2) commits military forces equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, repair, or training of United States forces, or for humanitarian or other peaceful purposes; or

(3) substantially enlarges military forces already located in a foreign nation;

the President shall submit promptly to the Speaker of the House of Representatives and to the President of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating his action;

(B) the constitutional, legislative, and treaty provisions under the authority of which he took such action, together with his reasons for not seeking specific prior congressional authorization;

(C) the estimated scope of activities; and

(D) such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

SEC. 4. Nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties.

Passed the House of Representatives August 2, 1971.

Attest:

W. PAT JENNINGS,
*Clerk.*

# SUMMARY INDEX


| | Page |
|---|---|
| Abdication of congressional power | 569 |
| Actions preceding U.S. agreements with Soviet Union | 533 |
| Adequate information to Congress | 612 |
| Administration position rejected | 517 |
| Administration's attitude toward action on Vietnam war | 542 |
| Administration's response to reconciliation | 502 |
| Admission of errors by Supreme Court, Chief Executive | 790 |
| Adversary discussion | 448 |
| Affect policy by use of media | 113 |
| Against congressional foot dragging | 73 |
| Agreement at SALT | 538 |
| Agreement in Spanish bases question | 788 |
| Aiken, Senator George D: | |
| Examination of witnesses: | |
| Commager, Henry Steele | 35–38 |
| Rogers, William P | 509–511, 532 |
| Alternatives to legislative effort | 381 |
| Ambiguities in resolution 85 and S. 731 | 15 |
| Amendment to change practice | 358 |
| Amendments to Javits bill | 569 |
| Americans adhere to beliefs | 88 |
| Analogy of ship taking trip | 504 |
| Antimilitary cost of mind | 77 |
| Are treaties self-executing? | 116 |
| Armed Forces abroad | 337 |
| Armed forces and armaments | 10 |
| Arguments on expectations of U.S. action | 582 |
| Arguments on troop reductions in Europe | 533 |
| Assumption of war powers by Commanders in Chief | 423 |
| Attempting congressional discretion | 90 |
| Authority for continuing Vietnam war | 504 |
| Authority for withdrawal of troops | 576 |
| Authority given President | 643 |
| Authority parallels other fields | 489 |
| Authority to meet emergencies | 783 |
| Authorize or sustain hostilities | 198 |
| Authorizations and restrictions | 101 |
| Authorizing Armed Forces to hostilities | 588 |
| Authorizing U.S. participation in Indochina | 535 |
| Balance can be restored only with support of people | 707 |
| Basic philosophical issue | 417 |
| Behavioral sciences | 148 |
| Belief and practice pattern | 86 |
| Belief of average American | 451 |
| Belief regarding congressional authorization | 528 |
| Best out of present situation | 582 |
| Better reporting by Executive | 714 |
| Bills and resolutions: | |
| House Joint Resolution 1 | 863 |
| H.R. 7290 | 407 |
| S. 731 | 2 |
| S. 1880 | 593 |
| S. 2956 | III |
| Senate Joint Resolution 18 | 3 |




58-809—72——56

Page

Senate Joint Resolution 59 — 4
Senate Joint Resolution 95 — 655
Bills under consideration — 557
Breadth of Senate Joint Resolution 18 — 273
Breaking of deadlocks because of Mansfield resolution — 531
Breaks in congressional-executive relationship — 89
Brecker amendment — 778
Bridging gap to future — 581
Brief on S. 731 — 138
Can Congress delegate powers to President? — 781
Can Congress require executive branch? — 66
Can Congress implement S. 731? — 68
Can Congress obtain information from executive? — 68
Can United States exercise world power? — 578
Cartoon on election in South Vietnam — 776
Case, Senator Clifford P.:
Examination of witnesses:
Bickel, Alexander M — 565–567
Commager, Henry Steele — 53–58
Goldberg, Arthur J., Esq — 786, 787, 794
Goldwater, Senator Barry — 386, 387, 395, 399, 400
Horton, Representative Frank — 414, 415
Kelly, Alfred H — 104, 112, 114–118
Morris, Richard B — 111–116, 118, 121
Reedy, George — 456, 457
Rogers, William P — 516–518
Cause and purpose of war — 710
Cause of opposition to S. 731 — 393
Centralization of power in Executive — 268
Change in war — 125
Changes in Constitution — 529
Changes in political progress — 584
Changing President's power questioned — 517
Character of Congress — 714
Checks in jeopardy — 254
Chief value of S. 731 — 91
Church, Senator Frank:
Examination of witnesses:
Rogers, William P — 505–508, 533–536
Circumstances leading to Presidential action — 709
Codifying war powers — 588
Commands war commitment — 765
Commendation concerning war powers — 416
Communications between Executive and Congress — 632
Compliance with treaty obligations — 609
Compromise on Mansfield resolution — 521
Concerning troops abroad — 344
Concluusion — 203
Conclusion: S. 731 — 84
Conclusions — 16
Conduct in use of Presidential force — 15
Confidence in Government — 125
Conflicts intentional in Constitution — 707
Confusion concerning commitment — 193
Congress and past commitments — 618
Congress and public opinion — 631
Congress in military affairs — 77
Congress' judgment superior to single man's? — 530
Congress may legislate in war power area — 774
Congress must participate in war process — 601
Congress power to pass S. 731 — 97
Congress reflects impression of public — 452
Congress to limit Presidential authority — 468
Congress to limit use of Armed Forces? — 480
Congress' right to information — 625

Page

Congress' right to withdraw troops from Europe 504
Congress' role in making decisions 528
Congressional access to information 600
Congressional action alleged to support war 452
Congressional action within 30 days 645
Congressional authority to declare war 554
Congressional authority to set date to end war 424
Congressional briefings empty 502
Congressional interference with war power 450
Congressional neglect of foreign policy 583
Congressional participation in decisions 636
Congressional participation in use-of-force 528
Congressional power legitimate 555
Congressional power to legislate 708
Congressional powers under S. 731 388, 389
Congressional procedures 772
Congressional procedure in Javits bill 573
Congressional restrictions on President 466
Congressional scrutiny of Executive privilege 601
Congressional support of Tonkin Gulf 42
Consideration by committee urged 709
Constitution can be changed 616
Constitution, not tradition, contains answer 769
Constitution on making peace 587
Constitution regarding Presidential power 603
Constitution secondary in war decision 600
Constitutional and legal aspects 13
Constitutional approach recommended 394
Constitutional authority for forces in Vietnam 629
Constitutionality of Javits proposal 653
Constitutionality of S. 731 31
"Constitutional process" in treaties 785
Constitutional provisions on war powers 385
Consultation and consent 30
Consulting Congress 55
Contemporary imperatives for S. 731 126
Cooper-Church amendment 101
Cooper, Senator John Sherman:
Examination of witnesses:
Ball, George W 632–634
Bickel, Alexander M 574–577
Commager, Henry Steele 60–62
Goldberg, Arthur J., Esq 781, 782, 790
Javits, Senator Jacob K 245–247
Kelly, Alfred H 100, 117
Mason, Alpheus T 324–326
Morris, Richard B 117
Rogers, William P 521–523, 538
Stennis, Senator John 716, 717
Taft, Senator Robert, Jr 327–329
Cost and benefit of Javits' proposal 477
Countries without defense treaties 348
Court actions in war powers area 779
Creation of new agencies 459
Criteria for Presidential power 117
Criticism of war powers bills 623
Curtiss-Wright decision 355
Danger in future situations 630
Debate on Korean treaty 717
Decisions in moments of crisis 42
Declaration of war 57
Declaration of war after fact 32
Defense agreements 348
Defiance of law by President? 783

Page

Defining "hostilities" ---- 559
Definition of Commander-in-Chief ---- 29
Definition of hostilities ---- 198, 481, 709
Delay in constitutional matters recommended ---- 517
Delay in U.S. needs for Vietnamese election questioned ---- 543
Delegating power ---- 563
Delimiting executive authority in advance ---- 473
Democracy confronted by dictatorship ---- 53
Departure from tradition ---- 8
Deployment of military advisers ---- 572
Desire legislation on War powers ---- 527
Deterioration of U.S. affairs ---- 503
Determining war commitment ---- 603
Determining when we are at war ---- 771
Developing right policy ---- 112
Difference between H.R. 7290 and S. 731 ---- 402
Difference between Senate Joint Resolution 95 and new bill ---- 715
Difference in supreme court ---- 257
Difference on approach ---- 384
Differences between Senate Joint Resolution 59 and S. 731 ---- 195
Disability of democracies ---- 56
Discussion in national scene ---- 442
Dissatisfaction with Indochina war ---- 475
Dissent in White House ---- 442
Distinction made in Constitution ---- 597
Disturbance in constitutional balance ---- 88
Division of powers suggested ---- 28, 602
Double morality in America ---- 520
Doubt regarding congressional delegation ---- 562
Drive to act now ---- 435
Eagleton, Senator Thomas E., statement ---- 193
Early commitment to peace ---- 76
Effect of Cooper-Church bill questioned ---- 388
Effects of 1967 troop reduction in Europe ---- 534
Effect of S. 731 on Cuban missile crisis ---- 540
Effect of S. 731 on President's obligations ---- 392
Effects of S. 1880 ---- 597
Effect of successful veto of bill ---- 782
Effect of Senate Joint Resolution 18 in Laos ---- 273
Effect of war powers bill on Vietnam passions ---- 540
Effect on movements had reporting been law ---- 339
Effects of troop reduction in Europe ---- 513
Efficacy of S. 731 ---- 91
Effort to have consultation available ---- 417
Eighteenth Century marketplace suggested ---- 115
Electorate is ultimate restraint ---- 497
Elimination of trip wire ---- 99
Emotions and passions of Vietnam conflict ---- 539
Enemy's regard for United States to act in crisis ---- 500
Entry into World War II ---- 55
Era since Tonkin Gulf resolution ---- 401
Examples of Presidential initiative ---- 489
Executive authority of President not wanted ---- 395
Executive agreement ---- 12
Executive agreement on Spanish bases ---- 531
Executive agreements should be reported to Congress ---- 789
Executive authority to delay ratification ---- 118
Executive branch and Congress ---- 58, 71, 441
Executive power of S. 731 ---- 32
Executive privilege ---- 453, 792
Executive use of war power ---- 9
Exemption of hostilities in Indochina ---- 202
Exhaustive service manual ---- 405
Existence of Congress in event of attack ---- 617
Expanded Presidential role ---- 464

Page

Expanded reporting requirement 340
Experts in executive branch 440
Extension of foreign policy involving troops 620
Extent of Executive privilege 459
Factual setting for exercise of war powers 496
Fallibility of Congress 631
Fartherest extension of Presidential power 551
Fear Executive usurpation 77
Few Judicial precedents in war power area 493
Fear unchecked appetite 252
Findley, Rep. Paul, statement of 336
Flexibility of S. 731 questioned 481
Focusing the past 41
Foreign countries approve of U.S. withdrawal 511
Foreign policy and military matters 395
Foreign Policy in 20th Century (By J. W. Fullbright) 46
Foreign reaction to President's policy 505
Framers of Constitution regarding war power 79
Framework of war powers bill 558
Fullbright, Senator J. W.
Examination of witnesses:
Bickel, Alexander M 558, 567–570
Bundy, McGeorge 423–425, 430–434
Chiles, Senator Lawton 765
Commager, Henry Steele 7, 58, 66–72
Eagleton, Senator Thomas F 193, 194, 237
Goldberg, Arthur J., Esq 775–777, 782, 788–791, 793
Javits, Senator Jacob K 6
Kelly, Alfred H 85, 102, 103, 106, 108
Mason, Alpheres T 251, 317–320, 329
Moore, John Norton 460, 463, 464, 476–478
Morris, Richard B 75, 101–107, 109, 110
Pell, Senator Claiborne 124, 125
Reedy, George 434, 441, 448–454, 459, 460
Rogers, William P 485, 502, 503–505, 528–533, 537, 538, 543, 544
Stennis, Senator John 711–714, 762
Taft, Senator Robert, Jr 259
Fulfill treaty obligation 271
Fuller debate in emergency 44
Function of joint committee 413
Function of pending legislation 71
Future rather than past 45
General Washington Commission 29, 400
Getting Congress to manifest its will 560
Getting POW's back 536
Growth of executive prerogative 87
Hearings on troop reduction 535
Hearings on U.S. troops in Europe 544
Historical experience 13
Historical references questioned 509
History of peaceful change 256
Hostilities other than declaration of war 420
Hostilities versus principle of authorization 100
How can attitude be changed? 450
Human element in solution 603
Illegality of continuing hostilities 458
Immediate responses 566
Imminent attack without consultation 712
Imminent nuclear attack 605, 714
Immunity of Mr. Kissinger 431
Impact of troop withdrawal and NATO 514
Importances of S. 731 334
Importances of war powers legislation 715
Impracticality of parliamentary system 448
Inconsistency between President's emergency powers and Vietnamization 523

Page

Increase in nuclear weapons in Europe in 1967 534
Increase in U.S. troops in Europe 537
Indirect declaration of war 586
Indirect method of republicanism needed 57
Influence of legislature 106
Information given to Senate 613
Information machinery in executive branch 439
Information not shared with Congress 608
Information to public and Congress 42
Inherent power rejected 770
Insertions for record 129
Intent of Founding Fathers 550
Intent of framers 487
Involvement in constitutional area 476
Is legislation regarding war powers needed? 775
Issue twofold 596
Issues in war powers controversy 461
Is war power justiciable issue? 774
Javits, Senator Jacob K.:
Examination of witnesses:
Bickel, Alexander M 559–564
Bundy, McGeorge 425–430
Commager, Henry Steele 28–32, 73
Eagleton, Senator Thomas F 241
Goldberg, Arthur J., Esq 783–787
Goldwater, Senator Barry 383–386, 388–397
Horton, Representative Frank 415–417
Kelly, Alfred H 93–95, 97, 99
Mason, Alpheus T 321, 322
Moore, John Norton 481, 482
Morris, Richard B 95, 96
Reedy, George 458
Rogers, William P 524, 526, 527, 539–542
Stennis, Senator John 715, 716
Taft, Senator Robert, Jr 322, 323
Javits, Senator Jacob K., statement 126
Joint Committee on Security 403
Judicial collision in war powers area 495
Judicial opinion and war power issue 494
Justification for involvement in Vietnam 707
Kelly, Alfred H., statement of 85
Lack congressional majority to end war 125
Legal rationale 784
Legislation aimed at codifying war powers 779
Legislation dealing with attacks 606
Legislation might have affected Cuban missile crisis 624
Legislation on war powers 711
Legislation passed from 1935 to 1937 621
Legislation's approach into reality 443
Legislation's effect on war 382
Legislative and executive branches 518
Legislative approach of S. 731 128
Limitations of Congress and Presidency 497
Limitation of funds to effect withdrawal 508
Limitations of Congress in control 337
Limitations of Presidency and Congress 556
Limitations on appropriations 713
Limitation on Commander in Chief 424
Limitations on policing Presidential role 465
Limited actions 39
Limits of Executive privilege 793
Limits of Presidential authority 508
Loss of congressional power 457
Make peace without war? 587
Mandate for congressional role 479

Page

Mandatory requirement of House Joint Resolution 1 ---- 338
Mason, Alpheus T, statement ---- 251
Meaning of word "war" ---- 463
Measure is essential ---- 567
Mechanism for consultation ---- 476
Military forces abroad ---- 354
Misgivings as to efficacy of resolutions ---- 773
Mistakes in Southeast Asian involvement ---- 766
Morris, Richard B., statement of ---- 75
McC. Mathias, Senator Charles, Jr., statement ---- 333
McGee, Senator Gale W:
  Examination of witnesses:
    Ball, George W ---- 630, 631
    Bickel, Alexander M ---- 578–581, 583–586
    Commager, Henry Steele ---- 38–45
    Kelly, Alfred H ---- 103
Need for changes in Constitution ---- 615
Need for greater communication ---- 433
Need for war powers legislation ---- 406, 607
New terminology ---- 11
Negotiate with Soviet Union on reduction of forces ---- 514
No war without moral sanction of people ---- 706
Objections to S. 731 ---- 421
Obligations and burdens on Congress ---- 646
Okinawa reversion presented as treaty ---- 531
Opposition to legislation ---- 379
Opposition to proposed legislation ---- 478
Opposition to war power bills ---- 498
Other nations passing legislation ---- 643
Parallel with 1930's ---- 584
Participation of Congress and executive ---- 613
Passing legislation ---- 778
Passing resolution or law ---- 526
Past Presidential interventions ---- 7
Pearson, Senator James B.:
  Examination of witnesses:
    Bickel, Alexander M ---- 586, 588
    Eagleton, Senator Thomas F ---- 248
Pell, Senator Claiborne:
  Examination of witnesses:
    Goldberg, Arthur J., Esq ---- 777, 778
    Kelly, Alfred H ---- 118, 120
    Morris, Richard B ---- 119, 120
    Rogers, William P ---- 518–521, 543, 544
  Statement ---- 124
Pentagon papers relevant to war powers ---- 599
Plea to committee to act ---- 642
Policy toward Israel ---- 397
Position of Mr. Katzenbach and witness ---- 530
Power of Congress on President ---- 425
Power of impeachment ---- 449
Power of Presidency will remain ---- 557
Power to order President into hostilities ---- 349
Power to protect troops on withdrawal ---- 577
Power to protect U.S. citizens ---- 396
Powers given Congress by Constitution ---- 708
Powers logged in Congress ---- 550
Powers of Executive ---- 777
Powers of President under S. 731 ---- 390
Powers under Constitution ---- 487
Powers vested in Congress and President ---- 766
Powers vested in President ---- 551
Public opinion ---- 268, 580, 630
Purpose of S. 731 is right ---- 422

| | Page |
|---|---|
| Practices obsolete? | 89 |
| Prepared statement | 340 |
| Present policy on Executive privilege | 519 |
| President and Congress in foreign policy | 261 |
| President and constitutional process | 716 |
| President and large-scale hostilities | 434 |
| President as Commander in Chief | 356 |
| President Eisenhower sends troops to Lebanon | 491 |
| President Eisenhower's request for resolution on Formosa | 491 |
| President Kennedy and Cuban crisis | 637 |
| President Kennedy ordered 1962 quarantine of Cuba | 492 |
| President John Adams and war powers | 82 |
| President Johnson's sending Marines to Dominican Republic | 492 |
| President Johnson's sending troops to Vietnam | 492 |
| President knows all the facts? | 438 |
| President Roosevelt and World War II | 580 |
| President Truman's actions on Republic of Korea | 491 |
| President Washington and warmaking powers | 81 |
| Presidential action under treaties | 574 |
| Presidential authority to commit forces | 574 |
| Presidential authority to dispatch troops | 506 |
| Presidential authority under S. 731 | 33, 93 |
| Presidential decisions | 69 |
| Presidential judgment in foreign affairs | 437 |
| Presidential powers under Constitution | 356 |
| Presidential power under NATO treaty | 391 |
| Presidential privacy questioned | 568 |
| President's authority broader than limitations | 470 |
| President's authority in emergency | 127 |
| President's authority on treaties and foreign bases | 510 |
| President's attitude toward Congress | 72 |
| President's authority under Constitution rejected | 516 |
| President's power in threatened attack | 559 |
| President's power to act | 617 |
| President's power to repel sudden attacks | 488 |
| President's power unrestricted? | 383 |
| President's power when Congress authorizes Presidential action | 495 |
| President's role | 80 |
| Pressure to be reelected | 116 |
| Previous enactment of pending legislation | 520 |
| Primary control of ballot box | 254 |
| Private counsel and public policy | 607 |
| Procedure versus resolutions | 30 |
| Prepared statement | 18 |
| Problem of Congress itself | 652 |
| Processes must be followed | 571 |
| Process under treaties | 61, 196 |
| Processes under U.N. charter | 61 |
| Proper balance between Congress and President? | 498 |
| Proposal on other foreign policy initiatives | 523 |
| Proposal of joint committee | 414 |
| Proposed legislation | 194 |
| Proposed legislation on NATO | 381 |
| Protection of lives abroad | 35, 95, 197, 397 |
| Protestors and dissenters | 258 |
| Providing information to Congress | 634 |
| Provision in treaties | 780 |
| Provisions concerning war powers | 462 |
| Provisions for war power | 770 |
| Provisions in Javits-Eagleton draft | 791 |
| Provisions in pending bills | 625 |
| Provisions needed on quorum | 619 |
| Provisions of concurring resolution | 458 |
| Question not legal | 710 |
| Question of declaration of war | 785 |

| | Page |
|---|---|
| Question of nation going to war | 399 |
| Question of "national commitment" | 561 |
| Questioning of President's judgment | 436 |
| Questions in war power use | 486 |
| Realities of nuclear age | 578 |
| Reaction to Supreme Court rulings | 350 |
| Reasserting Congress' constitutional authority | 483 |
| Recent executive actions | 40 |
| Reciprocal move suggested | 535 |
| Recognition and restriction of authority | 566 |
| Recommendations | 16 |
| Recreation of balance | 478 |
| Reduction in U.S. Armed Forces | 522 |
| Reduction of Canadian forces in Europe | 532 |
| Reduction of forces in Europe questioned | 512 |
| Regarding executive agreements | 776 |
| Regulating appropriation bill | 104 |
| Repeal of Gulf of Tonkin resolution | 484 |
| Resistance to return to Constitution | 772 |
| Resolution on morale of country | 458 |
| Resolutions and bills | 646 |
| Resolutions and concept of national interest | 493 |
| Response to attack on NATO treaty | 571 |
| Responsibility to act alone | 711 |
| Restore constitutional balance | 484 |
| Restrictions on President in deploying forces abroad | 556 |
| Restrictions versus principle | 34 |
| Results of Mansfield resolution | 521 |
| Return to authority of people | 335 |
| Review of laws suggested | 784 |
| Request for Mr. Kissinger's appearance | 432 |
| Right of self-defense | 272 |
| Role of Commander in Chief during hostilities | 199 |
| Role of Congress | 620 |
| Scott, Senator Hugh: | |
| Examination of witnesses: | |
| Eagleton, Senator Thomas F. | 608–610 |
| Secretary's efforts and U.S. Middle East policy | 508 |
| Section A4 of Javits bill | 563 |
| S. 1880 and other proposals | 598 |
| S. 1880 forces discipline upon Congress | 614 |
| Section 1 of Senate Joint Resolution 59 | 35 |
| S. 731 | 124 |
| S. 731 adds to congressional war power? | 427 |
| S. 731 Constructive and helpful | 95 |
| S. 731 basic national legislation | 126 |
| S. 731 congressional responsibility | 345 |
| S. 731 during Cuban missile crises | 425 |
| S. 731 gives full power to Congress? | 385 |
| S. 731 in conjunction with Senate Resolution 85 | 83 |
| S. 731 is a beginning | 92 |
| Senate Joint Resolution 59, 92d Congress, first session | 4 |
| Senate Joint Resolution 18, 92d Congress, first session | 3 |
| S. 731, 92d Congress, first session | 2 |
| S. 731 on Vietnam war | 428, 429 |
| S. 731—Regulate undeclared wars | 130 |
| S. 2224 best solution | 613 |
| Senate's role in today's world | 616 |
| Sending troops abroad | 62 |
| Separation of powers | 253 |
| Separate powers of Congress and President | 577 |
| Setting withdrawal date on POW's | 543 |
| Should President sign S. 731? | 96 |
| Showdowns forced by committees | 454 |
| Solution will be in political arena | 505 |

Sparkman, Senator John:
Examination of witnesses: Page
Ball, George W 629, 630
Bickel, Alexander M 571–574, 602
Eagleton, Senator Thomas F 240, 242
Javits, Senator Jacob K 239
Spelling out nuclear attack 589
Spong, Senator William B., Jr.:
Examination of witnesses:
Ball, George W 635–637
Bentsen, Senator Lloyd 605, 606
Bickel, Alexander M 588–590
Commager, Henry Steele 32–35
Findley, Representative Paul 336, 344
Goldberg, Arthur J., Esq 799, 780, 791, 792
Goldwater, Senator Barry 379–382
Horton, Representative Frank 401, 413, 417
Javits, Senator Jacob K 243
Kelly, Alfred H 98, 100, 101
Mathias, Senator Charles McC., Jr 333
Moore, John Norton 479, 480
Morris, Richard B 98
Reedy, George 451, 452, 456
Taft, Senator Robert, Jr 324, 329, 333
Spot announcement problems 114
Standing Committee To Consult With Executive 456
State system with existing technology 87
Statement by Senator Javits in support of S. 731 6
Statute over treaties 102
Strengthening congressional role 474
Structural and Bill of Rights checks 252
Subsection 1, section 2, of Stennis resolution 590
Subversion of treaty power and constitution 529
"Sudden attack" questioned 553
Supplemental appropriation for Cambodia 509
Support for proposed legislation 437
Supreme Court ruling on Javits' proposal ? 479
Symington, Senator Stuart:
Examination of witnesses:
Rogers, William P 512–515, 538, 539
Taft, Senator Robert, Jr., statement 260
Tendency to reject Congress 73
Testimony of Professor Bickel 602
Thirty-day limitation for expedited consideration 391, 472, 781
Threat of attack 271
Three proposals to restore balance 635
Time factor in attacks 575
Time frame might relieve President 541
Tonkin Gulf has S. 731 been law 334
To use force belongs to legislative branch 706
Treaties and Executive agreements 773
Treaties in war powers legislation 590
Treaties self-executing? 610
Troop deployment under Senate Joint Resolution 18 270
Troop deployment without congressional authority 786
Troop reduction on monetary crisis 522
Troops after 30-day limitation 577
Troops and nuclear weapons abroad 788
Trust and confidence in Government 606
Undeclared wars 38
Undeclared war illegal? 120
U.S. abuse of power 17
U.S. action in Laos, Cambodia, and China 507
U.S. entry into World War II 44

| | Page |
|---|---|
| U.S. entrance into conventional warfare | 632 |
| United States faces constitutional issue | 597 |
| U.S. forces under U.N. | 36 |
| U.S. intervention in Dominican Republic | 567 |
| U.S. involvement in Indochina | 269 |
| U.S. objective in Vietnam war | 504 |
| *United States* v. *Curtiss-Wright Corp* | 554 |
| Use of Armed Forces abroad | 463 |
| Use of Armed Forces under treaty | 98 |
| Use of Executive agreements | 101 |
| U.S. treaty obligations | 772 |
| Vacuum when Congress refuses role | 596 |
| Value of legislation early in Vietnam war | 442 |
| Value of standing committee | 457 |
| Vietnamese elections questioned | 543 |
| Views on Katzenbach position | 538 |
| Warmaking powers conditions changed | 255 |
| War power and foreign policy questioned | 533 |
| War power and 1787 Convention | 85 |
| War powers bill questioned | 352 |
| War powers brief questioned | 353 |
| War powers legislation | 570 |
| War powers political rather than legal matter | 711 |
| War powers question required | 501 |
| War powers shared | 387 |
| Were operations minor? | 355 |
| What committee is attempting | 621 |
| When legislative action should be taken | 716 |
| White House atmosphere on President | 70 |
| Who gets us out of war? | 524 |
| Who makes war? | 135, 194 |
| Witness' support of S. 731 | 570 |
| Would Javits bill inhibit President? | 566 |
| Would President veto this legislation? | 37 |
| Working out modus vivendi | 526 |
| Worry regarding Germany | 544 |


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