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WAR POWERS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON NATIONAL SECURITY POLICY AND SCIENTIFIC DEVELOPMENTS

OF THE

COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

FIRST SESSION

MARCH 7, 8, 13, 14, 15, 20, 1973

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To deal with all matters affecting our foreign relations that concern matters of national security and scientific developments affecting foreign policy, including the national space program, mutual defense, and the operation of our high strategy generally.

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FOREWORD

In recent years the issue of the war powers of the Congress and the President has received special attention. It was clear that a broad consensus existed in the House of Representatives for legislation which would clarify more precisely this constitutional question.

During March 1973 the Subcommittee on National Security Policy and Scientific Developments held 6 days of hearings on the issue. These hearings complemented those held by the subcommittee in 1970 and 1971. As a result of those earlier considerations and subsequent full committee action, the House of Representatives overwhelmingly approved war powers legislation three times in the past two Congresses. Unfortunately, however, full congressional approval was precluded by the Senate's failure to act in the 91st Congress and by the inability of conferees to reach agreement late in the 92d Congress.

Undeterred by these earlier developments, the House of Representatives in the 93d Congress demonstrated its renewed determination to pass meaningful and effective war powers legislation. That fact is amply evident in the more than 30 bills and resolutions representing approximately 12 different approaches to the question which were considered during the hearings recorded in this document.

On the basis of renewed understanding provided in the hearings and following several extensive and thorough open markup sessions, the subcommittee on May 2 approved a clean resolution for full committee action. The text of that resolution, House Joint Resolution 542, appears in the appendix to this volume.

The safeguards provided in this legislation will, I believe, restore to the Congress its rightful role in the area of war powers—the role which was envisaged by our Founding Fathers when they wrote the Constitution.

Hopefully, the testimony, comments, observations, and varied views presented by our colleagues, constitutional lawyers, historians, and academicians will be of assistance as this legislation is considered by the Committee on Foreign Affairs and the Congress. Undoubtedly, by enacting war powers legislation the Congress will demonstrate its commitment to the responsibilities we have as Members of Congress and representatives of the American people.

CLEMENT J. ZABLOCKI,
Chairman, Subcommittee on National Security Policy and Scientific Developments.

CONTENTS

LIST OF WITNESSES

	Page
Wednesday, March 7, 1973:	
Javits, Hon. Jacob K., a U.S. Senator from the State of New York	1
Eagleton, Hon. Thomas F., a U.S. Senator from the State of Missouri	29
Fascell, Hon. Dante B., a Representative in Congress from the State of Florida	77
Bingham, Hon. Jonathan, a Representative in Congress from the State of New York	80
Chappell, Hon. William, Jr., a Representative in Congress from the State of Florida	84
Thursday, March 8, 1973:	
Bingham, Hon. Jonathan B., a Representative in Congress from the State of New York	87
Matsunaga, Hon. Spark M., a Representative in Congress from the State of Hawaii	97
Leggett, Hon. Robert L., a Representative in Congress from the State of California	107
Dennis, Hon. David W., a Representative in Congress from the State of Indiana	112
Harrington, Hon. Michael, a Representative in Congress from the State of Massachusetts	123
Tuesday, March 13, 1973:	
Brower, Charles, acting legal adviser, Department of State	127
Wednesday, March 14, 1973:	
Schlesinger, Arthur, Jr., Albert Schweitzer Professor of Humanities, City University of New York	163
Bickel, Alexander, professor of law, Yale University	175
Thursday, March 15, 1973:	
Berger, Raoul, professor of law, Harvard University	209
Reveley, W. Taylor, III, joint fellow of the Council on Foreign Relations, and the Woodrow Wilson International Center for Scholars	224
Tuesday, March 20, 1973:	
Stevenson, Hon. John, former legal adviser, Department of State, member of New York Bar	265

MATERIAL SUBMITTED FOR THE RECORD

Colloquy between Senators Dole and Eagleton, Congressional Record, June 23, 1970	38
Speech by Senator Eagleton on the floor of the Senate regarding the War Powers Act, Congressional Record, January 18, 1973	66
Responses by Mr. Charles Brower to questions submitted by Mr. Fraser	135
Letter from Director of the CIA to the Honorable F. Edward Hébert, Chairman of the Committee on Armed Services, House of Representatives regarding congressional access to information in the executive branch	262

STATEMENTS SUBMITTED FOR THE RECORD BY MEMBERS OF CONGRESS

	Page
Abzug, Hon. Bella S., of New York	285
Danielson, Hon. George E., of California	288
Dellenback, Hon. John, of Oregon	291
Dickinson, Hon. Wm. L., of Alabama	293
Fuqua, Hon. Don, of Florida	294
Goldwater, Hon. Barry, of Arizona	296
Horton, Hon. Frank, of New York	377
Mazzoli, Hon. Romano L., of Kentucky	380
Quie, Hon. Albert H., of Minnesota	382
Railsback, Hon. Tom, of Illinois	386
Tiernan, Hon. Robert O., of Rhode Island	388
Ullman, Hon. Al, of Oregon	391
Wilson, Hon. Charles H., of California	392

APPENDIX

Statement of Prof. Eugene V. Rostow, Yale University Law School, New Haven, Conn	395
Statement of Prof. Raoul Berger, Harvard University Law School, Cambridge, Mass., in response to statement of Professor Rostow	497
Reply of Prof. Eugene V. Rostow to Professor Berger's response	500
Opinion of *Mitchell* v. *Laird* (No. 71-1510, Mar. 20, 1973)	503
An analysis of *Mitchell* v. *Laird*, a suit to enjoin and declare unconstitutational the war in Vietnam, by American Law Division, Library of Congress	508
"The Right to Make War", article from the New Republic, January 29, 1972, by Eugene G. Windchy	511
Memorandum by Charles A. Weil to Committee on Foreign Affairs, Subcommittee on National Security Policy, House of Representatives, in opposition to S. 440, War Powers Act	519
Text of House Joint Resolution 542	531

WAR POWERS

WEDNESDAY, MARCH 7, 1973

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON NATIONAL SECURITY
POLICY AND SCIENTIFIC DEVELOPMENTS,
Washington, D.C.

The subcommittee met at 10 a.m., in room 2200, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman of the subcommittee) presiding.

Mr. ZABLOCKI. The subcommittee will please come to order. Today the Subcommittee on National Security Policy and Scientific Developments opens 6 days of hearings on pending bills and resolutions concerning the war powers of Congress and the President.

These hearings are a follow-on and complement to extensive hearings on the same subject held by the subcommittee in 1970 and 1971. As a result of those hearings, the subcommittee drafted war powers legislation which passed the House of Representatives in both the 91st and 92d Congresses.

Subsequent failure by the Senate to act in the 91st Congress and a parliamentary snarl in the 92d Congress prevented agreement.

Consequently, with the convening of the 93d Congress an updated and strengthened resolution was introduced as House Joint Resolution 2. That resolution and a number of other proposals which have been introduced on the subject of war powers will be considered during these hearings.

SENATOR JAVITS FIRST WITNESS

Our first witness this morning is the Honorable Jacob Javits. First elected to the Senate from the State of New York in 1956, he has served his State and the Nation with distinction over the years.

As an alumnus of the House and of our committee, Senator, we welcome you. You have, together with Senators Stennis and Eagleton been a leader in the war powers area. We look upon you as an expert though we may not agree with you fully.

It is a pleasure to welcome you before the subcommittee.

STATEMENT OF HON. JACOB K. JAVITS, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator JAVITS. Thank you, Mr. Chairman. I greatly appreciate your remarks. Congressman Findley said I was coming home, which is quite correct; I was a member of this committee when I was in the House of Representatives.

I appreciate the honor paid to me by calling on me to be the first witness in these hearings.

I ask unanimous consent that my entire statement may be made part of the record as though it were read. I shall do my utmost with the permission of the Chair, and in fairness to other witnesses, to be brief in my presentation.

Mr. ZABLOCKI. Without objection, it is so ordered.

Senator JAVITS. There is no longer any serious argument as to the existence of a constitutional crisis over the exercise of the Nation's war powers. The pertinent question is: What will the Congress—and the President—do about this crisis? The *de facto* concentration of plenipotentiary war powers in the hands of the President has subverted the letter and the spirit of the Constitution and has placed an almost intolerable strain on our national life as the deep wounds of the Vietnam experience so inescapably remind us.

STRENGTH AND VIGOR OF PRESIDENCY

In the decisive field of national security the awesome strength and vigor of the Presidency, in contrast to the comparative weakness and lack of cohesiveness of the Congress, is a cause for deep concern and even chagrin. For, the now almost unlimited power of the Presidency with respect to matters of war is a unilateral power not only to defend our Nation wisely but also a unilateral power to involve us as in the quagmire of a Vietnam or in a thermonuclear holocaust.

The severe imbalance which has developed between the power of the President and that of Congress has evoked many charges of usurpation. While usurpation is a heady word which may help to assuage our feelings, a review of the record of the past 30 years leading up to our present predicament does not, in my judgment, allow us the solace of attributing the result to Presidential usurpation. The Congress has given away its authority—not only by default and acts of omission—but even more importantly in an endless series of loosely worded and broadly drawn delegations of authority to the President. To cite only one example, but they are numerous, how many of us—including myself—who voted for the Tonkin Gulf Resolution in 1965 do not feel uncomfortable today in rereading its extraordinary language: "the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force * * *"

The powers of Congress are enumerated in some detail in article I of the Constitution. Under the Constitution the Senate is given a special position in foreign affairs, while the House is given precedence in appropriations. The war powers, spelled out so purposefully in section 8 of article I, are given jointly to the House and the Senate. those three powers—foreign affairs, appropriations and war powers—tend to converge and mingle inextricably in the exercise of our Nation's contemporary role as a world superpower. Unfortunately, during the Vietnam period this convergence of foreign affairs, appropriations, and war powers saw the House and the Senate divided on policy, leaving the President an opportunity to neutralize Congress as an institution and to consolidate effective authority within his own office. The House and the Senate never did get together on Vietnam, with the result that Congress failed to play a commensurate role in the painful and protracted disengagement from that ill-starred misadventure.

VIETNAM SETTLEMENT ENDS POLICY DIFFERENCE

The conclusion of the Vietnam peace agreement removes the principal issue of policy difference between the Senate and the House, and thereby ought to facilitate the process of joint congressional action on the underlying constitutional challenge which confronts the House and the Senate together.

This committee, to a large extent under the leadership of Congressman Zablocki, has been wrestling with the war powers question for almost 3 years and conducted the first congressional hearings on the issue in June, July, and August of 1970. I had the honor of testifying myself in those hearings on August 5, 1970. In the Senate, together with Senators Stennis and Eagleton in particular, I have taken the lead in forging war powers legislation. After much hard work, in S. 2956 we were able to draft legislation which commanded an extraordinarily broad spectrum of support and was passed 68 to 16. On the Democratic side of the aisle, Senator Stennis, chairman of the Armed Services Committee, was a principal architect of the bill, which also commanded the support of Senator McGovern. On the Republican side, I was a principal architect of a bill which commanded the support of all four members of the Senate Republican leadership. To achieve such results there must be a lot that is right about the Senate bill.

At this time I would like to pay tribute to Chairman Zablocki for his far-sighted and statesmanly persistence with respect to war powers legislation. It was his initiative which broke a procedural logjam and made possible last year a House-Senate conference on war powers. Unfortunately, the conferees, who were all sorely pressed by other end-of-session and electoral responsibilities, were only able to meet once. At that meeting, it was understandably not possible to bridge the legislative differences between the House and Senate measures. But, personally, I was very heartened by the optimism and determination expressed by both House and Senate conferees that an agreement could and should be reached on this pressing constitutional challenge to the Congress as an institution. In my judgment, Congressman Zablocki's new bill introduced in this Congress already shows evidence of this determination to get together with the Senate on a war powers bill.

OBJECTIVES OF LEGISLATION

I have read carefully the report issued by this committee on August 3, 1972, to accompany S. 2956 (H. Rept. 92–1302). My attention was drawn particularly to pages 4–6 of the report which contains the subsection entitled "Objectives of the Legislation" and "Provisions of the Legislation."

I find that the provisions of the Senate bill are entirely consistent with the principles stated by this committee in that report. For instance, (a) Reaffirmation of Congress' power to declare war (which stated as a declarative sentence in the House bill) in section 5 of the Senate bill is given concrete and explicitly legislative expression; (b) emergency authority of the President (also expressed as a declarative sentence in the House bill) is delineated legislatively in section 3 of the Senate bill; and (c) prior consultation with the Congress before involv-

ing the Armed Forces in hostilities (which in the House bill of last year expressed the "sense of Congress") is given specific legislative expression in section 3(4) of the Senate bill.

The Senate War Powers Act (S. 440) is a bill to end the practice of Presidential war. It is an effort to learn from the lessons of the last tragic decade of war which has cost our Nation so heavily in blood, treasure, and morale. The War Powers Act would assure that any future decision to commit the United States to any warmaking must be shared in by the Congress to be lawful.

No legislation can guarantee national wisdom, but the fundamental premise of the Constitution, with its deliberate system of checks and balances and separation of powers, is that important decisions must be national decisions, shared in by the people's representatives in Congress as well as the President. By enumerating the war powers of Congress so explicitly and extensively in article I, section 8, the framers of the Constitution took special care to assure the Congress of a concurring role in any measures that would commit the Nation to war. Modern practice, culminating in the Vietnam war and the result of a long history of Executive action employing the warmaking power which weaves in and out of our national history, has upset the balance of the Constitution in this respect.

CORE OF WAR POWERS ACT

The central core of the War Powers Act is contained in sections 3 and 5 of the bill. Section 3 consists of four clauses which define the conditions of circumstances under which, in the absence of a congressional declaration of war, the Armed Forces of the United States "may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances."

The first three categories are codifications of the emergency powers of the President, as intended by the Founding Fathers and as confirmed by subsequent historical practice and judicial precedent. Thus, subsections (1), (2), and (3) of section 3 delineate by statute the implied power of the President in his concurrent role as Commander in Chief.

Subsection (4) of section 3 is perhaps the most significant; while subsections (1), (2), and (3) codify emergency powers which are inherent in the independent constitutional authority of the President as Commander in Chief, subsection (4) deals with the delegation by the Congress of additional authorities which would accrue to the President as a result of statutory action by the Congress, and which he does not, or would not, possess in the absence of such statutory action. Thus, subsection (4) regulates and defines the undertaking of a national commitment.

Section 5 provides that actions taken under the provisions of section 3 "shall not be sustained beyond 30 days from the date of the introduction of" such Armed Forces in hostilities or in any such situation unless—"the continued use of such Armed Forces in hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof."

PROVISIONS OF SECTION 5

Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the President in this age of instan-

taneous communications and of intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate and duty with respect to the great questions of war and peace.

A detailed, section-by-section explanation of the entire bill is contained in my speech of March 29, 1972, which initiated the Senate debate on the War Powers Act. I ask unanimous consent that the text of that speech be printed in the record at the conclusion of my remarks.

Our experience of the last 5 years or more has demonstrated how much harder it is to get out of an undeclared war than it is to get into one. In dealing with this situation, Congress has been forced back onto relying solely on its power of the purse over appropriations. We have seen how difficult and unsatisfactory it is for Congress to try to get a meaningful hold on the Vietnam war through the funds-cutoff route.

Yet there is a group of pundits, historians, and commentators who would have us fly directly in the face of this tortuous experience and confine ourselves to the funds-cutoff route. Those who would so advise us are either too timid or too conservative to try institutional reform. They would have us face the Presidential war power so often used as a fine tuned, subtle, and decisive instrument with a clumsy, blunt, and obsolescent tool. The fund-cutoff remedy is there now and will be there when the war powers bill becomes law. It can then be an excellent sanction, but it is not a substitute.

CONGRESS MUST IMPOSE POLICYMAKING POWERS

The obvious course for Congress is to devise ways to bring to bear its extensive, policymaking powers respecting war at the outset, so that it is not left to fumble later in an after-the-fact attempt to use its appropriations power. This is what the War Powers Act seeks to do.

If James Madison had pressed his point on September 7, 1787, during the debate in the Constitutional Convention, we might not be faced with our current agonizing dilemma. Madison proposed then that two-thirds of the Senate be authorized 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."

However, Madison withdrew his proposal without putting it to a vote.

It is not clear whether Madison was speaking seriously or facetiously. It is clear, however, that Presidents have tended to see their role, as Commander in Chief conducting a war, as the decisive power of the Presidency. President Nixon articulated this view very precisely, when he said last April:

> Each of us in his way tries to leave (the Presidency) with as much respect and with as much strength in the world as he possibly can—that is his responsibility—and to do it the best way that he possibly can. . . . But if the United States at this time leaves Vietnam and allows a Communist takeover, the office of President of the United States will lose respect and I am not going to let that happen.

The effort embodied in the War Powers Act is the fulcrum, in my judgment, of the broader attempt of the Congress to redress the dangerous constitutional imbalance which has developed in the relationship between the President and the Congress. Unless Congress succeeds in reasserting its war powers I do not think it can succeed

in reasserting its powers of the purse which have grown so weak in comparison with the executive branch.

The publicists and the lawyers of Presidents have been busy for years now in advancing a new constitutional doctrine. According to this novel doctrine the President has inherent powers, in his role as Commander in Chief, to override any other powers conferred anywhere else in the Constitution.

PRESIDENT DEFINES COMMANDER IN CHIEF ROLE

We have reached a point where proponents of the Presidency seem to be claiming that the power of the Commander in Chief is what he himself defines it to be in any given circumstance. This is the challenge that must be met by the Congress. If this challenge is not met successfully by the Congress, I do not see how it can prevent the further erosion of its powers and jeopardize freedom itself.

Mr. Chairman, I have studied carefully House Joint Resolution 2 which you introduced on January 3, 1973, with a number of your colleagues as cosponsors. This new version of House Joint Resolution 2 shows that your thinking is not frozen on the war powers question. I want to assure you that my thinking, and I believe the thinking in the Senate is also not frozen. We have worked very hard and we are convinced that we have a good piece of legislation. We are strongly convinced of the principles underlying our bill but we are not doctrinaire about the wording. I mentioned earlier that I thought the principles which your committee had set forth in last year's report were entirely consistent with the bill which the Senate has passed. In the new version of House Joint Resolution 2 I detect some further evolution in your thinking about legislative expression of those principles. I think we are on a converging path here: history is pushing us closer together. We are both seeking to serve the Nation and to fulfill our oath of office and our constitutional responsibilities as Members of Congress. When we meet in conference, we ought to meet as allies and as coequals as well.

OBSERVATIONS ON HOUSE JOINT RESOLUTION 2

If you will bear with me, Mr. Chairman, I would like to offer a few observations about House Joint Resolution 2 which is before you. First, I am gratified to note that section 3 and section 6 which have been added to your bill, bring it much closer in structure to the Senate bill than was the case last year. Section 3 of your bill closely resembles the language of a substitute for section 3 of the Senate bill which was offered as an amendment on the floor by Senator Fulbright during the Senate debate last year. The Senate rejected the Fulbright amendment 28 to 56 because we thought that it gave away practically the whole ball game to the President—sort of a generalized, Tonkin Gulf blank check. I would hope that your committee would give further consideration to this language from that perspective.

The new section 6 of House Joint Resolution 2 parallels in some respects sections 5, 6, and 7 of the Senate bill. I am attracted to the second paragraph of your section 6—which found on lines 11 to 15 of page 4 of House Joint Resolution 2. This paragraph provides for the special convening of Congress when it is not in session, to receive reports from the President in the event of his emergency use of the Armed

Forces in hostilities. This provision is not contained in the Senate bill but, in my judgment, it ought to be incorporated in the final legislation enacted by the Congress.

As I read the first paragraph of your section 6, it is a substitute for sections 5, 6, and 7 of our bill. While the language of those sections of the Senate bill is doubtlessly susceptible to negotiation in conference, I think there is wisdom in going the route of much greater specificity, as we have done in the Senate. Finally, in connection with your section 6, I find a troublesome ambiguity on a vital matter. The Senate bill, in section 5 particularly, is very deliberately constructed so as to throw the burden of proof on the President to convince the Congress, with respect to the question of authorizing an extension of his emergency involvement of the Armed Forces in hostilities. I think it is essential, when the President has acted in the absence of a declaration of war, that the burden be on him to convince the Congress that he has acted in response to a bona fide emergency. If the situation is reversed, and the burden is placed on the Congress affirmatively to overrule the President's action, the Congress is likely to be faced with grave psychological obstacles as well as the threat of a veto requiring two-thirds of both Houses to override. I would like to suggest that you look again at the language of your section 6 in this light.

CONGRESS ON TRIAL

In closing, Mr. Chairman, I wish to emphasize my view that the Congress itself is on trial in the eyes of the people. The issue addressed by the War Powers Act is a fundamental constitutional issue.

It rejects the premise that the issue of Presidential war can be handled by making distinctions between good Presidents and bad Presidents. We could never arrive at an agreed criteria for making such judgments and there is no way such distinctions could be applied to Presidential wars on an ad hoc basis.

The need is for legislation which will assure the exercise by Congress of its equal share of the responsibility at the onset of all wars. Our constitutional system requires confidence that the Congress will act as responsibly as any President in the national interest. Even more significantly, it assumes that the national interest can best be defined and acted upon when both the President and the Congress are required to come to an understanding as to what is that national interest.

Mr. Chairman, we are in a constitutional crisis, and I believe indeed it is essential to the interest of the Nation that we resolve that crisis. Now that the cease-fire has come in Vietnam, it's unlikely that we will have a resolution from the courts of this area of the Constitution which has been called a twilight zone. The judicial citations and decision with respect to the war powers issue demonstrate that. There is nothing conclusive about the *Prize* cases or the *Curtis* case or any of the others. The issue must be decided in the political arena.

The constitutional basis of the War Powers Act (S. 440) is the Congress' powers enumerated in article I, section 8, to deal with the organization of the Armed Forces, the establishment of the Armed Forces, the ruling of the Armed Forces, and so forth, and the power generally to legislate.

CONGRESS HAS POWER TO PUT US INTO WAR

In just so many words, the power to put us into war was in the hands of the Congress, according to the purpose and intent of the Constitution. This is the issue: We have tried to codify the war power, that is really what it comes down to. The question is, Can the House and Senate now get together? I do not think we have any difference in purpose.

I find the provisions of the Senate bill entirely consistent with the principles affirmed by this committee in its report on August 3, 1972, to accompany S. 2956.

These purposes, as I see it, are the following: One, to reaffirm Congress' power to declare war; two, to reaffirm the emergency authority of the President; and three, to require prior consultation with the Congress before involving the Armed Forces in hostilities.

We, on the other hand, require confirmation of the authority to actually put our forces into war or in imminent danger of hostilities. So, I think our bill and your bill are designed to end the practice of Presidential war and to learn from what we have experienced in Vietnam: That this question can no longer be left to the wrestling between the Congress and the President.

Now it is time to codify it, and that is the purpose of this exercise in which we are now engaged. I will not delay you with the details of our bill. The members of this committee are well acquainted with it.

There are two points that I would like to cover, however, which apply to both bills. One is that the funds cutoff route, which we are so often urged to take, has been shown to be inadequate for many reasons.

CANNOT CUT MONEY TO TROOPS IN FIELD

One, because of the oft heard plea—and I, myself, have yielded to it—that when you have troops in the field, you cannot cut off their money, and two, because it is rarely unequivocally before us in a clear-cut way.

Funds for troops in the field are often mixed up with other funds for deployment of forces around the world, et cetera. As you know, the budget for Vietnam was never per se the budget for Vietnam. It was always combined with hardware and munitions, and the pay of the troops, and so on.

So, what we were left with was the effort to cull something out of that—"You shall not spend money for so and so"—knowing full well that the attitude of the Presidency was such that the President—even if we had succeeded with the Church-Cooper, Hatfield-McGovern, or whatever you had in the House—would simply have been able to reach into the general defense appropriation pot and say:

> If I have the power to continue war, I have the power to help myself to the money for it, once you appropriate for the Armed Forces of the United States.

So, I think the funds cutoff route, which was the only one we saw open to us after Vietnam was in full play, is inadequate.

The other point is the claims, the almost wild claims made for the power of the Presidency, which shows how far this pendulum has swung. I would like to refer to two instances.

One such instance occurred when Nicholas Katzenbach, who, as you know, spoke for President Johnson, said about the Gulf of Tonkin resolution:

We did not think the resolution was necessary to do what we did and what we are doing.

And even President Johnson said:

We think we are well within the grounds of our constitutional responsibility.

DEAN ACHESON ON POWERS OF THE PRESIDENCY

Listen to Dean Acheson on the powers of the Presidency in respect to war. I suppose his characteristic arrogance was something that endeared him to us all, but this is what he said in respect to the Korean situation:

There has never been any serious doubt of a President's constitutional authority to do what he [President Truman] did. The basis for this conclusion is legal theory and historical precedent.

He listed 87 instances in the past century in which the President's predecessors had exercised Presidential power to send our forces into battle.

Now, gentlemen, if we are going to yield to that, then we are yielding to what was probably the classic statement on this subject, which was made by Barry Goldwater in a debate with me before the National Press Club on this issue.

Barry, after the attrition of debate had gone on for a while, said:

I have more confidence in the judgment of the one man who is the President of the United States than in the judgment of the 535 men in the Congress.

And gentlemen, that is what it gets down to. Do we succumb to that or do we not. We have, on occasion, been too weak. We have on occasion been too strong. There are occasions in our history when it was Congress that was clamoring for war.

Our position in the Senate is to require a joinder of the Congress and the President by granting authority to the President to use forces in given situations, expiring at the end of 30 days, and, under our bill, requiring affirmative action by the Congress to entitle him to go forward in the absence of affirmative congressional action he loses authority to continue.

IMPROVEMENTS IN HOUSE JOINT RESOLUTION 2

I would like to conclude as follows, Mr. Chairman. I see very significant differences between your bill this year and your previous bill. In the first place, I would like to pay you enormous tribute for undertaking this effort and being the primary spirit in the House in this respect.

You have stood in, in that regard, for not one but three Senators, at least. In our body, my partnership has been with John Stennis, chairman of our Armed Services Committee; with Tom Eagleton, who is here to testify this morning, and with a member who is now no longer with us, Bill Spong, of Virginia.

Now, I see the following movement—and I think it is real movement—in respect to the House bill this year. One, and very importantly, the House bill now specifies the areas in which the President shall have authority.

This is important to the Presidency, and perhaps the President does not as yet realize it because he is opposed to these measures, but they confirm him in an authority, which could be challenged, to respond not just to sudden attacks, but to other situations such as the imperiling of American citizens or situations in which we have given him statutory authority, as for example, in the three resolutions we have on the books, the Cuba, Formosa, and the Middle East resolutions.

The second point at which I see real movement in the House bill this year is the fact that you call for the Congress to meet and act. Now, the basic difference—and we would beg you to carefully examine your bill in that regard—is that under our bill, the President has to persuade us, because we are to give him the authority he must have to continue his actions.

DIFFERENCES BETWEEN HOUSE AND SENATE MEASURES

He does not have it after 30 days unless he persuades us. Under your bill, you have to persuade him, because if you pass legislation saying you do not want our troops in hostilities, he has to sign that legislation to make it law, and if he vetoes it, we can only make it law with a two-thirds vote. Thus, the President could make war with the support of only one-third of either House.

Also we think there is merit in the greater specificity in S. 440 in the powers conferred to the President, rather than giving him a wide-open mandate to do anything he wants to do where he finds an "emergency."

I might point out that your approach was suggested by Senator Fulbright in an amendment, which was defeated 28 to 56.

In closing, Mr. Chairman, I wish to emphasize my view that here we have a fundamental constitutional issue tying into the whole struggle of the Congress with the President respecting every phase, including impoundment and so many other vital issues.

The war powers issue we confront today has been a result of our tragic experience in Vietnam, which has taught us we simply cannot rely on the normal political wrestling process, because after we are deep into a Presidential war it is almost impossible for Congress effectively to check its continuance.

So now, we must finally reject the premise of "Presidential" war. No longer may any war be Johnson's war or Nixon's war or Truman's war. It has to be our Nation's war. Otherwise, we cannot fight it effectively. We cannot do credit and justice to the Nation or call upon our people to sacrifice what they have sacrificed in the Vietnam war without the decision to go to war being a national decision of the Congress and the President.

NO ONE MAN KNOWS THE NATIONAL INTEREST

Nor, Mr. Chairman, can we assume that one man alone knows the national interest. The national interest is the embodiment of the thinking of the Congress and the President, and, if it is necessary to go to war in that national interest, declared or undeclared, only a joinder of the two assures the Nation that that decision will be provident.

I hope, Mr. Chairman, that this time the House will pass a bill and that we will find an identity of interest in the conference and be able to present the President and the Nation with a finished product.

Thank you, Mr. Chairman.

Mr. ZABLOCKI. Thank you, Senator.

Of course, as you stated, we are deeply interested in accomplishing something in this area. The House acted in the last two Congresses. Indeed, we had three votes, Senator. In 1970 in the 90th Congress, the war powers resolution passed by a vote of 288 to 39.

In the 91st, on August 2, 1971, it passed by a voice vote. Later, in order to unsnarl the parliamentary situation in which the Congress found ourselves, in the House we substituted the language of House Joint Resolution 1 for the Senate number and that procedure passed in the House by a vote of 344 to 13.

I would submit, therefore, the House did, in that last vote, indicate its support for the provisions of House Joint Resolution 1.

I find there are two sections in the Senate bill, in your bill, S. 440, that are subject to constitutional question. They are sections 3 and 5. In your opinion, Senator, would the President veto S. 440?

PRESIDENT CAN VETO ANY LEGISLATION

After all, the President can veto any legislation. In your opinion, would the President more likely approve the House version or S. 440? Further, if he does veto it, do you believe the Senate could muster the two-thirds support needed to override? What would be your assessment as to that?

Personally, I do not believe S. 440 would get two-thirds vote in the House, Senator. To go through an exercise with legislation and not have it become a statute, to me is an exercise in futility. Therefore, we tried in the past to meet the constitutional question and approve legislation that the President would at least tacitly approve.

Would you care to address yourself to that?

Senator JAVITS. Mr. Chairman, I believe that this is really a matter of dignity. We must do what we believe will give us an adequate voice in this awful decision of war.

And, in doing that, we act in the highest tradition of our country because those who wrote the Constitution had in mind, above everything, the fact that the king could commit a nation to war, and they would not have it here. And, in my judgment, S. 440 seeks to restore the constitutional balance that has been upset by post World War II practice. In addition, if one looked at the numerical votes, one could override the President in either House.

You have an enormous vote here and we had an enormous vote in the Senate, and as a matter of dignity, considering the prerogatives of each House, I believe that a veto could be overriden, certainly in the Senate. You must judge as to your own House. But, frankly, Mr. Chairman, I do not believe that this legislation is of a character in which we can try to cut our cloth to suit a President.

STRUGGLE BETWEEN CONGRESS AND PRESIDENT

He is not going to be suited. This is a struggle, between the Congress and the President. This President—whom I helped to elect, and I am

not a bit bashful about it nor do I feel sorry about it at all because he was the best man for the job under all the circumstances which we faced in the last election in my judgment—but nevertheless, his concept of the Presidency is different from mine, and, I think, from a majority of the Congress.

Therefore, we have to have the character to do what needs to be done in the best interest of our country. So, with all respect, Mr. Chairman, I would pass the bill, which is in the best national interest of the country, and fight for the bill, and endeavor to pass it over a veto, not knowing what he will and won't veto.

I believe that on this issue we will prevail, if we have character. On the other hand, if we try to cut and trim to what the President might like or might not like, we will fail, because this is an issue of character. The question really is, Mr. Chairman, are the 535 Members of Congress in a delicate, subtle, difficult situation willing to make the decision for or against war, which could mean national survival.

It certainly could mean deaths, injuries, mountains of treasure and a deep division of the country as we saw in Vietnam. Do we want to shift that over to the President, or are we willing to take the responsibility too as the Constitution says we must.

WE HAVE TO HAVE THE CHARACTER

That is what this is all about, and we have to have the character, if we feel that way; that is our idea of freedom, and we must uphold it.

So I am not, Mr. Chairman, for adopting a bill which is going to make the President resentful, insult him, nor am I for adopting a bill which is going to be shaped so that "We think he is going to sign this one." If we believe we must share this responsibility, we must fashion a bill which will assure us that we are going to share the responsibility, and we might as well fight and die on this battleground as any other if we are going to get licked.

Mr. ZABLOCKI. I agree with you, Senator, except I think we are in a stronger position if legislation cannot be challenged on its constitutionality—where the President can veto the bill by stating it is unconstitutional—and I think we are in a weak position if, indeed, the constitutional question is not adequately resolved.

Our hearings in the past have indicated provisions in your proposal were clearly unconstitutional.

Senator JAVITS. Mr. Chairman, again our testimony—and there is an extensive record of it, and we are going to have another hearing—has, in my judgment, very fully sustained the constitutionality of every provision of the Senate bill and we have had experts of the first rank.

The testimony saying that any part of it is unconstitutional was very few and far between. One law professor, as I remember it, who is John Norton Moore of Virginia, was the only one of the whole panoply of witnesses who testified that he thought it was unconstitutional. He is now with the State Department, which opposes this measure.

But beyond that, there is a more conclusive argument against that attitude by the President. If the President says that it is unconstitutional, what is he really saying? He is saying this statute cannot take the power away from him.

PRESIDENTIAL INTERPRETATION OF WHAT IS UNCONSTITUTIONAL

If it cannot take the power away from him, what is he losing? He is losing nothing. You cannot take away from him constitutional authority by this statute, and I am speaking now as a lawyer.

He may have a grievance, but he is not damaged because he does not lose any power. We cannot take it away from him by this statute if in fact he has the authority he claims and I would hope an American President, after the experience of Vietnam and what it has done to this country, is going to go along with some law which will codify this proposition.

I deeply believe that Presidents, like the Supreme Court, read election reports and read the papers and have an ear close to what Congress does. This is a constitutional crisis, in my judgment, which we will not lose if we have character and resoluteness, and that is all I urge.

Mr. ZABLOCKI. I wish I could be as optimistic as you are, Senator.

One final comment. In rereading the Senate debate on the resolution in the last Congress whenever the constitutional question came up, the defense was, "But, we really do not mean it to be a constitutional test."

Therefore, the constitutional question was not fully questioned when debated in the other body.

Senator JAVITS. Mr. Chairman, I would not wish to say that the constitutional point is not raised and debated but the——

Mr. ZABLOCKI. I do not think it was adequately defended.

Senator JAVITS. Perhaps that is my fault. But it certainly was adequately sustained in the testimony, and, Mr. Chairman, the constitutional question goes both ways.

ASSERTING CONGRESSIONAL CONSTITUTIONAL AUTHORITY

We are asserting a congressional constitutional authority which is at least equal to the President's. That is the point I am making. He cannot take away our constitutional authority, but we have to assert it.

Nor can we take away his, and we will be watchful of that when the matter is debated again on the Senate floor.

This is, at the very least, a question which is open in the Constitution. The Constitution says nothing whatever about committing our forces to hostilities or putting them in such a condition that hostilities are bound to occur. Modern conditions make that tantamount to war, and the declaration of war is obsolescent. Things move too fast, too subtly. You have to do something which will codify the practice.

Mr. Lakeland, my assistant, reminds me that in the debate, Senator Goldwater kept claiming what we ought to do is offer a constitutional amendment, and we challenged that for the reasons I stated. Of course we denied that we were trying to amend the Constitution, as Senator Goldwater claimed. We are restoring the Constitution.

So, I do believe the debate did deal with the constitutional question. But, I will be wary of it, and I am sure Senator Eagleton will be too, when it is again debated in the Senate.

Mr. ZABLOCKI. Mr. Findley.

ESTABLISHING RELATIONSHIPS BETWEEN CONGRESS AND PRESIDENT

Mr. FINDLEY. My thanks to you, Senator Javits, for this very important contribution. This is a field that has long needed attention. It is my belief that the Congress, to this date, has never by statute even attempted to establish a relationship between the President and the legislative branch, and it is time we do it.

You spoke about the importance of the Congress responding with dignity and character. There have been many occasions in the last 4 or 5 years in which the Congress could have responded with dignity and character on the war issue, but it saw fit not to do so.

We could have passed concurrent resolutions to terminate all hostilities in Vietnam within a certain period of time. We could have passed a resolution to send no more troops. We could have passed a bill to actually cut off funds.

Recognizing these might not have had the effect desired, they at least would have been an expression of dignity and character on the part of the Congress in this war powers field.

What is your estimate of the response of the Congress in the future, assuming this legislation is passed? Do you have any reason to believe that in a real test of will between the Congress and the President, we would deport ourselves any better than we have in the past?

Let's say this is on the books and the President gets us into hostilities and we approach the 30-day time limit. Do you really believe that the existence of this legislation would cause the Congress to act more responsibly and with greater dignity and greater character on that occasion than we have in the past 4 or 5 years?

Senator JAVITS. I do, and I will tell you why. This gives you a veto power of war. It codifies the practice. Tom Eagleton called it a methodology. It establishes a responsibility and procedure by statute.

You have to vote if you want war. You cannot get out of it. So, the responsibility is fixed by the measure itself. You cannot say, "Well, the President put us in a position where there is nothing we can do about it now. We might as well show unity by passing a Gulf of Tonkin resolution."

ARGUMENT FOR GULF OF TONKIN

That was the argument for Gulf of Tonkin. You have a constitutional responsibility as does the President. If there is war the blood is on both of our hands. If you want to be really blunt about it, and we should be because war is such an awesome thing.

That is how serious war is. We should not be able to sleep at night any more than the President, in terms of this decision. I deeply believe that charged with that responsibility we will exercise it more responsibly.

As to the various resolutions respecting the Vietnam war, you heard all the debates. "How can we let him down now? What will America's commitment be worth?" et cetera, because there was doubt about whose commitment it was, ours in Congress or his as President.

With the War Powers Act enacted, there will be no question about it. The responsibility is ours and his, and without us he cannot involve us in war beyond 30 days. One argument, Congressman, that this reminds me of is this: It has been argued by the opponents of this bill

that this will lessen the credibility of the American commitment wherever it is undertaken.

I believe it will raise the credibility of the American commitment because, when the Nation then speaks, it will speak with one voice, and no foreign country is going to have to worry about the fact that the Congress may pass a Cooper-Church or a Hatfield-McGovern or whatever.

They will know that it is because the responsibility is total and it has been totally exercised; so that the bill will work precisely the other way, and I again point out that under our bill the Congress can join in making a commitment in advance under section 3(d).

AUTOMATICITY IN THE NATO TREATY

For example, there is no automaticity in the NATO treaty. If the President comes to us tomorrow with this bill—if this bill becomes law—and says, "Look, I want automaticity in the NATO treaty, you need it to back up Europe," then we can give it to him if we judge that provident and no one will have any doubt about our commitment.

Mr. FINDLEY. I am impressed with your argument on that point. Another question raised about the 30-day provision is that it might be an invitation to adventurism on the part of some future President.

He might read this language as an invitation to act a little bit more adventurously than he would otherwise. What is your comment on that point?

Senator JAVITS. I think that is a question of degree. If we have no authority in the field, the likelihood is of his acting even more adventurously. At least here we can shorten the time under this bill, and we can terminate his authority before the 30-day period expires pursuant to section 6 of S. 440.

The fact is that he will have to look over a shoulder and to his flanks and ribs, and I think that will have a sobering influence so far as adventurism is concerned.

As Presidents Nixon and Johnson have construed their power, and other Presidents before them in a lesser degree, there is no restraint. So, I think adventurism is encouraged more by no restraint than by a limited and defined restraint.

Mr. FINDLEY. Senator, one final item is this: You do not make much mention of the reporting requirement in the House bill which I believe is also incorporated in your bill. That I view as a very important item which conceivably could have kept us from the difficulty that we experienced in Vietnam.

REPORTING REQUIREMENT IMPACT ON VIETNAM

Had the reporting requirement been on the statute books in 1962 when President Kennedy sent 18,000 troops equipped for combat to Vietnam but identified them as military advisers—under this reporting requirement set forth in the House version, he would have had to give not only the justification for sending the forces but he would also have had to spell out the legal foundation for that action, and he would have been hard put to find anything in treaty provisions, in the Constitution or in the statutes to justify sending 18,000 troops equipped for combat to Vietnam.

This might at that point of decision have caused him to reconsider and not to send them at all. I view this as an important part of the bill, and I would appreciate any comment you would have.

Senator JAVITS. I thoroughly agree with you. In effect, we have adopted it, and I don't think the House and Senate, even on language, would have any problem on that score. That is the first thing that came out when we did get together in conference last year.

The other thing I would like to point out is you have in House Joint Resolution 2 a provision for special convening of the Congress. I like that very much and believe it should be included in the final product.

I think history is pushing us together, and I see great hope in the new House bill. I am very anxious to find a basis for agreement between us. I believe that your new bill makes it more possible, and what you say is an important factor.

Mr. ZABLOCKI. It is too early to comment on what may be done in conference, but it is indeed encouraging to note your conciliatory attitude, Senator.

Mr. Bingham.

PRESIDENT'S POWERS TO MAKE WAR ON HIS OWN

Mr. BINGHAM. Thank you very much.

Senator, I would like to compliment you most profoundly for your leadership in this field and for the eloquent way you have stated again and again your conviction that Congress must act and act in such a way that the President's powers to make war on his own are restrained effectively.

Having said that, I must confess that I have great reservations about the approach of your bill and the principal reservation I have is the requirement for a rigid 30-day period within which Congress must act affirmatively.

If such a bill as this requires that Congress act affirmatively to approve Presidential action initiating hostilities, then a deadline must be imposed. You cannot leave that open.

I see a lot of trouble and grief in the 30-day provision. First of all, the question may well arise in many cases, when does the 30-day period start. May I ask you this question: Assuming that bill had been in effect during the period of the Vietnam hostilities, when did our hostilities in Vietnam begin so as to start the 30-day period running?

Senator JAVITS. In my judgment the hostilities in Vietnam began when President Johnson deployed our forces in the combat situation to bail out the South Vietnamese which my best recollection is March 1965.

Mr. BINGHAM. You don't think that when President Kennedy sent 20,000 advisers to take part in the operations that that was the commencement?

Senator JAVITS. No. My initial reaction is that if I were President I would not define that as committing us to hostilities or imminent danger of hostilities. What it might have committed us to was having Americans in the area who could become involved with the imminent threat of hostilities and we might have to come to their rescue. However, my mind is not closed on this evaluation. Perhaps the best bench-

mark would be the days President Kennedy ordered U.S. advisers to accompany the ARVN units on combat patrols, with orders to shoot back if attacked.

WHEN DO HOSTILITIES BEGIN?

Mr. BINGHAM. What about President Johnson's ordering of American planes into action against North Vietnam. Was that not the beginning of hostilities?

Senator JAVITS. I don't remember now whether that preceded——

Mr. BINGHAM. That preceded.

Senator JAVITS. If it did precede, I would say yes. I think that you are making a very important point in that regard. I think that it is ascertainable when you are in hostilities or imminent danger of hostilities.

For example, take the Cuban crisis. I think when President Kennedy sent planes over Cuba to take pictures, we were not in hostilities or in imminent danger of hostilities, but when we insisted on inspecting ships, we may have been in imminent danger of hostilities, although it turned out that way because the Soviet ships were not stopped by us but stopped of their own accord.

I think historically there is enough of a line so you can fix the time. As you say yourself, Congressman, you have done a lot of thinking about this. You have a very interesting war powers bill of your own, and I am very gratified you are involved in this issue. I compliment you for participating in such an activity.

We have tried very hard in respect of the 30-day provision to develop some standards. I would be the first to affirm that by no means are we stripping the President of his constitutional powers in S. 440. There still remains great authority in the Office of the Presidency. For example, he can still deploy our forces generally at his discretion. Some have argued against this bill saying, for example, "Well, when the 7-day war occurred he moved the Navy closer to the theater of action." So what? He has a right to deploy them in international waters and put them in a position where they would be better postured if they are to be put into hostilities.

REQUIREMENT OF AFFIRMATIVE ACTION?

Mr. BINGHAM. Can we come back to the problem that is raised by the requirement of affirmative action? It seems to me the 30-day period also poses a very grave problem in that it may require the Congress to take action prematurely.

The President's involvement may appear at that time to be a relatively minor one, but once the Congress has acted in approval the President then has carte blanche to proceed. What I am getting at is I think the congressional action ought to be in the form of disapproval.

I have suggested, as you know, in my bill that it should be disapproval by either House, that as long as the President has the tacit approval of both Houses he can go ahead, but if either House disapproves, he loses authority.

That can take place any time—the first week—or it can take place a year later. The 30-day deadline means that the Congress must make up its mind. It may be at a time of enthusiasm; the country may not realize the implications of a particular struggle. Yet the Congress, once having acted, is committed.

Senator JAVITS. If you were right in your premise, you would be right in your argument, but I believe you are wrong in your premise because our bill permits the Congress to extend the President's authority to a certain date and under whatever conditions that the Congress may specify.

In addition, our bill permits orderly withdrawal if the Congress should refuse to give authority; the President is given the authority to disengage, but to disengage only, considering the security of our troops.

CONTINUING AFFIRMATIVE AUTHORITY OF THE CONGRESS

My answer to you is this: if the Congress believes we should not decide in 30 days, we don't have to decide in 30 days. We can decide in 6 months, but the continuing affirmative authority of the Congress would continue, which distinguishes it from the present situation.

As to the congressional veto, I don't believe that is the most effective route—but mind you, sir, I am not doctrinaire about this provision; my mind is open. I do have a question about both its practicality and its constitutionality.

The most important point is that this is a question of responsibility. We have got to act affirmatively if we are to assume some of the responsibility. We must say "It is our war, too." It is not just Lyndon Johnson's war. War is too important to be entrusted to any President any more than—a common aphorism—it is to be entrusted to a general.

The decision to go to war has to be made by the whole Congress and the President. There is no other way—that is the best we have to offer—to represent the united sentiment of this country. I say do it, but make us take some of the responsibility.

You and I have got to vote "aye." We cannot escape the responsibility. That is the way it ought to be in so awful a decision as war.

Mr. BINGHAM. I wish we could pursue this further, Mr. Chairman, but I don't want to take too much time.

Mr. ZABLOCKI. Governor Thomson?

PROVIDENT ACT OF CONGRESS

Mr. THOMSON. Senator, in your concluding remarks you said something to the effect that only by having Congress act will the decision be provident. The Congress did act insofar as the Gulf of Tonkin resolution was concerned. Would you judge that to be a provident act?

Senator JAVITS. It was an act which was obviously improvident, but perhaps I mispoke myself. What I really feel, to express it precisely, is that if the Congress joins with the President affirmatively, then we will have the best judgment that this country can make. That too might be improvident, but at least it is the summation of the national will. That is what I am arguing. You are quite right to call me to account on that. I am not God; 535 of us are not. But we didn't take the Tonkin Gulf vote as a solemn responsibility and I believe we would do better when we know that the responsibility is ours in full measure.

All I say is the collective judgment is the best we can summon to protect us against improvident decisions.

Mr. THOMSON. The President and the Congress both acted so far as Vietnam was concerned in the Gulf of Tonkin resolution OK, but in spite of that the conflict tore the country apart.

Senator JAVITS. I think again that is a perfectly proper point, but I will say this: Having been here at the time—and this is borne out, I think, by the experience of many—it was felt that we really did not have this responsibility. The President had acted. He put our forces into conflict. We had to back him up, and it really was not so much our judgment as it is his. He made the decision. If we have this responsibility by law—if you have to go back to your constituency, and so do I, and account for the fact that we kept the United States in war, I think it will impose a much heavier responsibility and more solemn consideration.

VALUE OF POWER IS THAT IT EXISTS AS A RIGHT

I will tell you this: The value of this power is not that it will be used adversely all the time. My guess is it won't. The value of it is that it exists and that it exists as a right.

There is no doubt about it, that we too will have the responsibility, and we will have to account for it to the electorate. I deeply feel—and the Senate agrees, a large majority of the Senate agrees—that this is such a qualitative difficulty as to be well worth taking.

It is an advantage over where we stand now. The points you are making are absolutely sound and very valid to be considered in this situation, and I have considered them and given you my best judgement.

Mr. THOMSON. Senator, is the basic difference between your resolution and those proposed by the House that in the Senate resolution the President must act and in the House resolution the Congress must act?

Senator JAVITS. I am sure I know what you are talking about. My answer would be yes, but I don't think I would express it that way. I would say in the Senate the President must persuade us or the situation must persuade us. In order for him to continue he must have a grant of authority. In the House he continues unless the authority is cut off. I think the former is the more desirable for precisely the reason I stated.

The Senate approach breaks with previous practice; it forces us to bear an affirmative responsibility, which we would have to account for subsequently. I think that is good and necessary. I believe the Senate's stand is the better.

OVERCOMING PRESIDENTIAL VETO

Mr. THOMSON. Under the House version, any action you say would be under the threat of a Presidential veto requiring two-thirds vote?

Senator JAVITS. That is right. It would be, and not just a threat.

Mr. THOMSON. Would that be true of a declaration of war?

Senator JAVITS. Yes, the President has to sign a declaration of war, if it took the usual form of a joint resolution. In practice, all our declarations of war have been pursuant to a Presidential request.

Mr. THOMSON. He could veto that, also?

Senator JAVITS. He could, but as I said we have not declared war until the President requested it. That has been the practice of our history.

Mr. THOMSON. That is really the difference between your proposal and the House version?

Senator JAVITS. I think that is true. I think in the House you let him go forward unless you stop him and in the Senate we say, "You do not have the authority to go forward unless we give it to you."

Incidentally, I think an important point in terms of your House is the jointure of interest here. We believe and our bill accepts the fact that both Houses are coequal in this matter, and they are. That is very important.

HOUSE ACTS FIRST ON APPROPRIATIONS

Mr. THOMSON. Is that a unique situation, Senator?

Senator JAVITS. Not at all. I have tried to put money on bills but I was struck down on the grounds that the House must act first on appropriations. So, you have that power. We have other powers; very important powers.

Mr. THOMSON. Thank you, Senator.

Mr. ZABLOCKI. Before calling on Mr. Wilson, the Chair would like to make a comment.

Senator Javits, we certainly appreciate the tribute you paid to the committee and particularly to the chairman. However, it is only proper that our esteemed colleague, the Honorable Dante Fascell, share the tribute because he was the principal sponsor of the amendments.

The sections that were added, 3 and 6, were in no small measure due to his advice and consultation. Therefore the record should show the great respect we have for him and give credit where credit is due.

Senator JAVITS. Mr. Chairman, I might add to that, as I stated Senator Stennis has made instrumental additions of great importance to our bill; and we are deeply indebted to Senator Eagleton for the specifications in this bill, and the questions of the automaticity of treaties, and any implied authority from appropriations bills, and so forth. It was a very creative job indeed.

Mr. ZABLOCKI. Mr. Wilson?

Mr. WILSON. What happens if no action is taken by the Congress in 30 days and then in 6 months Congress does decide that they would like to withdraw?

Senator JAVITS. At the end of 30 days, under my bill, the President would no longer have legal authority to continue the engagement of our forces, except that he would have the authority to disengage them.

Mr. WILSON. What if authority is granted and then in 6 months Congress changes its mind?

CONDITIONS ON GRANT OF AUTHORITY

Senator JAVITS. The grant of authority can be on conditions. We can write into the grant of authority any conditions we wish including monitoring what he does, more frequent reports, et cetera. We can put a date on it and put another date on it if we choose.

We can pull it back if we choose. By now the concept is—and it is still probably challengable but nonetheless seems to have persisted by usage what the Congress does can be undone by concurrent resolution.

So, the conditions of the grant could be written by the Congress in its judgment at the time it makes the grant of power.

Mr. DU PONT. Thank you, Mr. Chairman. I want to say I am wholly sympathetic with what you are trying to do. I think the time has come to redress the balance, to more clearly delineate the responsibility of the legislative versus executive branch in U.S. foreign policy.

At the same time, we are dealing with a very sensitive area. Because we are dealing with constitutional prerogatives, I think it is incumbent upon us to work very carefully. We are not dealing with good intentions. We are dealing with black words on white paper, and we have to be good craftsmen in drafting this. So, I would like to focus on two sections that are bothersome to me.

I was very much with you until I heard your answer to Congressman Bingham's question about military advisers. Looking at the current hot spot of the Middle East, are you suggesting that under your bill it would be permissible for the President to send 20,000 advisers to the Middle East and not be engaged in hostility?

WHAT CONSTITUTES HOSTILITIES?

Senator JAVITS. We covered that specifically in our bill. If you will be kind enough to refer to page 4 of our bill, line 19, you will see this. So, we have tried to specifically cover any such contingency.

Mr. DU PONT. That specific authorization is within the framework of this bill?

Senator JAVITS. That is correct.

Mr. DU PONT. The 30-day period in that case won't begin to run with the assignment of these advisers?

Senator JAVITS. That is correct. But the 30-day provision would be triggered by the assignment of any such advisers in a situation of imminent hostilities.

Mr. BINGHAM. In that case, talking about when the 30 days would have begun to run in the Vietnam situation, you answered it the other way.

Senator JAVITS. You may have a different situation. I am not pleading necessarily for my construction of what is hostilities or the imminent threat of hostilities, but here you have a number of requirements. Different sections of the bill might apply. (1) "The assignment of members of the Armed Forces." (2) "That the Armed Forces of foreign countries are engaged or there exists imminent threat that such forces will become engaged in hostilities." We set this forth in this bill specifically to say that specific authorization was required in order to bring it under a granted power under the bill.

SENDING ADVISERS TO THE MIDDLE EAST

For example, take Mr. du Pont's example: if you sent 20,000 advisers to the Middle East today, you would not put them in a situation—at least I don't define the Arab claims that the war continues to be de facto correct—where there is a struggle now or where there exists imminent threat that such forces will become so engaged. There is also the question of the Mideast resolution which remains on the books.

Mr. DU PONT. I agree with you at the present moment. If those 20,000 people had been sent at the height or on the first day of the 6-day war, your answer would be the other way.

Senator JAVITS. Yes, that is correct, or they had been sent on the eve of the 6-day war—I think that could have been defined as an imminent threat of hostilities. I think the point of imminent threat probably occurred when Nasser ordered the United Nations out of the Sinai.

If the advisers had been there at that time, I would say then they would have come under the prohibition of the statute.

Mr. DU PONT. I think the discussion pointed up one of the problems with your language, and that is with the susceptibility of it to different interpretations and it is a very fuzzy area.

Senator JAVITS. There is no question about that, but that decision would be for the President to make. No one is trying to denude the President of authority. All that we are claiming is a part in that authority which the Constitution says belongs to Congress.

I want to make that very clear. The President will still have a great deal of power. But we do not wish to yield the authority which we should have, and that too is very considerable under article I, section 8 of the Constitution.

PRESIDENT'S LEGAL AUTHORITY CEASES

Mr. DU PONT. Turning to the other area that is of concern to me, as I understand the bill, if Congress does not act affirmatively, the President's legal authority to continue engaging in hostilities ceases.

I am particularly concerned about, if the military action is a defensive one, repealing an attack on U.S. territory. I am concerned because it is so easy in Congress, as you well know, to do nothing.

If there were a military defensive operation going and Congress, not for military reasons, could not convene and act, but for political reasons refused to convene an act, that defensive operation would have to stop.

Senator JAVITS. No; it would not, because the section provides, on page 7 line 8, that "Except in cases where the President has determined and has certified to the Congress in writing that unavoidable military necessity respecting safety of Armed Forces of the United States engaged pursuant to section 3." That is the self-defense section of this act and, "requires continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities."

Mr. DU PONT. Therein lies the problem. If you are repelling an attack on the United States, you would not want to be disengaging.

Senator JAVITS. Of course not. Therefore, the answer is whatever time is required to disengage—section 5 does not specify except for the word "prompt," and it seems to me under that section you would be able to continue for an indefinite time and still meet the standards of the statute, the defense of the country. Moreover, it is incredible to postulate that the Congress would not sanction a defense of the Nation from attack.

DEFINITION OF "DISENGAGEMENT"

Mr. DU PONT. By disengagement, you mean not disengagement of U.S. forces, you mean disengagement of opposing forces?

Senator JAVITS. We cannot disengage unless they do, obviously because military necessity would continue so long as the forces of the United States were under attack. If that is strange—like in the

case Congressman Bingham raised about the advisors—I am willing, with the House, to develop other language. But the hypothesis seems too strange. I cannot envisage a Congress not willing to repel an attack.

The importance of hearings is to bring out exactly these points. On rereading this testimony I might agree that we ought to reword that section. I think Congressman Zablocki and the other Congressmen that have questioned me have put their finger on the key point.

If either House crosses that bridge—we may go your way, you may go our way, but once we settle that key question then I thoroughly agree with you and Jack Bingham that we ought to be as creative and as intelligent as we can in working this out the best way possible.

Mr. ZABLOCKI. Mr. Fountain?

Mr. FOUNTAIN. Thank you, Mr. Chairman. I apologize for not being here to hear your statement initially, Senator Javits. For that reason, I hesitate to ask questions, not knowing just what may have been covered.

However, I do want to ask one question and preface it with a comment. I think all of us can conceive of situations in which the President could well lay the foundation to engage us in war if he wants to, regardless of what the Congress does.

Isn't that a fact?

Senator JAVITS. Yes.

CONGRESS ACTING CONCURRENTLY WITH THE PRESIDENT

Mr. FOUNTAIN. About all we can do is make every effort to put in understandable language requirements which will enable the Congress to act concurrently with the President.

Senator JAVITS. Mr. Fountain, may I interrupt you to say that when I answered yes to that question, I didn't want it to stand naked for this reason: I think a President facing this kind of bill, this kind of a practice, if we enact the Senate bill, would be circumscribed in putting us in a position where we are bound to get into war. He would always have to know that very quickly on the flashpoint he would have to account to and persuade the Congress that he was right.

You are right; the President has enormous range of ways to put us into war if he really sets his mind to it, but the Senate bill would be a good restraint.

Mr. FOUNTAIN. I happen to believe in a strong President. I think in the nuclear age it is essential that we have a strong President, but I also believe in a strong Congress. I think, as you pointed out, in recent years we have been somewhat derelict in delegating or overdelegating power to the President, so that the President does or can do so many things by Executive order.

I am concerned now about the power of the President because of the recent decisions of the President to impound funds. When a President terminates a program which Congress has passed, that frightens me, even if I may have been against the program. Recent decisions of the President in the area of domestic affairs have frightened me tremendously.

VOTED AGAINST UNILATERAL WITHDRAWAL

I say that as one who has supported the President insofar as Vietnam is concerned in every vote that has come before this Congress. I have refused to tell the enemy we were going to get out of Vietnam. I have refused to vote to unilaterally withdraw.

But these decisions on the domestic scene have given me tremendous concern and have prompted me to reevaluate my own thinking about the powers of the President and how much power he is to have, which prompts me to ask this question:

While we are taking a look at the powers of the President and trying to prepare language which will, as you say, exercise certain restraints, do you think we might also give consideration to the power of the President to reduce the two-thirds vote requirement?

He can veto a bill and we can override it, but he has already shown that overriding the veto does not mean so much in some areas. I think his aim is right. Congress has been irresponsible in spending too much and I think Presidents have been irresponsible in recommending too much.

I wonder if we should take a look at the power of the President to veto and consider whether or not two-thirds may be requiring too many. I realize a majority is just a repetition of what you have already done in passing the legislation. Would you comment on that.

Senator JAVITS. Yes, I will, Mr. Fountain. I would not try it now because I think we have enough on our plate. I think there is also one other step which intervenes. We understand from the testimony of administration witnesses that the President will honor our wishes where we mandate expenditure. That test has yet to come. We have not yet sent him something which we mandated and which he did not do.

MANDATING CLAUSE IN LEGISLATION

For example, they claim—hindsight will tell us whether it is so or not—that they are doing what we mandated in respect of education. The general education bill has a mandating clause and the testimony of the administration witnesses is that they are complying with that clause.

The implication is that they will comply with similar clauses. The first test is the REA bill, which is in the House now.

If that becomes law by an override, presumably then I think we will face the issue. If the President defies us on that, then there may be a very strong case for reconsidering the effectiveness of the veto to put us to our proof by such a heavy majority.

I am very hopeful that the confrontation will not be drawn to that extreme, and I might say to you, too, sir, that for me even a more significant aspect of the confrontation is the contention that the President may eliminate a department of government which has been legislated into law.

This, I think, is very worrisome because he has such an easy route, the reorganization route. I believe that, as for expenditures, we will know quite soon whether we need to go to the extreme of trying to change the structure of government. I hope not.

PRESSING PRESIDENT'S POWER TO THE EXTREME

I hope the administration will remain catholic to what we understand to be its position, that it will not press the President's power to that extreme.

Mr. FOUNTAIN. I agree with you. I don't think our present President will do that. I am delighted to know he will honor, and I always felt he would, a final voice of the Congress.

I am thinking about future Presidents, and I think that is why we now need to take a look and do something about it, because if a future President has the precedent of a President having abolished an agency, let's say that Congress set up outside of his power, or terminated programs which Congress has legislated and provided appropriations for, it seems to me that there is no limit to what the wrong kind of President might do. That seems to me to be on the road to dictatorship, which I think we all abhor.

Senator JAVITS. I agree.

Mr. ZABLOCKI. Mr. Biester?

Mr. BIESTER. I want to preface my remarks with an expression of gratitude that you have been at the forefront of this struggle to try to reassert a balance between the Executive and the Congress with respect to warmaking powers.

However, I have certain problems with S. 440, and I would like to review those with you, if I might. Perhaps your answers can clarify my thinking.

LONESOME HEROIC DECISIONS

First, wouldn't the President want the Congress with him in a difficult decision like that so if it goes sour there is enough blame spread around that he is not the one who takes it all.

Senator JAVITS. You would think that, and yet Presidents in history have often loved these lonesome heroic decisions made in their study in the deep of the night or early in the morning where he feels this is his rendezvous with history.

He decided and changed the course of mankind. So, I don't think you can rely on that.

Mr. BIESTER. I was thinking in terms of the Gulf of Tonkin resolution which when the critical moment came for massive escalation of that war, one of the first acts the President engaged in was to draw the Congress with him by the Gulf of Tonkin resolution.

Senator JAVITS. He did spend a lot of time referring to it. It is said President Johnson carried a very frayed copy in his pocket at all times. Yet he and his people constantly testified they did not really need it.

Earlier I read to you Katzenbach's statement and the President himself spoke similarly: He had all the power he really needed. Indeed, this administration has said the same thing. It was very willing to see the Gulf of Tonkin resolution repealed because they felt they did not need it.

CASE OF PREEXISTING ENGAGEMENT

They had a better case than Lyndon Johnson. They had a case of a preexisting engagement and the necessity of protecting troops while

pulling out, but they certainly strained that justification when we went into Cambodia.

Mr. BIESTER. Supposing a case, not pursuant to 3(1) or 3(2), a President has committed 50,000 to 80,000 troops into an area and 29 days after that the Congress says no. That is not to go on. What are the mechanics by which he withdraws those 80,000 people on the 30th day?

Senator JAVITS. He withdraws them as is consistent with the combat and their security, and that is what we provide in the bill.

Mr. BIESTER. Isn't that pretty much the powers that this administration argued it had in Vietnam?

Senator JAVITS. This administration had a better case than the Johnson administration, but it certainly strained that case when it went into Cambodia and when it engaged in the mining of the Haiphong Harbor and the incentive bombing of North Vietnam.

It was still within the general ambit of the case. I agree with that. As a matter of fact, I think, to revert to a previous discussion with both Congressman Bingham and Congressman du Pont, I would want to reevaluate my own off-the-cuff judgment as to the flashpoint in respect to the advisors. I think, as they have pointed out, if we provided for it specifically in the legislation, we had in mind the fact that at the point when we sent advisors we were in hostilities or in imminent danger of hostilities. The fact the troops only carried carbines or pistols or nothing at all did not make the difference.

INHIBITING DIPLOMATIC FLEXIBILITY

Mr. BIESTER. Do you see any problem in a President's not being certain when to set this point at which he feels he must make the report, when the public nature of that report perhaps is inhibiting diplomatic flexibility at a moment in time which could result in destabilizing of the situation and in fact accentuate the risk of conflict?

Senator JAVITS. I think it is for that reason that this question has to be left to the President who is the man who decides that this is the time that he has to initiate action, which he then must account for and justify.

I think, however, it strengthens the hands of the Congress in that we challenge him on that issue which we have no methodology for it. Under the present set up our authority must lie dormant.

We have no practice for it. S. 440 would codify the situation. I hope you will bear with me when I repeat this is essentially a codification of practice. It cannot change constitutional authority.

Mr. BIESTER. I think some of the points I am raising demonstrate that it is a confusing practice and the practice has not necessarily produced a very balanced situation.

Senator JAVITS. It is not airtight. The President is elected, as we are.

Mr. BIESTER. One last question: With reference to Senator Goldwater's proposition, I would agree with you, and I would like to have 5 or 10 examples in which the Congress was right over the last 75 years and the President was wrong.

CONGRESSIONAL PRIORITY PROVISION OF S. 440

Mr. ZABLOCKI. I have one further question. Senator, you have been an excellent witness. I am deeply impressed with your references to

improvident decisions. I do have some concern with section 7 in S. 440, the congressional priority provision. It appears that section 7 almost insures precipitous action by the Congress on the question of war making powers.

Given the monopoly over the information about the crisis which Presidents usually claim and which they are too often reluctant to share with Congress, won't that certainly result in Congress rubberstamping what a President does? Indeed, we would have an improvident decision if the resolution is brought directly to Congress bypassing committees which would hear the testimony. Further, would Congress have to act 1 day after the resolution was introduced?

Senator JAVITS. Again, like a previous question, if your premise was right, you would be right, but your premise is not right for this reason: It mandates a very expeditious procedure if the Members of each House do not change that procedure, which they can do by a majority yea or nay vote, and I beg you to notice that. All the provisions here for expedition are simply to prevent a minority from blocking the majority.

They are not designed to block the majority because it says that "The bill shall be considered reported no later than 1 day following its introduction unless the Members of such House otherwise determined by the yeas and nays.

"It shall be reported to the floor * * * " and so on. "It shall become the pending business and shall be voted upon within 3 days unless such House shall otherwise determine by the yeas and nays."

STUBBORN MINORITY RESISTANCE

In short, the majority has complete control over the extent of the deliberation in which it engages, but we do not wish to enable a minority to let the 30 days run out and, therefore, like a Senate filibuster, succeed simply because of stubborn minority resistance.

That is all I am trying to say.

Mr. ZABLOCKI. Not having experienced a filibuster in the Senate, I am not familiar with such tactics.

Mr. DU PONT. Do you believe that that language effectively prevents a filibuster in the Senate?

Senator JAVITS. Yes, sir, we have it in the Reorganization Act the same way. You cannot filibuster a Reorganization Act resolution. It has substantially the same terms.

Mr. FINDLEY. Senator, as I read it, your bill S. 440 in its reporting requirements does not require that the President report in writing promptly to the Congress whenever he places forces equipped for combat on foreign territory, airspace, or water.

It has to be related to hostilities or the imminence of hostilities before the report is required. That strikes me as a serious defect. In the House language it "* * * would require the report whenever forces equipped for combat are placed on foreign territory, airspace, or waters for whatever purpose or whenever such forces are substantially enlarged."

Would you agree with me this is an important distinction?

Senator JAVITS. I would give the most careful consideration to that. That involves serious questions of policy, and perhaps Jack Bingham and Congressman du Pont would also like to see some other definition

93-626 O - 73 - 3

to catch up with the matter of advisers, and that would be the place to do it because that would spark the rest of our bill.

I would want to consider that very carefully in view of the other opinions expressed, like those of Mr. Fountain, Governor Thomson and Mr. Biester: that the President has broad deployment power. It is a question of balance.

INHIBITION ON PRESIDENT'S DEPLOYMENT POWER

Mr. FINDLEY. How could you interpret the reporting requirement as an inhibition on the President's deployment power? All he has to do is report.

Senator JAVITS. That is right, but as Mr. Biester said, and I think properly, on occasion a report which is a public report may be an inhibiting factor because of the delicacy of negotiation, et cetera.

Mr. FINDLEY. But the Committee on Foreign Affairs in considering its legislation in the past has taken into account the very strong likelihood that these reports might be carefully and very heavily classified, if not in whole, in part. We take into account the possibility that a report might carry the highest classification when it is transmitted to the Speaker of the House or the President of the Senate.

Senator JAVITS. I compliment you on that. I am, in general, impressed with the House's reporting provisions, but I would require him to report in terms of the authority specified within the bill—that is, section 3—and not just any claimed authority.

We already show in our now bill that impact and I am sure as the result of a conference, the bill will show even more of the House's impact. There is no question about the fact that the House's, being essentially a reporting bill, has very thoroughly implemented that concept, with the caveat I mentioned about the citation of authority claimed by the President.

INVENTING CLAIMS TO AUTHORITY

You concentrated on it, and you did the best you could with it but we shouldn't leave an open invitation to invent claims to authority outside the terms of the bill itself.

Mr. FINDLEY. There is another important distinction between the House language on reporting and the one that is in your bill. Under section 4 you state that "* * * the report must give full account of the circumstances, the estimated scope and the consistency of introduction of forces into hostilities." I am paraphrasing.

There is no requirement that the President in his written report cite the legal justification for the introduction of military forces into such circumstances.

Senator JAVITS. I think the implication is clear on that point in referring back to section 3 of S. 440 which gives the President affirmative authority in certain circumstances. We call for the legal justification, but if it needs to be spelled out more clearly, again I would certainly be instructed by the House in that area.

Mr. FINDLEY. If the report goes beyond circumstances of hostility, it would seem to me equally important, if not more important, that the legal foundation for the steps be required in the report, and I cannot think of any reason not to be specific on that requirement. Can you?

Senator JAVITS. No.

DIFFERENCES WILL BE RESOLVED IN CONFERENCE

Mr. ZABLOCKI. Thank you, Senator. You have been an excellent witness. I am quite optimistic that when both Houses will act on the proposals the differences will be resolved in conference.

Senator JAVITS. Thank you, Mr. Chairman. I deeply appreciate that. That is probably the most important thing that has been said at this hearing so far.

Mr. ZABLOCKI. Senator Eagleton is our next witness.

Senator Eagleton is a graduate of Amherst College and the Harvard University Law School. Following terms of office as attorney general and Lieutenant Governor of Missouri, he was elected to the Senate in 1968.

The subcommittee is pleased to welcome you here today.

STATEMENT OF HON. THOMAS F. EAGLETON, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator EAGLETON. Thank you, Mr. Chairman. It is a distinct honor to testify before your distinguished subcommittee as an advocate of the Senate war powers bill, S. 440.

Last month in a speech on the floor of the Senate, I called upon those who have participated in the drafting of war powers legislation in both Houses to resolve differences of approach by opening a constructive dialog. The kind invitation you have extended me to testify today is a clear indication that the members of this subcommittee desire to work expeditiously toward the day when Congress can speak with one voice on this important constitutional issue.

An overwhelming majority in both Houses now recognize that the responsibility of Congress to decide when our Nation goes to war has been usurped. But this majority has not been formed overnight. The distinguished chairman of this subcommittee was the very first to offer legislation to correct the institutional failure we have experienced in the warmaking area. The historic legislation that will finally emerge from this Congress will bear the mark of Chairman Zablocki's pioneering leadership.

NO ONE ABSOLUTE FORMULA

There is considerable merit to be found in each of the proposals that have been made to legislate in this highly complex area. And no one Member of Congress can claim to have found the absolute formula which will serve both to fulfill the intent of the Constitution and allow for the exigencies of modern civilization.

If we are to find an enduring solution, we will have to subject our proposals to careful deliberation and collective judgment, the very characteristics that the founders considered to be the primary source of Congress' strength.

But deliberation must be an active process. The time has come for Congress to reassert its role within our system. The public is now keenly aware that it is wrong to wage war without the full consent of Congress and the people. We cannot risk the possibility that memories

will fade before we have corrected the deficiencies that contributed to involving us in the most unpopular war in our history.

The issue before this committee today is not a partisan one. And, in the contemporary sense, it is not built on ideological bias. Those who have been active in seeking to correct the imbalance within our system represent a wide spectrum of political thought. Certainly the distinguished chairman of the Senate Armed Services Committee, Senator Stennis, and I have differed greatly on the efficacy of our involvement in Indochina. We both believe, however, that the decision to wage war must be made by Congress. As Senator Stennis has said:

> The last decade has taught us * * * that this country must never again go to war without the full moral sanction of the American people. The only practical way for all parts of the Nation to participate in such a decision is through the Congress."

THE CONSTITUTIONAL QUESTION

Before we can begin to correct the institutional deficiencies that were so dramatically exposed during the Vietnam years, we must first understand the nature of the constitutional crisis that now confronts us.

Congress' role in the warmaking area had seriously deteriorated long before we became involved in Vietnam. In the post-World War II period, Congress seemed, in large part, unconcerned with Presidential encroachments. Symptomatic of this lack of concern was Congress' quiet acquiesence in the early 1960's as Presidents gradually involved us more deeply in hostilities in Vietnam.

When, in a time of apparent crisis, both Houses routinely approved a vaguely worded and ill-defined White House draft which became known as the Gulf of Tonkin resolution, there were few in Congress who understood that the awesome responsibility to decide whether, when, and to what extent America would engage in hostilities was being delegated to the President.

Whether or not the Members of this body understood the full consequence of their vote is now a moot point. Faulty vision and political pressures cannot be permitted to minimize the legal significance of the Gulf of Tonkin resolution.

The constitutional crisis we experience today has not come about because the Gulf of Tonkin resolution was passed, but rather because it was repealed—on January 12, 1971. Since the date, President Nixon has relied almost exclusively on alleged Commander in Chief powers as authority for American involvement in Indochina. The war is now—we hope—coming to an end, but the constitutional question remains unresolved.

If the President's claim of power is allowed to stand without challenge, Congress will have lost its own powers by attrition. Instead of making the decision whether or not to authorize hostilities before they begin, we will be left in the position of either ratifying or attempting to reject Presidential faits accomplis.

The President cannot be allowed to initiate hostilities at will and then force Congress to muster a two-thirds majority of both Houses to stop him. That is precisely the problem we must address if Congress is going to regain its proper role.

I would like to present today a defense of the bill that was passed in the Senate during the last session of Congress by an overwhelming

68 to 16 majority. This bill, which was jointly authored by Senator Javits, Senator Stennis, and me, represents more than 3 years of concerted effort and careful deliberation. I believe that our bill has great merit, and I hope that this committee will give it close consideration.

CONSTITUTIONAL RESPONSIBILITIES OF CONGRESS AND THE PRESIDENT

I would like initially to establish two basic points which I believe must be reflected in any responsible attempt to legislate in this area.

First, Congress alone was given the responsibility to decide on the crucial questions of war and peace. The record is clear that those in attendance at the Constitutional 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."

The two Founders who are considered to be ideological adversaries on the question of congressional versus Executive power, James Madison and Alexander Hamilton, were in accord on the war powers issue. In the Federalist Papers, Madison stated:

> * * * 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 the cause of declaring war * * *.

Alexander Hamilton was equally emphatic when he declared that it was the "exclusive province of Congress, when the Nation is at peace, to change that state into a state of war * * * it belongs to Congress only, to go to war."

Second, the Commander in Chief was given the authority to "repel sudden attacks." The initial draft of the Constitution provided that the legislature should "make war." But this phrase was changed because of a concern that that wording did not, in the words of Madison and Gerry, "leave to the executive the power to repel sudden attacks." The expression "make war" was then changed to "declare war."

As we now seek the legislative formula that will best help us to fulfill the intent of the founders, we do so with the perspective of almost 200 years of experience in working with the Constitution. This is to our advantage.

But the exigencies of modern warfare are far beyond the imagination of those who drafted our fundamental law. Today, the Commander in Chief can move whole divisions half-way across the globe in a matter of hours * * * complex military alliances seem to commit us far beyond our own borders * * * and, perhaps most importantly, we can destroy ourselves and the rest of the world at the press of a button. To clarify the respective roles of Congress and the President in this environment is no easy task.

CODIFIED DELINEATION OF POWERS NEEDED

During most of our history, the legislative and executive branches were able to operate within the gray area that separates their respective war powers with no clarifying legislation. This was possible

because both sides pursued their obligations by exercising mutual restraint and good faith. This is no longer the case. Congressional apathy and Presidential aggressiveness have eroded the partnership in decisionmaking that the founders had originally intended. Our challenge today is to carefully circumscribe that discretion while still permitting enough flexibility to insure the national security.

Assuming that the provisions of the legislation we propose will be carried out in good faith—and we should assume nothing less in a nation of laws—we must, in my opinion, carefully define and codify the President's emergency powers to eliminate, to the maximum extent possible, his use of discretionary judgment. To do this we will have to avoid the loopholes that White House lawyers have so frequently found in other legislation. But we must also recognize that the biggest loophole of all occurs when we use phrases such as "in the judgment of the President" in lieu of our own definitions.

Some have argued that the codification of powers may have the unintended effect of giving away too much power. I believe that the contrary is true. By carefully defining these powers we not only limit them, we also permit ourselves to assess the President's implementing action against a very specific benchmark citation.

The best testimony that codification is the most feasible approach to the delineation of emergency powers is found in an examination of the provisions we have included in the Senate bill. After literally hundreds of drafting changes, I am convinced that we have considered all contingencies and that the fine line between Presidential flexibility and accountability to Congress has been found.

DESCRIPTION OF EMERGENCY PROVISIONS

We have allowed three situations where the President may take unilateral emergency action without prior consultation with Congress. Following is a brief description of these provisions.

The first emergency provision allows the Commander in Chief to:

> Repel an armed 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.

There were two controversial aspects involved in delineating the Commander in Chief's authority to repel attacks upon the United States. First, it was necessary to grant him the right to "forestall the direct and imminent threat" of an attack. While it is obvious that these words grant to the President a degree of judgment and discretion, we had to concede that this authority is inherent in the act of repelling an attack. It has been recognized as such both by the Founders and by subsequent judicial opinion. Justice Storey, for one, gave judicial support to this concept when he stated in *Martin* v. *Mott*:

> 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.

The granting of a degree of discretion in forestalling an attack, however, is carefully circumscribed in our bill. For instance, the threat which triggers Presidential action must be "direct and imminent." The President's judgment is even further subjected to congressional scrutiny by the additional requirement to report to Congress at the

earliest possible time and by the 30-day provision, which I will discuss later.

It was then necessary to deal with the most significant change in military warfare in history—the introduction of the atomic bomb. Today that weapon has forced us to consider contingencies that were beyond the wildest dreams of Thomas Jefferson and Alexander Hamilton. We must literally concern ourselves with the future of the world.

We have thus far managed to avoid a nuclear holocaust by depending upon universal acceptance of the policy of mutual deterrence. Our first emergency provision maintains the integrity of that policy by allowing the President to take "necessary and appropriate retaliatory actions." The words which condition this delegation of power are, of course, "necessary and appropriate."

HOLDING THE PRESIDENT LEGALLY AND POLITICALLY ACCOUNTABLE

The question of whether to expressly prohibit the President from initiating a preemptive nuclear attack was debated at some length. It was finally decided that, in the final analysis, all any legislation can expect to achieve is to hold the President legally and politically accountable for his actions. The consequences that would follow a first-strike nuclear attack by the United States would make the question of political and legal responsibility moot.

The second emergency provision allows the President to.

> Repel an armed 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.

This provision is, in large part, self-explanatory. The Commander in Chief obviously has the right and duty to protect American forces who are attacked while legally deployed in a foreign country. Again, we have permitted the President what we consider to be his inherent right to forestall a direct and imminent threat of attack on those forces.

In this case, however, we do not delegate the right to retaliate for such an attack. If the President feels that an attack on U.S. forces is of such a nature as to warrant retaliation, he must come to Congress for that authority.

The third emergency provision concerns the rescuing of American citizens who may be threatened while in a foreign country. The provision reads as follows.

> * * * to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat of the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present with the express or tacit consent of the government of such country and 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; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evaculated from such country * * *

The tightly worded language of this provision is designed to emphasize that the President has authority only to rescue endangered American citizens. He may not use the circumstance of their en-

dangered position to pursue a policy objective over and above their safe evacuation. Even before the President can take action under this provision he must ascertain that the government of the country in question is either incapable of protecting Americans or is itself presenting a threat to them.

EXPANDING RESCUE OPERATION INTO INVASION

Obviously, the most recent instance of a President expanding a rescue operation into an invasion was President Johnson's action during the Dominican Republic crisis in 1965. It should be emphasized that the policy considerations that motivated President Johnson may have been correct. They were, however, legally questionable since Congress was excluded from the decisionmaking process.

I believe that the careful drawing of emergency authority will, in the first instance, effectively curtail the President's usurpation of the role of Congress. We sometimes become overly concerned with the possibility of "tying the President's hands," and at the same time ignore the fact that the President now routinely preempts Congress own efforts to fulfill its warmaking responsibilities. The emergency powers we have delegated in the Senate bill will allow the President to respond expeditiously in an emergency while assuring that the important policy decision—whether or not to enter war—remains with Congress.

OTHER SITUATIONS REQUIRE SPECIFIC AUTHORIZATION

Beyond the codification of the President's emergency power, the Senate bill then considers the process by which Congress can delegate further authority to wage war in the more classic—offensive rather than defensive—sense of that word. This authority, according to our bill, can only be given as the result of a specific statutory authorization.

But we have gone beyond the simple statement that statutory authorization is required by stating that such authorization cannot be inferred from any other legislative action. Such action must include a specific authorization granted by both Houses of Congress. For this reason, treaties are exempted as legal authority for introducing forces into hostile situations.

It should not be necessary before this committee to consider this exemption at length. Since treaties do not require the approval of the House of Representatives, they could not possibly be used as authorization to conduct war. The founders clearly assigned that decision to both Houses of Congress.

We have also categorically stated that appropriations measures cannot imply congressional authorization to conduct war. If this principle were accepted, the President could theoretically wage war with impunity while confidently challenging each House to attempt to muster a two-thirds majority to stop him. Such a situation is not only extremely dangerous but, in effect, it turns our carefully devised system of checks and balances on its head.

The provisions I have just discussed—which are all under the section of our bill entitled "Emergency Use of the Armed Forces"—are, in my opinion, the most important part of the bill. These provisions represent the up-front delineation of the respective powers of Congress

and the President. I consider such a delineation of powers to be the indispensable foundation for any measure of this type. If these provisions are respected, no further enforcement mechanism would be required.

THE 30-DAY PROVISION

No matter how tightly we circumscribe the Commander in Chief's emergency role, however, we should not satisfy ourselves that that role would never be abused. Even if Presidents executed the provisions of the war powers bill in good faith, it would still be possible for them to use the discretion then retained as Commander in Chief to move our Nation from a defensive conflict to an offensive one. Whether this occurred inadvertently or not, Congress must possess the legislative mechanism that would require it to protect its own prerogatives.

Congress alone must decide whether we will enter an offensive war. And Congress alone must have the means to stop a President when he moves beyond the strictly defensive powers he derives from the Constitution.

Some have argued that the power of the purse would, in itself, be sufficient to protect Congress' right to declare war. In other words, if the President entered an offensive war without the consent of Congress, we could then cut off funds for that war and thus impose our will.

Acceptance of this argument would seriously distort the founder's intention. We cannot subject our exclusive responsibility to a Presidential veto and then be put into the position of attempting to override that veto to stop an illegal war. If we accept this premise, we will have compromised our most solemn responsibility.

The framers of the Constitution were aware that by giving specific and residual powers to the Congress and a somewhat undefined charter to the President, they had created a system of concurrent authority. They were fully aware that by doing so, they had sowed the seeds for possible conflict. How this conflict—if it occurred—should be resolved was also clear to them. Compromise would be sought at all costs but if negotiations proved fruitless, overriding control would remain with the Congress.

If the conflict centered over an action already begun, the Congress would not be helpless in the face of a fait accompli. Again, it was Hamilton who wrote:

> The legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions.

MUST IMPOSE THE WILL OF CONGRESS

To impose the will of Congress, therefore, we have chosen to limit the President's emergency powers in a quantitative manner by requiring congressional approval within 30 days if he wishes to continue his action. If such approval is not forthcoming, then the emergency action must be terminated automatically—the only exception being that the President could certify in writing that "unavoidable military necessity" to protect our forces requires continued action to bring about a "prompt disengagement."

The burden of proof is, therefore, on the President. He must demonstrate: (1) that the emergency action he has taken is legitimate and in accordance with the provisions of our bill; and (2) that continuation of such action beyond 30 days is warranted.

The President's case can be heard and then voted on by either House, if one-third of the membership cosponsors a bill or joint resolution. If this occurs, under the priority provisions, the question then must be voted on no later than 1 day after its introduction. Each House would then decide by a simple majority vote whether or not to approve the President's request.

The choice of 30 days has been criticized by some as too short and by others as too long. Admittedly it is an arbitrary choice but both these arguments can be answered by the same procedural explanation.

The passage of our bill will provide a constant warning not to give away the fundamental power of Congress even in a period of crisis. When Members of Congress are statutorily forced to uphold their responsibility, I expect that they will be very leery of either delegating it away too soon or allowing it to be abused by improper Presidential action.

If, therefore, Congress feels a longer period is needed to consider the President's request it can extend the authorization period for as long as it wants without ever losing control of the decision to declare offensive war. If, on the other hand, the President has clearly and blatantly abused his emergency authority, Congress may act to stop him immediately, even before the 30-day period is completed.

I concede that there may be other enforcement methods that could be used. For example, some have suggested a qualitative approach which would require the defining of circumstances or conditions whereby the emergency action would be recognized as changing in nature from defensive to offensive. I believe, however, that the straightforward quantitative approach avoids the subjectivity of other methods and would be easier to administer. Most importantly, the 30-day provision protects Congress' war powers by allowing Congress alone to make the decision whether or not to enter our Nation into a state of war and by placing the burden on the President to prove either: (1) that we are not already at war, or (2) that offensive war is warranted.

APPLICABILITY OF S. 440 TO INDOCHINA CONFLICT

Mr. Chairman, no discussion of war powers legislation would be complete if we failed to consider the single issue that has caused us to rethink so many of the fundamental principles upon which our Nation was founded—the Vietnam war. Controversy over that war continues to occupy us even though a cease-fire agreement has been signed and our military forces and POW's are coming home.

If all goes well, our active military participation in Vietnam will end on March 28. But many, myself included, are seriously concerned that the President could again involve us in that conflict without the consent of Congress.

Two weeks ago Senator Javits and I issued a joint statement clarifying the applicability of our bill. We stated that the provisions of S. 440 would apply in full to any reintroduction of forces to Indochina after our current military involvement is terminated.

This interpertative statement was necessary because we had originally excluded the ongoing conflict in Vietnam by stating in our bill that the provisions,

shall not apply to hostilities in which the armed forces of the United States are involved on the effective date of the act.

We had originally questioned the legality of enacting legislation which would apply retroactively and impact upon the Commander in Chief's current interpretation of his own powers, however mistaken we believed that interpretation to be. In addition, we did not believe that the constitutional issue would ever be resolved if we subjected our bill to the political debate of a very emotional contemporary problem.

Some have already introduced legislation to prohibit the expenditure of funds for a reintroduction of military forces into Indochina in the absence of congressional authorization. While I would support these measures because I agree with the policy considerations that motivated them, I do not feel that they address the more fundamental question: Does the President have the constitutional right to reenter hostilities in Indochina or anywhere else without the express consent of Congress?

These measures depend exclusively upon Congress' power of the purse to enforce its will on the question of Indochina. The power to appropriate is, of course, our strongest ace in the hole in resisting encroachments upon our legitimate powers. But this power should be used only as a last resort—it cannot be seen as the primary means of reasserting congressional war powers.

The legislation we propose would involve Congress in a positive manner at the outset of any emergency action and before any other hostility the President may feel our Nation should engage in. If the President refused to abide by the statutorily imposed procedure we propose today, he would have broken the law. If such a tragic breakdown of our system of laws should occur, we would then use our power of the purse as a last resort to stop him.

MUST SUBORDINATE PERSONAL VIEWS

As difficult as it may be, we must subordinate our personal views on the question of Vietnam to the more fundamental question of our constitutional responsibilities. As a policy matter, I have opposed our involvement in Vietnam and, now that a cease-fire agreement has been signed, I will work as one Member of Congress to assure that we do not become reinvolved. But I am willing to subject my personal view on this matter to the deliberation and collective judgment of this entire body. I would expect that those who differ with me would be willing to do likewise.

The issue that we discuss today goes far beyond our personal views. We propose to assure that each member of this body is held accountable for making the awesome decisions that could lead our country to war.

It is clear that Presidential decisions shaped the course of the war in Indochina 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.

The Founding Fathers sought to create a process by which important decisions would be reached only after thorough deliberation. They fully expected that the responsibility for committing the Nation to war would be shared—and that Congress would authorize this important commitment. It is time that we return to the spirit, as well as to the letter, of the system they worked so hard to create.

Mr. Chairman, I ask for an insertion from the Congressional Record of June 23, 1970, which is a record of colloquy I had with Senator Dole of Kansas, be inserted in the record at this point.

In addition, Mr. Chairman, I ask that the speech that I gave on the floor of the Senate on January 18, 1973, this year, when the War Powers Act was reintroduced, also be inserted in the record. This covers evolution of the Senate bill.

Mr. ZABLOCKI. Without objection, it is so ordered.

[The material follows.]

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.]

93-626 O - 73 - 4

"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 o"- 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

[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.

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[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 *a* 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.

[From the Congressional Record, January 18, 1973]

Mr. EAGLETON. I am pleased and honored to join again with Senators Javits and Stennis in introducing this important legislation.

The sponsors of the War Powers Act are joined together in a purpose which transcends partisan and ideological lines. We have of course, been motivated by the tragedy of our involvement in Vietnam—an involvement that has never received the unqualified support of the American people. While each of us has his own view as to how to end that involvement, we share the common belief that our experience in Vietnam has exposed a breakdown in the institutions of our Government. Most importantly, we are concerned that Congress has failed to assert its constitutional mandate to decide whether America goes to war.

Much has transpired since this body last considered the War Powers Act of 1972—passing that Act on April 13, 1972 by an overwhelming 68 to 16 vote.

After elevating the hopes of the American people with the now famous peace-is-at-hand statement in October, President Nixon conducted one of the most brutal bombardments in the history of aerial warfare over Hanoi and Haiphong in December. I am sure that the President made his decision because he felt that it was in the best interests of the country. But even now, after the bombing has been halted, the President has refused to come to the American people to explain why such action was necessary. If decisions of such moment as to involve war and peace are made in secrecy and kept from the arena of public opinion, the democratic process will be undermined.

The air bombardment of North Vietnam has made Americans more aware than ever of the dangers of permitting a single man to retain excessive power. But as American citizens have turned to Congress for action, they have become even more frustrated as they realize that our system of checks and balances has, to a significant degree, been compromised.

The President's recent announcement that bombing would be halted above the DMZ and the various news reports that a negotiated settlement is near have given us new cause to be hopeful. If we are again disappointed, however, and if the President again decides that military escalation is necessary, the burden for ending this long and tragic war would belong to the Congress of the United States.

But because we in Congress have forfeited our responsibility to decide by a simple majority vote the geographic limitations and the duration of our involvement in Indochina, we now must end that involvement by a two-thirds majority to override the expected Presidential veto. Congress must be involved at the outset in the decisions that could lead our Nation to war, not after our troops have been committed. That is what the War Powers Act is intended to accomplish.

Congress has failed in the past to assert its constitutional war powers because, quite frankly, the individual members of this body have preferred to avoid the more difficult questions facing our Nation. The temptation for those of us in political life to avoid such decisions is a natural tendency that cannot be condoned but must be considered as we seek to improve the institutions that guard us against human weakness. What we ask today is that this Congress establish a procedure which will obligate its Members to fulfill their responsibilities in making the most awesome decision that our Nation must face—the decision to go to war.

The history of the drafting of this legislation represents an exceptional chronology of Congress growing awareness of its own powers—an awareness that has brought us today on the brink of serious constitutional confrontation with the Executive in a variety of areas.

The Zablocki bill which passed the House of Representatives by unanimous consent on August 2, 1971, was the very first war powers measure considered by Congress. This bill, introduced as a Joint Resolution expressed the sense of Congress that whenever feasible the President should seek appropriate congressional consultations before involving the Armed Forces of the United States in armed conflict. This somewhat timid approach would have ceded to the President powers of discretion which he does not possess today even in the absence of specific war powers legislation. Congressman Zablocki's effort in 1970 did indicate, however, that the House of Representatives recognized the erosion of the congressional war power.

My distinguished colleague from New York (Mr. Javits) deserves great credit for introducing the first war powers bill in the U.S. Senate in June 1970. Senator Javits' bill provided a vehicle for Members of Congress and prominent constitutional scholars to discuss the parameters of congressional authority.

In February 1971, Senator Javits submitted a revised and superior version of his war powers legislation of the previous year. This bill was designed to make rules respecting military hostilities in the absence of a declaration of war. In this bill,

Senator Javits introduced for the first time the concept of placing a quantifiable limitation on the authority of the President to act in certain emergency situations spelled out in the bill.

The justification for establishing a 30-day period—within which the Congress must act to authorize the President to continue his use of forces in an emergency—is still applicable in the bill we introduce today. While recognizing the authority of the Commander in Chief to take emergency action—to repel an attack on the United States, or on U.S. Forces stationed abroad, or to rescue under carefully circumscribed conditions American citizens in foreign countries—we establish a procedure whereby Congress must be immediately notified of the emergency circumstances that justify the commitment of American Forces.

By placing a 30-day limitation on the President's emergency authority we recognize that a defensive emergency action can develop the offensive character of war. If Congress is to be involved in the decision to pursue, define, or, alternatively, to reject that war, it must be notified immediately of any emergency and convene to determine, first, whether such action was legitimate in the first instance, and second, if continued action of a retaliatory nature is either necessary or prudent.

In a recent New York Times article entitled "Making War, Not Love," Tom Wicker has the following to say about the War Powers Act:

"The so-called War Powers Act now pending, for example, would require a President who had sent the Marines to the Dominican Republic or the B–52's to Hanoi to report to Congress within thirty days and to ask for its approval. This would give the President thirty days of war-making license not now specified in the Constitution. Worse, it wraps the President in the flag, gives him the initiative as a Commander in Chief who has acted in what he will surely call the national interest, and puts the onus on Congress to declare that he was wrong and ought not to have done it."

This interpretation of our bill is inaccurate. The President is required to report promptly to Congress if he commits American forces in an emergency action. Congress in addition can act before 30 days if it wishes to remove the authority granted by the emergency provisions of the bill. This action can be taken with or without a report from the President.

Some critics seem to deny the President any emergency authority whatsoever to repel attacks. While it is true that the measure we introduce today would grant the President authority he does not now technically have under the Constitution—to repel attacks on American forces legally stationed abroad and to rescue American citizens who are threatened in foreign countries—I submit that these two carefully specified authorizations of power are simply a logical and necessary extension of the Commander in Chief's authority to repel attacks. This authority, which is clearly established in the legislative history of the Constitutional Convention, has been accepted throughout our history by both the legislative and judicial branches of our Government.

I would ask the critics of this approach if they would deny the President the authority to act expeditiously in an emergency to defend our forces stationed abroad or to rescue American citizens in a foreign country. I do not believe such a denial is either warranted or desired. I do believe, however, that Congress must carefully control this authority.

In March 1971 I introduced Senate Joint Resolution 59, a joint resolution for the purpose of defining the constitutional rules of Congress and the executive in war-making. This resolution adopted the format of Senator Javits' bill to the extent that it established certain emergency situations in which the President could act without prior congressional approval. Authority to continue action under these situations would be limited to 30 days, the limit proposed by Senator Javits.

But my bill modified the codification of these situations to carefully delineate and tighten the President's emergency powers. Senate Joint Resolution 59, for instance, excluded the proposal offered by some that the President could act to protect American property overseas in case of emergency. I did not feel that the risk of a larger war was justified in the absence of any threat on human life. I simply could not see granting the President authority to commit American forces to protect American business enterprises under threat of expropriation.

In addition, my resolution questioned a basic premise of post World War II foreign policy—that our treaty commitments are self-executing. The power to declare war was assigned to both houses of Congress. Treaties are, of course, ratified only by the Senate and cannot represent even an implicit American commitment to wage war at the discretion of the Commander in Chief alone.

Our treaties are also to be implemented only in accordance with the constitutional processes of the signatory nations. The constitutional processes of the United States specify that Congress—not the President—has the authority to declare war.

Prior war powers proposals were unclear as to whether appropriations measures could be interpreted as legitimate congressional authorization for the continuance of hostilities. Senate Joint Resolution 59 took the position that appropriations measures could not imply such authorization. This contention has become increasingly obvious as some Members of Congress attempt to end our involvement in Vietnam.

We now need a two-thirds majority to override a presidential veto to cut off funds for military activity in Indochina. This factor clearly gives the Commander in Chief power that was not intended by the Founding Fathers. The President theoretically could wage war with impunity while confidently challenging each House to attempt to muster a two-thirds of its membership in order to stop him. Such a situation is not only extremely dangerous; it in effect turns our carefully devised system of checks and balances on its head.

Senate Joint Resolution 59 also went further in defining the areas in which affirmative congressional action would be necessary. It defined "hostilities" as including 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 included 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 forces are engaged in any form of combat activity.

There was 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 Rivers. 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 has become increasingly more dangerous in an era when "brushfire" wars and guerrilla warfare are becoming even more common.

Senate Joint Resolution 59 added new ingredients to the by now raging debate over the war powers of Congress and the President. Never before had the Congress of the United States undertaken such a detailed examination of its own constitutional prerogatives.

I am proud to say that the concepts encompassed in my resolution—first considered to be a too-strict, too-energetic approach to Congress' war powers—were adopted by the Foreign Relations Committee and were included with the excellent provisions of Senator Javits' bill to make up the bill passed by the Senate on April 13, 1972.

No historical analysis of war powers legislation would be complete without a discussion of the outstanding contribution made by the distinguished chairman of the Armed Services Committee, Senator John Stennis. Senator Stennis has not only submitted his own excellent resolution to define the war powers of Congress and the President, he has participated for more than 20 years in the effort to assure that the prerogatives of Congress are protected.

An example of Senator Stennis' great concern that Congress not abrogate its responsibilities in the warmaking area was his careful questioning in 1954 of Senator Wiley of the Foreign Relations Committee, who managed the Mutual Defense Treaty between the United States and Korea. During that colloquy, Senator Stennis made clear that the phrase "constitutional processes" should be interpreted to mean that Congress alone would have to make the decision to implement the warmaking provisions of the treaty.

Senator Stennis has been consistent in the view that he has held concerning the Congress' war powers and in his strict constructionist view of the Con-

stitution. It is difficult today for advocates of a strong executive who supported Presidents Franklin D. Roosevelt, Harry S. Truman, and John F. Kennedy to concede that, in the area of war powers, strict constructionism always was the proper approach. We now realize after going through the trauma of our experience in Vietnam, however, that men like Senator John Stennis were correct in their untiring efforts to assure that Congress uphold its constitutional responsibilities.

Presidents have alleged a long list of powers to justify the commitment of American Forces in Indochina. The Gulf of Tonkin Resolution, the SEATO Treaty, congressional appropriations, and the powers of the Commander in Chief have all been cited at various times as legal authority for our presence in Vietnam.

President Nixon has, however, in statements attributed to him and to his administration, relied almost exclusively on the powers of the Commander in Chief. Such a reliance, of course, does not in any way necessitate the involvement of the Congress of the United States. If this claim of power is allowed to stand without challenge, Congress will continue to lose its powers by attrition and our Constitution will undergo a major restructuring.

Alexander Hamilton, our most eloquent defender of increased executive power at the Constitutional Convention, gave his interpretation of the powers of the Commander in Chief 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 of which by the Constitution under consideration, would appertain to the legislature."

This body must implement the provisions of the Constitution as described by Alexander Hamilton and James Madison in their Federalist Papers and as interpreted by a number of benchmark Supreme Court decisions. To do this we will have to use the authority assigned to Congress to make all laws necessary and proper to carry out the provisions of the Constitution. The War Powers Bill we submit to this body today is intended to do just that.

It is unfortunate that we in Congress, and Americans in general, have a tendency to overlook serious situations until they erupt into crisis. There should be little doubt that the gradual erosion of congressional war powers has grown to crisis proportions. If we fail to act now after the horrors of Vietnam have so clearly exposed the danger of individual war-making, we may never again see the questions of war and peace being decided by the sobering and deliberative processes inherent in the concept of collective judgment.

I ask this body to consider this legislation in an expeditious but thorough manner so that we can act quickly to restore balance within our system.

Mr. ZABLOCKI. Thank you for your excellent statement in support of S. 440.

I want to express my deep appreciation for your kind comments and I also want the record to show the chairman was assisted in no small measure by the gentlemen from Florida, Mr. Fascell as well as Mr. Findley, Mr. Hays, Mr. Bingham and others of the subcommittee.

In discussing in your statement the 30-day provision of S. 440, a provision over which we have serious reservations, you stress that Congress alone must decide whether we will enter an offensive war, and that we, in Congress, must not subject our "exclusive responsibility" to a presidential veto.

OTHER ENFORCEMENT METHODS?

Yet, on page 13, in the middle of the page, you concede that, and I quote, "There may be other enforcement methods that could be used. For example, some have suggested a qualitative approach."

While you flirt with the idea of a qualitative approach, you really do not embrace it. Is that a fair analysis of your situation?

Senator EAGLETON. That is right. I prefer the 30-day provision because it is a precise mechanism. I concede that perhaps a qualitative approach would have some merit, but I am not deserting the 30-

day provision. The qualitative approach would require the same intensive examination of the qualities that comprise offensive versus defensive war that we went through to delineate the emergency powers.

Mr. ZABLOCKI. You do find some merit in the qualitative approach?

Senator EAGLETON. I don't dismiss it but until I could examine a specific construction my preference is for the 30-day approach.

Mr. ZABLOCKI. In drafting S. 440, I presume that approach was thoroughly explored?

Senator EAGLETON. Explored. I query the word, "thoroughly," but it was explored.

Mr. ZABLOCKI. I use "thoroughly" advisedly because I know the Senators are thorough.

You say on page 3 of your prepared statement, and I quote, "The constitutional crisis we experience today has not come about because the Gulf of Tonkin Resolution was passed, but rather because it was repealed."

Would you please elaborate on that?

TONKIN GULF RESOLUTION GAVE BROAD AUTHORITY

Senator EAGLETON. Gulf of Tonkin was enacted as of August of 1964 and stayed on the books until January 12, 1971. I believe that that resolution was legal authorization for our activity in Southeast Asia. I think it was so broad in its mandate and so broad in its authorization that President Johnson and later President Nixon were delegated full power to carry on the war in Southeast Asia.

We gave too much away by that resolution. It was too loosely defined. I say that, of course, with the benefit of hindsight. Once it was repealed, there was in my opinion, no other legal authorization for the continuance of the war. I simply cannot buy the Commander in Chief authority as being so all encompassing as to authorize the continuance of the war in Southeast Asia after the repeal of the Tonkin Gulf resolution.

In terms of disengagement, I think disengagement has an element of promptness, and I don't think we were promptly disengaging from Southeast Asia from January 21, 1971 until March 1973.

We use the words "prompt disengagement" in our bill, and there was a debate on the floor of the Senate in connection with the adoption of that language. We said it had an element of promptness to it; that it implied that previous policy consideration had to be foregone. President Nixon never was willing to do that in Vietnam.

Mr. FINDLEY. Senator, on page 14—I am glad though you brought up the question of language relating to the reintroduction of military forces in Indochina. This same proposal has been made on the House side, as you know, and one reason that I question the wisdom of even supporting it, much less introducing it, is if the language is limited to the Indochina theatre, it leaves the implication that the President has authority to introduce military forces in other areas of armed conflict elsewhere in the world.

LANGUAGE MUST BE CAREFULLY DRAWN

None of us would want to leave that implication, I am sure. Unless the language is carefully drawn, I think it could backfire and tend to

give the President at least the feeling that he had greater authority to move forces and to engage forces than he does under the constitution.

Senator EAGLETON. An argument could certainly be made in that direction.

Mr. FINDLEY. If this bill faces the certainty that it will be vetoed, would you nevertheless recommend that we press forward and enact it?

Senator EAGLETON. Yes. I would adopt in essence the thrust of Senator Javits remarks in answer to a similar question.

As a practical person, I would say the chances are that S. 440, if enacted in this present form, would be vetoed by the President. But, I don't think we should veer away from what we think is the right course to pursue in this very important area. If we fully understand the responsibility assigned to us by the Constitution we can proceed with courage to regain our power. We cannot compromise with the President to satisfy his view of the war powers question.

This area is so important we either ought to pass what is necessary, or leave it alone entirely. We should run the risk of the veto.

Mr. FINDLEY. On the same general point, do you think we should proceed with this legislation intending to attempt an override if that should seem necessary?

Senator EAGLETON. Yes. There is ample precedent for that in this session of Congress because both Houses are pursuing with even more than deliberate speed 11 or 12 bills that were pocket vetoed by the President last October.

Two of them are my bills on aging which have already gone through the Senate, so I would pursue the same theory with respect to this proposal.

DEVISING WORTHWHILE TESTS

Mr. FINDLEY. On the possibility of a different test other than expiration of the 30-day time limit, have you considered the number of forces involved as a worthwhile test. For example, requiring that the President would have to have specific authority to send more than 10,000 troops, say.

Senator EAGLETON. Frankly, Congressman, I have not considered it in that vein. To directly answer, I had not considered it in terms of quantity of forces, number of ground troops, how many ground troops, how many aircraft carriers. Modern weaponry does not require large numbers of men. A war could be started with one pilot.

Mr. FINDLEY. You heard the colloquy I had with Senator Javits on the reporting provisions of the two different bills.

Do you have any comments to make? Do you think that the reporting requirement should set forth the legal justification for the introduction of military forces equipped for combat?

Senator EAGLETON. Yes; I think that is what we meant on page 5, line 20; "The estimated scope of hostilities and the consistency of the introduction of such forces and such hostilities or situations with the provision of section 3."

I think that could be redrafted along the lines you are suggesting. I think the President should be required to set forth what legal authority he is proceeding under, because, again, getting back to the Indochina situation, at one time or another both President Nixon and Johnson talked in terms of SEATO.

CITE VARIED AUTHORITY SOURCES FOR VIETNAM INVOLVEMENT

They talked in terms of the Gulf of Tonkin, in terms of Commander in Chief, and their associates talked in terms of year-to-year appropriations, all being used at different times as authority for waging war in Southeast Asia.

I would like the President to cite a provision of our bill to say why he is there. I agree.

Mr. FINDLEY. The way the present Senate bill is drafted the President could slip over that point without any problem. He could make no reference to the specific justification for it.

Would you like to see the reporting requirement expanded from the Senate scope to require a detailed report with legal justification by the President whenever he moves military forces equipped for combat to foreign territory for whatever purpose or whenever he substantially enlarges forces?

Senator EAGLETON. I would like to think that out. What we are attempting to do is set up a structure that better defines interrelationship between the President and Congress in this warmaking area. We have not restricted his right to deploy except when hostilities are imminent in the area these troops would be sent.

I don't question the President's authority to send the fleet anywhere it wants in international waters, within the 12-mile limit. I don't challenge authority to send the fleet 12.1 miles off the coast of Israel.

Back to your previous question, I think an argument can be made that reporting does not delineate authority. It just brings knowledge to the attention of Congress.

WHEN REPORTS REQUIRED

Mr. FINDLEY. The House version does not require a report whenever he moves military forces in international waters or international air space. It is only when they enter foreign territory, air space, or waters that a report is required, or where such forces are substantially enlarged.

The reason I believe in this so much is that I feel that the most fundamental decision that we make in the use of military forces is apt to occur when they are placed on foreign territory in advance of any hostile circumstance.

I am glad we have troops in Europe. I supported their presence and I will continue to, but I recognize their presence there puts them in potential jeopardy. Hostilities may develop there.

And the decision to put the troops in Europe is the fundamental decision; or if we decide to go from four divisions in Europe to eight, that is a fundamental decision that might be provocative and thus increase the possibility of war in Europe.

At that point, I think the President should be obligated to tell Congress what he did and why and to give the legal foundation for it.

Senator EAGLETON. I think there is a great deal of merit to what you say.

EAGLETON DISSENTS FROM JAVITS' VIEW

In further amplification of my position, I feel I must dissent from Senator Javits' answer, as I heard it, with respect to the deployment of troops to Israel.

Today, suppose the President sends 20,000 "advisers" to Israel. I think that he would have to obtain congressional approval, because I think that is a situation where imminent involvement in hostilities is clearly indicated by the circumstances. But there is, of course, room for debate on this point. That is why we would subject such questions to a majority vote.

I take it Senator Javits agrees on when the 30 days would start in such a case. And with the House language, the President would have to posthaste tell us under what authority and why he is sending troops there.

Mr. FOUNTAIN. I want to thank you, Senator Eagleton, and Senator Javits, for coming and giving us the benefit of your thinking on this delicate and important question.

I yield to Congressman Bingham.

Mr. BINGHAM. I would like to commend Senator Eagleton on an excellent presentation and also on his leadership in this field.

One specific question, Senator. You state on page 13 that, "If on the other hand, the President has clearly and blatantly abused his emergency authority, Congress may act to stop him immediately, even before the 30-day period is completed."

That is pursuant to your section 6. But is it not true that that section contemplates that be done by bill or joint resolution which would require the signature of the President to be effective?

Senator EAGLETON. The way you posed the question is basically correct in that if Congress were to act on, say, section 3, and say, "No," it would have to pass both Houses. It could then be vetoed by the President and would put the burden on Congress of having the two-thirds vote, both Houses, to override that.

PRESIDENT ACTS ON IMPLIED CONSENT FROM CONGRESS

Mr. BINGHAM. May I call your attention to my position which is that any action by the President in this area is done with the implied consent of Congress as long as Congress has not acted and that the implied consent can be and should be permitted to be withdrawn by a simple act of Congress without concurrence of the President or by the simple act of one House.

Senator EAGLETON. I think your idea of action by one body approaches a novel situation. There is some precedent, I think, for one House action in the Government Reorganization Act.

I don't consider this to be an analogous situation, however. I think that both Houses should participate in this and not either one have a veto of Presidential authority.

Mr. BINGHAM. But when you require affirmative action either House can veto that affirmative act, right?

Senator EAGLETON. That is correct.

Mr. BINGHAM. So that is not very different. Either House can say no to your affirmative resolution.

Senator EAGLETON. Yes, sir, in which event under our bill that terminates on day 30.

Mr. BINGHAM. What would your answer be after hearing the colloquy with Senator Javits, about when the 30 days would begin if this bill had been in effect during the Vietnam war?

Senator EAGLETON. I think it began sooner than Senator Javits indicated. I heard his answer to be that it began when the intensive

bombing started in March of 1965. I think it well predated the Gulf of Tonkin in August of 1964. I don't know if it was when the first adviser went over under Eisenhower, but the event would come under the provisions of our bill. If 34 Senators, for instance, considered an action to be triggering the 30-day clause, then a vote could take place. We must, in the end, depend upon the good faith of the President.

WHEN DOES 30-DAY PERIOD BEGIN?

Mr. BINGHAM. Would you agree the question of determining that point of beginning of the 30-day period is a very difficult question?

Senator EAGLETON. Yes. I wish I had a precise date. I wish I could say October 12, 1962, because such and such happened precisely on that date. But to dwell in the past when relationships in this area were not defined as they would be in our bill is fruitless. We intend to change those relationships.

Mr. FOUNTAIN. Senator Eagleton, I agree with you that legalistically when we repealed the Gulf of Tonkin resolution, we were saying in effect, "Get out of this war," but I don't think it was construed in that light, and I don't think we debated in that light. I don't think we considered it that serious.

At least, we did not in the House. It was an adjunct to other situations. I think it is regrettable we did not debate the impact of the repeal of the Gulf of Tonkin resolution. But I agree with you, if we repealed it, we would be saying to the President, "Get out of Vietnam as soon as we can."

Senator EAGLETON. That is the way I viewed it.

Mr. BINGHAM. May I ask unanimous consent that my testimony as submitted before the committee be introduced in the record as if read today and I will be glad to answer any questions at a later date.

Mr. ZABLOCKI. It was the Chair's intention, should the members of the subcommittee be willing, to recess for the quorum call. Would you care to come back?

Mr. BINGHAM. I have difficulty in that I have an engagement but I am ready to comply with the wishes of the committee.

Mr. ZABLOCKI. Without objection the statements of Congressmen Dante Fascell, Jonathan Bingham, and William Chappell, Jr. will be placed in the record at the conclusion of today's testimony as though read.

Mr. du Pont, any questions.

Mr. DU PONT. I have some questions, but I think if we get involved with them, we are going to miss our quorum call. I would personally be happy to miss the quorum call. It depends on your feeling on it.

Mr. ZABLOCKI. Begin the questions.

Mr. DU PONT. Thank you very much.

Senator, I would like to go back to my colloquy with Senator Javits concerning section 5. I don't know, perhaps I could have your opinion as to why you don't draft a bill to reverse the approval required by the Congress to permit the President to continue unless the Congress acts.

GIVING CONGRESS STRONG HAND IN DECISIONMAKING PROCESS

Senator EAGLETON. We think that the basic decision in terms of how and why and when and where to go to war is Congress' decision

under the intention of the Constitution, and we want to give Congress the strong hand in that decisionmaking process.

Mr. DU PONT. What I worry about is, having served in Congress, you know as well as I that many of our colleagues are masters at preventing Congress from taking any action at all.

I particularly worry about this when I think of a defensive action, when I think of Armed Forces engaged in repelling an attack on the U.S. territory and that Congress for some reason is unable to act, and therefore, the bill requires disengagement of those troops.

When I made that point to Senator Javits, he gave me what I consider an unusual reading of the word, "disengagement." He suggested we could keep on fighting to persuade the enemy to disengage.

Senator EAGLETON. I disagree. We use the words, "prompt disengagement." We had a debate on the difference between withdrawal and disengagement. We modified it by a "prompt" adjective.

Mr. DU PONT. And you also intend it to apply unilaterally to U.S. forces?

Senator EAGLETON. That is correct.

Mr. DU PONT. What would you think of a suggestion that in your section 3, which is emergency use of Armed Forces, in which you attempt to set forth the different circumstances and codify the President's power—what would you think of exempting section 3(1) which deals with armed attack of the United States from the requirement of section 5 so that if the action were totally defensive, failure of action by Congress would not require disengagement.

Senator EAGLETON. Before answering that—and that has never been proposed to me before—what would be the rationale as you would assume it. Let's assume an attack on—country X lands troops and country Y lands troops up in Maine, and they are working their way down the Maine coastline toward Massachusetts. Under any theory, why won't Congress act? Under any theory whatsoever?

PREVENTING A FILIBUSTER IN THE SENATE

Mr. DU PONT. I am not sure of that, but I have seen my colleagues fail to act so often that I am just worried about the situation in which it would not. I do not have a specific for you. I am not sure either that Senator Javits convinced me this language prevents a filibuster in your body.

Senator EAGLETON. We intend that it does.

Mr. DU PONT. Suppose a filibuster is going on—and Maine is a tough example, but American Samoa is a better one—when some people felt we should not be engaged in repelling the invasion and for some reason the 30 days expires.

In other words, I agree with you wholeheartedly in your view of offensive operations by the United States, but putting us in jeopardy of defending our territory defensively seems to me a little unusual.

Senator EAGLETON. Let me ponder that. It is a question of first impression to me and I don't want to give a quick off-the-top-of-the-head answer to a good and valid question.

Mr. BIESTER. Senator, I am concerned about whether, and if so to what extent, adoption of 440 would involve an offer to amend any of our treaty obligations such as NATO?

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Senator EAGLETON. I don't think it does. This was raised by Senator Sparkman at the Foreign Relations Committee hearing last year on a similar war powers bill.

There is language, in NATO, for instance, that nothing herein contained in this treaty shall affect the obligations of countries to participate pursuant to its constitutional process.

Mr. BIESTER. I appreciate this, but apart from legalism and interpretations of NATO, to what extent would it be an offer of invasion of the whole process of the commitment to the defense of Europe?

AUTHORIZATION TO BECOME ENGAGED IN WAR

Senator EAGLETON. I don't think it would have a disastrous or negative effect. I think it must be well known to the leaders of Great Britain and West Germany that before American troops become involved there has to be authorization to become engaged in war.

It might be a widely known fact, but I think it is known by leaders of respective countries, and I don't think further codifying this in the war powers bill would have a negative effect.

Mr. BIESTER. Suppose there was an attack on West Germany and our forces were involved, so we have 3–1 or 3–2 situation and the Congress voted against further involvement. Then it would be the obligation, I take it, of the President to get those troops out, prompt disengagement. How would he go about doing that?

Senator EAGLETON. And also protecting the troops while they are being promptly disengaged. Are you worrying about what happens to them when they are under fire in the process of disengagement?

Mr. BIESTER. From what sources would they be under fire? Suppose an attack on France, West Germany, and Italy, and Congress votes, "No," and we try to get 330,000 troops out of Europe. How will that be accomplished?

Senator EAGLETON. I guess with an airlift.

Mr. BIESTER. Do you think it might be difficult with our then former allies?

Senator EAGLETON. It might be somewhat difficult, but suppose we don't pass any bill at all, none whatsoever, and the same hypothetical thing takes place. I think you have to come to Congress to get a declaration of war. Suppose we refuse to give it?

Mr. BIESTER. I agree.

TREATY OBLIGATIONS TO ALLIES

Senator EAGLETON. Either House refuses to go along with the declaration. What effect does that have on our "Treaty obligations" with our allies?

Mr. BIESTER. I agree with you. It comes back to the question of whether it is a negative action on the part of Congress or affirmative action on the part of Congress.

I share Mr. du Pont's apprehension about our moving sometimes. It represents an example that could be perhaps in a SEATO country.

With respect to other NATO countries, does the Prime Minister of Great Britain have the capacity to put British troops in Europe?

Senator EAGLETON. I don't know what the constitutional authorization is in Britain or Belgium or any of the other NATO countries.

Mr. BIESTER. That has not established our relationship.

Senator EAGLETON. No.

Mr. BIESTER. And we assume any change in ourselves would stabilize theirs.

Senator EAGLETON. Since it is clearly worded in the NATO alliance that actions will be taken pursuant to constitutional role of each power, it is already there and they are on notice of it.

Mr. ZABLOCKI. Thank you, Senator. The subcommittee stands adjourned until 10 a.m., tomorrow morning.

(Whereupon, at 12:25 p.m. the subcommittee adjourned, to reconvene at 10 a.m., Thursday, March 8, 1973.)

[The statements of Congressmen Fascell, Bingham, and Chappell follow:]

STATEMENT OF HON. DANTE B. FASCELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. FASCELL. Mr. Chairman, thank you for this opportunity to appear before your subcommittee once again in support of war powers legislation. I commend you for scheduling early consideration of this crucial issue. Now is the time to act. It is imperative that we look to our involvement in Vietnam, and take action while that experience weighs clearly in our minds. The subcommittee's prompt action again reflects your strong leadership on this issue, Mr. Chairman, and you are to be congratulated.

I am glad that the distinguished Members of the other body—Senator Javits and Senator Eagleton—have joined us today. Under their leadership in the Senate, overwhelming support has been generated for the reassertion of the congressional prerogative and responsibility.

Since this committee first held hearings on war powers proposals in 1970, there has been growing support—and need—for affirmative action by the Congress to reassert itself as an integral part of the war power decisionmaking process. We have reviewed and debated the constitutional provisions, the notes of the constitutional convention, and historical precedence. This has led to the inescapable conclusion that the responsibility, under the Constitution, of committing U.S. troops to armed conflict is one shared by the legislative and executive branches of Government. The balance between the two branches intended by the framers of the Constitution has in recent history, however, swung heavily to the executive. Our efforts, then, are directed at restoring a proper balance by defining arrangements which will allow the President and Congress to work together toward the goal of maintaining the peace and security of the Nation.

RESOLVING DIFFERENCES BETWEEN HOUSE, SENATE MEASURES

The House has on two occasions passed legislation reported by this committee. Last year, the Senate also passed war powers legislation by a substantial margin, which has been reintroduced this year by the distinguished Senator from New York, Mr. Javits, and at least 57 of his colleagues. The task before us is to resolve the differences between the two measures.

The resolution introduced by Chairman Zablocki, which I am pleased to have cosponsored, includes several modifications of the war powers resolutions passed by the House last year. House Joint Resolution 2, as now written, includes a provision specifying those emergency circumstances under which the President may commit U.S. Armed Forces without a declaration of war. The comparable Senate provision is substantially more specific, and delineates in detail authority which the Presidency has assumed over the years by Executive action and Executive interpretation of the Constitution. Actually, this authority has accrued to the office not from any legal or constitutional basis, but simply from its exercise. The House language is more general, and, I suggest, more in line with our objective.

By legislating powers now only assumed, we are—in essence—giving the Executive authority which he does not now have. In other words, we are increasing his power, not decreasing it.

The impoundment issue, although clearly unrelated, is somewhat parallel. If Congress legislates regarding how the President will advise the Congress of his intention to impound funds, and what subsequent action will be taken by the Congress, we are in essence acknowledging the existence of his authority to impound. To define the power, necessarily recognizes its existence.

Similarly, if we, by statute, cite specific powers which are not now in the Constitution nor in the law, we are in reality expanding the authority of the President.

PRESIDENT NEEDS EMERGENCY POWERS

Of course I recognize, as we all do, that the President must have certain emergency powers to protect the country and its citizens. The nature of modern warfare and technology demands it. The House and Senate proposals both recognize this as well. I feel, however, that the less said the better, and urge approval of the language in House Joint Resolution 2.

Second, both the House and the Senate bill require the President to report to the Congress when he takes emergency action to commit U.S. forces. This is crucial. Clearly, if the Congress is to carry out its responsibilities we must always be fully advised. Such consultation should not be limited to after the fact reporting, however.

Central to the war powers issue is the establishing of full, continuing communications between the Congress and the executive branch. The most important factor, in my judgment, is to insure that the Congress is interjected in the war making process at the outset. Translated, this means that the Congress—or at the least those committees with direct jurisdiction over national security affairs—should always be fully apprised of U.S. troop presence and strategic interest anywhere in the world that could lead to involvement in armed conflict. We should know on a regular basis those incidents, minor and major, reported and unreported, which could lead to any necessity for the commitment of U.S. troops.

We now have the benefit of State Department briefings from time to time—generally after the fact and after we've all read about it in the newspapers. But we all know that the high-level foreign policy decisions which could involve the commitment of U.S. forces are made

not in the State Department, nor in the Defense Department, but in the White House—in the Office of the National Security Affairs Advisory and among the Joint Chiefs of Staff. It is these officials who should keep the Congress apprised. I say this with all deference to the State Department, of course.

MEANS OF KEEPING CONGRESS INFORMED

It has been suggested that the most effective means of keeping Congress informed might be for each House, or the Congress as a whole, to maintain a "situation room" with full-time staff on the job around the clock. The problems with this are obvious—but the point is we should not have to resort to such measures.

House Joint Resolution 2 does provide for consultation, and directs the President to consult with the Congress in situations "where imminent involvement in hostilities is clearly indicated."

Ideally, if the Congress were fully apprised, few emergency situations should arise which the Congress did not already have sufficient knowledge of. Furthermore, the concept of consultation need not be viewed as a one-way conversation. Meaningful briefings on sensitive areas could give the administration the benefit of the thinking of Members of Congress as well. The Congress could effectively advise the President, through his advisers, if it felt that our presence in any area was not sufficiently important to warrant possible involvement in war. Such consultation might modify U.S. posture before events leading to armed conflict developed.

In this way, the Congress could interject itself at the very outset of serious developments. There is, of course, a concurrent responsibility of the Congress to give every consideration to matters presented to it.

If the President did act under emergency authority, however, the Congress would have substantial knowledge of the facts leading up to that commitment. It would then be incumbent upon the President to report to the Congress on what specific additional incidents were sufficiently severe to warrant the use of armed forces.

PRESIDENT'S EMERGENCY ACTION ONLY TEMPORARY

It would then be up to the Congress to take further action. It must be clearly understood that any emergency action taken by the President would be only temporary in nature. Only the Congress can declare war and commit the United States to long-term involvement.

The Senate bill provides that the President's emergency authority shall expire within a specific time period—30 days—absent congressional action specifically authorizing continued commitment. Such a provision would, theoretically, put a limitation on the President's authority.

While there are those who subscribe to the theory that it is better to act than not to act, even though the action could predictably be a resounding vote of confidence in the President, I question that theory. It is my contention, that a requirement for congressional action within a specific time period would result, from a practical standpoint, in the automatic, pro forma ratification of the President's action. The pressure of taking action within the 30 days—or even an extended time, as provided for in the bill—would almost demand congressional approval.

The House proposal, on the other hand, provides for immediate congressional consideration regarding future authorization, but does not require action within any specific time frame nor provide for the cessation of the President's authority.

Herein lies the crux of the issue.

A STRUCTURE FOR INFLUENCING THE PRESIDENT

In the winter edition of Foreign Policy, Dr. Jack M. Schick of the Johns Hopkins University School of Advanced International Studies, commented on a series of articles by Senators Eagleton, Stennis, and Goldwater, and myself regarding the war powers issue and, specifically, the Senate proposal. Dr. Schick expressed his opinion that "It (the House bill) creates a structure for influencing the President before he acts which I would argue is the only way for Congress to be effective."

I concur with this position, and suggest that we give consideration to incorporating in any war powers legislation approved by the Congress, an even more explicit provision for insuring high-level consultation on a regular basis—and on an emergency basis when warranted—between the Congress and the Executive. While this seems a painfully elementary approach, and would presumably occur out of necessity, we know that we cannot rely on what ought to be. By requiring consultation, perhaps there would be little need for further provisions regarding Presidential action without congressional authority.

The 93d Congress faces a fundamental challenge. That is, whether or not we will meaningfully reassert our initiative in the policymaking process, reestablish our role as a viable force for leadership and change, and assume our constitutional responsibility and authority. Nowhere is it more important that this challenge be met effectively than in the powers of war.

I know the committee will continue to give this issue priority consideration, and I commend you, Mr. Chairman, and the committee members, as well as the distinguished Senators for the lead you have taken in this critical field. The Congress must act, and I urge a full and open discussion between the two bodies in an effort to resolve the difference in postures and enact effective legislation reconfirming the congressional role. I am willing to consider every alternative so that action may proceed in an expeditious manner.

The two bodies of the Congress have finally taken strong action on this issue. The differences which exist between the House and Senate are not so great that they cannot be resolved and a result which can be approved by both bodies obtained. It is extremely essential that we reach an accord. If we do not do so now, the opportunity may be lost for another 197 years.

Thank you, Mr. Chairman.

STATEMENT OF HON. JONATHAN B. BINGHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. BINGHAM. First of all, I should like to compliment you, Mr. Chairman, for once again holding hearings on this most important topic.

Senator Javits and others have eloquently argued the need for legislation to reassert the authority of the Congress over basic ques-

tions of peace and war. I shall not take the time to repeat these arguments. Let me just point out that President Nixon has in effect asserted the authority to take this country into wars without the consent of Congress and has acted as if he had that authority.

This raises a question which goes to the heart of our democratic system. If the Congress does not act to redress the balance, if the Congress by inaction lets the President's assumption of power stand unchallenged, then the provision of article I of the Constitution giving to the Congress the power to declare war is a dead letter.

It has been suggested—by you, Mr. Chairman, and by others—that any bill we pass that attempts to limit the President's power to make war will be vetoed and that therefore, we should not pass such a bill.

SOLEMN OBLIGATION OF CONGRESS

With all respect, may I express the contrary view that we as legislators, sworn to defend the Constitution, are under a solemn obligation to pass whatever bill we believe is necessary and proper. We should not base our action on speculation as to what the President will or will not approve.

If both houses of the Congress pass a bill limiting the President's power and if he does veto the bill, then at least the constitutional issue will be clearly drawn and the American people can react—at the polls or otherwise. The issue will not be clearly put before the people if Congress fails to pass a meaningful bill.

I have another reason for being unhappy about the kind of bill which the House of Representatives has twice passed and which I voted for, with some expressed reservations: A bill that simply asks the President to report on military operations that he has embarked on, without the consent of Congress, implies that the President has the power to engage in war even if the Congress disapproves.

House Joint Resolution 2, which you, Mr. Chairman, have introduced this year does contain a new section 3 which undertakes to specify when the President has such authority, but I would submit that the wording of clause (1) of this section is very broad and in effect gives the President total discretion.

GRAVE FAULTS OF JAVITS BILL

I should like to turn now to what I regard as the grave faults of the Javits bill. I realize, of course, that this is the same bill that was overwhelming passed by the Senate last year and that has been widely accepted by those who believe, as I do, that the Congress should act to limit the President's power to make war; and I have the greatest respect for Senator Javits and others who support his bill. Yet, I am constrained to say that, for all its good intentions, the Javits bill might well turn out to be worse than no bill at all.

First, I believe it is a mistake to attempt to define, as section 3 of the Javits bill does, those situations in which the President has the authority to engage in hostilities without prior congressional approval. Any such list is likely to be either too broad or too narrow, or both, as is indeed the case with Senator Javits' list.

His list is too narrow because it is easy to imagine a situation not covered by the bill when a President ought to be in a position to move rapidly.

Moreover, section 3(4) of the Javits bill appears to rule out a quick response to an attack on a fellow NATO member.

At the same time, Senator Javits' list can be said to be too broad and subject to abuse. Protection of American citizens has often been used in the past as an excuse for American military intervention, and section 3(3) of the Javits bill would expressly permit such action in certain circumstances.

It will be recalled that Mr. Nixon justified the invasion of Cambodia on the ground that it was necessary to protect the safe withdrawal of American forces from Vietnam. Under section 3(3) of the Javits bill, similar reasoning could be used to justify all kinds of military action: The President would merely state that such action was necessary to protect the evacuation of Americans, and there could be no appeal from this finding.

PRESIDENTIAL AUTHORITY TO TAKE ACTION SUBJECT TO CHALLENGE

It seems to me preferable to leave the President's authority to take action uncertain—and always subject to challenge—than to spell it out as Senator Javits has attempted to do. The very existence in a statute of four categories of situation where military action could be taken might well constitute a kind of invitation to Presidents, present and future, to embark on military adventures.

The other grievous flaw in the Javits bill, as I see it, is the rigid 30-day period within which the Congress must act. First of all, in many cases it would be difficult if not impossible to determine when the 30-day period begins to run. If the Javits bill had been law during the fifties and sixties, on what date would the U.S. military involvement in Vietnam have been said to begin—when the first military advisers were sent out by President Eisenhower, when the number of advisers was raised to 20,000 by President Kennedy, when President Johnson ordered American planes—or ground troops—into action?

An even more serious objection is that the 30-day limit is wholly arbitrary. Thirty days might be too long, permitting a President to involve the United States irrevocably. Or it might be too short a period for Congress to act wisely and with full information (remember how long it took for the full story of the Bay of Tonkin incident to emerge).

It would require the Congress to say, "Yes," or, "No," to an operation at a fairly early stage. At the end of 30 days, a given military operation might still be a very limited one, involving a small number of planes and personnel.

On that basis, the Congress might give its approval, and the President would then, in effect, have carte blanche to escalate the level of hostilities and multiply the size of the operation.

Also, the 30-day deadline may come at a time when the implications of the operation are by no means clear, when the operation may still be popular with the American people, who do not realize the morass it may lead into.

PROVIDING A MECHANISM FOR CONGRESSIONAL DISAPPROVAL

Obviously, however, if congressional approval is to be required for a Presidential war, then a deadline or time limit must be imposed. The way to avoid the flaws of the Javits bill, as I see it, is to provide a mechanism for congressional disapproval of a Presidential war, that is to provide a mechanism whereby the Congress at any time may effectively call a halt.

It may be argued that this is not necessary, because Congress has the power to call a halt through the appropriations process. The fact that Congress has this power speaks to the constitutional question: Since Congress indubitably has the power to cut off the funds for a military operation that it disapproves, how can it be argued that Congress has no constitutional authority to interfere with the President's actions in plunging the country into undeclared war? But the power to cut off funds is a blunt instrument, and one which may not be quickly effective.

What is needed is a more precise instrument to give instantaneous effect to the underlying power of the purse. This is what I have attempted to provide in my bill, H.R. 317, which provides that either House of the Congress may by resolution at any time terminate the President's authority to carry on undeclared hostilities.

The question may well be asked: Why should either House have this power, why should not action by both Houses be required?

My answer is the following: A declaration of war requires the approval of both Houses; either House can say "No." Accordingly, it is reasonable to say that, when the President embarks upon undeclared war, he can continue so long as both Houses give their approval, expressly or tacitly.

PRESIDENT'S WARMAKING POWERS DANGEROUS

But if either House expressly says "no," then he must stop. Or to put the matter another way, the President's power to engage in hostilities is such an extraordinary, and such a dangerous, power, that he should not have it if either House says he should not.

There is, of course, a familiar precedent for the one-House-veto procedure. Under the Reorganization Act of 1949, the President is given the extraordinary power to propose governmental reorganizations and to put such plans into effect if the Congress takes no action within 60 days. No affirmative action of the Congress is required. But either House can say no by simple resolution.

One final point: I am not happy with section 5 of my bill which attempts to assure that resolutions of disapproval could not be blocked by delaying tactics. This provision was taken from the Javits bill. It poses difficult questions, and I have come to the conclusion that it is not needed in my bill.

I intend shortly to circulate my bill, omitting this section and making certain other minor revisions and to invite those members who are so disposed to cosponsor it. I will then reintroduce it, as amended.

STATEMENT OF HON. WILLIAM CHAPPELL, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. CHAPPELL. Mr. Chairman, for 12 long years I watched the shadow of a war creep over this land bringing with it anguish, frustration, and despair as our people endeavored to understand America's involvement on another soil 10,000 miles away.

Neither praise nor condemnation of actions, past or present, but rather their unforgettable lessons, will avail us to a sensible direction for the future. One such lesson is that no government dare commit its people to prolonged armed conflict without a clear definition of the purpose of such commitment and the will of the people to pursue them to victory.

How then do we implement the lesson? We best do so by clearly implementing the respective responsibilities of the President and the Congress with reference to the constitutional power to make war.

House Joint Resolution 71, a resolution which I have again introduced, I believe, is a reasonable approach to such implementation. One hundred and fifty of our distinguished colleagues, most of whom cosponsored this measure during the 92d Congress, have joined with me to cosponsor House Joint Resolution 71.

DOES NOT ALTER PRESIDENT'S POWER

This resolution in no way alters the President's power to initially engage our troops to repel a sudden attack or to protect American lives and property. It simply requires the President, within 72 hours of committing any of our Armed Forces to action in any armed conflict outside the United States, to report such commitment to the Congress.

If the Congress shall fail to approve or otherwise act on such report within 30 calendar days after receiving it, the President shall within the next succeeding 30 days terminate such commitment and disengage all forces so committed.

This proposal embraces the intent of the framers of the Constitution and the thoughtful declaration of many great Americans after them.

The framers of the Constitution were very deliberate in balancing the powers of this Government and those of the Congress and the President, and they were deliberate for excellent reasons.

All too frequently, the American Colonies were drawn by the King's decree into England's wars. The leaders of the newly independent Republic resolved to make certain that their new country would never again be drawn into war at the direction and discretion of a single man. For this reason, it transferred the war power to the legislative branch of the newly created Government.

Indeed, the framers of the Constitution recognized that the President under certain circumstances might have to take defensive action to repel and subdue a sudden attack on this great Nation. But that was the extent of the warmaking power they were willing for him to exercise.

CONSTITUTION IS LIVING DOCUMENT

I deeply believe that the Constitution is a living document. The Congress of the United States must activate its responsibilities under the document for determining war and peace.

I feel most profoundly that had Congress either declared war or refused to allow our involvement in Vietnam at its outset, a clear-cut attitude would have been established and the national hurt of our people avoided.

The United States is the leader of the free world today, but this is not so because our citizens are anxious that we take the lead in military conquests; nor because our diplomats are the most expert; nor because our policies are the most faultless or the most popular.

The mantle of leadership has been placed upon our shoulders not by any nation, nor by our own Government or citizens, but by destiny and circumstance—by the sheer fact of our physical and economic strength, and by our role as the only real counter to the forces of Communism in the world today.

If events in Indochina have taught us to better fulfill that role, then it is not a wholly dark story. While this resolution in no way affects our present involvement, it reminds us that the mistakes of the past must be heeded in the future.

We in Congress, have the power to assure the American people that never again will we allow a situation like Vietnam to occur.

Mr. Chairman, I thank you for this opportunity to appear before your fine committee, and I deeply appreciate the thoughtful consideration that you are giving to this type of vital legislation.

WAR POWERS

THURSDAY, MARCH 8, 1973

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON NATIONAL SECURITY
POLICY AND SCIENTIFIC DEVELOPMENTS,
Washington, D.C.

The subcommittee met at 10:20 a.m. in room 2200, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman of the subcommittee) presiding.

Mr. ZABLOCKI. The subcommittee will please come to order.

The committee wishes to express its gratitude and appreciation to our colleagues, Congressmen Bingham, Fascell, and Chappell for their understanding and cooperation. Since the hour was late we could not fully hear them yesterday and therefore by unanimous consent their statements were placed in the record and we have invited them back this morning for a period of questioning. It may be however that Congressman Chappell and Congressman Fascell have conflicting and unavoidable commitments.

Congressman Bingham, if you care to take the witness chair.

We certainly want to thank you for your statement of yesterday. We regret that the lack of time precluded any questions and are grateful that you agreed to return this morning for that purpose. We appreciate your deep interest in this area and your untiring efforts to find a solution. Your bill is certainly very unique; it does pose some questions, however, as was quite evident in the colloquy yesterday when we were considering S. 440. It appears that your bill is to supplant or to attempt at least to resolve the constitutional question in sections 3 to 5 of the Senate version; that is, the Javits-Stennis-Eagleton bill. Is that the basic purpose of your bill?

STATEMENT OF HON. JONATHAN B. BINGHAM, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. BINGHAM. Well, Mr. Chairman, first of all, if I might just say a general word or two, I want to stress again as Senator Javits did yesterday the feeling I have that these are most important and most useful hearings and I want to compliment you for holding them and for the leadership that you have shown. I think in many ways the version of the Zablocki bill which has been introduced this year is a substantial advance over the bill that we have passed in previous years and in some ways I think comes closer to my ideas than the Javits bill does.

CONSTITUTION GIVES CONGRESS POWER TO DECLARE WAR

I would not say that my purpose is to avoid the constitutional problem. I don't have any really serious doubt in my mind that the Congress can act in this field. I think that the power in the Constitution to declare war is so clear that the burden is on the executive branch to justify action by the President in the nature of initiating hostilities without a declaration of war. I think that to the degree that your bill, House Joint Resolution 2, now contemplates action by the Congress under section 6 that is quite proper and I think that contemplates a perfectly constitutional exercise by the Congress of an authority which is not exclusive to the Congress but which it shares with the President.

I would like to say, too, that I am not satisfied with the version of my bill that has been introduced, I want to revise it. You have previously made comments which I think are well taken about the difficulties of the section that has to do with the expediting of congressional action. I don't think that is necessary in my bill and I propose to omit that from the revised version which I will be introducing shortly.

I also think that the section on reporting which is in House Joint Resolution 2 is a real improvement and I would like to incorporate that in my revised bill.

I think the essence of my approach is that explicit congressional approval should not be required of a Presidential decision to engage in hostilities but that a mechanism should be provided for congressional disapproval. I think in a sense that is implied in section 6 in House Joint Resolution 2 but I would like to see it spelled out more specifically.

If congressional disapproval is to be provided for, then the question arises whether it must be disapproval by both Houses or by a single House. My resolution, and I think this is quite fundamental to it, contemplates that if either House disapproves of a Presidential war, then that should be the end of the President's authority.

VETO BY ONE HOUSE OF CONGRESS

Mr. ZABLOCKI. As you know, Mr. Bingham, some comments were made in the last Congress and observers have noted that your bill would appear to give the President broad powers to deploy American forces subject only to a veto of one of the Houses, and such a delegation of powers to the President by the Congress appears to be unconstitutional since the Constitution requires positive action, not veto action. Under the Constitution Congress has the authority to declare war, not to veto a war if declared by or initiated by the executive branch. Therefore, it is argued that Congress has no authority to make such a delegation of powers to the President as your bill would seem to do.

Mr. BINGHAM. Well, let me respond to that in two ways. That is a very interesting point.

First of all, this points to another revision that I want to make in my bill which would attempt to avoid the implication that any authority is being granted under this bill to the President that he does not already have, and I think language can be drafted that would achieve that purpose. It was certainly not my intention that my reso-

lution should grant to the President any authority that he does not already have.

I see the difficulty more in something like section 3 of House Joint Resolution 2 which I think extends to the President very broad powers to engage in war without congressional approval. I have difficulty with this and therefore I feel that it would be wiser if we did not try to spell out the circumstances under which the President has the authority to engage in war without congressional approval in advance.

I have difficulty both with the Javits formulation and with the formulation in section 3 of House Joint Resolution 2. It is such a difficult thing. I do not know that we are wise enough or smart enough to draw language that can spell out when the President has this authority and when he does not. If it is drawn too tight, it is likely to limit the President in a way that would be undesirable. If it is drawn too broadly, then it amounts to a carte blanche for the President and almost an invitation to act.

PROVIDING MECHANISM FOR CONGRESS TO SAY NO

So my preference—and I came to this after long wrestling with the problem of how to draft language that would give the President the authority—would be for a bill that does not attempt to deal with that problem, that does not attempt to spell out when the President can move on his own but simply says that, if he does move on his own, we provide a mechanism for the Congress to say no.

Mr. ZABLOCKI. As you will recall, House Joint Resolution 1 did not have section 3.

Mr. BINGHAM. That is right.

Mr. ZABLOCKI. We did not attempt to spell out in the last Congress the President's authority and there was some criticism because we did not attempt to do so. Therefore, in House Joint Resolution 2 an attempt is made to broadly deal with this issue. I realize there may be other deficiencies but I detect that you do not question the constitutionality of section 3 in House Joint Resolution 2. However, it appears you do find constitutional problems in S. 440?

Mr. BINGHAM. No; I do not, Mr. Chairman.

Mr. ZABLOCKI. You do not?

Mr. BINGHAM. No. I think the Congress can legislate in this field constitutionally, deriving its authority from the power that the Constitution gives to the Congress to declare war and the other powers related to it. So I don't have difficulty on constitutional grounds. I do have difficulty on the ground that I think the formulation in the Javits bill may be, as I said, both too narrow and too broad.

May I say, too, Mr. Chairman, that I think House Joint Resolution 1 of the 91st Congress, even though it did not spell out when the President has this authority, implied that the President did have the authority because of the very fact that it says, "When the President enters into such hostilities, he must report to us." That implies that he has that authority, so I don't think we can get away from that problem by silence. That is why I feel it is so important to provide specifically for a mechanism whereby the Congress can say no.

DESIRE FOR STRONG LEGISLATION

Mr. ZABLOCKI. One final question, Mr. Bingham. As you recall, Senator Eagleton stated yesterday that it would be preferable to have strong legislation—even though questionable in constitutionality nevertheless it is better to approve such legislation or nothing at all.

Do you agree?

Mr. BINGHAM. No, I don't as a matter of fact. I hope very much that we can come to some agreement with the point of view of the Senate as expressed in the Javits bill. I think that yesterday's hearing indicates some motion toward a more common ground. I think that the additions to House Joint Resolution 2 go in that direction. I would hope that it would be possible to agree on legislation. I think legislation is very important.

I do feel, as Senator Javits and both Senators expressed the view yesterday, that we should do what we think is right. I think it is our obligation as legislators to do that, and we should not attempt to trim too much to what we think the President will approve. This is a very vital issue and if both Houses pass a bill and the President vetoes it, then at least there is a clear issue that the American people can react to. Even if we can't pass it over his veto. I think that that would be a useful thing and I would hate to see us be limited in what we do by a fear of a Presidential veto. It seems to me that as legislators we have the obligation and the responsibility to do what we think is needed to reassert the balance between the powers of the Congress and the powers of the Presidency.

Mr. ZABLOCKI. Thank you, Congressman Bingham. We certainly look forward to your revised version. I know you will make valuable suggestions when the subcommittee will markup the bill and report.

Mr. BINGHAM. Thank, you, Mr. Chairman.

Mr. ZABLOCKI. Mr. Thomson.

Mr. THOMSON. I have no questions.

Mr. ZABLOCKI. Mr. du Pont.

Mr. DU PONT. Thank you, Mr. Chairman.

CONGRESSIONAL ACTION TO STOP HOSTILITIES

Mr. Bingham, I appreciate all the work you have done on this. I think yesterday our hearings were particularly useful in developing what I consider some real weaknesses in the Javits approach. I think your approach is somewhat improved in that it requires congressional action to stop hostilities rather than the Javits approach of action to let them continue. I think that that is a better formulation.

I am concerned about the fact that you would let one House take action. I don't see the precedent for that anywhere in our legislative activities and I wonder that you can delegate that to one House.

Mr. BINGHAM. May I respond to that, Mr. du Pont.

When the Congress adopts a declaration of war, both Houses have to act. Either House can say no. When the Congress appropriates funds, which it has the constitutional authority and responsibility to do, both Houses have to act, either House can say no. Under the Javits bill or any bill that contemplates affirmative action by the Congress, both Houses must agree, either House can say no.

What I am proposing is that we provide a mechanism whereby this no vote by either House can be expressly provided for by law.

To put the matter another way, as I see it what happens when the President moves to embark on hostilities is that he is proceeding with the tacit consent of the Congress and he can proceed as long as that tacit consent applies but that tacit consent of the Congress can be negated by action of either House saying no. That is the justification.

Now we do have the precedent of the reorganization bill of 1949 for the mechanism whereby the President is given authority to take certain unusual and extraordinary steps in reorganizing the administrative branch, the executive branch, and then we provide that either House can say no. So the mechanism is not unknown. But I think more important is the fact that when it comes to affirmative action certainly it is recognized that either House has a veto. All my bill would do would be to turn that around and say specifically that, when the President is engaging in hostilities without the express consent of Congress, either House can terminate that authority.

CONSTITUTION SHARES WARMAKING POWERS

Mr. DU PONT. Well, can't you distinguish both of the arguments that you make? In regards to an appropriation bill or a declaration of war both Houses must act in order to take positive action. If the Congress had the clear constitutional mandate to engage in hostilities, that would be one thing, but under the Constitution it is shared; that is, the Congress has the power to declare war and the President has the power over the Armed Forces. It seems to me that when you are asking the Congress to take a positive act that you still should have concurrence of both Houses.

Mr. BINGHAM. Let me state, I feel philosophically that the power of the President to carry on hostilities on his own responsibility is such an extraordinary and such a dangerous power that he really should not have it if either House of the Congress is ready to go on record to say that he should not, that he should have it only if there is at least a tacit consent of both Houses.

So I feel that philosophically the one House veto is justified. I think, as I pointed out, that it corresponds to what amounts to a one House veto where the congressional authority to declare war is concerned.

Mr. DU PONT. Let me pursue the one other point, and you are far more familiar with this than I am. You referred to the Reorganization Act where the President can do nothing unless one House disapproves. Wasn't that legislation essentially a granting of power to the executive branch? The Congress said here, Mr. President, we are not going to get involved in this reorganization, we are going to give you specific power to do this and the only control we will keep is the right of one of our Houses to say no. Isn't that different from the war powers situation?

BURDEN OF PROOF

Mr. BINGHAM. I don't think it is, Mr. du Pont. I think that, as section 3 in House Joint Resolution 2 recognizes and as the corresponding section of the Javits bill recognizes, it is quite arguably within the responsibility of Congress to determine when the President has this authority. I think that really the burden of proof is on those who support the authority of the executive branch for the President

to move on his own. So I think that, under the terms of House Joint Resolution 2 or the Javits bill, the effect is to grant a certain authority to the President and then to provide mechanism for approving or disapproving the President's action and the disapproval could be, as in my bill, effected by action by one House.

Mr. DU PONT. But the only distinction I see there is that nowhere in the Constitution does it say that the President shall have power to reorganize the Federal Government and in the Constitution it does say that the President at least has some input over warmaking powers in that he has command of the Armed Forces.

Mr. BINGHAM. But if you interpret the Presidential power as commander of the armed services to include ordering the armed services into conflict without restriction, without the authority of the Congress, then I think the responsibility of the Congress to declare war is almost totally negated.

Mr. DU PONT. Thank you.

Thank you, Mr. Chairman.

Mr. ZABLOCKI. Mr. Fraser.

Mr. FRASER. I am sorry that I was not here when you made your original presentation, but I have read it.

My questions may cover ground that you have already covered.

DEFINITION OF "HOSTILITIES"

Have you addressed yourself to what you mean by the term "hostilities" in your bill? For example, would an operation in which the United States supplied air transport constitute hostilities and would that have invoked section 3 of your bill?

Mr. BINGHAM. I think I have to say the answer to that is no. I have not attempted to define what constitutes the involvement of American forces in hostilities. I am not sure that it would be possible in a statute to define that precisely. I think I would answer the particular question in the negative; that is, I don't think that providing transport in that type of situation to the U.N. forces would involve U.S. forces in hostilities.

I recognize there is a problem there and I think it is a problem which exists in any one of these bills; that is, when do they come into operation? We discussed at some length yesterday one of my problems with the Javits bill is when does the 30 days start and we had about six answers here before we got through as far as Vietnam was concerned. If the Javits bill had been in effect during the Vietnam war, when would it have been said that the hostilities started?

Mr. FRASER. I think that is very much on target. It seems to me this is a very arbitrary time requirement and I think it is an unworkable provision. I see no reason to restrict it. That is the point you made, isn't that right?

Mr. BINGHAM. Although House Joint Resolution 2 now takes a different approach, I argue that if you are going to require positive action by the Congress you have to set a deadline, you just can't leave it open because otherwise the Congress can stall around and stall around and do nothing and then the President continues to act. You don't need a deadline if you contemplate negative action because the negative action can take place at any point.

WHAT CONSTITUTES INVOLVEMENT OF U.S. FORCES?

Mr. FRASER. Supposing Marine guards at an embassy become involved in some military action? For example, supposing there is a siege of the embassy and the Marine guards become involved in protecting the embassy. Would that be an involvement of U.S. forces in hostilities?

Mr. BINGHAM. I suppose it could be.

Mr. FRASER. You have a provision that deals not only with the right of veto but with the requirement that the President convene the Congress in extraordinary session if they are not in session when the incident develops.

Mr. BINGHAM. I do and I think it is a good provision. As I said earlier, I want to revise my bill in a number of respects before reintroducing it and I think that is one provision that I would certainly include. I also would like to incorporate the new section on reporting in House Joint Resolution 2 which I think has been improved. I see a lot of problems with trying to define exactly what the term hostilities means.

Mr. FRASER. Let me come to a question that is fundamental. By imposing constraints on the President by making it easier for Congress to shut down a military involvement we encourage the President to create—manufacture, if you will—the kind of incident that would lead to a marshaling of public opinion behind his actions. In other words, if the President decides rightly or wrongly that our country should become involved, my impression is that, the President is going to make sure first that he has Congress tied up or tied down. Are we really creating an effective congressional device here?

OPPOSED TO SPELLING OUT CIRCUMSTANCES OF PRESIDENTIAL ACTION

Mr. BINGHAM. Well, I share the same concern, Mr. Fraser, and that is one reason why I am opposed to any effort to spell out the circumstances in which the President can move. Again if you phrase the legislation in negative terms and provide a mechanism for the Congress to say no, you don't have to spell out when the President can move, as is attempted in the Javits bill and to a certain extent under section 3 of House Joint Resolution 2. I think that either the President can manufacture the situation to bring his action within the scope of the authority or he can simply state that his action is necessary in order to protect American citizens, and then he goes on from there. We have certainly seen the same sort of thing in Vietnam when the President asserted that he had the right to go into Cambodia in order to protect the safety of American troops being withdrawn from Vietnam.

Mr. FRASER. I think your criticism of the Javits bill is right on target; I would agree with that, Mr. Bingham.

Would the Gulf of Tonkin resolution be the specific authorization that you call for under section 3 of your bill? You say, "in the absence of a declaration of war or specific authorization by Congress * * *."

Mr. BINGHAM. I am not sure of the answer to that. I think it probably would, but I have not looked at the language recently.

Mr. FRASER. Would a specific enactment by the United Nations Security Council calling for the use of armed forces in an international

conflict constitute "specific authorization" through our commitment to the U.N. charter.

Mr. BINGHAM. No; I don't think so. I think that you raise a question there about whether under the terms of the Javits bill the President could have responded as Mr. Truman did in Korea without specific authorization. That is one of the areas where I think the Javits bill may be too narrow. Frankly, I think the President should have the authority to move ahead under the obligations of the U.N. charter, but I think that that activity by the President should be subject to Congress saying no.

U.N. ACTION ON WAR AND PEACE ISSUE

Mr. FRASER. Then there is this other alternative in the United Nations, I think it is called the uniting for peace resolution, that authorized the General Assembly to take up an issue affecting war and peace. They don't have the power now to directly involve the United Nations but I think under that provision the General Assembly calls on member nations to support the action.

Mr. BINGHAM. That certainly would not be specific authorization, certainly not. Again I think that the President would have the responsibility to decide whether he was going to move in that direction but it would be subject to veto by the Congress.

Mr. FRASER. The problem I have with all these bills is that I have seen so much of our foreign policy develop on the basis of what has happened most recently. I think Munich helped carry us into the Vietnam war and I have become increasingly skeptical of framing legal devices based on what has happened in the last 10 years. At least I have not seen it work so far. My view is that the Senate acted responsibly with respest to Southeast Asia and the House acted irresponsibly by failing to terminate our involvement in the war.

I worry about when the President, say, in response to a United Nations uniting for peace resolution commits U.S. Forces to an action that is not popular in the House. For example, I can conceive of a situation in the southern part of Africa in which the racial issue emerges. The United Nations votes to support the African majority in this international problem. Now we have empowered one House to veto a President's favorable response to the U.N. action which in my judgment would be on the right side. I am skeptical of our supporting the right prescriptions here.

In brief, I have come to the conclusion that I don't think any legislation ought to be passed. That is where I come out because no matter what legislation is proposed, I see problems with it.

CONGRESSIONAL OPPOSITION SHOULD CONTROL

Mr. BINGHAM. Mr. Fraser, I might agree with you as to what we should or should not do in a particular situation but I have to stick philosophically to my point that, if either of the elected bodies of the Congress with their responsibilities is opposed to the President carrying on hostilities, then that opposition should control. I don't think the President's power to take action, whether it be under treaty—which it is in the case of the United Nations, or under anything other than a specific authorization by the Congress—should be

such that he can exercise it because he thinks he should, even though one House or the other is opposed to it. I would apply that principle even in a situation where I might think the President was right and the House that said no was wrong.

Frankly, I think for the Congress to take no action at all in this situation would be a copout on our part. We have a problem here and we have to face up to it, we have to try to deal with it. It is a difficult problem but we have seen how inadequate the power of the purse is, in terms that we have not effectively exercised it.

Mr. FRASER. It is not inadequate, the power of the purse is overwhelming.

Mr. BINGHAM. It is.

Mr. FRASER. What you are saying is there is either the lack of will or interest to use it.

Mr. BINGHAM. Admittedly we have not had a case where the power of the purse was exercised in the effort to control or bring to an end the Vietnam war. That is true and that is because the Congress didn't vote it. But, aside from that, the power of the purse is a clumsy tool. It is not a precise tool for the Congress to use.

Incidentally, Mr. Chairman, I think that the fact that the Congress does have the power of the purse is a strong argument in favor of the constitutionality of the Congress having authority in this field. If we have the power to say no by refusing to vote the funds, then we have the power to say no in some other way. I think we should provide a more precise tool for the Congress to exercise its authority in this field and not rely on the power of the purse.

DECLARING WAR ON NORTH VIETNAM

Mr. FRASER. Finally, one of the things the Congress clearly would have done from the middle of 1964 through the middle of 1967, had the President requested it, is we would have declared war on North Vietnam which in my judgment would have represented a further error.

Mr. BINGHAM. I agree with that.

Mr. FRASER. Yet the provisions of your bill would have protected him. He could not have gotten the same protection by relying specifically on the Gulf of Tonkin resolution. You say "in the absence of a specific authorization or a declaration of war," but the clearest hedge against any single House of veto would have been a declaration of war.

Mr. BINGHAM. That would be true in any situation, I think.

Mr. FRASER. That is right.

Mr. BINGHAM. I don't think you can——

Mr. FRASER. All I am saying is that this encourages the executive branch to protect itself.

Mr. BINGHAM. If a specific authorization other than a declaration of war would serve his purpose, I don't see why the President would go the more extreme route in order to avoid the possibility of veto.

Mr. FRASER. Well, supposing, for example, that the Gulf of Tonkin were written in the light of this section and would have been fashioned in a way that the Department lawyer said, OK, this satisfies the requirement. General as the language is, it is specific enough to comply with section 3 of this law.

Now in that case in order to stop the President you would then have had to repeal that authorization.

Mr. BINGHAM. That is right.

Mr. FRASER. Which is subject to veto.

Mr. BINGHAM. Right.

Mr. FRASER. And subject to action by both Houses.

Mr. BINGHAM. Right.

Mr. FRASER. It seems to me that every President is going to make sure they have that authorization and they are going to try to generate the public attitudes that will in effect force the Congress to enact it.

PRESERVING PRINCIPLE OF CONGRESSIONAL AUTHORITY

Mr. BINGHAM. Well, that may be true, but at least then you have preserved the principle that the Congress has a role in these decisions. If you go one of the other routes, either you are doing nothing to restrain the President, or you are calling specifically for an approval which would then stand unless repealed.

Mr. FRASER. Well, I will conclude by saying that I guess I am getting conservative in my old age. But I have seen so many things come around full circle and hit you in the back that I am not at this point really persuaded that we should do anything. We may make it worse.

Thank you, Mr. Chairman.

Mr. DU PONT. Mr. Chairman, I think the discussion that has just been heard between Mr. Bingham and Mr. Fraser points up very clearly the difficulty of drafting a detailed piece of legislation. Somehow circumstance will always throw up at you a situation you have not clearly envisaged. I would say that while I am not totally agreeing with Mr. Fraser that we ought to do nothing, that this discussion illustrates perhaps the wisdom of trying to draft the broadest possible kind of legislation without getting into specifics.

Mr. ZABLOCKI. I might add the more testimony I hear, the more I feel that House Joint Resolution 1 was the better approach and that probably section 3 and section 6 should be eliminated.

I do believe that the Congress should assert itself and request that its obligations in the war powers area be recognized. Further, that the President should consult with Congress; and should a commitment of U.S. Forces be made, that such a commitment be reported. That is as far as the chairman would care to go. Certainly we do not want to hamstring the President in the defense of our country or our citizens. Therefore, in the original version, we tried to avoid defining the war powers and to codify the war powers of the Congress or the President.

If I may just ask one further question, and I asked this of the Senator yesterday. In section 5 of your bill, the congressional priority provision, you recall Senator Javits said he was concerned about an improvident decision—the improvident decision, for example, some critics claim the Congress made in passing the Tonkin Gulf resolution. Under emotional stress, unfortunately, Congress may react by making such decisions.

DOES NOT BYPASS NORMAL PROCEDURES

Under your section 5 the disapproval is sponsored or cosponsored by one-third of the Members of the House of which it originally had

been considered reported to the floor of such House no later than 1 day following its introduction unless the Members, of course, of such House otherwise determined by yeas or nays.

Does this not really bypass the process of normal procedures which would include committee hearings, a report or other deliberations before a vote would be called for—deliberations which would hopefully help us avoid improvident decisions by either House?

I fully recall the Senator's reply, but I wonder what your view is.

Mr. BINGHAM. Mr. Chairman, if I may call attention to the last paragraph of my prepared statement, I indicated there that I was prepared in my revised bill to omit section 5. I have come to the conclusion that, at least as far as the House is concerned, such a provision is not necessary, and it does raise questions which you have raised before very persuasively. So I propose in my revised version of the bill to omit that section.

Mr. ZABLOCKI. Any further questions?

Thank you, Congressman Bingham.

Mr. BINGHAM. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Congressman Matsunaga.

STATEMENT OF HON. SPARK M. MATSUNAGA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mr. MATSUNAGA. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Welcome, Congressman Matsunaga. I want to express my appreciation for your past efforts and cooperation in sharing your wisdom and your views in this area with our subcommittee members and our colleagues on the floor in the past. I might say personally I am somewhat surprised you picked up the Senate bill, but I am sure you can defend it in testimony this morning.

Mr. MATSUNAGA. Thank you very much, Mr. Chairman and members of the subcommittee, for providing me this opportunity to express my views on H.R. 2053, a bill I have introduced relating to the war powers of Congress. This is a matter which I know has been the subject of hearings on several occasions by this distinguished subcommittee, and I commend you on your demonstrated interest, for at stake is the most important issue faced by any nation, the fateful issue of peace or war.

H.R. 2053, as the chairman has observed, is virtually identical to legislation which passed the Senate last year by the overwhelming margin of 68 to 16. It starts from the premise that the President must obtain prior congressional approval before committing American Armed Forces in any hostilities. However, the President would not be required to seek prior congressional approval—

EXCEPTIONS TO NEED OF SEEKING PRIOR CONGRESSIONAL APPROVAL

1. In the event of an invasion of the United States or its territories, or to prevent an imminent invasion;

2. To protect our Armed Forces overseas;

3. To rescue Americans from dangerous situations in other countries; or

4. Pursuant to a specific grant of authority by Congress to cover the particular situation in which the forces are to be used.

Whatever troops are committed without prior congressional approval, they must be withdrawn within 30 days, unless Congress specifically authorizes an extension or is physically unable to meet, or the President certifies that a further period is needed for a safe disengagement of our troops.

H.R. 2053 also provides for speedy congressional consideration, during the 30-day period, of resolutions to authorize the continued use of troops in any hostilities.

Regardless of the position we may have taken on our recent involvement in Indochina, we cannot deny that that war caused grave divisiveness among our own people. Certainly one of the major underlying causes for this divisiveness was the lack of a declaration of war by that governmental body which is closest to the people and which has the sole constitutional authority to declare war, the Congress of the United States.

DEFINITE PROCEDURES NEEDED TO PREVENT FUTURE VIETNAMS

If we have learned but one lesson from the tragedy in Vietnam, I believe it is that we need definite, unmistakable procedures to prevent future undeclared wars. "No more Vietnams" should be our objective in setting up such procedures. The time for Congress to take this action and to reassert its constitutional role is long overdue.

Five times in the past 12 years, Presidents have mounted major military interventions without prior consultation with the Congress: The Bay of Pigs, the intervention in the Dominican Republic, the bombing of North Vietnam, the incursion into Cambodia and then Laos.

Whatever our individual beliefs may be relative to the merits of these unilateral actions by the Executive, I believe we can all agree that Congress should have played a more significant role in the decision to mount each of these actions.

What was it that the framers of our Constitution had in mind when they gave to the Congress the exclusive power to declare war? To declare war is to decide to go to war, to commit this Nation to active participation in hostilities. It was intended that after the Congress had decided to depart from the normal state of affairs and declare war, and only after such declaration, the President, as Commander in Chief of our armed forces, was to exercise the power to conduct and direct the war. That this was the intent is clearly spelled out in the writings of one of the strongest advocates of executive power, Alexander Hamilton. In Federalist No. 69 he wrote that the President's authority as 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."

CONGRESS SOLE REPOSITORY OF POWER TO DECLARE WAR

Distinguished historians have assembled evidence on this matter which points inescapably to the conclusion that the Constitution envisions the Congress as the sole and exclusive repository of the power both to declare war and to judge its propriety.

Of course, there are those who contend that such a view of the warmaking powers of Congress is hopelessly archaic. We are told that we live in a world of instantaneous communication where momen-

tous decisions need to be made in less time than it takes to complete a quorum call. Perhaps so. But there are two compelling responses to that argument:

First, there is no historic basis for such an argument. There has never been a case of hostilities which posed such a demanding national emergency as to require the use of the warmaking powers by the President, without authority of Congress. As sudden and unexpected as the attack on Pearl Harbor was on December 7, 1941, we went to war only after its declaration by Congress.

Second, if we have in mind an unprecedented, unspeakable surprise attack, one which the President could not have reasonably anticipated, H.R. 2053 would provide for such a contingency quite adequately. Under its provisions, in a dire emergency, the President need not seek the approval of Congress to repel an attack or to save American lives abroad; he can act first and then forthwith request the needed authority from Congress. His hands are not tied at the crucial moment. He need only to convince the Congress, within 30 days after he acts, that he was right in acting unilaterally. I submit that that is not an unreasonable duty to impose on the Executive.

Mr. Chairman and members of the subcommittee, it is my firm belief that the proposed War Powers Act would, if enacted, serve the cause of peace by reestablishing the rightful constitutional role of the Congress in the warmaking process.

CONGRESSIONAL ACQUIESENCE ON USURPATION OF POWERS

As Members of that separate and independent branch of government known as the Congress of the United States, we have to a degree been guilty of acquiescing to the usurpation of congressional powers by the Executive. Perhaps now is the time when we should take heed of the words of Justice Jackson who once wrote, and I quote:

> 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.

By acting quickly and favorably on H.R. 2053 and similar legislation, we will prove to the American people that we do not intend to abandon our constitutionally granted powers and responsibilities.

Thank you, Mr. Chairman, for your attention.

Mr. ZABLOCKI. Thank you, Congressman Matsunaga, for defining your position on your bill.

However, there are problems involved in H.R. 2053 as I pointed out yesterday to a similar section of the Senate bill S. 440 section 3, and it is this section which contains the conditions of circumstances. You refer to these conditions of circumstances in your closing statement on page 4, a period when there is a dire emergency, a crucial moment. Of course the judgment of one man enters into that determination so you really don't avoid a war.

DEPLOYING U.S. FORCES WITHOUT DECLARATION OF WAR

Under these conditions of circumstances on which the Armed Forces may be deployed without a declaration of war, on the one hand appear to bind the President under your bill so inflexibly by such rules that he will not be able to act expeditiously in future situations

which cannot be envisioned now, as the Congressman from Minnesota has pointed out in the colloquy with Mr. Bingham. On the other hand, the President will actually use the legislation by your own definition to provide an explanation, to provide himself with an excuse to act when justification might otherwise be lacking, since the ultimate determination of what the words of the statute will mean will be his, whether it is a dire emergency or a crucial moment.

Certainly your legislation provides that Congress can undo his action within 30 days but would that be too late? Another question comes to mind. Do you believe that had your bill, H.R. 2053, been law at the time of the Tonkin Gulf incident Congress would not have taken the action we did—action which we now call unfortunate. Nonetheless, it was the sentiment in Congress at that time and certainly I presume—even if such legislation were on the statute books—the same action that occurred would have been taken by both Houses of Congress.

Mr. MATSUNAGA. I tend to agree with the chairman that even had the statute been on the books at the time of the Tonkin incident the same action would have been taken by the Congress in passing the so-called Tonkin resolution and authorizing the President to do as he deemed necessary in order to defend American lives and property. However, the fact that the President in acting unilaterally would need to come back to the Congress within 30 days, and fully justify this action to win the approval of Congress, would tend definitely to force the President to take a much more careful look before leaping into any hostilities.

EXECUTIVE CLAIMS NO NEED FOR CONGRESSIONAL AUTHORIZATION

Considering the present situation, where even after the Tonkin resolution was repealed the Executive insisted that it did not even need such authorization from the Congress to continue the hostilities in Vietnam, this proposal would be a vast improvement. At least we will restore to the Congress the right to make decisions whether the engagement in hostilities initiated under so-called dire emergencies ought to continue or not. So while I can foresee, as the chairman foresees, the same probable reaction on the part of the Congress, in the event of an attack, such as that represented to us with the Tonkin resolution, I believe a law which would require the President to come back to the Congress within 30 days for authority to continue military involvement, would be a vast improvement over what we have today.

Mr. ZABLOCKI. There is no doubt in my mind that we all are striving for legislation which would prevent future undeclared wars.

Could I have your comment: your version does not provide for consultation as House Joint Resolution 1 of the last Congress and House Joint Resolution 2 that is now before us does provide in section 4, namely that the President when acting pursuant to the provisions of section 3 would seek appropriate consultation with the Congress before introducing the Armed Forces.

This provisions calls for the President to consult with Congress before he acts. Your proposal is that Congress would have to act after he took action. Don't you think there is a likelihood that undeclared wars would be prevented if he consulted with the Congress before the

fact? I wondered why you didn't include that in your version. Personally, I feel very strongly about that section.

Mr. MATSUNAGA. Section 3, as you know, provides only for situations wherein it is presumed that the President must act immediately, even prior to consulting with the Congress.

VALUE IN CONSULTATION?

Mr. ZABLOCKI. Yes, section 3 of House Joint Resolution 2 has similar provisions. It is not identical; but attempts more generally to spell out where the President does have constitutional authority.

My question is: Do you see any value in consultation?

Mr. MATSUNAGA. Yes, I do. The committee in its wisdom may include a requirement of prior consultation, and I would have no objections. May I add that after listening to the questions raised here, I feel we may need to amend sections of my bill to define more clearly what we mean by hostilities, introduction of troops, and so on, in order to determine when the 30 days begin.

I realize that your subcommittee will have the problem of coming up with something which will be acceptable not only to members of this body but to the other body as well. Unfortunately we had no time in the last Congress for the conferees to get together. I do hope that there will be plenty of time in this Congress by your reporting this measure out early so that the differences could be ironed out.

Mr. ZABLOCKI. I can assure you we will act cautiously but expeditiously—I should say expeditiously but cautiously.

Mr. Thomson.

Mr. THOMSON. No questions.

Mr. ZABLOCKI. Mr. Fraser.

Mr. FRASER. Thank you, Mr. Chairman.

I want to commend our colleague for a very thoughtful statement on what I regard a very complicated and difficult subject.

You cite in your statement a number of military involvements in the past 12 years—the Bay of Pigs, the intervention in the Dominican Republic, the bombing of North Vietnam, the incursion into Cambodia, and then Laos.

So far as you can tell, had your bill been in force would any of those have been either prevented or limited?

DISCRETION LEFT TO EXECUTIVE

Mr. MATSUNAGA. Because the discretion would be left to the Executive, to be honest with you, probably not. The fact is, however, that we would at least require the President to come back to the Congress within 30 days for authority to continue any such expedition.

Mr. FRASER. I am interested in your listing these particular actions because in my view each one of these was a mistake by the United States.

Mr. MATSUNAGA. I agree.

Mr. FRASER. And yet your bill, as you say, and I am inclined to agree, would not have prevented them. So where are we?

Mr. MATSUNAGA. Well, what we are trying to do in my bill is to prevent Vietnams. Within the designated 30 days the President must justify his actions or the engagement will be terminated by Congress.

Now you might ask, "Does this not lead to expeditions of 29 days?" Even if it did, 29-day expeditions would be preferable to expeditions of 11 years duration. I think at least it is a step in the right direction and a step which is much more important toward a restoration of the war powers to the Congress.

Mr. FRASER. Let me go to a more difficult problem that our Government faced. I refer to the Cuban missile episode. The Soviet Union was installing medium range rockets with nuclear warheads in Cuba and so far as we know the United States would have been the target for those missiles.

I don't find in any of your descriptions under section 3 a provision that would have authorized the President to act; that is, this did not constitute an armed attack upon the United States or against the Armed Forces abroad or involve our citizens, and there was no specific statutory authorization for him to act. Of course, we never got to actual hostilities.

Mr. MATSUNAGA. Never did, no.

IMMINENT INVOLVEMENT IN HOSTILITIES

Mr. FRASER. You also say in the first part of section 3 that "the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances * * *." Clearly we came under that second clause for we deployed our naval forces in order to intercept ships.

What would you say about that?

Mr. MATSUNAGA. That situation as you stated did not involve hostilities, but it may have been interpreted to constitute imminent invasion. Under provisions of my bill such a situation could be handled under the emergency powers which would still remain within the Executive.

Mr. FRASER. Not as I read your bill.

Mr. MATSUNAGA. Well, section 3.

Mr. FRASER. "Section 3. In the absence of a declaration of war"—and we had no declaration of war, "* * * the Armed Forces may be introduced in hostilities"—and we didn't do that, "* * * or in situations where imminent involvement in hostilities is clearly indicated by the circumstances"—and we did do that.

So you say all right. No declaration of war, then the Armed Forces may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and that is what we did. In other words, absent one of those four the President would not have been authorized to do what he did.

I don't find in the Cuban episode a situation which comes under any of the four so you would have prohibited the President from creating the blockade. I don't know if they used the term "blockade".

Mr. MATSUNAGA. If the gentleman will look at section 3(1), it says, "to repel an armed attack upon the United States." Now look at the last clause, "and to forestall the direct and imminent threat of such an attack." That probably would cover the situation.

PLACEMENT OF MISSILES IN TURKEY

Mr. FRASER. Let me ask you this. Did our placement of missiles targeted on the Soviet Union in Turkey involve a direct and imminent attack on the Soviet Union?

Mr. MATSUNAGA. Well, if we were wearing the shoes on the other side probably it would have been interpreted as such.

Mr. FRASER. In other words, you are prepared to give this a fairly flexible meaning?

Mr. MATSUNAGA. I think the Executive is going to have to justify his actions by relating all the circumstances.

Mr. FRASER. In fact, if the missiles had been placed in Cuba, the delivery time for a nuclear warhead would have been cut from 30 minutes to 15 minutes.

Mr. MATSUNAGA. Yes.

Mr. FRASER. That would be the difference between having the missiles in Cuba or having long-range missiles based in the Soviet Union itself. The only difference would be 15 minutes in delivery time. You are saying that this difference would enable the President to involve this provision because there was a direct and imminent threat of an attack?

Mr. MATSUNAGA. That is for the President to determine, of course. The authority would be granted under this act for him to take into consideration all of the circumstances. If his intelligence indicated that the installation of missiles in Cuba definitely was a prelude to a planned and imminent attack, the President would be authorized to commit military forces first, then seek to justify his actions before the Congress. The Congress could then approve or not approve his action.

Mr. FRASER. In fact, so far as we know, there is as much basis for deploying them to protect Cuba against an invasion as there was to increase the capacity of the Soviets to attack us; isn't that true?

FROM THE CUBAN VIEWPOINT

Mr. MATSUNAGA. I am not fully cognizant of all the facts and circumstances. I know only what I was told in executive sessions and what I read in the newspapers, but if you looked at it from the Cuban viewpoint I suppose you could have concluded that the missiles were intended for the defense of Cuba. On the other hand, if our intelligence indicated that this was a prelude to a planned expansion of communism via Cuba in the Western Hemisphere, including the United States then, under my bill, the President would have been authorized to act under section 3(1). He, of course, would still need to come to the Congress to fully justify his actions to continue military actions beyond the 30 days.

Mr. FRASER. Let me turn to the NATO treaty if I may. The NATO treaty as I understand it says that an attack on one of our allies shall be construed as an attack on all.

Mr. MATSUNAGA. Yes.

Mr. FRASER. In other words, an attack on France or West Germany would be construed as an attack on the United States. Under the provisions of subparagraph 4 of your bill that would not be sufficient to

authorize the President to act if there were an attack, say, on West Germany unless the NATO agreement or perhaps the law ratifying the treaty indicated specifically that the President would be authorized to proceed notwithstanding the restrictions of this bill. In other words, it would have to spelled out specifically that it was an exemption.

Mr. MATSUNAGA. Right.

Mr. FRASER. My question is: Would you favor writing such an exemption into the law ratifying the NATO treaty? Would you advocate giving the President authority, no matter what the nature of the event, to directly introduce the U.S. forces into combat?

WARMAKING POWERS IN BOTH HOUSES OF CONGRESS

Mr. MATSUNAGA. No, I would not. Treaties, as the gentleman well knows, are ratified by one body of the Congress alone, the Senate. The warmaking powers of course are vested in the Congress which means both the Senate and the House of Representatives.

In the case of the NATO treaty, however, we may have committed ourselves to defend all other members of NATO by specific legislation authorizing the use of troops in support of the NATO treaty. I may be wrong on that. That is my impression. Perhaps the gentleman might know.

Mr. FRASER. I must say I don't.

Mr. MATSUNAGA. Maybe counsel can tell us. My impression is that Congress did pass such legislation relative to NATO.

Mr. ZABLOCKI. Our agreement is subject, however, to our constitutional provisions and I think it is in all treaties.

Mr. MATSUNAGA. My recollection is that there was specific legislation in the case of NATO.

So in answer to the gentleman's question: I would not, except "by specific authorization of the Congress to the President," permit the President to engage American forces in hostilities in support of any treaty with other nations.

Mr. FRASER. Without further congressional action?

Mr. MATSUNAGA. That is correct. In order to fully keep our commitment initially and to let the other members of the NATO treaty know that we do mean what we say in that treaty, the President can go to the Congress under provision of this law and specifically cover such a situation.

Mr. FRASER. Let me give you a scenario if I may, Mr. Chairman.

Mr. ZABLOCKI. Yes, 2 more minutes.

Mr. FRASER. I am sorry.

Mr. MATSUNAGA. I have an 11:30 engagement in town.

NUCLEAR ATTACK ON WESTERN EUROPE

Mr. FRASER. Suppose there were a nuclear attack on the Western European countries. What you are saying is that the President, in order to respond against the Soviet Union, would have to come to Congress?

Mr. MATSUNAGA. That is correct.

Mr. FRASER. This obviously would mean the lapse of a measureable period of time; 6, 12, 24 hours.

Mr. MATSUNAGA. Yes. But the President could obtain advance approval of Congress in support of a treaty.

Mr. FRASER. At that point Western Europe has been devastated and then the question facing the American people through the Congress would be, should they authorize an attack on the Soviet Union which would guarantee the destruction of most of the United States. I would myself see some difficulty in the Congress approving that course of action since it would simply result in destroying the Soviet Union and the United States.

In other words, what we would have done through the position you are advocating—and I realize I am asking you for offhand judgments here—we would have destroyed the element of uncertainty which the Soviet Union now has to accept. In fact, we may now respond immediately with a nuclear attack on the Soviet Union if they should attack any of our allies because unlike any other treaty to which we are a party the NATO treaty says that an attack on one shall be treated as an attack on all.

I want you to think about the implications of that. In other words, the nuclear shield that we presently provide Western Europe, would it in effect disappear in your judgment?

Mr. MATSUNAGA. I repeat what I said earlier, although I am not positive about what the actual situation is. In the case of NATO I believe we have congressional authorization passed by both the House and the Senate permitting military support of the treaty. In other words, the Congress has already granted that authority—the authority which those of us who are for this type of legislation say belongs exclusively to the Congress. That authority has already been granted in the case of NATO.

Mr. FRASER. But I understood you to say that you didn't favor allowing the President to use our——

Mr. MATSUNAGA. Not without congressional authority.

ADVANCE APPROVAL OF NATO ARRANGEMENT

Mr. FRASER. But you would give advance approval of this NATO arrangement?

Mr. MATSUNAGA. In a case like that, yes, I would; otherwise, the treaty would be meaningless.

Mr. ZABLOCKI. In S. 440 there is a disclaimer where NATO would be exempt there would not be any question as to the President's authority.

Mr. MATSUNAGA. Oh, yes.

Mr. ZABLOCKI. I don't know whether your bill is identical in that respect or not. In preparing your revised version you may want to give some thought to that.

Mr. MATSUNAGA. This is another area which I am sure the subcommittee can delve into in detail and come up with some language which would be acceptable to cover the exact situation.

Mr. ZABLOCKI. Mr. du Pont.

Mr. DU PONT. Thank you, Mr. Chairman.

Mr. Matsunaga, yesterday two very distinguished Senators, Senator Javits and Senator Eagleton, were appearing before us and we had the Javits bill. A question was asked of both of them that seemed to

cause some confusion. Let me ask the same question of you and perhaps you can help us.

The question was asked Senator Javits: When does the 30 days begin? If your bill had been in effect in the Vietnam conflict, when in your opinion did the 30 days begin?

Mr. MATSUNAGA. There is a lack of exact definition of the terms, I concede to the gentleman, in H.R. 2053 as well as in the Javits bill. This is an area I believe the committee would need to go into in order to clarify the terms used, such as "the introduction of hostilities." I would say if I were to give my own interpretation, the 30 days would begin when military advisers are dispatched to the battle areas.

Mr. DU PONT. Would you think that the dispatching of military advisers today to the Middle East, to Israel, would constitute the beginning of the 30-day period?

Mr. MATSUNAGA. My interpretation would be yes.

CUBAN MISSILE CRISIS, BAY OF PIGS OPERATION

Mr. DU PONT. All right. One other question.

You mentioned several examples in your testimony. Do you see a basic difference between the Cuban missile crisis and the Bay of Pigs operation?

Mr. MATSUNAGA. Yes; I do. Had I then been a Member of Congress, I would have supported the President in the missile crisis, but not in the Bay of Pigs situation.

Mr. DU PONT. Exactly, and the difference is in one instance we were conducting a defensive operation and in the other an offensive operation.

Mr. MATSUNAGA. I agree.

Mr. DU PONT. Let me just suggest to you that I have not formulated this fully in my own mind but you might consider this between now and whenever we get action in the committee here.

Might it not be appropriate to attempt to draft a resolution that somehow distinguishes between defensive operations to protect the United States and offensive excursions which I think is the chief reason that this legislation has been needed?

Mr. MATSUNAGA. Section 3 of my bill, of course, intends to do just that, but in discussing this matter more in detail in committee, especially during the markup sessions, I suppose much could be done to clarify the language.

Mr. DU PONT. Thank you very much.

Thank you, Mr. Chairman.

Mr. ZABLOCKI. Mr. Biester.

Mr. BIESTER. Thank you, Mr. Chairman.

I apologize to Mr. Matsunaga for being late.

Mr. MATSUNAGA. I am late for an appointment.

Mr. BIESTER. I will therefore simply make that apology, note the gentleman's observation, and say that I have been to a briefing on the tragic situation at Sudan and I will defer questions.

Thank you.

Mr. MATSUNAGA. I thank you.

Mr. ZABLOCKI. Thank you, Congressman Matsunaga. We certainly appreciate your coming before this committee and sharing your views.

We certainly will look forward to your recommendation and revisions to your own version.

Mr. MATSUNAGA. Thank you very much, Mr. Chairman, and members of the subcommittee.

Mr. ZABLOCKI. Mr. Leggett.

STATEMENT OF HON. ROBERT L. LEGGETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. LEGGETT. Thank you, Mr. Chairman.

Mr. ZABLOCKI. I understand you are pressed for time, that you had an 11:30 appointment.

Mr. LEGGETT. I have to go to a luncheon for Mr. O'Neal.

I would like to give a short summary and then submit my statement for the record, Mr. Chairman.

I do not know whether the committee has before it my House Joint Resolution 315 but it is my rather simplified approach to the overall problem. What it does, it puts the war power article I, section 8, clause 13—it puts the war power in the Congress and I don't think that anything that we do here that requires a further signature of the President of the United States is going to be signed by him very frankly. If the President does not sign it, I don't think that the Congress has shown any less inclination to give two-thirds support to overrule him in any international area.

WAR IS WHEN THE CONGRESS DECLARES IT

Therefore, the question is if we want to exert some kind of control in a Vietnam situation I think we have to do it simply by assisting the courts in declaring what war is, and in my House Joint Resolution 315 I purport to do that very simply. We say in the first section there that war is when the Congress declares it, and No. 2, the term "war" shall not include a state of international combat where less than 5,000 personnel of land, sea, and air force are committed to armed combat outside the United States for less than 10 days unless expressly so declared by the Congress in accordance with the first section of this joint resolution.

Then the third section states simply that no action of either house authorizing or appropriating funds shall either directly or by implication declare war. I go on in my statement to explain that this would not rule out hot pursuit situations. If we have a nuclear onslaught on the United States, we all presume that the President, as Mr. Fraser has indicated, has the power to effect instantaneous retaliation and if our ships are attacked overseas, just as in criminal cases we have the hot pursuit theory we would have the hot pursuit theory in war situations where we could actually pursue the aggressor on the spot wherever he might be.

I would tend to think that with this simple declaration by both Houses of Congress we would then not be, No. 1, ratifying the power of the President to involve us for 30 or 60 or 90 days without the consent of Congress. Second, I don't think that we should necessarily presume that a declaration like this would precipitate us into war situations because I don't think that we would necessarily have to come in and pass a declaration of war in an unlimited volume or time

any time the situation warranted an involvement of more than a fixed number of men for longer than a fixed time period.

NEED FOR LIMITATIONS

There is nothing magic about 5,000 men or nothing magic about 10 days. I wanted to put some limitations on that to get the attention of the committee. I do think though that we did exactly the wrong thing in the Gulf of Tonkin by all of us voting for this ratification that in fact ratified a long war that we did not have any control of in the Congress. We should have fixed some limits on that, and the way we do it is to do it under the war power where if we declare war, we declare a fixed war if it is going to be this type of slow, sucking in type of thing such as Vietnam was.

I would apply that to like we are in Thailand today—we have 37,000 troops over there, maybe 47,000, depending on how we redeploy the Vietnam forces. We are obviously using those forces. Even if we execute the Laotian agreement, if we are parties to something there and the Vietnam agreement, the question is at what point do we need further authority to support Thai troops in Thailand. I think that if we are using more than 10,000 personnel in an active combat role bombing different Thai installations within Thailand, which we are, why then I think they would have to come back to the Congress and get our approval on a form of declaration of war. It might not say we declare war against the guerrillas in Thailand but within the war power we have got considerable power and the President would be forced to come back and consult with the Congress and reach some kind of an accommodation and we could put fixed time limits on that.

[Mr. Leggett's prepared statement follows:]

STATEMENT OF HON. ROBERT L. LEGGETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman and Members of the Subcommittee: I am pleased to have the opportunity to testify on legislation designed to clarify the President's authority to engage in foreign military actions without the express consent of Congress.

These hearings come at a particularly crucial time. We appear to be concluding the longest, and one of the most painful wars in our history. Vietnam has cost us some 56,000 lives and $200 billion in direct expenditures. It has obligated us for another $200 billion in veterans' benefits, and has caused the greatest national rift since the War between the States. Yet, technically Vietnam was not a war, as it was never declared by Congress.

The Vietnam tragedy began within the impermeable walls of the Executive Branch, and it was largely conducted within those same walls with little or no Congressional input. As disturbing as this fact is, we must realize that Vietnam is only the last installment in three decades of Presidential infringement upon Congressional authority in the war-making area.

This infringement began with the 1941 occupation of Greenland, Iceland, and Dutch Guinea. It continued with the 1958 landing in Lebanon, and escalated with the Bay of Pigs invasion in 1962 and the Dominican Republic invasion of 1963. The termination of the conflict in Indochina affords us a unique opportunity to turn back this record and re-establish Congressional authority in this area.

It is certainly clear that the framers of the Constitution intended the war-making powers to reside with the Legislative Branch. For example, Thomas Jefferson wrote to James Madison in 1789 that, "we have already given in one 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".

The record shows that for some 150 years Thomas Jefferson's brag was no boast This is not to say that the Executive Branch did not ever commit American forces to foreign hostilities without Congressional assent. There have been, in fact, over 100 occasions in which an American President has used the military of the U.S. to intervene in foreign affairs, but nearly all of these interventions were of a very short duration and limited to the Western Hemisphere. Moreover, the few instances of American intervention outside the Western Hemisphere, such as the introduction of troops into Shanghai in 1859 and China in 1911, were an attempt to protect American lives and property from mob violence or revolution.

As History Professor Henry Steele Commager has testified, "it is only in the last 20 years that Presidents appear to have thrown caution and even constitutional scruples to the wind and ventured, on their own authority, into military operations that could only be termed acts of war.

The arguments for allowing the Executive Branch to engage in foreign military operations without the consent of Congress, are simple. The heightened pace, complexity and hazards of contemporary existence often require rapid and clear decisions without having those decisions subjected to prior publicity. We are told that secrecy in foreign affairs is invaluable, and that a credible military deterrent depends on a perception by other nations that our country is resolute in its determination to take decisive immediate action. Such action, the reasoning goes, is inimical to the nature of a deliberative body such as the U.S. Congress.

I am well aware that secrecy has its place in modern political institutions. I have no doubt that last year's détente with the Peoples Republic of China, for example, was at least partially due to Dr. Kissinger's ability to steal off into the night. The function of secrecy, however, ends when we begin talking not about détente, but the commitment of American men and material to a foreign military action.

The country is based on the apparent conviction that the best government is not necessarily the most efficient one. It is very disconcerting to hear it argued that the U.S. Constitution must be circumvented because speed and efficiency demand it. If the framers of the Constitution thought speed and efficiency demanded anything, they certainly would not have devised a system of government whose byword is caution, deliberation and compromise.

Five times in the last 12 years American presidents have mounted major military interventions in foreign nations without prior consultation with the Congress. These include the Bay of Pigs, the Invasion of the Dominican Republic, and the attacks on North Vietnam, Cambodia and Laos. Of the five, none were in response to an emergency; only one, the action in the Dominican Republic, could be remotely defended on the grounds that it was intended to protect American lives; and in all given cases it probably would have been better to break Executive secrecy and subject them to Congressional scrutiny.

Let's look at the record of these five actions. The Bay of Pigs was marked with ill-conception, mis-management and poor intelligence from start to finish. The invasion of the Dominican Republic began as an attempt to protect American tourists and ended as a massive intrusion into a foreign civil conflict. It precipitated a serious disintegration of the U.S. position within O.A.S.

The Cambodian "incursion", billed as the Normandy invasion of the Vietnam conflict, succeeded only in capturing bags of rice and caches of outdated Communist weaponry, and the attacks on North Vietnam and Laos speak for themselves. They destroyed a countryside, but failed to bring either a speedy or honorable end to the war, and really only created two more wars that required a negotiated "Peace with Honor".

In retrospect, Mr. Chairman, it is clear that the long run interests of the Nation in all of these instances would have been better served if the President had submitted to the healthy delays of the legislative process.

There are a number of bills before this committee which seek to prevent a reoccurrence of past mistakes by placing restraints on the President's ability to commit U.S. troops in foreign actions. Most of these measures fail to take into account the central fact of the last eight years. The Congress always had the power to end the Vietnam war. It could always withhold money for the war, but it never did.

The Executive Branch controlled the debate on the war. Presidents Eisenhower, Kennedy, Johnson and Nixon, with their vast access to the media, succeeded in defining for the country and the Congress what Vietnam was all about,—what constituted victory and what constituted defeat. The Congress was faced with a

fait accompli; it was either support the troops or face the extermination of those troops in South Vietnam. Given this state of affairs, it is not surprising that the Congress tended to accede to the President.

Thus, the bills before you that allow the President to commit troops for 30 to 90 days without the consent of Congress will fail to re-establish Congressional authority in this area. What Congress would vote for "surrender", as defined by the President—once our soldiers have been fighting in some foreign land for a month? Congressional power to make war depends on our ability to control debate before the fact, before the Executive Branch establishes a stranglehold on information sources and the media.

I have introduced a resolution, H.J. Res. 315, which would sharply limit the President's ability to ease us into a war by placing concrete limits on his prerogative as Commander and Chief. My resolution would explicitly define "war" as used in the Constitution as any international combat situation to which 5,000 air, sea or land armed combat forces are committed outside the U.S. for more than 10 days. This Joint Resolution does not require Presidential approval which is the basic flaw in all the other bills before you. NO President will voluntarily limit his powers and NO Congress in recent years has had nearly two-thirds support to reverse Presidential intent on an international issue. I would, of course, except by implication a certain situation of "hot pursuit" where our forces were overtly attacked including the President's powers to effect immediate nuclear retaliation because of a nuclear onslaught.

The President could respond to a Pearl Harbor type situation, but if he intended to commit troops for more than ten days he would have to come to the Congress for support. It may be that even ten days is too long. It is conceivable that even in this short span of time the President could exert enough influence to make Congressional input moot. Nevertheless, I am convinced that we must establish a clear and hopefully effectual, limitation on Presidential prerogative in this area, and retrieve our Constitutionally authorized "power to make war". The passage of House Joint Resolution 315 would be a step in that direction.

Mr. ZABLOCKI. I shall not try to have a colloquy upon what the impact is when Congress formally declares war. However, we were told in hearings last Congress that some very serious complications follow. That is why in recent decades wars were not declared; but we had undeclared wars because of the problems associated with declared wars.

PROBLEMS OF UNDECLARED WARS

Mr. LEGGETT. I think we found out that the problems associated with undeclared wars are far more complicated.

Mr. ZABLOCKI. That is the very reason we are now trying to find some legislative solution which can prevent wars of any kind or at least involvement in wars without the consultation and the approval of the Congress.

Your resolution is so brief that it intrigues me.

Mr. LEGGETT. I think you have to be simple to get involved in this area. Everything that I agree with, all of the objections to some of the resolutions that are on file with this committee, as far as I am concerned it ratifies far too much and gives away far too much and just opens the door for reinvolvements in Vietnam-type situations.

I am of the view that I am no total pacifist, but I think when you involve yourself in war, it should not be a simple extension of diplomacy, it ought to be a situation where you have got the virtual total commitment of the country.

We have seen the problems that have arisen where you don't have the total commitment as Mr. Matsunaga indicated. Even President Roosevelt had the time to come to Congress to get the declaration. I think if we are going to be involved in these slow wars of attrition in

the future, we ought to put some fixed limits on and we are going to have to do that relatively unilaterally because I cannot envision any President of the United States watering down his benevolent dictatorial powers in any way whatsoever in this general field.

Mr. ZABLOCKI. Under section 2, do you mean that the President should be completely free to take military actions of less than 10 days duration and fewer than 5,000 men? After all, the President could send 5 aircrews with nuclear weapons to a small nonnuclear country. That then would be an act of war; would it not?

Mr. LEGGETT. Well, the thing is, you can't cover every situation, and I would not purport to try to respond to all of the hypothetical situations that obviously this very energetic committee might conjure up.

GETTING A HANDLE ON WAR POWERS

I think what we want to do is to try to get a little bit of a handle on war power which is in the Constitution. That is the only purport of my resolution. I think you can only do it unilaterally. If the President has got the power to press a button and involve us in total nuclear war, he has obviously got certain other powers too, and I would presume that in the courts he would take this resolution at its face value and would interpret it in a reasonable way.

Mr. ZABLOCKI. I know your time is limited. Mr. Biester.

Mr. BIESTER. Thank you, Mr. Chairman.

I will be very brief in my questions also. You intrigue me with the proposition about too much flexibility in the action of the Congress with respect to war. Would you suggest that when we declare war that we set the conditions under which it would be stopped?

In other words, would we say unconditional surrender objectives or what?

Mr. LEGGETT. Well, implied would be peace with honor, of course, but I would say that certainly having been burned as I think everybody, hawk and dove alike, admits we have been burned to date, without attributing any cause or effect or victory or like that, I think we recognize that in these situations we need to relate more of the Executive with the Congress and with the country.

In certain situations, you might relate to a time limit, you might relate to a force structure, you might relate it to a division and again you would not be tying the hands, but you would be suggesting that they come back again.

Since we are getting involved in war piecemeal, let's go ahead and involve the Congress piecemeal in these declarations so we can get out of it in the same fashion.

Mr. BIESTER. In other words, the Congress should have a hand not only in starting it but in determining under what conditions it might end.

Mr. LEGGETT. Exactly.

Mr. BIESTER. Thank you.

Mr. ZABLOCKI. Mr. Fraser.

INNOVATIVE APPROACH COMMENDED

Mr. FRASER. Thank you, Mr. Chairman.

I want to commend our colleague for an innovative approach which I think clearly recognizes some of the difficulties in the other ap-

proaches. I think this effort, imaginative and creative as it is, leaves a lot of unanswered questions, but I do think it represents quite a different approach which may help stimulate the subcommittee thinking on this.

Mr. LEGGETT. Very good. I don't purport to have the answers to all the questions that you obviously have.

Mr. ZABLOCKI. Should we have difficulty, we will call upon you.

Mr. LEGGETT. Very good. I will be on the consulting committee. Thank you very much.

Mr. ZABLOCKI. Congressman Dennis.

We wish to welcome you, Congressman Dennis, to the committee and to hear your testimony on your bill cosponsored by Mr. Rhodes, Mr. Smith, Mr. Erlenborn, Mr. McClory, and Mr. Buchanan, H.R. 3046.

STATEMENT OF HON. DAVID W. DENNIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. DENNIS. Thank you, Mr. Chairman. I am privileged to appear before this distinguished committee on such an important matter as this. I do appear, as the chairman has said, on behalf of my bill, H.R. 3046, of which I am the author and which these other distinguished gentlemen have cosponsored with me.

If I may, I think I will open my remarks by trying to give briefly and in outline form what the provisions of the bill are, and they are as follows:

First, when there has been no declaration of war by the Congress, nor any attack on American territory, the President shall not commit the Armed Forces of the United States to combat or to situations abroad where combat is imminent or likely without prior congressional approval, except in cases of emergency or necessity—the existence of which emergency or necessity shall, however, be determined completely by the President.

Second, if the President determines that an emergency exists which justifies and requires the commitment of our Armed Forces to combat or to a combat situation abroad without prior congressional approval, and he goes ahead and does so, he shall immediately make a report in writing to Congress concerning his action.

CONGRESS HAS 90 DAYS TO ACT

Then, three under my proposal, the Congress shall within 90 days after receipt of that report take appropriate legislative action either to approve or disapprove the action taken by the Executive.

Fourth, if Congress approves the action taken, the President is thereafter required to make periodic reports on the situation at intervals of not more than 6 months, and at the time of each such report the Congress is again required, within 30 days of receipt of such report, to take legislative action to approve or disapprove what the President has done.

Fifth, if on receipt of the first report by the President or at the time of any subsequent report by the President, the Congress shall affirmatively disapprove what is done, and only in case the Congress does affirmatively disapprove, then the President shall terminate the

action taken and disengage the troops involved as expeditiously as it may be possible to do so "having regard to, and consistent with, the safety of the Armed Forces of the United States, its territories and possessions, the safety of citizens and nationals of the United States who may be involved, and the reasonable safety and necessities, after due and reasonable notice, of allied or friendly nationals and troops."

Sixth, the bill does not apply to hostilities which might be in progress at the time of its passage.

Lastly, it is prospective in character, and it does not in any way abrogate or alter existing treaty obligations, whatever they may be.

Now, if you will permit me to analyze with you these provisions for just a moment, I think we can notice a few principles here. In the first place, this proposed bill applies only when there has been no declaration of war nor any attack on American territory; it does not apply at all in either of those situations. In other words, if there has been a declaration of war, if there has been an attack on American territory, the bill has no application.

PRIOR CONGRESSIONAL AUTHORITY TO ACT

Second, in those situations, it recognizes the principle that the President should have prior congressional authority to act. Under the circumstance where there is no declaration of war, no attack on the United States, he should normally have that authority before he engages in hostilities.

The next thing is that we recognize that emergencies may exist where it is not practicable to get prior authority, and the President is given full authority to act in these situations, and I do not make any attempt to list or categorize or set forth what these emergency situations may be.

Now that, I think, is the great difference between my bill and that of Senator Javits, the very distinguished Senator from New York, and in my judgment it is a great superiority my bill has over his, for the reasons pointed out here by Mr. Fraser a moment ago, that I don't think you can possibly foresee all of the emergency situations which may arise and spell them out ahead of time as the Javits bill attempts to do.

So I have made no effort to do that at all. I leave that to the President. But if he takes such action, the next thing is that he has to report to the Congress. Now, the point of that is that the Congress gets early information. Congress is required, under my bill, to act on that information—so it has got to take part in the decision and in its continuance; and the President knows before he acts that he has got to justify his action which, I think, has a salutary effect on what he may do.

Then, if Congress acts and acts approvingly, the next principle of the bill—and I think this is highly important—is that periodic reports are required so that he must keep us up to date at regular intervals.

Again we are required to act. Therefore, if we go ahead and conduct the war, we are conducting it, we are taking part in this thing.

REPORTING PROVISIONS OF DENNIS BILL

Now, the reporting provisions are very similar to those of the measure introduced by the chairman, Mr. Zablocki. I must say, I can

certainly go along with the chairman's version of this much easier than I personally can go along with the version of the Senator from New York.

But the next thing—and here is where the chairman's bill and my bill are very different—I provide specifically in my bill that if at the time of any of these reports, when the Congress is required under the bill to take action, the Congress should act to disapprove what the President has done, then the President is required to bring his action to a termination as speedily as it can practicably be done.

Now, that is a strength which is not in the resolution submitted by the chairman, and which I believe is an important point in this case. If you don't have that provision, although there is a report, what can Congress do about it?

Well, we can pass a sense of the Congress resolution, which might or might not have much force or effect. We can cut off funds, which I personally consider a very unhandy and not very good way to attempt to handle the situation at all.

My bill provides a remedy: Action with force and effect that we could take under those circumstances.

Now my bill stays away from the treaty problem, because I realize, as we discussed in here, just what we are obligated to under previous treaties is debatable. My own thinking would be that the requirement of "constitutional process" requires some action on the part of the Congress, but that language is not as specific as it might be, and in a way it begs the question, because it does not say what the constitutional process is.

I have preferred not to get into that problem here, and to draw something for the future; so I have simply said, without trying to determine what these preexisting treaty obligations may be, that we don't affect them by this bill; this bill is something that takes effect from now on.

That, basically, is an analysis of the provisions of the bill.

OLD AND CONTROVERSIAL PROBLEM

As the committee knows, this is not a new problem. It is one we have had ever since the founding of the Republic and it is a very controversial problem because there is nothing in the Constitution which dots the "i's" and crosses the "t's" and exactly gives you a crystal-clear answer; and there is nothing in the gloss put on the Constitution by practice which does that either. Consequently it is possible to argue this thing, as people do.

But I am prepared to support the general position that the intent and purpose of the Constitution is that the decision to make war is basically a congressional decision, except in the case of an emergency situation; and that the role of the Executive, except in the case of an emergency situation, is to conduct the war after the Congress has decided to undertake it.

I think the specific language of article 1, section 8, of the Constitution and these various interpretations—some of which I cite here in my statement and some of which have been made this morning by others—tend to support that position.

Now Madison, of course, spoke about the power of the President to "repel sudden attacks" and that has been translated, and I think not

entirely improperly, in present times, to include the power to act in any emergency which was necessary to the national defense.

This is basically what Secretary Rogers told the Foreign Relations Committee of the Senate when he testified in the spring of 1971. He cited, of course, a great many instances where that had been done without any prior congressional authority, and I cite some of them here in my statement which is before the committee.

LEAVING IT TO PRACTICE AND GOOD WILL

It is perfectly possible to make an argument that this is such a difficult and delicate proposition, and it is so difficult to draw the lines, and it is so hard to define it, that you should not make any effort at all, and that you should leave it to practice and to the good will and good sense of the Executive and of the legislative branch, rather than trying to draw legislative lines in this constitutional field.

That is essentially what Secretary Rogers said to the committee. He recognized that both the President and the Congress should participate, but he objected to the idea of a legislative effort to draw the line.

Now, I think the difficulty with that position is that, whereas the Executive in the past showed considerable respect for congressional prerogative, over recent years—partly because of our default, partly no doubt because of modern situations—the Executive continually has taken more power in this field, and now, instead of doing minor things without congressional approval, we are getting into major operations and major wars without congressional approval.

Therefore, I have come to the conclusion that if we can legislate in this field in a way which will assure the congressional participation which I think everybody conceded there should be, and at the same time will not unduly circumscribe and hamper the necessary flexibility of the Executive, we should try to do it; and this bill is a serious minded effort, on a long-range view, to try to do that.

Now, there is one other problem that I think should be pointed out with Senator Javits' approach. I have already spoken about his attempt to categorize the situations where the Executive can commit troops.

SERIOUS FLAW IN JAVITS BILL

I think it is also a very serious fault with his bill—and this was pointed out by Senator Cooper, as you may know, in the Senate report on the bill when it was first reported out—that the first three of his four categories, and particularly that which allows defense of the United States, are inherent constitutional rights on the part of the Executive.

That being true, how can we possibly pass a statute here which says that the President can exercise a constitutional right for only 30 days? Let alone the impracticality of that, I don't believe it is a constitutional proposition.

I don't think we can pass a valid law which will say to the President of the United States, "You can act to defend the country from an armed attack for only 30 days."

I think he can do it for 10 years if he has to, and I think that is a fatal defect in the Javits approach.

So, I have tried, as I said a moment ago, to draw a bill which would meet most of the criticisms of the other war power bills which have been presented, and which would assure the principle of congressional participation—and continuing participation.

I think the continuing or periodic reporting, and the continuing requirement of action by Congress, is probably the heart of the measure and very important. This would give us in the Congress a method of bringing hostilities to a halt if we actually ever wanted to do so, and at the same time would leave the President, the Executive, the flexibility to act when he needed to act.

I think those are the objectives in which we are all interested, and I say to you, gentlemen, that I have made a serious effort to meet them in this bill. I submit it to you for your consideration, and I am glad to discuss it with you further as you may wish.

[The prepared statement of Mr. Dennis follows:]

PREPARED STATEMENT OF HON. DAVID W. DENNIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. Chairman and members of the committee: I appear there today before your distinguished Committee in behalf of H.R. 3046, of which I am the author and of which Mr. Rhodes of Arizona, Mr. Smith of New York, Mr. Erlenborn of Illinois, Mr. McClory of Illinois, and Mr. Buchanan of Alabama are cosponsors.

This is a measure entitled "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 of the United States or of a military attack upon the United States."

Briefly, and in outline, its provisions are as follows:

(1) When there has been no declaration of war by the Congress, nor any attack on American territory, the President shall not commit the armed forces of the United States to combat or to situations abroad where combat is imminent or likely without prior Congressional approval; except in cases of emergency or necessity—the existence of which emergency or necessity shall, however, be determined by the President.

(2) If the President determines that an emergency exists in such situations which justifies and requires the commitment of our armed forces to combat or to combat situations abroad without prior Congressional approval, he shall immediately make a report in writing to the Congress respecting his action.

(3) The Congress shall within 90 days thereafter take legislative action to approve or to disapprove the action of the executive.

(4) If the Congress approves the action taken, the President shall thereafter make reports on the situation to the Congress at intervals of not more than six months, and the Congress shall thereupon (and within 30 days from the receipt of such report) again approve or disapprove the action of the executive.

(5) If, on receipt of the first Presidential report or at the time of any subsequent report—as above provided—the Congress acts to affirmatively disapprove the action of the executive, the President shall thereupon terminate the action taken and disengage the troops involved as expeditiously as it may be possible to do so "having regard to, and consistent with, the safety of the armed forces of the United States, its territories and possessions, the safety of citizens and nationals of the United States who may be involved, and the reasonable safety and necessities, after due and reasonable notice, of allied or friendly nationals and troops."

(6) The bill does not apply to any hostilities which are in progress at the time of the passage of the bill.

(7) The bill noes not abrogate or alter existing treaty obligations of the United States.

I am pleased to be afforded the opportunity to appear before this distinguished Committee on the exceedingly important topic of the war powers of the President and the Congress—or the distribution as between Congress and the President of the war power of the United States, for I know of no topic, Mr. Chairman, which could be more vital to our nation or more worthy of our most painstaking consideration.

The problem before us is not a new one—it has been with us since the early days of our Republic.

It is a problem fraught with controversy because neither the presumed intentions of the framers, the language of the Constitution itself, nor the gloss given to the Constitution by years of interpretation by means of actual practice, has served to bring about a crystal-clear and indisputable resolution to conflicting points of view.

I am prepared, however, after some study and consideration of the subject, to accept and to defend the point of view that the intention of the framers was, basically and in general, to lodge with Congress the power and authority to commit the Nation to war (subject to a right in the executive to act in emergency situations to—in Madison's words—"repel sudden attacks") while placing in the President as Commander-in-Chief the conduct and direction of the war once the commitment to war has been made.

I base this view on the rather specific language of Article I, Sec. 8 of the Constitution, plus such early and authoritative interpretations as that of Thomas Jefferson, writing to James Madison in 1789, when 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.

and that of Alexander Hamilton who, in Federalist 69, wrote as follows:

> 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 to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.

The Supreme Court in *The Prize Cases, 2 Black (67 U.S.) 635 (1862)*, moreover, while upholding the executive declaration of a blockade, remarked that "Congress alone has the power to declare a national or foreign war," and that "He [the President] has no power to initiate or declare a war". Chief Justice Marshall in *Talbot* v. *Seeman, 1 Cranch (5 U.S.) 28 (1801)* spoke of

"The whole powers of war being, by the constitution of the United States, vested in congress . . .", and Congressman Abraham Lincoln showed his understanding of the matter when he wrote to his law partner, Bill Herndon, and 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 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."

Proponents of the executive power argue that the rationale of the concept that the President might act "to repel sudden attacks" (which Madison stated as the reason for changing the proposed words giving Congress the power "to make war" to the words "to declare war") was, and is, broad enough to justify independent action by the President to use the armed forces to protect the nation's security in a variety of emergency situations; and they can and do point to a long list of actual occasions on which such executive action has, in fact, been taken.

See, in this connection, the testimony of the Honorable William P. Rogers, the Secretary of State, before the Committee on Foreign Relations of the United States Senate on May 14, 1971. Secretary Rogers cited the cases of Mr. Jefferson and the Barbary pirates, President Polk and Mexico, President McKinley and the Boxer Rebellion, Theodore Roosevelt and Panama; actions by Presidents Theodore Roosevelt, Taft, Wilson and Coolidge in Mexico, other parts of Latin America, and the Caribbean; President Franklin D. Roosevelt's destroyers-for-bases agreements, with dispatch of troops to Greenland and Iceland; President Truman's action in Korea, President Eisenhower's landing of Marines in Lebanon, President Kennedy's quarantine of Cuba, and President Johnson's landing of Marines in the Dominican Republic, all as executive actions using and committing our armed forces without a declaration of war and often without prior Congressional authorization, and in that connection he said:

"I cite these historical precedents not because I believe they are dispositive of the constitutional issues your Committee is considering—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."

Some argue, and it is a legitimate argument worthy of serious consideration, that whatever ambiguity there may be in this field of the respective war powers of the executive and legislative branches, it is better left alone; that the task of legislative definition is an impossible one, requiring a rigidity not adapted to the varying and unforeseeable forms in which the problem may arise; and that while legislative and executive cooperation in the field are important this is best left to the good will and the good judgment of both branches, without any legislative attempt to define areas in this field of Constitutional powers. Thus Secretary Rogers, in his testimony already referred to, while recognizing that:

> . . . 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.

and while stating that:

> The recognition of the necessity for cooperation between the President and Congress in this area and for the participation of both in decision-making could not be clearer than it is today.

nevertheless held that:

> What is required is the judicious and constructive exercise by each branch of its constitutional powers rather than seeking to draw arbitrary lines between them.

I concede that this is a difficult field in which to legislate, and I am of the opinion—for example—for reasons which I will state in a few moments, that the proposed bill of the distinguished Senator from New York, Mr. Javits, which passed the Senate in the 92nd Congress, falls fatally afoul of these very arguments and, for that reason, ought not to be adopted.

The difficulty with the No Congressional Action thesis, however, lies in the fact that the executive (which earlier in our history was rather careful of the Congressional prerogative) increasingly in recent years—due in part to Congressional acquiescence and in part, no doubt, impelled by the necessities of modern conditions—has taken more and more power to itself in this field, and has engaged in military operations of increasing magnitude without prior Congressional authority with the result that we are in danger of losing that degree of Congressional participation and cooperation which all concede is necessary to the satisfactory conduct of military operations by the United States.

For this reason I have become convinced that a legislative effort to preserve and to further this Congressional participation is in order and is important, constructive and worthwhile, provided that this can be successfully accomplished while still preserving to the executive the flexibility to act promptly in the national interest which the realities of the modern world may require.

H.R. 3046 is presented as a serious effort to accomplish this important task.

If you will permit me to briefly analyze H.R. 3046 you will note the following:

First.—The bill recognizes the principle that when there has been no Congressional declaration of war, nor any attack on the United States, the President shall not ordinarily commit our armed forces to combat abroad without prior Congressional authorization.

Second.—It recognizes that situations of emergency or necessity may nevertheless occur which warrant such executive action without prior Congressional authorization.

Third.—It does not attempt to define, to list, or to categorize what these cases of emergency or necessity may be, and it leaves to the President the determination of whether such an emergency or necessity exists.

This is important; and it is an important point of difference from, and, in my respectful judgment, of superiority over, Senator Javits' bill, to which I have already referred.

The distinguished Senator from New York does attempt to list four cases, and four cases only, where the executive can act to commit troops to combat without a Congressional declaration of war.

In my judgment this is unrealistic and unduly restrictive—for the simple reason that it is impossible to foresee all the different and varying situations which may arise, and which may perhaps imperatively require such executive action.

Fourth.—Whenever such executive action without prior Congressional authority is taken, prompt report must be made by the executive to the Congress.

This will keep the Congress informed, and this legal necessity for reporting

and for justifying the action taken will, I think, have a salutary effect in discouraging ill-considered executive action.

Fifth.—Congress is thereafter required to take prompt action to approve or to disapprove the action of the executive. This assures Congressional consideration of what has been done and of participation in the decision.

Sixth.—If Congress approves (or, alternatively, fails to disapprove) the action taken, the President is required to make subsequent and continuing reports to Congress, at not to exceed six-month intervals.

Seventh.—Congress, on receipt of such subsequent reports, must again consider them and must again act thereon. These provisions—6th and 7th—are designed to assure continuing Congressional participation, and I believe and submit that for this reason they are highly important, and are probably the heart of the bill.

Eighth.—If Congress ever affirmatively disapproves the action taken, the President must terminate it as expeditiously as possible.

Finally.—The bill is prospective in character and in operation and does not apply to any hostilities in progress when it is adopted; nor does it alter or abrogate pre-existing treaty obligations, whatever these may be.

I believe and submit that H.R. 3046 meets most of the objections which have been urged—and I believe urged with some force—against other war power bills. I have already noted what I believe to be the fallacy of the effort to confine independent executive action in this field to four specified categories on a "use" basis. Senator Javits' bill, moreover, seeks to limit action even in these categories to only 30 days' duration, which, I submit, is certainly unrealistic and, since the categories so limited include even the case of an armed attack on the United States, is also probably unconstitutional—because surely the executive has the Constitutional right and duty to defend the country against an armed attack, and this Constitutional right and duty can hardly be limited by Congressional enactment to an exercise of only 30 days. H.R. 3046, on the other hand, does not apply or become operative at all in the case of an attack upon the United States, its territories or possessions.

The bill H.R. 3046 is thus submitted to your consideration as a bill designed as a long-range measure, which will not rigidly or unrealistically circumscribe necessary action by the Chief Executive, but which will assure, in the future, that cooperation and co-participation between the executive and the legislative branch, in the vital matter of peace and war, which was contemplated and intended by our fathers the framers of the Constitution, and which, in my judgment, is absolutely necessary to our continued functioning as a representative Republic.

Mr. ZABLOCKI. Thank you, Congressman Dennis. I want to comment you for a well-prepared statement and your presentation this morning, and also commend you for your efforts in this particular field.

One concern I have that you have not touched in your remarks regards section 6 of your bill. That section provides that failure to act by the Congress is to be taken as approval of Presidential action.

Now, I pose this question: What if the majority of the Congress wishes to stop a deployment of American Armed Forces into hostilities abroad, but is prevented from passing a bill by a filibuster in the Senate or by priorities that occur in the scheduling of legislation within the time limit of 90 days that your bill provides? Could such a development be taken as a positive endorsement for what the President had done?

"CONGRESS SHALL ACT" BILL

Mr. DENNIS. Well, my bill in the first place, Mr. Chairman, requires action. It is not a "may" bill; it says, "Congress shall act."

Perhaps you could stop right there, but it occurred to me that although we might pass a law saying we shall act, maybe for some reason we would not act anyway, and we will just violate the law to that extent. Then the question might arise, well, what is the effect of that?

So I thought in drawing section 6 that I would make it clear that should something like that happen, we didn't have a situation where

the President had to bring his action to a halt; that that could happen only if we in fact acted to tell him to do it, because I thought we ought to meet the possiblity of inaction. That is the reason for section 6.

Now, I did not try to spell out in a parliamentary sense as Senator Javits did the steps of action, but what I said is, you have to act within a certain length of time: 90 days the first time, 30 days thereafter.

That means you have got to get busy on this and act promptly, and that I think will meet the situation. The reason, as I said, that I said anything about nonaction at all was just to give an answer to the question, "What would be the effect here if for some reason we didn't do what the law plainly says we must do?"

Mr. ZABLOCKI. Congressman, you are absolutely correct. House Joint Resolution 1 did not provide for congressional action. However, as a result of further hearings and of recommendations made to the subcommittee, section 6 was added in House Joint Resolution 2. At the same time, the 30-days or 90-days provision was avoided. Thus, section 6 of House Joint Resolution 2 provides for accurate reporting. It would require that consideration be given to the question of whether Congress shall authorize the use of the Armed Forces of the United States and the expenditures for imminent hostilities cited in the reports received from the President.

PROCEED IMMEDIATELY TO CONSIDERATION OF QUESTION

Mr. DENNIS. Yes. I am aware of that, Mr. Chairman, and I didn't mean to say, if I did say it, there was no such provision here. The point I am making is that it says we shall proceed immediately to the consideration of the question, and I agree that that means we have got to consider it, there is no question about that.

I think I have gone a little bit further because I have provided specifically that if we take an action to disapprove it, he has got to quit, and I don't think that is in your bill.

Mr. ZABLOCKI. Well, I think if the action of the President were of such nature that it would incur the displeasure of Congress, we would take action.

Mr. DENNIS. How would you do it? You could cut off the funds, sure, but under my bill you could pass a resolution which said you must withdraw the troops, and he would be bound to withdraw them.

Now, I don't think you can do that constitutionally, maybe, when he is defending the country. I don't think you can. But when he is carrying on undeclared war over in Asia, I believe you can; and I think he would be required to do it, or there would be a possible impeachment action or something of that kind, and I would not accept the idea that he would not do it if we passed such a resolution.

Mr. ZABLOCKI. One further question, Mr. Dennis. Do you believe there is any value in providing for consultation, requesting the President to consult with the Congress, before introducing Armed Forces?

Mr. DENNIS. Yes, I do, and I think something of that kind might well be added here, although my bill requires that ordinarily the President should have prior congressional authorization, and I believe that such authorization would necessarily require some consultation.

Mr. ZABLOCKI. Mr. Biester.

ABLE AND ASTUTE CONSTITUTIONAL LAWYER

Mr. BIESTER. Thank you, Mr. Chairman.

I will not set us on the same running tour we got into yesterday, because of my questions at the time of the quorum call. I will be very, very brief.

I just would like to welcome our colleague to the hearings. He is an able and astute constitutional lawyer. I also commend him on the clarity of his statement.

I am wondering if it is assumed that in the congressional action which takes place along the way here, under your plan would the Congress from time to time be able to set and reset the objectives and goals of the military action in which we are involved?

Mr. DENNIS. Well, I think the Congress probably has the right to do that anyway. Of course, what I specifically provided for here is a reconsideration of what has been done, but I would think in the course of reconsidering what has been done that we could certainly have a wide-ranging discussion of the goals in arriving at our conclusion as to whether we arrive at an approval or a disapproval.

Mr. BIESTER. But you don't see it as just simply yes or no, lack of giving even what the President may have done. Would you have a role in that in your plan?

Mr. DENNIS. I would think so. I would think so. Possibly we could even to some degree—I am just thinking out loud—regulate the extent of what is being done; but I am not quite so sure about that because I think perhaps there you may get into the President's role as the Commander in Chief.

Mr. BIESTER. One last question, and that is that even under your plan, don't we finally hit the point at which there are troops committed under the command of the Commander in Chief, some prisoners have been taken and in which the forces deployed may be at some hazard with respect to their redeployment, and we run into the same kind of problem we ran into the last several years in the Vietnam war in which there was an assertion of implied authority to redeploy those troops in the safest and most rational way.

SOME PROBLEMS INESCAPABLE

Mr. DENNIS. Well, I think some difficulties here frankly are inescapable. What I have said is, supposing we pass a resolution now which says we disapprove this and the President has to stop, I have not tried to cut him off in the next 5 minutes. What I say is that under those circumstances, the President shall discontinue the action so taken by him and shall terminate any hostilities which may be in progress and shall withdraw, disengage, and redeploy the Armed Forces of the United States which may be involved just as expeditiously as may be possible, "having regard to, and consistent with, the safety of the Armed Forces of the United States, the necessary defense and protection of the United States, its territories and possessions, the safety of citizens and nationals of the United States who may be involved, and the reasonable safety and necessities, after due and reasonable notice, of allied or friendly nationals and troops."

Now, I admit that leaves him a wide latitude, but I don't believe you can leave him anything else. I don't think you can say. "You have to do it in 24 hours or 10 days or 30 days." But it still is inescapable in this language, I think, that under these circumstances he has to do it, and he has to do it just as fast as he can, having regard to these considerations.

Mr. ZABLOCKI. Mr. Fraser.

Mr. FRASER. Thank you, Mr. Chairman. I will try to make this very brief.

I have difficulty with your phrase "necessity." I can't believe that there has ever been a President who has ever committed troops to hostilities abroad who didn't feel there was a necessity, and I fear that you maybe opening up a constitutional loophole which may exist now.

NECESSITIES BORN OF DIFFERENT CIRCUMSTANCES

Let me pass from that though. You say in section 5——

Mr. DENNIS. I would say just in passing, I might have in mind your missile crisis, for instance, which easily could be a necessity.

Mr. FRASER. I think we could agree on that.

Mr. DENNIS. Also, an emergency.

Mr. FRASER. I think we could agree on necessities, but necessities are born of different circumstances. One necessity is to show our determination to the other side that we are not pansies or we are not weak.

It is widely believed that that is why Pre dent Kennedy decided to go into Vietnam as far as he did, after the meeting with Khrushchev in Vienna.

But you say, "At any time." Did you mean to extend the 90 days when you say, "At any time"?

Mr. DENNIS. No. What I mean is that——

Mr. FRASER. If you act within the 90 days that you provide for in 3 and 4.

Mr. DENNIS. What I mean is that "at any time" there has been a report. You could say, "If the Congress shall ever."

Mr. FRASER. I don't see why, if you require periodic reports, you should not give the Congress the authority at any time to disapprove. Why limit it to 90 days?

Mr. DENNIS. I would say this, Mr. Fraser. I think Congress could act. I think we probably now have the right to do this; but all the bill says is, not that you could not do it quicker if you wanted to, but you are required to do something about it every 6 months; and you must act within 90 days of the first report and within 30 days after subsequent reports.

Mr. FRASER. Finally, you say, "By the enactment of the resolution." Now a bill clearly would require Presidential signature.

Mr. DENNIS. That is probably right.

CONCURRENT VS. JOINT RESOLUTION

Mr. FRASER. Looking at the word "resolution" in conjunction with the bill, I would assume it has to be a joint resolution which also requires the Presidential signature—a concurrent resolution would not be sufficient. Do you intend that the President must sign this?

Mr. DENNIS. I don't know whether I thought that completely through. I intended to leave it rather flexible to the Congress what they wanted to do, but I would think "resolution" is broad enough to cover your concurrent resolution if that was what the Congress decided was the method to take.

Mr. FRASER. I would think that you would have to make that explicit or you would have difficulties.

Mr. DENNIS. Well, I would have no particular quarrel with it; although I think if you say "resolution," that that includes any kind of a resolution within our prerogative.

Mr. FRASER. I think it might have, except you say "bill or resolution."

Mr. DENNIS. Well, bill or concurrent resolution or joint resolution. My only idea, really, was to let us determine at the time what is the best route.

Mr. FRASER. I think you have in your draft, if I may say so, dealt with many of the difficulties we have seen in other drafts. I want to commend you for a good effort.

Mr. DENNIS. Thank you.

Mr. ZABLOCKI. Gargantuan effort. Thank you, Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Unfortunately, because of our running later than we thought and conflicts in his own schedule. Mr. Harrington will be unable to appear as scheduled. His statement will therefore follow as though read at this point.

[The statement follows:]

STATEMENT OF HON. MICHAEL HARRINGTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. HARRINGTON. Mr. Chairman, I wish to thank you for the opportunity to testify today on my war powers legislation—an issue which I regard as vitally important.

During the last century, the United States has witnessed an unparalleled expansion of Presidential warmaking power. This expansion has now reached dangerous limits which could undermine the system of checks and balances underpinning our constitutional system of government.

This history of the last 10 years offers striking evidence of the danger of increased Presidential power. We slipped into a war which no one wanted, and once in, found ourselves unable to get out, despite widespread public dissatisfaction and disillusionment of our course of action.

FROM STRICT CONSTITUTIONAL VIEWPOINT

From a strict constitutional viewpoint, I believe the various war powers proposals before this committee are both proper and justified. Article I, section 8 of the Constitution clearly vests the authority to initiate war in the Congress. The absence of extended debate over the war powers in the Constitutional Convention and the historical record of the next 150 years clearly attest as to where that authority properly belonged.

However, since World War II, Congress power to initiate war has been severely eroded. The executive branch has pointed to changes in the world political situation, the emergence of the United States as

a world power and protector, the revolution in travel and communication, and the development of atomic weapons, as justifications for the increased power.

The Congress, up to now, has accepted the President's explanations, and therefore must share the blame for any constitutional imbalances that have occurred. There was barely a word of protest when President Johnson asked for the Tonkin Gulf resolution.

But I believe most Members of Congress now believe that a mistake was made—that we have gone too far in delegating responsibility to the executive branch.

One of the major political phenomenon of the last decade has been the simultaneous assumption of concentrated power by the President and the decentralization of that power within the executive branch. The Pentagon papers, and David Halberstam's excellent book, "The Best and the Brightest," both document the fact that not only the Congress lost control over the decision to go to war in Vietnam, but the President himself lost control over the bureaucracy.

STRATEGIC DECISIONMAKING DONE BY TECHNICIANS

This distrubs me as much, if not more, than the Congress-President debate. In recent years, strategic decisionmaking has been turned over to the technicians, and the record shows the bureaucratic momentum has overwhelmed both Presidents Kennedy and Johnson. If these men, who are both generally acclaimed to be strong Presidents lost control over the decisionmaking process, a real danger exists that future Presidents will be equally unable to control events.

The answer to this problem lies not in reform of the executive branch, but in a return of authority to the Congress. The two branches of Government respond to separate sets of pressures. The bureaucratic momentum which can overwhelm a President is not so strongly felt in the Congress, where power is diffused and the Members are more attuned to local interests, rather than to the interests of the departments and agencies.

There are legitimate circumstances in which Executive commitment of the Armed Forces are valid. But it is necessary to balance this authority with congressional authority. The legislation I have introduced established this balance. At this point, I will briefly outline the provisions of the bill:

Section I: Provides that this bill governs the use of Armed Forces "in the absence of a declaration of war by the Congress." In this bill we are dealing with undeclared wars—wars which have come to be called Presidential wars because of the constitutional process of obtaining congressional authorization has been shortcircuited.

FULFILLING INTENT OF FRAMERS OF CONSTITUTION

Section II: It sets out the purpose of the bill to fulfill—not to alter, amend or adjust—the intent of the framers of the Constitution to insure that the collective judgment of both Congress and the President is brought to bear in decisions involving the introduction of Armed Forces into hostilities.

Section III: It defines the emergency conditions in which, in the absence of a declaration of a war by Congress, the Armed Forces of

the United States may be introduced into hostilities or in situations where eminent involvement in hostilities is indicated by the circumstances. The conditions are:

1. To repel an armed attack on the U.S.A., its territories and possessions; to take necessary and appropriate retaliation in the event of such an attack and forestall the threat of such an attack.

2. To repel an immediate attack upon the Armed Forces of the U.S.A. located outside the United States or forestall such an attack.

3. To protect the evacuation of U.S. citizens from foreign lands.

These conditions give the President a change to act forcefully against any aggressor and provide a deterrent for any potential aggressor, but they do not give him a carte blanche.

PURSUANT TO SPECIFIC STATUTORY AUTHORIZATION

Subsection 4 of section 3 sets forth the criteria by which the Congress can "pursuant to specific statutory authorization" give the President advance authority to take emergency action. In codifying this authority, the Congress is exercising its own constitutional power "to make all laws which shall be necessary and proper for carrying into execution * * * all other power vested by this Constitution in the Government of the United States, or in any other department of officer thereof." It was judged important to specify that the authority to use Armed Forces is not to be inferred from any provision of the law including appropriations, unless such authority is explicitly provided. This includes treaties past, present or future unless legislation is implemented to authorize the use of Armed Forces. These requirements provide first for an exchange of knowledge between the Congress and the President; second, this subsection provides against "area resolutions" such as the controversial Tonkin Gulf Resolution. The subsection also requires specific statutory authorization for the assignment of members of the Armed Forces to participate in combat related to military activities of the regular or irregular forces of any foreign country—this clause provides against the gradual escalation of war without congressional consent by the introduction of military advisers such as in Vietnam.

Section IV: Specifies that the President shall report promptly to the Congress in the event of an outbreak of hostilities. This section provides against the gradual escalation of war without congressional consent, also the hampering of action by Congress due to lack of information and above all it makes the President accountable for his actions.

Sections V and VI: The 30-day authorization period—these sections resolve the modern dilemma of reconciling the need for speedy and emergency action by the President in this age of instantaneous communication and intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate. This 30-day period can be shortened or lengthened by the Congress.

INSURING PRIORITY CONSIDERATION BY CONGRESS

Section VII: Establishes strict procedures to insure priority congressional action to extend or foreshorten the 30-day period as pro-

vided in sections V and VI. This section eliminates the possibility of delaying actions.

Section VIII: Contains a separability clause specifying that if any provision of the bill should be held invalid, the remainder would not be affected thereby.

Section IX: Specifies that the bill would take affect on the date of its enactment but would not apply to the hostilities in which the Armed Forces of the United States were involved prior thereto.

I hope that in this short analysis and summary that the members of the subcommittee will see this bill as a flexible and sensible method to restore Congress constitutional powers.

Since 1970 we have seen a great number of war powers bills, resolutions and joint resolutions introduced. They have all been of varying degrees of comprehensiveness. My bill outlined the entire problem in great depth. It provides a solution which is both necessarily flexible in the advent of unforeseen circumstances yet it is firm enough to assure that Congress maintains its warmaking authority. It does this by outlining in great detail when the President can use Armed Forces in emergency conditions. But as it gives the President power in emergency conditions, it also includes provisions that make sure first, that he can't act against the public will; and second, the bill by its constitutional priority provisions makes sure that any initiation of war can be discussed in Congress as soon as possible. In addition, my bill and the Javits bill have widespread support in Congress. The Javits bill passed the Senate in the last session. This year it has 58 Senators cosponsoring it, including both the majority and minority leaders.

Mr. ZABLOCKI. The subcommittee stands adjourned until 2 o'clock Tuesday, March 13, when we will hear Department of State witnesses.

(Whereupon, at 12:20 p.m., the subcommittee adjourned, to reconvene at 2 p.m., Tuesday, March 13, 1973.)

WAR POWERS

TUESDAY, MARCH 13, 1973

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON NATIONAL SECURITY
POLICY AND SCIENTIFIC DEVELOPMENTS,
Washington, D.C.

The subcommittee met at 2:40 p.m., in room 2200, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman) presiding.

Mr. ZABLOCKI. The subcommittee will please come to order.

This afternoon we resume our hearings on war powers legislation pending before the Congress. This is the third of 5 days of hearings. Our witness today is Hon. Charles N. Brower, Acting Legal Adviser for the Department of State. His testimony will express the administration position on the war powers issue.

Mr. Brower, we are pleased to have you with us. If you will proceed, please.

STATEMENT OF HON. CHARLES N. BROWER, ACTING LEGAL ADVISER, DEPARTMENT OF STATE

Mr. BROWER. Thank you, Mr. Chairman.

I appreciate very much the opportunity to testify before you this afternoon on the very important subject of proposed war powers legislation.

I should say I am particularly pleased to be able to testify on what I consider to be a unique occasion. This I think is the first time in the long history of these deliberations on such legislation that we can consider such legislation free from the distraction of major American involvement in hostilities overseas, and divorced from the special political pressures of an election year.

I believe also that the stunning foreign policy success which President Nixon has achieved in his first term precisely through the judicious exercise of his constitutional authority must also be considered as part of the background to these deliberations. I would hope that the general perspective on these issues can now be somewhat broader.

CHANGES IN PUBLIC ENVIRONMENT

The changes in the public environment are particularly significant since war powers legislation has undoubtedly had its genesis in disenchantment with the protracted hostilities in which the United States became engaged during the last decade. Blaming those events on the

Presidents who were in office during that time, the proponents of the more restrictive forms of war powers legislation seek to avoid similar policies in the future by diminishing the fundamental authority of the Presidency, now and forever after. Many such advocates do concede, albeit reluctantly, that Congress itself played a role in past policies, but they would argue that Congress was led to act unwisely because it was supplied inadequate information and therefore was unable to exercise its responsibilities competently.

I do not myself accept this view of history, but I think it is worth noting because the conclusions drawn from it by advocates of restrictive war powers legislation are not in fact logically consistent with this view. These advocates have sought to place arbitrarily defined legal obstacles in the way of expeditious executive branch action. I think at the same time they ignore what from their point of view should be the real source of concern, namely, a need for Congress to have more complete and timely information, to be capable of better analysis, and to maintain a more thorough exchange of ideas in the development of particular foreign policies.

It is, I would suggest, only through availability and knowledgeable use of adequate information, on a timely basis, and with the best possible analysis of what that information means, that the executive branch or the Congress can exercise its respective constitutional responsibilities in the foreign policy field to the very best of its ability. Imperfect performance by one branch of Government cannot be remedied by attempts to undercut or diminish the fundamental constitutional authority of another branch. Because the war powers are distributed between the Congress and the executive by the Constitution, those two branches must cooperate closely in order for either to exercise its powers effectively. Each must make the particular contribution assigned it by the Constitution. Performance is more likely to be enhanced by the increased and improved flow of information to and between those bodies in an effective and timely manner.

ARBITRARY LEGAL OBSTACLES

The negative approach to war powers legislation—namely, the interposition of arbitrary legal obstacles hindering the exercise of executive responsibilities—has an additional serious fault which I think is particularly worth calling to the attention of this body. Proponents of such restrictive legislation overlook the fact—and I believe it is a fact of political life—that it is impossible for Congress to tie the hands of the executive branch without itself suffering a similar limitation of its freedom to act. Every proposed reduction of Presidential authority in this area effects a comparable diminution of congressional freedom. I might give two brief examples from the legislation we are considering. If the President's exercise of certain powers were restricted to a period of 30 days, as a practical matter the President would also become the beneficiary of a 30-day blank check, endorsed by the Congress. If congressional debate were required in all cases immediately upon the submission of a report from the President or at predetermined intervals which might have no relevance to the course of events, Congress would also lose its flexibility to adjust its own schedule of activities to the uneven pace of unforeseen events.

These are but two examples, yet I think they are illustrative of the fact that in declaring the executive branch incompetent to act except in prescribed circumstances, Congress would also be inhibiting its own ability to act except in precisely delineated fashion.

The correct balance, I submit, between the Congress and the Executive in the exercise of war powers is struck by each branch exercising the powers assigned to it in the most informed, and hence the most responsible, way; that balance cannot be established or maintained, indeed it could well be destroyed, by legislative attempts to alter the basic scheme which the drafters of the Constitution so carefully established. What is needed, I suggest, are processes designed to increase the likelihood that our Government as a whole, including both the executive branch and the Congress, will be able to exercise its responsibilities on the basis of maximum information, rather than as a result of sterile confrontation. The answer to dissatisfaction with a particular foreign policy is not to be found in alteration of constitutional authority; it is rather to be found through enhancement of our respective abilities, exercised within that authority, to formulate wise foreign policies for the future. From this point of departure, Mr. Chairman, I would like to address the three bills on which our comments have been particularly requested.

PROVISIONS OF THE JAVITS BILL

I would address myself first to the Javits bill, S. 440, which would allow the President to employ the Armed Forces in hostilities or situations where imminent involvement in hostilities is indicated by the circumstances in only four categories of situations absent a declaration of war. In each of those four situations, the President would be barred from continuing to use those troops beyond 30 days without the affirmative consent of Congress unless, of course, Congress is physically unable to meet as a result of an armed attack on the United States, or unless it were necessary to use troops to protect their own prompt disengagement.

Mr. Chairman, the Department of State continues to believe as in the past very strongly that it would be unwise and unconstitutional for the Congress to adopt this bill. S. 440 seeks by statute to redefine specifically and restrictively the constitutional allocation of the war powers. The drafters of the Constitution, however, recognized the extreme difficulty of anticipating all circumstances which might in the future call for the use of the Armed Forces.

As Alexander Hamilton said, writing in the Federalist, and I quote: "It is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them." This difficulty was underscored by the repeated amendments to the same bill as it was being debated last year in the Senate.

The Founding Fathers wisely avoided a precise definition of the interface between congressional and executive authority. They established instead a general structure of shared powers requiring the cooperation of both branches, predicated on the assumption that the form of that cooperation would remain, within certain limits, sufficiently flexible to accommodate many different kinds of circumstances.

CHANGING THE HISTORICAL SCHEME OF FLEXIBILITY

S. 440 would change that historical scheme of flexibility by imposing technical legal prerequisites to action, and in so doing would insure that every important national security debate following emergency action by the President, instead of being argued entirely on the merits, would be obscured by procedural arguments as to whether or not the President had acted in accordance with this new legislation. When the question might be whether the President has acted rightly, might become whether the President has acted correctly in accordance with certain procedural rules. The scheme envisaged in S. 440 is a significant departure from that established in the Constitution, and hence could legitimately be effected only by a constitutional amendment, not by legislation, even if it were desirable.

I should say something about the "necessary and proper" clause in light of the growing role it appears to play in the presentation of S. 440. Contrary to the apparent assertion of section 2 of this bill, nothing in the "necessary and proper" clause of article 1, section 8, of the Constitution gives Congress this power to alter the war powers. As Alexander Hamilton also made clear in the Federalist, the "necessary and proper" clause was intended principally to guard against an excessively narrow construction of the authority of the Union vis-a-vis individual State authority. There has never been a judicial decision which has held that the "necessary and proper" clause was intended to limit the principle of separation of powers. In fact, the case of *Myers* v. *United States*, 272 U.S. 52 (1926), in which the Supreme Court held that Congress did not have the power to condition the President's removal power on the concurrence of the Senate, indicates clearly that the separation of powers is not limited by Congress' power under the "necessary and proper" clause. While this provision gives Congress the authority to implement both congressional and executive powers, it does not empower Congress to change the balance between those powers by defining and limiting the President's authority.

S. 440 is notably deficient in that it omits Presidential authority to deploy Armed Forces abroad as an instrument of foreign policy in the absence of an actual attack or imminent threat of attack on American territory or forces. Yet this historic Presidential prerogative for nearly 200 years has been essential to the resistance of aggression and the protection of American security interests. As Secretary of State Rogers has said, "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." Elimination of this weapon from the Presidential arsenal could very seriously undermine our security posture, and likewise cannot properly be achieved except by constitutional amendment, not be legislation.

DEFENDING THE UNITED STATES AGAINST ARMED ATTACK

S. 440 also purports to restrict the authority of the President to defend the United States itself against an actual armed attack, by limiting to 30 days his right to use the Armed Forces in such hos-

tilities, unless Congress specifically authorizes a continuation or is physically unable to meet as a result of the attack. The defense of the United States of America against armed attack, however, it seems to me, is a core area of Presidential authority; Congress cannot affect the President's constitutional authority in this area.

Even the States—the 50 individual States—have constitutional authority to provide for their own defense when invaded or in imminent danger of invasions, article I, section 10. Surely the President of the United States can have no less authority or responsibility for defense than the States. This is particularly so when you realize the Federal Government has an unlimited constitutional obligation to defend the States, article IV, section 4, and the President as Chief Executive, article II, section 1, and Commander in Chief, article II, section 2, has the responsibility and the authority to provide that defense. Surely the Congress cannot by legislation reduce these constitutionally prescribed rights and obligations.

Since Congress already has the authority to conduct at any time the same kinds of review that S. 440 proposes to mandate within 30 days, it is difficult to see what advantages Congress gains by legislating an arbitrary deadline. Congress in any particular case can undertake its consideration in a manner and within a period of time appropriate to the circumstances.

ARBITRARILY FIXED TIME LIMITATION

An arbitrarily fixed time limitation on Presidential authority contributes nothing to the right of Congress to exercise its constitutional authority, and at the same time it could seriously impede action or undermine negotiations in the future in a manner not desired by either the President or the Congress at that future time. To seek to terminate Presidential authority if, for whatever reason, the Congress does not expressly affirm an action within an arbitrary time limit is neither helpful to the interests of either branch nor a constructive contribution to the development of a wise foreign policy.

I now turn to the second bill which I have been asked to consider, and this is H.R. 317, which is known, I believe, as the Bingham bill.

This second bill avoids some of the serious problems of S. 440. It does not propose to specify the constitutional powers of the President. Neither does it propose a fixed and arbitrary time limitation for congressional action in response to Presidential initiatives. It would call for prompt reports from the President to the Congress whenever the armed forces are used in hostilities absent specific congressional authorization or a declaration of war.

We do question the necessity, and I would say we question the advisability of requiring, as H.R. 317 would, that the Congress be convened if not in session at the time the President submits such a report. It is certainly conceivable that the formality and attention given to a special session of the Congress could negate the advantages of quiet diplomacy in the case of an understated show of strength. A decision to convene Congress in extraordinary session constitutionally lies within the discretion of the President, and should depend on the circumstances prevailing at the time.

ONE-HOUSE ACTION PROVISION OF H.R. 317

Section 4 of H.R. 317, entitled "Termination of Authority," presents difficulty in two respects. This section proposes that the authority of the President to deploy the armed forces or to direct or authorize them to engage in hostile action, absent specific congressional authorization or a declaration of war, is terminated if either House of the Congress—either the House of Representatives or the Senate—adopts a resolution disapproving continuation of an action the President has taken.

First, the proscription of Presidential action would seem far too broadly drawn for both constitutional and policy reasons. Although within its constitutional authority Congress clearly can decide, for example, whether or not to appropriate funds to support policies or programs of which it disapproves, it is extremely doubtful, as I have mentioned earlier, that Congress could terminate Presidential authority to deploy forces as the President saw fit, for example to protect the United States itself against an armed attack.

A second, and I think grave difficulty with section 4 of H.R. 317 is that it purports to terminate the authority of the President upon the passage of a resolution by either House of Congress. This must be considered an unworkable standard for a number of reasons. We are dealing here with a division of power between the Congress and the Executive, not a division between the Senate or the House on the one hand and the Executive on the other. When one branch purports to impose legally binding restrictions on the exercise of the authority of the other, it clearly must be acting with its own full authority. The Congress clearly has authority to approve or not to approve funds for use by the executive branch. Such a decision, of course, governs to some extent the activities of the Executive, and clearly depends on the consent of both Houses of the Congress.

IMPAIRING CONSTITUTIONAL AUTHORITY OF CONGRESS

A law which states that the same effect can be accomplished by the passage of a simple resolution by only one House of Congress is constitutionally defective. It impairs the constitutional authority of Congress itself as well as that of the Executive. Furthermore, I might pose the following interesting question. What would be the true position of Congress if, for example one House passes a resolution supporting the President's action and the other a resolution calling for its termination? It is clear that in matters of such significance the Congress must speak with one voice in order to have legal force.

Let me now turn to the third measure I have been asked to discuss, Mr. Chairman, and this is House Joint Resolution 2, introduced by you for yourself and others. It is primarily oriented toward increasing the flow of information on which Congress can base its decisions in exercising its constitutional responsibilities. As I have discussed at some length, it is this general approach, rather than that of attempting to change the underlying authority of either branch of Government that we strongly feel is the more constructive and positive way to proceed. I would like to mention, Mr. Chairman, that we have the greatest respect and the sincerest appreciation for your efforts over

the past several years to conduct a balanced, responsible and searching investigation into the issues raised by war powers legislation. The country is indebted to you in this respect and it is indeed a high honor for me to participate this afternoon in the deliberations in which you have been so long engaged.

Unlike the Zablocki bill passed last year by the House of Representatives, however, House Joint Resolution 2 includes provisions in section 3 which could be read as limiting the fundamental authority of the President to introduce the Armed Forces into hostilities or situations where imminent involvement in hostilities is clearly indicated.

DIFFICULT CONSTITUTIONAL PROBLEMS

As I have discussed earlier, this type of provision as so intended leads us into very difficult constitutional and general policy problems. It does not, in my view, take us very far along the road to developing responsible and forward looking foreign policy in the future. I do note that House Joint Resolution 2 does not impose any artificial deadline for congressional response to a Presidential initiative. That is an improvement over other bills and of course it maintains the option for such a response at any time.

In addition, section 6, which provides that Congress should meet after the President has committed Armed Forces as described in section 5 in order to decide whether to authorize such use of the Armed Forces or the expenditure of funds for that action, seems to imply that the President may not have authority to act in the first place. It is clear from what I have already said, however, that the President possesses broad constitutional authority to commit military forces in cases contemplated by section 5. Finally, as I have indicated, I do not think it necessarily appropriate that Congress be mandatorily convened in extraordinary session by the President of the United States as required by section 6 if Congress is not in session upon the receipt of each and every report rendered pursuant to section 5.

Mr. Chairman, it is my hope that Congress will reject the highly restrictive approach to war powers legislation, which is unsound and that instead it will concentrate on enhancing its own ability to participate in the development of future foreign policies with the executive branch, as the drafters of the Constitution intended.

To help move us toward that goal, I would like to repeat for your serious consideration several proposals which the Secretary of State made to the Congress in his war powers testimony of May 14, 1971. We are prepared, as we were then, to explore with you ways of reinforcing the information capability of Congress on issues involving war and peace. For example, we would be prepared to have each geographic assistant secretary provide on a regular basis full briefings on developments in his respective area. Such briefings would help the Congress to stay abreast of developing crisis situations as well as to build up a deeper background of information in many areas.

THE NEED TO ACT SPEEDILY

There is, as we have noted many times, the need to be able to act speedily and sometimes without prior publicity in crisis situations. I

think the Cuban missile crisis in 1962 is the most commonly cited example of such a situation. We should concentrate on efforts to find better institutional methods to keep these requirements from becoming an obstacle to the exercise by Congress of its full and proper role, rather than on counterproductive efforts to impede the executive in exercising its role. We have heard a number of suggestions concerning the possibility of establishing a joint congressional committee which could act as a consultative body with the President in times of emergencies, and, as Secretary Rogers indicated in his testimony which I mentioned previously if there is interest in this idea in the Congress we would be willing to discuss this possibility with you to determine how best we might cooperate.

Mr. Chairman, we in the executive branch, those in the Government, those in Congress—we must all retain flexibility for we are living in a dynamic world. We must both work together. I think the hallmark of a successful foreign policy over the years is cooperation and working together. The decisions we make in this area are frequently momentous and profound. Let us join together to improve the quality and facility of our individual and joint decisions rather than inhibiting our capacity individually or collectively to make them.

I thank you very much, Mr. Chairman, for the opportunity to participate in these hearings with you this afternoon. I am ready to answer such questions as you and the other members of the committee might have on this subject.

Mr. ZABLOCKI. Thank you, Mr. Brower, for your statement.

The chairman will yield his time at this point to Mr. Fraser. I understand you have a prior commitment.

Mr. FRASER. Thank you, Mr. Chairman.

REPRESENTATIVE FRASER POSES FOUR QUESTIONS

Mr. Brower, I am going to read some questions into the record, and if you will respond in writing I would appreciate it.

First, let me say I was unsympathetic to any legislation in this field until I read your statement this afternoon. Your assertion of the rights of the President to use armed force without apparently any constraint of any kind that I can discover in your statement astonishes me.

Mr. BROWER. If I might address myself to that, if we have an opportunity, Congressman——

Mr. FRASER. I am sure you will be asked about that.

First, would you list specific instances where Senate 440 would be unconstitutional, specific fact situations.

Second, would you be willing to provide for the record the authority for the President to carry on bombing missions in Cambodia today, and, then, his authority to carry on bombing missions in Cambodia after all American troops are out of Vietnam.

Third, if the President is found to act beyond constitutional authority with respect to the use of armed force, what remedy is there for a citizen of the United States?

LIMITING FUNDAMENTAL AUTHORITY OF PRESIDENT

Fourth, on page 14 you say that section 3 could be read as limiting the fundamental authority of the President to introduce Armed Forces

into hostilities or situations where imminent involvement in hostilities is clearly indicated. I would like to have specific examples of how that might be read.

Finally, could the Congress pass a law, for example now, which would say that if there was a case in which our forces were in armed combat under no specific authority, in such a case a concurrent resolution would be sufficient to put constraints upon the President's actions, having in mind the concurrent resolution does not require a signature of the President.

I am sorry that I have to go, but I do want to get these questions in the record, and then if you could supply answers later, I would appreciate it.

Mr. BROWER. I say in all candor I don't know what my own reaction is, Mr. Congressman. I will certainly endeavor if we can to supply the answers to the questions which you have placed in the record. I would not want you to leave on the assumption that I was intending to allege or advocate total Presidential authority to do anything without any role or constraint or participation by Congress. I think that truly is not intended by my testimony; in any event, it was not intended. I am sure we will be going into that in other questions.

[The information follows:]

RESPONSES TO QUESTIONS SUBMITTED BY MR. FRASER

Question. First, would you list specific instances where Senate 440 would be unconstitutional, specific fact situations.

Answer. Any legislative attempt to limit the authority of the President to less than that granted to him by the Constitution would obviously be unconstitutional. Section 3 of S. 440 purports to limit the authority of the President to use the armed forces in an emergency absent a declaration of war to four types of situations, and in those cases the President's authority would continue only for a maximum of thirty days unless the Congress specifically affirmed the President's action. Such enumeration would clearly limit Presidential authority more than the Constitution does, rather than implement that authority, and hence would be unconstitutional.

For example, S. 440 purports to restrict the President's power to defend even the continental United States by limiting to thirty days the period in which he may engage in hostilities unless Congress specifically authorizes an extension or is physically unable to meet because of an attack on the United States. Under the Constitution even the states have authority to provide for their own defense when they are actually invaded or are in imminent danger of invasion (Article 1, section 10).

Surely the President can have no less authority than the constituent states of the Union. Indeed, the federal Government has an unlimited constitutional obligation and authority to defend the states (Article 4, section 4), and the President as Chief Executive and Commander-in-Chief is the officer bearing the responsibility and possessing the authority to ensure that defense. There can hardly be serious doubt that the limitation on continental defense envisaged by S. 440 cannot properly be imposed other than by means of a constitutional amendment.

The Constitution does not necessarily limit the President's emergency authority to these four categories of action, at least in part because the nature of future emergencies and the need for Presidential action cannot be foreseen with sufficient reliability. Constitutionally we cannot change that system by legislating it away; and as a matter of policy as well we believe it would be most unwise to attempt to do.

Question. Second, would you be willing to provide for the record the authority for the President to carry on bombing missions in Cambodia today, and, then, his authority to carry on bombing missions in Cambodia after all American troops are out of Viet Nam?

Answer. The President has, since assuming office, had and exercised the constitutional authority as Commander-in-Chief to bring the war in Indochina to an end. The President has not involved the United States in new hostilities through the recent air strikes on Cambodia; he has rather been attempting to wind up the last corner of major fighting remaining from the long war in Indochina. The President had that authority prior to the conclusion of the agreement on peace in South Vietnam and throughout Indochina on January 27, 1973, and the constitutional situation has not fundamentally changed. I might add that this conclusion was supported by a recent study prepared by the Library of Congress at the request of the Senate Foreign Relations Committee which asserts that the President retains the legal authority even to reintroduce U.S. forces into South Vietnam, North Vietnam and Laos, not to mention Cambodia.

Question. Third, if the President is found to act beyond Constitutional authority with respect to the use of armed force, what remedy is there for a citizen of the United States?

Answer. Our constitutional system of checks and balances provides various ways for the citizen's voice to be heard, including through the Congress or the Courts, depending on the circumstances of each individual situation. Without knowing what precise facts the question might presuppose, such as what person or body has made the finding referred to, it is difficult to speculate on what would be the appropriate course to take.

Question. Fourth, on page 14 you say that Section 3 could be read as limiting the fundamental authority of the President to introduce armed forces into hostilities or situations where imminent involvement in hostilities is clearly indicated. I would like to have specific examples of how that might be read.

Answer. Section 3 could be read to permit the President to introduce the armed forces into hostilities or situations where imminent involvement in hostilities is clearly indicated only in response to an act or situation that directly endangers the physical territory of the United States, its territories or possessions or its citizens, etc. Such a reading could make illegal any such action of the President to protect any United States interests abroad, no matter how important, unless United States citizens or nationals were involved, and then such action might be valid only to the extent necessary to protect those individuals.

The rapid deployment of our naval and other armed forces in situations which could fairly be described as presently a risk of imminent involvement in hostilities can be a useful deterrent assisting our own foreign policy interests and discouraging the escalation of hostilities by others. This has been the case in the past with respect to Berlin and the Middle East, for example. If Section 3 were read as suggested above, the President could well lack legal authority to order such deployments abroad even in an emergency. This would clearly constitute a limitation on the President's fundamental authority to deploy the armed forces.

Question. Could the Congress pass a law, for example now, which would say that, if there was a case in which our forces were in armed combat under no specific authority in such a case a concurrent resolution would be sufficient to put constraints upon the President's actions, having in mind the concurrent resolution does not require a signature of the President.

Answer. Whether or not the Congress had passed either a declaration of war or other specific authorization, our armed forces presumably would not be involved in armed combat unless the President had sufficient constitutional authority to so engage them. In any case it is now and has long been clear that a concurrent resolution constitutes an expression of the opinion of the Congress rather than the establishment of binding legal requirements. If the President were authorized by the Constitution or by legislation to take certain actions, that authority could not be negated by a concurrent resolution, even though he would doubtless give such an expression great weight in his policy decisions.

Mr. FRASER. Thank you.

Mr. BROWER. Thank you.

Mr. ZABLOCKI. Mr. Findley.

Mr. Thomson.

Mr. FOUNTAIN. Mr. Chairman, thank you very much.

MORE EXCHANGE OF INFORMATION NEEDED

Mr. ZABLOCKI. Just one moment.

Mr. Thomson.

Under the rule we have to recognize Members in the order that they arrived.

Mr. THOMSON. Mr. Brower, I notice you repeatedly assert the theme that what is needed is more exchange of information between the two branches of government, more timely information through an exchange of ideas. Again you say performance is more likely to be enhanced by the increased and improved flow of information to and between those two branches of government.

Is the gist of your statements today that the solution to this problem is simply a closer working relationship between the President and the Congress, rather than the enactment of any legislation that would put restrictions on the President?

Mr. BROWER. I think the fundamental thrust of my testimony is that the two branches of government are somewhat like two neighbors living in close proximity. Things work well, things work best, the relationship and the mutual productivity of the relationship are greatest when there is cooperation, mutual understanding, exchanges, the necessary give and take which is fundamental to our constitutional political process as it is to a working relationship between two neighbors.

INTERPOSITION OF ARBITRARY LIMITS, RULES

I think as between Congress and the Executive, as between neighbors, any ability to achieve something for the community is probably not advanced by the interposition of arbitrary limits, rules, fences, if you will. I think it is just in the fundamental nature of your constitutional system that we must work together and we must always in the executive branch and Congress strive for the highest level of performance, and strive to adopt those methods to acquire that knowledge which will enable us to fulfill to the fullest extent possible the solemn responsibilities which all of us have undertaken in our respective positions.

Mr. THOMSON. Well, you said that in a little different way on page 5. You said on page 5—

> The answer to dissatisfaction with a particular foreign policy is not to be found in alteration of Constitutional authority.

Mr. BROWER. Correct.

Mr. THOMSON [continuing].

> It is rather to be found through enhancement of our respective abilities, exercised within that authority, to formulate wise foreign policies for the future.

Now what you are really saying is that we can improve the working relationship between Congress and the President, but beyond that we need a constitutional amendment to change any of the authorities that now exist.

ALTERING PRESENT ALLOCATION OF WAR POWERS

Mr. BROWER. I am not advocating a constitutional amendment. My position is that a constitutional amendment would be the only legally effective way of altering the present allocation of what are called the war powers between the President and Congress. I do not believe the statement you cited from page 5 of my testimony is at variance with my answer to the previous question.

Mr. THOMSON. No, it is not; no, I agree with you. Thank you very much.

Mr. ZABLOCKI. Mr. Fountain of North Carolina?

Mr. FOUNTAIN. Thank you, Mr. Chairman.

Mr. Brower, so that our record might have some background material, I think it would be good for us to know something about the witness. How long have you been in the State Department?

Mr. BROWER. A little over 3 years and 4 months, sir. I arrived on duty at the Department of State on November 10, 1969.

Mr. FOUNTAIN. What was your position prior to joining the State Department?

Mr. BROWER. Prior to being appointed to the Department of State I was a partner in a law firm in the city of New York.

Mr. FOUNTAIN. How long had you been engaged in practice?

Mr. BROWER. Approximately 8 years.

Mr. FOUNTAIN. Where did you go to school?

STUDENT IN EUROPE

Mr. BROWER. I went to law school at Harvard Law School. Prior to that I was a student in Europe for 1 year as the beneficiary of a Fulbright grant. Prior to that I was a honors graduate of Harvard College.

Mr. FOUNTAIN. Thank you very much.

I think all of us are trying to reach the same goal, and probably all of us are in a state of indecision as to how best to reach that goal. I happen to be one who believes in a strong President, as I have said a number of times, and I don't think any of us on this committee want to hamstring the President, or limit his powers to do what is necessary to protect this country. I think what we are hopeful we can do is come to some kind of understanding and put it in language if we can—maybe we won't, I don't know—that will not necessarily limit the powers of the President but prevent the President from exercising excessive powers, or powers which the Constitution has not given him.

For that reason I think we might ask what you conceive to be the war powers of the President under the Constitution and which provision of the Constitution would you make reference to?

Mr. BROWER. I should preface my answer by saying I would not undertake to do what I have just described as being legislatively impossible, and that is to catalog in detail every single thing in a hypothetical situation that the President can undertake.

Mr. FOUNTAIN. I understand that.

PERTINENT PROVISIONS OF CONSTITUTION

Mr. BROWER. I will refer to those provisions of the Constitution which I believe play a role here with the warning that my memory may not be exhaustive and if I omit one or two provisions I would like to supply them for the record later.

You have asked for the war powers of the President.

Mr. FOUNTAIN. Right.

Mr. BROWER. They are principally his authority as Commander in Chief of the Armed Forces, to some extent of course his authority as Chief Executive of the Government, to some extent they are found in his responsibility to see that the laws are faithfully executed, inasmuch as those laws include a constitutional obligation to defend the States of the United States against invasion and save them from enemies. They really include all of the laws which provide in some way for the defense of the United States.

The President, of course, also plays some role in authorization and appropriation legislation, and other types of legislation that Congress would enact which would be important in this field.

Now that is a quick survey of what I think are the principal references.

Mr. FOUNTAIN. I guess the only provision in the Constitution which makes any specific reference relating to the Armed Forces is his power as Commander in Chief in article 2, is it not?

AUTHORITY OF CONGRESS UNDER ARTICLE 1

Mr. BROWER. There are, Congressman Fountain, also references under, I believe, article 1, with respect to Congress, indicating that Congress has authority to provide for armies and provide for the raising of armies and maintaining the Navy.

Mr. FOUNTAIN. That was the next question I was going to ask you. What do you deem to be the war powers of the Congress, and what are the provisions relating thereto of the Constitution?

Mr. BROWER. Well, I would say principally the powers to raise armies, provide for and maintain navies, and by implication other armed forces. They would include all the necessary authorizing and appropriation legislation, and they would include, of course, the power to declare war in the circumstances where that might be appropriate. Congress does of course under the "necessary and proper" clause have authority to a very considerable extent to carry out and execute and provide in detail for the application of its constitutional prerogatives or responsibilities.

Mr. FOUNTAIN. You take the position that the passing of legislation which specifies circumstances under which the President may act would be an unconstitutional piece of legislation?

HISTORICAL CONSTITUTIONAL CONCEPT OF FLEXIBILITY

Mr. BROWER. Well, it certainly could be unconstitutional. It is clearly unconstitutional in the sense that it violates our basic historic constitutional concept of flexibility. I think we all agree, for example, if I

may use a somewhat homely example, that today, yesterday, and a hundred years ago people had to eat. Now what they ate and how they they nourished themselves is a somewhat different question. If you picked out of an old trunk a grocery list from even 10 years ago, to say nothing of 30 or 40 or 50 years ago, you would be amazed at the things that are on it and the things that are not on it. It is similarly impossible with the pace of technology and the ingenuity of mankind around the world to foresee all of the circumstances that might arise in the future in which the Founding Fathers would have thought that the President has authority to operate in a certain way. That is a general answer.

More specifically, the proposed legislation, certainly the more severe restrictions contained in legislation before us, would be clearly unconstitutional in that, for example, they might limit to a short period of time the President's authority to defend the continental United States. The Constitution very clearly provides that the Federal Government will guarantee a republican form of government to the States and protect them, and the President of the United States, who is Commander in Chief, is sworn by his oath to uphold the Constitution in that respect as well as in every other respect.

BETTER INFORMATION TO CONGRESS

Mr. FOUNTAIN. This problem concerns me. I was one of those who joined the chairman in the last Congress in introducing legislation which would require a greater consultation and better information to the Congress. I think some of us have not been too satisfied with that, and yet I quite agree with you that we can't anticipate all of the circumstances which might call for the use of the armed forces. I am not so sure we can specify in a piece of legislation all of those areas where the President might need to act, or where maybe he should not act, and yet I can't help but feel that something needs to be done, either by way of constitutional amendment or by way of legislation to eliminate some of the ambiguities and to more clearly define just what the war powers of the President are, and what the war powers of the Congress are.

I think if you take the Constitution itself, except for the President being Commander in Chief of the Armed Forces—both in peace and war—more is said about the powers of the Congress than about the powers of the President. The Congress provides appropriations and shall do all things which are necessary to help defend this country through appropriations and shall also declare war if it is necessary, which I think clearly indicates the intent of the Founding Fathers that where we are actually engaged in all-out war it ought to be a declaration by the Congress.

PRESIDENT EXCEEDING HIS AUTHORITY

I am inclined to think that maybe by acquiescence we have permitted the President down through the years to exceed his authority, and actually he may have exceeded his authority. I think that is one reason why it is so difficult to work out something tangible now.

Would you say that it would be proper to pass legislation which would require the President before he embarks upon an act which well may lead this country into war to call upon the Congress of the United States either to approve or to disapprove his action?

Mr. BROWER. That is advance approval or disapproval?

Mr. FOUNTAIN. Whether he has already acted or whether he is about to act. Under either circumstance.

Mr. BROWER. I think such legislation could be quite troublesome, Congressman Fountain, partly for the reasons that I have stated and partly for reasons that I might be able to elaborate. I heartily concur in what you said at the outset that our objectives are the same. We are all Americans. We are all part of the same Government, although different branches. We all hold basically the same things holy, and have the same goals, and the same wishes, the same dreams. The only question between us, it seems to me, on this subject is how best to account for the concern, to adjust conflicting currents of circumstances to which you allude, and which quite clearly underlie your obviously thoughtful approach to this problem.

SUPERIOR WISDOM NOT EXCLUSIVELY IN ONE BRANCH

I think we have to agree that mankind being what it is, humans being what they are, it is not possible constitutionally to conclude that the superior wisdom in all events resides in the executive branch, or that in all events resides in Congress. It always has to be a common effort, and when you come to attempt drawing rules by which individuals and the larger bodies in Government work together it does create very serious difficulty.

Now I think to draw such rules would be a particularly troublesome exercise in a sense at the present time. Although the events of the recent past probably have been the single greatest cause for the interest in legislation which this committee is now considering, it also is a fact that the events of the recent past—certainly of the last 4 years—have included the most monumental changes in the fundamental direction of American foreign policy in approximately 25 years, and may set the direction for this country for many years to come.

Now, those steps have not been undertaken entirely or alone by the President of the United States. Of course Congress and others have had an appropriate role in the events of the past years. The fact is that the President and the entire executive branch have had a very substantial role in these monumental events of the last few years. I think this should give one pause.

PREVENTING FUTURE VIETNAMS

Some are troubled by the fact that we became involved in very extensive hostilities at a cost of many lives and much money over a period of time, and wonder if there is not some way to prevent a future President from doing that. I am sure others would be equally troubled at the prospect that the imposition of arbitrary restrictions might impede a future President from achieving the truly remarkable gains,

revisions in our foreign policy which we have experienced in the last few years.

Now, I think all of this perhaps simply confirms that it is a troublesome issue, and maybe you will conclude, as I think you must conclude, that the answer really does not lie in drawing rules. You cannot operate a Presidential-congressional-constitutional form of government on the basis of rules which get so specific as those you use in baseball games or football games, and that talk about pinch-hitters and two-point conversions; it is just not possible.

How we work toward better cooperation, how we gain more momentum in this area, it is a matter of sitting down and discussing. I don't think anyone has a particular panacea for that. I think the existence of the appropriate will on both sides is probably the fundamental prerequisite, and I am satisfied it exists.

Mr. FOUNTAIN. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Mr. Biester of Pennsylvania.

SHARPENING FOCUS, CHALLENGING ASSERTIONS

Mr. BIESTER. Thank you, Mr. Chairman.

I wish to join the others in welcoming your testimony here this afternoon and I would hope the extent to which I may offer questions may bring into sharper focus my own thoughts with respect to this subject and will not be taken amiss or awry because they may challenge some of the assertions in your testimony.

Mr. BROWER. Well, we are all here trying to provoke thought and I join in that sentiment.

Mr. BIESTER. Very good.

I am surprised at your statement on page 9 making reference to the President's responsibility. It refers to his responsibilities in article II, section 1, and article II, section 2, and article IV, section 4, and then offers the phrase, "has the responsibility and authority to provide that defense," being the defense of the States, without making reference to the fact that the Constitution very clearly spells out in section 8 of article I, referring to the powers of the Congress, that the Congress shall have the power among other things to pay the debts and provide for the common defense and general welfare of the United States. Is that omission by inadvertence?

Mr. BROWER. If it is an omission it is inadvertent, but I think perhaps it might not be an omission. The point sought to be made there is that the President, given the existence of armed forces, for which Congress of course is responsible, has the constitutional authority and indeed the constitutional obligation to apply them to the defense of the country when there is an invasion.

CONSTITUTIONAL OBLIGATION OF CONGRESS

You could argue, I suppose, as to whether or not Congress has a constitutional obligation to provide an army or a navy, and I would not propose to discourse on that subject. My only point was that given the existence of such forces the President must invoke them, certainly has the clear authority to commit them to the defense of the 50 States of the United States.

It was not intended in any way to exclude, denigrate, or ignore the very clear congressional role provided for the raising of the military forces.

Mr. BIESTER. Or the specific congressional role called for in section 8 to provide for the common defense?

Mr. BROWER. Correct.

Mr. BIESTER. And that is not as I see it reflected anywhere in your testimony. Would I be correct about that?

Mr. BROWER. I find from long experience with the war powers issue, Congressman, that even what undoubtedly appears to be a fairly lengthy statement of mine is not capable of encompassing all of the fine points, and some of the points that are not even fine points. I tried to make as complete, without exhausting the patience of the committee, a statement and so therefore some things you may have particular questions about that do not appear in the statement.

CONGRESSIONAL POWER TO DECLARE WAR

Mr. BIESTER. With respect to the congressional power to provide for declarations of war there is also a grant of powers to provide for letters of marque and reprisal. My history is always rusty, but I think marque and reprisal could be issued without declarations of war providing for a kind of surrogate effort on the high seas at distant places for quasi-public and quasi-privateering purposes, but with matters which involved apparently the country's materiel in exercise of foreign policy but not at the level of war.

Would I be correct about that?

Mr. BROWER. If I understand your question, it is whether or not a declaration of war is necessary authorization for exercise of marque and reprisal.

Mr. BIESTER. Yes.

Mr. BROWER. Well, I must confess also to some rustiness on that subject. Are you asking this as a question of U.S. constitutional law or one of international law?

Mr. BIESTER. My point really was I guess the framers thought of activities which were international in nature and might involve some effort on the part of resources of the United States in quasi-military action, but not rise to the level of war, and gave that power to the Congress and not to the President.

CONGRESSIONAL WARMAKING POWERS IN CONSTITUTION

Mr. BROWER. Well, I think it is very clear that Congress did so for this reason. You may recall that the provision in the Constitution giving Congress the power to declare war was actually changed from a previous draft before the Committee on Detail in the Constitutional Convention. That previous draft would have given Congress the power to make war, and the explanation for the change from "make war" to "declare war," I believe the precise language was the President must have the authority to repel sudden attacks. That is the way his emergency powers were described at the time.

So it is quite clear that the Founding Fathers had very much in their minds that the military forces of the United States would be em-

ployed in serious hostilities in the absence of a declaration of war, and it is a fact that in the nearly 200 years of the Republic, although military forces of the United States have been engaged in a number of hostile actions which are variously estimated at between about 130 and close to 200, we have only 5 times in our history had a declaration of war.

This is not a phenomenon of the 20th century. This is typical throughout our history. I think it is worth reflecting on a bit because of the emphasis placed on the congressional authority to declare war by the advocates of the very restrictive war powers legislation.

LIMITATION ON TIME SPAN

Mr. BIESTER. Excuse me. Would you agree further on in section 8 that the limitation on the time span during which the Congress would raise and support armies and provide appropriations was limited to 2 years, was an expression on the part of the framers that an Executive in the future should not have the power to use those armies nor provide for them without congressional approval?

Mr. BROWER. I think the Constitution, and particularly the war powers area, reflects a general concern by the framers of the Constitution to avoid the sort of tradition which grew up in Europe where kings and other forms of absolute sovereigns had total control over military forces and had used them in offensive wars and extensive foreign adventures in a way which really was not to the overall benefit of the country.

If I may avert one moment to the question of the declaration of war; as I say we have only had a declaration of war five times in our history, and I think it is worth reflecting on this. The declaration of war by the United States really is a very strong measure. It is saying to the country or countries to which it is addressed not simply that the United States is going to take the necessary steps to defend its national interest, it is not a minimal act at all. It is a fundamental, broadly based national decision that this country is going to war and it is going to fight a war, and conquer the enemy.

TOTAL CAPITULATION IN WORLD WAR II

As you know, in the case of the Second World War that turned out historically to include total capitulation by the other side in Germany. I think that in many instances in which the United States necessarily is involved in potential hostile activity a declaration of war could be very easily misread, and would not be an accurate reflection of the true mood of Congress, to say nothing of the true mood of the country.

Mr. BIESTER. Mr. Chairman, I think I have consumed my time.

Mr. ZABLOCKI. Mr. Bingham of New York.

Mr. BINGHAM. Thank you, Mr. Chairman.

Mr. Brower, your construction of the term "Commander in Chief" and I think this also reflects the construction that has been given to it by other officials of the administration, and perhaps indeed including the President—seems to be so broad that it virtually eliminates the necessity of declaration of war. It almost goes to the point that where the President considers it necessary he can embark on a war on his own authority.

What limitations do you see on that authority as you envision it?

HESITANT TO ENUMERATE PRESIDENTIAL POWERS

Mr. BROWER. I would say again that I feel ill-placed to embark on an enumeration detailing the precise hypothetical situations where the President might have authority to commit military forces to action, because I think it is fundamentally extremely difficult, if not impossible, to do.

I mentioned when Congressman Fraser was here before that my testimony should not be understood as maintaining that the President of the United States has totally limitless authority to commit U.S. forces to hostile action in any proportion in any circumstance. I don't think that has been the view of any President of the United States. Certainly we do hold the view that the President has rather broad authority historically to do what is necessary in a variety of circumstances to meet his constitutional obligations for the defense and security of the country.

Now you ask me to explain what are the cases in which he would not——

Mr. BINGHAM. No, I asked you for the limits. What are the limits of that authority?

Mr. BROWER. Well, the limits in what sense? Do you mean temporal limits or territorial limits, or functional limits?

Mr. BINGHAM. Any limits whatsoever to the President's authority to take us into hostilities.

Mr. BROWER. I think it is explicit in what I have said that they are.

PRECISELY DEFINING PRESIDENTIAL AUTHORITY

Mr. BINGHAM. But you can't define them?

Mr. BROWER. I have spent some time this afternoon saying that no one can precisely define what the limits are. As I mentioned before, the Constitution is a pretty old document; it never said the U.S. Congress should provide an air force. Well, in those days there was not an air force, there were no airplanes. But we have an air force, and nobody doubts the authority of Congress to provide an air force. It is construed, it is inferred from the authority to raise armies and provide navies.

Now, that is a very simplistic example of the growth and the flexibility, adaptability of the Constitution. I wish I had more ability to see into the future, but I do not have and I do not claim the ability to see all the kinds of predicaments which might confront a President some 5, 10, or 20 years from now. If I were trying to enumerate them, I would only be proving the wisdom of the proposition that I have been presenting this afternoon; namely, that it cannot be done.

Mr. BINGHAM. Well, let me suggest a line of thinking, a line of analysis that I think might be helpful, and that is that in using the term "Commander in Chief" what the authors of the Constitution were thinking of was something like the powers of a commanding general in a given situation. I think this may be a useful analogy. A commanding general of a sector of the continental coast presumably has authority if that coast is attacked to take defensive action without authority from anywhere else. Similarly, a commander of American forces in

a given situation outside the country presumably has the authority to defend those forces.

THE AUTHORITY OF A COMMANDING GENERAL

Nobody would contend that a commanding general of American forces, say, placed at Clark Field in the Philippines would have the authority to undertake offensive action against, say, Philippine forces.

I would suggest to you that there is an analogy here that maybe is worth thinking about.

Nobody can say for sure just how far the authority of the Commander in Chief goes, but I think that, in saying that the Congress has the power to declare war, the constitutional fathers were declaring a very broad principle which is fully applicable today, and that principle is that the Congress should have the basic authority to determine the large questions of war or peace, that is, as to whether this country is to be involved in major hostilities.

Now let me turn to some of your specific comments on H.R. 317, which is the bill that I introduced.

In the second paragraph you say that you question whether it is necessary for the Congress to be convened immediately under the circumstances stated in section 3 of my bill and you say that this might negate the advantages of quiet diplomacy in the case of "an understated show of strength."

RELEVANCE TO SECTION 3 OF H.R. 317

Well, I could understand that if you were talking about simple deployment and I think you may have a point which has relevance to section 5 of House Joint Resolution 2, but I don't think it has any relevance to the section 3 in my bill because that section refers only to hostilities in the absence of a declaration of war.

Now, how can you have "an understated show of strength" and have hostilities? I just don't know how those two terms can be reconciled.

Mr. BROWER. I see your point. I think the fundamental point to be made is that there may be circumstances where H.R. 317 would require a report because, as you point out, hostilities would be involved.

Mr. BINGHAM. You see, there is a difference.

Mr. BROWER. I understand.

Mr. BINGHAM. There is a distinct difference between my section 3 and section 5 of House Joint Resolution 2 in that section 5 of House Joint Resolution 2 is not limited to hostilities.

Mr. BROWER. I understand that. In precise terms I see your point. I think the remark I made may well be more accurately or precisely directed to House Joint Resolution 2. The fundamental proposition, however, really is the same, and that is this: When you have a reporting requirement which encompasses a wide range of possible events, is it really proper to determine in advance that whenever such a report is filed, whether it is a minimal hostility or a large hostility, whether it is a small show of force or a large event, whether in the case of House Joint Resolution 2 it is simply an increase in station forces in the country where things are pretty quiet, should the Con-

gress determine in advance that the President of the United States must convene an extraordinary session of Congress to receive that report? I think it requires unusual foresight to be sure that that will be the case.

SUBSTANTIAL ENLARGEMENT OF U.S. FORCES

Now in House Joint Resolution 2, for example, there is, as I mentioned, a provision that a report be filed with the Congress in the event there is any substantial enlargement of military forces already located in a foreign nation. Now if a test of substantiality is a comparison between the increase and the number of forces already in that particular country, you may have a proportionately substantial increase of a small force, and is Congress really to be called back——

Mr. BINGHAM. Let me interrupt you, Mr. Brower, to say on that point I think you may be right, and in the revision of my bill that I am currently undertaking, which adopts most of the language of section 5 of House Joint Resolution 2, I am trying to meet that. I personally would feel that the Congress ought to be convened whenever hostilities are involved, recognizing that it is only a matter of accident if Congress is not in session, and that to provide in advance that this will be done automatically would minimize the effect of the action.

I can imagine the type of situation that you are talking about where it might make matters worse if there were to be a sudden sort of crisis atmosphere. But at least as far as where there are hostilities, I think that the Congress ought to be in session. Since the Congress does not have the power to call itself into session when it is out of session, it seems to me that that should be provided for, the President should automatically do that.

PRESIDENTIAL AUTHORITY TO DEPLOY FORCES

Now let me pass to the next paragraph of your comment on my bill. I think that you have a point that the authority of the President to deploy armed forces is very broad. So I think we should be more cautious in attempting to limit the President's authority to deploy forces than we are in terms of limiting the President's authority to engage in hostilities. I see a difference there, and in my revision of my bill I am going to refer only to cases of hostilities where the equivalent of something like the declaration-of-war power is being exercised.

Let me pass to the comment that you make at the bottom of page 12, in which you suggest that allowing one House of the Congress to have a veto is all wrong.

May I call your attention to the fact that you state at the top of page 13 that the authority to approve funds clearly depends on the consent of both Houses of the Congress. Now, the other side of the coin is that either House can say no to the appropriation of funds. Equally you would have to agree that either House can say no to a declaration of war. All that I am doing is extending that principle to the tacit consent that the Congress gives to the Presidential use of force when it does not take action. My contention is that that tacit approval by both Houses can be negated by the action of either House.

NEED TO TAKE POSITIVE ACTION

Mr. BROWER. I see your point, Congressman Bingham. I think the position that Congress is in, in the circumstances you indicate, is that constitutionally it must take positive action; namely, through act of Congress, or appropriate joint resolution, to bring about a nonauthorization, as you will, or a nonappropriation, inasmuch as the forces that are out in the field presumably are funded by an existing authorization or appropriation, and you really put the President or the executive branch in a position of a man who wants to marry siamese twins—if one says "yes," and one says "no," what is the answer?

Mr. BINGHAM. Well, I think in a matter of such importance as hostilities where there is no declaration of war that both Houses should concur with what the President is doing. Once he loses the support of one House, then it is quite appropriate to say that he should no longer have the authority. But I don't expect you to agree with that.

Mr. BROWER. Well, if I may, Congressman Bingham, I think what you are suggesting is that the disapproval of authority contained in your bill may from case to case rest on different constitutional foundations, and I think that will require very——

Mr. BINGHAM. I am not aware that that is what I am saying. Why is that what I am saying?

ENGAGEMENT OF FORCES IN ACTION

Mr. BROWER. Well, it seems to me you are saying that if the President has engaged military forces in an action which by all rights is of such a fundamental, massive, comprehensive nature that it should be authorized by a declaration of war, then inasmuch as the declaration of war can be withheld by one House of Congress, then by extrapolation one House of Congress should be able to turn back the clock in this situation.

Now, I think you are saying beyond that, if there is a situation where forces are engaged on the order of the President in hostilities which do not have the character which you would think require a declaration of war, you are then maybe relying on the authorization and appropriation powers of Congress and the prospective nonexercise of those powers in order to achieve withdrawal of the forces. I think very clearly in that case you certainly would require the concurrence of both Houses.

All I am suggesting is what appears on the face as reasonably facile may be constitutionally far more complex than one might think at first blush.

Mr. BINGHAM. Do I understand you to say from this last argument that if the bill provided for the action of both Houses by concurrent resolution that you would have no problem with it?

OTHER PROBLEMS OF H.R. 317

Mr. BROWER. I think that would be going a little too far, Congressman Bingham, because the bill obviously has some of the other problems which I have recited with respect to other bills. It would perhaps have one less.

Mr. ZABLOCKI. The gentleman's time has expired.

Mr. BINGHAM. With the indulgence of the chairman, may I make just one final comment. It seems to me that you are asking us to trust the President not to abuse his authority and trust him to consult with Congress in this field, and I would just submit that the record does not justify that kind of faith on the part of the Congress in the actions of the President.

When you consider the move into Cambodia without consultation, and at last December's escalation without consultation, when you consider the assertions of authority that have been made that there is virtually no limit to the authority of the Commander in Chief, then I think you have no right to ask the Congress to trust the Chief Executive to engage in what is adequate cooperation.

Mr. BROWER. Congressman Bingham, I think it is certainly fundamental to the administration approach to this legislation, as I believe it is fundamental to our constitutional system of government, that a certain amount of faith in fellow mankind is required. Certainly a great amount of cooperation between the branches—and I am clearly expressing the view that that cooperation which is necessary from both our points of view, as necessary in the national interest—can best be achieved when both branches have the fullest capability, whether through mutual interchange or through development of each one's independent capability to have knowledge, to have understanding, to be able to exercise intelligent analysis as to any given situation. I simply think that if that basic, fundamental, cooperative exercise of our respective constitutional authorities and obligations is not present we will have difficulty under any circumstances, and we both must participate.

DISENCHANTMENT OVER SOUTHEAST ASIA

With respect to your specific comments about the events of the past few years, I would allude, I think, to what I said before. It is curious in a sense, it is noteworthy, that our consideration of this legislation comes at a time when there has been noticeable disenchantment in some elements in the country with events in Southeast Asia over a period of the last 10 years approximately, and extending before that. It also comes at a time when the President of the United States now occupying office has brought about the most fundamental and profound achievements in foreign policy of many recent years, and which I think may mark a change of direction, a new era into which we will now proceed.

I think one must be very circumspectly and with very careful consideration address this quite serious constitutional issue. I think caution and restraint are certainly the order of the day. I think that the actual results produced, the product if you will, of the last 4 years is by any measure phenomenal. There has been argument along the way about the methods. If you like the product, I suggest we be cautious about tinkering with the factory.

Mr. BINGHAM. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Before calling our next colleague I would like to register a few comments. Faith and cooperation is something that we are all urging and would like to see happen, but in view of what has been the practice of the Executive in the recent past it appears that Congress must exert itself.

In using your analogy of marriage, it is like a wife who is not faithful. As a matter of fact, you might as well tell her you have a loaded gun and you are going to use it, and in some States such drastic action is permitted in such cases. Although we are not going to go that far, I think Congress must pass some legislation.

I will have some questions later, but now I would like to call on Congressman Findley of Illinois.

OMITTING PRESIDENTIAL AUTHORITY TO DEPLOY FORCES

Mr. FINDLEY. Mr. Brower, on page 8 your language raises a lot of questions in my mind. You state: "S. 440 noticeably omits Presidential authority to deploy Armed Forces abroad as an instrument of foreign policy in the absence of an actual attack or imminent threat of attack on American territory or forces."

Then you refer to that authority as a historic prerogative.

Now, I realize that as you stated often this afternoon it is impossible to list in complete detail all of the circumstances in which a President might find it in the national interest to use military forces. Yet to get down to a very particular and nonhypothetical case, how about the present situation in Indochina? As our colleague, Mr. Fraser, indicated there are still bombing operations in Cambodia.

Now I can understand a rationale that justifies these bombing operations as a part of our program to withdraw our own forces from an area of danger, but I would really be troubled if you would seek to defend the bombing attacks as representing the Presidential authority to deploy Armed Forces abroad in order to resist aggression, and I take these words from that single paragraph.

Can you tell us the legal foundation for the President's action in undertaking bombing raids in Cambodia?

Mr. BROWER. I see Congressman Fraser left me off the hook with a written summation. He impaled me on it again.

FUNDAMENTAL TO WAR POWERS QUESTION

Mr. FINDLEY. It is a very important question. I don't think there could be anything more fundamental or appropriate to the war powers question now before us.

Mr. BROWER. I realize it is a very important question, Congressman Findley, not only to you but to this committee, and to others.

When the Secretary of State appeared earlier this year before the full Committee on Foreign Affairs and was asked some rather similar questions with respect to Presidential authority in certain situations in Southeast Asia, he expressed a view in which I concur, that the present time, today, simply is not an appropriate time for me to engage in a specific discussion of Presidential authority, or from specific Presidential authority in hypothetical situations in Southeast Asia.

Mr. FINDLEY. But this is not hypothetical at all. Cambodia is under bombing attack.

Mr. BROWER. I understand that, but you basically are asking me about a hypothetical situation. You are asking when you no longer are protecting troops what is the authorization?

Mr. FINDLEY. Well, Mr. Fraser did, but I did not. I am glad to have you elaborate on that, but I hope you will also respond to the question

on the legal basis of what the President is doing now. I think a legal foundation can be made for it.

LACK OF AGREEMENT IN CAMBODIA

Mr. BROWER. I naturally concur in that. I must say, however, I think this afternoon is not the appropriate time for me to engage in that analysis while we do not have an agreement with respect to Cambodia. At the present time there are peace agreements being implemented which affect our own military forces and our own prisoners of war in Southeast Asia, and while the parties are in the still somewhat early stages of implementing what we believe should be a successful agreement on peace and reconciliation in that area of Southeast Asia I think it would not be appropriate for me to engage in a discussion of contingencies, theories, and so forth with respect to any portion of that area.

Mr. FINDLEY. Will you answer the question in detail in writing to this subcommittee when our last forces have been removed from South Vietnam?

Mr. BROWER. As I indicated to Congressman Fraser, I accept your inquiries and will do what I can with them.

Mr. FOUNTAIN. Don't overcommit yourself. [Laughter.]

Mr. BROWER. I think that is a careful statement of the situation.

Mr. FINDLEY. I am sure you recognize that it is a serious matter we are discussing. I pose the question in a serious vein. It seems to me in hearings like this the executive branch ought to be willing to state its own position, its own legal justification. If it can't see fit to explain even in a classified manner to a subcommittee of the Congress what the legal foundation for the use of military forces in Cambodia is today, I don't see how we can reasonably expect at a future date that a reporting requirement we might write into law would bring about a candid response in such circumstances. Then too it could easily be cited that the times are simply too delicate for the executive branch to go into such detail.

Will you respond?

U.S. ACTIVITIES IN CAMBODIA

Mr. BROWER. Congressman Findley, as you have indicated, our activities in Cambodia at the present time have some connection with the rest of the situation in Southeast Asia where we have forces present and we have prisoners still in captivity. I believe it has been pointed out by the administration that our activities with respect to Cambodia have been undertaken at the request of that Government. I am not prepared at the present time to go beyond those statements which are on the record, and to engage in any discussion on this subject with respect to that part of the world.

Mr. FINDLEY. The House last year passed a bill on this subject and to the best of my recollection the executive branch did not state opposition to that language. The same language has been reintroduced as House Joint Resolution 96 by Mr. Pepper of Florida. Would the executive branch enter any opposition to the enactment of such language this year?

Mr. BROWER. You are referring to House Joint Resolution No. 1 of the 92d Congress, the Zablocki bill of last year?

Mr. FINDLEY. Yes.

ADMINISTRATION POSITION ON WAR POWERS

Mr. BROWER. You are correct in your characterization of the administration position with respect to that bill in the last Congress.

Quite clearly I believe now, as we believed then, that this represents a fundamentally more sound approach to war powers legislation than legislation such as S. 440 or H.R. 317.

Mr. FINDLEY. Returning once more to page 8, and your references to Presidential authority to deploy Armed Forces abroad. Can you elaborate on your use of the word "authority"? Where does that authority rest? Is there something in the Constitution that you would cite as the basis for that statement?

Mr. BROWER. You are referring to the statement that S. 440 omits the Presidential authority to deploy Armed Forces abroad as an instrument of foreign policy?

Mr. FINDLEY. Yes.

Mr. BROWER. That derives principally from the President's authority as Chief Executive. He has various authorities as Chief Executive which add up to his authority to conduct the foreign policy of the United States, and of course his authority as Commander in Chief. As in many constitutional questions, we must look to the practice of a series of Presidents and a series of Congresses over a period of many years, now reaching almost 200. I think we would say that the provisions I have cited from the Constitution as elaborated by unbroken constitutional practice, by Presidents and Congresses over nearly 200 years indicate that that authority does exist.

LIMITS ON PRESIDENTIAL AUTHORITY

Mr. FINDLEY. What limits exist on the authority of the President as Executive and as Commander in Chief to move military forces to foreign territory?

Mr. BROWER. I think this parallels the question that Congressman Bingham was asking me before. In a couple of words the President does not have and does not lay claim to absolute authority to do anything, anyplace, anytime under any circumstances with any amount of military power. That is not what our Constitution provides.

If you ask me what are the limits specifically, I think I have to say it is inherent in our approach to this constitutional problem that one simply cannot specifically define a whole list of circumstances in which the President will have authority or will not have authority.

Mr. FINDLEY. It sounds like he can almost do whatever he can get by with.

Now you cite the use by Congress of the power of the purse as one restraint, admitting the severe limitations of that particular restraint.

Mr. BROWER. I do not recall having engaged in discussion on what the limits of the appropriation and authorization power are. It obviously is a different kind of power and its implementation by Congress is necessarily somewhat different than its implementation of other powers.

Mr. FINDLEY. Thank you, Mr. Chairman.

EXECUTIVE BRANCH POSITION ON EARLIER LEGISLATION

Mr. ZABLOCKI. Mr. Brower, you replied to Mr. Findley that the executive branch did not have any objection to House Joint Resolution 1 of the 92d Congress. As you know, the only additions in the 93d Congress version, House Joint Resolution 2, are section 3 and section 6.

Now, section 3 was added as a result of the discussion and debate when House Joint Resolution 1 was considered. After all, section 2 states that the Congress reffirms its powers under the Constitution to declare war, while also recognizing the extraordinary circumstances under which the President may act.

Section 3 therefore merely attempts to clarify where the emergency or extraordinary circumstances lie. Subparagraph 1 of section 3, House Joint Resolution 2, spells out that U.S. Armed Forces may be used to respond to any act or situation that endangers the United States, its territories, and its possessions, or its citizens or nationals when the necessity to respond to such act or situation in the judgment of the President constitutes extraordinary and emergency circumstances.

Of course, subparagraph 2 provides authority if there is a specific prior authorization by statute or concurred resolution of both Houses of Congress, as was the case in the Tonkin Gulf resolution.

Therefore, I cannot agree with the observation on page 14 of your statement, that the provision in section 3 could be read as limiting the fundamental authority of the President. This leads me to the question: Do you have any constitutional objections, as opposed to practical objections, to House Joint Resolution 2? In other words, do you doubt that Congress could constitutionally enact it into law? Is there any question in your mind as to the right of Congress under the Constitution to restate its prerogatives as spelled out under article I, section 8?

RESTRICTING PRESIDENT'S AUTHORITY

Mr. BROWER. I think, Mr. Chairman, I have to dissect that question somewhat. I said, and my words were carefully selected, that this section could be read as restricting the President's——

Mr. ZABLOCKI. I appreciate your saying it "could" be read and not saying definitively it "will" be read.

Mr. BROWER. How it is intended to read, or how it will be read, is perhaps up to others. The statement, for example, that the forces may be committed to respond to any act or situation that endangers the United States, its territories or possessions, or its citizens or nationals, could seem to imply a territorial approach, a physical approach. If there is an immediate, direct danger to the continental United States or 50 States of the United States, or to American citizens, or nationals overseas, it is all right to use the forces, but if there is some situation overseas which less directly, less immediately, physically affects our national security, but nonetheless does affect it, this provision would preclude the President's authority to act in such a situation, and I think it would pose constitutional difficulties.

The problem, of course, in this whole field is, the more precise the language is, the more problems you may run into constitutionally; but

the less precise you are, the more questions you are likely to have in any national debate following the national emergency as to what was intended, and what the President was authorized to do, and not authorized to do.

I think this dilemma underscores the fundamental difficulty in trying to spell out outside the Constitution itself—to rephrase or to clarify, as it were—exactly what the President's authorities are, established over 200 years ago and through subsequent practice.

MERELY RESTATING CONSTITUTION ON WAR POWERS

Mr. ZABLOCKI. I am rapidly coming to the conclusion that you would probably object even to a resolution which would merely restate what the Constitution provides in article I, section 8, as to the war powers of the Congress, and in article II, section 2, stating that "the President shall be Commander-in-Chief of the Army and Navy of the United States and of the militia of the several States, when called into actual service of the United States." That would also be questioned as to whether we were limiting the power of the President.

You apparently would object no matter what the Congress would restate in legislative form. Under your interpretation, even by restating what is already in the Constitution we would allegedly be limiting the President's power.

Mr. BROWER. Well, I think, Mr. Chairman, the fundamental difficulty is this: Lawyers are trained to adhere to a canon of construction, which says fundamentally that every word used must be attributed some meaning, words are not invoked uselessly. Therefore, if you have a statement in a statute purporting basically to restate a constitutional requirement, the very fact of the use of different words necessarily gives rise to discussion over the specific meaning to be attributed to those words.

Mr. ZABLOCKI. But I suggested the introduction of legislation restating exactly what is in the Constitution, word for word.

Mr. BROWER. Well, I would have to say in that event then it seems to me adequate that it is stated in the Constitution. I am not sure what the purpose of the restatement would be.

Mr. ZABLOCKI. The purpose would be simply to make more clear the respective responsibilities of the President and the Congress in the area of warmaking powers. But you would perhaps interpret even that as limiting the prerogatives that former Presidents and this President have taken as far as warmaking powers are concerned. Such action would merely be restating the Constitution and saying this is what we intend to live up to.

Mr. FOUNTAIN. Would the gentleman yield?

Mr. ZABLOCKI. Glad to.

BY HISTORICAL ACTS AND PRECEDENTS

Mr. FOUNTAIN. I think he is saying with substantial validity that down through the years, we as a people, and we as a Congress, by historical acts and by precedents, have interpreted the Constitution to give the President more real power than the exact precise language of the Constitution gives him.

Mr. ZABLOCKI. Exactly, and that is why I would want to restate the Constitution and limit his powers to what our Founding Fathers had intended.

Mr. FOUNTAIN. But, Mr. Chairman, what concerns me is that once we limit the powers of the President, if we don't do it in a proper way, and that is the difficulty——

Mr. ZABLOCKI. What could be more proper than restating the Constitution?

Mr. FOUNTAIN. Except that the Constitution has been interpreted by history and Presidents.

I don't think the power of the President altogether resides after 200 years of practice in the exact language of the Constitution.

Mr. ZABLOCKI. Well, to that I do not agree. I took my oath of office as a Congressman to live up to the Constitution, and indeed if history has changed or has interpreted the Constitution, then indeed the executive branch should ask for a constitutional amendment to legitimatize what is historical practice.

CONGRESS PLACING ITSELF IN STRAIGHTJACKET

Mr. FOUNTAIN. What bothers me is the fact that in view of our experience on the domestic scene recently, it may now be possible for the President to exercise more power than he actually legally has. What we would like to do is limit that power, but at the same time not put ourselves in a straightjacket in the process. We happen to be a people who will accede to the President's exceeding his power if he ends up doing the right thing, or ends up acting in the best interest of the country.

Mr ZABLOCKI. What happens when he does the wrong thing? That is what bothers me.

Mr. FOUNTAIN. Then we all take the consequences.

Mr. ZABLOCKI. Well, only he should take the consequences if he errs.

Let me ask you, Mr. Brower, if indeed a restatement of the Consittution was provided in a resolution as I outlined earlier, would you find that a constitutional process?

Mr. BROWER. You mean if Congress were to enact as a statute——

Mr. ZABLOCKI. A mere restatement of what is in the Constitution. Would that be constitutional?

Mr. BROWER. Would that include the entire Constitution?

Mr. ZABLOCKI. Those provisions in the Constitution dealing with war powers.

ONE PIECE OF CONSTITUTION IN ISOLATION

Mr. BROWER. I am not sure just how you take one piece of the Constitution in isolation from the rest of the Constitution. It is a unitary document. There is a periodic accretion through constitutional amendment, but it does seem to me to take it apart in pieces and to enact part of it as statute without enacting another part of it could also give rise to questions as just what the intention of Congress was in doing this.

Mr. ZABLOCKI. Well, the short title would be just as it is now in our joint resolution concerning the war powers of Congress and the President. And section I would also be the same. The measure may be cited

as the "war powers resolution of 1973." The policy and purpose section would be the same. Then the resolution would just list those sections in the Constitution which deal with war powers, period. The proposal would not change a comma or a word. This would only be restating the Constitution, and I don't see how this would change anything as far as the interpretation. It is the same as restating the Ten Commandments as to what they mean.

Mr. BROWER. That depends on whether you pick up all Ten Commandments, I think.

I think you make a suggestion which is——

Mr. ZABLOCKI. Let's take the one Commandment dealing with adultery and deal with that Commandment. Would that invalidate the rest of the Commandments?

Mr. BROWER. I am not sure I want to get in the middle of that argument, Mr. Chairman.

Mr. ZABLOCKI. Well, I am not very well versed in that area myself. [Laughter.]

PROVIDING A REPORTING MECHANISM

Mr. FOUNTAIN. There is some question about the interpretation of that today, you know.

Mr. ZABLOCKI. The only purpose for adding section 6 into House Joint Resolution 2 was to provide a reporting mechanism. House Joint Resolution 1 was silent as to what should be done after Congress receives the report. We felt the need for some statement or some provision of what should be done, what congressional action should be anticipated when reports are presented after the commitment of troops to foreign areas which would involve our troops where there are hostilities. I really can't see why you find difficulty with this section.

Mr. BROWER. I understand the concept of your approach, Mr. Chairman, and I should emphasize as I think I have mentioned before, that the fundamental approach taken by this subcommittee under your leadership I think has been in the direction much more in conformity with our constitutional history, and the requirements of the present circumstances.

Our concern with respect to section 6 is twofold. There is an implication when you say that both Houses of Congress shall proceed to a consideration of the question of whether Congress shall authorize the use of the Armed Forces of the United States and the expenditure of funds for purposes relating to those hostilities that Congress in fact possesses the constitutional authority to order the President to cease any kind of military activity despite the fact that there are certain kinds which I think we would all agree the President is constitutionally able to do without the express approval of Congress and which he is constitutionally obliged to do perhaps regardless of the feelings of Congress at the time. There are obligations such as those to defend the United States which are so fundamentally rooted in our Constitution as to be unsusceptible for legislative tinkering by the Congress.

Now to the extent that this section does imply that there are such limitations on the President's authority it could be constitutionally unsound.

CALLING AN EXTRAORDINARY SESSION OF CONGRESS

The second and perhaps lesser problem which appears in the second paragraph of section 6, to which I have alluded previously, is the necessity to call an extraordinary session of Congress if it is not in session for receipt of reports which might be required under section 5, which includes some potential reports on reasonably significant events overseas.

I also note I think some discrepancy between the provision of the first paragraph of section 6 which refers only to hostilities or imminent hostilities, whereas the reports required under section 5 cover a wide variety of situations, including whether there would be no hostilities or imminent threat of hostilities.

Mr. ZABLOCKI. Of course section 6, the convening of Congress, would only be required if the action on the part of the President was within the provisions of section 5.

Mr. BROWER. Pardon me, Mr. Chairman. That is correct, but section 5 calls for a report even in the case of a substantial enlargement of military forces already located in a foreign nation. If you had a 50 percent increment of a very small force in a relatively less troublesome country, in the current environment, would you really want to require the President to call Congress into extraordinary session to receive it?

Mr. ZABLOCKI. Well, Mr. Brower, if there is a substantial enlargement of military forces in order for Congress to fulfill its obligation under the Constitution as provided in article I, section 8 to raise and support the armies, should not the Congress be called in to provide the funds and authorize the funds for that purpose? Otherwise isn't Congress indeed abrogating its rightful constitutional authority and responsibility?

CIRCUMSTANCES OF TROOP INCREASE

Mr. BROWER. I would say in the very least that depends upon the circumstances. If the United States has 10,000 forces in country "X" and for particular reasons wants to increase that by 5,000, or a total of 50 percent at 5,000, that is not very much measured against the total U.S. military forces. If it is a situation where there are no hostilities or imminent threat of hostilities, there are just some particular local or strategic tactical reasons for doing that, I wonder if in every case it is really appropriate to have the President call an extraordinary session of Congress in order for Congress to receive that report when he simply transfers 5,000 men from one place to another.

Mr. ZABLOCKI. I conclude from your statement that you suggest the possibility of establishing a joint congressional committee which could act as a consultive body with the President in times of emergency.

I presume this would enable the President to report to the joint congressional committee when a substantial enlargement of the military forces was in his judgment——

Mr. BROWER. I did not mean to indicate that I have a blueprint in mind. I was reiterating Secretary of State Rogers' statement made before the Senate Foreign Relations Committee in his testimony of May 14, 1971, that we have heard such suggestion, and if there is

interest in this idea in Congress we would be willing to discuss the possibility and see if we can determine how best we might cooperate.

Mr. ZABLOCKI. Is it advisable to delegate an important issue like war powers to a joint committee rather than the entire Congress?

CONFLICTING CONSTITUTIONAL INTERESTS

Mr. BROWER. It depends on what you mean by delegation, Mr. Chairman. I am not sure what circumstances you are contemplating. It may be we have conflicting constitutional interests here. Congress wishes to play the maximum role foreseen for it under the Constitution in decisions involving hostilities which may require authorization and appropriation of funds and raise other considerations in Congress.

On the other hand, the executive branch has the responsibility to respond effectively, quickly in execution of its constitutional duties in some emergency situations. You have described them in some respects as extraordinary and emergency situations.

Now we all know that an animal with 535 pairs of legs just does not move as fast as one with 1 pair of legs and if the exigencies of such quick response is required clearly in the national interest there are situations where it would not be possible. Historically it has not been possible to engage from the start in a broad-range discussion of this with the entire membership of Congress.

It has been suggested in the past by some Members of Congress that one way to facilitate useful consultation and information sharing and opinion sharing and deliberation on important national security issues in emergency situations might be to provide for a small group of representatives in Congress that would have the responsibility to engage in these consultations. I simply express and reiterate our broad willingness and our specific willingness in this area to consider with you and with your committee proposals that have been made and might be made in this regard.

NOT DENYING PRESIDENTIAL POWER TO ACT IN EMERGENCY

Mr. ZABLOCKI. Mr. Brower, not any of the resolution or proposals in this area now pending before Congress intend to deny the President the power to respond to any act or situation that endangers the United States, so that is not the question, not at all. As you eloquently stated, certainly the executive branch wants to protect its warmaking powers under the Constitution, and likewise does the Congress. However, there is a gray area, and on page 7 of your statement you suggest that "necessary and proper" clause of the Constitution has little or no meaning in the area of war powers because it cannot limit the principle of separation of powers. Is it not true, however, that the war powers are shared powers and the line of division between the legislative and executive branches is in a kind of zone of twilight, a gray area under the Constitution? In such a situation as that, would not a plain reading of the "necessary and proper" clause give Congress the right to define the authority of the President, so long as it did not impinge on those powers, which clearly are recognized as being his?

Mr. BROWER. Mr. Chairman, I think you have hit the nail on the head in saying that there is a gray area here. That in a nutshell is the problem with which we deal. The committee recognizes there is a gray area, and historically a twilight zone as you have termed it. There is not absolute precision in the Constitution and that has frankly been part of its genius, and the reason we have had one Constitution for nearly 200 years rather than a series of patchwork arrangements, as we might otherwise have had.

CONGRESSIONAL AUTHORITY UNDER NECESSARY AND PROPER CLAUSE

Now the question, as I understand it, is this: "Is it not true that the 'necessary and proper' clause gives Congress the authority to go in to this gray area and say where black stops and white begins?" I think clearly it does not. The "necessary and proper" clause is important in the war powers area. It is the application of the "necessary and proper" clause that Congress has enacted much of the legislation it has over the past, nearly, 200 years in carrying out its specific constitutional obligations or responsibilities with respect to the raising of armies and the maintaining of navies.

The "necessary and proper" clause was designed to insure that the States, which we always have to recall were like foreign countries which got together and formed the union—was to insure that the States would not be able to take the position that Congress was not entitled to enact any statute except those precisely spelled out in the Constitution itself. In effect it says Congress can go beyond the precise language of the Constitution vis-a-vis the States. That was the purpose of it. It was not intended to be a license as it were for Congress to try and discern black from white in what we all agree is a gray area.

Mr. ZABLOCKI. It is not the intention in House Joint Resolution 2 to codify the powers or define them. But in this twilight zone, or the gray area, all I would like to accomplish is for the executive branch and the Congress to get together and let us reason together, and that is why the consultation and the reporting provisions were provided.

PROVIDING MORE INFORMATION TO CONGRESS

My final question is do you truly believe that if Congress will remain silent on this particular warmaking powers problem that indeed the executive branch will be more apt to give Congress more information, which you so well stated is extremely important if Congress is to act responsibly in the warmaking powers? Or don't you think we have to nudge the executive branch which has quite clearly been necessary over the last few decades in order to get the executive branch to reasonably consult and to report to Congress without usurping some of the prerogatives of Congress?

Mr. BROWER. Mr. Chairman, the Congress definitely has not been silent on the subject of war powers.

Mr. ZABLOCKI. We probably were vocal, but we did not act.

Mr. BROWER. Well, Congress, or at least the respective Houses of Congress have acted. I think what we need to keep in the forefront of

our minds in addressing this issue is that like all fundamental questions of national importance under our Constitution in the last analysis this is basically a political question and not one really to be resolved as a legal question. Our Constitution was so constructed that we would have three branches of Government, and the one in which you participate is in many ways the most active. It was foreseen that a neutral interaction, interplay of forces, some nudging this way, some nudging that way, the whole panoply of political events and interplay would collectively lead this Government and our Nation to the best achievable results as a political entity. I believe very strongly in that, and I know you, Mr. Chairman, as is evident from your long and careful devotion to this particular subject, believe in that also.

BASICALLY A POLITICAL PROCESS

I think we have to remember that it is basically a political process; it depends upon the interplay of political forces of which congressional views on the question of war powers are an element. It will not in the last analysis be successfully resolved by legalistic intrusions. There is a very good reason why the judicial branch of the U.S. Government has traditionally treated many questions as so-called political questions. There are questions into which it simply does not go, intrude itself because they are questions of fundamental importance to be resolved by the interplay of a variety of political forces, particularly between these two branches of Government.

I believe in the fundamental soundness of that form of government and I think that we should be very careful in approaching any proposals to alter its basic structure.

Mr. ZABLOCKI. Basically I would agree with you, but when any branch encroaches upon the other then we have to put up barriers.

Any further questions?

Mr. Biester.

Mr. BIESTER. I don't think so, Mr. Chairman. I believe that last colloquy is helpful to have on the record. I don't happen to believe that what we are doing here is overly legalistic. It seems to me that we are doing exactly what the process implies we should do, recognizing that we have been deficient and recognizing that we have not been sufficiently responsible and sufficiently active in fundamental decisions in this field and out of that recognition pursuing within the gray area a defined, a more effective and reasonable role for the people's House, at least in this warmaking decision.

RESOLUTION NOT UNCONSTITUTIONAL

Mr. ZABLOCKI. Mr. Fountain, any further questions?

Mr. FOUNTAIN. No questions, Mr. Chairman.

I would like to say this. I personally don't think that this resolution would be unconstitutional.

Mr. ZABLOCKI. You personally think it would not?

Mr. FOUNTAIN. I don't think it would be unconstitutional, but the question that confronts me is whether or not it would be unwise. That is one reason I had you put into the record the provisions of the Con-

stitution which support the power of the President. I don't think the precise language of the Constitution itself is broad enough to give the President all of the powers he has exercised. But, I think by tradition, by precedent, by acquiescence, by some of the things we have done down through the years we have helped to interpret the Constitution and given the President more power than he actually has in the Constitution. In the type of world in which we live today with nuclear weapons, I think in calling upon the President to consult with us, and not to use excessive power under unreasonable circumstances, we have to be extremely careful that we don't become so precise, as you say, that we tie the hands of the President. I think we also must be extremely careful that we don't become so precise that we say to a potential enemy there are certain circumstances on which the President cannot act and thus prompt an attack.

Thank you, Mr. Chairman.

Mr. ZABLOCKI. Thank you, Mr. Brower. You have been an excellent witness.

The subcommittee stands adjourned until 2 p.m., Wednesday, March 14, when our witnesses will be two respected constitutional law experts, Prof. Arthur Schlesinger, Jr., of the City University of New York, and Prof. Alexander M. Bickel of Yale University.

The subcommittee stands adjourned.

Thank you very much.

Mr. BROWER. Thank you very much.

[Whereupon, at 4:46 p.m., the subcommittee adjourned, to reconvene at 2 p.m., Wednesday, March 14, 1973.]

WAR POWERS

WEDNESDAY, MARCH 14, 1973

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON NATIONAL SECURITY
POLICY AND SCIENTIFIC DEVELOPMENTS,
Washington, D.C.

The subcommittee met at 2 p.m., in room 2200, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman) presiding.

Mr. ZABLOCKI. The subcommittee will please come to order. We resume this afternoon our hearings on war powers legislation. In earlier sessions, we heard Members of Congress who have sponsored a variety of measures in this area. Yesterday, the administration's position was expressed by Mr. Charles Brower, acting legal adviser for the State Department.

Today we turn to witnesses who, because of their vast understanding of the intricate constitutional issues involved in this question, are regarded as experts. We are privileged to have with us two respected scholars who have written extensively on the issue. They are Arthur Schlesinger, Jr., historian, writer, Presidential adviser, and currently Albert Schweitzer professor of humanities at the City University of New York; and Alexander M. Bickel, noted constitutional law expert and professor of law at Yale University.

We are pleased to have you here. Mr. Schlesinger, if you will proceed, please; then we will hear from Professor Bickel.

STATEMENT OF ARTHUR SCHLESINGER, JR., ALBERT SCHWEITZER PROFESSOR OF HUMANITIES, CITY UNIVERSITY OF NEW YORK

Mr. SCHLESINGER. Thank you. I will summarize portions of my statement on the assumption that the statement, as a whole, can be put in the record.

Mr. ZABLOCKI. Without objection, the entire statement will be made part of the record.

Mr. SCHLESINGER. As one much concerned with these questions both as a former Government official and as a student of American history, I welcome the opportunity to set forth certain views on the range of questions embraced by the war powers resolutions before this committee.

These resolutions address themselves to a question of wide import and deep significance: the question of the democratic control of that most vital of national decisions, the decision to go to war. I am glad

that this committee is conducting so careful an inquiry into the alternative modes of action open to Congress and the country.

Of the various proposals before the committee, I shall refer first to the war powers bill as passed so emphatically by the Senate last year—S. 440.

Let me begin by emphasizing that I heartily endorse the purposes of this bill. Nor do I have any any question about its constitutionality.

I will skip the passages in my statement having to do with the constitutionality. I will be glad to go into that later if there is any doubt about that.

THREE ELEMENTS OF S. 440

S. 440 contains three separable elements: (1) A definition of the circumstances in which the President can send armed forces into battle without a declaration of war by Congress; (2) a provision requiring the President to report periodically to Congress on the status of hostilities; and (3) a provision enabling Congress to terminate hostilities by statute or joint resolution.

My difficulties with this bill arise from the first of these elements. Section 3 of the bill attempts to define the possible contingencies in which the President would be authorized to commit armed forces on his own initiative. History is exceedingly unpredictable, and the attempt to specify in advance all the circumstances that might justify unilateral Presidential action seems to me hazardous in the extreme.

"The circumstances that endanger the safety of nations are infinite," Hamilton wrote in the 23d Federalist. Able and perspicacious as the sponsors of this legislation are, one wonders whether they can see so much more clearly into the future than the men who designed the Constitution.

TOO LIMITING AND TOO EXPANSIVE

In attempting to specify these contingencies, section 3 has the peculiar character, or so it seems to me, of being at once too limiting and too expansive. While on the one hand it seeks to pin down the particularity of circumstance that would legitimize unilateral Presidential action, on the other hand it gives its blessing to the theory that has justified the most extravagant instances of such action; that is, the theory of defensive war.

I call your attention to the relevant phrases—the power proposed in paragraph (1) to send armed forces into battle "to forestall the direct and imminent threat" of attack on the United States; the power proposed in paragraph (2) to send armed forces into battle "to forestall the direct and imminent threat" of attack against the armed forces located outside the United States and its possessions; the power proposed in paragraph (3) to send armed forces into battle in any country where American citizens are "subjected to a direct and imminent threat to their lives."

Since no provision is made as to who shall make the judgment about the directness and imminence of such threat, it is to be assumed that the judgment is left to the President.

I hardly need recall to this committee the warning issued by a Member of the House of Representatives exactly 125 years and 1 month ago: "Allow the President to invade a neighboring nation, whenever he

shall deem it necessary to repel an invasion," said Congressman Lincoln of Illinois, "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.' "

RECOGNIZING STATE OF WAR

Though this proposition did not apply to the Mexican War, where Congress had formally recognized the existence of a state of war, it does apply with great precision to S. 440.

There is nothing more elastic than the theory of defensive war once that theory is extended beyond actual attack to alleged threat of attack. Presidents of a certain temperament may easily see direct and imminent threats on every hand; and, if Members of Congress fail to see such threats, "Be silent; I see them, if you don't." When one has seen this highly expansive concept of defensive war invoked to justify American attacks on neutral countries, one recalls Joseph A. Schumpeter's description of the foreign policy of the Roman Empire: "Here," he wrote, "is the classic example of that kind of insincerity in both foreign and domestic affairs which permeates not only avowed motives, but also probably the conscious motives of the actors themselves—of that policy which pretends to aspire to peace but unerringly generates war, the policy of continual preparation for war, the policy of meddlesome interventionism.

> There was no corner of the known world where some interest was not alleged to be in danger or under actual attack. If the interests were not Roman, they were those of Rome's allies; and if Rome had no allies, then allies would be invented. When it was utterly impossible to contrive such an interest—why, then it was the national honor that had been insulted. The fight was always invested with an aura of legality. Rome was always being attacked by evil-minded neighbors, always fighting for a breathing space. The whole world was pervaded by a host of enemies, and it was manifestly Rome's duty to guard against their indubitably hostile designs.

EXPANSIVE THEORY OF DEFENSIVE WAR

Nothing seems to me more perilous in S. 440 than the congressional sanction thus bestowed on the expansive theory of defensive war. The President has always had the power to repel sudden attacks on his own responsibility. But this bill would give him blanket congressional authorization to send armed forces into battle whenever he sees within the first three categories what he pronounces, by his own personal, independent, unilateral, and unchecked judgment, as "direct and imminent threat" of attack.

As Senator Javits has frankly said, the bill "gives the President more authority to do what is necessary and proper in an emergency than he now possesses" and provides "ample play to the need of the Commander in Chief to have 'discretionary' as well as 'emergency' authority."

The President must, of course, have the power to respond to emergency. But it would seem to me far better that he exercise this power on

his own and not with the color of congressional authorization. I see no advantage in Congress thus giving away its independence and compromising its position in advance.

A PRESIDENT ACCOUNTABLE TO CONGRESS

On this issue, I agree with Senator Fulbright that a President "would remain accountable to Congress for his action to a greater extent (if he acted on his own responsibility) than he would if he had specific authorizing language to fall back upon. Congress, for its part, would retain its uncompromised right to pass judgment upon any military initiative undertaken without its advance approval."

I have equal difficulty with the provision in section 5 of S. 440 requiring congressional authorization for the prosecution of hostilities after a period of 30 days. This raises first of all a problem that is more tricky than it may seem: how to ascertain the date on which hostilities begin?

Nor does the bill make this conundrum any easier of solution by mentioning, in an additional endorsement "where imminent involvement in hostilities is clearly indicated by the circumstances."

What in the world does this mean? At what point does the commitment of armed force in response to actual attack or to speculative threats of attack trigger the 30-day authorization period? Had S. 440 been on the statute books in 1960, at what point would the 30-day deadline have applied to the American involvement in Vietnam? These are not frivolous questions. They go to the heart of the proposed legislation.

THIRTY-DAY DEADLINE FILLED WITH BOOBYTRAPS

The 30-day deadline seems to me to be filled with boobytraps. Most wars are popular in their first 30 days. These are the 30 days when the President who ordered the action overwhelms Congress and the press with his own rendition of the facts and his own interpretation of the crisis.

It generally takes a good deal more than 30 days for other facts to emerge and other interpretations to win a hearing. With the President's immense advantages in his control of information, in his ability to define the emergency, in his capacity to rouse the Nation, it would take a very stouthearted Congress indeed to veto his request for the authorization of continued hostilities—except in those infrequent cases where differences have already crystallized in advance of the commitment of force.

This bill, S. 440, I greatly fear, would be more likely to become a means of inducing formal congressional approval of warlike Presidential acts than of preventing such acts. Moreover, the principle on which the bill is based—that the President must carry out the policy directives of Congress in the initiation and prosecution of military hostilities—is founded on the unstated assumption that Congress can be relied upon to be more peace-minded than the Executive.

WAR IMPOSED ON A DIFFIDENT EXECUTIVE

This assumption finds little sustenance in the historical record. In two of our five declared wars in American history—the War of 1812

and the Spanish-American War—Congress imposed war on a diffident Executive.

One need go back no further than the Cuban missile crisis to recall, as Robert Kennedy has told us, that the congressional leaders, when informed by President Kennedy of the quarantine policy, "felt that the President should take more forceful action, a military attack or invasion, and that the blockade was far too weak a response."

A bill constructed on the supposition that the President is always a force for war and Congress always a force for restraint may have unexpected consequence when, as has been so often the case in our history, it is the Congress which is seeking war and the President restraint.

As a historian, I feel that a legislative proposal of this consequence must be subjected to the historical test, by which I mean that we must carefully consider what its effect would have been had it been on the statute books in times of crisis in our past.

CAPACIOUS THEORY OF DEFENSIVE WAR

I will not enter here into the question whether S. 440 would have prevented the action undertaken by President Truman in Korea and by President Kennedy in the Cuban missile crisis. Both conceivably could have slipped through under the capacious theory of defensive war sanctioned in the bill, and neither probably would have been hampered by the 30-day deadline.

I will concentrate rather on two other situations of equal significance: the undeclared naval war with Germany in the North Atlantic in 1941, and the war in Vietnam. In 1941 Britain, fighting alone in the West against Hitler, depended on American aid for survival. The Roosevelt administration felt that British collapse and Nazi victory would jeopardize the security of the United States.

Accordingly, Roosevelt announced a "shoot-on-sight" policy in order to protect the British lifeline. It is not at all clear that this action falls within the categories of initiative permitted to Presidents by S. 440. In any case, it is fairly certain that Congress would not have sustained the shoot-on-sight policy after 30 days.

For this was one of those cases where policy differences had been well crystallized before the commitment of force. One has only to recall the fact that in August 1941 the House of Representatives came very close to disbanding the American Army when it extended the draft by but a single vote.

It is hardly conceivable that this same Congress would have authorized Roosevelt to pursue an undeclared war in the North Atlantic.

CONGRESSIONAL BLESSING ON VIETNAM WAR

As for the Vietnam war, President Johnson could unquestionably have got all the congressional blessing he wanted at any point up to 1968 and probably even then and thereafter. If S. 440 had been on the books, it would not have arrested American participation in the war; it would only have locked Congress deeper into the escalation policy.

In short, the war powers bill would have prevented President Roosevelt from protecting the British lifeline against Nazi subma-

rines; and it would not have prevented President Johnson from intensifying the war in Vietnam nor President Nixon from carrying that war into Cambodia and Laos. If all this is so, then the bill will serve neither the purpose for which it was drafted nor the national interest of the United States.

All these considerations constrain me to believe that sections 3 and 5 of S. 440, however constitutional they may be, are ill considered, unwise, and filled with danger for public policy. Now, indeed, do these sections seem to me essential to attain the declared purposes of the bill.

For these purposes can be effectively attained, in my judgment, by the provisions in S. 440 providing for the reporting and the recall of hostilities. For this reason, Congressman Bingham's proposal, H.R. 317, seems to me to represent a greatly preferable approach to this complex problem.

FORESEEING ALL FUTURE CONTINGENCIES

H.R. 317 omits the impossible attempt to foresee all future contingencies; it omits the placing of the congressional imprimatur on expansive theories of defensive war; it avoids the perplexities and dangers created by the 30-day deadline. H.R. 317 retains, however, the usable and useful provisions of S. 440.

Section 3 of H.R. 317 provides for periodic Presidential reports to Congress on the status of hostilities. My only comment on this section is to wonder whether the requirement that the President must report to Congress at least once every 6 months is sufficient. It would seem to me safer to require such reports no less often than every 3 months.

Sections 4 and 5 provide for the termination of hostilities upon the adoption by either House of a resolution disapproving continuance of the action taken. I am in agreement with the congressional priority provision in section 5.

As for the mode of termination prescribed in section 4, this is based on the precedent of the Executive Reorganization Act; and the reasoning behind it in this case is evident—that, since one House of Congress could defeat a declaration or authorization of war, one House of Congress should be able to prevent the continuation of undeclared or unauthorized war.

JOINT RESOLUTION AS APPROPRIATE FORM OF ACTION

From some viewpoints, a joint resolution passed by both Houses of Congress would seem a more appropriate form of action. I am not sure, for example, whether section 4 of H.R. 317, if on the statute books in 1941, might not have resulted in the termination of American protection of the British lifeline, though, since it would have required positive action by one or the other House, such termination could not have been achieved without a most intense national debate.

On the other hand, with the Presidential power to veto joint resolutions, the warmaking power would rest in the hands of one-third of each House, and this surely was not the intention of the Constitution. So, on balance, I am inclined to feel that the mode prescribed in section 4 is a feasible solution.

With this perplexity noted, I would urge on this committee the consideration of H.R. 317, which will, I believe, fulfill the purposes of

S. 440 without saddling the country with that curious melange of rigidity and permissiveness I find in S. 440.

As for House Joint Resolution 2, this proposal seems to me to suffer from two defects. It would appear to endorse the expansive theory of defensive war on Presidential initiative by authorizing the President to commit forces when "the necessity to respond" to situations endangering the United States constitutes in the Presidential judgment "extraordinary and emergency circumstances as do not permit advance congressional authorization."

PRESIDENTS COMPELLED BY EMERGENCY

While Presidents may be compelled by emergency to take action without congressional sanction, it does not seem to me, as I have noted before, essential that Congress should encourage them to do so by providing an appearance of sanction. The reporting provisions in section 5 seem to me admirable and might well be incorporated in H.R. 317. The provision for congressional action in section 6 seems to me vague and less satisfactory than the more specific provisions in H.R. 317.

In the interests of time, I will not comment in this statement on the other resolution before the committee, though I will be glad to do so to the best of my ability in the course of the hearing.

Before closing, I would beg the indulgence of the committee to suggest two other aspects of this general problem for your consideration. One means by which Congress could get a grip on the problem of war powers is through the exertion of its control over the deployment of armed force outside the United States.

I recognize that the constitutional authority of Congress to determine the commitment of forces outside the country has been in dispute. Nevertheless, I would recall to you the statement made on the floor of the Senate in 1912 by the eminent lawyer, Elihu Root, who had served as Secretary of War under McKinley and Secretary of State under Theodore Roosevelt. While expressing the hope that it would never do so, Root conceded that "Congress could by law forbid the troops' being sent out of the country."

GREAT DEBATE OF 1951

The more venerable among us can remember the "great debate" of 1951 when President Truman proposed to send four additional divisions to Europe. That debate ended inconclusively with the passage of a "sense of the Senate" resolution in which the Senate approved the sending of the divisions but added, over administration opposition, that no additional ground troops should be sent to Western Europe "without further congressional approval." Among those voting against inherent Presidential authority and for the principle of congressional control of troop deployment was Senator Nixon of California.

I would call this committee's attention to the statement by the Research and Policy Committee of the Committee for Economic Development in February 1972 entitled "Military Manpower and National Security."

This statement argues persuasively for a procedure by which Congress could regularly authorize and control the overseas deployment

of military manpower. The report recommends that Congress should annually and explicitly authorize the major overseas areas the number of troops that may be deployed outside the United States.

This need not limit the President's power to act in an emergency, for Congress can require of the President an after-the-fact accounting for emergency action; but it would give Congress a continuing voice in peacetime overseas deployments. This would go far, in my judgment, in restoring the proper balance between Congress and the Presidency.

My second point has to do with the vital question of information. Nothing has been more effective in obstructing the democratic control of foreign policy and in perpetuating monopolistic control by the national security bureaucracy than the myth of inside information—the "if you only knew what we knew" attitude.

SOUND AND INFORMED JUDGMENT

There is absolutely no reason why Congress should not have before it all the facts essential to sound and informed judgment on the large decisions of foreign affairs. This would require a marked change of attitude on the part of the Executive.

It would require the substitution of genuine consultation for unilateral briefing. It would require the end of the abuse of executive privilege. It would require the transmission of all executive agreements to the foreign affairs committees of both Houses, with appropriate provisions for secrecy when secrecy is really necessary.

It would require, it seems to me, the establishment of a Joint Committee on Intelligence on the model of the Joint Committee on Atomic Energy. It might well require, as Benjamin V. Cohen has proposed, the establishment by Congress of a commission with representatives from both Houses and from the executive branch empowered to exchange information and views on the most delicate and critical questions of foreign affairs.

SYSTEMATIC AND AGGRESSIVE EFFORTS BY CONGRESS

It will require above all more systematic and aggressive efforts by Congress to avail itself of the vast resources of knowledge in the public domain; for, in my experience, the great bulk of information necessary for intelligent political judgment is available to any citizen who will take the trouble to seek it out.

If Congress will arm itself with knowledge, with the control of overseas troop deployment and with some means of terminating hostilities undertaken on unilateral Presidential initiative, it will make long strides toward bringing the warmaking power under responsible democratic control.

Thank you.

Mr. ZABLOCKI. Thank you, Professor Schlesinger.

[Mr. Schlesinger's prepared statement follows:]

STATEMENT OF ARTHUR SCHLESINGER, JR.

As one much concerned with these questions both as a former government official and as a student of American history, I welcome the opportunity to set forth certain views on the range of questions embraced by the war powers resolutions before this Committee. These resolutions address themselves to a question

of wide import and deep significance: the question of the democratic control of that most vital of national decisions, the decision to go to war. I am glad that this Committee is conducting so careful an inquiry into the alternative modes of action open to Congress and the country.

Of the various proposals before the Committee, I shall refer first to the War Powers bill as passed so emphatically by the Senate last year—S. 440.

Let me begin by emphasizing that I heartily endorse the purposes of this bill. Nor do I have any question about its constitutionality. I am aware that objection has been made that, in seeking to define the powers of the President, the bill is in derogation of his authority as Commander in Chief and is therefore unconstitutional. This objection seems to me without force. The notion of the office of Commander in Chief as a source of independent and inherent peacetime authority is relatively novel in our constitutional history. The Founding Fathers would surely have regarded it as a latter-day heresy.

For the men who drafted the Constitution made clear their very narrow interpretation of the office of Commander in Chief. "It would amount," Hamilton carefully explained in the 69th Federalist, "to nothing more than the supreme command and direction of the military and naval forces"—and he went on to distinguish this limited authority from the much broader authority of the British King. The President's power as Commnander in Chief, in short, was simply the power to issue orders to the armed forces within a framework established by Congress; it was, in particular, the power to conduct war once Congress had authorized war. As Commander in Chief the President would have no more power than the first general of the Army or the first admiral of the Navy would have as professional military men.

This view prevailed through the early republic. In 1850, the Supreme Court, in reviewing "the power conferred upon the President by the declaration of war" in the case of *Fleming* v. *Page*, said bluntly that, when he assumed the role of Commander in Chief, "His duty and his power are purely military." The theory that the Commander in Chief had larger powers first appeared during the Civil War, but this was justified, as Lincoln repeatedly said, by the emergency, noted in the Constitution in connection with the suspension of *habeas corpus*, of rebellion and invasion. Lincoln's successors did not claim that their role as Commander in Chief conferred on them any special peacetime authority. In his 83 press conferences in 1941 up to Pearl Harbor, during the anxious time when our nation entered into an undeclared naval war with Germany in the North Atlantic, Roosevelt never once claimed that he had any special powers to bypass Congress by virtue of his office as Commander in Chief.

The Second World War gave Presidents the theory that this office was a residuum of inherent and independent authority, and in peace as well as in war. This theory did not have judicial sanction. In the steel seizure case of 1952, Justice Jackson rejected the expansive reading of the Commander in Chief clause. The office of Commander in Chief as thus invoked was, he said, a "loose appellation" advanced as support for any presidential action involving the use of force, "the idea being that it vests power to do anything, anywhere, that can be done with any army or navy." The President's powers as Commander in Chief, Jackson insisted, were to be "measured by the command functions usual to the topmost officer of the army and navy." Subsequent executive interpretations have ignored the Court but, despite self-serving pronouncements by members of the executive branch, cannot be accorded the status of constitutional gospel.

In any case, the idea that S. 440 is unconstitutional because its interferes with the President's authority as Commander in Chief is based on a conception of that office unknown to the men who wrote the Constitution—unknown, indeed, to most Presidents of the United States until very recently in our history.

S. 440 contains three separable elements: (1) a definition of the circumstances in which the President can send armed force into battle without a declaration of war by Congress; (2) a provision requiring the President to report periodically to Congress on the status of hostilities; (3) a provision enabling Congress to terminate hostilities by statute or joint resolution.

My difficulties with this bill arise from the first of these elements. Section 3 of the bill attempts to define the possible contingencies in which the President would be authorized to commit armed force on his own initiative. History is exceedingly unpredictable; and the attempt to specify in advance all the circumstances that might justify unilateral presidential action seems to me hazardous in the extreme. "The circumstances that endanger the safety of nations are

infinite," Hamilton wrote in the 23rd Federalist. Able and perspicacious as the sponsors of this legislation are, one wonders whether they can see so much more clearly into the future than the men who designed the Constitution.

In attempting to specify these contingencies, Section 2 has the peculiar character, or so it seems to me, of being at once too limiting and too expansive. While on the one hand it seeks to pin down the particularity of circumstances that would legitimize unilateral presidential action, on the other hand it gives its blessing to the theory that has justified the most extravagant instances of such action—that is, the theory of defensive war. I call your attention to the relevant phrases—the power proposed in paragraph (1) to send armed forces into battle "to forestall the direct and imminent threat" of attack on the United States; the power proposed in paragraph (2) to send armed forces into battle "to forestall the direct and imminent threat" of attack against the armed forces located outside the United States and its possessions; the power proposed in paragraph (3) to send armed forces into battle in any country where American citizens are "subjected to a direct and imminent threat to their lives." Since no provision is made as to who shall make the judgment about the directness and imminence of such threat, it is to be assumed that the judgment is left to the President.

I hardly need recall to this Committee the warning issued by a member of the House of Representatives exactly one hundred and twenty-five years and one month ago. "Allow the President to invade a neighboring nation, whenever *he* shall deem it necessary to repel an invasion," said Congressman Lincoln of Illinois, ". . . 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, to-day, 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 if you don't.' " Though this proposition did not apply to the Mexican War, where Congress had formally recognized the existence of a state of war, it does apply with great precision to S. 440.

There is nothing more elastic than the theory of defensive war once that theory is extended beyond actual attack to alleged threat of attack. Presidents of a certain temperament may easily see direct and imminent threats on every hand; and, if members of Congress fail to see such threats, Be silent; I see them, if you don't. When one has seen this highly expansive concept of defensive war invoked to justify American attacks on neutral countries, one recalls Joseph A. Schumpeter's description of the foreign policy of the Roman Empire. "Here," he wrote, "is the classic example of that kind of insincerity in both foreign and domestic affairs which permeates not only avowed motives but also probably the conscious motives of the actors themselves—of that policy which pretends to aspire to peace but unerringly generates war, the policy of continual preparation for war, the policy of meddlesome interventionism. There was no corner of the known world where some interest was not alleged to be in danger or under actual attack. If the interests were not Roman, they were those of Rome's allies; and if Rome had no allies, then allies would be invented. When it was utterly impossible to contrive such an interest—why, then it was the national honor that had been insulted. The fight was always invested with an aura of legality. Rome was always being attacked by evil-minded neighbors, always fighting for a breathing space. The whole world was pervaded by a host of enemies, and it was manifestly Rome's duty to guard against their indubitably hostile designs."

Nothing seems to me more perilous in S. 440 than the congressional sanction thus bestowed on the expansive theory of defensive war. The President has always had the power to repel sudden attacks on his own responsibility. But this bill would give him blanket congressional authorization to send armed force into battle whenever he sees within the first three categories what he pronounces, by his own personal, independent, unilateral and unchecked judgment, as "direct and imminent threat" of attack. As Senator Javits has frankly said, the bill "gives the President more authority to do what is necessary and proper in an emergency than he now possesses" and provides "ample play to the need of the Commander in Chief to have 'discretionary' as well as 'emergency' authority."

The President must of course have the power to respond to emergency. But it would seem to me far better that he exercise this power on his own and not with the color of congressional authorization. I see no advantage in Congress thus giving away its independence and compromising its position in advance. On this issue I agree with Senator Fulbright that a President "would remain accountable to Congress for his action to a greater extent [if he acted on his

own responsibility] than he would if he had specific authorizing language to fall back upon. Congress, for its part, would retain its uncompromised right to pass judgment upon any military initiative undertaken without its advance approval."

I have equal difficulty with the provision in Section 5 of S. 440 requiring congressional authorization for the prosecution of hostilities after a period of thirty days. This raises first of all a problem that is more tricky than it may seem: how to ascertain the date on which hostilities begin? Nor does the bill make this conundrum any easier of solution by mentioning, in an additional endorsement of the expansive theory of defensive war, situations "where imminent involvement in hostilities is clearly indicated by the circumstances." What in the world does this mean? At what point does the commitment of armed force in response to actual attack or to speculative threats of attack trigger the 30-day authorization period? Had S. 440 been on the statute books in 1960, at what point would the 30-day deadline have applied to the American involvement in Vietnam? These are not frivolous questions. They go to the heart of the proposed legislation.

The 30-day deadline seems to me to be filled with booby-traps. Most wars are popular in their first 30 days. These are the 30 days when the President who ordered the action overwhelms Congress and the press with his own rendition of the facts and his own interpretation of the crisis. It generally takes a good deal more than 30 days for other facts to emerge and other interpretations to win a hearing. With the President's immense advantages in his control of information, in his ability to define the emergency, in his capacity to rouse the nation, it would take a very stout-hearted Congress indeed to veto his request for the authorization of continued hostilities—except in those infrequent cases where differences have already crystallized in advance of the commitment of force. This bill, S. 440, I greatly fear, would be more likely to become a means of inducing formal congressional approval of warlike presidential acts than of preventing such acts.

Moreover, the principle on which the bill is based—that the President must carry out the policy directives of Congress in the initiation and prosecution of military hostilities—is founded on the unstated assumption that Congress can be relied upon to be more peace-minded than the executive. This assumption finds little sustenance in the historical record. In two of our five declared wars in American history—the War of 1812 and the Spanish-American War—Congress imposed war on a diffident executive. One need go back no further than the Cuban missile crisis to recall, as Robert Kennedy has told us, that the congressional leaders, when informed by President Kennedy of the quarantine policy, "felt that the President should take more forceful action, a military attack or invasion, and that the blockade was far too weak a response." A bill constructed on the supposition that the President is always a force for war and Congress always a force for restraint may have unexpected consequence when, as has been so often the case in our history, it is the Congress which is seeking war and the President restraint.

As an historian, I feel that a legislative proposal of this consequence must be subjected to the historical test, by which I mean that we must carefully consider what its effect would have been had it been on the statute books in times of crisis in our past. I will not enter here into the question whether S. 440 would have prevented the action undertaken by President Truman in Korea and by President Kennedy in the Cuban missile crisis. Both conceivably could have slipped through under the capacious theory of defensive war sanctioned in the bill, and neither probably would have been hampered by the 30-day deadline. I will concentrate rather on two other situations of equal significance: the undeclared naval war with Germany in the North Atlantic in 1941, and the war in Vietnam.

In 1941 Britain, fighting alone in the west against Hitler, depended on American aid for survival. The Roosevelt administration felt that British collapse and Nazi victory would jeopardize the security of the United States. Accordingly, Roosevelt announced a "shoot-on-sight" policy in order to protect the British lifeline. It is not at all clear that this action falls within the categories of initiative permitted to Presidents by S. 440. In any case, it is fairly certain that Congress would not have sustained the shoot-on-sight policy after 30 days. For this was one of those cases whose policy differences had been well crystallized before the commitment of force. One has only to recall the fact that in August 1941 the House of Representatives came very close to disbanding the American Army when

it extended the draft by but a single vote. It is hardly conceivable that this same Congress would have authorized Roosevelt to pursue an undeclared war in the North Atlantic.

As for the Vietnam war, President Johnson could unquestionably have got all the congressional blessing he wanted at any point up to 1968 and probably even then and thereafter. If S. 440 had been on the books, it would not have arrested American participation in the war; it would only have locked Congress deeper into the escalation policy. In short, the War Powers bill would have prevented President Roosevelt from protecting the British lifeline against Nazi submarines; and it would not have prevented President Johnson from intensifying the war in Vietnam nor President Nixon from carrying that war into Cambodia and Laos. If all this is so, then the bill will serve neither the purpose for which it was drafted nor the national interest of the United States.

All these considerations constrain me to believe that Sections 3 and 5 of S. 440, however constitutional they may be, are ill-considered, unwise and filled with danger for public policy. Nor, indeed, do these sections seem to me essential to attain the declared purposes of the bill. For these purposes can be effectively attained, in my judgment, by the provisions in S. 440 providing for the reporting and the recall of hostilities. For this reason, Congressman Bingham's proposal, H.R. 317, seems to me to represent a greatly preferable approach to this complex problem.

H.R. 317 omits the impossible attempt to foresee all future contingencies; it omits the placing of the congressional *imprimatur* on expansive theories of defensive war; it avoids the perplexities and dangers created by the 30-day deadline. H.R. 317 retains, however, the usable and useful provisions of S. 440.

Section 3 of H.R. 317 provides for periodic presidential reports to Congress on the status of hostilities. My only comment on this section is to wonder whether the requirement that the President must report to Congress at least once every six months is sufficient. It would seem to me safer to require such reports no less often than every three months.

Sections 4 and 5 provide for the termination of hostilities upon the adoption by either House of a resolution disapproving continuance of the action taken. I am in agreement with the congressional priority provision in Section 5. As for the mode of termination prescribed in Section 4, this is based on the precedent of the Executive Reorganization Act; and the reasoning behind it in this case is evident—that, since one House of Congress could defeat a declaration or authorization of war, one House of Congress should be able to prevent the continuation of undeclared or unauthorized war. From some viewpoints, a joint resolution passed by both Houses of Congress would seem a more appropriate form of action. I am not sure, for example, whether Section 4 of H.R. 317, if on the statute books in 1941, might not have resulted in the termination of American protection of the British lifeline, though, since it would have required positive action by one or the other House, such termination could not have been achieved without a most intense national debate. On the other hand, with the presidential power to veto joint resolutions, the war-making power would rest in the hands of one-third of each House, and this surely was not the intention of the Constitution. So, on balance, I am inclined to feel that the mode prescribed in Section 4 is a feasible solution. With this perplexity noted, I would urge on this Committee the consideration of H.R. 317, which will, I believe, fulfill the purposes of S. 440 without saddling the country with that curious melange of rigidity and permissiveness I find in S. 440.

As for H. J. Res. 2, this proposal seems to me to suffer from two defects. It would appear to endorse the expansive theory of defensive war on presidential initiative by authorizing the President to commit forces when "the necessity to respond" to situations endangering the United States constitutes in the presidential judgment "extraordinary and emergency circumstances as do not permit advance Congressional authorization." While Presidents may be compelled by emergency to take action without congressional sanction, it does not seem to me, as I have noted before, essential that Congress should encourage them to do so by providing an appearance of sanction. The reporting provisions in Section 5 seem to me admirable and might well be incorporated in H. R. 317. The provision for congressional action in Section 6 seems to me vague and less satisfactory than the more specific provisions in H. R. 317.

In the interests of time, I will not comment in this statement on the other resolutions before the Committee, though I will be glad to do so to the best of my ability in the course of the hearing.

Before closing, I would beg the indulgence of the Committee to suggest two other aspects of this general problem for your consideration.

One means by which Congress could get a grip on the problem of war powers is through the exertion of its control over the deployment of armed force outside the United States. I recognize that the constitutional authority of Congress to determine the commitment of forces outside the country has been in dispute. Nevertheless I would recall to you the statement made on the floor of the Senate in 1912 by the eminent lawyer Elihu Root, who had served as Secretary of War under McKinley and Secretary of State under Theodore Roosevelt. While expressing the hope that it would never do so, Root conceded that "Congress could by law forbid the troops' being sent out of the country." The more venerable among us can remember the "great debate" of 1951 when President Truman proposed to send four additional divisions to Europe. That debate ended inconclusively with the passage of a "sense of the Senate" resolution in which the Senate approved the sending of the divisions but added, over administration opposition, that no additional ground troops should be sent to Western Europe "without further congressional approval." Among those voting against inherent presidential authority and for the principle of congressional control of troop deployment was Senator Nixon of California.

I would call this Committee's attention to the statement by the Research and Policy Committee of the Committee for Economic Development in February 1972 entitled "Military Manpower and National Security." This statement argues persuasively for a procedure by which Congress could regularly authorize and control the overseas deployment of military manpower. The report recommends that Congress should annually and explicitly authorize by major overseas areas the number of troops that may be deployed outside the United States. This need not limit the President's power to act in an emergency, for Congress can require of the President an after-the-fact accounting for emergenccy action; but it would give Congress a continuing voice in peacetime overseas deployments. This would go far, in my judgment, in restoring the proper balance between Congress and the Presidency.

My second point has to do with the vital question of information. Nothing has been more effective in obstructing the democratic control of foreign policy and in perpetuating monopolistic control by the national security bureaucracy than the myth of inside information—the "if you only knew what we knew" attitude. There is absolutely no reason why Congress should not have before it all the facts essential to sound and informed judgment on the large decisions of foreign affairs. This would require a marked change of attitude on the part of the executive. It would require the substitution of genuine consultation for unilateral briefing. It would require the end of the abuse of executive privilege. It would require the transmission of all executive agreements to the foreign affairs committees of both Houses, with appropriate provisions for secrecy when secrecy is really necessary. It would require, it seems to me, the establishment of a Joint Committee on Intelligence on the model of the Joint Committee on Atomic Energy. It might well require, as Benjamin V. Cohen has proposed, the establishment by Congress of a commission with representatives from both Houses and from the executive branch empowered to exchange information and views on the most delicate and critical questions of foreign affairs. It will require above all more systematic and aggressive efforts by Congress to avail itself of the vast resources of knowledge in the public domain; for, in my experience, the great bulk of information necessary for intelligent political judgment is available to any citizen who will take the trouble to seek it out.

If Congress will arm itself with knowledge, with the control of overseas troop deployment and with some means of terminating hostilities undertaken on unilateral presidential initiative, it will make long strides toward bringing the war-making power under responsible democratic control.

Mr. ZABLOCKI. We will next hear from Professor Bickel.

STATEMENT OF ALEXANDER M. BICKEL, PROFESSOR OF LAW, YALE UNIVERSITY

Mr. BICKEL. Thank you, Mr. Chairman. I am delighted to be here today and delighted to be side by side with Mr. Schlesinger.

I hope you will forgive me if I begin in a somewhat autobiographical vein. I was here once before, nearly 3 years ago, in June 1970, speaking to the same issues. My views have evolved somewhat since then, and I think it may be of interest for me to tell you how and why.

I affirmed on that earlier occasion, as I do now, the necessary and proper power of Congress to fill in the constitutional outline by prescribing in greater detail than does the Constitution itself, the allocation of warmaking power between the President and the Congress.

THE POWER OF CONGRESS

When I speak of the power of Congress, I mean, of course, the legislative process, which includes the President. In order to make law, Congress may have to act by a two-thirds vote, if it should encounter a Presidential veto.

But I expressed the natural doubt of a common-law trained lawyer about efforts at codification, which seemed to me to run the risk, as Mr. Schlesinger noted, of being either too restrictive in their definitions of Presidential power, or else of becoming, like the lamentable Tonkin Gulf resolution, blank checks.

This doubt extended to the Javits bill, what is now S. 440, of which I had then had a chance only hastily to examine an early draft. My conclusion was—and as I say, this was as of the summer of 1970—that the most desirable form of congressional action would have been the exercise of some immediate control over the Vietnam situation and of the power of Congress over deployment of troops.

I said I believed it was Senator John Sherman of Ohio, the general's brother, who some time after the Civil War expressed the view that the way to resume specie payments was to resume, and I remarked that the way for Congress to resume control over the foreign and war policy of the United States was to resume, by specific action, then.

PRESIDENT REJECTS ADVICE

Needless to say, there was very little specific action then or in the years since then. In the Military Procurement Authorization Act of 1971, there was a provision declaring it to be "the policy of the United States" to end the war "at the earliest practicable date" and to undertake a "prompt and orderly withdrawal * * * subject to the release of all American prisoners of war."

The President rejected this advice, because advice was all it was. The amendment, said the President, describing its language and the intent behind it with total accuracy, "is without binding force or effect." Congress had shied from using mandatory language—"the President shall"—because it shied from the responsibility, and because it tried to avoid a veto which it very likely could not have overridden.

By the summer of 1971 I had become convinced that Congress could not be brought to resume exercise of its share of the war power through specific actions until it had in declarative fashion reallocated a share of the responsibility to itself.

The people tend not to hold Congress responsible, and its own Members shy from the responsibility. It became apparent to me that some

quasi-constitutive act on the part of Congress, an act of standing forth before the people as responsible, was necessary before Congress could be expected to take any specific measures.

SERIOUS IMBALANCE BETWEEN PRESIDENCY AND CONGRESS

And so I became convinced that unless a declarative statute on the model of the Javits bill was passed, a great opportunity to redress what in my view was a serious imbalance between the Presidency and the Congress would be wholly lost.

The problem, I have long thought, is very serious. It is in the nature of our institutional arrangements that any power vacuum will be filled by the President. Hence, in future as in the recent past, the President will act if there is nothing on the books that validly circumscribes his freedom.

Yet I think the Vietnam experience should have taught us that, barring a Pearl Harbor sort of exigency, or something that can convincingly be made to resemble an imminent Pearl Harbor, we cannot well fight Presidential wars.

It is useless, it is in the end an act of self-flagellation which helps nobody, including the ally we are supposed to be rescuing, and which does to ourselves domestically what the Vietnam war did. We need to reassert and refurbish the constitutional arrangements which in my judgment were intended precisely to see to it that the country did not get into wars unless it knew that it wanted to, or had been persuaded that it should—as a nation, through the two institutions, the Presidency and the Congress, that together are fit to express the national will.

At the same time, successive drafts of the Javits bill, each an improvement on an earlier one, stilled my common-law doubts, taught me that general legislation, a kind of codification, is possible in this area, and that the risks and pitfalls are less forbidding than I had first thought.

SPELLING OUT LIMITS OF PRESIDENTIAL POWERS

A law spelling out the limits of presidential warmaking power should not be necessary ideally; we would be better off if it weren't. It would not be necessary if Congress had exercised its undoubted powers in recent crisis situations, including Korea and Vietnam.

A responsible Congress would, I hope, have agreed to undertake the Korean action—there was time, if only a matter of days—and would, I hope, have refused to allow the massive intervention in Vietnam.

I cannot guarantee it. I am just expressing what I hope would have happened. But Congress stood by, partly at least because it shared a general confusion about the division of warmaking powers between itself and the President, despite the fact that the Constitution is, and used to be commonly understood as being, fairly clear on the subject.

When a Tonkin Gulf resolution or a Formosa resolution is put before the Congress, it goes through quickly because a substantial part of the membership is under the misapprehension that Congress is merely being asked to stand patriotically by the President, who is acting within the constitutional sphere of his own independent authority.

Thus, the late Senator Richard Russell, we are told, advised against

intervention in Vietnam, but told President Johnson that he would stand by him loyally if the President should act. The President for his part does not feel obliged to put his whole case before Congress, to bare his mind and reveal his intentions and thus defend his proposal and persuade Congress and the country to accept it.

PLAUSIBLE REASONS FOR MAXIMUM SECRECY

For, after all, he is not proposing, he is merely asking Congress to stand with him in united ranks behind something he has authority to do anyway. There is no need for Congress to know everything, since it is not Congress that is assuming the responsibility, and there are always plausible reasons for maximum secrecy.

The sum of it is that a vast ambiguity now shrouds the allocation of the warmaking power, even though it ought not and need not. Consequently, Congress does not answer responsibly when asked to act, and certainly takes no responsibile initiatives.

A war powers bill is necessary because it is apparent that Congress must declare its own responsibilities to itself and assume them in principle before the country, if it is ever to exercise them in practice in particular situations.

Restoring a proper share of responsibility to Congress will by no means insure its wise exercise. This is the point Mr. Schlesinger emphasized. There is no assurance of wisdom in Congress any more than in the Presidency, on domestic problems any more than on foreign.

DEFINE NATIONAL INTEREST BY EVOKING IT

The only assurance there is lies in process, in the duty to explain, justify, and persuade, to define the national interest by evoking it, and to act by consent. Congress will sometimes fail to assent to wisdom and hold out for foolishness or rush into it.

At such times, the President, who is differently constituted, has enormous leverage as a persuader, and great power as a brake. Singly or together, President and Congress can fall into bad errors, of commission and omission. But together they are all we've got; except that in emergencies requiring instant action, or for purposes of command decision, we must rely on the President alone, as S. 440 fully recognizes.

S. 440 would allow the President to act, as the Constitution intended him to do, in the event of an attack or of an imminent threat of attack against the United States or the Armed Forces of the United States. He may take the measures necessary to forestall an attack on the United States or its forces anywhere in the event of a "direct and imminent threat," to repel the attack if it occurs, and to retaliate, if it is an attack on the United States itself, its territories or possessions.

S. 440 would also allow the President, and this is somewhat extra-constitutional, to protect and evacuate Americans caught in fighting on the high seas or in a foreign country. That, in all reason, in the contemplation of the framers of the American Constitution, and in light of the experience of nearly two centuries, including a quarter century of the nuclear age, describes the sort of emergencies in which the automatic use of force is called for, and in which a purpose to use force

automatically and take the consequences can be imputed to our people without testing that purpose in the institution that reflects and represents the people in all their diversity; namely, the Congress.

SPECIFIC PROSPECTIVE AUTHORIZATION

Looking beyond the emergencies just described, S. 440, in its section 3(4)(A) and 3(4)(B), makes provision for specific prospective authorization of the use of force, and the emphasis is on the word "specific."

There are to be no more Tonkin Gulf resolutions authorizing everything and nothing, and no other ratifications, prospective or post facto, without the assumption of responsibility, as by appropriating money.

To appropriate money in support of a war the President is already waging is no more to ratify his action in responsible fashion than to appropriate for the payment of his salary. Under the sections I am discussing, the United States will be able to undertake credible international commitments through specific legislation implementing treaties or other agreements.

These commitments will be more credible than any we supposedly now have, which do not validly authorize automatic action, and exist at best in the miasma of ambiguity and misapprehension that has of late surrounded our domestic allocation of warmaking power.

Section 3 of House Joint Resolution 2, which is the operative section, by contrast with the closely drafted provisions of S. 440, seems to me to constitute a blank check, and for that reason to leave us worse off than we are now.

"ENDANGERS THE UNITED STATES"

The operative phrase of this operative section is "endangers the United States"—not directly or immediately, but in any sense. The phrase suggests, not a question of fact, but of judgment; and not a judgment tied to present circumstances, but a prophesy.

I do not think any President, including President Johnson in 1965, ever acted except in the good-faith belief that he was responding to a situation that, in a large sense, and looking to a distant future, endangered the United States, or ever thought, to continue quoting the language of section 3, that he was in anything but such "extraordinary and emergency circumstances as do not permit advance congressional authorization," if for no other reason than that he thought it wise to keep his decision private and his options open to the last minute.

House Joint Resolution 2, therefore, amounts, in my judgment, to no more than a reporting statute, and the reporting provisions of its section 5 are not terribly rigorous at that. Section 4, providing for consultation, is simply hortatory.

SINGLE HOUSE TERMINATION OF HOSTILITIES

H.R. 317, Mr. Bingham's bill, is again a reporting bill, except that it would authorize a single House of Congress to terminate hostilities that a President had engaged in. That is an extraconstitutional arrangement that has seemed to me undesirable in the few other condi-

tions in which it now prevails, and more undesirable as applied to matters of war and peace.

H.R. 926 seems to me similar in intent to S. 440, but the latter is simply a better and more detailed draft. H.R. 3046 I think is, again, little more than a reporting bill.

I came to the conclusion that S. 440 is a wise proposal which will redress what has come to be a dangerous and uncharacteristic imbalance in our institutional arrangements. I urge the committee to give it its favorable consideration.

Mr. ZABLOCKI. Thank you, gentlemen, for your excellent statements in support of your positions.

I detect that both of our witnesses this afternoon agree that all of the bills in this area now pending before Congress, and primarily S. 440, House Joint Resolution 2, and House Joint Resolution 317, contain, in your opinion, constitutional provisions.

As I gather from your testimony, there is no question of constitutionality in legislating in this area.

Mr. BICKEL. There is none in my mind.

Mr. SCHLESINGER. I am only a historian, so I yield to Professor Bickel.

Mr. BICKEL. Constitutional law draws its sustenance from an enabling alliance with history. I see no argument at all.

CONGRESS SHOULD BE MORE FULLY INFORMED

Mr. ZABLOCKI. Another agreement I find is that you both think Congress should be more fully informed.

Mr. BICKEL. Yes, sir.

Mr. SCHLESINGER. Yes.

Mr. ZABLOCKI. I also find another area of agreement that the Congress indeed should enact some legislation in this area.

Mr. SCHLESINGER. Yes.

Mr. ZABLOCKI. Professor Bickel, specifically you believe that only by legislation the war powers of the President of the United States can be resolved?

Mr. BICKEL. Yes, sir; I am wholly convinced now and have been for some time that the only way to begin is to have a broad declarative act.

Mr. ZABLOCKI. Then the President would either have to tacitly accept or formally approve the legislation by signing it into law.

Mr. BICKEL. He would have to sign it unless you succeed in passing it over his veto, but it is not less law when you do.

Mr. ZABLOCKI. That is true. However, witnesses we have had before us, including the sponsors of S. 440, agreed that the President would likely veto that bill, and there would not be enough votes to override the veto.

Then it would be an exercise in futility; would it not?

Mr. BICKEL. I guess so; this is the area of your expertise more than mine.

REESTABLISHING CONGRESSIONAL AUTHORITY

Mr. ZABLOCKI. Then from a practical standpoint, we should attempt to bring out legislation which would deal with this problem respon-

sibly and which may become a statute. Otherwise, why not just pass a strong concurrent resolution? This would not, in your opinion, accomplish what we want to accomplish; namely, reestablishing congressional authority in the war powers area by preventing the President from acting on his own.

Mr. BICKEL. It would not have the force of law, but it would not be a futile exercise. We are dealing in an area where the Constitution is the Constitution of practice.

We are also dealing in an area where one of the questions is the assumption of constitutional responsibility. I would regret if it came to a resolution, but if it did come to that, it would be a statement that enters the constitutional tradition, and it would be a statement by Congress to itself about what it thought its function was for the future. I would prefer the statute, of course.

Mr. ZABLOCKI. We in the House did not go through an exercise in the 92d Congress nor in the 91st session.

In the 91st Congress the House passed a resolution in this area. The Senate did not act. In the 92d Congress both Houses passed resolutions, but because the Senate action came late in the session the differences were not resolved.

Mr. BICKEL. I think the President, facing the decision President Johnson faced in 1965, would not have made it in the same atmosphere that it was made in then.

RAISING THE CONSCIOUSNESS OF THE EXECUTIVE BRANCH

Mr. SCHLESINGER. I think one of the problems, in the language of the women liberation movement, is to raise the consciousness of the executive branch and make it far more senstive to these issues than it was in the past.

I speak with some repentance about this because I was in the executive branch in the early 1960's, and I did not have the sensitivity to this range of issues that I have acquired since and that Vietnam has given to us all.

I feel that, had Congress declared itself by a sense of the House or sense of the Senate resolution, had it even made an effort to enact a bill which the President might have vetoed, it still would have raised the consciousness of the Executive.

I think that rather than to try to measure things which would be acceptable to the President one might argue that exercises which do not produce an immediate legislative result may produce a more enduring result in increasing awareness and Executive sensitivity to the constitutional issue and the need for involving Congress in these things.

Mr. ZABLOCKI. As one individual, I can assure you I don't feel our efforts in the past were complete failures or exercises in futility, nor are we frustrated, otherwise, we would not continue in our efforts.

DIFFERENCES ON SECTION 3 OF HOUSE JOINT RESOLUTION 2

I gather both of you disagree with section 3 in House Joint Resolution 2. Professor Bickel said this section practically gave the broader

power to the President. Yet, the State Department's witness yesterday said this particular section 3 would cause difficulties in meeting certain emergencies as far as the President is concerned.

Since there is a difference of opinion in this area, I am coming to the conclusion, since the Department is not satisfied and you think it is too broad, it must be a good section. Would you care to comment further?

Mr. BICKEL. The Department takes, and this is not the first instance of it, what seems to me to be an incredibly far out position. It seems to me the only way you can come to this section and view it as an inhibition on the President's power is if you start with the premise that his powers are wholly independent, that Congress has no business saying word one about them, and that they are not only unlimited but illimatable in the sense that nobody can foresee in what fashion he may seek to use them.

That is an imperial view of Presidential power that I certainly don't hold. I think the section is too broad because as I said in my testimony, the phrase, "Endangering the United States," with no reference to the immediate circumstances, with no reference to factual situations, but as a matter of prophetic judgment is a phrase that would cover every single Presidential action I can imagine.

EFFORTS AT CODIFICATION

Mr. ZABLOCKI. To pursue the question, in your testimony in the past, and again today and I quote from your testimony today, . . . "efforts at codification, which seemed to me to run the risk of being either too restrictive in their definitions of Presidential power, or else of becoming, like the lamentable Tonkin Gulf resolution, blank checks."

What you appear to be saying is that Congress should not attempt to codify. Doesn't S. 440 do just that?

Mr. BICKEL. I said that view I expressed nearly 3 years ago was my initial view. I have been taught, so to speak, by the drafting processes of S. 440 in which I took some small part, by Senators Javits, Eagleton, and others, and by their staffs, that the thing is do-able. S. 440 as I now read it as a lawyer seems to me to avoid pitfalls and to codify in language that is precise and, to me, satisfactory, those conditions in which the President has constitutional authority to act and those conditions in which he must have congressional authority.

Mr. ZABLOCKI. You mean in S. 440 all possible imaginable conditions are included?

Mr. BICKEL. Well, Mr. Chairman, within the limits of reason. One must guard against counsels of despair applicable to any legislation at all. Of course, nobody can sit here and say we are 100 percent certain we have taken care of everything. The Constitution of the United States has been amended 20 some times and this bill may be amended sometime in the future.

THE BEST JUDGMENT OF MEN

But it is my judgment that this bill, S. 440, now contains the best judgment of men now living so far as they can foresee the future. That is the process of legislation, Mr. Chairman.

Mr. ZABLOCKI. Thank you.

Mr. SCHLESINGER. May I comment?

Mr. ZABLOCKI. Yes.

Mr. SCHLESINGER. I agree with what Professor Bickel says about section 3 in the joint resolution 2. But it seems to me that S. 440 suffers from the same defect and that S. 440, too, involves Congress in, as I say, an endorsement of a very expansive theory of defensive war.

If I may ask Professor Bickel, S. 440 would have authorized the recent actions in Cambodia?

Mr. BICKEL. No; not in my judgment. I think there has been a great deal of confusion about that. The Cambodian actions nobody could have stopped, authorized or not authorized. They were taken as actions in a de facto war by a commander in chief. They were no different than, say, what FDR did in 1941. He did not come to Congress to ask whether he could invade North Africa. Once there is a war, the Commander in Chief can move his forces any place he wants to to achieve safety and victory.

PRIOR ENDORSEMENT BY CONGRESS

Mr. SCHLESINGER. S. 440 does say among the particular categories, "To repel an armed attack against the Armed Forces of the United States located outside the United States, territories, or possessions and forestall a direct attack." This was the ground on which Mr. Nixon invaded Cambodia.

I agree with Professor Bickel's actual description of the powers of the thing, but it seems to me there is no great virtue in Congress giving a prior endorsement to these things.

I agree with Senator Fulbright that Congress would be in a much less compromised position if the President, in undertaking this form of attack, could not cite statutes passed by Congress as authorities for what he was doing.

Mr. ZABLOCKI. We don't intend to have a debate between our witnesses; however, we do want to have a full discussion of the issue without getting too lengthy.

Mr. BICKEL. If S. 440 had been on the books, Congress would have had to authorize the massive presence of troops in Vietnam.

Then I agree that the Cambodian invasion could have taken place on the President's authority, of course. But what S. 440 intends to do is disable the President from the massive placement of troops in a place such as Vietnam.

INDEPENDENT PRESIDENTIAL ACTIONS

Therefore, the Cambodian situation could not have arisen. Second, sure the section of S. 440 which authorizes independent Presidential actions is a restatement, except for the provision about rescuing Americans who were caught in somebody else's country, is a restatement of the constitutional Presidential power which could not be taken away.

The virtue in the restatement that I see is that by a creeping practice over the past few decades that irreducible power has been enlarged by Presidents so that they have used it well beyond what the Constitution means. This is a restatement which says only this far do you have independent power and no farther. That is for me the virtue of it.

Mr. ZABLOCKI. Thank you, gentlemen. Governor Thomson?

Mr. THOMSON. I will reserve my time, Mr. Chairman.

Mr. ZABLOCKI. Congressman du Pont?

Mr. DU PONT. Thank you, Mr. Chairman.

We have heard over the past few days from a great many witnesses arguing a great many points of view. It seems to me if we are all agreed that we want to enact some kind of meaningful legislation, we ought to turn our attention to the subject of what that legislation ought to contain. There are three principal elements. I would like to get your opinion on problems I see with all of them.

The first is, it seems to me we are necessarily dealing only with offensive situations. Do either of you gentlemen see any problem in giving the President of the United States carte blanche in order to defend the United States?

Mr. SCHLESINGER. Against actual attack, none.

STOP DEFENDING THE UNITED STATES IN MIDSTREAM

Mr. DU PONT. But both the Javits' bill and Bingham bill would put restrictions on it.

In the Javits' bill if no resolution was passed by Congress, the President would have to stop defending the United States in midstream.

Mr. BICKEL. No, I don't agree with that. The Javits bill says that if he has engaged in hostilities in defense of the United States or placed troops he has to report and within 30 days he has to stop, but not in the sense that he is required to disengage if in his judgment it is not possible to disengage.

The Javits' bill doesn't tell him, and you could not constitutionally tell him, at the end of 30 days when a bell rings in Congress, "Cease fire."

That is an encroachment on the power of the Commander in Chief and the Javits' bill does not do it.

Mr. SCHLESINGER. Indeed, the Javits' bill in section 2 says this act does not intend to encroach upon the right of the President as Chief Executive to respond to attacks or threat of imminent attack.

PROTECTING FORCES WHILE DISENGAGING

Mr. DU PONT. In section 5 in lines 15 onwards, the President doesn't have to stop if he determines that the safety of the Armed Forces while disengaging from this threat I would if—that is the Vietnam argument, protecting your forces while you disengage. I wouldn't consider fighting a defensive operation in the Aleutian Islands a disengagement.

As I read this bill, you would have to stop.

Mr. BICKEL. As I read it, if he had this happen in 1967 or 1968 he might have spent a year to get out and might have gone to Cambodia in the process of getting out of there.

One must assume good faith on his part. This gives him the mission. It says if the 30 days run out, your mission is to get out. If Congress acts, it may say, go conquer Vietnam or fight China.

If there is no action, the mission is disengagement but disengage-

ment within the judgment and powers of the Commander in Chief which is a considerable amount of power.

Mr. SCHLESINGER. I agree with Professor Bickel's reading of the bill. I don't think this touches the Presidential authority to repel an attack. But if my reading were incorrect, it doesn't seem conceivable that if the United States were under attack that Congress would tell the President to cease and desist.

Mr. DU PONT. This brings me to the second part of the problem. That is the problem with the Bingham bill.

CONGRESS CAN TERMINATE HOSTILITIES

Mr. SCHLESINGER. The Bingham bill does not have an automatic 30 days outline that has to be met for the hostilities to continue. The Bingham bill imposes a form by which the Congress can terminate hostilities. Therefore, I don't see where there would be any problem.

Mr. BICKEL. The problem would be the other way around.

Mr. DU PONT. The third important thing I think in drafting the legislation is to try to draw a bright line so that everybody understands, both from the congressional and Executive side, where we stand.

How would you gentlemen define the operative word, "hostility," in these bills? We had quite a discussion with Senator Javits and Congressman Bingham and others as to just what "hostilities" mean. I believe Congressman Findley asked whether hostilities was using U.S. aircraft in the Congo operation for example. There are lots of thoughts that can be raised. Do you have any comments?

Mr. BICKEL. I have been in that discussion with the Senate Foreign Relations Committee. It is at this point that I become Mr. Schlesinger, although I can't confirm that he becomes Bickel at this point.

It is at this point that my urge to codify vanishes. There is no way in which one can define that term other than a good faith understanding of it and the assumption that in the future Presidents will act in good faith to discharge their duty to execute the law.

THE TAYLOR-ROSTOW MISSION

I would suppose that if you were President Kennedy in the very early 1960's after the Taylor-Rostow mission, and you were sending 15,000 men into Vietnam, you would have to be very disingenuous not to have thought you were throwing them into a place where there was a threat of hostilities.

I suppose if you were sending rescue planes to the Congo you would have a different judgment. If you were sending the Marines into Lebanon as President Eisenhower did, you would again have felt you were sending them into an area where there was an imminent threat of hostilities. I think hostilities is a reasonable word as words go, and I just don't know if one can do better.

Mr. DU PONT. Thank you.

Mr. ZABLOCKI. The gentleman from Minnesota, Mr. Fraser.

Mr. FRASER. Thank you very much, Mr. Chairman.

I am delighted to welcome both Professor Bickel and Dr. Schlesinger here. Do either of you believe that had either of these resolutions been on the statute books, the ones you respectively advocated, that it

would have prevented the Bay of Pigs, the Dominican Republic invasion, or Vietnam?

APPLICATION TO BAY OF PIGS

Mr. SCHLESINGER. On the question of the Bay of Pigs, this was not something that involved the commitment of American forces. It was an expedition which was sponsored, organized, trained, and armed by the United States, but I would take it that none of these bills would apply to the Bay of Pigs.

I think the way of getting at that if there were ever to be such a clandestine operation by the CIA again, would be through a joint committee on intelligence. The pretext for the Dominican invasion was the protection of lives of Americans in the Dominican Republic. It may be that to protect the lives of Americans who were threatened may not in the light of reason seem to require the dispatchment of 24,000 troops. But the pretext was that, and therefore, it would not be affected by either of these bills. What was the other?

Mr. FRASER. Vietnam.

Mr. SCHLESINGER. I think in the case of Vietnam, if the Javits bill had been on the books it would have dug the Congress in much deeper and systematically than the Gulf of Tonkin resolution did because it seems to me realistically the Congress would have renewed the mandate every 30 days or whatever the requirement was in the bill.

Mr. BICKEL. I would say the same thing on the Bay of Pigs. I would have two different answers on the other two. On the Dominican Republic that seems to me, as Mr. Schlesinger said, a disingenuous action, and I think a President would be given pause if there were a bill on the statute books which said he could act only to rescue American citizens and then you get out.

EFFECT ON DOMINICAN REPUBLIC SITUATION

So, I think it might have had an effect upon the Dominican Republic situation. Vietnam is different. It could have been that Congress would have cheerfully started that war. But that goes to the point that neither this bill nor anything else we can do now will insure wisdom. If the Congress had passed a bill to fight in Vietnam in 1965, and had been responsible for it, then at least we would know now that we had made the mistake with the best and brightest of our institutions, not just the best and brightest of our men.

I would be satisfied that way. I don't want to make infantile statements, but I believe in the Constitution.

Mr. FRASER. From what both of you said, I gather that in practical terms these provisions, given the climate that existed at the time each of these occurred, that these would not have constituted hindrances or limitations on what the President did.

Mr. BICKEL. With the qualification on the Dominican Republic.

THE PRESIDENT SHALL MAKE EVERY EFFORT

Mr. FRASER. This clause 3 of section 3 says down toward the end, "The President shall make every effort to terminate without using the Armed Forces of the United States and shall, where possible, ob-

tain the agreement of the subject country." That was the name of the game down there to protect the Government against the international effort to overthrow it.

Once we went in to save American lives, and we had not only the consent but appreciation of the host Government to stay there as we did——

Mr. BICKEL. Not under this section. It says he can go in, evacuate as rapidly as possible, and then get out. For that he needs the consent.

Mr. FRASER. By the time we had our U.S. nationals out we had put down the revolution.

Mr. BICKEL. But that would have been disingenuous and bad faith action if this act were on the books.

Mr. FRASER. Disingenuous seems to be the name of the game where Presidents are concerned. We might put an outline in the law about that.

I have thought it might be a good idea to make it unlawful and a criminal act for a Government official to lie.

Mr. BICKEL. Do you have enough jails?

Mr. FRASER. It seems to me it would get closer to the problem than other efforts. Professor.

INFLUENCE ON PRESIDENTIAL DECISIONS

Mr. SCHLESINGER. The provisions in H.R. 317 for the recall of hostilities might, it seems to me, have had some possible influence on Presidential decisions because this permits recall by the action of one House. Whether the Senate passed the Javits bill by such a large margin, whether the balance might have been close enough in 1970 or 1971 for the Senate to take a resolution of disapproval, whether this might have had a restraining effect on the President, I don't know, but it might have.

Mr. FRASER. But in H.R. 317 that is operative only if there is not specific authority for what is going on. I think we both should agree that the executive branch, faced with this on the books, would have nailed down the specific authority in the early months when Congress would have adopted the declaration of war by a 3–4–1 vote.

Mr. SCHLESINGER. In that case, it would have the effect of having forced Congress to assume some responsibility on it.

Mr. FRASER. That is an interesting but——

Mr. BICKEL. That is the constitutional concept.

Mr. FRASER. Your disclaimer that an appropriation for a war doesn't constitute an endorsement, I am prepared to support that in a legal sense.

When one recognizes that really the ultimate authority we have is the power of the purse and the right to withhold funds, I have to say in my judgment the Congress shared with the President throughout the Vietnam war the responsibility for its continuation because we clearly could have terminated it.

LACKING THE POLITICAL WILL

As you pointed out, we should have terminated it, but we did not, and we lacked the political will to terminate it.

Mr. SCHLESINGER. May I say in general the appropriations do constitute an implicit ratification of hostilities taken by the President unless Congress by appropriate action cancels that authorization. This is the view Judge Coffin—a former member of this body—took in the first circuit, and it has much to commend it.

In 1847, Lincoln and Adams continued to vote for appropriations. Some Congressmen did not. Joshua Giddings of Ohio reminded his colleagues that during the War of the Revolution, antiwar members of British Parliament declined to vote for appropriations.

Despite that, Lincoln and Adams did vote for appropriations.

Mr. FRASER. They were then operating on the basis that amendments to a bill of which there was no record and then the problem became the final passage of the appropriations bills. That probably included the general support of the Armed Forces.

That was the practical problem we faced in the first years. On the record, bills on final passage we were financing all kinds of things. That procedure was prevalent then.

LINCOLN AND ADAMS CHALLENGED

Mr. SCHLESINGER. Lincoln and Adams were both challenged by Giddings. I am ashamed to say I don't know what form these appropriations took, whether they were for the army in Mexico. The bulk were probably for that purpose.

However, the House of Representatives did in 1848 cancel the implied ratification of the war through the appropriations process when it passed a resolution saying that the law had been illegally and unconstitutionally initiated by the President of the United States.

So, I do think it is within the power of Congress to eliminate the notion that appropriations imply approval by taking positive action as they did in 1848.

Mr. FRASER. Except for the testimony of the Legal Department of the Department of State yesterday, which claims such vast powers for the President that I was enormously disturbed, I am really reluctant to try to have passed something in which nobody can tell me would have any practical consequences in the war I think has been a mistake in the past 10 years.

It seems to me that gets me in trouble, the attitudes we have viewed and fashioned in the short term rather than taking a longer term perspective.

If passing this would not have prevented the things I don't like, I can't see much value in it.

A PROCEDURE FOR CONSCIOUSNESS-RAISING

Mr. SCHLESINGER. S. 440, I don't think would have prevented the things you don't like, and would have prevented things which were in the interest of the United States in 1941. That objection doesn't seem to me to apply to H.R. 317. I think it is consciousness-raising to have a procedure hanging over the head of Presidents by which Congress can terminate hostilities. It might have a restraining effect.

Mr. BICKEL. I really think, if I may say so with great respect, Mr. Fraser, you are not here to legislate retroactively about the mistakes

that have been made. You are here to legislate first of all on the relatively abstract issue of what proper institutional arrangements should be.

You are here to legislate about things that are bound not to be anything like the three past instances. They will never reoccur. History does not repeat itself except as Mr. Schlesinger writes it up.

There is no such thing. There is the future and that is all. The Constitution has a great deal to say on this. We have gone astray from it, gone wrong as compared to the scheme. The Constitution doesn't say you ratify wars by appropriation.

MISTAKING CONGRESS FOR HOUSE OF COMMONS

You mistake the Congress for the House of Commons of the 18th century. Your main power is not the purse. You are the legislative organization of this Government and you have the necessary and proper power to legislate for all portions of it.

The appropriations power is not even mentioned. You have the power to pass laws. What the Constitution provides is that money can't be spent unless you say so, but the assumption is that the appropriation is dependent on lawmaking.

Mr. FRASER. But the practical thing is, that the failure to appropriate is not subject to a veto.

Mr. BICKEL. That is true.

Mr. ZABLOCKI. Mr. Biester.

Mr. BIESTER. Thank you. I served for 6 years on the Committee on the Judiciary. Mr. Bickel testified many times before us. Now I am surprised to find him over here.

I admire the working of his mind as he deals with this problem, but also the relevance of his thought on many subjects. I would like to come back to the Constitution if I might, and confirm my belief that section 8, article 1 spells out in a number of ways an emphasis on the Congress with respect to warmaking, the declaration of war, even events which authorize military action not going to the extent of declaration of war, and with respect to appropriations limiting appropriations for the military to 2 years which is a kind of 440 with a different time period.

CONGRESS AS MAIN DECISIONMAKER ON WAR

I am wondering if you gentlemen with your various disciplines agree that the framers intended the Congress to have the dominant role in determining whether we went to war?

Mr. SCHLESINGER. Yes, it did intend to have a dominant role, and at the very least an equal role. It did assign certain powers to the President.

There was a certain ambiguity here, and experience showed that the powers assigned to the President which enabled the President to present to Congress fait accomplis that, in a sense, thwarted the Constitution.

But I would agree with your general statement.

Mr. BICKEL. The only problem that the framers faced was how to vest this power in Congress without getting themselves into the kind

of problem they faced under the Articles of Confederation where Congress began to wage war as a committee.

That is why they chose "declare" as against "make." They came entirely from the other direction. There was no doubt in their minds that the war power was to be legislative. The problem was how to keep the President as effective Commander in Chief.

NOT EVEN A SHARED POWER

It was not even a shared power, I think, in their minds.

Mr. BIESTER. The second question is with respect to criteria. In making the judgment with respect to the role of the Congress, what criteria should we apply? Should we apply the criterion that it was the intention of the framers?

Should we apply the criterion that it is likely to be the wisest reciprocatory? Should we apply the criterion that if it is a congressional responsibility, it is more likely to be a whole and national undertaking or do we apply a mix of the three or what?

I would appreciate your comments with respect to this. What criteria do we apply in making this judgment?

Mr. BICKEL. I think that I would accept the three you mentioned as constituting a very appropriate mix. There is a constitutional provision, and most of us are of the persuasion that on the whole the constitutional arrangements are wise.

There is, then, the question of present policy, of the wisdom of present policy. It seems to me the constitutional arrangement, its wisdom, has been confirmed by the experience of the past two decades. It seems to me ultimately as to the wisdom of institutional arrangements, we have to seek, for war more than for any other policy the Government pursues, the broadest possible base of consent which I think is the foundation of effective government all together anyway.

CONGRESS AND PRESIDENT ACTING TOGETHER

I am at a loss to see how anybody can argue against the proposition that the broadest base of consent for governmental action in our system is obtained when, in accordance with the constitutional scheme, Congress and the President act together.

As I read S. 440, that is what it intends to do.

Mr. SCHLESINGER. I would agree with that. I think the objective of the Founding Fathers was to make sure that no one man would have the power to, as Lincoln said, get us into this distress of war. That is an essential part of wisdom. But, if I understand you to say that Congress was a wiser branch than the executive, I do not think that is necessary to the argument.

Mr. BIESTER. I was asking whether as a criterion we would use wisdom of either institution.

Mr. SCHLESINGER. No, I think that both institutions are capable of wisdom and both capable of folly. On the war question, as I suggested in my opening remarks, it is not the case that Congress is notably less bellicose than the Executive.

MADISON AND JEFFERSON ON THE EXECUTIVE

This was the impression that both Madison and Jefferson had. Madison wrote in 1798 about the Executive as being prone to war and so on, but when Madison was President, 14 years later, it was the Executive who was more prone to peace, and the legislature more prone to war.

So, I do not think that element, as I would see it, would enter into the argument. I think the essential point to keep in mind is the constitutional intention to make sure that no one man has the right to get us into war.

Mr. ZABLOCKI. Mr. Fountain?

Mr. FOUNTAIN. Thank you, Mr. Chairman.

I want to thank Professor Bickel and Mr. Schlesinger for taking the time to come before this subcommittee and giving us the benefit of their thought-provoking discussion of this extremely complicated, difficult and, at the same time, sensitive subject. I say complicated because we have already found it to be difficult to write an appropriate statute in a manner of this kind.

I joined with the chairman in introducing House Joint Resolution 2, not because I think it is necessarily the exact wording we ought to have, but because I thought it was a start and that maybe something ought to be done. However, I am beginning to feel somewhat as I did on the prayer amendment. I think all Americans feel that children have been deprived of the right of reading Scripture and prayer in the public schools. Yet after having studied the matter, I can see the difficulty in writing a law that doesn't leave us in worse shape than we are in, either in breaching the doctrine of separation of church and state or restricting the rights of people.

BALANCING POWERS OF EXECUTIVE AND CONGRESS

I am beginning to think we are maybe in the same situation here, trying to write something that will not overlimit or will diminish the power of either or both branches of government. I would like to ask both of you one question—I note that you, Professor Bickel, support S. 440 as it is written. I gather from your statement, Mr. Schlesinger, that you are not satisfied with S. 440—you think we ought to develop another approach.

I am sorry I did not hear your entire statement, but I wonder if each of you would briefly summarize just the substance of what you think the legislation ought to contain.

First, let me ask you, do I understand that both of you agree we ought to have something?

Mr. BICKEL. Yes.

Mr. SCHLESINGER. Yes.

Mr. BICKEL. I do think the heart of the problem right now—and I would not have said this 2 years ago, because I was in hopes that Congress would do something immediately—I like Mr. Schlesinger's phrase consciousness raising, although I don't like where he borrowed it—is the need of Congress telling the country, we are in this game also.

CONSTITUTIONAL ARGUMENT FROM THE EXECUTIVE

It seems clear that some vacuous statement that says merely what I have just said would not do it. It does require some description of the responsibilities that Congress assumes. That, in turn, it seems to me, is impossible without running into strong constitutional argument from the Executive. It is impossible to do without, at the same time, putting aside and confirming what are the Executive's constitutional powers. You wind up with a thing like the Javits bill which says we recognize what the President can do under the Constitution, but it is limited, and that which is described in the next section he cannot do without specific authorization from us.

I think that is called for and I think the Javits bill does do it fairly satisfactorily.

Mr. SCHLESINGER. I accept Professor Bickel's argument about the need for some form of congressional declaration which I think he argues with great subtlety and force in his statement. This does not, however, lead to S. 440 as the inevitable conclusion. I, for reasons set forth in the statement, feel that in certain regards this weakens the position of Congress with regard to the Executive by providing the Executive forms of language which will enable him to claim congressional support for actions which previously he would have to undertake on his own responsibility and if undertaken on his own responsibility, it would seem to me Congress would be in a better position to deal with them than if Congress had authorized the action by language in a statute.

ONE MAN MAKING FEARFUL DECISIONS

It would seem to me that the purpose of the declarative act, along with the efforts to try to make it impossible for one man to make these fearful decisions, could be accomplished by a bill to concentrate on reporting and recall. I do disagree with Professor Bickel. I think the provisions for reporting in the chairman's bill are good. They seem to me better than the provisions in Congressman Bingham's bill. I was just handed a new version of the Bingham bill in which he appears to have incorporated the chairman's provisions.

I think a provision for recall by action of the Congress is essential. Therefore, I would think that the reporting and recall would do the job, including the job of consciousness raising without getting into the difficult problems raised by the other sections of the Javits bill, the 30-day provision and the blessing it does give to expansive Presidential interpretations of defensive war.

Mr. FOUNTAIN. What part do treaties play in this picture?

Mr. BICKEL. As things stand now, as you know, treaties, the main ones, NATO, SEATO, have applicable provisions which I don't think are credible to anyone. I think Charles de Gaulle expressed the true view about those. He didn't believe them for a minute because they are circular. They say we will go to war automatically in accordance with our constitutional processes.

CREDIBLE CAPABILITY TO ACT IN CRISES

Nobody knows what those are. Any statesman with his head screwed on right will know that whatever Presidential power was 10 years ago, it is likely to be less now. So I think treaties do not give us credible capability to act in crises. Under the Javits bill Congress would be empowered and, therefore, having passed that bill have the obligation to look over our so-called treaty commitments and to decide which ones it did, and in what circumstances, wish to make more credible than they are now.

The Javits bill provides that under a treaty or any other agreement that the only way we can have a commitment to action on a fairly automatic basis is pursuant to a specific implementing statute. The Javits bill, among its other virtues, would be conducive to a coherent examination by the Congress of the foreign policy of the United States throughout the world.

Mr. FOUNTAIN. Just one other observation. I am tremendously impressed by Mr. Schlesinger's emphasis upon a joint committee of some kind. I don't trust completely the wisdom of the President or the Congress. I think one of our big difficulties has been not having accurate and adequate information upon which to form an opinion or to advise our people when they contact us. It seems to me that even the Congress, if it should declare war, ought to have access to all the information available before it makes such a decision.

GULF OF TONKIN RESOLUTION PASSED HURRIEDLY

I think the Gulf of Tonkin resolution was passed hurriedly, and in an emotional atmosphere. The language was too broad, but hindsight is always better than foresight. However, if Congress is going to declare war on the basis of such limited information as we had then—of course, when we were attacked at Pearl Harbor, it was different—I just wonder if maybe we don't need something like Mr. Schlesinger says we need. What is your view?

Mr. BICKEL. I don't disagree other than to say that action by joint committees, the oligarchs of Congress, the higher-ups, and this is true of the Foreign Relations Committee in the Truman administration—that to me is not responsible action after the fashion of representative democracy.

I have no more faith in the Executive acting with a congressional bureaucracy in tow than in the Executive acting by himself. I do have such faith as I have in free institutions, and it is great, in action in accordance with the constitutional structure by the Congress and the President together. That means Congress, not a committee.

I would hesitate to institutionalize the informing function in some new congressional hierarchy which becomes the place the Executive goes and consults, draws them in and they sort of become half-Executive and half-Congress and become an oligarchy themselves.

Mr. FOUNTAIN. I appreciate that, too.

Mr. ZABLOCKI. Do you have a comment, Professor Schlesinger?

INVOKING THE QUESTION OF EMERGENCY

Mr. SCHLESINGER. Yes; I feel there are occasions where there are problems of secrecy of information. In such cases it seems to me that a body like this might serve some purpose. In general where there are no such considerations obviously Congress as a whole should be informed. In this connection it might be relevant to say a word about the question of emergency which is often invoked as a reason for the concentration of power on the Presidency on the grounds that in the nuclear world it is necessary to make instant decisions.

Actually that was much more of an argument, it seems to me, for Executive decision in the 1790's when it took a month to convene Congress together, when a Congressman from outlying States took several weeks to get to Washington, than there is today in the day of the telephones and jet aircraft.

I think the emergency argument is greatly overemphasized. Since the Second World War, there has been only one emergency which could arguably not permit full congressional participation and that was the Cuban missile crisis. Even in the case of Korea Congress was in session. President Truman should and could have gotten a resolution except he was persuaded by the constitutional argument of his Secretary of State, a former law clerk of Justice Brandeis, who told him he did not need congressional authorization. I think Secretary Acheson was wrong.

VALUE OF JOINT COMMITTEE ON INTELLIGENCE

Mr. ZABLOCKI. The Chair would like to comment that certainly a joint committee on intelligence has some value. However, since joint committees would have to be approved by the rules committee this committee would be exceeding its prerogatives by trying to incorporate such a proposal in any legislation it might approve. Perhaps we can deal with this issue in our report. We may be able to persuade the Rules Committee to amend by adding a section to the resolution providing for a Joint Committee on Intelligence which would be the receiving body when Congress is not in session, thereby precluding the necessity of the President to convene Congress whenever an emergency would arise when Congress is not in session.

We will explore this fully when we mark up the bill in its final size.

Our colleague from Illinois, Mr. Findley.

Mr. FINDLEY. Mr. Schlesinger, if I made any meager contributions to the war power discourse we have had had here for about 3 years, it lies in the construction of the reporting provision that was passed by the House last year and is still embodied in House Joint Resolution 2, which is now before us. It is very gratifying for me to hear you use the word "admirable" to describe that reporting provision. It seems to me that the reporting provision has not had nearly the attention by witnesses and by the subcommittee up to this point that it really deserves.

IMPOSING THE 30-DAY TIME LIMIT

I have been inclined to feel that it is most unlikely that Congress would ever use the 30-day time limit requirement to cut off fighting

when the guns are blazing or even when the military forces of our Nation seem to be under threat of attack. Such a highly charged emotional atmosphere is generated here on the Hill as well as elsewhere in the country, that it is most unlikely that the Congress would turn its back on what the President wanted. I think it is most unlikely that the Congress would fail to give him the continuing authority that he might want under those circumstances. I don't see that as a very likely avenue for the Congress to use in keeping us out of wars or conflicts which don't serve our national interest.

It seems to me far more profitable for us to try to establish a very definite, precise reporting requirement under which we can be informed whenever military forces equipped for combat are placed in foreign territories, air space, or waters and in that reporting requirement insist that the Executive not only act pomptly and put it in writing, but in addition give his justification for not coming to Congress first and also cite in detail the legal foundation for the action he is taking.

Now maybe it is wishful thinking on my part, but I would like to believe that back in 1962 when President Kennedy sent some 18,000 troops to Vietnam, identified at that time as military advisers, but nevertheless equipped for combat, had he been confronted by a very precise reporting requirement in which he would have had to cite the legal justification for taking that action, it might have given him pause for thought. It might have caused him to put off the decision.

Is that wishful thinking, Doctor, would you say?

IMPORTANCE OF REPORTING REQUIREMENT

Mr. SCHLESINGER. I agree with the importance of the reporting requirement. I think that so far as legal foundation is concerned Government lawyers are sufficiently resourceful, having been trained at institutions like the Harvard and Yale Law Schools, so that they can give an appearance of constitutionality or constitutional argument for many things the President may wish to do.

I wish there had been such a reporting requirement in 1962 or 1963, but I am not so sure whether it would have restrained any action because it would have been easy enough to prepare an argument saying this or that was constitutionally justified. That is why, it seems to me, a reporting argument by itself may not be enough and it ought to be associated with a recall possibility, in which case I think you get more serious reporting.

Mr. FINDLEY. I would like to have you elaborate on recall, but first of all, do you have any suggestions for improvement of the reporting requirement provisions of House Joint Resolution 2?

STATING LEGAL POSITION OF REPORTING REQUIREMENT

Mr. BICKEL. I would, Mr. Findley. I have to preface it by saying it is difficult for me to see a reporting requirement that is not prefaced somewhere with an attempt to state the legal position because if you don't so preface it, you fall into what seems to be me to be the fault of this one. For example, you ask the President to tell us under what constitutional, legislative, and treaty provisions he has acted. That

is by implication a ratification of the theory which the Executive now holds, President Johnson held, that somehow the SEATO treaty or various other agreements and engagements justify and legally support his action, which is regrettable. I don't think they do. I don't think Congress ought to even by implication suggest that they do.

If you don't have anything prefacing a reporting section that says, "Here, this is our view of where your authority ends and where ours begins," you necessarily fall into that pitfall because you assume that there is legal authority out there beyond the Constitution.

The other day, I was not there but I saw reports, at Senator Ervin's Subcommittee on Separation of Powers, the Deputy Attorney General, the distinguished former dean of the Duke Law School, Mr. Sneed, was asked how he supported the current Presidential claim to the impounding power?

He said, "Under articles 1, 2, and 3 of the Constitution." I think that is what you invite with a reporting provision such as this.

Mr. FINDLEY. Do you recommend it be omitted?

CIRCUMSCRIBING THE EXERCISE OF PRESIDENTIAL POWER

Mr. BICKEL. No, sir. I recommend that it be part of a bill, the heart of which is an effort to circumscribe the exercise of Presidential power, which has exceeded all limits by now.

Mr. FINDLEY. Do you think there is value in causing the executive branch to face up to the necessity for legal justification at the time the fundamental decision is made?

Mr. BICKEL. Yes, sir; if there is, in terms that they have to take account of, a statement of a legal position which disables them from answering simply, "Articles 1, 2, and 3 of the Constitution." If there is not such a statement, that is what you get, "The SEATO Treaty, Mideast resolution, and Commander in Chief," of course.

Mr. FINDLEY. If the President is required to put in writing a report which includes suspicious legal justification, the ball is in the court of the Congress. It could hold hearings and call in witnesses to find the legal justification. It could pass judgment on the wisdom of the action taken.

Mr. BICKEL. You and Mr. Schlesinger and many others have said, and it is a judgment I cannot gainsay, that in that 30-day, 60-day, 1-year period right after hostilities Congress will go right along with the President. Those chances are not going to be minimized by a reporting provision or a recall provision as Mr. Schlesinger advocates unless there is a prior statement that Congress has made and spread upon the statute book which says, "Here is the legal position" and which enables Congress to say, "Well, he is out of bounds" or "We have a responsibility to act."

STANDING BEHIND THE PRESIDENT

We cannot sit back and say he is President and has acted under the Constitution, articles 1, 2, and 3, and let's stand beside him. I think that is all you will get if there is nothing but a reporting provision plus recall.

Mr. FINDLEY. If the movement of forces is to an area where combat has not yet broken out, there would not be this overtone of emotion.

Hopefully the requirements of that reporting provision might cause the President some second thoughts about moving the forces.

Mr. BICKEL. I am not here to say there is no value in it at all. I am arguing for more.

Mr. ZABLOCKI. Would the gentleman yield to the gentleman from North Carolina?

Mr. FOUNTAIN. How about a provision requiring the President to discuss with the appropriate Members of the Congress, whoever they may be, the facts, not just legal arguments, but the actual facts and necessity or lack of necessity before the decision is made?

Mr. ZABLOCKI. As provided in section 4 of House Joint Resolution 2.

Mr. FOUNTAIN. Yes.

PRESIDENT SEEKING CONSULTATION WITH CONGRESS

Mr. SCHLESINGER. I think anything we can have in the way of consultation is great, but I do agree with Professor Bickel that section 4 seems to me hortatory. Obviously the President should seek consultation with Congress. Consultation which consists of inviting large bodies from Congress over to the White House to be briefed by the Secretary of State and the President's Assistant for National Security Affairs, that it seems to me is not what you had in mind.

Mr. FINDLEY. Chairman Zablocki posed a serious question, when he stated the dilemma which faces us is getting something enacted by the Congress which the President will sign. The administration has indicated it will not object to House Joint Resolution 1 of last year which essentially is a reporting requirement and has been reintroduced by Representative Pepper of Florida.

Now do you gentlemen feel that the language enacted by the House last year is a sufficient forward step to justify passage this year?

Mr. BICKEL. My answer, Mr. Findley, is "No." I would prefer a veto and a repassage, let's say, as a concurrent resolution of S. 440 and that kind of accretion by Congress to the constitutional tradition rather than a relatively bland, and I am afraid, harmless provision, which merely causes everybody to breathe a sigh of relief that the constitutional crisis has passed.

Mr. SCHLESINGER. I would agree. I don't think S. 440 is the answer. I think it is better to try to get something that has some meaning. I think a test of meaning is whether it will be unacceptable to the administration.

RAISING THE LEVEL OF CONSCIOUSNESS

I don't say this about the administration only. I think administrations of the other party have been just as bad on this. I think it is better to pose the issue in some way. I would get something that has a chance of being passed by Congress, and get a veto and have a fight over the veto. I think that would have a chance of raising consciousness. That fact alone, known by the American people, would have an effect on them.

Mr. ZABLOCKI. I would like to point out that the executive branch did not find House Joint Resolution 1 acceptable. The only thing apparently acceptable to the executive branch would be silence. I think

we are moving in an area where we could at least have tacit approval. Perhaps the President would never sign any resolution.

Mr. FINDLEY. There was no hint of a veto at any point that I detected. Was there on your part?

Mr. ZABLOCKI. As a result of the lack of enthusiasm and no action in the other body, it would indicate that everything was done by the Executive to prevent any resolution from being enacted during the last Congress.

Mr. BICKEL. In my judgment the President could let it become law without his signature or even sign it and accompany it with a statement, in which he fully reasserts the farthest extension of Presidential power and as a matter of rebuilding the Constitution you are exactly where you started.

GOING THE CONCURRENT RESOLUTION ROUTE

Mr. FINDLEY. The other possibility I feel does deserve some attention is the extent to which the Congress can go by the concurrent resolution route without Presidential signature. I don't know that a declaration of war has ever been vetoed. I think the War of 1812 was authorized by Congress over Presidential objection.

Mr. SCHLESINGER. No; Madison was willing to do it. You are right. None has been vetoed. Grover Cleveland, I think, said if we got into war over Cuba, he would veto it, but it never arose.

Mr. FINDLEY. Is there any question whether a declaration of war can be avoided by a Presidential veto?

Mr. BICKEL. None at all. It is a statute and can be vetoed. I don't think you can do anything in which you are free from the President's signature. You can pass a sense of Congress resolution, but that is not a law.

Mr. FINDLEY. Even though we have every reason to expect a veto of S. 440 or any version of it, you nevertheless both feel it would be right to press forward with a joint resolution or a bill, accept the veto and then consider a concurrent resolution?

Mr. BICKEL. Yes.

EFFECT OF CONCURRENT RESOLUTION ON PRESIDENT

Mr. FINDLEY. What effect do you think the concurrent resolution might have on Presidential action?

Mr. BICKEL. As I said before, this is the Constitution of practice we are dealing with. In that area of the Constitution a statement by the President about his own power, the thing he did on Executive privilege the other day, a concurrent resolution by Congress, indeed major speeches by respected Senators on the floor of the Senate or respected Members of the House of their power are the equivalent of the opinions by the Supreme Court. That is how the Constitution of practice grows and develops. Of course, it develops best by statute, as law.

But second best is that. In fact, we are in some measure making the Constitution of practice right here. It is difficult to imagine, but it is true.

Mr. FINDLEY. Thank you.

Mr. ZABLOCKI. If I may pursue the issue of a veto of S. 440 by the President. If either House could not override the veto would we not be in a worse position?

Mr. BICKEL. I think not, Mr. Chairman. I think if Congress reasserts itself, repasses it as a concurrent resolution, the debates that have been had—I think the next time the issue comes up that would be a major source of materials to anyone who looked into the question of what can the President do, what is the position on Presidential power under the Constitution, just as today major sources of materials are what Lincoln said during the Mexican War.

CONTRIBUTING TO THE LAW

If Congress passed a bill after lengthy consideration, then it failed because of the veto, and Congress repassed it as a concurrent resolution, I think you may have had a contribution to the law greater than something which is hortatory and harmless.

Mr. ZABLOCKI. Then if the Congress failed to override and the President issued a statement which said, well, I do have this power and Congress has so reasserted, then in the future, as you referred to Lincoln's statement in the Mexican War, the President's statement would be a precedent?

Mr. BICKEL. Yes; the next time the Secretary of State or Attorney General would have to advise the President, the President would have to be told "President Nixon took this position but Congress, by repeated majorities, took the opposite position and here is the text of the resolution it passed and President Nixon's position was stated in general terms." This was very specific by the Congress and this is what they thought twice. The Senate passed it in the 92d Congress. It was passed twice in the 93d. That becomes a fact of constitutional life, not binding, but a fact of constitutional life.

Mr. ZABLOCKI. Certainly the Congress can bring about the same interpretation in our report restating the determination of Congress in this area? Would that not be legislative history?

SPELLING OUT THE INTENT OF CONGRESS

Mr. BICKEL. In my judgment the more specific the better.

Mr. ZABLOCKI. An expression would be in the statute books augmented by the reports and legislative history spelling out the intent of Congress.

Mr. SCHLESINGER. I would agree in general with what Professor Bickel said except I would favor as the vehicle for congressional expression a combination of H.R. 371 and House Joint Resolution 2 as suggested rather than S. 440.

Mr. ZABLOCKI. Mr. Findley.

Mr. FINDLEY. I don't recall that any of the witnesses have considered the possibility of a constitutional amendment. Is there a form of a constitutional amendment dealing with war powers which strikes either of you as desirable?

Mr. ZABLOCKI. Professor Bickel.

Mr. BICKEL. If S. 440 were proposed as a constitutional amendment, I would hesitate a great deal more. Of course, you avoid the

President that way. I start with a powerful bias. I hope I don't find myself here 3 years hence reneging on this position as well. I start with a powerful bias against constitutional amendments unless the need is very clear and unless the issue can be dealt with in constitutional terms which seems to me in a sentence or two. This is not that kind of an issue.

Mr. SCHLESINGER. I think the committee would like to look at the congressional control of overseas troop deployment as an example. I think this has been in the area of constitutional dispute. I think the argument for congressional power is pretty strong to specify the size and assignment of troops overseas.

THE TERMINATION OF HOSTILITIES

Mr. FINDLEY. Would you spell out more in detail what you meant by recall?

Mr. SCHLESINGER. I meant the termination of hostilities.

Mr. ZABLOCKI. Mr. du Pont?

Mr. DU PONT Thank you. I have one more question for Professor Bickel. Professor Bickel, I am still grappling with the fact that you seem to wholeheartedly endorse a piece of legislation that I just find loaded with pitfalls. I am not trying to take you by surprise, but during the course of the hearing we were passing out a roughed-out version of Mr. Bingham's new bill. I hope you have a copy.

Mr. BICKEL. I have not had a chance to read it, but I have it.

Mr. DU PONT. Let me read you section 5 of that and ask your opinion about that: "If the President in any case shall assume the authority to direct or authorize the Armed Forces of the United States to engage in armed conflict outside of the United States," et cetera "such authority shall terminate on the adoption by either House, et cetera."

Doesn't that language "engage in armed conflict outside of the United States" avoid the 30-day pitfall of the Javits bill, the positive action pitfall, and the hostilities pitfall? It seems to me on first reading that that is a much better formula. I wonder what you think of it.

AVOIDING PROBLEMS BY NOT SOLVING THEM

Mr. BICKEL. It seems to me that that language avoids a great many problems by not solving them. The 30-day pitfall of the Javits bill is something to me that is negotiable. That is not the heart of the Javits bill. The heart of the Javits bill is the effort to delineate the power of the President and its limits by both stating it in its constitutional terms and coming around from the other direction and saying here is the power of Congress and here is how we mean to assert the power of Congress.

Now this leaves that entirely open. A President, under this language, is indeed encouraged more than he is now to engage in hostilities and armed conflict outside of the United States any time he chooses and thinks it is right on the basis of his own constitutional view, which is bound to be expansive, and his own political judgment. He knows that if he does so, he of course as a Commander in Chief may be engaged in those hostilities for 2 or 3 years.

Once he is engaged, it is very difficult to keep him out of Cambodia. So this allows him to be engaged and he knows that at some point one House of Congress can bring him out. I have objection, as I said in my main statement, to this extra constitutional arrangement of letting one House of Congress act.

Mr. DU PONT. I agree with you.

Mr. BICKEL. Passing that objection, what this recall provision does is ratifying by implication the most expansive view of Presidential authority by simply telling the President, "We assume you act in many instances . . ." It then says Congress will come along and stop you.

A STATEMENT OF LIMITS

Mr. Findley told us and others have told us convincingly that Congress will not do that. The heart of the Javits bill is a statement of limits which I assume that any future President, having taken a good-faith oath to support the Constitution, which includes the oath to faithfully execute the laws, will abide by and we will not have the recall problem.

Mr. SCHLESINGER. I disagree; I think there is more encouragement to Presidential initiative in the Javits bill. I don't care for its endorsement of the elastic theory of defensive war Senator Javits says the bill gives the President more authority than he now possesses.

Mr. BICKEL. I think Homer nodded that time.

Mr. DU PONT. I think the difference is that, Professor Bickel, you approach this from the point of view of elucidation of constitutional powers and I approach it from the point of view of wanting to be able to pin him down if something happened. You didn't do that in the Javits bill. Perhaps you cannot do it in this.

Mr. FINDLEY. Would you yield?

Mr. DU PONT. Yes.

Mr. FINDLEY. Can you suggest language changes that you think would be an improvement on the definition of powers in the Javits bill?

IMPLICATING CONGRESS IN PRESIDENTIAL ACTION

Mr. SCHLESINGER. It seems to me that what section 3 does is to implicate Congress in action the President feels he may have to take on his own, but which Congress would be in a better position to react to if the President did not invoke language of a statute passed by Congress in support of the action. I see no advantage in section 3.

Mr. FINDLEY. You would eliminate it?

Mr. SCHLESINGER. I would eliminate it.

Mr. FINDLEY. In view of Dr. Bickel's comments you just gutted the bill.

Mr. SCHLESINGER. I would say section 2 is declarative.

Mr. BICKEL. That would not make anything happen.

Mr. SCHLESINGER. I don't think section 3 does much except tell the President he can do anything he wants, with congressional authority.

Mr. BICKEL. Section 2 has much the same language except section 2 is a statement of purported congressional power. It is self-serving.

Mr. ZABLOCKI. I wonder if we could have your analysis and views on section 3 of House Joint Resolution 2 in this regard?

Mr. SCHLESINGER. This, it seems to me, to again err in the way of endorsement of defensive war. I think paragraph 1 in section 3 gives the President a very large blank check in conducting defensive war, with defensive war as I have said, having a very elastic definition.

REPORTING PROVISIONS OF HOUSE JOINT RESOLUTION 2

Mr. ZABLOCKI. In your discussion of House Joint Resolution 2 you suggest that the reporting provision of the legislation, section 5, is and I quote, "not terribly rigorous," whereas Professor Schlesinger said it was acceptable and to the point and he applauded Congressman Bingham for incorporating section 5 of House Joint Resolution 2 into his new version.

Now, Professor Bickel, what additions in the language of this section would you suggest to improve the reporting aspects?

Mr. BICKEL. Let me tell you where it troubles me. It really goes in part to the coloquy Mr. Findley and I had before. There being no predicate to it, no prior statement of limits of presidential power that I think is terribly effective, when you ask him to report certain events necessitating his action, fine, then the constitutional and legislative and treaty provisions under whose authority he took action you impliedly say he is authorized to act on his own initiative under existing treaty provisions.

He can say what do you mean by treaty provisions? You take a look, SEATO, NATO, this is evidence of the congressional view that present treaties empower him or indeed any treaty could empower him, which I doubt, to act on his own initiative in situations other than those described in section 3 of the Javits bill. That seems to me an implicit enlargement of his power and an invitation for him to come back and say, "Articles 1, 2, and 3 of the Constitution and all the treaties signed."

ESTIMATED SCOPE OF ACTIVITIES

Under 2, "Estimated Scope of Activities," that is fine. Then (E), "Powers," information he deems useful to Congress, that seems to me to be all kinds of executive privilege and security and whatnot. He can be trusted to invoke that anyway, but the language as drafted seems to invite it. It seems to say that Congress naturally expects that there is all kinds of information that he may not deem useful.

I would much rather have a provision that turns that around and says "such other information as Congress may request," putting the affirmative on the power of Congress and the implication that, of course, Congress can have most all information it wants. There may be limits, but we will see when they arise.

Mr. ZABLOCKI. If the committee amends section 5 to comply with the recommendations you have made, where would House Joint Resolution 2 stand in your estimation as a desirable piece of legislation?

Mr. BICKEL. It would need a predicate; namely, the predicate of a statement of what the limits of his powers are.

Mr. ZABLOCKI. And if we then included the predicate which would be section 3 of S. 440, would then, in your opinion, House Joint Resolu-

tion 2 be a preferable legislative vehicle than S. 440 with some of the shortcomings that Professor Schlesinger has so well pointed out?

30-DAY PROVISION LEAST IMPORTANT

Mr. BICKEL. If you include section 3 of S. 440 and your own reporting section, in essence you would be leaving out the 30-day provision. I am not prepared to say whether it is an improvement, but the 30-day provision seems to be the least important thing.

Mr. ZABLOCKI. All testimony tends to indicate that the 30-day provision is nothing but a headache. Indeed, all we are looking for is an aspirin.

Mr. BICKEL. I can understand that position. I think it would certainly be a strong bill as you describe it, even without the 30-day provision as in the Javits bill. That doesn't seem to be the heart of the Javits bill to me.

Mr. FINDLEY. I appreciate your precise comments about the reporting provision. The reason I recommended the inclusion of treaty provision was solely because I was then under the illusion, and maybe it was just an illusion, that the NATO Treaty was something exceptional and that there was an element of "automaticity" in it. I think that most people argue that it is not in that category.

Mr. BICKEL. I am quite clear it is not. I think if you look at the legislative history in the Senate when it was ratified, Secretary Acheson was brought in. He said no, it was not an automatic provision. When they brought SEATO around, it was drafted to say that.

IN ACCORDANCE WITH CONSTITUTIONAL PROCESSES

Mr. SCHLESINGER. The phrase "in accordance with the constitutional processes" appears in the NATO Treaty.

Mr. FINDLEY. I thought it was exceptional in that the SEATO and CENTO Treaties had the phrase and NATO did not.

Mr. BICKEL. The history is that NATO was deemed imprecise. The Senate raised a furor about it. Mr. Acheson came in and clarified it as to the role of Congress. Then they ratified it, and when they came to SEATO they wrote against that background.

Mr. SCHLESINGER. I disagree. I think you will find that "in accordance with constitutional processes" is in the NATO Treaty.

Mr. FINDLEY. I think you are right, but in any event, the interpretation now currently given to the treaty, I believe, by the administration does not recognize any automatic situation. In light of that, I am inclined to agree that treaty provisions ought to be striken.

I like your suggestion that Congress should require such information as it deems useful. I think both strengthen the reporting part. I think there is a virtue in causing the Executive to put down the legal foundation for his action.

We are supposedly a nation of laws and the President ought to give a legal foundation for the use of military force.

Thank you.

Mr. ZABLOCKI. I believe section 9 of S. 440 was intended to deal with the problem of NATO in the other body.

SPECIFIC IMPLEMENTING LEGISLATION

Mr. BICKEL. Yes. And also very specially in sections 3 and 4, where it is quite clear that it takes specific implementing legislation to get any authorization. In section 9 they take care of any supposed existing one.

Mr. ZABLOCKI. Professor Bickel, the Department of State witness yesterday stated that the "necessary and proper" clause of the Constitution does not permit Congress to delineate Presidential war powers, since to do so would violate the separation of powers.

Since we have been bandying about this issue indirectly, what is your view of the use of the "necessary and proper" clause in the war powers area?

Mr. BICKEL. Well, Mr. Chairman, if the premise were well taken that a bill like the Javits bill is unconstitutional because it makes inroads on Presidential power, which Congress may not do because it makes inroads on the power of the Commander in Chief, then of course the "necessary and proper" clause would not help because the "necessary and proper" clause is not in there to enable Congress to do unconstitutional things.

That is, however, not true. The Constitution empowers him to be the Commander in Chief and it empowers the Congress to declare war. There are in that outline open spaces which the Constitution does not necessarily settle. In my judgment it does, but there are questions.

NECESSARY AND PROPER POWER OF CONGRESS

Now that being the case, the "necessary and proper" power enables Congress to act because it authorizes Congress in this, as in all other instances, to make all laws that shall be necessary and proper for carrying into execution the foregoing powers; namely, its own, including the power to declare war, and all other powers vested by the Constitution in the Government of the United States as a whole or in any department or officer thereof, which includes the President.

So, on the premise which I take that the most that can be said is that there is an open texture in the Constitution here, I would say the Constitution is quite clear on who has power to do what, and the President has been doing—President Johnson did in 1965 an unconstitutional thing—that is a matter of opinion. I may be wrong, but at most what can be said is that it is an open texture, it is a matter of opinion, in the Constitution.

That being the case, Congress has the power to fill that open texture. That is the "necessary and proper" power.

I think the legal adviser of the State Department begged his question. He took the premise that the bill is unconstitutional. Then, of course it follows that no power the Congress possesses can enable it to do an unconstitutional thing. That is a circular argument.

Mr. ZABLOCKI. If I may ask another question of Professor Schlesinger, Mr. Brower of the State Department yesterday stated that the idea of a one-House veto was defective. His argument was that the concept impairs the constitutional authority of Congress itself as well as that of the Executive.

THE TRUE POSITION OF CONGRESS

What is the true position of Congress if, for example, one House passes a resolution approving the President's action and the other passes a resolution calling for its termination?

It is the view of the administration that Congress must speak with one voice. Would you please respond?

Mr. SCHLESINGER. A resolution declaring war would have to be passed by both Houses. If one House called for it, it would not pass.

It seems to me that on that argument, since the dissent of one House of Congress can prevent a war being declared or authorized, one House could prevent a war from being continued.

Mr. ZABLOCKI. Don't you think that both Houses of Congress should voice their opinion on such an important issue?

Mr. SCHLESINGER. I think that both Houses of Congress would voice their opinion. But take the case of a declaration of war. Say one House favors a declaration of war or authorization of war and the second House does not. The House that declines to authorize war would prevent an authorization of war.

If one House of Congress can prevent the authorization of war or the declaration of war, it seems to me reasonable to argue that one House of Congress should be able to prevent the continuation of war.

ONE-HOUSE ACTION UNCONSTITUTIONAL

Mr. ZABLOCKI. I believe that Professor Bickel referred to the one-House action provided in the Reorganization Act as unconstitutional.

Mr. BICKEL. I have constitutional doubts about it.

On this issue I agree with the State Department.

Mr. ZABLOCKI. I realize, Professor Schlesinger, you are not a constitutional lawyer, but as a historian, would you comment?

Mr. SCHLESINGER. If it is constitutional for the Executive Reorganization Act, I don't see why it can't be constitutional for this.

Mr. ZABLOCKI. But Professor Bickel says it is not.

Mr. SCHLESINGER. Has it been tested?

Mr. BICKEL. No. The Court has respected it as applied to its own rulemaking. The Court's broad rulemaking power has been dissented from by powerful voices, not excluding Hugo Black, Justice Frankfurter, and Justice Brandeis. I think they are the authoritative voice.

Mr. ZABLOCKI. Some Members of Congress would prefer that the Supreme Court would not enter into any further questions of constitutionality.

Mr. Fountain.

Mr. FOUNTAIN. Is it constitutional for the President to issue an Executive order or otherwise repealing a program of the Congress for which funds have already been appropriated?

Mr. BICKEL. That is a question that requires a long answer.

NO "YES" OR "NO" ANSWER

Mr. FOUNTAIN. I will take "yes" or "no."

Mr. FINDLEY. Just give us the last sentence.

Mr. BICKEL. I will say briefly there is no "yes" or "no" answer to it. If the question is "Does Congress have the constitutional power to force the President to spend money?" my answer to that is flatly "Yes." But in the present statutory position, "Are all impoundments by the President unconstitutional?" I cannot answer that "Yes" or "No."

Mr. FOUNTAIN. Many of these bills, regrettably, said, "The President is authorized" to do thus-and-so. Now we are saying, "The President shall."

Mr. BICKEL. When you say that, there is something of a different matter. But now you have on the books something called the Anti-Deficiency Act, which makes a difference.

Mr. ZABLOCKI. Mr. Biester.

Mr. BIESTER. I have a brief question. It relates to the idea that since the power to declare war requires the vote of both Chambers, that one Chamber could veto a war that is underway. It seems to me you start with a situation when you declare war, but once a war has been underway for some period of time, that a great number of events may create a host of problems which would occur if there were a dislocation from the event of war, a recall.

TWO HOUSES NEEDED TO DECLARE WAR

Aren't we dealing with a different quality of act at that point than just simply to say in the abstract that if it took two Chambers to declare war it ought to take two to continue it?

Mr. SCHLESINGER. As my statement suggested, I was not altogether happy with this provision. In the end, it seems to me there were arguments to doing this by joint resolution rather than by the action of one House. But then a joint resolution could be vetoed.

This means that one-third plus one of either House could prevent a joint resolution from going into effect, which would in effect seem to me to confine the war-continuing power to one-third plus one of one House. I don't think that is very satisfactory either. So I just don't know.

I see the force of your point. As my testimony indicates, I am worried about it somewhat, myself.

Mr. BICKEL. The constitutional difficulty is that the Constitution pretty clearly says that anything you do that is to have the force of law has to be approved by both Chambers and submitted to the President for signature.

ONE-HOUSE VETO EXTRA-CONSTITUTIONAL

As I read the Constitution and as I suspect the Supreme Court would look at it, these things are extra-constitutional. They are not what was foreseen.

Mr. BIESTER. Thank you.

Mr. ZABLOCKI. Any further questions?

I do not remember verbatim Senator Javits' testimony in reference to section 3, but I do recall that not only did he say it was an improvement but he didn't find in the provision of section 3 of House Joint Resolution 2 the alarm that you find, Professor Bickel. Did he nod again?

Mr. BICKEL. I see there are people from his office here, and I am going to hesitate with my wisecracks. I don't know what he said. I am here to represent my own opinion.

Mr. ZABLOCKI. You don't blame me for trying to defend House Joint Resolution 2 to the fullest?

Mr. BICKEL. Not in the least.

ENLIGHTENING TESTIMONY HELPFUL

Mr. ZABLOCKI. On behalf of the entire subcommittee, I want to thank you for your very enlightening testimony. Your views were most helpful.

I believe the subcommittee will probably incorporate some of your suggestions. I say "probably" advisedly.

The subcommittee stands adjourned until 2 p.m., Thursday, March 15, when we will have as our witnesses Professor Raoul Berger of Harvard University and Professor W. Taylor Revèley, a Fellow of the Council on Foreign Relations and Woodrow Wilson International Center for Scholars.

[Whereupon, at 4:35 p.m. the subcommittee adjourned.]

WAR POWERS

THURSDAY, MARCH 15, 1973

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON NATIONAL SECURITY
POLICY AND SCIENTIFIC DEVELOPMENTS,
Washington, D.C.

The subcommittee met at 2 p.m., in room 2200, Rayburn House Office Building, Hon. Clement J. Zablocki [chairman of the subcommittee] presiding.

Mr. ZABLOCKI. The subcommittee will please come to order.

We continue this afternoon our hearings on war powers legislation. Our objective throughout this set of hearings has been to gain a better understanding on this complex issue.

To assist us today in that effort are two respected constitutional experts and legal scholars. They are Prof. Raoul Berger, of Harvard University, and Mr. W. Taylor Reveley, a joint fellow of the Council on Foreign Relations and the Woodrow Wilson Center of the Smithsonian Institution.

Gentlemen, we are honored that you accepted the subcommittee's invitation. Professor Berger, if you will proceed please.

STATEMENT OF RAOUL BERGER, PROFESSOR OF LAW, HARVARD UNIVERSITY

Mr. BERGER. It is a privilege to appear before you and to congratulate you for facing up to the unceasing takeover of congressional functions by the President.

"The history of the Presidency," said Edward Corwin, "has been a history of aggrandizement"; it is a history of ever-expanding encroachment on congressional prerogatives.

Because I believe that the maintenance of our democratic system and indeed the protection of individual liberty is bound up with the preservation of the separation of powers, I am here to uphold your efforts to curb Presidential expansionism.

My chief concern is to defend the Javits war powers type of bill against charges by Secretary of State William P. Rogers and Prof. Eugene V. Rostow that it is unconstitutional.

OPINION ON CONSTITUTIONALITY OF BILLS

Yesterday Prof. Alexander Bickel and Arthur Schlesinger gave their opinions that the bills are constitutional. Before the Senate For-

eign Relations Committee, four distinguished historians—Henry Steele Commager, Alpheus Mason, Richard Morris, and Alfred Kelly agreed the bills are constitutional.

But I don't think Mr. Chairman, that this issue ought to be settled on a count of noses. I think it is of the highest importance that every Member of Congress have a real grip on the basic facts which underlie the position of the Congress.

If you know the facts yourself, and are familiar with them, you will more confidently proceed with the resumption of your powers.

I may interpolate, I came here prepared to discuss various issues with Professor Rostow and learned only late yesterday that he will not be here and that my coworker in the vineyard would be Professor Reveley.

I am pleased that Mr. Reveley has come as a substitute because he and I will come to issue on a tremendously important fact.

I don't think that Professor Reveley disagrees on the original intention of the founders; but he has a theory, and has presented it in its most sophisticated form, which has found favor with a group of academicians, not I may say with the Supreme Court, and which is really a silky rationalization for presidential power grabs.

BASIC CONSTITUTIONAL FACTS

So we will come to that issue; but in the meantime I want to come to grips with some of the basic constitutional facts.

I should say it is not my purpose here to defend the wisdom of your several bills, for as stated by John Marshall, "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." [1]

Opponents of the bills summon remote hypothetical contingencies which might demand instant, unfettered presidential response. Against such a parade of horribles I would pose the actual horror of our ever-deepening involvement in the Vietnam quagmire.

One who can't learn from past mistakes is destined to repeat them. Most presidential adventures, as Prof. Henry Steele Commager points out, lacked the element of urgency, and in almost every case there was time to consult Congress.[2] I cannot improve on his statement that "great principles of government are not to be decided on the basis of the argument 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." (Fulbright Hearings 16.)

WISEST POSSIBLE SOLUTION TO PROBLEM

Whether or not your bills represent the wisest possible solution of the problem—the legislature is yet to be born that can draft a perfect bill—is not nearly so important as the fact that you are taking a step toward resumption of your constitutional powers. Congress, the

[1] Raoul Berger, "War-making by the President," 121 University of Pennsylvania Law Review, pp. 29, 31 (1972) hereinafter cited as "R. B."

[2] Hearings on War Powers legislation before the Senate Committee on Foreign Relations, p. 14 (1971), hereinafter cited as "Fulbright Hearings."

Supreme Court has often held, cannot abdicate its powers. The corollary of that axiom is that Congress is under a duty to exercise those powers itself.

Another good reason for such a bill, to borrow some words from Mr. Reveley, is that it is less easy for a President to evade an explicit congressional denial of authority than for Congress to negate a presidential fait accompli. It will provide—again to borrow from Mr. Reveley the—initial thrust and spark a consensus.

You will not merely raise consciousness as Mr. Schlesinger said yesterday, of the executive, but you will educate the public. Until the public realizes that the presidential powers have been grossly abused, that they must be resumed by Congress, Congress itself will not go very far.

Let me then focus on the issue of constitutionality. Roughly speaking, the several war powers bills before you seek to limit presidential warmaking in the absence of authorization by Congress, leaving the President free to defend the United States and its Armed Forces against sudden attack.

CONSTITUTION VESTS CONGRESS WITH POWER TO WAGE WAR

The power to wage war, it may be confidently asserted, was vested by the Constitution in Congress, not the President. If this be so, your bills merely seek to restore the original design. It cannot be unconstitutional to go back to the Constitution. Here I can only sketch the materials which demonstrate the purpose of the founders, referring for documentation to my article, "Warmaking by the President," supra, note 1, which was inserted in the Congressional Record of February 20, 1973, by Senator Javits.

The best index of constitutionality is the specific provisions of the Constitution respecting the war powers plus the explanation of the founders as to what they intended to accomplish thereby.

I find unacceptable in this context Professor Reveley's suggestion that the plain meaning is an illusive goal. There is nothing illusory, nothing obscure about the meaning of the framers of the Constitution, as I hope to demonstrate in very short order.

The war powers of the President are expressed in three little words—Commander in Chief, which Hamilton explained to a people in dread of creating another George the Third, merely meant the President was to be the first general. (RB 35.) As Professor Henkin recently observed, generals—

> even when they are "first," do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others (L. Henkin, Foreign Affairs, 50–51 (1972)).

ROLE OF THE COMMANDER IN CHIEF

The Commander in Chief was to lead the Armed Forces once war was commenced by Congress or by a sudden attack on the United States. No more can be squeezed out of those three little words. Indeed Hamilton, in explaining them, said it was the first general function only of the monarchs of England that was being given to the president; the rest of the war powers were being given to Congress.

In contrast to these three words the over-towering bulk of the war-making power was lodged in Congress. James Wilson, with Madison, the leading architect of the Constitution, explained:

> The power of declaring war, and the other powers naturally connected with it, are vested in Congress. To provide and maintain a Navy—to make rules for its government—to grant letters of marque and reprisal—to make rules concerning captures—to raise and support armies—to establish rules for their regulation—to provide for organizing * * * the militia, and for calling them forth in the service of the Union [there was no standing army]—all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress.

To this may be added that Congress is also empowered to provide for the common defense and to make appropriations for the foregoing purposes. Since all the powers naturally connected with warmaking are vested in Congress, it follows, as several founders expressly stated, that they are not to be exercised by the President. (RB 41 n. 93.)

EXECUTIVE IS SIMPLY NAMED COMMANDER IN CHIEF

Let me pause to read something from Mr. Reveley on this score, because on this I believe we concur. In a recent article in the Virginia Law Review, Mr. Reveley stated as follows:

> The executive is simply named commander in chief and given the power to commission officers. His appointment prerogative mentioned previously also comes into play in the military sphere—

And I may interpolate, subject to Senate consent. He continued:

> Congress on the other hand has a battery of responsibilities including inter alia, the power to raise and support the armed forces and the power to declare war.

Professor Reveley, therefore, agrees with me that all that the Constitution gave to the President were the three little words, "commander in chief"; the remaining battery of powers was given to Congress.

You may think, Mr. Chairman, that I, too, easily glide from a power to "declare" war to a power to "make" it. Originally it was proposed that Congress be empowered to "make" war; this was changed to "declare" (RB 39–41), for reasons well summarized by Secretary of State Rogers. In his testimony before the Senate Foreign Relations Committee in 1971, he confirmed that the "change in wording" from "make" to "declare" "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" as commander in chief. (Fulbright hearings 488.)

DECISIONS INVOLVED IN CONDUCTING WAR

But for the decisions involved in conducting war, all the rest of the warmaking power remained in Congress. In the words of Hamilton's proposal to the Convention, the Executive would "have the direction of war when authorized or begun" (RB 37), implying it was not for him to begin a war. Though Hamilton was the great proponent of expanded presidential powers, he later stated that "it belongs to Congress only, to go to war." (RB 42 n. 99) Observe he does not say to

declare war but to go to war, big wars, little wars. The power to declare, i.e. to wage war, was vested in Congress, James Wilson explained to the Pennsylvania Ratification Convention, as a guard against being hurried into war, so that no "single man (can) * * * involve us in such distress" (RB 36).

The severely limited role of the President was a studied response to what Madison called "an axiom, that the Executive is the department of power most distinguished by its propensity to war; hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence" (RB 38). "Those who are to conduct the war," said Madison, "cannot in the nature of things be proper or safe judges, whether a war ought to be commenced, continued or concluded" (RB 39). I beg you to remember not merely "commenced," but also "continued or concluded," meaning terminated by treaty or otherwise. That power was not lodged in the President but in Congress.

George Mason also was against giving the power of war to the President, because not (safely) to be trusted with it (RB 40). So the President was left with the power to repel and not to commence war, as Roger Sherman advised (RB 39).

THE POWER TO REPEL SUDDEN ATTACK

But for the power to repel sudden attacks on the United States or to direct a war once begun by Congress, the entire warmaking power was vested in Congress. On this eminent scholars are agreed, as the hearings before the Senate Foreign Relations Committee on the Javits War Powers Bill (1971) amply testify.

I may add, Mr. Chairman, I very drastically foreshortened the historical facts that further buttress this position.

Professor John Norton Moore finds uncertainty as to which branch would have authority to commit the nation to force short of war, or indeed what war meant (Fulbright Hearings 462). Such semantic questionings overlook the founders' anxiety to limit the power of a single man to hurry us into war.

You may say, Mr. Chairman, what are hostilities; my colleagues were loathe to comment on that. Being an old man I shall be more indiscreet. I would say about hostilities what Justice Potter Stewart said about hardcore propaganda, "I cannot define it but I think I can recognize it; a cock fight or a fight between two soldiers plainly is not hostilities." Maybe a fracas between 50 soldiers is not hostilities; but for example, if 1,000 men invade American soil, that is hostilities. If 1,000 soldiers start firing rockets and bombarding American soldiers on German soil I would say that is hostilities, and for a starter that is good enough.

PRESIDENTS STARTING BRUSH FIRES

Those who feared a blazing forest fire were little disposed to authorize the President to start brush fires. Brinksmanship is an invention of our era. A convention which carefully authorized the President to repel sudden attacks on the United States hardly left him free to engage in foreign adventures short of war. Congress, said the Supreme Court in 1800, may declare a general war or wage a limited war. *Bas* v. *Tinsay*, 4 Dallas 37, dissipating Mr. Moore's uncertainty.

Madison's summary of the matter deserves to be blazoned on your walls in letters of gold:

> 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, the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging the cause 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 (RB 48).

In 1966 the Legal Adviser of the State Department had little quarrel with the view of the original intention of the Founders herein expressed, and said of the President's power to repel sudden attack that "In 1787 the world was a far larger place, and the farmers probably had in mind attacks upon the United States." (RB47).

Assuredly the farmers did not conceive that the President might repel attacks on Kamchatka. But the Adviser added:

> 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 * * *. 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 (RB 50).

NO CONSTITUTIONAL SUPPORT

No member of the executive has ever pointed to a constitutional provision, or to a statement of the founders that supports this astonishing claim.

Recall Madison's words "the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war." Whether an attack on a foreign state represents a threat to the national security is a political matter not left to the decision of the first general.

The "power of judging the causes of war," said Madison, "is fully and exclusively vested in the legislature." I don't believe Professor Revelev is going to bring forth any constitutional provision or statement of the framers to the contrary.

In essence, the executive branch appeals to emergency power, and on this we need to bear in mind what Justice Jackson stated when President Truman seized the steel mills in the midst of the Korean War so that production would not be interrupted by labor strife:

> Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 652 (1952) (concurring opinion).

EXTRAORDINARY PRESIDENTIAL CLAIMS

I want to stress that the architect of these extraordinary presidential claims was Dean Acheson. When Secretary of State Acheson advised President Truman in 1950 that he had constitutional authority as Commander in Chief to commit troops to meet the invasion of South Korea, he relied on a State Department memorandum which listed

87 instances in the past century in which prior Presidents had exercised presidential power to send our forces into battle (RB 59). Remember those words "to send our forces into battle." Later Under Secretary of State Katzenbach stated that "most of these [incidents] were relatively minor uses of force" (RB 50–60). The vast majority of such cases, said Edward Corwin—

> involved fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts [to protect American citizens], the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border (RB 60).

No possibility of war was presented by these incidents; and one can only marvel at the fantasy that can conjure from such incidents precedents for sending our troops into battle.

EXECUTIVE WAGING OF WAR

Were these incidents to be regarded as equivalent to Executive waging of war, the last precedent would stand no better than the first. Illegality is not legitimated by repetition. So the Supreme Court has held. It was argued in Powell against MacCormack where the House said: "We have been doing this for a long time," and it was argued in the *Steel Seizure* case where the Attorney General said, "Presidents have done it in the past." But the court said, "that makes no difference. It was illegal then, it is illegal now."

It is the academicians who have fallen in love with the theory: If you repeat something often enough it becomes embedded in the Constitution. But in the words of Mr. Reveley: "We cannot permit power seeking presidents to broaden their constitutional control through bootstrapping," and that, Mr. Chairman, will be my text from here on out. Some academicians consider that Presidential practices constitute a gloss of life on the Constitution, that the Constitution is a living document which must expand to meet new needs. But the way to such expansion is by amendment not by self-appointed revisionists. Given a presidential takeover of war powers plainly conferred upon Congress alone, and accompanied by an unmistakable intention of the framers to withhold them from the President, his appeal to his own precedents would alter the constitutional distribution of powers in violation of the separation of powers.

HERESY OF EXPANDING LIVING CONSTITUTION

I don't want to pause here but should you have the patience later in the hearing I would like to briefly comment on this gloss of life and on this expanding living Constitution heresy because I dug up very interesting facts on that, and it is facts that sustain us, not fantasy.

Those who talk to us about a living Constitution are the first who want to amputate it, put a new transplant on it or put new grafts on it. If it is going to be a living Constitution let it live as it was born.

Let me read a couple of statements that I garnered from Mr. Reveley's article. The rationale is this:

"Even the clear intent of the drafters must be abandoned without the process of formal amendment, if the Constitution is to minister

successfully to needs created by changing times." And he says, "because of the difficulty of the [Constitution's] formal amendment process alteration by usage has proved to be the principal means of modifying our fundamental law."

Undeniably the process of amendment is cumbersome and it was made designedly so, so as to protect minorities against the passions of the moment. But it is a marvelous non sequitur that in consequence of its cumbersomeness the servants of the people may amend this Constitution without consulting the people.

A CLEAR DELINEATION OF POWERS

Bear in mind in light of what I have said before, Mr. Chairman, we are dealing with a clear delineation of powers. Nothing vague, nothing amorphous. A Constitution, particularly as explained by the founders, which clearly lodges the vast bulk of the warmaking powers in the Congress.

And now comes the President and his adherents and they tell us "Well, the nuclear age, smaller ocean, we have to change this old-fashioned document." Who shall change it—the President. He'll decide it is too cumbersome to go to the people, and ergo he will revise the Constitution.

Professor Rostow inveighs against the Javits bill because "it would permit Congress to amend the Constitution without the inconvenience of consulting the people," (RB 31) this about a return to the Constitution! If Congress cannot by legislation thus "amend" the Constitution, how can Presidential proponents defend the President's amendment of the Constitution by his own practices?

Hamilton, the daring pioneer advocate of broadly read Presidential powers, regarded it as a fundamental maxim that: "An agent cannot new-model his own commission. A treaty, for example, cannot transfer the legislative power to the executive department" (RB 57). Now the President claims that what Senate and President combined cannot do, he can do single-handed—transfer the legislative power to the executive department.

Let me read something to you from Professor Reveley.

ADHERENCE TO INTENT OF LAWGIVER

"It seems that most people feel that the rule of law necessitates undeviating adherence to the intent of the lawgiver, until the language in which he embodies his intent is physically changed in accordance with formal processes of revision. Nothing less," he says, "will suffice to assure these people that our society is governed according to law and not pursuant to the whim of public officials. Thus pending formal amendment of the language of the framers most people believe their intent ought to remain binding."

I could not have said that half as well, Mr. Chairman. Very well. We have this sound belief of the people, the bulk of the people, that if the Constitution is going to be changed it should be changed by formal revision.

Mr. Reveley proposes a compromise variant: if we are going to revise the Constitution, the ultimate criterion must be the long-term

best interest of the country. Who is to decide that. The President? Deputy Attorney General Sneed said the other day, "Neither Congress nor the courts can interfere with the President when he exercises his powers." He asserts a blanket control. So who is going to take that away from him? Or are we going to put it in the hands of a self-appointed elite, be they "the best and the brightest," or some closet philosophers?

FORMULA FOR SELECTION OF THE ELITE

On this Prof. Myres McDougal of Yale said:

> Until we are furnished with the formula for selection of the elite we are entitled to doubts that the minority has any unique monopoly of wisdom. Government, by a self-designated elite like that of benevolent despotism, may be a good form of government for some people but it is not the American way.

Again hallelujah. I believe that is true. I prefer to regard the framers' expectations as "holy writ," to use the words of Mr. Reveley, rather than to permit a headstrong President to rewrite the Constitution at his will.

It is a mark of intellectual confusion that at the very time Secretary of State Rogers was saying of the Javits bill, which merely seeks to insure congressional participation in decisions for hostilities: "I don't think you can change the Constitution, amend the Constitution, by legislation," that he could also state:

> 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 institution of hostilities be made not by the President alone * * * but by the entire Congress and President together [Fulbright Hearings 488].

And he agreed that "the Constitution mandates a role for Congress in the making of decisions to use force." [Fulbright Hearings 528.] How can a bill which seeks to secure that role be in violation of the Constitution?

CONSTITUTION VESTS WARMAKING ROLE IN CONGRESS

If the Constitution already vests this warmaking role in Congress, it may be asked, why is it necessary so to provide by statute? The reason is that proponents of Presidential warmaking, relying on Acheson's "87 incidents," now swelled to 154, maintain that "a practice so deeply embedded in our constitutional structure should be treated as decisive of the constitutional issue." [RB81.] Congress too can construe its powers under the Constitution; and a statute would serve as such a construction. Since, on the view most favorable to the President, warmaking is a shared power, the Presidential power, the Supreme Court has held, would be subject to a countervailing statute.

Moreover, disobedience of a statute by the President would place him in the position of a lawbreaker. No man is above the law, not even the President; and a violation of law opens the courts to enforcement of the statute.

Let me emphasize, this issue will not be settled by pious exhortations, even in statutory form. President Eisenhower in 1960 unhesitatingly ordered the Secretary of the Treasury to disobey a statutory

cutoff of funds on the ground that it was unconstitutional.[3] Ultimately the Supreme Court must decide whether the President may act in defiance of a statute. Given a dispute about constitutional boundaries the Court is the inescapable arbiter.

In my judgment, the executive argument for a broader power than that of first general has no color of law; but as a lawyer I feel that every man is entitled to his day in court. I no more want to see you unilaterally decide the powers of the President than I want to see the President unilaterally arrogate your powers to himself. The only arbiter is the courts.

ACTING IN DEFIANCE OF LAW

I cannot believe that the Supreme Court would prefer to have Congress impeach the President for acting in defiance of law. When the Reconstruction Congress so proceeded against Andrew Johnson, Chief Justice Chase wrote that the issue ought to have been submitted to the courts.[4]

Now I come to a final passage. Without this your war powers bills, particularly as they permit the President to forestall the imminent danger of attack on Armed Forces stationed abroad, are virtually useless. So whether you write a special statute, or incorporate a provision in your War Powers Act, you need control over deployments.

You will remember both Professors Bickel and Schlesinger—and those are fine authorities—had no doubts on the score of deployment but again I think this ought to be spelled out in your record. It has not been spelled out in any other hearing that I know of.

Unless Congress establishes control over deployment by statute requiring congressional authorization, the President will in the future as in the past, station the Armed Forces in trouble spots that invite attack, witness the "Maddox" at Tonkin Gulf. Once such an attack occurs, retaliation becomes almost impossible to resist. Although I agree with Professor Alexander Bickel that "Congress can govern absolutely, absolutely, the deployment of our forces outside our borders" (RB–78, n. 318), account must be taken of Secretary of State Acheson's categorical statement to the contrary:

CARRYING OUT BROAD FOREIGN POLICY

> 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 that this authority may not be interfered with by Congress in the exercise of powers which it has under the Constitution.

Acheson furnished no citations or reasoning for this extraordinary claim. His exclusion of Congress is demonstrably without foundation.

It is for Congress to provide for the common defense which implies the right to decide what is requisite thereto.[5]

Congress also is to raise and support armies, and by necessary implication it can withhold or withdraw that support. In determining the size of the army it will support it is entitled to weigh priorities: Shall troops be stationed in Germany or deployed in Cambodia? In-

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[3] The incident is described and the documents set forth in Clark Mullenhof, "Washington Coverup," pp. 173–174, 233–235 (1962).
[4] R. Berger, *Impeachment: The Constitutional Problems*, pp. 291, 295 (1972).
[5] Citations for this section will be found in RB 78–80.

deed the constitutional mandate that no appropriation for support of the armies shall be for a longer term than 2 years implies that it is for Congress to decide at any point whether further appropriations should be made and in what amounts. The duty of Congress, in Hamilton's words, "to deliberate upon the propriety of keeping a military force on foot," surely comprehends the right to insist that a portion of the military forces should not be kept on foot in Vietnam or Europe.

SPECIFYING HOW APPROPRIATED MONEY IS SPENT

With the power of appropriation goes the right to specify how appropriated moneys shall be spent. This is immediately relevant to impoundment. It is not a mere matter of logic but of established parliamentary principle. After 1665, stated the great English historian, Henry Hallam, it became "an undisputed principle" that moneys "granted by Parliament, are only to be expended for particular objects specified by itself." That practice was embodied in an early congressional enactment. If, therefore, Congress specifies that its appropriations are to be spent only for troops stationed in the United States, that specification is binding on the Executive. Finally there is the power to make rules for the government and regulation of the Armed Forces, withheld from the Commander in Chief and given to Congress. These words connote a power to govern and control the Armed Forces, and they manifestly embrace congressional restraint upon their deployment.

REQUIRING CONGRESSIONAL AUTHORIZATION

I would therefore urge that your warmaking legislation, whether by separate enactment or by incorporation in a war-limiting bill, make express provision requiring congressional authorization for the deployment of Armed Forces abroad, except in tightly limited circumstances which hold no prospect of involvement in hostilities.

In sum, I consider that the constitutionality of the proposed legislation limiting the President's power singlehanded to embroil the Nation in war is unassailable. Congress, the sleeping giant, is stirring. Wake up, I say, and resume your place in the sun. Thereby you will profit the Nation and preserve our democratic system.

[The prepared statement of Professor Berger follows:]

STATEMENT OF RAOUL BERGER

It is a privilege to appear before you and to congratulate you for facing up to the unceasing take-over of Congressional functions by the President. "The history of the presidency," said Edward Corwin, "has been a history of aggrandizement"; it is a history of ever expanding encroachment on Congressional prerogatives. Because I believe that the maintenance of our democratic system and indeed the protection of individual liberty is bound up with the preservation of the separation of powers, I am here to uphold your efforts to curb presidential expansionism.

My chief concern is to defend the Javits War Powers type of bill against charges by Secretary of State William P. Rogers and Professor Eugene V. Rostow that it is unconstitutional. It is not my purpose to defend the wisdom of such efforts, for as John Marshall stated, "The peculiar circumstances of the moment

may render a measure more or less wise, but cannot render it more or less constitutional.[1] Opponents of the bills summon remote hypothetical contingencies which might demand instant, unfettered presidential response. Against such a parade of horribles I would pose the actual horror of our ever-deepening involvement in the Vietnam quagmire. Most presidential adventures, as Professor Henry Steele Commager points out, lacked the element of urgency, and in almost every case there was time to consult Congress.[2]

I cannot improve on his statement that "great principles of government are not to be decided on the basis of the argument 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. (Fulbright Hearings 16). Whether or not your bills represent the wisest possible solution of the problem—the legislature is yet to be born that can draft a perfect bill—is not nearly so important as the fact that you are taking a step towards resumption of your constitutional powers. Congress, the Supreme Court has often held, cannot abdicate its powers. The corollary of that axiom is that Congress is under a duty to exercise those powers itself.

Let me then focus on the issue of constitutionality. Roughly speaking, the several war powers bills before you seek to limit presidential war-making in the absence of authorization by Congress, leaving the President free to defend the United States and its armed forces against sudden attack. The power to wage war, it may be confidently asserted, was vested by the Constitution in Congress, not the President. If this be so, your bills merely seek to restore the original design. It cannot be unconstitutional to go back to the Constitution. Here I can only sketch the materials which demonstrate the purpose of the Founders, referring for documentation to my article, "War-Making by the President," supra, note 1, which was inserted in the Congressional Record of February 20, 1973, by Senator Javits.

The best index of constitutionality is the specific provisions of the Constitution respecting the war powers plus the explanation of the Founders as to what they intended to accomplish thereby. The war powers of the President are expressed in three little words—"Commander-in-Chief," which Hamilton explained to a people in dread of creating another George the Third, merely meant the President was to be the "first General." (RB 35). As Professor Henkin recently observed, generals, "even when they are 'first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others." (Louis Henkin, Foreign Relations 50–51 (1972).) The "Commander-in-Chief" was to lead the armed forces once war was "commenced" by Congress or by a "sudden attack" on the United States. No more can be squeezed out of those three little words.

In contrast, the over-towering bulk of the war-making power was lodged in Congress. James Wilson, with Madison, the leading architect of the Constitution, explained,

"The power of declaring war, and the other powers naturally connected with it, are vested in congress. To provide and maintain a navy—to make rules for its government—to grant letters of marque and reprisal—to make rules concerning captures—to raise and support armies—to establish rules for their regulation—to provide for organizing * * * the militia, and for calling them forth in the service of the Union [there was no standing army]—all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress" (RB 36).

To this may be added that Congress is also empowered to "provide for the common defense" and to make appropriations for the foregoing purposes. Since all the powers "naturally connected" with war-making are vested in Congress, it follows, as several Founders expressly stated, that they are not to be exercised by the President. (RB 41 n. 93).

You may think that I too easily glide from a power to "declare" war to a power to "make" it. Originally it was proposed that Congress be empowered to "make" war; this was changed to "declare," (RB 39–41) for reasons well summarized by Secretary of State Rogers. In his testimony before the Senate Foreign Relations Committee in 1971, he confirmed that the "change in wording" from "make"

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[1] Berger, War-Making by the President, 121 U. Pa. L. Rev. 29, 31 (1972), hereinafter cited as "RB."

[2] Hearings on War Powers Legislation before the Senate Committee on Foreign Relations 14 (1971), hereinafter cited "Fulbright Hearings."

to "declare" "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" as Commander-in-Chief. (Fulbright Hearings 488). But for the decisions involved in conducting war, all the rest of the war-making power remained in Congress. In the words of Hamilton's proposal to the Convention, the Executive would "have the direction of war when authorized or begun," (RB 37), implying it was not for him to begin a war. Though Hamilton was the great proponent of expanded presidential powers, he later stated that "it belongs to Congress only, to go to war." (RB 42 n. 99).

The power to "declare," i.e. to wage, war, was vested in Congress, James Wilson explained to the Pennsylvania Ratification Convention, as a guard against being "hurried" into war, so that no "single man [can] . . . involve us in such distress." (RB 36). The severely limited role of the President was a studied response to what Madison called "an axiom, that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." (RB 38). "Those who are to conduct the war, said Madison, "cannot in the nature of things be proper or safe judges, whether a war ought to be commenced, continued or concluded." (RB 39). George Mason also "was against giving the power of war to the President, because not (safely) to be trusted with it." (RB 40). So the President was left with the power "to repel and not to commence war," as Roger Sherman advised. (RB 39). But for the power to "repel sudden attack" on the United States or to direct a war once begun by Congress, *the entire war-making power was vested in Congress.* On this eminent scholars are agreed, as the Hearings before the Senate Foreign Relations Committee on the Javits War Powers Bill (1971) amply testify.

Professor John Norton Moore finds uncertainty as to "which branch would have authority to commit the nation to force short of war, or indeed what 'war' meant." (Fulbright Hearings 462). Such semantic questionings overlook the Founders' anxiety to limit the power of a "single man" to "hurry" us into war. Those who feared a blazing forest fire were little disposed to authorize the President to start brush fires. "Brinkmanship" is an invention of our era. A Convention which carefully authorized the President to "repel sudden attack" on the United States hardly left him free to engage in foreign adventures "short of war." Congress, said the Supreme Court in 1800, may "declare a general war" or "wage a limited war." Bas v. Tingey, 4 Dallas 37, dissipating the "uncertainty."

Madison's summary of the matter deserves to be blazoned on your walls in letters of gold:

"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, 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 and proper" (RB 48).

In 1966 the Legal Adviser of the State Department had little quarrel with the view of the "original intention" herein expressed, and said of the President's power to "repel sudden attack" that "In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States." (RB 47.) Assuredly the Framers did not conceive that the President might repel attacks on Kamchatka. But the Adviser added, "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. . . . The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequence so threatening to the security of the United States that he should act without formally consulting the Congress." (RB 50.) No member of the Executive has ever pointed to a constitutional provision, or to a statement of the founders that supports this astonishing claim. Recall Madison's words: "the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war." Whether an attack on a foreign state represents a threat to the "national security" is a political matter not left to the decision of the "first General." The "power of judging the causes of war," said Madison, "is fully and exclusively vested in the legislature."

In essence, the Executive branch appeals to emergency power, and on this we need to bear in mind what Justice Jackson stated when President Truman seized the steel mills in the midst of the Korean War so that production would not be interrupted by labor strife:

"Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them" (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 652 (1952) (concurring opinion)).

When Secretary of State Acheson advised President Truman in 1950 that he had constitutional authority as Commander-in-Chief to commit troops to meet the invasion of South Korea, he relied on a State Department memorandum which "listed eighty-seven instances in the past century" in which prior Presidents had exercised "presidential power to send our forces into battle." (RB 59). Later Under Secretary of State Nicholas Katzenbach stated that "most of these [incidents] were relatively minor uses of force." (RB 59–60). The "vast majority" of such cases, said Edward Corwin, "involved fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts [to protect American citizens], the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border." (RB 60). No possibility of "war" was presented by these incidents; and one can only marvel at the fantasy that can conjure from such incidents "precedents" for sending our troops "into battle." Were these incidents to be regarded as equivalent to executive waging of war, the last precedent would stand no better than the first. Illegality is not legitimated by repetition. So the Supreme Court has held. (RB 60 n. 200).

Some academicians consider that presidential practices constitute a "gloss of life" on the Constitution, that the Constitution is a living document which must expand to meet new needs. But the way to such expansion is by amendment, not by self-appointed revisionists. Given a presidential take-over of war powers plainly conferred upon Congress alone, and accompanied by an unmistakable intention to withhold them from the President, his appeal to his own "precedents" would *alter* the constitutional distribution of powers in violation of the separation of powers. Professor Rostow inveighs against the Javits Bill because "it would permit Congress to amend the Constitution without the inconvenience of consulting the people," (RB 31) this about a return to the Constitution! If Congress cannot by legislation thus "amend" the Constitution, how can presidential proponents defend the President's amendment of the Constitution by his own practices? Hamilton, the daring pioneer advocate of broadly-read presidential powers, regarded it as a fundamental maxim that—

"An agent cannot new-model his own commission. A treaty, for example, cannot transfer the legislative power to the executive department."

Now the President claims that what Senate and President combined cannot do, he can do single-handed—"transfer the legislative power to the executive department."

It is a mark of intellectual confusion that at the very same time that Secretary of State Rogers was saying of the Javits Bill, which merely seeks to insure congressional participation in decisions for hostilities: "I don't think you can change the Constitution, amend the Constitution, by legislation" (Fulbright Hearings 525), that he could also state,

"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 institution of hostilities be made not by the President alone . . . but by the entire Congress and President together" (Fulbright Hearings 488).

And he agreed that "the Constitution mandates a role for Congress in the making of decisions to use force." (Fulbright Hearings 528.) How can a bill which seeks to secure that role be in violation of the Constitution?

If the Constitution already vests this war-making role in Congress, it may be asked, why is it necessary so to provide by statute? The reason is that proponents of presidential war-making, relying on Acheson's "87 incidents", maintain that "a practice so deeply embedded in our constitutional structure should be treated as decisive of the constitutional issue." (RB 81.) Congress too can construe its powers under the Constitution; and a statute would serve as such a construction. Since, on the view most favorable to the President, war-making is a shared power, the presidential power, the Supreme Court has held, would be subject to a countervailing statute. (RB 76.) Moreover, disobedience of a statute by the President would place him in the position of a law-breaker. No man is above the law; and a violation of law opens the courts to enforcement of the statute.

Let me emphasize, this issue will not be settled by pious exhortations, even in statutory form. President Eisenhower unhesitatingly ordered the Secretary of the Treasury to disobey a statutory cut-off of funds on the ground that it was unconstitutional.[3] Ultimately the Supreme Court must decide whether the President may act in defiance of a statute. Given a dispute about constitutional boundaries the Court is the inescapable arbiter. I cannot believe that the Supreme Court would prefer to have Congress impeach the President for acting in defiance of law. When the Reconstruction Congress so proceeded against Andrew Johnson, Chief Justice Chase wrote that the issue ought to have been submitted to the courts.[4]

DEPLOYMENT

One provision of the Javits-type bill requires additional comment, the § 3(2) authorization to "repel an armed attack against the Armed Forces . . . located outside the United States . . ." Unless Congress establishes control over deployment by statute requiring Congressional authorization, the President will in the future as in the past station the Armed Forces in trouble spots that invite attack, witness the "Maddox" at Tonkin Gulf. Once such an attack occurs, retaliation becomes almost impossible to resist. Although I agree with Professor Alexander Bickel that "Congress can govern absolutely, absolutely, the deployment of our forces outside our borders (RB 78 n. 318), account must be taken of Secretary of State Acheson's categorical statement to the contrary:

"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 that this authority may not be interefered with by Congress in the exercise of powers which it has under the Constitution" (RB 77).

Acheson furnished no citations or reasoning for this extraordinary claim. The exclusion of Congress is demonstrably without foundation.

It is Congress that is to "provide for the common Defense,"[5] which implies the right to decide what is requisite thereto. Congress also is "to raise and support armies," and by necessary implication it can withhold or withdraw that support. In determining the size of the army it will "support" it is entitled to weigh priorities: shall troops be stationed in Germany or deployed in Cambodia? Indeed the constitutional mandate that "no appropriation" for support of the armies "shall be for a longer term than two years" implies that it is for Congress to decide at any point whether further appropriations should be made and in what amounts. The duty of Congress, in Hamilton's words, "to deliberate upon the propriety of keeping a military force on foot," surely comprehends the right to insist that a portion of the military forces should not be kept "on foot" in Vietnam or Europe.

With the power of appropriation goes the right to specify how appropriated moneys shall be spent. This is not a mere matter of logic but of established parliamentary principle. After 1665, stated the great English historian, Henry Hallam, it became "an undisputed principle" that moneys "granted by Parliament, are only to be expended for particular objects specified by itself." That practice was embodied in an early Congressional enactment. If, therefore, Congress specifies that its appropriations are to be spent only for troops stationed in the United States, that specification is binding on the Executive. Finally there is the power to make rules "for the government and regulation of the armed forces," withheld from the Commander-in-Chief and given to Congress. These words connote a power to govern and control the armed forces, and they manifestly embrace congressional restraint upon their deployment. I would therefore urge that your war-making legislation, whether by separate enactment or by incorporation in a war-limiting bill, make express provision requiring Congressional authorization for the deployment of Armed Forces abroad, except in tightly limited circumstances which hold no prospect of involvement in hostilities.

In sum, I consider that the constitutionality of the proposed legislation limiting the President's power single-handed to embroil the nation in war is unassailable. Congress, the sleeping giant, is stirring. Wake up, I say, and resume your place in the sun. Thereby you will profit the Nation and preserve our democratic system.

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[3] The incident is described and documents set forth in Clark Mollenhof, Washington Cover Up, 173–174, 233–235 (1962).
[4] R. Berger, Impeachment: The Constitutional Problems, 291, 295 (1972).
[5] Citations for this section will be found in RB 78–80.

Mr. ZABLOCKI. Thank you, Professor Berger, for your eloquent statement.

Professor Reveley, will you please give your statement.

STATEMENT OF W. TAYLOR REVELEY III, JOINT FELLOW OF THE COUNCIL ON FOREIGN RELATIONS AND THE WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS

Mr. REVELEY. Mr. Chairman, I'm pleased to have an opportunity to talk with your committee about the difficult but intriguing problem at hand.

One personal note at the outset. Lest the academic community accuse me of usurping its prerogatives and titles, I should note that I'm a practicing lawyer, not a professor, in the midst of a year's leave from my law firm to attempt a book on the constitutional law of the war powers.

My written statement deals with two matters: first, constitutional considerations relevant to any analysis of war-powers legislation and second, in light of those considerations, what war-powers legislation, if any, is desirable.

SUMMARIZING PERTINENT CONSTITUTIONAL ISSUES

As my written statement is somewhat lengthy, I will focus my oral remarks on pages 23 through 30 of the statement. Those pages summarizes the pertinent constitutional considerations and then suggest the sort of war-powers legislation that I think is most appropriate.

Turning to page 23, in skeletal form, these are the constitutional considerations that in my view must be taken into account.

First, constitutional law governing the allocation of control between the President and Congress over the use of force is presently uncertain and in flux. Belief that the President has a constitutional prerogative to use force as he thinks necessary in the national interest now hotly contends with belief that he may do so only after obtaining prior congressional approval, except in a few emergency circumstances and then often for only a limited time, unless ex post facto congressional approval is forthcoming.

The former belief springs from 20th-century executive practice, especially that of the cold war; the latter belief is rooted in the framers' intent and in 19th-century practice.

Second, present constitutional confusion cannot be ended by invocation of the framers' expectations as holy writ, nor by automatic canonization of recent Executive hegemoney as amendment of the Constitution by usage.

CONSISTENT WITH CONSTITUTIONAL TRADITION

An end to confusion more consistent with our constitutional tradition involves, (1) identification of the ends or objectives that the country seeks to achieve by the nature of its allocation of control between the President and Congress, and, (2) a constitutional division of authority between them that is most likely to realize those ends in today's world.

It follows that I radically disagree with Professor Berger about the mechanics of constitutional interpretation; if the committee is interested, he and I could debate them.

The bulk of my written statement, with which I am not dealing in my oral remarks, concerns (1) identification of those ends that the country has traditionally sought to obtain by the nature of its allocation of control between the President and Congress, (2) the respective institutional capabilities of the President and Congress to realize those ends, and (3) the allocational problem that arises when—as I think is the case—it becomes clear that the President acting alone is more able to realize certain of the objectives, while Congress and the President acting together are more capable of realizing others.

My conclusion, based on inquiry into the purposes behind the allocation of the war powers, is stated on page 24. It is that the division of authority most likely to realize those ends is one that involves less control for Congress than the Framers intended, but also less control for the President than most Chief Executives in this century have claimed.

As regards Presidential prerogative, we should constitutionally concede to the President the right to initiate force on his own authority, whenever he thinks it necessary in the national interest.

"WAR" IN THE CONSTITUTIONAL SENSE

We should further concede him the right to continue any use of force as he thinks necessary, so long as a majority of both Houses of Congress do not vote to limit or terminate that use.

Finally, we should recognize, as was the case in the 19th century, that some uses of force do not amount to "war" in the constitutional sense, and leave them wholly within Presidential control; these uses involve applications of force that have little human or economic cost for this country and do not impair the sovereignty of another country, under current concepts of international law.

As regards congressional prerogative, we should resurrect for Congress two of its dormant constitutional prerogatives: first, the right to be informed promptly by the President that he has begun a use of force involving "war" in the constitutional sense, whatever his reason for doing so; and, second, the right to limit or terminate that use of force, at any time following the President's report, by majority vote of both Houses.

Under such an allocation of control, we would expect as a matter of practical politics, though not of constitutional obligation, that the President would obtain prior congressional approval before initiating force, except when he felt that the need for speed or secrecy compelled his unilateral action.

IMPLEMENTING ALLOCATIONAL ROLES

Is there a role for war-powers legislation in implementing these allocational rules? Yes, but with this fundamental qualification: it is unlikely that a larger congressional voice, such as that described above, can ultimately rest on war-powers legislation. Rather it will depend upon (1) the extent of congressional determination to become involved in use-of-force decisions, as shown by internal reform to strengthen congressional capacity to deal with these questions rationally and, when necessary, swiftly or secretly; (2) congressional willingness to

vote yea or nay on use-of-force policies during their formative periods; and (3) congressional use of existing means, for example, the appropriations and legislative processes, to cajole or coerce the executive branch into meaningful collaboration with Congress, primarily through its pertinent committees, on use-of-force policies from their birth to death.

If these steps are not taken, war-powers legislation by itself will mean little. In fact, it may be counterproductive, representing one last ineffective but very public lunge at congressional use-of-force relevance. Better no law than one that proves meaningless.

Against this background, however, war-powers legislation does have merit on two scores. First, it may provide the initial thrust necessary to break both the President and Congress out of the gravitational pull of present executive hegemony. Without action-forcing, or encouraging, legislation and with the dimming of Vietnam passions, it is easy to envisage continued presidential control over American use of force, rocked only slightly by occasional bursts of congressional rhetoric.

SPARKING THE DEVELOPMENT OF CONSENSUS

Second, war-powers legislation may effectively spark the development of consensus about the allocation of control. If there are basic elements of the allocation on which the President and Congress can agree, and if these elements can be captured in a war-powers act, signed by the Executive, that concrete, visible agreement could provide a constitutional starting point for the evolution of general accord. In other words, war-powers legislation need not, indeed cannot, deal with all of the allocational dilemmas posed by control over American use-of-force policy. But it can provide a simple, effective point of departure for resolution of those dilemmas.

War-powers legislation with clearly positive effect, in my view, would have terms such as these:

Section 1: Whenever the President without prior congressional approval initiates the use of armed force by the United States, he shall submit promptly to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(a) The objectives of the use of force;

(b) The human and economic resources committed;

(c) The geographical areas affected and the length of time that given resources have been committed to given areas;

(d) Projection of future developments as to each of the above;

(e) Domestic and international legal bases for his use of force, including why no prior congressional approval of it was obtained;

(f) Such other information as the President may deem useful to Congress in the fulfillment of its constitutional responsibilities with respect to the initiation of the use of armed force by the United States.

CONVENING CONGRESS TO CONSIDER REPORT

Section 2: Whenever the Speaker of the House of Representatives and the President pro tempore of the Senate receive such a report and Congress is not in session, the President shall convene Congress in

order that it may consider the report, unless the use of force has already been terminated.

Section 3: Whenever a report is submitted by the President pursuant to this act, both Houses of Congress shall proceed immediately to the consideration of the use of force cited in the report, unless the use of force has already been terminated.

A few comments on the language just proposed may be helpful. Section 1 of the act above avoids the problem of what constitutes "war" in the constitutional sense by requiring the President to report all uses of force to Congress. He would have an opportunity under section 1(c) to indicate those uses that he believes do not constitute "war," and thus fall within his absolute control. Congress in turn would have an opportunity to disagree with him when it considers his report. Reasonable men may differ in close cases over whether a use of force has significant human or economic cost for this country and whether it impairs the sovereignty of another country, but they are not likely to disagree in the important instances—those in which the use of force is either patently significant or insignificant. Presidents and Congresses through a process of claim and concession over time should be able to reach basic agreement on what is and is not a use of force wholly within executive prerogative.

LEGISLATIVELY DEFINING THE DIVIDING LINE

To minimize confusion over what is and is not "war" for constitutional purposes, however, Congress could legislatively define the dividing line. Any such definition would be arbitrary to a degree, but so long as it embodied the constitutional distinction between significant and insignificant uses of force, the definition should fall within congressional authority to implement the Constitution.

Section 1 of the proposed act also indicates by its use of the phrase "prior congressional approval" rather than "prior congressional declaration of war" that the form of authorization by Congress has nothing whatsoever to do with the constitutional allocation of control.

Definition in section 1 of the minimum content of the executive report is necessary to prevent meaningless presidential compliance. With information of the sort specified in hand, Congress should be equipped to weigh the costs and benefits of the use of force.

Two other problems with the reporting process exist: One that the President may not act quickly enough, if guided only by the adverb "promptly," and two, that the President may believe that portions of the required report should be transmitted and kept in secret. Both problems could be specifically dealt with in the legislation, or left, as in the act above, to resolution through presidential-congressional claim and concession. "Promptly," in particular, would be difficult to define rigidly, since there may be occasions when the President needs to delay his report to guard the impact of American action yet unsuspected by the enemy.

CONGRESSIONAL REVIEW OF PRESIDENT'S ACTION

Section 2 insures that Congress will have a timely opportunity to review the executive initiation of force. The "unless the use of force has already been terminated" proviso exists to prevent needless special

sessions. If the force has already been terminated, it very likely did not constitute "war" in the constitutional sense. Should the Speaker and the President pro tempore nonetheless wish a special session, they may urge one on the President. Should Congress upon later considering the matter wish to take a position, it would be free to do so.

Section 3 again assumes that in most cases there will be no need for immediate congressional action once a use of force has ended. It further assumes that Congress will not act on all uses reported to it; those so insignificant as to fall within the President's absolute control are immune from congressional limitation or termination, and Congress may choose to remain silent for a time, or forever, even on uses that constitute "war."

Arguably, section 3 should prescribe procedures to force rapid congressional consideration of use-of-force reports. Assuming that statement of such procedures is technically feasible, it could well do more harm than good. There is no merit in having Congress rush to ill-considered decision, whether for or against Presidential action. So long as Congress proceeds "immediately" to consider the question, and refuses to allow its processes to be thwarted by minority will, it should take the time for meaningful consideration by its appropriate committees and on the floor of both Houses.

LEGISLATION DELIBERATELY SIMPLE

The legislation described above is deliberately simple. It does not deal with any aspect of the war powers except the actual initiation of force. And it presents only a few crucial elements of the allocation of authority over the initiation of force, leaving the rest of articulation by the President and Congress through a process of claim and concession in specific cases.

The proposed act does provide Congress with what it presently lacks: The guarantee that it will have the facts and an opportunity to act at the outset of any significant American use of force, except for those few, if any, that end before the President has time to report and Congress to be called into session.

As suggested earlier, a Congress determined to be involved in American use-of-force policy can move from that opportunity to more general collaboration with the Executive via existing mechanisms.

The balance of my written statement lays out a more detailed war-powers act, which embodies more comprehensively the allocational rules described at the beginning of my oral remarks.

I prefer, however, the shorter and more simple act just discussed. It seems to me that the less complex war-powers legislation is, the more likely it is to be understood and respected. It also seems to me that both understanding and respect are vital if a war-powers act is to provide the thrust necessary to escape the pull of existing practice. And, again, the passage of use-of-force legislation that is then ignored by the President and by Congress would have a far more debilitating effect on congressional use-of-force prerogatives than the failure to enact any war-powers legislation at all.

COMMENT ON HOUSE JOINT RESOLUTION NO. 2

In conclusion, let me comment briefly on House Joint Resolution No. 2, which is the principal proposal now pending before Congress that comes closest to the sort of legislation that I believe desirable.

I will go down the resolution section by section.

I do not agree with the assumption in sections 2 and 3 that the President may initiate force on his own authority only in emergency situations. In my view, Executive practice in this century should be recognized as amendment of the Constitution by usage to the extent that it gives the President the right to initiate the use of force whenever he concludes that the national interest requires it.

In section 3, I don't see the need for the "declaration of war" terminology. It seems redundant in light of the "authorization" language in the second clause of the section. We should be aware that any form in which Congress authorizes the use of force is constitutionally acceptable. There is no magic in declarations of war. Congress has often approved uses of force through means other than formal declarations. Thus, rather than focusing on declarations, it would be more accurate to refer simply to congressional authorization, whatever form it may take.

The requirement in section 4 that the President consult Congress before he commits troops pursuant to section 3 is desirable as a matter of practice, but not desirable as formal legislation. I would prefer to see that sort of consultation evolve out of existing mechanisms for interchange between the President and Congress. I don't think legislatively mandating it will do much good, unless other conditions exist: That is, congressional willingness to retaliate against the President if he fails to consult and congressional willingness to put its own house in order so that it can and will meaningfully participate in use-of-force decisionmaking.

REQUIREMENT OF PERIODIC CONSULTATION

The section 4 requirement of periodic consultation during armed conflict, similarly, should evolve naturally if the conditions just noted exist.

Section 5, again, has "declaration of war" language which I think is better replaced by simple authorization language.

Section 5 also deals with deployment and other war-powers action short of the actual use of force. In so doing, the resolution courts unenforceability. Is it likely that the President will report—or that Congress will insist that he report—every time action of the sort described in section 5 is taken? Any requirement not likely to be obeyed, in my view, is best excluded from war powers legislation, lest its inclusion undermine the credibility of the whole.

The matters to be covered in the Presidential report, as noted in section 5, are essentially the same as those that I propose on page 27 of my statement. The requirements stated on page 27 seem to be somewhat more precise than the ones set out in section 5.

Section 6, in my judgment, should simply require Congress to move immediately to consideration of the use of force cited in the report.

Section 7, I would delete after the first sentence.

Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Reveley follows:]

STATEMENT OF W. TAYLOR REVELEY III[1]

My comments, first, sketch constitutional considerations relevant to war-powers legislation, and, second, against the background of these considerations, explore what, if any, war-powers legislation is desirable. In the interest of expedition, much of the statement is conclusory. Its organization is as follows:

I. Constitutional Considerations
- A. Many Issues
- B. Description of the Present State of the Law
  - 1. Language, Intent and Pre-Twentieth Century Practice
  - 2. Twentieth Century Practice
- C. Resolution of Uncertainty in Present Law
  - 1. Framers' Intent Versus Amendment by Usage
  - 2. Purposes, or Ends, Underlying the Constitutional Allocation of Control
  - 3. Respective Congressional and Executive Capacities to Realize Each of the Desired Ends
  - 4. Preference Among Ends: The Allocation of Control
  - 5. Reasons for the Allocation of Control Just Described

II. War-Powers Legislation in Light of Relevant Constituional Considerations
- A. Recapitulation of Constitutional Considerations
  - 1. Presidential Prerogative
  - 2. Congressional Prerogative
- B. The Role of War-Powers Legislation
- C. A Basic War Powers Act
  - 1. Text
  - 2. Comment
- D. A More Detailed War-Powers Act

I. CONSTITUTIONAL CONSIDERATIONS

A. Many Issues

Most proposed war-powers legislation focuses on the allocation between the President and Congress of control over decisions to initiate the use of armed force abroad. It is well to remember, however, that control over the initiation of force is only one among a number of constitutional issues regarding the war powers. Crucial questions also exist concerning control over the conduct and termination of force, and concerning the initiation, conduct and termination of other sorts of action: commitments by this country to use force in the future, the raising and deploying of the military, and other provocative diplomacy, legislation or international agreement. Thus, the initiation of force poses only the middle issue of a series of questions concerning the constitutional allocation of control between the President and Congress over American war-powers policy. The initiation of force is a useful starting point for congressional efforts to deal with problems of control, but no more than that.

B. Description of the Present State of the Law

Description involves inquiry into pertinent data of three sorts: (1) constitutional language, (2) intent of the Framers and Ratifiers and (3) war-powers practice by the President, Congress and courts from 1789 to date. My study of these data suggests that the constitutional allocation of control between the President and Congress over the initiation of force is in flux; it wavers uncertain

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between executive dominance, most apparent since 1945, and a return to the strong congressional voice that existed before this century. A new constitutional consensus on the initiation of force is likely to emerge within the next decade or two. Its nature cannot yet be accurately predicted; and those who claim that constitutional certainty already exists, some taking refuge in the Framers' dictates of 1789 and others garnering equal if contradictory assurance from presidential practice since World War II, are unrealistic. The facts belie their certainty, as does this country's method of making constitutional law.

1. Language, Intent and Pre-Twentieth Century Practice

Though the pertinent constitutional language is somewhat ambiguous, the Framers' intent and pre-twentieth century practice generally support the necessity for prior congressional authorization of any initiation of armed force by the President, except (a) when the United States is physically attacked with such suddenness that a defensive reaction is essential before Congress has an opportunity to act, or (b) when the force has little human or economic cost for this country *and* does not impair the sovereignty of another country, under prevailing concepts of international law. Under nineteenth century concepts, the navy in particular landed frequently to protect American lives and property endangered by disorder in weak nations or stateless areas; took punitive action or reprisals against primitive, stateless peoples who had attacked Americans or their property; pursued fleeing miscreants into weak nations or stateless areas; and enforced laws against piracy and slave trading. Congressional authorization of American use of force also occurred often during the late eighteenth and nineteenth centuries and took a number of forms in addition to formal declarations of war.

2. Twentieth Century Practice

The weight of practice in this century, on the other hand, supports a presidential prerogative to use force as he thinks necessary in the national interest, so long as war is not formally declared. Executive initiative and congressional acquiescence in China at the turn of the century, in Latin America during its first thirty years, before the two World Wars and during the Cold War all argue for such a prerogative. Since 1945 Chief Executives (with Eisenhower ambiguities) have been willing openly to claim the prerogative as their constitutional due. Dominant support for that constitutional reading existed in Congress and among influential commentators from the Second World War to the souring of American involvement in Vietnam. This interpretation of the constitutional war-powers provisions rested on the common assumption that only the President, not Congress, could cope with the pace, complexity and hazards of contemporary international life. Though essential, the congressional role was principally one of support—the giving of advice and martial resolutions when asked, and the voting of necessary appropriations and legislation.

In the wake of Vietnam, however, has come reconsideration of the institutional advantages previously assumed for the President in the conduct of foreign affairs, and reawakening of latent constitutional expectations, drawn from language, intent and pre-twentieth century practice. The reawakening has not been universally experienced, however; many continue to believe that the Constitution vests in the President a broad war-powers prerogative.

In short, a presidential claim to amendment of the Constitution by usage has been suddenly and strongly challenged, just as it was about to set its second foot in the constitutional promised land.

C. Resolution of Uncertainty in Present Law

1. Framers' Intent Versus Amendment by Usage

Almost certainly, there will be no rollback of the presidential claim to initiation-of-force hegemony *simply* because the claim departs from the Framers' intent. To do so would be to deny the possibility of constitutional change in this country through any but the process of formal amendment. Such a Canute-like stance ignores historic reality that, for good and familiar reasons, our Constitution has far more frequently evolved through usage than through formal amendment, when the pertinent constitutional language is ambiguous. The allocation of war powers between the President and Congress has had its fair share of voluntary development, through a process of claim and concession between the political branches and, less frequently, through judicial decision.

But neither, on the other hand, does our constitutional tradition require that a claim be accepted as amendment by usage *just* because it has existed for a while and been given some substance in practice. The exercise of control by itself is not conclusive of its constitutionality. To so hold would be to permit power-seeking Presidents or Congresses to broaden their constitutional control through bootstrapping.

It is true, though, that persistent bootstrapping over an extended period may ultimately produce amendment by usage, if those with contrary constitutional views choose to clothe them only in rhetoric. This is simply to say that what happens in fact generally proves to be a more potent influence on constitutional development than statements about what ought to happen. Another generation of executive control, in fact, over the initiation of force will conclude the issue, in my judgment, no matter what Congress and commentators may say to the contrary about how control ought constitutionally to have been allocated.

If constitutional certainty cannot be found simply by harking back to the dictates of 1789 or by canonizing recent practice, where do we look for answers?

2. Purposes, or Ends, Underlying the Constitutional Allocation of Control

Control over the use of force is allocated in one manner rather than another in order to achieve certain ends vital to the national good. These purposes provide the standards by which to judge the merit of alternative allocations between the President and Congress. Definition of the underlying ends began with the Framers and Ratifiers and has continued as new national needs emerge that require accommodation in the allocation, and as attempts are made to better adjust it to achieve old ends. Reasonable men may disagree about the nature of these ends, and, more often, about their allocational implications. But, in my view, we will be neither reasonable nor true to our constitutional tradition, if we try to resolve existing uncertainty about the allocation of control over the initiation of force except by (a) identification of the ends, vital to the national good, to be sought in that allocation and (b) choice of the allocation most likely to realize them.

In other words, what is the United States trying to accomplish by its constitutional law governing the allocation of control over the initiation of force? To what extent can the desired ends be achieved by adherence to the intent of the Framers? To what extent are they realized by recent divergent presidential practice? If the Framers' design remains functional, then the executive claim to hegemony over the initiation of force is properly rejected as unnecessary usurpation of authority from Congress. To whatever degree, however, that the claim responds to national needs not met by the Framers' design, to that extent it is properly recognized as amendment by usage.

The following objectives are among those that have been sought in the allocation of war powers:

First, to hinder the use of force by either branch to tyrannize the American public or to establish dictatorial government in this country. The Framers feared overt instances of these evils, for example, use of the military to overthrow the Constitution and establish an American monarchy. The threat today is more subtle. It lies in coercion that stems from keeping a huge military establishment, with civilian adjuncts, for use in foreign wars.

Second, to hinder aggressive use of force by the United States abroad. The Framers did not anticipate any but defensive use of American military power, though aggressive war had greater claim both to international legality and to predictable, tolerable consequences in the late eighteenth and nineteenth centuries than it does today.

Third, to encourage democratic control over use-of-force policy. Democratic control implies the reporting of executive policies with their supporting facts and rationales to Congress and to the interested public; it implies executive responsiveness to congressional and public judgments, when clearly and persistently voiced, and congressional responsiveness, in turn, to executive and public opinion. Admittedly, public judgment has often been viewed as uninformed, irrational, inconstant and either too militant or not militant enough. The same is frequently said of congressional judgment, as opposed to executive. Consent of the governed, however, is the organizing principle of our polity, and today's increasingly educated and demanding citizens are unlikely to lessen the traditional demand for a government responsive to the governed. That principle has special relevance in use-of-force policy, where the consequences of national decision-making can be so profound. Democratic control remains a basic objective, accordingly,

pending better evidence than now exists that public judgment is consistently detrimental to the national good and impervious to the persuasion of better advised executive officials.

Fourth, to create and maintain national consensus behind American use-of-force policies. Without that consensus, it is difficult for the country effectively to pursue any policy for a significant period of time; and the absence of consensus may plunge the United States into bitter internal controversy, with debilitating effects both internationally and domestically.

Fifth, to permit short-term emergency uses of American force that are neither subject to democratic control nor backed by national consensus. Any attempt to absolutize the necessity for democratic control and consensus founders on those occasions when public opinion has been fatally wrong, and when neither government advocacy nor events have yet managed to win tolerance for the necessary policies. The years immediately prior to American entry into World War II speak eloquently about the potential of public judgment for short-term fundamental error.

Sixth, to encourage rational use-of-force decision-making. That is, the making of decisions by elected officials who are well acquainted with (a) overall American foreign policy objectives and priorities, (b) the basic facts of the situation at hand, (c) realistic alternatives for dealing with it, (d) expert evaluations (both technical and political) of these alternatives, and (e) criticism of each alternative by persons of genuinely independent judgment and persuasive power.

Seventh, to ensure American capacity to consider use-of-force questions and make policy rapidly or secretely, when necessary, and flexibly and proportionately always. The importance of speed and secrecy has been, and will continue to be, crucial in certain circumstances. Flexibility—the capacity to act in a manner responsive to changing events—is vital in an area as volatile and unforgiving of error as that of use of force. The capacity to respond proportionately avoids inadequate or excessive American reaction to foreign provocation.

Eighth, to permit continuity in American use-of-force policy, when desirable. Continuity leads to credibility and predictability. Both are necessary to assure allies, deter enemies and to reach agreement with other countries.

Ninth, to encourage the periodic review and revision, as necessary, of our use-of-force policies. The timely modification or termination of a policy often has an importance equal to its timely initiation.

Tenth, to facilitate the efficient making and execution of American use-of-force policy. Government inefficiency during the Revolutionary and Confederation periods provided strong impetus to the constitution-making of 1787–89. Our need for efficiency has increased radically since 1789, with growth in the complexity and magnitude of the problems with which the government must deal, and with tremendous increases in the pace of events. Consistent inefficiency in making and executing decisions can undermine even wise policies.

Two very important questions remain even after the basic objectives, or ends, of the allocation of control are known. (1) What are the respective capacities of Congress and the President to achieve each of the ends? (2) If certain ends conflict with one another, and if all of them cannot be directly pursued at once, which ends are to be preferred?

3. Respective Congressional and Executive Capacities to Realize Each of the Desired Ends

At issue here are the implications of different institutional characteristics of Congress and the President. What, for example, is the effect on their capacities to achieve the desired ends of their respective terms of office? Of their different modes of election and electoral constituencies? Of the fact that the President is one and Congress many? That only the President is never out of session and never out of contact with the government apparatus? That the President far more than Congress controls the services and day-to-day activities of the overwhelming mass of federal employees? That the executive role is characterized more by recommendation, interpretation and action, and the legislative role more by deliberation, consent and authorization?

At issue also is the extent to which either branch can *and* will alter its present ways of doing business to increase its capacity to realize the desired ends. If such reform is technically and politically feasible, the prospect of its occurring must be taken into account. Congress, for example, could improve the methods by which it now obtains, absorbs and critically considers information essential to use-of-force decisions. It could further coordinate and set priorities for the

splintered processes by which it now deals with these decisions. It could provide for their more systematic review and revision. And Congress could significantly improve its capacity for rapid and secret use-of-force decision-making.

Assuming, however, that the President's and Congress' institutional capabilities remain essentially as they now are, my conclusion is that the first four ends described above are likely to be most often realized by an allocation of control that requires joint executive-congressional authorization of any initiation of force. In other words, to hinder the use of force to build tyranny at home (end one) or to wage war aggressively abroad (end two), to foster democratic control over use-of-force policy (end three), and to create and maintain national consensus behind that policy (end four), the best allocation of control is one that divides responsibility between the President and Congress.

With certain qualifications, however, this is not my conclusion as regards the last six ends described above. They are likely to be realized in more cases than not by an allocation of control that gives the decisive voice to the President, subject to such congressional consultation and support as he may seek, and subject to congressional power to thwart or reverse his decisions through means other than the right to vote yea or nay on the actual initiation of force (for example, the denial of implementing appropriations and legislation, or the use of hearings to inform and arouse the public against executive policy). In other words, to ensure American capacity for short-term, unpopular use of force that is vital to national security (end five), to encourage rational use-of-force decision-making (end six), to ensure American capacity to consider use-of-force questions and make policy rapidly or secretly, when necessary, and flexibly and proportionately always (end seven), to permit continuity in that policy, when desirable (end eight), to ease the periodic review and revision, as necessary, of American use-of-force policies (end nine), and to facilitate the efficient making and execution of those policies (end ten), the best allocation of control is one that allows the President to act as he thinks wisest, without the necessity to obtain congressional approval.

This judgment must be qualified in three respects: First, it is not clear that Presidents can consistently obtain from any source but Congress an element of rational decision-making: the criticism of alternative courses of action by persons of genuinely independent judgment and persuasive force (end six-e). Devils-advocate from within the Executive Branch seem all too often to have a modest impact on their leader. Second, it is possible that end nine—the periodic review and revision, as necessary, of use-of-force policies—might be more likely if both Congress and the President were necessarily involved, the one to offset any obsessive preferences of the other for one policy or another. Finally, as noted a moment ago, Congress could alter its ways of doing business so as to narrow significantly the gap between its and the President's institutional capabilities to realize ends five through ten. Thus, the allocational judgment just stated is more tentative than the judgment concerning the first four ends.

The conclusions above do not reflect the impact that unusual personalities in either the White House or on the Hill may have on realization of the desired ends. And they do not pretend to apply to all cases, only most cases. What has been said about ends six through ten might well not hold were abnormally wise and strong Congressmen to confront an abnormally foolish and weak President. And certainly there have been, and will be, occasions when Congress rather than the President proves more capable of realizing any of the last six ends. But in most cases (the more relevant subject for consideration), this does not seem to be true.

The problem remains how control is to be divided when certain of the allocational objectives call for joint executive—congressional responsibility, while others call for executive prerogative.

4. Preference Among Ends: The Allocation of Control

At the outset, it is well to be clear that there is no necessary conflict among the objectives in question. The first four ends may be realized, sooner or later, even if the President alone controls the initiation of force. He may, for example, be scrupulous to avoid aggressive uses of force at home or abroad; he may temper his policy in the fire of congressional and public opinion and successfully build consensus behind it. Similarly, the last six purposes could be achieved even were the President required to obtain congressional approval for the use of force. No iron law compels Congress to vote down unpopular action vital to national security; to reach irrational decisions; to prove incapable of speedy, secret, flexible

and proportionate action; to toss aside essential continuity in policy or refuse its review and revision; nor is Congress inexorably doomed to sit astride the efficient making and execution of American policy.

But practically speaking, ends one through four do now compete with ends five through ten. For as noted, our chances of realizing the first group are measurably better if the President and Congress share authority, while our chances of realizing the second set are measurably enhanced by executive prerogative. Which group of ends is to be preferred in the allocation of control over the initiation of force?

In my judgment, neither group is dominant except as to the time of preference during the process of initiating force. Three stages are important during that process:

First, at the outset of initiation, realization of ends five through ten should dominate. In other words, we should concede the President a constitutional prerogative to initiate the use of force when he deems it in the national interest. To that extent, we should recognize as amendment by usage executive practice during this century, especially during the last thirty years.

Second, however, immediately after the President has unilaterally begun the use of force, our dominant concern should become realization of ends one through four. In other words, we should preserve from the Framers' intent and nineteenth-century practice two congressional prerogatives: (1) the constitutional right to be promptly informed by the President that he has begun the use of force; and (2) the constitutional right, then or at any time thereafter, to limit or terminate that use of force by majority vote of both Houses. These rights should come into play irrespective of the reason that the President initiated the use of force. For example, Congress should not be denied the report and a timely opportunity to act just because the President is, or claims to be, engaged in response to an attack on American territory or security interests. But any congressional resolution that a use of force be limited or ended, of course, must not infringe the Executive's control as Commander-in-Chief over military tactics or the safe withdrawal of committed units. It is doubtful, too, that Congress could constitutionally order the President to limit or cease military operations essential to the direct defense of American territory.

Third, pending such time as both Houses vote to limit or terminate the President's use of force, his prerogative to wage war as he deems in the national interest should continue. Congress may fail to vote yea or nay for many reasons other than to realize ends one through four. Thus to permit Congress to pocket veto presidential use of force would risk frustration of ends five through ten for frivolous reasons.

This is an appropriate time to note a fourth allocational rule: the President, of course, should retain his absolute constitutional prerogative to use force when it involves little human or economic cost to this country and when it does not infringe the sovereignty of any other state. Executive use of American planes in 1964 to help Belgium paratroops rescue whites trapped by rebellious elements in the Congo, with the permission of the Congolese government, provides an apt instance of this prerogative. Occasions for executive action of this sort, however, are significantly less extensive now than during the nineteenth century, both because of the absence of stateless but inhabited territory in today's world and because of today's more stringent international rules against landing troops in, or taking reprisals against, any state, no matter how weak or uncouth.

5. Reasons for the Allocation of Control Just Described

Why should the President have a constitutional prerogative to initiate force, and to continue it as he thinks best, so long as Congress fails to vote to the contrary? Because ends five through ten are more important to the country today than was the case in the late eighteenth and nineteenth centuries.

First, international events arise, progress and alter their complexion much more rapidly now than they did then. Thus there is a premium on the government's capacity to respond quickly, flexibly and proportionately to emerging developments.

Second, international events today are far more complex than before, both in themselves and in their relation to other aspects of reality. It is increasingly important, accordingly, that the government take the steps required for coordinated, informed, expert and critical decisionmaing, as outlined in end six above.

Finally, international life is far more hazardous for the United States than ever before. True, during the first generation under the Constitution, this country suffered the tribulations of a small, weak nation caught up, if only at a distance, in the wars of the prevailing superpowers. But even during that period, the United States was protected by geography, the modest state of existing military technology and the slight American interdependence with the rest of the world. During most of the nineteenth century, the country was further sheltered from international dangers and burdens by a European balance of power, for whose workings it had no direct responsibility. Thus, American government rarely then confronted the possibility that an unpopular or secret use of force might be vital to national security. It did not face the necessity to make use-of-force policy, including commitments to other countries, on whose credibility and predictability American security and world order would depend to a measurable degree. And the rational review and revision of our use-of-force policy, as well as its efficient making and execution, had a second-order importance akin to that of the policy itself. For familiar reasons, none of these happy circumstances exists today.

In short, we live in a more fast-moving, complex and dangerous international world than existed before this century. We do not enjoy the peaceful isolation that the Framers expected or that the country in fact enjoyed during much of the nineteenth century. The changed needs of the United States call for greater presidential control over the use of force than existed prior to 1900, because the Presidency is institutionally more capable than Congress of realizing ends five through ten.

It is doubtful, moreover, that any person capable of election as Chief Executive for the foreseeable future would accept a use-of-force prerogative *more* narrow than the one described. As has been the case with rare exception during this century, Presidents are likely to continue to initiate force on their own authority whenever they believe it essential to the physical protection of American citizens or military units abroad or to the defense of national security. To persuade contemporary Presidents (a) to report meaningfully to Congress immediately after initiating force, and then (b) to accept congressional limitations on, or termination of, that force, should they be voted, is the greatest rollback in recent executive practice that realistically can be made, in my judgment.

Why is even that rollback desirable, in light of existing international circumstances? Because ends one through four remain at least as important to the country as they have ever been, and because Congress is best positioned to restrain or curb a President who, through malice or incompetence, fails himself to realize them. A *bona fide*, constitutionally guaranteed opportunity for Congress to express its views on significant initiations of force is the best means to ensure that the President does not use foreign war as a route to tyranny at home; that he does not act aggressively abroad with unpredictable and potentially catastrophic consequences; that he does not obstruct and ignore the development of majority sentiment after he and events have had an opportunity to shape it; and that he does not persistently act unsupported by national consensus, essential to avoid debilitating controversy over policy.

Congressional involvement is important also as more than a failsafe against executive error. Though the President may have a comparative advantage in the realization of ends five through ten, Congress too can contribute significantly to them. Two of the most important areas for legislative contribution have already been suggested: (a) the critical scrutiny of executive policy to expose both its weaknesses and the merit of alternatives, and (b) the impetus to review and revision of executive policies that have outlived their usefulness.

If the allocation of control described above were to become American practice, there would be great pressure on the President to involve Congress in the use-of-force decision-making process *before*, not after, the commitment of the military. With the chilling awareness that he must report any use of force to Congress and then risk limitation or termination by majority vote of both Houses, the President would be driven to seek either the fact or high probability of congressional approval before acting himself. Such executive-legislative consultation and collaboration, through channels now already in existence, would constitute the war-powers millennium. Thus, as a matter of practical politics, the President would be likely to present congressmen with use-of-force *faits accomplis* only when, in his judgment, immediate or secret action was essential to the physical protection of American citizens or military units abroad, or to the defense of national security.

Should the allocation of control described above satisfy devotees of presidential prerogative traumatized by what Congress did, and would have done given the opportunity, to Franklin Roosevelt before the Second World War? Or, on the other hand, should it satisfy devotees of congressional prerogative traumatized by what Presidents Johnson and Nixon, in particular, did to Congress in Indochina? Very probably not, for their positions rest on certain inescapable dilemmas. Roosevelt, had he been forced candidly to report to Congress and seek its approval, might well not have been able to take steps vital to American security. And the Johnson-Nixon buffetings of Congress over Indochina make clear congressional disarray in the face of executive *faits accomplis*. In other words, there is no avoiding the fact that, given an opportunity to decide, Congress may make disastrously poor judgments, or the fact that the President, given an opportunity to shape events before seeking congressional views, may notably narrow the legislators' decision-making freedom.

The problem symbolized by prewar Roosevelt is the more acute, in my view; it would be less easy for a President to evade an explicit congressional denial of authority than for Congress to negate a presidential *fait accompli*. Four mitigating considerations exist, however. First, Congress has grown in foreign-affairs wisdom since the 1930's and has the capacity to take significantly greater strides in that direction. Second, a President believing force vital to the national interest may always act under the allocation noted above and then rely on the persuasive power of his office and events to win either congressional approval or inaction. Third, in times of national emergency Presidents have acted beyond their constitutional powers, as then understood, and presumably would do so again. Fourth, to read Congress out of our constitutional process for initiating force, let it do to later Presidents what it did to Roosevelt, would obliterate one evil while ignoring the other president fallibility, against which Congress is our best defense.

II. WAR-POWERS LEGISLATION IN LIGHT OF RELEVANT CONSTITUTIONAL CONSIDERATIONS

A. Recapitulation of Constitutional Considerations

Reiterated in skeletal form, these are the constitutional considerations that in my view must be taken into account by any war-powers legislation. First, constitutional law governing the allocation of control between the President and Congress over the use of force is presently uncertain and in flux. Belief that the President has a constitutional prerogative to use force as he thinks necessary in the national interest now hotly contends with belief that he may do so only after obtaining prior congressional approval, except in a few emergency circumstances and then often for only a limited time, unless *ex post facto* congressional approval is forthcoming. The former belief springs from twentieth-century executive practice, especially that of the Cold War; the latter belief is rooted in the Framers' intent and in nineteenth-century practice.

Second, present constitutional confusion cannot be ended by invocation of the Framers' expectations as holy writ, nor by automatic canonization of recent executive hegemony as amendment by usage. An end to confusion more consistent with our constitutional tradition involves, first, identification of the ends that the country seeks to achieve by the nature of its allocation of control between the President and Congress, and, second, a constitutional division of authority between them that is most likely to realize those ends in *today's* world.

Third, the allocation of control that most realizes those ends, in my judgment, is one that involves less control for Congress than the Framers intended, but also less control for the President than most Chief Executives in this century have claimed:

1. Presidential Prerogative

We should constitutionally concede to the President the right to initiate force on his own authority, whenever he thinks it necessary in the national interest. We should further concede him the right to continue any use of force as he thinks necessary, so long as a majority of both houses of Congress do not vote to limit or terminate that use. Finally, we should recognize, as was the case in the nineteenth century, that some uses of force do not amount to "war" in the constitutional sense, and leave them wholly within presidential control; these uses involve applications of force that have little human or economic cost for this country and do not impair the sovereignty of another country, under current concepts of international law.

2. Congressional Prerogative

We should resurrect for Congress two of its dormant constitutional prerogatives: first, the right to be informed promptly by the President that he has begun a use of force involving "war" in the constitutional sense, whatever his reason for doing so; and, second, the right to limit or terminate that use of force, at any time following the President's report, by majority vote of both Houses. Under such an allocation of control, we would expect as a matter of practical politics, though not of constitutional obligation, that the President would obtain *prior* congressional approval before initiating force, except when he felt that the need for speed or secrecy compelled his unilateral action.

B. The Role of War-Powers Legislation

Is there a role for war-powers legislation in implementing these allocational rules? It is unlikely that a larger congressional voice, such as that described above, can ultimately rest on war-powers legislation. Rather it will depend upon the extent of congressional determination to become involved in these decisions, as shown by (a) internal reform to strengthen congressional capacity to deal with use-of-force questions rationally and, when necessary, swiftly or secretly; (b) congressional willingness to vote yea or nay on use-of-force policies during their formative periods; and (c) the use of existing means (for example, the appropriations and legislative processes) to cajole or coerce the Executive Branch into meaningful collaboration with Congress, primarily through its pertinent committees, on use-of-force policies from their birth to death. If these steps are not taken, war-powers legislation by itself will mean little. In fact, it may be counterproductive, representing one last ineffective but very public lunge at congressional use-of-force relevance. Better no law than one that proves meaningless.

Against this background, however, war-powers legislation does have merit on two scores. First, it may provide initial thrust necessary to break both the President and Congress out of the gravital pull of present executive hegemony. Without action-forcing, or encouraging, legislation and with the dimming of Vietnam passions, it is easy to envisage continued presidential control over American use of force, rocked only slightly by occasional bursts of congressional rhetoric.

Second, war-powers legislation may effectively spark the development of consensus about the allocation of control. If there are basic elements of the allocation on which the President and Congress can agree, and if these elements can be captured in a war-powers act, signed by the Executive, that concrete, visible agreement could provide a constitutional starting point for the evolution of general accord. In other words, war-powers legislation need not, indeed can not, deal with all of the allocational dilemmas posed by control over American use-of-force policy. But it can provide a simple, effective point of departure for resolution of those dilemmas.

C. A Basic War-Powers Act

War-powers legislation with clearly positive effect, in my view, would have terms such as these:

1. Text

Section 1. Whenever the President without prior congressional approval initiates the use of armed force by the United States, he shall submit promptly to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(*a*) the objectives of the use of force;

(*b*) the human and economic resources committed;

(*c*) the geographical areas affected and the length of time that given resources have been committed to given areas;

(*d*) projection of future developments as to each of the above;

(*e*) domestic and international legal bases for his use of force, including why no prior congressional approval of it was obtained;

(*f*) such other information as the President may deem useful to Congress in the fulfillment of its constitutional responsibilities with respect to the initiation of the use of armed force by the United States.

Section 2. Whenever the Speaker of the House and the President pro tempore of the Senate receive such a report and Congress is not in session, the President shall convene Congress in order that it may consider the report, unless the use of force has already been terminated.

Section 3. Whenever a report is submitted by the President pursuant to this act, both Houses of Congress shall proceed immediately to the consideration of the use of force cited in the report, unless the use of force has already been terminated.

2. Comment

Section 1 of the act above avoids the problem of what constitutes "war" in the constitutional sense by requiring the President to report *all* uses of force to Congress. He would have an opportunity under section 1(e) to indicate those uses that he believes do not constitute "war" and thus fall within his absolute control. Congress in turn would have an opportunity to disagree with him when it considers his report. Reasonable men may differ in close cases over whether a use of force has significant human or economic cost for this country and whether it impairs the sovereignty of another country, but they are not likely to disagree in the important instances—those in which the use of force is either patently significant or insignificant. Presidents and Congresses through a process of claim and concession over time should be able to reach basic agreement on what is and is not a use of force wholly within executive prerogative.

To minimize confusion over what is and is not "war" for constitutional purposes, however, Congress could legislatively define the dividing line. Any such definition would be arbitrary to a degree, but so long as it embodied the constitutional distinction between significant and insignificant uses of force, the definition should fall within congressional authority to implement the Constitution (see section 2 of "A More Detailed War Powers Act" below).

Section 1 above also indicates by its use of the phrase "prior congressional approval" rather than "prior congressional declaration of war" that the *form* of authorization by Congress has nothing whatsoever to do with the constitutional allocation of control.

Definition in section 1 of the minimum content of the executive report is necessary to prevent meaningless presidential compliance. With information of that sort in hand, Congress should be equipped to weigh the costs and benefits of the use of force. Two other problems with the reporting process exist: one that the President may not act quickly enough, if guided only by the adverb "promptly," and two that the President may believe that portions of the required report should be transmitted and kept in secret. Both problems could be specifically dealt with in the legislation, or left, as in the act above, to resolution through presidential-congressional claim and concession. "Promptly," in particular, would be difficult to define rigidly, since there may be occasions when the President needs to delay his report to guard the impact of American action yet unsuspected by the enemy.

Section 2 ensures that Congress will have a timely opportunity to review the executive initiation of force. The "unless the use of force has already been terminated" proviso exists to prevent needless special sessions. If the force has already been terminated, it very likely did not constitute "war" in the constitutional sense. Should the Speaker and the President pro tempore nonetheless wish a special session, they may urge one on the President. Should Congress upon later considering the matter wish to take a position, it would be free to do so.

Section 3 again assumes that in most cases there will be no need for immediate congressional action once the use of force has ended. It further assumes that Congress will *not* act on all uses reported to it; those within the President's absolute control are immune from congressional limitation or termination, and Congress may choose to remain silent for a time, or forever, even on uses that constitute "war".

Arguably, section 3 should prescribe procedures to force rapid congressional consideration of use-of-force reports. Assuming that statement of such procedures is technically feasible, it could well do more harm than good. There is no merit in having Congress rush to ill-considered decision, whether for or against presidential action. So long as Congress proceeds "immediately" to consider the question, and refuses to allow its processes to be thwarted by minority will, it should take the time for meaningful consideration by its appropriate committees and on the floor of both Houses.

The legislation described above is deliberately simple. It does not deal with any aspect of control over the war-powers except the actual initiation of force. And it presents only a few crucial elements of that allocation of authority, leaving the rest to articulation by the President and Congress in specific cases. It does provide Congress with what it presently lacks: the guarantee that it will

have the facts and an opportunity to act at the outset of any significant American use of force, except for those few, if any, that end before the President has time to report and Congress to be called into session. As suggested earlier, a Congress determined to be involved in American use-of-force policy can move from that opportunity to more general collaboration with the Executive via existing mechanisms.

D. A More Detailed War-Powers Act

If a fuller statement of the allocation of control than appears in the act proposed above is thought essential, my recommendation would be as follows:

Section 1. The Constitution allocates control between the President and Congress over American involvement in war. It is the purpose of this act to define procedures for the exercise by the President and Congress of their joint responsibility for American involvement in war.

Section 2. The United States is involved in war when 1,000 or more American ground troops, or equivalent air or naval units, are (a) committed to an area of combat, whether or not all of the committed units actually engage in hostilities, or (b) committed to the territory of another state whose government opposes their presence.

Section 3. The President may initiate on his own authority any use of armed force by the United States not amounting to war as defined in section 2 of this act.

Section 4. If the President seeks congressional approval before engaging in war as defined in section 2 of this act, American involvement may be authorized by any instrument approved by a majority of both Houses of Congress and signed by the President. That instrument may limit the objectives, geographical areas, human and economic resources committed, and the duration of American involvement, or leave all or any of these matters to the President's discretion.

Section 5. If the President engages in war as defined in section 2 of this act without obtaining prior congressional approval, he must submit promptly to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(*a*) the objectives of the use of force;

(*b*) the human and economic resources committed;

(*c*) the geographical areas affected and the length of time that given resources have been committed to given areas;

(*d*) projection of future developments as to each of the above;

(*e*) domestic and international legal bases for his use of force, including why no prior congressional approval of it was obtained;

(*f*) such other information as the President may deem useful to Congress in the fulfillment of its constitutional responsibilities with respect to the involvement of the United States in war.

Section 6. Whenever the Speaker of the House and the President pro tempore of the Senate receive such a report and Congress is not in session, the President shall convene Congress in order that it may consider the report.

Section 7. Whenever a report is submitted by the President pursuant to this act, both Houses of Congress shall proceed immediately to the consideration of the use of force cited in the report. By majority vote of both Houses, Congress may at any time ratify, limit, or terminate American involvement.

Section 8. So long as Congress fails to limit or terminate the use of force, the President may control American involvement as he thinks necessary in the national interest.

The act above elaborates the simpler version stated earlier, changed to take account of the definition of "war" included in the more lengthy version. Though the allocational rules stated in the second act are those which should be followed, in my judgment, the simpler act is preferable as actual war-powers legislation. The less complex the legislation, the more likely it is to be understood and respected. Both understanding and respect are vital if a war-powers act is to provide the thrust necessary to escape the pull of existing practice.

Mr. ZABLOCKI. Thank you Mr. Reveley.

You have not addressed yourself to S. 440, legislation with broad sponsorship in the other body. It will undoubtedly be considered in the Senate as the principal measure.

S. 440 NOT TENABLE

Mr. REVELEY. Your proposal comes closer to the sort of legislation I think appropriate, than does S. 440. S. 440 in my judgment is not tenable.

Mr. ZABLOCKI. Would you address yourself particularly to sections 3 and 5 on which some witnesses have raised questions of constitutionality.

Mr. REVELEY. I have a great deal of difficulty—as mentioned in a section of my written statement that I have not discussed this afternoon—in being dogmatic about what is and what is not constitutional. It seems to me that the country is in a period of extreme disagreement about what is and what is not constitutional, so far as the allocation of war powers between the President and Congress is concerned.

I think that sections 3 and 5 of S. 440 generally reflect the intent of the Framers and 19th-century practice. They do not reflect Presidential practice in this century—practice strongly supported by most Members of Congress during the heyday of the cold war. Thus, I have no certain answer as to the constitutionality of those two sections.

In my opinion, however, they do not reflect the best contemporary allocation of control between the President and Congress, in terms of the purposes that the country is seeking to achieve by that allocation. These are the purposes laid out in the written part of my statement that I did not cover.

PRESIDENTS COMMIT FORCES WITHOUT CONGRESSIONAL APPROVAL

Mr. ZABLOCKI. Professor Berger, as you noted on page 7 of your statement, throughout American history Presidents have sent the Armed Forces into conflict situations without prior congressional approval. In most cases these have been minor incidents, as you stated. But some have not been.

Mr. BERGER. Not in the 19th century.

Mr. ZABLOCKI. Is it your contention that a President has no power to deploy troops abroad even when the situation clearly would not involve combat, unless consent has been given by Congress?

Mr. BERGER. I suggest a deployment statute that would limit the circumstances in which troops could be deployed to situations which would not invite hostilities. I would not attempt either here or in writing to draft a deployment statute but plainly I think the Congress ought to be consulted and its authority should be sought before you deploy 300,000 troops in Germany. It happens as a matter of policy that I would be for it, but I think the Congress ought to be heard. I want to put this to the forefront of your thinking. It is not merely that I have any special love for the Congress and a distaste for the Presidency, but I think the Congress is the great debating forum. It is the representative forum. It is constantly being changed. It represents a diversity of opinion. That means to me that on any given issue debate will bring forth all sorts of imperfections and counterarguments that should be considered. No matter how heated you are, time after time there have been strong men who have had a strong impact on your thinking because you do listen to reason. Not always, but generally. It is for that reason I would like to have discussion here.

AUTHORIZATION FOR DEPLOYMENT

But to go back to deployments, I would find no difficulty with a comprehensive statute that would lay down the sort of situations in which no further authorization for deployment need be sought. But what I submit to you is that as a constitutional matter, deployment is the prerogative of the Congress and the thing has been turned topsy-turvy. You are never consulted. One of the consequences is the Executive deploys the destroyer Maddox to invite a shot. He deploys troops where somebody is going to go at them.

I read of a meeting not long before Pearl Harbor where Secretary Stimson, then Secretary of War, conferred with various admirals on "How can we cause the Japanese to strike the first blow without too much risk?" That sort of judgment just should not be left to generals, or to Secretaries. To put your troops in troubled spots is like a little boy putting a chip on his shoulder. It is going to get knocked off and then you are in a fracas.

Mr. ZABLOCKI. Certainly you have an understanding, Professor Berger, that the committee at least considers setting some clear demarcation as to what would constitute invitation to hostilities as determined, for example, by the number of troops involved. Mr. Reveley in his more detailed war powers proposal on page 31 seeks to draw the line between what is and what is not a war, by setting a number of 1,000 or more ground troops or equivalent air or naval units. This raises several questions.

LIMITATION DETERMINED BY NUMBERS

In a nuclear age when a hydrogen bomb dropped by a fighter bomber with a crew of two could utterly devastate a small country, how can any number such as 1,000 be set? That clearly would be a full-scale war even though only two human beings were involved. I find some problems if we try to include in legislation a demarcation or a limitation determined by the number of personnel.

Mr. BERGER. It so happens, by coincidence, Mr. Reveley and I arrived at a suggested 1,000 independently, but I have no special affinity to 1,000. Problems like that, Mr. Chairman, in my judgment—and I may say something of which you are not aware—I spent 8 years in the Government and I was later chairman of the Administrative Law Section of the American Bar Association. We were trying to reform the Administrative Procedure Act, so I know something about the problems of legislation. I would not pretend to make suggestions to you for the details of deployment statutes. I tackled a broader problem. Acheson said categorically Congress has no right to interfere with deployment, and I laid the constitutional basis that refutes that claim, makes it untenable.

Now what the details are, I think like the details of all legislation, some of your splendid aides have to hammer away at it. You have to talk about it back and forth. They are not insoluble problems. You might want to give more elbow room to the President in a deployment statute in certain situations. But certainly you can start with this, it seems to me, given a situation which plainly invites hostilities, deployment must have the authorization of Congress. Wouldn't you agree?

CUSTOMARY PRACTICE VERSUS LEGISLATIVE PRACTICE

Mr. REVELEY. As a matter of customary practice perhaps, not as a legislative requirement. Remember, I firmly believe that formal war powers legislation ought to be kept simple to increase the likelihood that it will be obeyed.

Mr. Chairman, let me comment on your well-taken point about nuclear weapons. My limit of 1,000 ground troops, or their naval or air equivalent, assumes the use of conventional weapons. Since one nuclear weapon, even if carried in a suitcase by a little old lady, could start a war in the most fundamental sense, I would condition my 1,000-troop proposal on the use of conventional weapons.

Mr. ZABLOCKI. How would you define an equivalent air or naval unit? Would that definition be left to the President or would legislative history by Congress make it clear?

Mr. REVELEY. I think Congress would provide the definition, though I haven't as yet done so. The 1,000-troop limit, however, is my alternative proposal. I believe the better arrangement is one in which the President is allowed to do as he will, subject to a meaningful reporting requirement, which promptly gives Congress an opportunity to take whatever action it thinks is appropriate. If Congress gets into definitional problems in war powers legislation and tries to cover too much ground, it risks producing a statute that will not be obeyed either by the President or by Congress in enough instances to give it credibility.

DEFINING "WAR" IN CONSTITUTIONAL SENSE

But if Congress wants to define "war" in the constitutional sense, I think it can be done, taking into account the nuclear versus conventional weapons distinction, and taking into account the need for a clear definition of what naval and air forces are equivalent to 1,000 ground troops.

Mr. ZABLOCKI. I certainly appreciate your comments on H.J. Res. 2. I find your proposal intriguing because it is so simple. I agree with you that perhaps S. 440 is too definitive and I thought H.J. Res. 2 would be a compromise version. I believe your suggestion about H.J. Res. 2, regarding the reference to declaration of war warrants serious consideration.

Mr. BERGER. I would add that authorization is a more flexible term today than declaration. Your authorization can take several forms, although I would remind you of Professor Bickel's insistence don't spell authorization out of appropriations or something like that. It must be an express authorization, but "authorization" is a broader term.

Mr. ZABLOCKI. Governor Thomson?

Mr. THOMSON. I wonder, gentlemen, if we had had a proposal such as Senate 440 or H.R. 2 at the time President Kennedy was sending 15,000 American troops into Vietnam, would there have been any benefit from it at all except the involvement of Congress in a decision?

Mr. BERGER. If I may address myself to that, I think that is a tremendous benefit. I want to remind you, sir, of the Tonkin Gulf resolution which is a little later, when you had one lone voice, Sen. Wayne

Morse when Fulbright was taken into camp by Lyndon Johnson, something he never ceased to regret.

Mr. THOMSON. Hindsight is helpful.

NONE OF US HAVE FORESIGHT

Mr. BERGER. But those who don't learn from hindsight can't learn, because we, none of us, have foresight. At that time there was one lone voice, a maverick Senator who said, "Let's have hearings. Let this thing be aired" and I think, for example, had that been aired—I will go further, had some of the intelligence estimates you can find if you read the Pentagon Papers been disclosed, there would have been a debate. I think if we are going to go into danger we should go open-eyed, we should know what is happening and the place to find out is in Congress.

Mr. Congressman, I have great admiration for many Congressmen, not for all. I don't think they are the ultimate responsitory of wisdom; but I simply cannot grasp what it is that takes a man who is just another Congressman up here on the Hill and transforms him into a miracle man when he moves down a mile or two to Pennsylvania Avenue. There is something miraculous about that that has always eluded my grasp.

You see there is a much better exchange of opinions right here than you get among the White House circle. When you read the inside stories, by people like George Reed—if you have a strong man like Lyndon Johnson, he does not want anybody but yes men around him. He made up his mind so he gets trapped in his own frailties, but here you have fellows as willful and strong-minded as you are. You are a marketplace of ideas, arguing the whole thing out.

You may come out on the wrong end, but I am a Democrat and I accept that—even that they elected Nixon. That is the democratic process.

CONSTITUTIONAL ALLOCATION OF WAR POWERS RESPONSIBILITY

Mr. REVELEY. Let me answer in terms of several of the underlying purposes that we are trying to achieve by the constitutional allocation of war-powers responsibility, as noted on pages 8 through 11 of my written statement. One objective is to encourage democratic control over the use of force. Democratic control is encouraged if the Executive must promptly report to Congress the facts of what he has done and his rationale for doing it.

Another objective is to create and maintain national consensus behind American use-of-force policies. Absent that consensus, we know policies can come to a bad end, along with other things tainted by them. If Congress is involved from the outset, the building of consensus is more likely to occur.

We always want rational use-of-force decisions, and an element in rational decisionmaking is criticism of Executive policy. I don't think we are likely to get such criticism consistently from any source but Congress. The sooner Congress gets the facts and becomes involved, the sooner meaningful criticism can begin.

Finally, congressional involvement should ease the review and change of use-of-force policies when they become outmoded.

In short there is real benefit in having congressional involvement from the outset. It may not lead to specific authorizing, limiting or terminating action by Congress. But it should lead to focused, informed congressional consideration of American involvement in conflict at its very beginning.

THE FACTS DRIBBLE IN

As things now stand, I don't think Congress gets the opportunity for that consideration. The facts dribble in. Many Congressmen feel like they never have a clear point in time, at which, if they want to, they can take a stand.

Mr. THOMSON. Congress knew in 1963 that 15,000 troops had been committed to Vietnam and the next year they got the Gulf of Tonkin resolution from the President and they passed it. Now we did not have any statutory requirements for the President to report to the Congress, but he did report to the Congress and he did ask Congress to pass the Gulf of Tonkin resolution and Congress passed it.

Mr. REVELEY. I am not of the school that thinks Congress was uninvolved in the decision to commit this country in Vietnam. I do think, though, the congressional involvement was haphazard, never clearly focused, and generally clouded by the cold war notion that it is more important to support the President than to examine the costs and benefits of his policies. What I am suggesting is that war-powers legislation can be useful in an action-forcing sense, by providing procedural impetus to get Congress to do what it already has the power to do if it wants to, and to get the Executive also to do what he has the power to do but often chooses not to do.

Mr. THOMSON. Do you gentlemen both think that we were engaged in a defacto war in Vietnam or a de jure war in Vietnam?

COMMANDER IN CHIEF'S RIGHT TO DEPLOY TROOPS IN CAMBODIA

Mr. REVELEY. I think de jure in light of the Tonkin Gulf resolution.

Mr. BERGER. I never stopped to think about it. It was war.

Mr. THOMSON. If it was either de facto or de jure, did the Commander in Chief under those conditions have the right to deploy troops into Cambodia?

Mr. REVELEY. That is a more difficult question. Under the terms of the Tonkin Gulf Resolution, which were broad, he may well have. But the Cambodian incursion can be viewed as a new war just about as easily as it can be understood as an emanation of the war in Vietnam.

Mr. THOMSON. When President Roosevelt ordered troops into Africa, was that extra-constitutional or extra-legal? He is the Commander of troops and during the war he has the right to deploy those troops.

Mr. BERGER. I had great difficulty with that as I listened yesterday. Let me just change the facts a little.

Mr. THOMSON. We can't now.

Mr. BERGER. Not those facts. You know we test our assumptions by looking at the possible application to other facts. As a lawyer you know a very slight change of facts can produce a quite startling difference of result.

THE THEORY OF HOT PURSUIT

Consider, for example, MacArthur was raring to go into North Korea. Truman stopped him because that would have involved China. It was relatively simple to go into Cambodia; but suppose on the theory of hot pursuit that the "first General" decides to go into China, protect his troops. How far does this go?

My own feeling is that we have to stop and ask the policymaker how far does it want to go at any point? The final voice in measuring the cost to the Nation as against the benefits that accrue is for the Congress.

Now I would like to make another point. I was an ardent Roosevelt ian. I worked for the New Deal at the time and admired vastly what he did, and was consumed with a passion against Hitlerism. As I have gotten older—and I am getting along in years—and reflected upon it all, I have been very worried. Today there are two schools of thought about it. There is a school of thought that feels, thank God, that we had a leader that was capable of disregarding the will of the people and the will of Congress. You were told yesterday he got his draft law by one vote. Others think—and I have come to that conclusion—that a democracy has a right to go to hell in its own way.

I don't glory in what Roosevelt did to defy Congress. I think Congress is elected to have a voice in all these decisions. It might have been a frightful thing looked at in hindsight. But I think ultimately our Constitution—we have rocked along for 175 years because we have lived under it and respected it—must prevail. A nation, Mr. Congressman, the salvation of which depends on the wisdom of one man, is in one hell of a box.

CONGRESS AUTHORIZING TOTAL WAR

Mr. Reveley. I'd like to speak to the analogy between North Africa and Cambodia. My understanding of the Second World War is that Congress authorized total war, anything the President wanted to do to crush the enemy he might do. If Congress had been clear in Vietnam, however, and authorized only a ground struggle in South Vietnam, which in my judgment it constitutionally might have done, then the Cambodian incursion would have been beyond the authorization given the President.

Even granting the breadth of the Tonkin Gulf resolution, if the President had wished to attack the Soviet Union in his conduct of the Vietnam War, I think that would have been beyond the authorization given him by that resolution. Thus, what the President may do depends on the nature of the authorization.

A different but related question is the Commander in Chief's control over tactics and strategy, and how this control bears on the length to which Congress can go in limiting the theater of war.

Mr. Berger. Would you permit me to address myself to an important matter that was raised yesterday? That is, as an experienced seasoned legislator, you looked down the road, anticipated the practical results, and foreseeing the possibility of a veto you asked "Is this an exercise in futility?" It is to that I wish to address a few remarks. I do not think it is an exercise in futility.

NO QUESTION ABOUT CONGRESSIONAL WARMAKING POWER

Mr. Reveley has told us he agrees that as far as the original intention of the Framers, and in the 19th Century practice, there is no question about the warmaking power of Congress. Presidential warmaking is a 20th Century practice, and by this we must mean from Korea and Vietnam only.

We have a President that says, "I can create my powers;" they are needed for our safety and I can make them. There is a school, in part including Mr. Reveley, who says these practices have become embedded in the Constitution. He has very sophisticated ideas, but still leaves open the question, who is going to redistribute the powers defined in the Constitution. Others, believe that what the Constitution says, it means. If you are going to change it, you have to amend it. That, according to Mr. Reveley, is what most of the people think; and I agree. I am one of them.

Mr. THOMSON. The Constitution says that Congress has the power to raise and maintain an Army and a Navy. Congress has for many years raised and equipped an Air Force. Now, how does that——

Mr. BERGER. I would have some difficulty being literal-minded about that because by that token we would have to say we could not have nuclear forces because all we knew back in the days of old was musketry. The joker, Mr. Congressman, is you used the word "Air Force." Suppose you had infantry, artillery, and Air Force in the Army——

Mr. THOMSON. We have an Army Air Force.

LITERAL READING OF THE CONSTITUTION

Mr. BERGER. The point I am making is that even on a literal reading you cannot read "Army" in this respect as not to include technical apparatus which becomes an arm of the Army.

Some would now weigh Presidential practice against the clear intention of the founders. This is not an area of textual doubt. We know what the Framers meant by their division of powers and what they said is crystal clear. The State Department expressly, and Acheson tacitly, admitted, that the only power the President was given was to repel attack on the United States.

It is time for a construction by the Congress of its own powers. It is accused of acquiescence. Therefore it has to say, "There are our powers." Now suppose; that you are vetoed. What then?

Mr. Bickel said yesterday you should then have a concurrent resolution. Let's say you are vetoed and adopt a concurrent resolution embodying your idea of what the original powers are. Now you have a concurrent resolution which gives the sense of Congress of the meaning of the Constitution, which it is entitled to do: And suppose you have a headstrong President who now sends 15,000 troops to Vietnam or tomorrow decides to resume the war in Vietnam, bomb North Vietnam back into the stone age. At that point you are entitled to go into court and say that the President is acting contrary to the Constitution.

I want to say to you bluntly it does no good merely to huff and puff.

ANTICIPATING WHAT CONGRESS WILL DO

It is because the President knows and anticipates that is what Congress will do that he is becoming increasingly arrogant and willful. Witness what he has done about John Dean and Dwight Chapin in his latest effusion about executive privilege. He is so daring because he knows that Senator Eastland won't subpoena Dean. Were I sitting where Senator Eastland sits, I would issue a subpena; I would hold Dean in contempt; then I would send the Sergeant-at-Arms to arrest him, and I would take a corps of press photographers with me. If the President met the Sergeant-at-Arms with a file of Marines, the sergeant should say, "Mr. President, I am only trying to get into court." Because 20 minutes after Dean is in the guardroom he can send his lawyers into the District Court and obtain a writ of habeus corpus. Instead of being like a pair of washer women, we will have this decided in a respectable way.

Get your concurrent resolution on the books, and if the President sends 15,000 troops into Vietnam, Congress should appeal to the courts. Just bear in mind the court stopped Truman in the midst of the Korean War from a seizure of the steel mills. Bear that in mind. There are precious few decisions by the Supreme Court that intimate that the Commander in Chief enjoys supreme powers. The reason I spent time here, Mr. Chairman, being tedious perhaps and boring you with details of constitutional history, I want to be sure that you have a firm grasp of the historical facts. The first step is to know the truth, and the truth shall make you strong. Know the constitutional facts, and that there is no disagreement as to what the original intention was.

THE WISDOM OF ANY PARTICULAR LEGISLATIVE PROPOSAL

Mr. ZABLOCKI. Mr. Findley of Illinois.

Mr. FINDLEY. Mr. Berger, I am sorry I have to phrase it this way, but I believe you do recommend enactment of S. 440, is that correct?

Mr. BERGER. Without commenting on the wisdom of the statute. I have not addressed myself, Mr. Congressman, to the wisdom of any particular act. I think the most important thing about the proposed bills is that they mark a first step toward resumption of your powers. That is what is needed.

Now we can talk endlessly about details and I submit this thought to you. There never was a perfect statute.

Mr. FINDLEY. I saw that remark and I agree with you, but we do have to deal with details here. We have before us House Joint Resolution 2.

Mr. BERGER. I am the wrong man for you. I don't want to waste your time.

Mr. FINDLEY. You would rather not respond?

Mr. BERGER. That's right. I speak with confidence—about what I have studied; when I studied the war powers I went back to all the original sources for myself. I combed everything, so when I talk to you about it—I am not diffident. I learned to sift out everything, and then when I make up my mind to have confidence in my judgment. But I don't want to advise you or give you off the top of my head suggestions or criticism without study.

GIVING MORE POWER TO PRESIDENT

Mr. ZABLOCKI. But, Mr. Berger, you set your own precedent because you did comment on section 3 in House Joint Resolution 2 as giving more power to the President than he has now.

Mr. BERGER. One aspect. I said first, Mr. Chairman, that in the main what the statute does is restore the original distribution of powers which gave Congress the power to authorize, to wage war and gave the President the right to repel attack on the United States and to conduct war. Then I said—maybe I exposed myself—I said it went beyond that when it authorized him to protect troops located outside the United States, which Congress could do.

But remember the reason I mentioned that was to make the point that you have to exercise control over deployment. Now another thing, I have been down three times in the last month. I have been asked to talk about Executive privilege and I have tried to study that very carefully. It is as great an issue as you have here in war powers because the flow of information is power. He who controls that controls our lives. Vietnam teaches that with all its concealment. I have not had time to study the details of your statutes and I would be foolhardy to talk about them.

TRYING TO DEFINE THE WAR POWERS

Mr. FINDLEY. Thank you for your candor on that. I would like to ask Mr. Reveley a few questions. First of all, the language that appears at the bottom of page 26—the basic war-powers act—I find especially appealing because it is so close to the precise language I first drafted about, I think, 3½ years ago.

I did not attempt to define the war powers. I dealt only with reporting requirements. And I still feel myself that this could be a very useful step forward for the Congress to take, even if we do not try to define the war powers vis-a-vis the Legislature and executive branch.

I would like to ask you a few questions about your use of words. You have in section 1 the word "initiates." What does that mean?

Mr. REVELEY. I am trying to distinguish the situation in which the President sends American troops into actual combat from the situation in which he simply sends them to a place where hostilities are imminent, but not in progress. By initiate I mean the commitment of Armed Forces to actual hostilities.

Mr. FINDLEY. You have reason to prefer initiates over the word commits?

Mr. REVELEY. No.

Mr. FINDLEY. In your view do they mean the same thing?

PRECISE MEANING OF WORDS

Mr. REVELEY. Yes, the distinction is between imminent hostilities and actual hostilities and the verb used to describe involvement in the latter could be either initiates or commits.

Mr. FINDLEY. Continuing that phrase you say, "Approve and initiate the use of Armed Forces * * *"? Do the words "use of," mean deployment?

Mr. REVELEY. No, it does not. It means only commitment of American Armed Forces—ground, air, or naval—to actual hostilities.

Mr. FINDLEY. Do you have any reason to oppose the expansion of that section then to require a report when the use occurs as well as when the deployment occurs?

Mr. REVELEY. My principal reason is this: A reporting requirement for deployment raises enforcement and definitional problems. It seems likely that there will be some deployments so de minimis in their potential consequences that the President will feel no need to report them and Congress will be reluctant to make an issue out of his failure to report—even though, for example, the deployment in question doesn't fall within the exemptions of House Joint Resolution 2 section 5(2). To remedy this problem, Congress would be driven to complicated, difficult to understand statutory definitions of reportable and nonreportable deployments.

ELEMENTAL WAR-POWERS LEGISLATION

I feel strongly that if Congress does enact war-powers legislation, it ought to be elemental, so simple that any reasonable man can understand and obey its requirements. If after that sort of basic legislation proves viable, Congress wants to go on and pass something more complex, fine.

I also feel that war-powers legislation can do little more now than provide the initial thrust necessary to escape the gravitational pull of present practice—to push Congress and the President out of their present ways of doing use-of-force business. Beyond that, collaboration between the two branches will come, if at all, through existing mechanisms, for example, committee proceedings, informal contacts, legislation and appropriations, on a day-in, day-out basis from the beginning of the formation of any use-of-force policy to the end.

Thus I favor legislation that deals only with the commitment of American Armed Forces to actual hostilities, that requires the President to report promptly and Congress to consider his report immediately.

Mr. FINDLEY. My next question relates to the word "promptly" which is the same word we wound up with in both of our proposals. Yet we never defined this to my satisfaction in the legislative history. I think we use some words like "from 2 to 5 days" or something like that. Is that precise enough in your judgment?

SETTING SPECIFIC DEADLINES

Mr. REVELEY. In my early drafts of a war-powers act, I set specific deadlines for the filing of the report, for example, 24 hours after the beginning of the use of force if Congress is in session. In later drafts, I dropped the precise times because there may be occasions when it is not in the national interest to reveal that an American initiative is underway before it can be sprung full-blown on the opposition.

Mr. FINDLEY. You mean the hostile government?

Mr. REVELEY. Yes, sir. If you start trying to specify precise times, you run head-on into the problem that they may conflict with the need for secrecy. Also, there may be occasions when it is reasonable for the

President to take 48 hours rather than 24, because he is absolutely swamped.

Mr. FINDLEY. Doesn't that argue even more strongly for the preparation of that report in that moment of crisis when he is adding up pros and cons of a given course of action? Should not he take into account the necessity to report?

Mr. REVELEY. I didn't mean to suggest that the President shouldn't report as a rule within 24 hours. But it should be up to Congress through its action in specific cases, rather than through potentially unrealistic statutory deadlines, to make clear to the President that he may not wait 48 hours to report when he could have reasonably done so in 24, and that there is no politically acceptable possibility of his waiting a week under such circumstances, or of his not having thought through the costs and benefits of American involvement before he acted.

Mr. FINDLEY. A further safeguard from the standpoint of the Executive is that the report under our bill is to go to the Speaker of the House and the President pro tem of the Senate.

Mr. REVELEY. Which is what I propose also.

SPECIFYING THE REPORTING TIME PERIOD

Mr. FINDLEY. If it were deemed advisable, there could be a time period of the highest classification and still meet the reporting requirements. What I am getting at is perhaps we ought to be specific and say within 24 hours.

Mr. REVELEY. If you couple that with the understanding that then the Speaker and the President pro tem would not disclose the report.

Mr. FINDLEY. Publicly.

Mr. REVELEY. Publicly. But if the report is given to Congress, especially if Congress must be called into special session to receive it, the secrecy dilemma remains acute; and if the report isn't given promptly to Congress, has much been accomplished by giving it to the Speaker and President pro tem? Perhaps so. It would at least make clear to the President that he has to have the report written and handed over promptly even if it is not immediately disclosed to Congress as a whole.

Mr. FINDLEY. The report could be transmitted to the Chairman of the Foreign Affairs and Foreign Relations Committees. They could be brought into consultation. They could decide whether to pass it on to the Members of their committee.

KEEPING REPORT IN CONFIDENCE

Mr. REVELEY. What about a time certain for transmission of the report to the Speaker and President pro tem, coupled with an understanding in the legislative history, or an explicit statutory proviso, that if, in the President's judgment, disclosure of the report, all or any part of it, would impair national security, then it would be kept in confidence by them.

Mr. FINDLEY. I think that was in our language.

Mr. ZABLOCKI. It was developed in legislative history when we debated the question of the floor.

Mr. FINDLEY. My next question relates to page 27 under (E). I don't know if you were here yesterday when the witnesses challenged a portion of the reporting requirement and they made a good point against the present reference to present treaty provisions. They took the position that there is no treaty that really conveys to the President automatic authority to use military force.

And I am inclined to think they are right and if it is listed as a source to which the President could look for legal justification, then we are inviting trouble.

Mr. REVELEY. I agree there are no treaties in existence at the moment that automatically authorize the President to use force on his own authority, but that is not what I meant.

Mr. FINDLEY. What do mean by "international legal basis"? Is there such a basis?

VIOLATING INTERNATIONAL LAW

Mr. REVELEY. In weighing the costs and benefits of American involvement in war, one thing Congress needs to know is whether our involvement in that particular conflict violates international law, for example, Article 2(4) of the U.N. Charter; any violation of international law in American conduct of war has legal, political, and moral consequences that may be quite costly to the country.

The President couldn't make a convincing case under section 5(c) of my proposed act that international law is in accord with American use of force if the force were used aggressively.

Mr. FINDLEY. You are not suggesting he use any international legal basis as his authority for using force?

Mr. REVELEY. No, I don't think that is possible.

Mr. FINDLEY. We ought to figure out a better expression.

Mr. REVELEY. It seems to me that there are two sorts of war costs: first, the human and economic costs to this country, and the diminished legal rights of its citizens stemming from a draft, restrictions on freedom of speech and so forth; second, the costs that come from damage to our international political and legal situation. The latter is what I am getting at under "international legal bases."

I am not suggesting that the President can ever get from international law a prerogative to use force on his own authority. That authority must be found, if at all, in domestic constitutional law.

Mr. FINDLEY. But it is important that this statute not leave such an impression.

LANGUAGE IS CONFUSING

Mr. REVELEY. Right. Your point is well taken that my language is confusing. That is not what I meant.

Mr. FINDLEY. My other question relates to section 3 in which you require that both Houses proceed immediately to the consideration of the use of force. By "consideration" do you mean consideration by a committee or by the entire Chamber or both?

Mr. REVELEY. Again I chose not to attempt to state procedural mechanisms for consideration. The kind of consideration desired will vary from case to case. If a matter is presented that Congress as a

whole wants to consider quickly, then Congress always has the power to adopt the necessary procedural rules to speed action on that case. There are many instances in which I think the action-forcing procedures now in S. 440, however, could be counter-productive. Congress may not want to act that quickly. It may need a couple of months to weigh the costs and benefits. That is fine, so long as the appropriate committees immediately begin to consider the use of force.

Mr. ZABLOCKI. On that point you are aware that House Joint Resolution 317 provides that a report or action on the part of the Congress be taken immediately so the report would be part of the congressional action the very next day.

Mr. REVELEY. I think that is much too quick.

Mr. ZABLOCKI. And only one House——

Mr. REVELEY. One House can't do it.

PROTECTING U.S. CITIZENS AND NATIONALS

Mr. FINDLEY. One question. Is it wise for the Congress to include in a statute a statement showing clearly that the President has a reserve power to use military force to protect citizens or nationals of the United States?

Mr. REVELEY. My feeling is that it is no wiser to include that provision than other similar provisions, for example, that the President may repel attacks on American territory. I would prefer to leave to Congress and the President, through a process of claim and concession in actual cases, the definition of those situations in which the President ought as a rule to act unilaterally and those situations in which he ought as a rule to consult Congress before acting.

Mr. ZABLOCKI. I gather Mr. Reveley you have a preference for the 92d Congress version to House Joint Resolution 1, which did not contain section 3 and section 6.

Mr. REVELEY. Yes, I do.

I think that in an attempt to accommodate the Senate and to deal more specifically with the allocation of control your measure has lost some of the classic simplicity and workability that it had in the past.

Mr. ZABLOCKI. Would you amplify on your reason for suggesting that section 4 in House Joint Resolution 2, the consultation provision, should not be included? I am interested in your position because my own view is that we should obtain that by congressional insistence.

EXECUTIVE'S CONSULTATION MEAGER IN PAST

Now, given the meager performance of the executive branch in recent decades do you think the White House would conduct such consultation on its own? Wouldn't such Executive-congressional consultation be more likely if we had it spelled out in legislation?

Mr. REVELEY. That might be the result. But if you spell it out, and consultation does not occur, then you have a dead letter in your act, which undermines the force of the whole measure.

I feel that change in existing practice, which is essentially executive dominance, is likely to come only when the President decides that consultation with Congress is both inescapable and useful. To this end,

Congress needs to engage in internal reform that will enable it to have a more meaningful voice in use-of-force decisions, and Congress needs to develop the will to take the political heat involved in acting on these questions when they are still young.

Mr. ZABLOCKI. Would you clarify what you mean by internal reform of Congress?

Mr. REVELEY. For example, improvement in the process by which Congress gets information essential to use-of-force decisionmaking.

Mr. ZABLOCKI. That is what we are trying to do.

Mr. REVELEY. I know that. Reporting provisions in war-powers legislation have merit on that score, but I think Congress needs to start getting information long before the time at which these provisions would come into play.

INFORMATION NEEDED IN EARLY STAGES

In other words, information is needed during the early stages leading toward the moment at which a decision to commit or withhold troops is actually made.

I am talking about basic foreign affairs information. The kind of information that the Executive has in vast quantities today, but that Congress struggles to grasp.

In part, Congress struggles because the Executive won't help. In part it struggles because Congress itself does not have strong information gathering and distributing machinery.

Mr. ZABLOCKI. In the area of advising Congress on executive agreements, we did not get such information voluntarily.

Indeed, other agencies within the Government and the executive branch did not receive such information and only after we passed legislation did Congress and the other agencies get that information.

For example, the State Department benefited by our legislative action.

Mr. REVELEY. That is right.

Mr. ZABLOCKI. So I feel strongly about the consultation provision. I think unless we insist by legislation we will never get it.

Mr. REVELEY. Why couldn't Congress set up a mechanism independent of the executive branch to get basic foreign affairs information?

A PRIORITY-GOVERNED PROCESS FOR DECISIONMAKING

If Congress were to structure its committees to produce a coordinated, priority-governed process for reaching decisions; if it developed better procedures for dealing with classified information; if it had better procedures for acting swiftly; and if Congress were to start taking positions on use-of-force issues from their outset, it seems to me that you would be able to cajole or coerce the Executive into consultation that he is not going to agree to otherwise.

This sort of internal reform and development of willpower by Congress is going to make the difference, rather than language in war powers legislation. Though it's possible a statutory requirement on consultation could be helpful also.

Mr. ZABLOCKI. Mr. Reveley, we in Congress attempted to get information in the past and the reply from the executive branch was the inevitable executive plea of executive privilege.

Mr. BERGER. They reply "It is not in the national interest to tell you."

Mr. REVELEY. Could you set up a mechanism that is run by Congress, that gets the information itself?

I grant that there is some information that can come only from the Executive, but it seems to me that much of the basic data important to judging foreign affairs could be gathered by congressional operatives, just as executive operatives gather that information for the executive branch.

OBTAINING THE PRESIDENT'S VIEWS AND PLANS

Mr. ZABLOCKI. I do not see how any machinery in Congress could obtain the views and plans of the President, what he is intending to do.

Mr. REVELEY. Could they get information on what is going on in Vietnam? Not on Presidential thinking, but on what's going on in the world?

Mr. ZABLOCKI. Congress would be getting the information after the fact?

Mr. REVELEY. Couldn't you get it before the fact?

Mr. ZABLOCKI. I doubt it.

Mr. FINDLEY. A bill that Senator Cooper sponsored in the last Congress and I believe passed the Senate but which unhappily had no consideration on this side of the Capitol would have required the CIA to make detailed reports to the Congress of its factual findings. Not its techniques but its findings worldwide. This I think would be a very significant advance.

Mr. ZABLOCKI. For years, Mr. Findley, I have sponsored legislation calling for a Joint Committee on Intelligence but we never got anywhere because the executive branch and the leadership in Congress did not support the proposal.

LEADERSHIP BEHIND CONGRESSIONAL COMMITTEES

Mr. REVELEY. The leadership has to be behind the congressional committees directly responsible for foreign affairs, and that support has often been lacking in the past. This is another element of congressional reform that seems necessary to make Congress a more potent participant in war powers decisionmaking.

Barring such reform, all the war-powers legislation on earth won't go but so far in restoring a congressional voice in use-of-force decisions.

Mr. ZABLOCKI. It was proposed in hearings in the past that a joint committee on information be created. Do you think this might resolve the problem?

Mr. REVELEY. One problem with joint committees is that they tread upon other committees' jurisdiction and thus often do not end up very effective.

Mr. ZABLOCKI. One effective role that a Joint Committee on Information could play would be when Congress is not in session. It could receive the reports without calling the Congress into session.

Mr. REVELEY. If we were starting from scratch, it would be useful to have a Joint Committee on Foreign Affairs, like the Joint Committee on Atomic Energy, with legislative teeth, without significant competition from other committees. That would be the most rational way of going about it, but since we are not starting from scratch, I don't think that sort of solution is realistic.

COORDINATION BETWEEN CONGRESSIONAL COMMITTEES

But how do the Foreign Affairs Committees in both Houses coordinate their work with that of the Armed Services Committees, and the Appropriations Committees? How are foreign affairs priorities set and followed in Congress? These sorts of problems of internal organization, I think, have to be confronted if Congress is to effectively reestablish itself on foreign affairs.

Mr. ZABLOCKI. If I may go to another troubling issue, and either one of you may respond if you wish.

Professor Bickel testified yesterday that he does not believe the 30-day provision contained in S. 440 is essential to the operation of the bill. But that section 3 of S. 440 is essential.

Would you care to comment?

Mr. REVELEY. As far as the 30-day provision goes, it is most unfortunate, because it would enable Congress to pocket veto Executive action, to terminate a use of force without a decision on the merits. I think that if the S. 440 approach is taken, yes, section 3 is needed to make it effective, because, unlike the 30-day proviso, that section spells out when the President can act by himself and when he cannot.

Mr. ZABLOCKI. The second congressional prerogative to which you refer on page 24 of your statement, Mr. Reveley, is the right to limit or terminate the use of force at any time following the President's report by a majority vote of both Houses.

What exactly do you mean by saying "to terminate and limit"?

DEFINITION OF "TERMINATION"

Mr. REVELEY. By termination, I mean a congressional resolution saying the country is not to be involved in that particular conflict. Should such a resolution pass, then I think the President must terminate American involvement. He may do so in a manner consistent with the safety of American forces during the withdrawal process.

Mr. ZABLOCKI. In your opinion a concurrent resolution would be of sufficient statutory force?

Mr. REVELEY. Yes, I don't think the President has to sign the resolution. A different situation exists before the President has committed troops. Then it is up to him to sign or veto, because at that point he has not yet exercised his half of the joint responsibility that he shares with Congress over the involvement of this country in hostilities.

But once he has already committed troops, then Congress by a concurrent resolution may terminate American involvement.

By congressional authority to "limit" American involvement, I mean limits on such matters as the geographical areas where force may be used, ceilings on the number of American troops to be committed, restrictions on the use of nuclear weapons.

Mr. BERGER. May I furnish a legal basis for Mr. Reveley's proposition?

CONGRESS ALONE CAN WAGE WAR

Do you remember I read to you the statement by Madison that Congress alone can wage, continue or terminate war. You remember that?

Mr. ZABLOCKI. Yes, sir.

Mr. BERGER. Now if Congress is to do that, if Congress seeks to terminate a war, and if the attempt is subject to the veto of the President, Congress has been deprived of the power that Madison says it has.

The President is the "first general." He cannot compel Congress to continue a war against its will so the only medium that is left to it is a concurrent resolution. In short, the power of Congress to terminate a war is plenary.

Mr. REVELEY. I ought to qualify what I said.

I don't think Congress constitutionally could terminate a use of force by the President that is directly essential to the physical protection of American territory. Let's remember that the President was named Commander in Chief by the Constitution and that among the powers expressly given him by the Framers was authority to repel invasion.

Mr. BERGER. He was not repelling it as President; but as Commander in Chief, as Rogers explains, I would agree only partially that you cannot stop his use of force in defending the United States. There could conceivably come a time when the people of the United States would say, "let's call a halt no matter what it costs." For example, what led the Japanese at Hiroshima to say "enough." You do not have to permit the President to have the United States bombed back to the stone age.

GENERATING CONSTITUTIONAL CRISIS

Mr. REVELEY. I think you would have a constitutional crisis of the first water in that case, because a plenary Presidential obligation under the Constitution to defend the country would oppose a plenary congressional right under the Constitution to judge whether the benefits of American involvement in war are worth the costs.

I don't think the constitutional dilemma would be susceptible to any sort of simple answer.

Mr. BERGER. You create a dilemma by using a joker, the word "plenary." I never thought of the power of the Commander in Chief as plenary.

Mr. REVELEY. You read it much too narrowly.

Mr. FINDLEY. Our troops are nearly out of Vietnam, our POW's are nearly home and within a few days perhaps both projects will be completed.

If after that date bombing continues in Cambodia by U.S. military planes, could the Congress by a concurrent resolution effectively stop the President from continuing such attacks?

END BOMBING THROUGH CONCURRENT RESOLUTION

Mr. REVELEY. Not just by arguing that Congress may constitutionally end the bombing by passing a concurrent resolution. The President would very likely regard such a resolution as advisory only, in light of the present disagreement and confusion in the country over war-powers constitutional law. If, however, Congress were willing to back up the resolution by cutting appropriations necessary to the bombing or by sanctioning the President in other areas, he might heed the resolution, without conceding that he is constitutionally required to do so.

To establish the constitutional point, if it can be established, will require a change in executive thinking and habits—a change that could be begun by passage of war-powers legislation that requires Presidential reporting and that guarantees Congress a meaningful, early opportunity to express its will on American involvement in hostilities.

Mr. BERGER. The source of Mr. Reveley's doubt about constitutional certainty arises from the practices of the President. Presidential usurpations do not impeach the clear delineation of powers in the Constitution; I cannot buy this "constitutional uncertainty" argument.

No. 2, I would differ about this question of the effect of a concurrent resolution very vigorously. I want to remind you that, in one of the soldier's cases brought to stop the Vietnam war, one of the circuit court judges of the First Circuit said the case would be different if Congress were here asking us to stop the war. I cannot put my finger on it but I remember it.

USURPATION OF CONGRESSIONAL POWER

I cannot conceive that a court that would stop Truman in the middle of the Korean war from seizing a steel plant when he said a strike would disrupt all our steel production necessary for armament, that that court refuse to decide a claim by Congress that "there is a usurpation of congressional power and we want a halt to this."

Gentlemen, I say you have to decide what your rights are; if you don't do that, you're always going to be stepped upon.

Mr. ZABLOCKI. Mr. Reveley.

Mr. REVELEY. Let me lay one ghost, or what I think is a ghost, to rest. That is Professor Berger's assumption that only the President has claimed for himself a broad constitutional prerogative to use force.

Some of the most eloquent statements regarding Presidential prerogative were made in the Senate during the debate over the constitutionality of Truman's action in Korea, and thereafter until the souring of the Vietnam war.

Mr. BERGER. That is a count of noses, and Congressmen can be as wrong as the President. A plague, a pox on going back to these pseudo authorities.

THE "HOLY WRIT" OF CONSTITUTION

I want to go back to what Mr. Reveley calls "holy writ." He admits that for 100 years, "holy writ" prevailed. He admits the people believed in "holy writ," that is the Constitution. What right do we have to frustrate that belief in the intention of the Framers?

Mr. REVELEY. It started with George Washington.

Mr. BERGER. I would like to debate George Washington with you. I think I am familiar with what George Washington did do. I can read you something for the record, what George Washington said. George Washington said in his farewell address, "Don't usurp a power even when you think you are doing something good because the example you thereby set is worse than the good you accomplish and will destroy the Nation." Those were George Washington's last words.

In any event I started out by saying I did not want you to accept a bunch of opinions merely because they concurred with mine. That is a count of noses. I remind you what Professor Bickel said. "I believe in the Constitution." And that is what Professor Schlesinger said.

If we don't like the Constitution let's submit the issue to the people without any Madison Avenue euphemisms. Tell them the President thinks he has to be able to run this conutry alone and Congress be damned; and maybe Congress will be in such disrepute that the people will give it to him.

ELITIST GROUP MAKING DECISION

I will accept that, but I don't want a little elitist group making that decision.

Myres McDougal, a well-meaning man and fine gentleman, was afraid in the midst of World War II that we would have a band of willful men such as were led by Senator Lodge that would defeat the new League of Nations. He cried "Damnation on what Lodge did in the World War"; therefore we have to deprive this minority of the power to do that. The way to do that, he proclaimed, is to recognize that the Constitution has been changed; adaptation by usage. He made an elaborate argument for executive agreements.

What did he emerge with? Instead of a little undemocratic "minority"—one-third of elected Senators from all over the country—he has the President making executive agreements by himself.

Secret agreements the Senate cannot find out about. That is the kind of thing philosophers can emerge with. They do not look around the corner to see what may ensue. I would rather live with the wisdom of Madison and Jefferson and not McDougal. He argued for presidential agreements. I have chapter and verse on that. He went so far as to argue that there are certain agreements made under the independent power of the Commander in Chief that cannot be touched by Congress. Think of it, Congress by a statute can repeal a treaty, but it cannot repeal an executive agreement which is not mentioned in the Constitution.

NO PROPRIETARY INTEREST IN INFORMATION

I want to add one thing. Set up your own information gathering, says Mr. Reveley. The President does not have a proprietary interest in information which costs us millions to collect. Congress has set up the most elaborate information collecting machinery in the world and has made the mistake of depositing it in executive agencies. Now Mr. Reveley tells us "Let's duplicate that."

Deputy Comptroller General Robert Keller testified that when GAO tried to duplicate one little segment in Southeast Asia it cost us $170,000. Multiply it. I am a taxpayer. Why should we duplicate it. History shows that there is a plenary congressional right to require information from the Executive.

The Supreme Court said Congress has attributes of the legislative power that were enjoyed by Parliament; Parliament enjoyed untrammeled power to inquire. You have a right to information and I

would agree with you Mr. Chairman. Information is at the root of good government.

Now, on confidentiality. The other day John Stevenson, former legal adviser to the State Department, came down to a conference in which I participated, speaking as gently as a sucking dove, telling Congressmen: "We will work this out; let us cooperate."

They always talk like that when they are under the gun.

CONGRESSIONAL PARTICIPATION IN TREATY MAKING

In the treaty field I would say to the Senate, you are entitled to participate in treaty making from the word go, from the beginning, not just to serve as a rubber stamp. May I remind you that when you are playing with a fellow that plays tough, you have to respond in kind or you are just going to be beaten down to the ground.

Mr. ZABLOCKI. If I may pursue the provision of congressional right to limit or terminate use of force. Would you argue that it would be advisable to spell out in the resolution the procedure for congressional action in this area? Or do you prefer ambiguous language?

Mr. REVELEY. My preference is not to spell it out, though I believe that I did so in my alternative, more detailed war-powers proposal. Section 7 of that proposal, on page 32 of my written statement, says:

"Whenever a report is submitted by the President pursuant to this act both Houses of Congress shall proceed immediately to the consideration of the use of force cited in the report.

"By majority vote of both Houses, Congress may at any time ratify or limit or terminate American involvement."

By that, I mean congressional action through a concurrent resolution. In other words, Congress would not need to get Presidential signature or override Presidential veto in order to limit or terminate a use of force begun by the President without prior congressional approval.

Mr. ZABLOCKI. Do you prefer your more detailed war-powers act proposal or the simpler one?

THE EVOLUTION OF CONSENSUS

Mr. REVELEY. I prefer the simpler one for two reasons. First, because it covers less ground, it would be easier to understand and more likely to be followed to the letter. War-powers legislation must be understood and obeyed if it is to provide the starting point for the evolution of consensus about the pertinent constitutional rules, and if it is to push Congress and the President out of their present acceptance of executive dominance.

Second—I realize I keep saying this—a reassertion of congressional authority over the war powers depends much less on war-powers legislation than on the further development of congressional capacity and will to participate in use-of-force decisions, and on the exercise of that capacity and will through processes already in existence.

Mr. ZABLOCKI. Gentlemen, you have been most generous with your time, however, I have one further question of Mr. Berger.

As you recall, in his testimony yesterday, Professor Schlesinger noted the Javits' bill must be submitted to the test of practical historical applicability in order to test the wisdom of the proposal. In your statement today you note it is not your purpose to defend the wisdom

of the proposal but rather its constitutionality which has come under attack.

I would appreciate your comment on the wisdom of S. 440 and how it might have affected past situations.

For example, is it your contention that if S. 440 had been law in 1960 the United States would likely not have become embroiled in the Vietnam war.

INITIAL ACTION ON VIETNAM CONCEALED

Mr. BERGER. I think a President would have had very serious thoughts about embarking on the measures he did embark on. Of course our problem there is that a great deal of what was done was concealed initially. If you go through the Pentagon papers—some of it is summarized in Halverstan's book "The Best and the Brightest"—a lot of this was covert. For example, we were never told that we were waging clandestine war. We were never told that prior to the *Maddox* there was a scheme for sending forth Vietnamese raiders. We did not man them, but it was planned that they would conduct raids, and we were right in that area where we could get shot at. Legislation without a curb on deployment might not have it done. But I would say this: had you known that 15,000 men were being sent into combat, some Congressman could raise it on the floor and say, "This is prohibited by statute; and let's go on from there."

I might say I am not enamored of suits by individual Congressmen even for causes that I like. I like Congress to act as a body. That is what it is supposed to do. I am prepared to accept defeat at the hands of Congress as a body. I have trust in its collective judgment. When I stop having that I have to stop being a democrat.

The wisdom of this for me springs from a deeper well, Mr. Chairman, than testing any given commitment, whether it be the commitment of 15,000 troops or later 200,000 troops. It springs from the crying need for an assertion by the Congress of its constitutional rights. It needs to say, "Stop this constant erosion and invasion of our prerogatives." We have a function to perform in interest of the democratic process.

RESTORING CONSTITUTIONAL BALANCE

The first step is a construction by yourself of your own powers. The reason I like section 3 is not for what it can do. I did not stop to weigh on pharmaceutical scales what it can do. The reason I like section 3 is because it seeks to restore what is the original constitutional balance, equilibrium. Mr. Reveley would not deny that it was the intention of the Founders that Congress would have the vast bulk of the war powers and the only Presidential initiative would be on the invasion of the United States. That was admitted by the legal adviser of the State Department in 1966 and that it what section 3 says. If it does nothing else it will have one great virtue if we pass it. I think the President can then be halted in his tracks as a lawbreaker, and he should be.

I think it is an affront to our legal system to stomach violation of the law by the President. You cannot ask a highwayman on the street to obey a law if you cannot ask your President to obey a law. If I were in Congress I would stop at nothing to see that the President obeys the law. No doubletalk about it.

EXPRESSES APPRECIATION TO WITNESSES

Mr. FINDLEY. I would like to express my appreciation to both of these men for testifying today.

I would like also to assure Mr. Berger that at least one Republican shares his convictions that he has just expressed so eloquently—it is not just Democrats that feel that way—and also to ask unanimous consent to include in the record the text of a letter from the Director of the CIA dated September 28, 1972, which sets forth very clearly the problem the Congress confronts in trying to make itself better informed and have access to information in the executive branch.

[The letter referred to follows:]

CENTRAL INTELLIGENCE AGENCY,
OFFICE OF THE DIRECTOR,
Washington, D.C., September 28, 1972.

Hon. F. EDWARD HÉBERT,
Chairman, Committee on Armed Services, House of Representatives, Washington, D.C.

MY DEAR MR. CHAIRMAN: This is in response to your request for recommendations concerning H.R. 10204 and an identical bill, H.R. 16334, "To amend the National Security Act of 1947, as amended, to keep the Congress better informed on matters relating to foreign policy and national security by providing it with intelligence information obtained by the Central Intelligence Agency and with analysis of such information by such agency."

Generally, H.R. 10204 and H.R. 16334 require the transmittal of certain Agency information and analysis and the performance of certain activities for the Senate Armed Services and Foreign Relations Committees and the House Armed Services and Foreign Affairs Committees. Specifically, the bills:

(*a*) require full and current Agency reporting and analysis to the committees of all intelligence information collected by the Agency concerning relations of the United States to foreign countries and matters of national security;

(*b*) authorize any one of the four committees to impose special reporting, analysis, and, implicitly, related collection requirements upon this Agency;

(*c*) provide access to this information and analysis to all Members and all congressional employees designated by a Member and determined by the committee concerned to have necessary security clearances.

As you know, we have consistently made ourselves available to a number of congressional committees to provide substantive intelligence briefings and to answer questions which fall within their jurisdiction. The principal recipients of these briefings are: the Aeronautical and Space Sciences, Appropriations, Armed Services, and Foreign Relations Committees of the Senate; the Appropriations, Armed Services, Foreign Affairs, and Science and Astronautics Committees of the House; and the Joint Committee on Atomic Energy and the Joint Economic Committee. This current arrangement appears to have been satisfactory from the standpoint of the committees and has not been inconsistent with the responsibilities Congress has imposed by law upon the Director of Central Intelligence to protect intelligence sources and methods.

H.R. 10204 and H.R. 16334, on the other hand, pose a number of serious problems:

(*a*) The authority of congressional committees to impose special reporting, analysis and related collection requirements upon the Agency appears to be in conflict with the constitutional separation of powers by subjecting the Agency to executive direction from two separate branches of Government;

(*b*) The five-fold increase in the number of statutory clients for the Agency from one (the President as Chairman of the National Security Council) to five (the President and four separate committees of the Congress) would diminish the Agency's resources and capability to serve any one of its clients and inevitably lead to irreconcilable conflicts of priority and interest;

(c) Widespread access throughout the principal political branch of our Government to all Agency information and analysis made available to the four committees would tend to politicize that which must remain apolitical to retain its value;

(d) It is impossible to divorce completely all of the intelligence information subject to the bills from the sources and methods used in its collection. Any derogation in our ability to protect such information increases the possibility that vital sources of information will be irretrievably lost.

In view of the above considerations, I believe that enactment of either H.R. 10204 or H.R. 16334 would jeopardize the performance of the functions imposed upon this Agency by the National Security Act of 1947 and recommend against their favorable consideration by your Committee.

The Office of Management and Budget advises that there is no objection to the submission of this report and that enactment of either H.R. 10204 or H.R. 16334 in their present form would not be consistent with the Administration's objectives.

Respectfully,

RICHARD HELMS, *Director.*

Mr. BERGER. I want to thank you, Mr. Chairman, for the privilege of testifying for I do count it a great privilege.

Mr. REVELEY. And I also, Mr. Chairman.

Mr. ZABLOCKI. Thank you, gentlemen. We appreciate your testimony. It has been most enlightening and some of your suggestions will receive full consideration.

The subcommittee stands adjourned until 10 a.m., Tuesday, March 20, when we will hear two respected members of the bar, both of whom are distinguished former Government officials but currently engaged in private practice.

They are: The Honorable Herbert Brownell, former Attorney General, and the Honorable John Stevenson, former Legal Adviser to the Department of State.

Thank you, gentlemen.

[Whereupon, at 5 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Tuesday, March 20, 1973.]

WAR POWERS

TUESDAY, MARCH 20, 1973

HOUSE OF REPRESENTATIVES,
COMMITTEE ON FOREIGN AFFAIRS,
SUBCOMMITTEE ON NATIONAL SECURITY POLICY
AND SCIENTIFIC DEVELOPMENTS,
Washington, D.C.

The subcommittee met at 9:30 a.m., pursuant to call in room 2200, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman of the subcommittee) presiding.

Mr. ZABLOCKI. The subcommittee will please come to order. We convene this morning what is scheduled, as of now at least, to be the last session in our hearings on war-powers legislation. Earlier testimony from a variety of witnesses has amply demonstrated the complexity of this issue. Rather than shy from that complexity, however, the subcommittee is more determined than ever to face its challenge responsibly and hopefully report meaningful legislation.

Here to assist us this morning in that effort is Mr. John Stevenson. Formerly legal adviser to the Department of State, Mr. Stevenson is now engaged in private practice as a member of the bar in New York City.

Mr. Herbert Brownell, former Attorney General, was also scheduled to testify this morning. However, because of an emergency he has been prevented from doing so.

Mr. Stevenson, if you will proceed please.

Mr. Stevenson has appeared before this subcommittee in the past and has given excellent testimony. We look forward to your words of wisdom this morning.

STATEMENT OF JOHN R. STEVENSON, NEW YORK BAR

Mr. STEVENSON. Thank you very much, Mr. Chairman. I appreciate very much the opportunity to appear again before this subcommittee. I have a strong personal interest in the subject matter of these hearings which I have had the opportunity to discuss with you previously in my then capacity as the legal adviser of the Department of State. I appear today as a private citizen and member of the bar with no official standing. My statement expresses solely my own personal views and is in no sense intended as a statement of past or present administration policy.

You have asked me to comment on three presently pending bills—House Joint Resolution 2, H.R. 317, and S. 440. In the first instance, however, I would like to make a somewhat more general statement

directed at what I consider to be the central constitutional and policy question involved in these bills, namely, the attempt to define by statute the extent of the President's power to use the Armed Forces.

OF DOUBTFUL CONSTITUTIONALITY

In brief summary, it is my opinion that to the extent the various war powers bills attempt to define the President's powers to use the Armed Forces they are of doubtful constitutionality; that such definition by way of a constitutional amendment, while legally valid, would not be desirable since it would both unduly restrict the President in certain circumstances and appear to give him a blank check in others; and, finally, that such bills do not meet the basic problem which is, in my view, not one of legislative or constitutional definition, but rather of effective cooperation and consultation between the Congress and the President in discharging their respective independent and shared constitutional responsibilities.

A. In the first place, defining the President's powers would be of doubtful constitutionality. The reasoning underlying my views is as follows:

Both Congress and the President have constitutional powers with respect to the Armed Forces of the United States and in this area of shared constitutional powers it seems to me particularly inappropriate for one branch of the Government to attempt to define the reach of the other's constitutional powers. The fundamental constitutional principle of the separation of powers clearly contemplates that in this important area of shared responsibilities the two branches of the Government will cooperate in the exercise of their shared and independent responsibilities with differences to be resolved not by legislation or judicial interpretation, but by mutual accommodation springing from political interaction between the two branches and with the electorate.

The courts, for their part, have been most reluctant to interfere with the political processes in this area. The District of Columbia Court of Appeals has stated the judiciary's views very succinctly as follows:

> 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, at 665–66 [D.C. Cir. 1967].

"NECESSARY AND PROPER" CLAUSE NOT SUFFICIENT BASIS FOR CONGRESS

I am not impressed with the argument that Congress' 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 * * *" is a sufficient constitutional basis for defining the President's constitutional powers. While admittedly this clause gives Congress the authority to execute and implement powers of the other branches of the Government, as well as of those of Congress, it should not be read as giving Congress the authority to overturn the constitutional balance between the Congress and the President. That would not be to execute but rather to extirpate.

There is no judicial authority for the proposition that the "necessary and proper" clause was intended to limit the principle on the separation of powers. Alexander Hamilton indicated in The Federalist papers that it was intended principally to guard against an excessively narrow construction of the authority of the National Government versus that of the States.

Second, definition of the President's war powers by constitutional amendment would not be in the national interest:

While, of course, the definition of the President's powers to use the Armed Forces would be constitutionally valid if effected through a constitutional amendment, such an amendment would in my view not be in the national interest.

UNDERCUTTING PRESIDENT'S FOREIGN POLICY ACTION

Such definition would seriously undercut the President's power to conduct an effective foreign policy, on the one hand, while on the other hand would in many cases not effectively prevent, and might even exaggerate, the involvement in hostilities which the sponsors of war powers legislation seek to prevent.

I will not give you an extensive list of specific horribles that might result from the enactment of such a definition since I believe a number of other witnesses in this and prior hearings have already done so. Let me state the relevant consideration in a more general way:

(1) We are not wise enough at this time to foresee in advance all possible cases in which it may be necessary for the President to have emergency power to employ the Armed Forces. As Alexander Hamilton so correctly states in the Federalist No. 23 "the circumstances that endanger the safety of the Nation are infinite."

(2) On the other hand, in other cases the proposed definition could be regarded as clearly authorizing action with respect to which a more cautious approach would be taken by the President in the absence of such definition. Where a particular action clearly falls within the definition's permissive authority for Presidential action (without congressional authorization until some later date), it might well be that future Presidents in these circumstances would in effect feel that Congress had affirmatively authorized such action and not address the question of appropriate congressional consultation in the light of the particular facts of the particular situation.

PREVENTING FUTURE VIETNAMS

(3) Definition of the President's powers would be of little utility as a means of preventing future Vietnams. In view of the historical fact of general congressional support for the administration's Vietnam policy at the time of the original commitment of U.S. combat forces, as evidenced by the passage of the Tonkin Gulf resolution and other congressional actions supportive of such commitment, it would seem entirely probable that, had the proposed definition of the President's authority been in force, the President would have obtained the requisite congressional authorization required under the proposal. He thus, in effect, would have had even clearer authorization than was actually the case in the absence of such definition.

Finally, in my view, the constitutional definition obscures the basic problem. By concentrating on the necessity for formal authorization by Congress, the constitutional definition approach to the exercise by the President of his powers to use the Armed Forces obscures and neglects what in my view is the basic problem—that of achieving more effective cooperation and consultation between the executive and legislative branches.

What should be done?

First, let me state that I am not for one moment maintaining that the present situation is a desirable one or that no steps are necessary to provide for more effective cooperation between the executive and legislative branches in meeting the critical questions involving the use of our Armed Forces which this and subsequent governments must meet at the present time and in the years ahead.

I would urge, however, that a solution be looked for and worked out within the existing constitutional framework which recognizes that this is an area of shared powers with the problem of coordination to be resolved through the political processes and not by constitutional, legislative or judicial definition. With cooperation such definition would be unnecessary; without cooperation, it will be ineffective and will only raise false hopes that through legal formulas we can solve what are basically political problems under our separation of powers system.

IMPROVING COOPERATION ON INFORMATION

Second, I would hope the Congress will accept the offer by the Secretary of State and other administration spokesmen to cooperate in improving the process of informing, and consulting with, the Congress. In this respect I have two specific suggestions and a caveat.

First, I suggest that there be regular briefings and consultations, not merely in times of crisis but also on a regular basis, as Secretary Rogers proposed to the Senate Foreign Relations Committee.

With a background of regular consultation in respect of the problems of a specific area and appreciation of the various considerations involved in foreign policy decisions in which use of the Armed Forces might conceivably be involved, it will be much more feasible to act speedily in a crisis and, where the occasion demands, without publicity, yet with the benefit of advance consultation with Congress. Moreover, with this sort of history of regular consultation, I would hope that there would be much greater confidence on the part of the executive branch in the benefits of consultation in advance of the action.

Second, it seems desirable that consideration be given to means of institutionalizing consultation with Congress in respect of the use of the Armed Forces.

This could be achieved, as a number of Congressmen have suggested, by the establishment of a special joint committee of the Congress. Institutionalization would have the advantage of providing the President with a definite group—recognized by Congress to speak for it in this area—with which the executive branch could develop the habit of working with confidence and mutual trust.

ACHIEVING APPROPRIATE SECURITY PROTECTION

Moreover, such a joint committee would facilitate the problem of working out an appropriate solution to the difficult question of achieving appropriate security protection for the highly confidential information which will inevitably form the basis for effective consultation in many of these crises.

So much for my two specific suggestions. Now for the caveat. While this may in part reflect my past 4 years' participation in the executive branch of the Government, I do not think it inappropriate to point out that consultation to be effective must be a two-way street. Congress must be willing to organize itself in such a way that consultation will be a continuing process in times of relative calm as well as crisis. Moreover, Congress must in effect be willing to assume the responsibilities inherent in advance consultation and forego the luxury of holding the executive branch solely responsible—on the basis of 20–20 hindsight—for action taken in crises.

Whether or not these specific suggestions commend themselves to the subcommittee, I would also like to urge what might well be considered as procedural suggestions in dealing with this issue of the use of the Armed Forces. I believe that the various war power bills represent the most significant and far-reaching proposals relating to the President's authority in the foreign affairs field that Congress has ever made. In view of their importance and the fact that we now have the opportunity as a result of the termination of the U.S. military role in the Vietnam conflict to consider these issues on their merits as they relate to this country's future and without the distraction and distortions imposed by our domestic differences over Vietnam, I would urge the fullest indepth consideration of these proposals before Congress acts.

CONGRESS, PUBLIC, UNAWARE OF ISSUES

I am quite aware of the extensive hearings which this subcommittee and the Foreign Relations Committee of the Senate have held in this area, but the fact remains that, until the debate in Congress last spring, not only the public at large, but most of the informed leaders of the country were not aware of many of the important issues raised by these proposals. In point of fact, no representative of any organized bar association has appeared before this subcommittee or the Senate Foreign Relations Committee and it is my understanding that the study which the American Bar Association is conducting in this area has not yet been completed.

I recognize the concern of many with respect to the existing situation as well as the suspicion that a request such as this may be a delaying technique—although I assure you it is not. I do urge, however, that this subcommittee continue its considered study of alternative approaches to the very real problem with which you have been concerned. In this connection I respectfully urge that you indicate your interest in receiving the views of representatives of bar associations and other informed citizens' groups throughout the country.

Against this background of my general views, let me speak very briefly on the three pending bills on which you have asked my comments.

1. S. 440. This Senate bill, which is in effect the same bill which was passed by the Senate last year, represents the definitional approach to the war powers question in its most comprehensive form. For the reasons indicated above, I strongly oppose the attempt to define in advance, whether by statute or constitutional amendment, the circumstances in which the President may make emergency use of the Armed Forces without congressional authorization and to require the termination of such use of the Armed Forces within 30 days if Congress has not acted. Moreover, predicating this authority on the necessary and proper clause tends to undermine our separation of powers principle.

WELCOMES REPORTING PROVISIONS

I have no objection to the reporting provisions of this legislation; in fact, I welcome them, but I note with regret that there is no reference whatsoever to what I consider the basic problem in this area—consultation between the President and the Congress.

2. H.R. 317. I see no objection to Congressman Bingham's proposal for prompt reporting, although I would prefer a provision for the President to convene a special joint committee rather than the entire Congress, when Congress is not in session.

I strongly oppose his provision purporting to terminate the President's authority to use the Armed Forces—in the absence of express congressional authorization—by a resolution adopted by either House of Congress. Such a proposal seems to me to purport to deprive the President of his constitutional authority by the action of one House of Congress alone. Moreover, it seems to raise an additional constitutional question. For even if Congress did have the power to terminate the President's authority in all circumstances, that power would surely be vested in the Congress as a whole and not in one of its Chambers acting alone.

HOUSE JOINT RESOLUTION 2 SENSIBLE, REALISTIC

3. House Joint Resolution 2. This new House bill, which you, Chairman Zablocki, and other Members of this subcommittee are sponsoring, continues in some respects the sensible and realistic approach to this problem reflected in House Joint Resolution 1 passed by the House of Representatives in the 92d Congress. It does so by its emphasis on consultation and prompt reporting of the use of the Armed Forces. However, regrettably it was moved to adopt in part the constitutional definition approach by attempting to limit in advance, albeit by much more general language than S. 440, the President's use of the Armed Forces. It is preferable to S. 440 because of its generality and because it does not provide for termination of the President's authority within 30 days in the absence of congressional action. However, like all definitional approaches it raises a constitutional issue and may not cover all necessary uses of the President's emergency powers, and may, on the other hand, suggest that the President need not take as cautious an approach in some situations as he would in the absence of this definition.

My own strong personal preference is for House Joint Resolution 1 in the form reported by this subcommittee and passed by the House

of Representatives last year. If the Members of the subcommittee consider that some strengthening of that bill is necessary, I would recommend that, rather than crossing into the quagmire of constitutional definition, the subcommittee give further consideration to means of strengthening and institutionalizing the consultation process between the executive branch and the Congress.

Thank you very much.

JOINT COMMISSION ON INFORMATION

Mr. ZABLOCKI. Thank you, Mr. Stevenson.

I presume your recommendation in your final sentence refers to a joint commission on information which would receive the consultation and reports from the executive branch, particularly when Congress is not in session. Is that your intention?

Mr. STEVENSON. That seems to be the specific suggestion that has attracted the most support. I think there may be other supplementary ways of improving the consultation process by also having regional subcommittees to confer with State Department officials on particular areas as a way of keeping the Congress as a whole informed. But with respect, though, to this particular problem of the use of the Armed Forces, I think the special joint committee is probably the most effective institutional suggestion.

Mr. ZABLOCKI. As you well know, however, this subcommittee would be transgressing its authority if it attempted to provide a joint commission on information in this legislation. Under House rules this would have to be provided by the Rules Committee. Nevertheless, I would hope that the Foreign Affairs Committee would strongly recommend such a joint commission on information in the report accompanying the resolution which we will report for action to the Congress.

You raise a constitutional question regarding section 3 of House Joint Resolution 2. It was merely added to clarify section 2 of House Joint Resolution 1 in the 92d Congress which is still contained in House Joint Resolution 2, where 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. Therefore, I cannot really see why this would raise a constitutional question not where it departs from a responsible position.

OPENING DOOR TO CONSTITUTIONAL DEFINITION

Mr. STEVENSON. Mr. Chairman, as I indicated this is a very general statement and as a practical matter, I would not at this point anticipate great difficulties with it. However, I think once the door to constitutional definition is opened, that it is very difficult to then in the future argue that a definition going somewhat further is objectionable on constitutional grounds, and I think we do have a dual question here, the constitutional question as well as the question of practicality. It has also seemed to me that while both the Congress and the Executive are entitled to their own views of how the Constitution should be interpreted; that once you go beyond the stage of interpretation in a sense the Congress resolution, which you are certainly entitled to do (as to

how you view the application of particular provisions) to an attempt to say what the President's constitutional powers are, I then have trouble, under our constitutional framework.

Moreover, I also am concerned about overturning what seems to me the wisdom of the founding fathers in not attempting to be too specific about what the situation might be in the future and so, therefore, while this section really is very general and in that sense, much preferable from a practical standpoint to the Senate proposal. I still would much prefer to not see you turn toward the definitional route, or if you do, I would hope it would be in the form of a sense of the Congress resolution rather than an attempt to legislatively state what the President's powers are.

Mr. ZABLOCKI. Our intention is merely to restate these powers.

Section 6 is another addition to House Joint Resolution 1 which has been passed by the last two Congresses. It provides for congressional action. You have not addressed yourself to this section. Would you care to share your views with the subcommittee on the validity and desirability of section 6?

CONGRESSIONAL CONSIDERATION OF REPORTS

Mr. STEVENSON. Certainly. If in fact, you do wish to provide for the Congress assembling and considering these reports, I see no constitutional problem in providing for this action. However, I would question whether it is desirable in all cases to create the more or less crisis atmosphere convoking the two houses of Congress if they are not in session, might cause. I think in this area there is an overlay with the suggestion with respect to having some sort of a joint committee because it seems to me in some circumstances a report of this nature would be more appropriately dealt with by a joint committee than by the Congress as a whole. I think this is particularly true when you look at some of the specific reporting requirements.

Your legislation, Mr. Chairman, not only deals with situations involving hostilities but even where there has been an enlargement of our military forces at overseas stations. So it would seem to me that it might be much more appropriate to at least in the first instance or at least in some of the circumstances, provide for joint committee action rather than action by the Congress as a whole. This could also have the advantage of enabling more effective consultation and speedier action and, in some cases where it is necessary, action without publicity.

Mr. ZABLOCKI. Such a joint commission could then recommend whether any congressional action would be warranted.

Mr. STEVENSON. Exactly, I am not saying that I might not want to go on to the next step, if it were serious.

Mr. ZABLOCKI. In previous testimony the recommendation has been made repeatedly that Congress should pass the strongest legislation possible, probably S. 440. Even if the President vetoes it, and even if Congress in either body could not override the next action of the Congress should be a concurrent resolution. In view of your statement on page 2 that rather than bills attempting to define or codify by legislative action, constitutional war powers, it would be preferable to promote effective cooperation and consultation between the Congress and

the President in discharging their respective independent and shared constitutional responsibilities, what actions of Congress would, in your opinion, enhance greater cooperation and consultation?

DEFINING PRESIDENT'S CONSTITUTIONAL POWERS

Mr. STEVENSON. Mr. Chairman, it is my view that the attempt to provide by the strongest legislation—if by strongest you mean this attempt to define the President's constitutional powers—is the least productive way to produce the consultation and cooperation which I think are so necessary. I think this tends to lead to fairly sterile constitutional confrontations, in an area in which the Judiciary, at least, indicates that you are not going to get final constitutional solutions. And I think it tends to impede the effective cooperation and functioning of the political processes which otherwise might enable us, at this particular time in our history, to make a fresh start. I think, as I said in my testimony, I think the fact that our military involvement in Vietnam has ended makes this a time where it could be possible to have effective and imaginative and constructive approaches to this problem of consultation and cooperation.

Mr. ZABLOCKI. On page 5 you state that you are not "for one moment maintaining that the present situation is a desirable one or that no steps are necessary * * *". That would indicate that, contrary to what some people maintain, Congress should enact legislation. It would also indicate that there had not been effective cooperation and consultation between the executive branch and Congress in the past.

Mr. STEVENSON. Mr. Chairman, I did state that and I also supplemented it by stating that I did not feel that effective consultation was solely the responsibility of the executive branch. I think if in fact we do establish institutional means of consultation and if Congress accepts the offers to work along these lines that the Secretary of State and others have made, I think we will have a vastly improved situation. I do not think that the cooperation and consultation has been as good as it might have been.

CONGRESSIONAL INITIATIVE ON CONSULTATION

Mr. ZABLOCKI. To what degree, Mr. Stevenson, do you believe that congressional initiative in the area of consultation was thwarted by the executive privilege positions repeatedly taken by the Executive?

Mr. STEVENSON. Mr. Chairman, I think we have been dealing with perhaps the most difficult situation you can have in terms of cooperation, namely, an ongoing conflict on which the President was doing his best to disengage the United States under honorable conditions. I think that that is the most difficult and trying situation in which to act and I think it is a situation involving his functions as Commander in Chief where he has responsibility to protect our Armed Forces which makes indepth consultation and secure use of classified information the most difficult of problems. My own feeling is—and I made this point in my statement—that with some sort of joint committee and with a growing mutual trust through the use of this joint committee, that a number of these problems would be much more manage-

able and you would not be forced to the executive privilege confrontation in the future. I think that in fact executive privilege has not actually been invoked as many times as has been suggested and I think while there can always be differences as to the necessity of invoking executive privilege in a particular situation, I think the principle itself is essential, particularly in the area of advice on matters of vast importance to our foreign policy.

Mr. ZABLOCKI. Would you not agree nevertheless that in the recent years the Congress has shown a willingness to assume its responsibility, but the executive branch, under pretense of executive privilege, did not cooperate?

Mr. STEVENSON. I could not accept that general statement because——

EXECUTIVE WILLINGNESS TO SHARE INFORMATION

Mr. ZABLOCKI. Would you say there was willingness on the part of the Executive to share with Congress the information they have?

Mr. STEVENSON. Well, Mr. Chairman, I can only say that I know for a fact that the Secretary of State on many occasions did offer to set up briefings and provide for regular briefings by Assistant Secretaries and I don't think these opportunities were always taken up. Now, there have been other situations where Congress felt that they were not being as fully informed as they might have been. After all, we are all human and no one is perfect in this area. I have stated that I think that there could be improvement in this area and I am trying to look for the ways to achieve that improvement.

Mr. ZABLOCKI. Let me share with you the frustration Congress has felt when we've accepted the invitation of the executive branch to be informed. We would meet in closed secret sessions. The same information and more appeared in the evening paper than we were told in secret, in the morning. My point, of course, is that Congress has not really been leveled with in the past. I don't think there was any effort or willingness on the part of the Executive to share with Congress. Let me ask you another question. Do you think the Executive would be more willing to share such information if we had a joint commission on information? Would the composition of such a commission make any difference?

IMPROVING CONSULTATION PROCESS

Mr. STEVENSON. It is my personal opinion that it would improve the consultation process. I feel by the regular use of this committee, by the mutual habit of working together that would build up over the years, that there would be a common sense of confidence and willingness to consult much more fully. I think the experience of the Joint Atomic Energy Committee, which also deals with a highly sensitive area, is illustrative of an effective solution when you are dealing with areas where admittedly there is sensitivity if the information is not dealt with in a proper fashion.

Mr. ZABLOCKI. Do you believe the executive branch would welcome such a joint commission on information? I ask this question because

in the past the executive branch was adamantly opposed to the suggestion of a joint committee on central intelligence, which would, in a sense, be a joint commission on information. What is the administration's position now?

Mr. STEVENSON. As I stated at the outset, I am no longer a member of the administration. I am a private lawyer but I can refer you to Secretary Rogers' statement before the Foreign Relations Committee where he said he was quite prepared to work with Congress in this area. He did not go into any details and I think quite properly. The question of the organization of Congress is a matter for Congress in the first instance. But I would certainly hope that some proposal along these lines would be looked into and considered by the administration. I know there is considerable support among many serious students of this whole problem for this proposal. I think Dean Wilcox of the Johns Hopkins school who has had both executive branch experience and also was chief of staff of Foreign Relations Committee has made a very specific proposal along these lines. He certainly is one of the most constructive and impartial persons who has been considering this whole problem.

SUPPORT FOR JOINT COMMISSION ON INTELLIGENCE

Mr. ZABLOCKI. I am fully acquainted with Dean Wilcox position. I believe when he was with the legislative branch he supported the Joint Commission on Intelligence.

I want to apologize to my colleagues for taking so much time.

Governor Thomson?

Mr. THOMSON. Do you really believe that we have already passed the distractions and distortions, as you call them, imposed by the war in Vietnam, and we are now in a period of calm in which we can appraise these constitutional questions impartially and without regard to our recent unhappy experience?

Mr. STEVENSON. As I said to the chairman, I am no longer a member of the administration so I can only express my hope as a private citizen that we are in fact past that involvement and that the very constructive agreements that have been negotiated are in the process of being effectively carried out. I think clearly the termination of this Vietnam experience, if my hopes and expectations are correct, certainly gives us an opportunity to deal with this problem in terms of the future, in terms of long-range general interests. I mean I am not suggesting—in fact, I was not saying we should act right now. I still think that some careful consideration should be given to this problem.

Despite my own efforts, both officially in the last year and since leaving the Government, I have not yet seen the serious attention to this issue by organized bar associations and other interested groups that I think the importance of the issue warrants. In the case of the Bricker amendment, you had a 3- or 4- or 5-year period of very intensive consideration, numerous bar association reports, and so forth, and I think that there is no necessity for too much speed in this area right now. But I think this period is much more propicious than when the Vietnam conflict was still in process.

WOULD LEGISLATION HAVE PREVENTED VIETNAM?

Mr. THOMSON. If you review the testimony before the committee, there was hardly a witness that was not asked would a resolution of this kind have prevented Vietnam or did the President have authority to send troops into Cambodia or did he have certain powers to continue bombing and some of the testimony has gone to the questions of the extent of the Presidential powers to deploy troops outside of this country. Now do you believe that the President does have constitutional powers to station troops outside of this country?

Mr. STEVENSON. Yes, I do. I feel that obviously Congress has a very definite role in this area. I mean there are numerous relevant congressional powers, but, of course, the most conspicuous is the congressional power of the purse. If you are going to have bases outside this country and are going to have troops in them, you need appropriations, so Congress very definitely has a role in that area. In fact, most of the agreements in this area do provide, if they are not previously authorized, that they are subject to congressional action with respect to the financial implications. There are other areas where Congress role is also reflected. So it seems to me that neither the President nor Congress can really act effectively in this area without cooperation between them. I think the best way to have cooperation is to have effective consultation.

Mr. THOMSON. You think then the President was fully empowered to deploy our Navy off the coast of Israel during the 6-day war so that they would be in a position if needed or if he thought it in the interest of this country to use the power that we had there.

OVERALL INTEREST OF UNITED STATES

Mr. STEVENSON. I think that each of these instances has to be looked at very clearly in terms of the then factual situation as to what the overall U.S. interest is in a particular situation and with, in my view at least, the disability of having, where feasible, maximum amount of congressional participation. But I do feel that the President as Commander in Chief and as the Chief Executive of this country, clearly has and has traditionally had the right to deploy our Armed Forces, particularly our Navy in the best interest of the United States, at least as seen by him.

Mr. THOMSON. You would agree with Professor Schlesinger then that if we had on the books S. 440, it would not have prevented Vietnam, but it might have prevented President Roosevelt engaging in a naval war with Germany prior to World War II because of the problems he was having with the Congress at this time.

Mr. STEVENSON. I clearly indicated in my statement that this legislation would in my view not have prevented the commitment of our troops to Vietnam. You certainly had, at the time the commitment was made, evidence of congressional support. When you read the Tonkin Gulf resolution, that was adopted, it appears very similar to some of the sort of action that is contemplated under this statute. So I think in one respect the effect of this statute would have been to in a sense strengthen the decision that was taken rather than to in any sense have prevented it.

Mr. THOMSON. What you are telling us is really that it is very difficult to define the constitutional powers of the President and if they can be defined, it would be inadvisable to write the definition into the statute or into the Constitution.

Mr. STEVENSON. Those are exactly my sentiments.

Mr. THOMSON. Thank you very much.

Mr. ZABLOCKI. Mr. Biester, my colleague from Pennsylvania.

PRESIDENTIAL CAUTION IN COMMITMENT OF FORCES

Mr. BIESTER. I apologize for not having been here during all of your testimony.

I wonder if you agree that a President should be extremely cautious before placing the forces of the United States in such a position that hostilities are likely to result?

Mr. STEVENSON. Certainly, as a matter of policy, I think any situation in which hostilities may result is one to be viewed with great concern.

Mr. BIESTER. I did not say concern. I said caution.

Mr. STEVENSON. I also say with caution. In fact, you will note in my statement that one of my concerns is that under some of these proposals, the President might feel that if something came within the four letters of one of these definitions that that in effect exhausted his obligation to consult with Congress or be cautious. I do not feel that this legislation is going to result in the President's being more cautious. I think perhaps the most troublesome part of it all is the Senate bill, where you have the 30-day proposal which might almost lead a President to take action during that 30 days that he might not otherwise take because of his concern about what would happen at the end of the period. So my own feeling is, if it is caution that we want, the best way to get caution is by improving the cooperation and consultation procedures and I think also your reporting provision is helpful in this regard. So that as I said to the chairman earlier, I was fully sympathetic to the earlier House bill and I am very sympathetic to attempts to institutionalize the cooperation and consultation procedure.

APPROPRIATENESS OF 30-DAY CLAUSE

Mr. BIESTER. Let me be sure I understand you. Are you saying the 30-day clause is inappropriate because it might induce a President to engage in conduct in which he thinks Congress might approve within that 30 days?

Mr. STEVENSON. What I am saying is that with a 30-day proposal you face the Chief Executive with a time limit. By that time limit he is going to have to seek congressional approval or maybe a congressional debate. And I think that is the sort of pressure that may not be the most conducive to the sort of overall approach that I would like to have the President take. That is not my principal objection to that proposal, but you were talking about the question of caution.

Mr. BIESTER. I want to say to the matter of caution—and it seems to me every time we institutionalize caution in this area, we may be engaging in a beneficial act—it seems to me the provisions of practi-

cally all of these bills involves institutionalizing to a certain degree of caution on the part of any Executive in carrying out his powers as Commander in Chief. And I wonder what is wrong with that?

SPECIFIC CONDITIONS CONTAINED IN S. 440

Mr. STEVENSON. In the first place, I do not accept your premise, because it seems to me where you have a bill like the Senate bill which does not even talk about consultation the first thing you do is you see whether a particular action comes within the four specific cases that are being dealt with. And if it does, I would suggest that maybe there would be less Presidential caution in that situation than where it is not all that pressing. Now, you say well, isn't the fact that the President is going to have to go to Congress in 30 days going to also induce him to be cautious. Well, certainly in some situations where the involvement is such that it is perfectly clear that he is taking the necessary action to exercise his constitutional powers in their narrowest sense, namely, to defend the United States against a sudden attack, there probably will be no problem in getting congressional approval. But in some of the other situations where it is not all that clear what the situation is, I am somewhat concerned about the effect of a 30-day deadline and a public discussion at the end of that time. I am not saying that Congress should not participate, but I think there are many ways that it could participate without having that one fixed formula and that one deadline.

Mr. BIESTER. Again, I guess I am going to have to come back to a word you use and this time it is "clear." If it is not all that clear he may even feel inhibited in his action. Do you think he should commit forces of the United States in circumstances which may directly result in hostility unless it is clear to him that it is in the best interest of the United States and if he cannot convince the Congress of the wisdom of the clarity of his position, do you think he should go ahead?

ACTING IN RESPONSIBLE, CAUTIOUS WAY

Mr. STEVENSON. To answer your last question, I agree with you completely, I think he should not. I think obviously, at least in my view, the President should be acting in the responsible, cautious way but there are situations that are very complex and where the time when you take certain action may be just as important in terms of the national interest as the specific action that you take and there may also be other circumstances in which consultation with a committee of Congress that could be conducted privately might be more in the national interest than a general debate. So I am not disputing your point, but I think it is too much of a straitjacket. I would like more flexibility.

Mr. BIESTER. Would you clarify for me—and I should like to clear this up—I apologize for asking you—the concept of "letters of marque and reprisal." I have a recollection that those are authorizations to privateers in a nonwar situation. Am I correct about that?

Mr. STEVENSON. My history is a little rusty on this, but I think this goes back to an earlier day when it was customary without declaring war, without, in fact being engaged generally in hostilities,

for governments to authorize privateers to carry on certain actions and I think these provisions of our Constitution reflect really the practice of earlier day rather than the present day situation.

Mr. BIESTER. I would be correct, would I not, that the Constitution gave that power to the Congress in article I, section 8?

Mr. STEVENSON. That is correct.

Mr. BIESTER. Thank you very much.

CALL FOR BAR ASSOCIATION TESTIMONY

Mr. ZABLOCKI. Mr. Stevenson, in your prepared statement as well as in your colloquy with my colleague, Governor Thomson, you suggest holding off any action by the subcommittee until representatives of the bar association and other informed citizens groups can be heard. Of course, you do say in the statement that you are aware that the House Foreign Affairs Committee and the Committee on Foreign Relations in the other body did indeed hold hearings. This subcommittee held 11 days of hearings on war powers in 1970 and another 2 days in 1971 and 5 days this year. We have heard dozens of witnesses. In addition, the issue has been debated at length on the floor of the Senate and the House. So I must ask you, do you honestly believe that Congress has failed to give this issue due consideration?

Mr. STEVENSON. As I indicated, I do not blame Congress but I am, as a private citizen, very much concerned when this important public issue has not received the attention of some of the organized groups which I think should be considering it. There have been many witnesses but they have all been appearing in their individual capacity and I regret that the bar associations have not moved more quickly. There is an American Bar Association study underway. I think I would also say this, Mr. Chairman, that it is particularly the proposals for constitutional definition that arouse my concern. I mean clearly some of the other proposals, particularly along the lines that you have been addressing yourself to, do not raise such serious questions. So that it is particularly the area of constitutional definition that I would be very concerned in having Congress move on without hearing more on this subject.

Now, of course, your committee has dealt with this subject, but it is only recently and only in a very limited way that this subcommittee has moved to that approach.

ABA STUDY ON WAR POWERS

Mr. ZABLOCKI. The study to which you referred was authorized by the American Bar Association at its summer 1971 meeting—almost a full year after the Congress had passed the first war powers resolution. As I understand it, it is being carried out by the ABA's international law section, by a special steering committee on war powers study chaired by a New York lawyer, Mr. Lyman M. Tondel, Jr. In a telephone conversation with Mr. Berdes of our staff on March 19 Mr. Tondel described the study as one predicated on the ABA's belief that there should be a thorough and scholarly study of the war powers issue, its constitutional meaning as interpreted from the Constitutional Convention to the present day, and not in relation to any

specific incidents, wars for example. While the great stress is to be on its intended scholarliness, the study is planned in two phases. Phase I will be a scholarly historical review of constitutional meaning as supported by history, et cetera. This phase has been contracted to the Columbia University Law School. We have no idea when a report will be forthcoming on phase I. As I understand it phase II will involve an analysis and review of the scholarly phase I effort.

This will reportedly be done by a group of experienced international lawyers and will supposedly result in a final report which together with the phase I effort will constitute the final study. This is expected to be completed by the fall of 1974, which, I submit, is much too late for the 93d Congress to act upon their recommendations. Because you have recommended that Congress withhold action until this report from the American Bar Association will be available, I must ask this question: What new ideas relative to war powers do you anticipate will be forthcoming from the American Bar Association or other organizations—ideas which have not already been discussed before this committee?

DEFINITIONAL APPROACH TO PROBLEM

Mr. STEVENSON. Mr. Chairman, as I indicated earlier, it is primarily with respect to the serious constitutional issues that the definitional approach to this problem raises that I feel the report of the ABA group and other reports by the organized bar would be helpful. I am in no sense suggesting that there should be a delay in trying to improve the consultation process, if this can be done either by getting a rule which will permit consideration of a joint committee or through working out reporting procedures. I would not have been concerned with the passage of the bill passed by the House last year. So that perhaps I should have narrowed my statement with respect to the necessity for awaiting reports by bar associations and put it more in terms of not acting in terms of constitutional definition without having the benefit of their views.

Mr. ZABLOCKI. Indeed, your word of caution would be more apropos to the Members of the other body where they appear to be gung ho in support of S. 440.

Mr. STEVENSON. That is absolutely correct.

Mr. ZABLOCKI. I did not want the record to show that you had such apprehensions about the House of Representatives.

Mr. STEVENSON. I appreciate your point. It is well taken.

Mr. ZABLOCKI. On page 4, Mr. Stevenson, you argue that effort to resolve the dilemma over the warmaking powers through a constitutional amendment would be—and I quote—"not in the national interest." However, in the very next sentence you seem to equate the national interest with the President's power. That is on page 4, "* * * the President's power to conduct an effective foreign policy * * *". Do you believe that the Congress has any role whatsoever in the formulation and execution of U.S. foreign policy?

CONSULTATION AND COOPERATION

Mr. STEVENSON. I certainly do. That I think is implicit in my whole statement, that consultation and cooperation are the ways that our system of separation of powers works most effectively. Clearly, any President to be most effective requires both congressional and public support for his policies and it is only through achieving this support that policy can be maximally effected and furthermore Congress does have so many powers in this area. We talked a little earlier about the power of the purse. There is no question that foreign policy depends very greatly on congressional cooperation with respect to all sorts of financial implications of our foreign programs. Indeed, even the organization of the State Department itself is dependent upon cooperation with Congress.

Mr. ZABLOCKI. The power of the purse seems in recent years to be exercised to a greater degree by the Executive through the impoundment of domestic funding of certain projects. I will not go into the constitutionality of that particular action on the part of the executive branch. But I do think and I do agree that Congress does have this power of the purse. At times, however, situations make it very difficult for Congress to withhold moneys or funding when a decision has already been made. I am referring, for example, to the safety of U.S. Armed Forces sent to foreign lands where there is combat or imminent hostility. It would be foolhardy not to provide the necessary funds which would allow those troops to efficiently and safely conduct the mandate that was placed on them by the executive branch.

Mr. THOMSON. No questions.

Mr. ZABLOCKI. Let me ask one final question. In earlier testimony Prof. Alexander Bickel stated, and I quote, "A vast ambiguity now shrouds the allocation of the warmaking power." Would you agree with him in his statement?

INTENT OF FOUNDING FATHERS

Mr. STEVENSON. I would not put it quite that way. But I think it has been clear that I have felt that the question of the warmaking powers is something that the founders purposely attempted to deal with in a general way relying on the political interaction between the two branches of government rather than by specifying detailed rules. And I think I prefer the general approach rather than the detailed rulemaking approach in this area.

Mr. ZABLOCKI. I understand that, Mr. Stevenson, but if indeed there is ambiguity, there must be serious effort to correct it.

Mr. STEVENSON. Again, I guess my only quarrel would be with the word "ambiguity." I don't think that the Founding Fathers intended to be ambiguous. They intended to be general realizing that given diverse circumstances with which this country would have to deal over the years, that any attempts at a greater definition would soon be outdated in a not effective way of dealing with the problem. I prefer not to characterize that as ambiguity. I think they knew what they were doing and they provided for a general framework which could adapt itself to changing circumstances.

Mr. ZABLOCKI. When your successor, Mr. Brower, acting legal adviser to the Department of State, was before the committee, I suggested that this area of warmaking powers could perhaps be clarified by a resolution which would only restate those references to warmaking powers found in the Constitution of the United States—article I, section 8, which lists the powers of the Congress, and article II, section 2, the one sentence, which states, "The President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the general States when called into the actual service of the United States." Although I asked the question somewhat facetiously it appears that he thought even this type of legislation would be subject to constitutionality. All I was suggesting was a mere restatement of the Constitution.

DEALING WITH QUESTION COMPLETELY

Mr. STEVENSON. Well, Mr. Chairman, it is a very interesting suggestion. My problem as a lawyer I guess, would be in knowing what significance to attribute to which provisions you selected and which you had left out because I think there would be other relevant provisions certainly if you were attempting to deal with the question completely. So that I would think that perhaps Mr. Brower's apprehensions were that you were not repeating the Constitution as a whole and if you repeated it as a whole, I am not sure that that would serve any purpose.

Mr. ZABLOCKI. Only those sections in the Constitution that deal with war powers would be repeated in legislation.

Mr. STEVENSON. Well, certainly, Mr. Chairman, the Constitution is the Constitution and it would not be altered by the fact that you in a resolution referred to these provisions. If in fact you were attempting to legislate these provisions into law, I cannot see precisely what the legal effect would be, because they are already the supreme law of the land.

Mr. ZABLOCKI. We would hope that would be the case but by restatement attention would be brought to those specific portions of the Constitution. Hopefully that would satisfy those who say the executive powers were increased by historical acceptance and development. We would bring it back to what the Founding Fathers had intended.

Mr. STEVENSON. It is an interesting suggestion. I would wish to urge you to include all the relevant provisions if you will.

Mr. ZABLOCKI. It would not be my intention to omit anything relevant. But I don't think you would suggest the committee should clutter the resolution with irrelevant portions of the Constitution.

AN ORIGINAL SUGGESTION

Mr. STEVENSON. I must say, Mr. Chairman, it is a very original suggestion. I am not sure what the executive branch or the public at large would make of that sort of legislation. I think you certainly have the tradition of referring to constitutional provisions in your bills but to in fact attempt to relegislate something that is in the Constitution, I am not sure that it might not confuse people.

Mr. ZABLOCKI. I would hope not. The only purpose would be that both branches, the executive and the legislative, would live up to the provisions of the Constitution.

Mr. STEVENSON. I think I have about exhausted my comments on that proposal, sir.

Mr. ZABLOCKI. Governor Thomson?

Mr. THOMSON. No questions.

Mr. ZABLOCKI. At this point, I am reluctant to say we have to close this session. I want to thank you again, Mr. Stevenson, for your enlightened views. If you have any influence with the ABA, it would be appreciated if you can hurry the report so that we can have the benefit of their views, not in 1974 but as early as possible. We are very anxious to have the advice of constitutional lawyers and that of such prestigious organizations as the ABA. Though we may not always agree with their suggestions, nevertheless, I am sure the subcommittee would welcome them. I submit if we are going to wait until the fall of 1974, legislation will fall by the wayside. My own view is that we will go to conference in the 93d Congress. Something will be enacted which will be presented for the President's consideration. Hopefully we will have legislation which will be in keeping with our national interests and at the same time restate the intent of Congress to meet its obligations in this very troubled area of war powers.

Thank you again, Mr. Stevenson.

The subcommittee will stand adjourned to the call of the chairman.

[Whereupon, at 10:55 a.m., the subcommittee adjourned to reconvene subject to the call of the Chair.]

93-626—73——19

STATEMENT OF HON. BELLA S. ABZUG OF NEW YORK

Ms. ABZUG. Mr. Chairman, it is strange that we have reached the point of extended debate over "war powers." It is strange, that is, if we are still a constitutional democracy; for the Constitution states without qualification that "the Congress shall have the power * * * to declare war." There is nothing anywhere in the Constitution that authorizes Presidential wars. Yet that is what we have had and are still enduring in Indochina. After the signing of a cease-fire agreement in Vietnam, the President continues to bomb Cambodia daily. He threatens to resume American bombing in North and South Vietnam also, despite the repeated demand of an overwhelming majority of Americans, that we get out of Southeast Asia and stay out.

It is strange that one man has such power. The Founding Fathers would never have believed it. They envisioned a system in which a vote meant something and was not just a parody of participation in making decisions. This President makes all the decisions, alone, often against the advice even of his own advisers—who then have to scurry around to find legal justification for what he has done. They can't find such justifications, but that doesn't stop Mr. Nixon from continuing to do as he pleases.

It is strange that the Congress seems powerless to stop him. We have the power: that, too, was provided in the Constitution. Congress has the ultimate power, the "power of the purse"—if we had the will, we could put a stop to this madness at once by cutting off all funds for present and future ventures in Indochina.

We could have the backing and the enthusiastic support of a vast majority of our constituents. No war in America's history has ever been so unpopular. The repeal of the Tonkin Gulf resolution repealed every vestige of authorization by Congress for Presidential wars—and essentially admitted error in having been tricked into passing the resolution in the first place. There is every evidence that prolonging or renewing this war will meet with tremendous resistance, not just from peace groups, but from moderates and conservatives as well.

Before the cease-fire agreement, the Senate twice passed measures to cut off funds, but the House, fearing that such action would endanger our troops and impede the President's peace efforts, refused to pass similar legislation. By this time, it is surely clear to all that, whether or not the President's peace efforts were sincere, they did not work. There is no peace in Southeast Asia; there is not even a cease-fire in Vietnam. Both sides go on shooting, each blaming the other. Undoubtedly, both sides do violate the cease-fire; but that is not a problem that can or should be settled by American bombs. If we are to avoid continued involvement, the Congress must take firm control of American intervention in the affairs of other nations.

I have introduced two bills that would have this effect in the Asian situation. H.R. 3578 would terminate all military and paramilitary assistance to the nations of Indochina. This specifically includes funding for military activities of such agencies as the CIA and AID, whose activities have often served as a covert substitute for a declaration of war. Political subversion and assassination in other lands should not be paid for by American taxpayers. Yet we have seen it happen, not only in Southeast Asia, but in South America and the Dominican Republic.

My second bill, H.R. 5821, would require congressional authorization for the reinvolvement of American forces in Indochina.

The problem I find with the other bills that have been introduced to cope with this situation is that congressional sanction would be applied for any armed intervention longer than 30 days. This last provision invalidates the whole concept. Within 30 days, as we have seen all over the globe, a well-supplied army can overthrow practically any government and substitute a more friendly one. This is precisely what the ITT and the U.S. Government planned in such countries as Chile. What point is there in allowing this to happen and then asking Congress to rubberstamp it? Is it conceivable that at such a point, Congress will cut off funds for our troops backing the new, "friendly" government? We have been caught in that trap for the last decade. We should have learned something from it.

The Congress should demand that unless the United States is attacked on our own soil the President must receive specific authorization prior to intervention in the affairs of other nations. We are now discovering that a great deal of intervention has been going on, without public accountability, in a number of countries. One might call it prewar intervention. U.S. dollars and military aid continue to prop up shaky regimes around the world. When they fall—as Cambodia's seems about to do—we find ourselves committed by Presidential decisions to war, by whatever name. This is clearly an uncontitutional exercise of war powers which the Congress can act to prevent before, not after, conflagrations occur.

Apart from pragmatic results, there is the basic necessity for establishing the principle of congressional authority. This country is traveling down a dangerous road in allowing more and more power to be concentrated in one man's hands. Can we name any country where this trend has not ended in dictatorship? What reason have we to believe that it will be different here? Before we leap to cite the safeguards of democracy, we should look to see just what is happening to those safeguards. Opponents of the present administration are not yet in jail in any great numbers, but they have certainly been silenced. Under threat of losing licenses, broadcast media have imposed an uneasy "self-censorship." News reporters who will not disclose their sources are being jailed—which means that sources are drying up. "Executive privilege" is being used to cover—we know not what, for those close to the President are being protected from disclosing their role in the Watergate bugging and break-in. Impoundment of funds already appropriated for social services, is being used as a way to keep the poor from getting too knowledgeable in organizing. Mr.

Nixon's proposed budget cuts would finish off all hope that moderate- and low-income people can make it in this inflated economy. Only the rich will make it—and that too is characteristic of dictatorships.

The course of least resistance is to allow ourselves to continue on this downhill slide. It is not easy, having relinquished our power, to regain it. But it is the one significant act that can change the course of history for decades to come. And the time to act is now, before it is too late.

STATEMENT OF HON. GEORGE E. DANIELSON OF CALIFORNIA

Mr. Chairman, my purpose in presenting this testimony is to urge the adoption by the Congress of legislation which will clarify the relationship between the powers of the Congress and of the President as they relate to making war. The legislation which I propose, which is embodied in House Joint Resolution 21, would make unmistakably clear and carry out the intentions of the framers of the Constitution.

It is elementary that the framers of the Constitution intended that power should be shared between the various branches of Government. They established an elaborate, and effective, system of checks and balances for the purpose of preventing the exercise of governmental powers being concentrated in any one department of Government. That philosophy was clearly stated by Thomas Jefferson, who said, "It is not by the consolidation, or the concentration of powers, but by their distribution, that good government is affected."

This has presented no problem during those times in our history when the Congress and the President have been of one mind and purpose in carrying out national policies. In times of conflict between the Congress and the President, however, each branch tends to interpret the Constitution in the manner which supports its own point of view. Who is "right" sometimes seems to depend upon the opinion of the public. But this must not be, for the proper exercise of constitutional powers is a matter of law, not popular referendum.

Since we are a government of laws, and not of men, it is imperative for us now to clarify for all time the relationship between the Congress and the President as to the warmaking powers.

Certainly there is no respect in which the need to clarify the sharing of Government powers is more important than in that of the warmaking powers. War being the most extreme of all national endeavors, should not be entered into except under unquestionable constitutional authority, based upon full compliance with the great decisionmaking process that the Constitution established.

The legislation I propose, to clarify the powers of the Congress and the Executive, is entirely appropriate under the Constitution. Article 1, section 8, of the Constitution gives Congress the power to "* * * make all laws which shall be necessary and proper for carrying into execution" the enumerated powers of the legislative branch. This clause not only gives the Congress the power to implement its own powers through legislation; it gives Congress the power 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."

The conflict in the matter of warmaking powers seems to arise out of the difference between the power of the President in his capacity as Commander in Chief, as opposed to the power of the Congress to declare war.

Since the Constitution expressly provides that it is the Congress that shall have power "* * * to provide for the common defense, * * * to raise and support armies, * * *" and "* * * to provide and maintain a navy * * *" it is clear that the President would be Commander in Chief in name only if Congress did not provide him with armed forces to command. Thus, while the Constitution establishes that the President is Commander in Chief of our Armed Forces, the power is granted to the Congress to make all laws which shall be necessary and proper for carrying the Commander in Chief's powers into execution.

Most importantly, the one and only power to declare war is granted and imposed by the Constitution on the Congress.

It is certain that the framers of the Constitution intended that this be more than an idle exercise. It very clearly means that, if a state of war is to exist between the United States of America and another nation, it is Congress that must decide that issue. As in other Government decisions, Congress establishes the policy which the President is to carry out.

In an early draft, the proposed Constitution gave the Congress the power to make war, but that language was changed to the power to declare war, thus preserving and continuing the constitutional pattern of giving the Congress the power and duty of creating national policy, by legislation, and giving the executive the power and duty to take care that those national policies and laws be faithfully executed.

Thus, the Constitution makes a clear distinction between the legislative and executive functions—between policymaking and its execution and the national policy decision as to whether this Nation is to go to war is clearly a congressional power and duty.

Congress also has the power "to raise and support armies, but no appropriation of money to that use shall be for a longer term than 2 years." No department of Government other than Congress can raise or support an army. This entails the power of the purse, as well as the national policy decision as to whether we shall have armies and the size and extent of our armies.

The problem here, which the framers foresaw, was that, while Congress might raise an army, an open ended appropriation to support an army would be self-perpetuating and would place too much power in one department of government. They did not want the purse and the sword under the control of one department of government. Accordingly, they prohibited such an open ended commitment of funds. They required that war appropriations be renewed every 2 years. This provides for debate, discussion, and the airing of all points of view, which is typically part of the legislative process. It assumes that one decision will reflect the will of the American people. If pursuit of a military goal was no longer deemed justified, or if the need for an army has disappeared, Congress would be in a position to consider these things in deciding whether to renew a war appropriation.

This power, taken together with Congress' power to declare war, gives a clear picture of the framers' intention that Congress should determine whether the forces of the United States should be committed to war.

The legislation I am proposing would provide a statutory clarification of the scheme of checks and balances the framers foresaw in the area of making war and yet provide reasonable flexibility to enable the President to meet the contingencies inherent in the world of today. This legislation is pursuant to Congress' power to make all laws necessary and proper to carry into execution its enumerated powers.

Very simply, it acknowledges the Commander in Chief's power to meet emergency situations with armed force, but requires him to report his reasons for his action to the Congress within 72 hours. This commitment of U.S. troops cannot exceed 30 days without the approval of Congress in the form of a concurrent resolution.

The legislation is necessary. We must never again go to war unless we have the undivided support of the Nation. We must never again ask our people to spill their blood in a cause which does not have their support. If we decide to call upon our citizens to make great sacrifices in a military cause, they must have a voice in that decision. And the voice of the people of the United States is heard through their representatives in the House of Representatives and the Senate. As a matter of constitutional law, and as a matter of democracy, the decision can be made in no other way.

STATEMENT OF HON. JOHN DELLENBACK OF OREGON

Mr. Chairman, I commend you and the other members of the subcommittee for acting so promptly in this session to hold hearings once again on the war powers issue. I'm pleased to have the opportunity to submit a statement in behalf of H.R. 454, which I introduced, and to urge your serious consideration of this measure and other proposed legislation dealing with this issue.

There is a good deal of discussion in this country today about the division of authority between the Congress and the executive. I don't wish to open for debate here the question of whether the executive branch has assumed a disproportionate share of power in the affairs of Government, on either side of which issue there is a good argument to be made. In the realm of warmaking, however, the fact of the matter is that during the terms of three consecutive Presidents American forces were involved in conflict in Vietnam for some 10 years largely on the basis of simple Presidential authority. By no means do I intend to equate the actions of those three Presidents—indeed their actions were quite different—but the fact remains of what occurred, and there are important lessons there to be learned.

Such a situation as that through which we have all so recently suffered results, in my opinion, from a subversion of the original intent of those who framed the Constitution. I am convinced that, with the exception of repelling sudden attacks on the United States or its citizens or acting in other emergency situations, our forefathers intended to vest full war powers in the Congress. Clearly the President's power is to serve as Commander in Chief of the Nation's armed forces once those forces are committed to war, but he does not bear the responsibility of committing them to war. This responsibility falls squarely on the Congress.

Congress has exercised its power to declare war on only five different occasions: the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II. U.S. forces have been involved in hostilities without an official declaration of war on more than 150 occasions in our country's history. Prior to this century, however, such incursions were of brief duration and relatively uncostly. What is most alarming is the fact that with no congressional declaration of war, we've spent some 80,000 lives and $180 billion dollars on two very real and prolonged wars in the 20th century. It is unthinkable to me that in our country and under our system of government the decision to sacrifice so much should fall upon any one man alone, however able and whoever he may be.

H.R. 454, which is virtually the same as the bill which overwhelmingly passed the Senate during the last session of Congress, represents a deliberate proposal that the Congress speak clearly on the critical issue of the powers vested respectively by the Constitution in the legislative branch and in the executive branch so far as the commitment of and the control over the Armed Forces of the Nation are concerned.

The bill begins by defining those circumstances under which the President, without prior congressional approval, may introduce forces into hostilities or situations where imminent involvement in hostilities is clearly indicated. The four specific conditions outlined are what may be termed emergency situations calling for defensive action and fall in line with the intention of the Constitution's authors to allow the President to deal with emergency situations. They are:

(1) To repel an armed attack upon the United States and its possessions;

(2) To repel an armed attack against U.S. forces located outside of the United States;

(3) To protect American citizens who are being evacuated from a situation of danger; and

(4) In compliance with specific statutory authorizations for the conduct of military operations.

Should the President determine that any of the above situations exists and decide to employ U.S. forces, he would then be required promptly to report to Congress the extent of such involvement and the circumstances under which it was initiated. Moreover, he would be required periodically to apprise Congress of the status of such military activities.

Section 5 prohibits the President from continuing military hostilities under the bill's permitted conditions beyond 30 days unless Congress passes specific enabling legislation. Provision is made, of course, to expedite the passage of such legislation.

What the 30-day limit does is place the burden of proof on the President who must convince Congress that military action by U.S. forces is both justified and essential to the country's welfare. Should a President be contemplating the introduction of forces into hostilities, he would have to stop and consider whether he would be able to accomplish his objectives within 30 days or whether he would be able to persuade Congress that a more sustained involvement is warranted. In other words, the bill will make it as difficult as possible for the Executive to place us in a position where we are too far into war to get out and will prevent the President from finding himself in the lonely position of conducting a war without the support of the people's representatives in the Congress.

Opponents of this legislation may argue that Congress is going too far by attempting to impose restrictions on the Executive in in this matter, They may argue that today's fast pace and instant communications may require immediate and unhindered action by the Commander in Chief to protect our interests. Let me point out that this bill in no way prohibits the President from acting quickly to protect the country or its citizens, but rather provides him a good deal of flexibility in emergency situations and the means to obtain congressional support when necessary.

A prime concern of the Congress should be to make certain that it is not easy to go to war, and if that takes imposing restrictions, then I am all for it. Vietnam has made it all too painfully clear that once we have substantially committed American men, money, and equipment to the defense of another nation, extrication from the conflict becomes extremely difficult. Congress cannot effectively act after the fact, nor should it be expected to. The time for Congress to act is when the original decision is made and in joint participation with the President.

I thank the subcommittee for your attention to this matter.

STATEMENT OF HON. WM. L. DICKINSON OF ALABAMA

Mr. Chairman, it is a privilege to appear before the Subcommittee on National Security Policy and Scientific Developments to speak in behalf of legislation to define the authority of the President to intervene abroad or to make war without the express consent of Congress.

I know there will be many constitutional experts who will testify before you on the technical aspects of this legislation, and I will not pretend to have their knowledge of the issue. Nevertheless, as a Representative of a segment of the American people who have a stake in the outcome of these hearings, I would like to go on record here today in favor of legislation which I introduced on this subject.

My bill, House Joint Resolution 250, would assure that any action taken by the President to commit any armed force of the United States to armed conflict with hostile forces outside the United States would be reported in detail to the Congress, which would then have 30 days to concur or dissent. Should the Congress dissent, the President would have 30 days in which to disengage all forces so committed.

Certainly, the President must be left with the power to repel sudden attacks upon the United States without congressional authorization for obvious reasons, and my bill would leave the President with that power. However, the Congress would then be able to review the President's action and determine the propriety of the action.

Many of my constituents have written me during the last 8 years both praising and condemning our actions in Vietnam. However, in most cases, the opening line of the correspondence went something like this: "I do not think we should have gotten involved in the first place * * *." I have said the same thing myself many times, and I am sure many, if not all, of you have heard or said it on numerous occasions too. The lesson has been a long and bitter one, but hopefully we have learned from it. The American people have a right to be protected from another involvement of this nature, and it is up to the Congress, and specifically the gentlemen on this committee, to come up with legislation which will give us that protection.

We, as Members of Congress, have accepted the responsibility to speak for our constitutents and see that their views are taken into account when decisions of national impact are made. Therefore, let's stop shirking our duty in this area of vast importance to our people and pass legislation to assert our responsibility in making war policy.

Thank you, Mr. Chairman.

STATEMENT OF HON. DON FUQUA OF FLORIDA

Mr. Chairman, members of the subcommittee, I welcome this opportunity to testify in support of measures which would define the authority of the President to intervene abroad or to make war without the express consent of Congress. I have been a cosponsor of this legislation in the past two Congresses and I feel that it is most important if we are to responsibly carry out the constitutional powers we are given over matters of war and peace.

Essentially, the legislation recognizes that war is too momentous and too awesome an undertaking to be decided by one individual or one individual and his closet personal advisers. Certainly, the framers of the American Constitution were nearly unanimous in insisting that their own people, through the Congress, assume such an awesome right. We are confronted with, many assert, a constitutional crisis. I wonder, however, if we are not witnessing the interplay of the legislative and executive branches under a living and dynamic Constitution. I applaud the efforts of this subcommittee and other of my colleagues in asserting the constitutional powers over war and peace which are rightly those of the Congress. We have been cited a list of nearly 200 U.S. military hostilities abroad without a declaration of war. Accordingly, the Congress has in too many instances stood idly by while the executive, with dubious constitutional grounds, has taken this country to and retained it in war. The introduction of the various war powers bills reaches to the very core of the division of powers between the legislative and the executive and I am pleased that the issue has finally been joined.

Senator John Stennis, a great American and strong supporter of this Nation's efforts in meeting our commitments to foreign nations, is a primary sponsor of this legislation and addressed the need for its enactment:

> The last decade has taught us . . . that this country must never again go to war without the full moral sanction of the American people. The only practical way for all parts of the nation to participate in such a decision is through the Congress.

I feel strongly that the original constitutional distribution of powers must be restored by statute in order to insure congressional participation in warmaking policy. In a superb article by Prof. Raoul Berger of the Harvard University Law School, it was demonstrated that the power to declare war was lodged in Congress as a guard against being "hurried" into war, so that no single man can involve us in such distress. The recent extrication of this country from the tragic conflict in Vietnam illustrates that it is indeed easier to go to war than it is to get out of one. Certainly, one purpose of the legislation we are now considering would be to make war more difficult to attain than is peace.

There is little question but that the Founding Fathers invested the President with the power to defend against sudden attack upon the United States. Certainly, I recognize and support the President's authority to react to such emergencies as it is essential to the defense of

our people. The various legislative proposals provide for such exigencies and in no way inhibit the President from asserting his powers as Commander in Chief.

The legislation that I have introduced enumerates the war powers of the Congress contained in section 8 of article I of the Constitution which states that Congress shall have the power to declare war; to raise and support armies; to provide and maintain a navy; to make rules for the Government and regulation of the Armed Forces; to provide for calling forth the militia for organizing, arming, and disciplining the militia; and to make all laws necessary and proper for executing the foregoing powers. The Framers of the Constitution were most explicit in assuring the Congress of a concurring role in any measure that would commit the Nation to war. My bill specifically limits the power of the President to commit the Armed Forces of the United States to action in any armed conflict with hostile forces outside the United States to the period of war declared by Congress or the period of a national emergency declared by Congress if such commitment should last over 30 days. The President would have full authority to take whatever action he felt was necessary to repel sudden attack or to respond to a threat to national security. The President would, however, be required to report to Congress within 72 hours and explain in detail his reasons for, and his evaluation with respect to the effect and duration of, such commitment. If the Congress, within 30 calendar days after receiving such report, shall not by concurrent resolution approve or otherwise act on said report, such commitment shall immediately terminate, and the President, as soon as practicable but not later than 30 calendar days after such termination, shall disengage all forces so committed.

Since the introduction of my bill during the 92d Congress, I have had the opportunity to review the very thoughtful remarks of my colleague and friend, Dante Fascell, which appeared in the pages of Foreign Policy, a well respected journal. Congressman Fascell has raised the question of whether the 30-day period in which the Congress must consider the President's request for congressional authorization of his commitment of U.S. Armed Forces, would result in the Congress proceeding in a hasty and rubberstamp fashion. Certainly, if such a time period would result in a rubberstamp approval of the President's actions, I would prefer a different approach. The Congress must have adequate opportunity to carefully scrutinize the President's evaluation of the situation and be able to independently analyze the threat or lack thereof. Accordingly, there is indeed a great need to provide a structure for influencing the President before he acts to commit American troops overseas in hostile combat. The debate on the exact mechanism for this consultation is exhaustive. It serves, however, to highlight the seriousness of the constitutional question confronting us.

The most important consideration, however, is to insure that the exercise of the war powers is a matter for collective judgment, wisdom and responsibility. Certainly, no altering of the Constitution is necessary. It is simply incumbent upon the Congress to enact such legislation as is necessary and proper to the discharge of its war declaring power and the President's Commander in Chief responsibilities. Again, I thank the subcommittee for this opportunity to present my testimony and I respectfully encourage you to report out an effective war power bill so that the Congress can resume its rightful place as coequals in the determinations over matters of war and peace.

STATEMENT OF HON. BARRY GOLDWATER OF ARIZONA

Forgetful of the post-World War I period of the 1920's and the 1930's when this country was being called an isolated country and a fortress America, some in Congress seek to revive legislation which they, as their philosophical kin of the past, believe might prevent this country from ever again being drawn into another major conflict. In my opinion, this legislation, known as the war powers bills, is unrealistic, unwise, and unconstitutional. It makes no sense from the standpoint of safe or intelligent military planning. It is disruptive of our entire mutual security system which now safeguards world order. It is totally without any statutory precedent in American history. And, in my opinion, it invalidly prohibits the President in the exercise of his constitutional powers of national defense.

The specific legislation which has been introduced is so rigidly drafted it would leave the United States standing by helplessly in the face of an all-out attack against important friendly nations, such as Israel, with which we have no defense treaty, and would even block humanitarian assistance such as the 1964 Congo rescue mission in which the U.S. military saved almost 2,000 non-Americans from rebel atrocities.

There are two major approaches taken by legislation introduced in the House of Representatives. H.R. 2053 is typical of one of these schemes. It sets out only four narrow situations in which U.S. forces can be used. If an emergency does not fit one of the four situations which the draftsmen of the bill have foreseen, the President is prohibited from acting until Congress authorizes him, no matter how untenable the situation may become as a result of our failure to act. Even when the President may act, the bill places a limit of 30 days on his conduct. Another provision of the bill allows Congress to stop whatever action the President has started before the 30 days are up. Thus, what the bill gives with one hand it takes away with the other.

The other major approach is represented by House Joint Resolution 2. Although it utilizes broader, and therefore more flexible language, it too sets statutory limitations on the situations when the Armed Forces may be introduced in hostilities.

In essence, this raises many basic objections against any form of war powers legislation. First, I believe it is simply impossible to prophesy in any law all of the unexpected and unlimited variations of events when a President may need to take defensive action without advance congressional approval.

Second, these bills attempt to define the boundaries of the constitutional allotment of the war powers between Congress and the President, something the Founding Fathers never attempted to do. For the declaration of war clause does not confer upon Congress the sole power whereby the country can become engaged in war. In fact, the Constitutional Convention purposefully narrowed the authority of

Congress by substituting "declare" for "make" in that clause. This was done in an age when the declaration was already in disuse, there having been 38 wars in the Western World from 1700 to 1787, the year of the Constitutional Convention, and only one of them was preceded by a declaration of war. From this, it is clear that even by the 18th century, the declaration had come to mean no more than a formal notice to the world and to one's own people that an already existing state of war was officially acknowledged. This is how it is defined in the sole standard dictionary of the English language then published, the famous Samuel Johnson work, and it is how the Constitution has been interpreted during the succeeding 183 years of practice.

The truth is, there are circumstances in which any President must have flexibility of action in order to meet a present crisis which might develop into an unalterable threat against our national security in the future, as well as to cope with a crisis which clearly presents a "direct and imminent" danger as described in H.R. 2053, or "extraordinary and emergency circumstances," as referred to in House Joint Resolution 2.

As early as 1836, John Quincy Adams stated:

> However startled we may be at the idea that the Executive Chief Magistrate has the power of involving the Nation in war, even without consulting Congress, an experience of fifty years has proved that in numberless cases he has and must have exercised the power.

In all there have been at least 204 foreign military hostilities in the history of our Republic and only five of them were declared. Congress has never once passed a law blocking or ordering a halt to any of them. These incidents show a consistent practice under which American Presidents have always responded to foreign threats with whatever force they believed was necessary and technologically available at the particular moment. The idea that Presidential troop commitments are a recent development is a myth.

To those who contend this concept gives an unrestrained power to the President to do anything he wants, I would remind them that I am speaking only of defensive responses by the Executive. The President cannot conduct a war of aggression. He cannot begin a war of conquest of another's territory. He cannot bully another country with threats of armed action simply because we do not like its tariff policies or the way it governs its own internal affairs. His constitutional power of independent action is limited to self-defense of our country, its people, and its freedoms, whenever and wherever in his judgment a danger exists, imminently or prospectively, which compels a response on our part. And to those who contend this concept will lead to another Vietnam, I answer that this ignores recent history. In the words of a Washington Star editorial, the contention that war powers legislation would have stopped Vietnam "is a monumental piece of historical hogwash."

It has now been judicially determined that Congress was involved up to its ears in the expansion of the Vietnam war. I could detail at least 24 statutes in which Congress has specifically spoken of Vietnam over the past two decades and has authorized the conduct of that campaign. These collaborations, enacted after full and open debate, placed Congress knowingly and squarely behind U.S. military operations in Southeast Asia.

The real story is that Presidents and their Cabinet members have spent an enormous amount of time working with Congress and striving to put the two branches in unison. It would be folly to alter this longstanding constitutional arrangement by a mere statute. Congress does not need new legislation to give it a place in the political command centers. It already has a very forceful and effective policymaking position. Through its power of the purse, Congress has basic control over the size and strength of the military sinews with which the President can wage war. In addition, Congress can grant or withhold a multitude of emergency powers bearing on foreign trade and the distribution of strategic materials and other economic elements that comprise the Nation's defense machinery.

Members of Congress also enjoy a prominent public forum from which they can immediately and easily gain the ear of a free press and reach the American people directly with their own alternatives to executive policies. Moreover, Congress can reject treaties or resolutions with defense implications.

These are the means by which the founders meant for Congress to share in deciding questions of war and peace and, in my opinion, Congress cannot alter this arrangement by any legislation short of a constitutional amendment.

Mr. Chairman, before closing I would like to identify some of the specific areas which trouble me the most about the text of the measures and where there appears to be a contradiction between the plain language of the legislation and the explanations given by its sponsors. Since H.R. 2053 is similar to S. 440, a Senate bill with which I am familiar, I will direct most of my comments to H.R. 2053.

One. Senator Javits, author of the Senate version of H.R. 2053, argued the President can use his own "judgment and discretion" as to when an emergency fits one of the four situations when he can use Armed Forces under the bill.

Yet, nowhere in S. 440 or H.R. 2053 is there any language providing that the President may make an independent judgment of any kind under the bill. In fact, a legal brief introduced in the Senate hearings record by Senator Javits argues that the President is the mere executive arm of the Congress who must follow the dictates of the legislative branch. I would note that House Joint Resolution 2 is more generous to the Executive in this respect by providing in section 3 that U.S. forces may be used when the necessity to respond "in the judgment of the President" constitutes extraordinary and emergency circumstances.

Two. The sponsors of S. 440 and H.R. 2053 claim the President can take whatever forestalling action is needed without waiting "until the bombs actually started landing on our soil." They claim the bill is not inflexible.

But the actual text of H.R. 2053 requires that before the President takes any defensive measure there must be an armed attack on the United States or our Armed Forces, or "the direct and imminent" threat of such an attack. In the case of an attack on a foreign nation, for example a part of Turkey where we have no troops deployed, the "direct" threat would be to that nation, not to the United States. The threat would be imminent to that nation, but distant to us. If a move against Turkey actually carried with it an implicit threat against the United States, it would only be because the attack set in motion a

chain of events which ultimately might represent a serious threat to us. If it is the sponsors' purpose to allow the President flexibility in these circumstances, as they contend, then they must intend "direct" to mean "indirect," and "imminent" to mean "some indefinite date in the future." In contrast, I might observe, House Joint Resolution 2 wisely avoids using the ambiguous and undefined terms "imminent" or "direct" threat and instead recognizes the power of the Executive to act whenever he sees any act or situation that "endangers" the United States or its citizens.

Three. The sponsors of S. 440 and H.R. 2053 claim it is the purpose of section 3, clause (4), to ratify the Formosan, Cuban, and Middle East resolutions as authority for the President to respond to crises in these areas.

The bill itself plainly states that no provision of law now in force shall be construed as authority for Presidential action unless it "specifically authorizes" the introduction of troops in hostilities. But all of the area resolutions mentioned do not specifically grant authority for the commitment of U.S. forces in armed actions. One, the Formosan resolution, does provide that "the President of the United States be and he hereby is authorized to employ the Armed Forces * * *" In contrast, however, the Cuban resolution states only that "the United States is determined" to take certain steps. The Middle East resolution is even weaker. It merely declares "the United States is prepared to use armed forces" and qualifies even this declaration by expressly providing that such employment shall be consonant "with the Constitution of the United States."

It must be remembered, Mr. Chairman, that a similar phrase "in accordance with constitutional processes," as used in our mutual defense treaties, is argued by the authors of H.R. 2053 to mean that no specific authority is given pursuant to such treaties. The sponsors do not explain what the difference is between the term "constitutional processes" as used in treaties and "consonant with the Constitution" as used in the Middle East resolution. In short, the authors are reading section 3(4) as containing a proviso that these three area resolutions shall constitute specific authority for emergency use of American forces, when the section itself does not contain any reference at all to such resolutions. House Joint Resolution 2 is silent on this question, except that it allows the use of troops "pursuant to specific prior authorization" by statute or concurrent resolution. No prohibition is made in House Joint Resolution 2 as to what may constitute such an authorization, again granting an important area of flexibility that is missing in H.R. 2053.

Four. Senator Javits has claimed there is full authority for the U.S. 6th Fleet to be deployed in the Mediterranean at will by the President during times of crisis under S. 440 and H.R. 2053.

The bill itself, however, specifically directs that U.S. forces shall not be introduced in situations where imminent involvement in hostilities is at risk except in the narrow situations where the United States or U.S. forces are attacked or directly and imminently threatened with attack. In the 6-day Middle East War of 1967, for example, the United States itself was not directly threatened with attack; nor was there any imminent threat to American forces. There was an open and imminent threat made by Russia against Israel. Premier Kosygin actually called President Johnson over the hot line to warn

that Russia was prepared to take military action against Israel. President's Johnson's prompt response by moving the 6th Fleet into the danger area in order to forestall Russian pressure on Israel would be prohibited under H.R. 2053 because no threat had been made against our own forces. For the sponsors of the bill to say that an American response is authorized in these facts reveals that the authors do not understand the implications of their own bill. House Joint Resolution 2 is not clear as to what action the President might take in the above situation.

Five. Senator Javits claims it would "be a faulty and distorted reading of the legislation," to infer that S. 440 and H.R. 2053 would prohibit U.S. personnel in the NATO integrated commands from exercising any functions without additional congressional authorization.

The language of section 3(4) flatly states that specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to "command" or "coordinate" in the movement of the military forces of any foreign country or government at any time when there exists an imminent threat that the forces will become engaged in hostilities. Thus, at the very moment when our participation in the NATO unified command would be needed the most, the bill squarely prohibits U.S. personnel from exercising any functions. House Joint Resolution 2 is silent on the question of whether this situation is covered by its terms.

Six. H.R. 2053 and S. 440 use three totally different ways of describing what constitutes an "imminent threat." Section 2 refers to "the imminent threat of attacks," while section 3 refers both to "situations where imminent involvement in hostilities is clearly indicated" and situations where there is a "direct and imminent threat" of an armed attack.

When is an attack "imminent" but not "direct and imminent"? When is our imminent involvement in hostilities "clearly indicated" but the threat of attack against our forces nor "direct and imminent"? The sponsors of the bill have never given an explanation of what the difference is between "imminent" as used in one provision and that used in another. House Joint Resolution 2 does not entertain this problem, though it presents a different one by using the phrase "extraordinary and emergency circumstances." What this means is left undefined and appears to be properly left for definition by the President in his judgment in the setting of each crisis as it may occur.

In summary, House Joint Resolution 2 is clearly the most flexible legislation of the two in allowing room for protection of the United States and its 210 million citizens. But, in my opinion, it is unwise to legislate any rules in this field which is already treated by the Constitution and which has never been defined by Congress or the courts in our 183 years of life under that document.

Mr. Chairman, with your permission, I would like to ask that two recent law review articles on this subject may be printed with your hearings. One is a paper which I wrote for the law journal of Arizona State University and the other is a revised edition of an analysis of American military hostilities outside the United States without a declaration of war which my legislative assistant, Mr. Terry Emerson, first published in the West Virginia University Law Review.

[The articles follow:]

EXHIBIT I

[Reprinted by permission from "Law and the Social Order", Arizona State University Law Journal, Volume 1971, Number Three]

The President's Ability To Protect America's Freedoms — The Warmaking Power

Barry M. Goldwater*

The Senate Foreign Relations Committee has ordered favorably reported Senate Bill 2956, which lays down rigid rules to govern the President's use of the Armed Forces in the absence of a congressional declaration of war. With this bill in the background, Senator Goldwater discusses the historical military actions taken by American Presidents and Congress' responses to these actions. He then examines the constitutionality of congressional limitations on the President's warmaking power and concludes that, while Congress holds control over the size and strength of the country's military machinery, the President's power to use that machinery when he feels the country is in danger cannot be restrained by congressional policy directives.

I. CONTEMPORARY SETTING

On November 17, 1971, President Nixon signed a $21.3 billion military procurement bill,[1] but emphasized in doing so that he would ignore a so-called end-the-war rider as being "without binding force or effect" and failing to "reflect my judgment about the way in which the war should be brought to a conclusion."[2] Hours later, the House of Representatives rejected, for the fourth time in 1971, a proposal to set a specific deadline for ending the United States military involvement in Indochina.[3]

Not to be deterred by two setbacks in one day, Senator Mike Mansfield, the distinguished Majority Leader of the Senate and author of the troop withdrawal amendment just torpedoed by President Nixon, promptly opened

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*Member, United States Senate (Arizona).

1. Act of Nov. 17, 1971, Pub. L. No. 91–156, 85 Stat. 423.
2. 29 CONG. Q. WEEKLY REP. 2371 (1971). (The Act was signed Nov. 17, 1971.) President Nixon's comments were directed at section 601 of the Act, the "Mansfield Amendment." *Id.*
3. The proposal was in the form of an amendment to the 1972 Department of Defense Appropriations Act, H.R. 11,731, 92d Cong., 1st Sess. (1971), calling for a halt in funding for any military support by United States forces in or over Indochina after June 1, 1972. It was rejected by a vote of 163 to 238. *See* text of amendment at 117 CONG. REC. H 11,170 (daily ed. Nov. 17, 1971) and vote, *id.* at H 11,196–97.

a new attack on the Executive's military authority. The next day another Mansfield amendment was reported to the Senate—a prohibition on spending attached to the 1972 Department of Defense Appropriation Act which sought to force the withdrawal of 60,000 American troops from NATO.[4] This time the President needed no aid from the other Chamber, since the Senate voted on November 23 to reject the limitation by 39 yeas to 54 nays.[5]

The senior Senator from Montana had yet one more challenge waiting in his campaign against Executive discretion, however, for only a week earlier the Senate had passed his third amendment of the year aimed at terminating all United States military operations in Indochina.[6] The amendment set a final date for the withdrawal of all United States forces within 6 months, and was coupled to the Special Foreign Military and Related Assistance Act.[7] The first session of the 92d Congress might still be deadlocked over this issue had not the House of Representatives voted against the proposal a week before Christmas.[8]

However, the most sweeping challenge of 1971 to the President's foreign policy prerogatives stayed alive. I refer to Senate Bill 2956, a bill to codify the rules governing the use of the Armed Forces in the absence of a declaration of war.[9] This legislation, awesome in its implications, was ordered reported favorably on December 7, 1971, by a unanimous vote of the Senate Committee on Foreign Relations.[10]

Thus closed the legislative year 1971, the second succeeding year in which Congress had undertaken a massive effort to reverse what many members of Congress call the erosion of the legislative branch by Presidential usurpation.[11] Many lawmakers and constitutional writers treat the current moves by Congress as a momentous occasion, precipitated by what they allege to be a completely unprecedented example of Presidential warmaking during the past quarter century.[12] But is the experience of Executive initiative in the use of military force truly a modern phenomenon—a departure from long-

4. H.R. 11,731, § 744 (Star Print), 92d Cong., 1st Sess. (1971), as reported by The Senate Committee on Appropriations, S. REP. No. 92–498, 92d Cong., 1st Sess. 48–49 (1971).
5. 117 CONG. REC. S 19,516 (daily ed. Nov. 23, 1971).
6. *See* S. 2819, § 9, 92d Cong., 1st Sess., 117 CONG. REC. S 18,282 (daily ed. Nov. 11, 1971).
7. *Id.*
8. 117 CONG. REC. H 12,689–90 (daily ed. Dec. 16, 1971).
9. S. 2956, 92d Cong., 1st Sess. (1971), was introduced by Senator Javits for himself and Senators Stennis, Eagleton, and Spong. *See* text of bill, 117 CONG. REC. S 20,627–28 (daily ed. Dec. 6, 1971).
10. Daily Digest, 117 CONG. REC. D 1280 (daily ed. Dec. 7, 1971).
11. *See* pages 429–31 *infra.*
12. *See, e.g.*, statements of Senators Javits and Eagleton, 117 CONG. REC. S 20,627–28 (daily ed. Dec. 6, 1971), and the testimony of Professors Commager, Morris, and Kelly, *Hearings on S. 731, S.J. Res. 18 & 59, Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1971), *reprinted in* 117 CONG. REC. S 3353–62 (daily ed. Mar. 16, 1971) [hereinafter cited as *Senate War Powers Hearings*].

standing tradition? Is the recent struggle in Congress to impose controls over the waging of war an historical first, unknown until now in view of the general self-restraint by earlier Presidents? Or are the present maneuverings between the two political branches of our government merely a sign of recurring ripples in the stream of history? Who, if anyone, possesses the dominant powers to wage war; to authorize the initiative of war; to deploy men, equipment, and supplies? What checks and balances are there on the war powers? What control does Congress or the President have over the other in regard to making war? What kind of hostilities, if any, can our nation legally engage in without a formal declaration of war? All these questions, and more, are interwoven in the current effort by Congress to restrict the President's ability to wage war. It is my hope that this Article will help illuminate these issues.

II. Historical Overview

A. *Presidential Initiatives*

It may come as a shock to many Americans that the United States has been involved in at least 197 foreign military hostilities in its history,[13] only five of which have been declared wars.[14] These incidents took place all over the world.[15] Nearly half involved actual fighting,[16] and no less than 111 actions were undertaken solely on Executive authority without the initial support of any related statute or treaty, let alone a declaration of war.[17]

A few commentators have brushed aside these precedents as being "short-lived,"[18] or "minor undertakings,"[19] or almost exclusively "confined to the Western Hemisphere."[20] But it is a fact that 93 actions lasted more than 30 days,[21] a considerable number involved the landing of many thousands of American troops on foreign soil, and exactly 100 occurred outside the Western

13. *See generally* Emerson, *War Powers Legislation*, 74 W. Va. L. Rev. 53 (1972).
14. The five declared wars are the War of 1812, the War with Mexico, the Spanish-American War, and World Wars I and II.
15. *See generally*, Emerson, *supra* note 13, app. A (chronological list of 192 United States military hostilities abroad without a declaration of war, prepared at my request).
16. At least 81 hostilities were accompanied by fighting or ultimatums. *Id.* app. D.
17. See the list of 81 hostilities which may arguably have been initiated pursuant to prior legislative authority, *id.* app. G. But it should be observed that 51 of these possible collaborations by Congress took the form of a treaty. Thus, if a full-blown congressional declaration of war would be required to commit United States forces to hostilities, the fact that 51 activities may have been authorized by treaty and therefore by one House of Congress alone, would not serve as a precedent for the requirement of declarations of war in other circumstances.
18. Malawer, *The Vietnam War Under the Constitution: Legal Issues Involved in the United States Military Involvement in Vietnam*, 31 U. Pitt. L. Rev. 213 (1969).
19. Reveley, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 Va. L. Rev. 1243, 1258 (1969).
20. *See* testimony of Professor Henry Steele Commager, who claims the precedents are confined to the Western Hemisphere and contiguous territory up to "the last twenty years or so," with one exception. *Senate War Powers Hearings*, supra note 12, at S 3355.
21. *See* Emerson, *supra* note 13, app. E.
22. *Id.* app. A.

Hemisphere.[23] These operations include the capture of 90 French ships during the period from 1798 to 1800, the sinking or capture of 65 pirate vessels in the Caribbean prior to 1825, several landings and punitive actions abroad to defend or evacuate United States citizens and their property, the dispatch of 2,000 sailors and marines to force open commercial trade with Japan in the 1850's, the use of 126,468 troops to suppress the Philippine Insurrection after the 1898 treaty of peace with Spain was concluded, the deployment of several thousands of troops ashore in China from 1900 to 1941, the Pershing Expedition into Mexico with 12,000 men, the commitment of 14,000 men to Allied expeditions in Russia a year and a half after Armistice Day, the Korean Conflict of the 1950's, the occupation of parts of Lebanon in 1958 by 14,000 American soldiers and marines, the super-power confrontation between the United States and the Soviet Union during the Cuban missile crisis of 1962, and the Vietnam hostilities, among many others.[24]

B. Early Congressional Response

Obviously, little wars are not a "phenomen[on] new to the national experience."[25] Nor have past Presidents been immune from congressional sniping at their military policies.[26] Throughout the early years of this century, there were dozens of attempts in Congress to shackle the President's right to use military power. In 1912, Senator Bacon proposed an amendment to the Army Appropriation Bill which would have prohibited the use of any money provided by that law

> for the pay or supplies of any part of the Army of the United States employed, stationed, or on duty in any country or territory beyond the jurisdiction of the laws of the United States or in going to or returning from points within the same.[27]

This amendment, which would have restricted all United States troops to the United States or its possessions, was defeated without a record vote.[28] In

23. *Id.* app. F.

24. *Id.* app. A.

25. *See* R. DUPUY & W. BAUMER, THE LITTLE WARS OF THE UNITED STATES, at preface (1968).

26. President Tyler was denounced in Congress and threatened with impeachment because he deployed military units to protect Texas against Mexico in 1844. C. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 47–49, 70–74 (1921).

President Polk was rebuked in a resolution passed by the House of Representatives declaring that the war with Mexico, which his military maneuvers had precipitated, "was unnecessarily and unconstitutionally begun by the President of the United States." *Id.*

In 1871, President Grant was severely condemned on the floor of the Senate because of his action in sending a strong naval force to Santo Domingo to protect it from invasion and internal disorder. In fact, a resolution introduced by Senator Sumner would have condemned the use of the Navy without the authority of Congress as "an infraction of the Constitution of the United States and a usurpation of power not conferred upon the President." But the resolution was tabled by a large majority (38 to 16). *Id.*

27. 48 CONG. REC. 10,927 (1912).

28. *Id.* at 10,930.

1919, several Members of Congress introduced measures aimed at ordering American soldiers home from Europe and challenging the presence of our troops in Siberia as unconstitutional.[29] The only one that passed, however, was a watered-down resolution by Senator Hiram Johnson, simply requesting the President to provide Congress with information on the Siberian Expedition.[30] Then in 1922, a major effort was made in Congress to control the geographical deployment of American forces. The House Committee on Appropriations reported the War Department funding bill with a provision specifying:

> No part of the appropriations made herein for pay of the Army shall be used, except in time of emergency, for the payment of troops garrisoned in China, or for payment of more than 500 officers and enlisted men on the Continent of Europe; nor shall such appropriations be used, except in time of emergency, for the payment of more than 5,000 enlisted men in the Panama Canal Zone, or more than 5,000 enlisted men in the Hawaiian Islands.[31]

After a vigorous debate squarely on the constitutional allotment of the war powers between the Executive and Congress,[32] the House agreed, on March 24, to Representative Rogers' motion to strike out the committee restriction. John Rogers, a law graduate from Harvard and a seven-term Republican Congressman, presented an illuminating and scholarly discussion of the constitutional issues involved, which stands to this day as one of the greatest expositions ever made during a legislative attempt to run the details of the Armed Forces.[33]

The Senate made its move later in the year. On December 27, 1922, Senator Reed offered an amendment to the Naval Appropriation Bill designed to "at once cause the return to the United States of all American troops now stationed in Germany."[34] The amendment was debated, but never accepted. On December 30, 1922, Senator King called up an amendment to the same appropriation measure providing:

> That no part of said amount shall be used for the purpose of maintaining or employing marines, either officers or enlisted men, in the Republic of Haiti or the Dominican Republic after June 30, 1923.[35]

Senator King's amendment was rejected the same day.[36] In 1925, he was again disturbed by the use of American troops in the Caribbean and again intro-

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29. *See* H.R. Res. 251 (Representative Rhodes), H.R. Res. 266 (Representative Wood), H.R. Con. Res. 8 (Representative Mason), S. Res. 181 (Senator McCormick), S.J. Res. 60 (Senator Edge), S.J. Res. 111 (Senator Sherman), 66th Cong., 1st Sess. (1919).
30. S. Res. 13, 66th Cong., 1st Sess. (1919). *See* 58 CONG. REC. 1864 (1919).
31. 62 CONG. REC. 4109 (1922).
32. *Id.* at 4510.
33. *See id.* at 4109–10, 4295–98.
34. *See* 64 CONG. REC. 934 (1922).
35. *Id.* at 1117.
36. *Id.* at 1131.

duced an amendment to the Naval Appropriations Bill. It stated that "no part of . . . any amount carried in this bill shall be used to keep or maintain any marines in the Republic of Haiti."[37] Once more, Senator King's amendment was rejected.[38]

Three years later, the Senate engaged in one of the most fully-aired debates ever conducted on the question of congressional authority to restrict the power of the President to employ troops abroad—a discussion that would put to shame contemporary exchanges in that body which wander far afield of the true inquiries at the heart of the war powers issue. In 1928, the Senate focused its attention on an effort by Senator Blaine to prevent American forces from being used for intervention in the affairs of any foreign nation "unless war has been declared by Congress or unless a state of war actually exists under recognized principles of international law."[39] The proposal was initiated in view of the feeling of several Senators that the United States military occupation of Nicaragua was not in accordance with the Constitution.[40] Senator Blaine's broad amendment, and a more limited one by Senator McKellar which was confined to Nicaragua alone,[41] would have directed the withdrawal of troops and marines from Nicaragua within 9 months, presaging the format of the first Mansfield amendment of 1971.[42] Only the geographical area was different. Both the Blaine and McKellar amendments failed after a week of debate, by a vote of 22 yeas to 52 nays on the Blaine proposal and 20 yeas to 53 nays on the McKellar amendment.[44]

By 1940, Congress did succeed in enacting a geographical limitation on the emplacement of United States units abroad. Section 3(e) of the Selective Service Act of 1940 expressly required that no draftees were to be employed beyond the Western Hemisphere, except in territories and possessions of the United States.[45] Congressional debate on the provision confirms beyond doubt that it was the intent of its sponsors to limit the meaning of "Western Hemisphere" narrowly to the area of the Americas which "we have long engaged to protect under the Monroe Doctrine."[46]

And yet, 1 year later President Franklin Roosevelt deployed our forces, including draftees, to hold Iceland and Greenland, months before the United States formally entered World War II.[47] President Roosevelt's action in send-

37. 66 CONG. REC. 2191 (1925).
38. *Id.* at 2215.
39. 69 CONG. REC. 6991 (1928).
40. *See, e.g.*, 69 CONG. REC. 6982–92 (1928).
41. *Id.* at 6986.
42. *See* 117 CONG. REC. S 9717 (daily ed. June 22, 1971).
43. 69 CONG. REC. 7192 (1928).
44. *Id.*
45. 54 Stat. 885, 886 (1940).
46. 86 CONG. REC. 10,295 (1940). *See id.* at 10,092, 10,103–05, 10,116, 10,129, 10,391, 10,742, 10,794–98, 10,895–914.
47. *See* Emerson, *supra* note 13, app. A.

ing troops more than 2,000 miles away from home bore out Senator Lodge's admission, as author of the restriction, that "[t]his is a pious hope."[48]

A year before, Roosevelt had violated at least two of the post-World War I neutrality laws when he handed over 50 reconditioned destroyers to Great Britain in exchange for a series of military bases in the British West Atlantic.[49] President Roosevelt further moved this nation from a neutral into a belligerent status before the repeal of the neutrality laws by ordering the United States Navy to convoy military supplies meant for Britain and Russia as far as Iceland and to attack Axis submarines in the process.[50]

III. Congress Reasserts Itself

A. *Indochina Amendments*

This historical sketch, while not exhaustive, demonstrates that individual Members of Congress have often criticized Presidential conduct of foreign hostilities, but seldom, and perhaps never, has the Legislative Branch as a unit directly challenged the President's decisions with statutes unequivocally ordering the Executive to withdraw troops from a specific geographic area, or prohibiting him from employing forces in certain situations.[51] Even recent highly-publicized endeavors by Congress to restrict Executive actions, fall far short of being outright shackles on his conduct.

For example, the Cooper-Church amendment, purportedly barring the introduction of new forces into Laos and Thailand, actually attempts to translate into law President Nixon's own pledges not to involve American ground combat troops in these countries.[52] This amendment, as enacted in the Department of Defense Appropriation Act of 1970, reads:

> 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 or Thailand.[53]

Nothing is said about barring the sending of advisors to these two countries,

48. 86 Cong. Rec. 10,897 (1940). The 1940 provision is a poor precedent for war powers legislation. Not only was it flouted by President Roosevelt, but it was openly admitted during Senate debate that Congress could not constitutionally restrain the President from commanding troops wherever he wishes. *Id.* at 10,895–914.

49. *See*, E. Corwin, The President: Office and Powers 238–39 (4th rev. ed. 1957).

50. *Id.* at 203. Schwartz concludes:

> The President's action in this respect is of particular legal interest because of an express provision in the Lend Lease Act of 1941, that "Nothing in this Act shall be construed to authorize or permit the authorization of convoying vessels by naval vessels of the United States."

2 B. Schwartz, The Powers of Government 202 (1963).

51. The 1940 law, which apparently barred the sending of troops outside the Western Hemisphere, was treated by both Congress and the President as merely a "hope" of Congress, not an actual limitation on Executive authority. *See* note 48 *supra*.

52. Congressional Research Service, Legislation Enacted by the 91st Congress to Limit United States Military Involvement in Southeast Asia 9–10 (Mar. 30, 1971) [hereinafter cited as C.R.S.].

53. Act of Dec. 29, 1969, Pub. L. No. 91–171, § 643, 83 Stat. 469, 487.

or requiring the removal of any American forces already there. Nor is there any mention of stopping the bombing, or how the provision is to be construed in the event its language no longer represents the President's position.

An identical provision was also enacted as part of the defense appropriations laws for 1971[54] and 1972.[55] Indeed, President Nixon included the language of the 1970 provision in his own proposed budgets for these years.[56]

Another quasi-restriction on the employment of United States forces, which cleared Congress in 1970, is a ban against the introduction of both United States ground combat troops and advisors into Cambodia. This provision, incorporated into the Supplemental Foreign Assistance Authorization Act for 1971,[57] states:

> In line with the expressed intention of the President of the United States, none of the funds authorized or appropriated pursuant to this or any other Act 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.[58]

Again, the Administration posed no objection to the proposal. Secretary of State William P. Rogers testified that it "carries out the President's intention."[59] In fact, Secretary Rogers may have facilitated passage of the amendment when he later wrote to Senator Church: "I should like to reaffirm that the Administration's program, policies, and intentions in Cambodia in no way conflict with" the proposal.[60] It should be noted that the amendment does not purport to cover the use of air and sea power. Nor, according to the conference report on the provision, does it

> prevent the use of United States troops in border sanctuary operations designed to protect the lives of American soldiers [or of] United States military personnel to supervise the distribution and care of United States military supplies and deliveries to Cambodia, and . . . the training of Cambodian soldiers in South Vietnam.[61]

Given such broad exceptions, I believe these provisions are no precedent at all for strict congressional supervision over the Executive's warmaking ability. In truth, they are no more than exercises in restating, with Presidential acquiescence, policy decisions which he had previously announced his intention to follow. Should the President, in viewing the world situation, feel compelled to alter his position, I further believe he could constitutionally

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54. Act of Jan. 11, 1971, Pub. L. No. 91–668, § 843, 84 Stat. 2020.
55. Act of Dec. 18, 1971, Pub. L. No. 92–204, § 742.
56. C.R.S., *supra* note 52, at 28.
57. Act of Jan. 5, 1971, Pub. L. No. 91–652, § 7(a), 84 Stat. 1942.
58. *Id.*
59. C.R.S., *supra* note 52, at 18.
60. *Id.*
61. H.R. Rep. No. 1791, 91st Cong., 2d Sess. (1970).

avoid any of the above kinds of quasi-limitations on the basis of his independent powers, which I shall discuss in a later part of this Article.[62]

In 1971, the House of Representatives rejected, on five occasions,[63] specific deadlines for ending the hostilities in Southeast Asia, beating back, by the greatest majorities (158 to 254 and 163 to 238), two proposals which sought to cut off funds for the war.[64] The Senate turned down its own version of the fund cut-off when it defeated the Hatfield-McGovern amendment by a 42 to 55 vote.[65]

The Senate subsequently approved the first of three Mansfield amendments.[66] The original provision, added to the Military Selective Service Act Amendments,[67] declared it

> to be the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina and to provide for the prompt and orderly withdrawal of all United States military forces not later than nine months after the date of enactment of this section . . . .[68]

Senator Mansfield's amendment further "urges and requests the President to implement the above-expressed policy by initiating immediately" three described actions.[69] But nowhere in this or in either of his other two proposals is there a tie to the congressional appropriation power, nor is there any suggestion that the policy expressed therein be binding on the President.

Even so, Congress watered down the first provision before enacting it, changing "the policy of the United States" to "the sense of Congress" and dropping the 9-month termination date entirely.[70] When Congress subsequently did adopt a second Mansfield amendment as a declaration of "the

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62. *See* pages 435–43 *infra*.

63. These votes were taken on June 17, June 28, Oct. 19, Nov. 17, and Dec. 16, 1971. 29 CONG. Q. WEEKLY REP. 2371 (1971); 117 CONG. REC. H 12,689–90 (daily ed. Dec. 16, 1971).

64. Nedzi-Whalen amendment, 117 CONG. REC. H 5399–400 (daily ed. June 17, 1971) (text and vote); Boland amendment, 117 CONG. REC. H 11,170 (daily ed. Nov. 17, 1971) (text), and *id.* at H 11,196–97 (vote).

65. 117 CONG. REC. S 9251, S 9279 (daily ed. June 16, 1971). Also, an effort to deny funds for use by our forces in Indochina for any purpose other than withdrawing such troops, was defeated when the Senate struck the Cooper-Church amendment from the Foreign Aid Authorization bill by a vote of 47 to 44. 117 CONG. REC. S 17,060, S 17,075 (daily ed. Oct. 28, 1971).

66. Amend. no. 214, 117 CONG. REC. S 9717–18 (daily ed. June 22, 1971); amend. no. 437, 117 CONG. REC. S 15,111 (daily ed. Sept. 17, 1971) (proposal), 117 CONG. REC. S 15,582 (daily ed. Sept. 30, 1971) (vote); and S. 2819, § 9, 92d Cong., 1st Sess., 117 CONG. REC. S 18,282 (daily ed. Nov. 11, 1971).

67. H.R. 6531, 92d Cong., 1st Sess. (1971).

68. Amend. no. 214, note 66 *supra*.

69. *Id.* The Amendment would require the President to (1) establish a final date for the withdrawal from Indochina of all United States military forces within 9 months, contingent upon the release of all American prisoners of war; (2) negotiate for an immediate cease-fire in Indochina; and (3) negotiate for phased and rapid withdrawals of United States forces in exchange for phased releases of American prisoners of war. *Id.*

70. *See* Act of Sept. 28, 1971, Pub. L. No. 92–129, § 401.

policy of the United States,"[71] President Nixon emphatically announced his intention to ignore the policy,[72] even though Congress had once again excised any specific timetable from the amendment.[73] As mentioned above, the third Mansfield amendment was dropped in conference, after the House voted against it.[74]

B. Codification of War Powers

In 1971, the Senate Foreign Relations Committee closed out the book on Congress' efforts to reassert itself vis-à-vis the President by ordering Senate Bill 2956 favorably reported. This bill was introduced by the senior Senator from New York, Jacob Javits, to codify the war powers.[75] S. 2956 is a redraft of a concept first proposed by Senator Javits in 1970.[76] It has been taken up in varying form by 18 other Senators, who individually or jointly introduced five different proposals designed to define the sole conditions under which the Armed Forces of the United States shall be used in hostilities.[77]

S. 2956 represents a compromise of all these approaches.[78] Section 1 of the bill sets out the short title, "The War Powers Act of 1971." Section 2 contains a statement of purpose and policy. The primary thrust of S. 2956 is conveyed by section 3, which relates to the emergency use of the Armed Forces. The provision dictates that, in the absence of a declaration of war by Congress, the military power of the United States "shall be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances" only in four limited situations. The instances to which the President is restricted in using the Armed Forces are (1) to repel an attack upon the United States, take necessary and appropriate retaliatory actions in the event of such an attack, and forestall the direct and imminent threat of such an attack; (2) to repel an attack against our military forces located outside the United States, and forestall the direct and imminent threat of such an attack; (3) to evacuate endangered citizens of the United States located in foreign countries; and (4) to carry out a

71. *See* Act of Nov. 17, 1971, Pub. L. No. 92–156, § 601.
72. *See* note 2 *supra*.
73. *See* Act of Nov. 17, 1971, Pub. L. No. 92–156, § 601.
74. *See* note 8 *supra*.
75. *See* note 9 *supra*.
76. S. 3964, 91st Cong., 2d Sess. (1970).
77. S. 731, 92d Cong., 1st Sess. (1971) (Senators Javits, Bayh, Mathias, Packwood, Pell, Spong, Weicker, and Williams); S. 1880, 92d Cong., 1st Sess. (1971) (Senators Bentsen and Byrd of W. Va.); S.J. Res. 18, 92d Cong., 1st Sess. (1971) (Senator Taft); S.J. Res. 59, 92d Cong., 1st Sess. (1971) (Senators Eagleton, Inouye, McGovern, Montoya, and Stevenson); and S.J. Res. 95, 92d Cong., 1st Sess. (1971) (Senators Stennis, Mansfield, and Roth).
78. *See* 117 CONG. REC. S 20,627 (daily ed. Dec. 6, 1971) (remarks of Senator Javits upon introducing S. 2956).

specific statutory authorization, which shall never be *inferred* from any treaty or provision of law, including any appropriation act.

Section 4 of the bill provides for prompt reports by the President to Congress whenever troops are committed pursuant to section 3, and section 5 mandates that no hostility initiated under section 3 shall be sustained beyond 30 days without further congressional authorization. Moreover, section 6 states that hostilities commenced pursuant to section 3 may be terminated prior to 30 days by statute or joint resolution of Congress.

Section 7 establishes a legislative procedure under which congressional consideration of legislation authorizing the continuation of hostilities, or the termination of hostilities, shall be given priority treatment to guide such legislation through Congress in no more than 8 days from the date of its introduction, if sponsored or cosponsored by one-third of the Members of the House in which it is introduced. Section 8 sets the effective date of the law as the day of its enactment, but expressly excludes from its application, hostilities in which United States forces are involved on that date.

In short, the bill lays down rigid rules which are supposed to govern the nature and duration of the only situations in which the President may use United States military forces in hostile action. The term "hostilities" is not defined, and thus it is unclear whether our forces are to be so limited only in situations involving actual battles and the imminent threat thereof, or also in situations involving deployments of men and equipment stationed in a state of readiness or alert, for possible response to a developing emergency.[79] In either event, the bill represents the most sweeping attempt to govern Presidential use of America's military machinery that this country has ever witnessed.

IV. Constitutionality of Congressional Limitations

A. *Textual Allotments to Congress*

The major role of upholding the constitutionality of legislation restricting the President's command over the use of the Armed Forces has been assumed

79. One of the bill's sponsors, Senator Stennis, has warned that "the Congress should not restrain the President's powers, as Commander in Chief, to deploy forces to crisis areas and, for example, 'show the flag' by sending a carrier to stand offshore." 117 Cong. Rec. S 20,628 (daily ed. Dec. 6, 1971). Nevertheless, absent a definition of "hostilities," there is no guarantee on the face of the bill that American forces can be introduced in crisis situations without a divisive confrontation between Congress and the President, unless Congress agrees with the President in advance of each deployment. For example, if the Soviet Union invaded Rumania, it is doubtful the United States could build up its forces in certain areas of NATO. If it is "clearly indicated" (an undefined term) that American troops may be drawn into action, the limitations of S. 2956 would be triggered. In this case, our forces could not be shifted into position unless one of the four emergency conditions of the bill existed. This could mean the President must assure Congress, for example, that United States forces were directly and imminently threatened by the Soviet attack, a difficult burden of proof in such a volatile and unpredictable situation. But even should a redeployment or increase of American forces be permissible, the President would be required to withdraw our

by Senator Jacob Javits,[80] with a significant helping hand from Senator William B. Spong of Virginia,[81] a learned scholar of international law in his own right. In addition, such respected and nationally-known authorities as Professor Henry Steele Commager, Professor Richard B. Morris, Professor Alfred H. Kelly, Dean McGeorge Bundy, and Professor Alexander Bickel have testified that the Javits bill is in direct pursuance of the congressional war power.[82]

In essence, the advocates of war powers legislation contend that the major war powers are expressly granted to Congress by article I, section 8, of the Constitution.[83] Here are found the powers to "provide for the common Defense"; "regulate Commerce with foreign Nations"; "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"; "declare War . . . and make Rules concerning Captures on Land and Water"; "raise and support Armies"; "provide and maintain a Navy"; "make Rules for the Government and Regulation of the land and naval Forces"; "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrection and repel Invasions"; "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"; and "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."[84]

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forces from the trouble spot after 30 days should Congress fail to extend his authority. Whether such a pullout would inflame the crisis rather than calm it, is a judgment the bill would thereby transfer from the President to Congress.

80. *See A Brief on S. 731, to Make Rules Respecting Military Hostilities in the Absence of a Declaration of War*, 117 CONG. REC. S 2527–31 (daily ed. Mar. 5, 1971); Javits, *Congress and the President: A Modern Delineation of the War Powers*, 35 ALBANY L. REV. 632 (1971).

81. *See* Spong, *Can Balance Be Restored in the Constitutional War Powers of the President and Congress*, 6 U. RICHMOND L. REV. 1 (1971).

82. *See* testimony of Professors Commager, Morris, and Kelly, *Senate War Powers Hearings*, *supra* note 12, at 3353–62 (daily ed. Mar. 16, 1971); testimony of Dean McGeorge Bundy, *Senate War Powers Hearings*, *supra* note 12, at S 5629 (daily ed. Apr. 26, 1971); testimony of Professor Bickel, *Senate War Powers Hearings*, *supra* note 12, at S 12,387 (daily ed. July 28, 1971).

It may be recalled that in 1951, when President Truman was under attack for deploying American land forces to Korea and Europe without congressional authorization, Professor Commager lambasted Truman's critics as "unregenerate isolationists." He then insisted "that the overwhelming weight of authority supports Presidential discretion in this field." Proposals calling for congressional approval before any American soldiers can be sent out of the country "have no support in law or in history," he said. Commager, *Presidential Power: The Issue Analyzed*, N.Y. Times, Jan. 14, 1951, § 6 (Magazine), at 11; *id.*, Apr. 1, 1951, § 6 (Magazine), at 31.

Also, it should be noted that Professor Bickel qualified his support of the legislation by saying:

> 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); or of his power to respond to attacks and threats against our troops wherever they may be, as well as against our territory; or 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.*

117 CONG. REC. S 12,390 (daily ed. July 28, 1971) (emphasis added).

83. *See* 117 CONG. REC. S 2528 (daily ed. Mar. 5, 1971).

84. U.S. CONST. art. I, § 8.

In particular, it is argued that the Constitutional Convention intended, by reserving to Congress the power "to declare war," to leave with Congress the power "to authorize war."[85] The constitutional concept of the President's role in the scheme of prosecuting war, is claimed to be built upon the experience of the Founding Fathers with the commission given to General George Washington by the Continental Congress when it appointed him to head the colonial forces.[86] The last clause of the commission provided that General Washington was "punctually to observe and follow such orders and directions"[87] as he should receive from the Congress. Also, heavy reliance is placed on the specific power of Congress to carry into execution, not only its own powers, but also all other powers vested by the Constitution in any *officer* of the Government.[88] My distinguished and highly respected Chairman of the Senate Armed Services Committee, Senator John Stennis, commented upon the matter at the time of the introduction of the redraft, of which he is a cosponsor. He said that this clause is considered to grant Congress the power not only to carry "into execution" the powers vested in the President, but also to restrict and control those powers.[89]

B. Textual Allotments to the President

Notwithstanding the current voices of astonishment over claims by the Executive that he may employ military forces on his own authority, many leading writers throughout the greater part of our history have recognized that this power is vested by the Constitution in the President. One major source of this power, of course, is his designation as Commander in Chief.[90] Professor Quincy Wright, one of the nation's foremost commentators on international law, wrote some 50 years ago:

> The powers of the Commander in Chief extend to the conduct of all military operations in time of peace and of war, thus embracing control of the disposition of troops, the direction of vessels of war and the planning and execution of campaigns, and are exclusive and independent of Congressional power.[91]

Just why the Founding Fathers saw fit to confer this title on the President and to invest him with these powers, I have 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

85. Javits, *supra* note 80, at 632, 634.
86. *See* 117 CONG REC. S 2528 (daily ed. Mar. 5, 1971).
87. *Quoted in id.* at S 2528–29.
88. *See* S. 2956, 92d Cong., 1st Sess., § 2 (1971).
89. *See* 117 CONG. REC. S 20,628 (daily ed. Dec. 6, 1971).
90. U.S. CONST. art. II, § 2.
91. Wright, *Validity of the Proposed Reservations to the Peace Treaty*, 20 COLUM. L. REV. 121, 134 (1920).

use them more wisely than a Congress which is constantly looking toward the political results. Though I first came to this thought without the benefit of supporting writings, I have recently learned of other places where a similar view is recorded.

In speaking of this grant of power, Hamilton wrote:

> Of all the cares or concerns of government, 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 executive authority.[92]

Contrary to the position taken by my Senate colleague from New York, Senator Jacob Javits, the Constitutional Convention was probably appalled at the difficulties Washington had encountered at the hands of the Continental Congress.[93] Rather than desiring to perpetuate the experience of weakness and division which the country had suffered under the early Congresses and Articles of Confederation,[94] I believe the Framers intended to infuse national strength through this provision, so as to effectively "secure the Blessings of Liberty to ourselves and our Posterity."[95]

In 1910, Dr. David Watson wrote, in his two-volume work on the Constitution, that of all of the explanations of why the Constitution should make its President Commander in Chief of the military and naval forces of the country,

> none seems more reasonable than the fact that during the Revolution Washington experienced great trouble and embarrassment resulting from the failure of Congress to support him with firmness and dispatch. There was a want of directness in the management of affairs during that period which was attributable to the absence of centralized authority to command. The members of the Convention

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92. THE FEDERALIST, No. 73, at 409 (rev. ed. 1901) (with special introduction by Goldwyn-Smith).

93. Professor John Norton Moore testified at the War Powers Hearings that he believes "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." *Senate War Powers Hearings, supra* note 12, at S 6469. The Articles were operative during at least 5 of the 8 years covered by George Washington's commission.

94. According to J. H. McIlvaine, writing in the *Princeton Review* for October 1861:

> It was the extreme weakness of the Confederation which caused the war of independence to drag its slow length along through seven dreary years. . . . The treaties which the Confederation had made with foreign powers, it was forced to see violated and treated with contempt by its members; which brought upon it distrust from its friends, and scorn from its enemies. It had no standing among the nations of the world, because it had no power to secure the faith of its national obligations.

Quoted in J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 51–52 (1870).

95. U.S. CONST. preamble. It is instructive that Hamilton and Madison expressly rejected as too weak the political model of the Germanic Empire in which the Diet possessed the general power of making war. In any emergency, they warned, "military preparations must be preceded by so many tedious discussions . . . that before the Diet can settle the arrangements the enemy are in the field . . . ." THE FEDERALIST, No. 19, *supra* note 92, at 97–98.

> knew this and probably thought they could prevent its recurrence by making the President Commander-in-Chief of the Army and Navy. Doubtless, also, the Convention was influenced by precedents, of which there were many, running back for a long period.[96]

Professor Clarence Berdahl, upon writing in 1922 his outstanding thesis on war powers of the Executive, observed:

> The members of the Convention probably had not forgotten the trouble and embarrassment caused during the Revolution by congressional interference and the lack of a centralized control over the army. They were very likely influenced also by the precedents in the practise of European states, in former plans of union for the colonies, and in the recently established state constitutions.[97]

Thus, not only did the Framers plan "a union which could fight with the strength of one people, under one government intrusted with the common defense,"[98] but in so doing they were undoubtedly influenced by political traditions known to them.[99]

Nor does the conferral of a broad power to wage a defensive war conflict with the design of the Founding Fathers to avoid establishing a "despicable monarch." Charles Evans Hughes wrote:

> The prosecution of war demands in the highest degree the promptness, directness and unity of action in military operations which alone can proceed from the executive. This exclusive power to command the army and navy and thus direct and control campaigns exhibits not autocracy but democracy fighting effectively through its chosen instruments and in accordance with the established organic law.[100]

This recognized emphasis by the Framers on unity and single-mindedness of purpose in the new Government logically means the President must deploy

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96. 2 D. Watson, The Constitution of the United States 912 (1910).

97. C. Berdahl, *supra* note 26, at 115.

98. Hughes, *War Powers Under the Constitution*, 85 Cent. L.J. 206, 209 (1917).

99. During the great debate of 1922 over the effort by Congress to control and move the Army and Navy, Representative Newton of Minnesota argued:

> The fathers who sat in the constitutional convention had some very definite ideas about government . . . . They had but emerged from the War of Independence and were trying to avoid the anarchy and chaos following that war. Its members included Washington, Hamilton, and others who had witnessed during the days of the Revolutionary War the inefficiency of the legislative body attempting to function as an executive, which resulted in interference with military operations and caused great trouble and embarrassment and added materially to the increasing of the cost of the military operations. Washington had had to put up with congressional interference and knew its evils. Hamilton had been on Washington's staff and was thoroughly familiar with all of the troubles and embarrassments that Washington had been subjected to by the Continental Congress, which was clothed with the powers of an executive. There is no question but what they and their colleagues made up their minds that the new Government would have an Executive that was clothed with real power. Furthermore, the governors of several of the 13 States were clothed with power, making them commander in chief of the military forces of their State. Therefore, with experience and precedent to guide and direct them, the Chief Executive was made the Commander in Chief of the Army and the Navy, both in time of war and peace.

62 Cong. Rec. 4298–99 (1922).

100. Hughes, *supra* note 98, at 206.

93-626 O - 73 - 21

and direct military forces free of control by Congress, and it has been so interpreted by several authorities. As early as 1862, William Whiting, one of the great lawyers of his time,[101] compiled a work on the war powers of the President in which he declared:

> Congress may effectually control the military power, by refusing to vote supplies, or to raise troops, and by impeachment of the President; but for the military movements and measures essential to overcome the enemy—for the general conduct of the war—the President is responsible to and controlled by no other department of government.[102]

Whiting's foresight[103] led him to add that the Constitution "does not prescribe any territorial limits, within the United States, to which his military operations shall be restricted."[104]

Dean Pomeroy,[105] a contemporary of Whiting, wrote in the 1870 edition of his textbook on constitutional law that he, too, rejected the idea that "the disposition and management of the land and naval forces would be in the hands of Congress . . . ." "The policy of the Constitution is very different," Pomeroy instructs. "It was felt that active hostilities, under the control of a large deliberative body, would be feebly carried on, with uniform disastrous results."[106] He said that the Legislature may "furnish the requisite supplies of money and materials" and "authorize the raising of men," but "all direct management of warlike operations, all planning and organizing of campaigns, all establishing of blockades, all direction of marches, sieges, battles, and the like, are as much beyond the jurisdiction of the legislature, as they are beyond that of any assemblage of private citizens."[107] What of congressional authority to pass laws for executing all powers vested by the Constitution in the Government of the United States, or in any department or officer thereof? "But these measures," declares Pomeroy, "must be supplementary to, and in aid of, the separate and independent functions of the President as

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101. It is said of Whiting that "[a]s a lawyer, he proved to be so thorough, industrious, and adroit in analysis of mastered cases that the old Common Pleas [in Massachusetts] was often termed 'Whiting's court.'" He was appointed special counselor of the United States War Department in November 1862, and became its solicitor from February 1863, until he resigned in April 1865. 21 H. Starr, Dictionary of American Biography 703 (1944).

102. W. Whiting, The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason, and Slavery 82 (2d ed. 1862).

103. Months before Lincoln's Emancipation Proclamation, Whiting argued that the President, as Commander in Chief, may emancipate the slaves of any belligerent section of the country, if such an act is necessary to weaken the enemy. *Id.* at 66–82.

104. *Id.* at 83.

105. Dr. John Norton Pomeroy was Dean of the University of New York Law School.

106. J. Pomeroy, *supra* note 94, at 288–89. On other grounds, Madison indicates the Constitution intentionally removed the direction of the military forces from Congress because it is "particularly dangerous to give the keys of the Treasury and the command of the army into the same hands . . . ." The Federalist, No. 37, *supra* note 92, at 202.

107. J. Pomeroy, *supra* note 94, at 289.

commander-in-chief; they cannot interfere with, much less limit, his discretion in the exercise of those functions."[108] Pomeroy expands on this view by telling us Congress "may determine how many men shall be enlisted in each branch of the service, or what and how many armed vessels shall be constructed." As Congress makes all appropriations, it may decide "what forts shall be erected, and their cost; what ships built, their character and cost; what kind of arms purchased or manufactured, and the cost." The President, on the other hand, "may make all dispositions of troops and officers, stationing them now at this post, now at that; he may send out naval vessels to such parts of the world as he pleases; he may distribute the arms, ammunition, and supplies in such quantities and at such arsenals and depositories as he deems best . . . ."[109] When actual hostilities have commenced, the President "wages war, Congress does not." He "possesses the sole authority and is clothed with the sole responsibility" of conducting all warlike movements, whether at home or abroad.[110]

This untrammeled view of the President's freedom to deploy troops and equipment wherever and whenever he chooses is a consistent theme in commentaries from both the colleges and the courts.[111] Berdahl squarely takes up the issue:

> Altho there has been some contention that Congress, by virtue of its power to declare war and to provide for the support of the armed forces, is a superior body, and the President, as Commander-in-Chief, is "but the Executive arm, . . . in every detail and particular, subject to the commands of the lawmaking power," practically all authorities agree that the President, as Commander-in-Chief, occupies an entirely independent position, having powers that are exclusively his, subject to no restriction or control by either the legislative or judicial departments.[112]

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108. *Id.*
109. *Id.* at 472.
110. *Id.* at 473.
111. Watson believed:

> The power is vested in the President to dispose of or arrange the component-parts of the Army and Navy at his pleasure . . . . While Congress can make rules for the Army and Navy, it cannot interfere with the President's power as commander of such forces.

D. WATSON, *supra* note 96, at 914. Speaking of the President's duties for the protection of our citizens and national interests, Wright declares:

> 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 can not limit his legal power as Commander-in-Chief to employ the means at his disposal for these purposes.

Q. WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 307 n.93 (1922). Also of interest is the remark by former President William H. Taft that it "is clear that Congress may not usurp the functions of the Executive . . . by forbidding or directing the movements of the army and navy." Taft, *The Boundaries Between The Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 600, 606 (1916).

112. C. BERDAHL, *supra* note 26, at 116–17.

Anticipating legislative proposals of the kind embodied in today's end-the-war amendments, Berdahl concludes:

> Just as the President decides when and where troops shall be employed in time of war, so he alone likewise determines how the forces shall be used, for what purposes, the manner and extent of their participation in campaigns, and the time of their withdrawal.[113]

The position of these writers has been fortified by judicial opinion. Thus, in explaining that it is for the President, as Commander in Chief, to direct the campaigns of the army "wherever he may think they should be carried on,"[114] Charles Evans Hughes cited *Fleming v. Page*,[115] where the Supreme Court said:

> As Commander in Chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.[116]

Likewise, in 1866, four concurring members of the Supreme Court declared that "Congress cannot direct the conduct of campaigns . . . ."[117] Later, the Supreme Court affirmed a holding in which the Court of Claims had said that "Congress cannot in the disguise of 'rules for the government' of the Army impair the authority of the President as commander in chief."[118] And in *United States v. Sweeny*, the Court said that the Constitution has conferred upon the President "such supreme and undivided command as would be necessary to the prosecution of a successful war."[119]

But, as broad and unrestricted as is the President's role of Commander in Chief, it does not exhaust his authority in the field of national defense. Another great power vested in the President is his conduct of the nation's foreign policy. The Constitution provides that the President shall make treaties and appoint ambassadors with the advice and consent of the Senate.[120] But the Constitution provides that the President alone receives ambassadors,[121] and holds all the Executive power of a sovereign nation.[122] From this, it is clear the President bears "primary responsibility for the conduct of our foreign affairs."[123] It was Alexander Hamilton who first argued that the President's

113. *Id.* at 122.
114. Hughes, *supra* note 98, at 209.
115. 50 U.S. (9 How.) 603 (1850).
116. *Id.* at 615.
117. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).
118. Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), *aff'd*, 165 U.S. 553 (1897).
119. 157 U.S. 281, 284 (1895).
120. U.S. CONST. art. II, § 2.
121. *Id.* § 3.
122. *Id.* § 1. Also see remark by Solicitor General Erwin Griswold that the grant of Executive power "is not a merely passive grant." 117 CONG. REC. S 12,968 (daily ed. Aug. 3, 1971).
123. New York Times Co. v. United States, 403 U.S. 713, 741 (1971) (Marshall, J., concurring). Three other Justices of the Supreme Court also recently acknowledged

role in international affairs is a dynamic one, which "may, in its consequences, affect the exercise of the power of the Legislature to declare war."[124]

The President's power to initiate and formulate the foreign policies of our government entirely on his own authority, has been conclusively established by the Supreme Court.[125] The Court's holding is squarely aligned with the accepted tradition under which the President can effectively commit Congress and the country to the course he has set. Pomeroy says:

> The President may, without any possibility of hindrance from the legislature, so conduct the foreign intercourse, the diplomatic negotiations with other governments, as to force a war, as to compel another nation to take the initiative, and that step once taken, the challenge cannot be refused.[126]

Berdahl, in his famed thesis, summarizes the authorities in 1920 as agreeing that

> the President, through his control of diplomatic intercourse, holds in his keeping the peace and safety of the United States, that he may initiate such diplomatic policies and so conduct diplomatic negotiations as to force the country into a war, "without any possibility of hindrance from Congress or the Senate."[127]

Professor Westel Willoughby has also observed that the President's control over foreign relations

> makes it possible for him to bring about a situation in which, as a practical proposition, there is little option left to Congress as to whether it will or will not declare war or recognize a state of war as existing.[128]

Willoughby did not mean to imply that this result was improper and could be checked by Congress. He wrote that the power of the President to send troops outside the country "as a means of preserving or advancing the foreign

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the President's "constitutional primacy in the field of foreign affairs." *Id.* at 756 (Harlan, J., dissenting, with whom Burger, C.J., and Blackmun, J., joined).

124. E. Corwin, *supra* note 49, at 178–79. In other words, says Corwin, the President "is consequently able to confront the other departments, and Congress in particular, with *fait accomplis* [*sic*] at will . . . ." *Id.* at 180.

125. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936), in which the Supreme Court held that the power of the President in the field of international relations is "delicate, plenary and exclusive" and "does not require as a basis for its exercise an act of Congress . . . ." Pertinent here are comments by then Professor Woodrow Wilson about the Chief Executive's "control, which is very absolute, of the foreign relations of the nation." According to Wilson, "The initiative in foreign affairs, which the President possesses without any restriction whatever, is virtually the power to control them absolutely." W. Wilson, Constitutional Government in the United States 77 (1961) (lectures first printed in 1911).

126. J. Pomeroy, *supra* note 94, at 447.

127. C. Berdahl, *supra* note 26, at 31.

128. 3 W. Willoughby, The Constitutional Law of the United States 1558 (2d ed. 1929). Even the practice of recognition, an exclusive act of the President, can, if premature, be treated as cause for war under international law. *See* Berdahl, *supra* note 26, at 32. Justice Joseph Story refers to the authority of the President to receive foreign envoys, with its implicit power of recognition, as "pregnant with consequences, often involving the question of peace and war." 3 J. Story, Commentaries on the Constitution of the United States § 1561, at 418 (1833).

interests or relations of the United States" is a "discretionary right constitutionally vested in him, and, therefore, not subject to congressional control."[129]

An additional source of power bearing on this inquiry lies in the President's duty, and right, to execute the laws. The Supreme Court has announced that this power includes enforcement of

> 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 . . . .[130]

The reach of this power, too, continues even as it touches other grants made by the Constitution. Corwin asserts that, by virtue of his power to base action directly on his own reading of international law (which today includes some 42 mutual defense treaties),[131]

> the President has been able to gather to himself powers with respect to warmaking that ill accord with the specific delegation in the Constitution of the war-declaring power to Congress.[132]

Corwin thereby acknowledges that this power is vested in the President, notwithstanding its impact upon the separate war power of Congress.[133]

The courts have upheld the power of the President to begin and continue hostilities without a declaration of war. In approving President Lincoln's blockade of the Confederacy, the Supreme Court held that when

> 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.[134]

From this, Professor Schwartz believes:

> The language of the high Court in the *Prize Cases* is broad enough to empower the President to do much more than merely parry a blow already struck against the nation. Properly construed, in truth, it constitutes juristic justification of the many instances in our history (ranging from Jefferson's dispatch of a naval squadron to the Barbary Coast to the 1962 blockade of Cuba) in which the President has ordered belligerent measures abroad without a state of war having been declared by Congress.[135]

The principle of national self-defense thus ratifies each of the 192 undeclared wars which I have cited above.[136] The power of the President to wage these

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129. W. WILLOUGHBY, *supra* note 128, at 1567.

130. *In re* Neagle, 135 U.S. 1, 64 (1890). *See also* Wright, *supra* note 91, at 134–35. See the comment by Professor Corwin that "the President may also make himself the direct administrator of the international rights and duties of the United States, or of what are adjudged by him to be such, without awaiting action either by the treaty-making power or by Congress, or by the courts." E. CORWIN, *supra* note 49, at 196.

131. U.S. DEP'T OF STATE, UNITED STATES COLLECTIVE DEFENSE ARRANGEMENTS (1966).

132. E. CORWIN, *supra* note 49, at 197–98.

133. *Id.*

134. The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862).

135. B. SCHWARTZ, THE REINS OF POWER 98 (1963).

136. *See* page 425 *supra.*

actions without a formal declaration, and generally without any prior approval of Congress, is not only supported by the doctrine of *The Prize Cases*,[137] but is the natural extension of the concept of defensive wars contemplated by the Founding Fathers. When the Constitutional Convention altered a clause giving Congress the power "to make war" by replacing it with the power "to declare war,"[138] there was unquestionably a purpose of "leaving to the Executive the power to repel sudden attacks."[139] How much else the Framers meant to leave with the President is not as definite, but it is at least significant that they had a difference in mind between the two terms and left the making of war with the President.

It is my strong belief that the Framers intentionally painted with a broad brush.[140] For the Founding Fathers clearly understood that "it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them."[141] From this I conclude that, should the Fathers be set down by the Divine Hand in our modern world, they would not tolerate rigid legislative policy restrictions on the authority needed by the Executive in defending our nation and our people against all possible foreign threats.[142]

Other judicial precedents bear out the power of the Executive to use such force as is necessary for defensive purposes. Justice Nelson, sitting as a circuit justice, held that the President's duty to execute the laws includes a duty to protect citizens abroad.[143] The Supreme Court has carried this concept even further by declaring that a citizen abroad is entitled "to demand the care and protection of the Federal government over his life, liberty, and property."[144] The right of intervention for the protection of "the lives, liberty, and property" of citizens abroad is firmly established by international law as well.[145] Of course, the right of a state to secure its own self-preservation is also cemented under international law.[146]

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137. 67 U.S. (2 Black) 635 (1862).
138. Madison, *Notes of the Debates in the Federal Convention of 1787*, in 3 U.S. DEP'T OF STATE, DOCUMENTARY HISTORY OF THE CONSTITUTION 554 (1900).
139. "Mr. Madison and Mr. Gerry moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks." *Id.* at 553.
140. But compare the view of my distinguished friend from Virginia that "the President's only role in the war-making process was, as Commander-in-Chief, to direct operations as the executive arm of the Congress." Spong, *supra* note 81, at 4–5.
141. THE FEDERALIST, No. 23, *supra* note 92, at 119.
142. In the words of Hamilton, "The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." *Id.* at 119–20.
143. Durand v. Hollins, 8 F. Cas 111 (No. 4186) (C.C.S.D.N.Y. 1860) (Justice Nelson had been on the Supreme Court since 1845).
144. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 79 (1872).
145. *See* J. CLARK, RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES 25 (3d rev. ed. 1934).
146. *See* Q. WRIGHT, *supra* note 111, at 307; Spong, *supra* note 81, at 24; B. SCHWARTZ, *supra* note 135, at 175; C. BERDAHL, *supra* note 26, at 59; U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet-Nam*, in THE VIETNAM WAR AND INTERNATIONAL LAW 583 (R. Falk, ed. 1968).

V. CONCLUSIONS

The forging of a lengthy chain of historical ventures by Presidents,[147] set against a backdrop of national weakness that the Framers, as practical men, were determined to reverse, persuades me that Presidents have acted constitutionally, and in accordance with a great American tradition, when they have deployed forces outside the United States in defense of our national interests.[148] I further believe the right of the President to take military action

147. In the words of Professor Henry Monaghan, "A practice so deeply embedded in our governmental structure should be treated as decisive of the Constitutional issue." Monaghan, *Presidential War-Making*, 50 BOSTON U.L. REV. 31 (1970).

In contrast is the view of Francis D. Wormuth, who makes the guess that of all these military hostilities "eighty-two were undertaken by a subordinate officer on the spot and without orders from superiors." From this, he ridicules the significance of the entire list by claiming the argument must be that these 82 precedents "hold that every naval and army captain also has the legal right to initiate war without the authorization of either Congress or the President." SATURDAY REVIEW, Oct. 2, 1971, at 28.

Nonsense! All of the precedents set forth herein were undertaken pursuant to known Executive policies. No incidents are cited which were later repudiated or disavowed. The military officers "on the spot" were acting in each of the 192 hostilities to carry out a clear Presidential policy, whether it be a design to suppress piracy or the slave trade, or a commitment to protect United States citizens and property abroad, or an avowed Presidential foreign policy objective, such as the Monroe Doctrine or an executive interpretation of our treaty rights.

In illustration of how routine this practice is, I might refer to a letter by Secretary of State Cass in August 1858, in which he advised the Secretary of Navy, "I have the honor also to suggest the importance of our squadron being directed to traverse the whole of the Levant, showing itself along the coasts of Egypt, Palestine, Syria, and of Asia Minor for the purpose of affording all possible protection to the persons and property of our citizens." 69 CONG. REC. 6930 (1928). Another example is the letter by Secretary of State Charles E. Hughes, on March 15, 1922, in which he informed the Chairman of the House Military Affairs Committee that the practice of landing troops in China for over 20 years was conceded to the United States by the final protocol for the settlement of the disturbances in China of 1900. 62 CONG. REC. 4300 (1922).

Finally, since it is the President who is Commander in Chief and bearer of all the Executive power under the Constitution, it is the President who is thereby immediately responsible for the command of forces and the conduct of campaigns. In practice, the President acts through the Executive departments of Government and they, in turn, act through subordinate officers. But their acts are in legal contemplation the acts of the President himself, unless disavowed. *See* United States v. Eliason, 41 U.S. (16 Pet.) 291, 301–02 (1842); Wilcox v. Jackson, 38 U.S. (13 Pet) 498, 512 (1839); C. BERDAHL, *supra* note 26, at 21; D. WATSON, *supra* note 96, at 914.

148. Summarizing his position after more than 50 years of study, Professor Quincy Wright declared:

> I conclude that the Constitution and practice under it have given the President, as Commander-in-Chief and conductor of foreign policy, legal authority to send the armed forces abroad; to recognize foreign states, governments, belligerency, and aggression against the United States or a foreign state; to conduct foreign policy in a way to invite foreign hostilities; and even to make commitments which may require the future use of force. By the exercise of these powers he may nullify the theoretically exclusive power of Congress to declare war.

Wright, *The Power of the Executive to Use Military Forces Abroad*, 10 VA. J. INT'L. L. 43, 54 (1969).

Another eminent authority summed up his own half-century of study by finding that the practice of the President to use military power at his own will "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?*, N.Y. Times, July 31, 1949, at 14. *See also* pages 425–26 *supra*.

at any time he feels danger for the country or its freedoms or, stretching a point, its position in the world, cannot be restrained by policy directives from Congress.[149]

Congress indeed holds an impressive share of the national war powers. Congress can set the size of the various branches of the Armed Services, a step which the 92d Congress has already taken.[150] It can end the draft, a move I have advocated since 1964.[151] It can deny or cut appropriations for tanks, aircraft, submarines, carriers, ABM's, and all the other military-related hardware that constitutes the country's defense arsenal.[152] It can turn down an Administration's request for funds to equip and train the military units of

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149. *See* pages 435–43 *supra*. The 100th Justice of the Supreme Court has said that (1) there is no prohibition in the Constitution which keeps the President from initiating war without the declaration of Congress, and (2) no statute could "prevent the President from exercising his traditional powers as Commander in Chief, which do include under certain circumstances the commitment of armed forces to hostilities." Testimony of William H. Rehnquist, *Hearings on Congress, the President, and the War Powers Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess., 228–29, 232 (1970).

My personal view is strengthened by the almost unanimous advice from some 40 authorities, of all political shadings, whom I have consulted on this subject. For example, Dean Acheson wrote to me about legislation which would limit the President's use of forces to 30 days in emergency situations unless Congress specifically extends his authority. He said:

> Any attempt to spell out procedural requirements and limitations on executive power will tend to make rigid that which must be flexible. If the President and the Congress are to assume attitudes of hostility, the nation in this modern world will be subject to grave perils. The separation of powers is not based upon the premise of their fundamental hostility. Criticism and restraint are contemplated in the workings of the system, and can be accomplished. The present legislative proposals do not seem to me to provide for this, but, instead, by setting up a series of rigid rules, to limit the powers of the President beyond safety and to give the Congress, by inaction, what the Constitution never contemplated, a veto upon executive action.

Letter from Dean Acheson to Barry M. Goldwater, May 18, 1971 (unpublished letter in author's personal files). Another former Secretary of State said:

> [W]e should not clutter up our Constitution with detailed directives to the President and to the Congress where we cannot know the future circumstances in which such directives will have to be followed.

Letter from Dean Rusk to Barry M. Goldwater, May 11, 1971 (unpublished letter in author's personal files). Thus, Dean Rusk writes of his opposition to war powers controls either in the form of legislation or an amendment to the Constitution.

150. *See* Congressional Reference Service, *Regulating the Size of the Armed Force Under Selective Service Law*, 117 CONG. REC. S 9590–91 (daily ed. June 21, 1971). According to Senator Stennis, 1971 is the first time Congress has ever set numerical strength levels on the total size of the regular forces, including both volunteers and inductees, in the Selective Service Act. *See id.* at S 9589 (remarks of Senator Stennis).

151. Prompt repeal of the compulsory draft and its replacement with an all-volunteer military were among the pledges included in my 1964 platform as the presidential candidate of the Republican Party.

152. It is a little-noticed fact that the 1972 defense budget is the smallest relative military budget in a quarter century. Defense spending dropped to 34% of total federal spending in 1972, falling below human resource spending (42%) for the first time in over 20 years. OFFICE OF MANAGEMENT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE U.S. BUDGET IN BRIEF, FISCAL YEAR 1972, at 5 (1971).

allied foreign countries.[153] Congress can choose not to increase taxes, thereby placing tremendous political pressure on a President whose own instincts for international adventurism must be weighed against the risks of bucking a public that wants butter, not guns, and of assuming the stigma of a grossly unbalanced budget. Congress also can repeal or limit the numerous delegations of emergency powers that have been granted the President over wages and prices,[154] the exportation, manufacture, or distribution of vital or rare materials,[155] the licensing of trade with foreign countries,[156] and the multitude of other economic elements that bear on the defense strength of the United States.[157] In addition, Members of Congress enjoy a prominent public forum from which they can go directly to the American people with their criticisms of executive policies.[158]

In short, Congress has control over the size and strength of the military and economic machinery which the President may use for making war.[159] A

153. For example, in mid-1964 President Johnson sought $125 million in military aid funds, much of it earmarked for a larger air force for South Vietnam. 1 L. JOHNSON, *Special Message to the Congress Transmitting Request for Additional Funds for Viet-Nam*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, LYNDON B. JOHNSON, 1963–64, at 692–93 (1965). Congress turned down this early opportunity to prevent an escalation of our Indochina activity and approved all the funds which the President had requested. Act of Oct. 7, 1964, Pub. L. No. 88–633, § 607, 78 Stat. 1010; Act of Oct. 7, 1964, Pub. L. No. 88–634, 78 Stat. 1015.

154. *See, e.g.*, Economic Stabilization Act Amendments of 1971, Pub. L. No. 92–210 (Dec. 22, 1971).

155. *See, e.g.*, The Export Administration Act of 1969, 50 U.S.C. App. §§ 2401–13 (1970) (export controls). Also of interest is The Defense Production Act of 1950, *id.* §§ 2061–166, relative to the diversion of certain materials from civilian use to military purposes and controls on the distribution of critical and strategic materials.

156. *See, e.g.*, Trading With the Enemy Act of 1917, *id.* §§ 1–44, relative to the licensing of transactions with foreign enemies or allies of enemies during any period of national emergency declared by the President; The Export Administration Act of 1969, *id.* §§ 2401–13.

157. *See* U.S. NEWS & WORLD REPORT, Oct. 25, 1971, at 31.

158. We can probably see the effect of a changing public mood in the Vietnamization policy of the current Administration, under which 480,000 troops will have been withdrawn from Indochina in three years. The State of the Union Address, President Richard M. Nixon, 118 CONG. REC. H 145, H 149 (daily ed. Jan. 20, 1972).

159. The active role outlined for Congress in the preceding paragraph would, I believe, conform foursquare with the doctrine announced by the United States Court of Appeals for the Second Circuit in Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 92 S. Ct. 94 (1971). The court held that the power of Congress to declare war calls for "*some* mutual participation between the Congress and the President . . . with action by the Congress sufficient to authorize or ratify the military activity at issue . . . ." 443 F.2d at 1043 (emphasis original). The court expressly indicated that congressional collaboration can follow the initiation of a hostility, rather than precede it, and can take the form of military appropriations as well as extensions of the draft. In addition, the court suggests that area resolutions and treaties, such as the Tonkin Gulf Resolution, Pub. L. No. 88–408, 78 Stat. 384 (1964), *terminated*, Foreign Military Sales Act of 1971, Pub. L. No. 91–672, § 12, 84 Stat. 2053, and the SEATO Treaty, Southeast Asia Collective Defense Treaty, Sept. 8, 1954, [1955] 1 U.S.T. 81, T.I.A.S. No. 3170, are sufficient in authorizing the prosecution of war even though expressed in broad language.

Needless to say, there is probably some resolution or treaty around which would fit almost any military contingency. And no fighting is going to continue for long without a President including funds in his annual or supplemental budget request for its support, at which point Congress will either collaborate by voting the money or force a change in policy by cutting or denying defense-oriented funds.

President leading a nation with three million men under arms can, if he chooses, involve the country in considerably more commitments than a Commander in Chief who heads an armed force of two million members. A President strengthened by a $90 billion defense budget can deploy vastly more arms and vessels around the world than a President who must carefully ration out the means available under a $60 billion defense appropriation.

But once Congress establishes the military forces and provides them with equipment and supplies, it is the President who determines the policies under which those forces shall be stationed, transported, and committed in furtherance of the national defense. Once Congress has created a military of, for example, 2½ million members, Congress possesses no power to tell the President how many of those servicemen shall be stationed in Europe, or how many in Indochina, or when these troops shall be withdrawn from certain areas overseas, or for how long they can be employed in hostilities. These are policy decisions which have been vested by the Constitution in the President, free of the direct supervision and control of the legislature. I repeat, Congress cannot dictate these kinds of military policy rules to the President and, in full accordance with the Constitution, he need not follow such rules should Congress pass them.

The uniform refusal by Congress, as a collective body, ever to block or limit even one of the nearly 200 Presidentially-initiated hostilities which have occurred to date,[160] strongly suggests the construction which the Founding Fathers intended for the constitutional provisions allotting the war powers. For some legislators to say that this long-continued practice may now be overturned by a sudden change of interpretation, demands that the sponsors of legislative command centers should bear the burden of proving their case by the most clear and cogent evidence.

The mere repetition of statements that the power to declare war carries with it the sole power to commence war, does not make it so. The fact that "[n]o Supreme Court decision has restrained the conduct of presidentially-authorized hostilities,"[161] holds far more meaning for me than all of the

160. *See* pages 426–32 *supra*.

161. Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461, 486 (1971).

Though three early cases touching the French naval war are heavily relied upon by the advocates of war powers controls, these cases were decided after hostilities had ended. Thus, the issue of curbing the President's conduct of war during actual fighting was not presented. *See* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804). Furthermore, the 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.'" Testimony of Prof. J. Moore, 117 CONG. REC. S 6469 (daily ed. May 10, 1971). See U.S. CONST. art. I, § 8.

Although Schwartz at one point indicates *Little* may have broad implications, he sharply qualifies his position elsewhere by adding: "A Constitution which did not permit the Commander in Chief to order belligerent acts whenever they are deemed necessary to defend the interests of the nation, would be less an instrument intended

anguished pleas in the world that Congress must prevent another Vietnam.[162]

In the first place, Congress was involved up to its ears each step of the way throughout the expansion of our participation in Indochina.[163] Time and again Congress put its votes on the side of more troops and more funds.[164] Secondly, the Constitution cannot be changed out of emotional whims, no matter how morally pious they may be. Thirdly, the proposals to define when, where, and for how long the President can employ United States forces abroad are shot through with terrible problems that are even more ominous than the ones they seek to forestall.[165]

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to endure through the ages, than a suicide pact." He also writes: "If one thing is clear under the Constitution, it is that the actual use of the armed forces by the Commander in Chief is not subject to any legal control." B. SCHWARTZ, *supra* note 50, at 168, 205, 217.

162. A prime conception motivating the introduction of war powers legislation seems to be an assumption that it is the President who has, on his own, drawn this nation into an escalation of the Vietnam hostilities. For example, Senator Javits comments that this legislation "may, in retrospect, be viewed as the most constructive legislative by-product of our Nation's tragic Vietnam experience." 117 CONG. REC. S 20,627 (daily ed. Dec. 6, 1971) (remarks of Senator Javits).

163. I have identified at least 24 statutes in which Congress has supported an expansion of the Indochina hostilities. Goldwater, *Congress: Accessory to Vietnam*, 117 CONG. REC. S 12,446 (daily ed. July 29, 1971).

In the words of the United States Court of Appeals for the Second Circuit: "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." Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 92 S. Ct. 94 (1971).

164. For example, in 1966, Congress approved a $13.1 billion supplemental appropriations request meant chiefly to fund military operations in Southeast Asia. Although the bills implementing this request were the focus for televised hearings by the Senate during which our Indochina policy was thoroughly examined, Congress responded by granting every penny sought. Act of Mar. 16, 1966, Pub. L. No. 89–367, 80 Stat. 36, 37; Act of Mar. 25, 1966, Pub. L. No. 89–374, 80 Stat. 79, 82; 1966 CONG. Q. ALMANAC 153. One year later, Congress appropriated an additional $12.2 billion tagged for the support of military operations in Southeast Asia. Act of Mar. 16, 1967, Pub. L. No. 90–5, 81 Stat. 5, 6; Act of Apr. 4, 1967, Pub. L. No. 90–8, 81 Stat. 8; 1967 CONG. Q. ALMANAC 209.

165. For example, Secretary of State William P. Rogers cautions:

> 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.

Testimony of Secretary of State William P. Rogers, *Senate War Powers Hearings*, *supra* note 12, at S 7199 (daily ed. May 18, 1971). Professor James MacGregory Burns agrees. He has testified that artificial restrictions on Executive discretion "may not lead to peace but to war, as foreign adversaries estimate that the United States will not respond to a threat to world peace because of legislative restrictions on the executive." *Hearings on Congress, the President, and the War Powers, Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. 81–82 (1970) (testimony of Dr. Burns).

I have spoken of my own fears about war powers legislation on the grounds it will place all our treaty obligations in a state of permanent doubt; prevent the United States from responding in even a limited way to protect the existence of friendly and strategically important countries such as Israel, with which we have no defense commitment specifically authorized by statute; and conceivably might drag the President into an unwanted expansion of hostilities, the presumption of the legislation being that the President has no power to contravene congressional direc-

It is not easy for me to assert that the President has this terrific power, but I must. I wish it were possible for me to join those dreamers who think we have no problems in this world. But I am old enough to have lived through this same thing before. It is not difficult at all for me to transport myself back in time to the 1920's and the 1930's when, as a young man, I can remember this country as an isolated country and a country being called a "Fortress America." I can remember when our troops drilled with wooden guns and paper tanks, when we did not have enough airplanes in our Air Corps even to hold maneuvers, and when our Navy was weak—all because we were going through the very same kind of emotional trauma we see expressed throughout our country today.

We have an understandable desire to be at peace. Lord knows, I do not want another war. I do not want my grandchildren to suffer war, but neither do I want my children or grandchildren, or the children of any American, to be subjected to the dangerous, serious threat that our country was faced with in the late 1930's when we knew we were going to have to go to war and we knew that we were not equipped.[166]

When I rise in the Senate to support a new defensive weapons system or when I uphold in this article the concept of sufficient flexibility in Executive powers to defend America's freedoms, I do not have any degree of satisfaction, unless that satisfaction might come to me in my older years as I sit on my hill in the desert and think that possibly the warning a few of us are trying to give the American people was heeded and that I could sit in peace on that hill and talk with my grandchildren because of it.

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tives. See my testimony before *Senate War Powers Hearings, supra* note 12, at S 5637–47 (daily ed. Apr. 26, 1971).

On the latter point, it must be remembered that historians generally concur that it "was the War Hawks–members of Congress all–who aggressively sought the War of 1812," and that in 1898 it was "the press and Congress" who pressured President McKinley into requesting a declaration of war. Nanes, *Congress and Military Commitments: An Overview*, CURRENT HISTORY, Aug. 1969, at 116. In this connection, it is also important to recall how congressional leaders sought in 1962 to talk President Kennedy into a military attack or invasion of Cuba, rather than a blockade. *See* R. KENNEDY, THIRTEEN DAYS 53–54 (1969).

166. Mr. George Ball, who has served his country well on five separate occasions in the executive branch, testified during the war powers hearings that he has been around long enough to have seen other legislation which was supposed to assure that the United States would not be drawn into another major conflict. He recalls that by passing a series of neutrality laws in the 1930's, Congress believed it would forestall a repetition of World War I. And yet, Mr. Ball points out that this very legislation might have been instrumental in leading to war:

> 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.

Testimony of the Honorable George S. Ball, *Senate War Powers Hearings, supra* note 12, at S 12,621 (daily ed. July 30, 1971).

EXHIBIT II

REVISED EDITION OF APPENDIXES ORIGINALLY PRINTED WITH EMERSON, J. T., WAR POWERS LEGISLATION, 74 W. VA. L. REV. 53, 88–119 (1972).

APPENDIX

A. CHRONOLOGICAL LIST OF 199 U.S. MILITARY HOSTILITIES* ABROAD WITHOUT A DECLARATION OF WAR, 1798-1972

1798-1800: Naval War with France.

When John Adams became President in 1797, he faced the serious problem of strained relations between France and the United States, in which France had made it a practice to seize American merchant ships and to manhandle their crews. Adams first attempted to negotiate a settlement, but, when the French demanded exorbitant bribes and loans, his envoys rejected the proposals and departed.

Adams, thereupon, asked Congress for the power to arm merchant ships and take other defensive measures. Congress responded by creating a Navy Department, voting appropriations for new warships, and authorizing 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 American Navy attacked only French warships and privateers and fought primarily for the protection of commerce. Some ninety French ships were captured during this naval war. Of [illegible] 1800 a convention was agreed to and peace was achieved. State, 2.

1800: West Indies.

On April 1, U. S. Marines participated in the action between the U. S. schooner Enterprise and a Spanish man-of-war brig in the West Indies. USMC, I, 40.

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. State, 3.

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* The list includes only actual battles, landings, or evacuations in foreign territory or waters. Deployments to maintain an American presence, or alerts bringing an advanced state of readiness are not included, except for seven or eight incidents when the risk of war was unusually grave. No military operations known to have been subsequently disavowed or repudiated have been included. The list was prepared with the direction of U. S. Senator Barry Goldwater and is published with his consent.

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. State, 16.

1806-1810: Gulf of Mexico.

American gunboats operated from New Orleans against Spanish and French privateers. State, 16.

1810: West Florida (Spanish territory).

Governor Claiborne 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. State, 16.

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. State, 16.

1813-1814: Marqueses Islands, South Pacific (claimed by Spain).

U. S. Marines built a fort on one of the islands to protect three captured prize ships. State, 16.

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. Marine detachments participated in at least 14 of these actions. State, 16.

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. 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. 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. State, 3.

1816-1818: Spanish Florida.

During the "First Seminole War," U. S. 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 hostile Seminole Indians. In the process, United States forces attacked and occupied Spanish posts believed to serve as havens by the hostiles. President Monroe assumed responsibility for these acts. Moore, 403-406.

1817: Amelia Island (Spanish Territory).

Under orders from President Monroe, U. S. forces landed and expelled a group of smugglers and pirates. Moore, 406-408.

1818: Oregon:

The U.S.S. Ontario landed at the Colombia River and in August took possession. Russia and Spain asserted claims to the area. Rogers, 96.

1820: West Africa.

Marines participated in the capture of seven slave schooners by the U. S. corvette Cyane off Cape Mount and the Gallinos River on the west coast of Africa during the period from April 5 through 12. USMC, I, 64.

1820-1822: West Coast of South America.

Marines were aboard three of the U. S. ships stationed off the west coast of South America from 1820 until May, 1822, to protect American commerce during the revolt against Spain. USMC, I, 65.

1822: Cuba (Spanish Territory).

U. S. naval forces landed on the northwestern coast of Cuba and burned a pirate station. State, 17.

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. State, 17.

1824: Cuba (Spanish Territory).

In October, the U.S.S. Porpoise landed sailors to pursue pirates during a cruise authorized by Congress. State, 17.

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. State, 17.

1827: Greece.

Apparently acting pursuant to legislation, in October and November, United States forces from the U.S.S. Warren and the U. S. schooner Porpoise engaged in seven actions against pirate vessels off Greece and made landings on three Greek Islands. State, 17.

1828: West Indies.

In December, incident to legislation, Marines participated in the capture of the Argentinean privateer Federal by the U. S. sloop Eric at St. Bartholomew Island, W. I. USMC, I, 67.

1830: Haiti.

On June 5, marines participated in the capture of the slave brig Fenix by the U. S. schooner Grampus off Cape Haïtien, Haiti. USMC, I, 67.

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 succeeded in releasing the vessels and their crews and dispersed the Argentine colonists. State, 17.

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. State, 18.

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. State, 18.

1835: Samoan Islands.

On October 11, eighty Marines and sailors burned the principal village on the island to avenge harsh treatment meted out to American seamen. Paullin, 729.

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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, and to protect the American Consulate at Lima. State, 18.

1837: Mexico.

On April 16, marines joined in the capture of a Mexican brig-of-war by the U.S.S. Natchez off Brasos de Santiago for illegal seizure of two American merchantmen. USMC, I, 70.

1839: Sumatra.

In January,

American forces from the U. S. sloop John Adams and the U. S. frigate Columbia landed at Muckie, Sumatra, to protect American lives and property and to punish natives of two towns for attacking American ships. USMC, I, 70.

1840: Fiji Islands.

American forces totaling 70 officers and men, landed on July 12 and 26 to punish natives of two towns for attacking American exploring and surveying parties. State, 18.

1841: Samoan Islands.

On February 25, an American force of 70 marines and seamen from the U.S.S. Peacock landed to avenge the murder of a seaman. They burned three native villages. USMC, I, 71.

1841: Drummond Island (Kingsmill Group, Pacific Ocean).

On April 6, marines from the U.S.S. Peacock landed and burned two towns to avenge the murder of a seaman by natives. State, 18.

1843: China.

In June and July, a clash between Americans and Chinese at the Canton trading post led to the landing of 60 sailors and marines from the St. Louis. Paullin, 1095-1096.

1843: West Africa.

In November and December, four U. S. vessels from Commodore Perry's squadron 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. The actions appear to have been pursuant to the Treaty of August 9, 1842, with Great Britain relative to the suppression of the slave trade. State, 18.

1844: Mexico.

President Tyler deployed our forces to protect Texas against Mexico, anticipating Senate approval of a treaty of annexation, which was rejected later in his term. Corwin, 245.

1844: China.

On June 18, Marines from the U. S. sloop St. Louis went ashore at Canton, China, to protect American lives. USMC, I, 72.

1845: African coast.

On November 30, Marines joined in the capture of the slave bark Pons by the U. S. sloop Yorktown off Kahenda, Africa. The action was consistent with the Treaty of 1842. USMC, I, 72.

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. U.S., 378.

1849: Smyrna (Now Izmir, Turkey).

In July, the U.S.S. St. Louis gained the release of an American seized by Austrian officials. State, 18.

1850: African coast.

On June 6, Marines joined in capturing a slave ship by the U. S. brig Perry off Luanda, Africa. The action was consistent with the Treaty of 1842. USMC, I, 77.

1851: Turkey.

After a massacre of foreigners (including Americans) at Jaffa, the U. S. Mediterranean Squadron was ordered to demonstrate along the Turkish coast. Apparently, no shots were fired, but the display amounted to compulsion. State, 19.

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. State, 19.

1852-1853: Argentina.

Several landings of marines took place in order to protect American residents of Buenos Aires during a revolt. State, 19.

1853: Nicaragua.

American forces under Captain Hollins of the U.S.S. Cyane landed at Greytown about March 10 to protect American lives and interests during political disturbances. His activities were approved by the Secretary of the Navy. Moore, 414-415.

1853: China.

On September 11, a small Marine force from the U.S. steamer Mississippi boarded a Siamese vessel in the Canton River and put down a mutiny. USMC, I, 78.

1853: West Coast of Africa.

In accordance with the Treaty of 1842, on December 3, Marines joined in the capture of the slave schooner Gambrill by the U.S. frigate Constitution off the Congo River on the west coast of Africa. USMC, I, 78.

1853: Smyrna.

Martin Koszta, who was an American declarant, was released by his Austrian captors, upon an ultimatum given by Naval Captain Ingraham who trained his guns upon the Austrian vessel on which Koszta was held. Secretary of State Marcy defended the rescue against protest by the Austrian Government. Berdahl, 50.

1853-1854: Japan.

Commodore Matthew C. Perry led an expedition 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. State, 19.

1854: West Coast of Africa.

Pursuant to the Treaty of 1842, on March 10, Marines joined in the capture of a slave brig by the U.S. brig Perry off the west coast of Africa. USMC, I, 78.

1854: China.

American and British forces consisting of 150 English sailors, 60 U.S. sailors, and 30 merchant sailors landed at Shanghai on April 4 and stayed until June 7 to protect their nationals during a battle between Chinese imperial and revolutionary troops. State, 19.

1854: Greytown, Nicaragua.

In July, the commander of an American naval vessel demanded reparation after the U.S. minister to Central America was injured during a riot. When this was not forthcoming, the vessel bombarded the town. President Pierce defended the action of the American commander in his annual message to Congress. Moore, 415-416.

1854: Okinawa.

On July 6, a force of 20 Marines from the U.S. steamer Powhatan went ashore on Okinawa and seized a religious shrine in punishment of persons who murdered an American. On November 17, Marines and seamen from the U.S. sloop Vincennes went ashore again at Okinawa to enforce treaty provisions. USMC, I, 78.

1855: China.

There were two brief actions by U.S. warships, the first a landing in May at Shanghai to protect American interests there, the second an attack in August at Hong Kong against pirates. State, 20.

1855: Fiji Islands.

In September and October, marines from the sloop-of-war John Adams landed four times to seek reparations for depredations against Americans and to force natives to honor a treaty. The landing parties fought skirmishes and burned some villages. USMC, I, 79.

1855: Uruguay.

In August and November, U.S. naval forces put sailors ashore to protect American interests in Montevideo. State, 20.

1856: Panama, Republic of New Granada.

U.S. forces landed and stayed two days to protect American 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.) State, 20.

1856: China.

In October and November, the U.S. warships Portsmouth and Levant landed 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 U.S. flag. The Americans took and destroyed four Chinese forts. The attack by U.S. war vessels without authority of Congress was approved by President Buchanan. Berdahl, 51.

1858: Uruguay.

Forces from two U.S. warships landed in January to protect American lives and 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. State, 20.

1858: African coast.

On September 8, Marines joined in the capture of a ketch laden with slave food by the U.S. sloop Marion off the southeast coast of Africa. The action was consistent with the Treaty of 1842. USMC, I, 80.

1858: Cuban waters.

After repeated acts of British cruisers in boarding and searching our merchant vessels in the Gulf of Mexico and adjacent seas, President Buchanan addressed remonstrances to the British Government against these searches and, without authority from Congress, ordered a naval force to the Cuban waters with directions "to protect all vessels of the United States on the high seas from search or detention by the vessels of war of any other nation." A conflict with Great Britain was avoided only by its abandonment of her claim to the right of visit and search in time of peace. Berdahl, 51; Richardson, 3038.

1858: Fiji Islands.

On October 6, 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. State, 21.

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 U.S. Navy to make a display of force along the Levant. State, 21.

1858-1859: Paraguay.

From October 1858, to February, 1859, an American expedition went to Paraguay to demand 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. Congress authorized the action. State, 21.

1859: African coast.

On April 21 and 27, Marines joined in the capture of a slave ship near the Congo River, Africa. The action was consistent with the Treaty of 1842. USMC, I, 81.

1859: Mexico.

Two hundred U. S. soldiers crossed the Rio Grande in pursuit of the Mexican bandit Cortina. State, 21.

1859. China.

On July 31, forces from the U.S.S. Mississippi landed at Woosung and Shanghai, where they remained until August 2, to protect American interests and restore order. The American consul had called on the ship for assistance. State, 21.

1860: Kissembo, West Africa.

On March 1, 40 Marines and seamen from the sloop-of-war Marion landed twice to prevent the destruction of American property during a period of local unrest. State, 21.

1860: Colombia (State of Panama).

On September 27, the Marine guard from the sloop U.S.S. St. Mary's landed to protect American interests during a revolt. This may have been authorized pursuant to the Treaty of 1846. State, 21.

1863: Japan.

On July 16, when Japanese shore batteries at Shimonoseki fired on a U. S. merchant ship, 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. The American Minister had demanded redress.

1864: Japan:

From July 14 to August 3, U. S. forces protected the U. S. Minister to Japan when he visited Yedo concerning some American claims against Japan. The forces also were designed to impress the Japanese with American power. LRS, IV, 52.

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 cannon seized. State, 21.

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 to 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. U. S., 580-581.

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. State, 22.

1866: China.

Various landings by over 100 marines and seamen were made in June and July at Newchwang to punish an assault on the American Consul and to guard diplomats. State, 22.

1867: Formosa.

On June 13, 181 Marines and seamen from the U.S.S. Hartford and U.S.S. Wyoming landed to punish natives who had murdered the crew of a wrecked American merchantman. Several huts were burned. USMC, I, 91.

1867: Nicaragua.

On September 6, Marines landed and occupied Managua and Leon. USMC, I, 92.

1868: Japan.

From February 1 until April 4, landings were made at Hiago, Nagasaki, and Yokohama to protect American lives and property during local hostilities. USMC, I, 92.

1868: Uruguay.

At the request of local Uruguayan authorities, several landings were made from five U. S. steamers at Montevideo during the month of February in order to protect American lives and property during an insurrection. State, 22.

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. State, 22.

1869-1871: Dominican Republic.

President Grant, having negotiated a treaty of annexation, sent a strong naval force to the island to protect it from invasion and internal disorder, both during consideration of the treaty by the Senate and for months after its rejection. Berdahl, 48.

1870: Mexico.

On June 17, the U.S.S. Mohican pursued a pirate ship up the Tecapan River near Mazatlan, landed a party of Marines and seamen, and destroyed it during a pitched battle. State, 22.

1871: Korea.

In June, American landing forces under Admiral Rodgers captured five Korean forts after a surveying party, granted permission to make certain surveys and soundings, had been attacked. No treaty or convention was in effect. State, 22.

1873: Colombia.

In May and September, nearly 200 American forces landed at the Bay of Panama to protect American lives and interests during local hostilities. The actions were impliedly allowed by the Treaty of 1846. State, 22.

1873: Cuban waters.

On October 31, the steamer Virginius, flying the American flag, was captured some 18 miles from Jamaica by the Spanish steamer Tornado, her actual destination having been to make a landing of men and arms in Cuba. In violation of treaty stipulations with the U.S. regarding counsel and trial before a proper court, a summary court-martial was convened and with circumstances of the utmost barbarity, a total of 53 of the crew and passengers were executed, including a considerable number of Americans. Large meetings were held in this country demanding violent action against Spain and President Grant authorized the Secretary of the Navy to put our navy on a war footing. Every available ship was commissioned or recalled from foreign stations and war looked imminent. Spain yielded and the Virginius with her surviving crew and passengers were returned in late December. Also, by an agreement concluded February 27, 1875, Spain admitted the illegality of the capture and the wrongfulness of the summary execution and paid an indemnity of $80,000 to the United States. Chadwick, 314-351.

1873-1882: Mexico.

U.S. troops repeatedly crossed the Mexican border to pursue cattle thieves and Indian marauders. Mexico occasionally reciprocated. Such incursions were finally recognized as legitimate by agreements concluded in 1882 and subsequent years. Moore, 418-425.

1874: Hawaii.

In February, a party of 150 men from two U.S. vessels landed to preserve order at the request of local authorities. State, 23.

1876: Mexico.

On May 16, at the request of the U.S. consul at Matamoras, a small American force was landed to preserve order when the town was temporarily without a government. State, 23.

1882: Egypt.

On July 14, over 100 forces from the U.S.S. Lancaster, U.S.S. Quinnebaug, and U.S.S. Nipsic landed at Alexandria, when the city was being bombarded by the British navy, in order to protect American interests there, including the American consulate. State, 23.

1885: Colombia (State of Panama).

On January 18, March 16, March 31, April 8, April 11, April 12, and April 25, American forces landed to protect American property and guard valuables in transit over the Isthmus during local revolutionary activity, an action authorized under the Treaty of 1846. USMC, I, 96.

1888: Korea.

On June 19, 25 men from the U.S.S. Essex landed at Chemulpo and marched to Seoul to protect American residents during unsettled political conditions. The action was requested by the American Minister. State, 23.

1888-1889: Samoan Islands.

In 1886, the German consul announced that the Samwan 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, U. S. 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 invited the three powers to a conference, which was agreed to and held in Berlin. In April, 1889, they established a three-power protectorate there. In 1899 the Samoans were divided, the United States acquiring Tutuila. State, 23.

1888: Haiti.

In December, American warships made a display of force 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. State, 24.

1889: Hawaii.

On July 30, at the request of the American Minister in Honolulu, the U.S.S. Adams sent a marine guard ashore to protect American lives and property during revolutionary disorder. State, 24.

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. State, 24.

1891: Navassa Island, Haiti.

American forces from the U.S.S. Kearsarge landed on June 2 to protect American lives and property during a period of unrest. The action was taken pursuant to Congressional action. State, 24.

1891: Bering Sea.

An American squadron operated from June to October, jointly with British naval vessels, seizing four schooners. Rogers, 109.

1891: Chile.

In August, 102 Americans of the South Pacific station landed at Valparaiso during a revolt in order to protect the American Consulate and American lives. State, 24.

1894: Brazil.

The U. S. 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." State, 24.

1894: Nicaragua.

In July, American forces landed at Bluefields to protect American interests during a revolt. State, 24.

1894-1896: Korea.

On July 24, at the request of the American Minister, a force of 21 Marines and 29 sailors landed at Chemulpo and marched to Seoul to protect American lives and property during the Sino-Japanese War. A Marine guard remained at the American Legation until 1896. State, 24.

1894-1895: China.

On December 6, 1894, Marines disembarked from the U.S.S. Baltimore at Taku and marched to Tientsin to protect American lives and property during the Sino-Japanese War. The landing party maintained order until May 16, 1895. USMC, I, 98.

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. State, 24.

1895-1896: Korea.

During internal disorders from October 11, 1895, to April 3, 1896, the American Legation at Seoul was protected by Marines from various ships. Ellsworth, 60.

1896: Nicaragua.

On May 2, marines were put ashore at Corinto by the U.S.S. Alert during revolutionary disorders to protect American interests. USMC, I, 99.

1898: Nicaragua.

On February 7, Marines landed at San Juan del Sur by the U.S.S. Alert to protect Americans against disorder. USMC, I, 99.

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. President McKinley reported this protective action in his annual message. State, 25.

1899: Nicaragua.

On February 24, in response to a petition from foreign merchants during an insurrection, Marines landed to protect life and property at San Juan del Norte and Bluefields. State, 25.

1899: Samoan Islands.

Sixty Americans landed on February 14 from the U.S.S. Philadelphia, and on April 1 joined a British force in efforts to disperse native rebels. This may have been under color of treaty or statue. State, 25.

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. 40C. of Claims. 26-32.

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.) State, 3-4.

1901: Colombia (State of Panama).

American forces went ashore in late 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. State, 25.

1902: Colombia (State of Panama).

Marine guards landed in April to protect American lives and 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. State, 25.

1903: Honduras.

American forces disembarked at Puerto Cortez in March to protect the American Consulate and port facilities during a period of revolutionary activity. State, 25.

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. State, 25.

1903-1904: Syria.

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. State, 25.

1903: Panama.

A revolution leading to the independence of Panama from Colombia broke out in November. Marines landed from the U.S.S. Dixie 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. State, 25-26.

1903-1904: Abyssinia.

Twenty-five American marines were sent to protect the U. S. Consel General from November 18, 1903, to January 15, 1904, while he was negotiating a treaty with the Emperor. USMC, I, 109.

1904: Dominican Republic.

On January 3, 7, and 17, and on February 11, over 300 Marines landed at Puerto Plata, Sosua, and Santo Domingo to protect American lives and property during a revolt. USMC, I, 108-109.

1904: Morocco.

A squadron demonstrated in Moroccan waters in June to force the release of a kidnapped American. A Marine contingent had landed on May 30 to protect the Consul General. State, 26.

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. State, 26.

1904-1905: Korea.

In January, 1904, over 100 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. In March, 1904, marines assisted in the evacuation of American nationals. USMC, I, 108.

1905-1907: Dominican Republic.

After the Senate failed to ratify a treaty providing that the United States should guarantee the integrity of the Dominican Republic, take charge of its customs, and settle its obligations, President T. Roosevelt nevertheless put its terms into effect for two years until in 1907 the Senate ratified a slightly revised version. Berdahl, 41-42.

1906-1909: Cuba.

An American squadron demonstrated off Havana, and, in September, marines landed to protect American interests during a revolution. In October, marine and 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. State, 26.

1907: Honduras.

On March 18, during a war between Honduras and Nicaragua, the U.S.S. Marietta disembarked 10 men to guard the American Consulate at Trujillo. The U.S.S. Paducah also landed forces at Laguna and Choloma on April 28. State, 26.

1910: Nicaragua.

In May, 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." State, 26.

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. State, 26.

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. State, 27.

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. State, 27.

1912: Cuba.

In May, 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. President Taft telegraphed the President of Cuba that the action was for protection only. Hackworth, 328-329.

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. State, 27.

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 sizable landings of marines in August and September, 1912. 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 was reinforced in 1922 and remained until August 1, 1925. State, 27.

1913: China.

U. S. forces landed in July at Chapei and 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 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, 117.

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. State, 27.

1914: Haiti.

Marines landed in January, February, and August to protect American citizens during a period of unrest. State, 27.

1914: Dominican Republic.

During a period of revolutionary activity, U. S. 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. State, 28.

93-626 O - 73 - 23

1914: Occupation of Vera Cruz, Mexico.

On April 9, 1914, an 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. Admiral Mayo, commander of the American squadron, also demanded a 21-gun salute to the American flag. The Mexicans refused and President Wilson promptly ordered the North Atlantic battleship fleet to Tampico. On April 20, he addressed Congress in a joint session and asked for authority to use 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 21. On April 22, Congress passed a joint resolution which declared 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," but that "the United States disclaimed any hostility to the Mexican people or any purpose to make war upon Mexico." By November 23, 1914, American troops had left Mexican soil. State, 4.

1915: Dominican Republic.

On August 15, the 5th Marine Regiment arrived at Puerto Plata to protect American lives and property during a revolutionary outbreak. Their protective mission lasted until October 12, 1915. USMC, I, 116.

1915-1934: 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 protect American lives and property and in part to forestall European intervention to collect debts. Marines were stationed in Haiti until 1934. The occupation was sanctioned by a treaty consented to by the Senate in February, 1916, but the first months of the occupation were on executive authority alone. State, 28.

1916-1924: 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. U.S. troops withdrew in 1924, and a general treaty signed that year formally sanctioned the previous occupation. The Convention of February 8, 1907, also appears to have authorized the landing of U.S. troops. State, 28.

1916: China.

American forces landed at Nanking to quell a riot taking place on American property. Apparently this was authorized by a treaty. State, 28.

1916-1917: Pershing Expedition into Mexico.

In October, 1915, the United States recognized the Carranza regime as the de facto government in Mexico. At the same time, 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.

Then, on March 9, 1916, 400 of Villa's men raided Columbus, New Mexico, and killed 17 Americans. The American public was incensed, and Wilson delayed sending an expedition only until he could obtain Carranza's consent. On March 13, 1916, when Carranza's government acceded, Wilson ordered General John J. Pershing to take U.S. Army units into Mexico. On March 16, Pershing crossed the border with 6,000 troops. On the following day, Congress adopted a joint resolution introduced by Senator Robert LaFollette sanctioning the use of the armed forces. Until then, Wilson had been relying on claims of authority under the Acts of 1795 and 1807 relative to employing the armed forces whenever there is "imminent danger of invasion."

Villa eluded Pershing, and the size of the U.S. 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. But neither country really wanted war, and the crisis gradually subsided. Wilson decided to withdraw all American troops from Mexico in February, 1917. State, 5-6.

1917: Armed Atlantic Merchant Ships.

In February, President Wilson asked Congress for authority to arm U.S. merchant vessels with defensive guns, but Congress refused to pass such a law. Thereupon President Wilson acted, on his own authority, to equip American merchant vessels with guns

and gunners assigned to them from the Navy. His action occurred prior to the declaration of war on Germany which did not take place until April 6, 1917. Willoughby, III, 1568.

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. State, 28.

1917: China.

On December 3 and 4, / American troops landed at Chungking to protect American lives during a political crisis. Apparently this was done pursuant to the Treaty of June 18, 1858, and the Boxer Protocol of September 7, 1901. Hackworth, 332.

1918-1919: Mexico.

U. S. 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. State, 28.

1918-1920: Expeditions to Russia.

Following the Bolshevik revolution in Russia in 1917, Allied expeditions landed, in 1918, at Murmansk and then Archangel. American troops first landed in August, 1918, with most arriving in Archangel Harbor on September 4. Though Armistice Day came on November 11, 1918, the American forces remained until June 27, 1919. At Archangel, the U. S. contributed some 5,208 men and suffered some 549 casualties, including 244 deaths.

The Allies also landed units in Siberia in August and September of 1918 where Bolshevik troops were fighting a force of 65,000 Czech soldiers who were trying to fight their way eastward. The Japanese sent 74,000 soldiers; the Americans sent 8,388; and the British and French provided minor contingents. The American forces began embarking for home on January 17, 1920, and the last units left on April 1, 1920.

President Wilson, who acted without Congressional approval, agreed to participate in the Allied expeditions to aid the anti-Bolsheviks, to help several thousands of Czech troops get back to their homeland, and to forestall possible Japanese expansionist plans in Siberia. State, 6.

1919: Dalmatia.

At the request of Italian authorities, U.S. bluejackets were landed at Trau, September, 1919, in order to police order between the Italians and the Serbs. The action, which was entirely without the previous knowledge or consent of Congress, was an extension of the Constitutional principle of police supervision as applied in the zone of the Carribbean. Berdahl, 56. earlier

1919: Turkey.

On May 14, a Marine detachment from the U.S.S. Arizona landed to guard the U.S. Consulate at Constantinople during the Greek occupation of the city. USMC, I, 121.

1919: Honduras.

A small American force went ashore at Puerto Cortez to maintain order in neutral zone during an attempted revolt. State, 29.

1918-1920: Panama.

American troops went outside the Canal Zone, on request of the Panamanian Government, to supervise elections and police the Province of Chiriqui. This was authorized by the Convention of November 18, 1903. Hackworth, 331.

1920: China.

In March and August, American forces landed at Kiukiang and Youchow to protect American lives and property. This appears to have been authorized by treaty. Hackworth, 332.

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, but were withdrawn after about 10 days. State, 29.

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. State, 29.

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. State, 29.

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. Hackworth, 333.

1922-1923: China.

There were five landings by Marines from April, 1922, to November, 1923 (at Peking, Tientsin, Taku, Tungshan, and Masu Island) to protect Americans during periods of unrest. This appears to have been authorized by treaty. USMC, I, 122-123.

1924-1925: Honduras.

There were intermittent landings from February, 1924, to April, 1925, to protect American lives and property during local unrest. In March, 1924, the Denver put ashore 167 men and in September, the U.S.S. Rochester landed 111 additional forces. USMC, I, 123-124.

1924-1925: China.

From September, 1924, to June, 1925, over seven landings were made by the Marines at Shanghai to protect Americans during a period of unrest. This appears to have been authorized by treaty. USMC, I, 124-125; Hackworth, 332-333.

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. State, 29.

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 1927, five thousand soldiers were put ashore.

Rebel political leader, Sandino, who received Communist propaganda and financial support, turned the situation into a real civil war. In January, 1928, Sandino was forced to flee to Mexico by Marine forces, but backed by Communist aid, he returned in 1930 and Nicaragua flared again. By 1933 an all-Nicaraguan Guardia Naçional became strong enough so that all U. S. Marines could leave. In all the marines had engaged in 150 clashes and lost 97 men, 32 in action. Rebel losses were approximately over a thousand.

The occupation was initiated entirely on the executive responsibility of President Coolidge. The Democrat minority bitterly criticized his policy as a "private war" and as "imperialism," but did not question the President's authority. State, 6-7; and Dupuy and Baumer, 168.

1926: China.

American forces landed at Hankow in August and September and at Chingwangtao in November to protect American interests. This appears to have been authorized by treaty. State, 29.

1927-1928: Armed Actions in China.

Anti-foreign incidents in China reached a climax in 1927.

In February, a U. S. expeditionary battalion landed at Shanghai and in March, 1,228 marine reinforcements landed there. By the end of 1927, the United States had 44 naval vessels in Chinese waters and 5,670 men ashore. In 1928, when the Nationalists had gained greater control over Chinese territory and purged themselves of Communist support, the United States reached a separate accord with them and, in July, signed a treaty which constituted United States recognition of the Nationalist Government. A gradual reduction of United States forces in China began in the same month. State, 7-8.

1932: China.

In February, American forces landed at Shanghai to protect American interests during the Japanese occupation of the city, apparently under treaty. State, 30.

1933: Cuba.

During a revolution, United States naval forces demonstrated offshore but no forces landed. This was pursuant to the Treaty of 1903. State, 30.

1934: China.

In January, marines from the U.S.S. Tulsa landed at Foochow to protect the American Consulate, apparently pursuant to treaty rights. USMC, I, 129.

1936: Spain.

From July 27, through September 19, the Quincy, carrying a marine guard, served in the Spanish war zone. The vessel touched at several ports, sometimes evacuating American nationals. (Master rolls.)

1937-1938: China.

Beginning on August 12, 1937, several marine landings were made at Shanghai to protect American interests during Sino-Japanese hostilities. Marine strength in China, assigned under the International Defense Scheme, reached 2,536 men by September 19. USMC, II, 2-3.

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. State, 8-9.

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. State, 8-9.

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 Serivce Act of 1940 provided that United States troops could not be used outside the Western Hemisphere. Iceland is generally placed with the section on Europe in each World Atlas and is some 2,300 miles away from the United States.
State, 8-9.

1941: Dutch Guiana.

In November, the President ordered American troops to occupy Dutch Guiana by agreement with the Netherlands Government-in-exile. Again there was no Congressional authority for the military occupation. State, 8-9.

1941: Atlantic Convoys.

By July 7, President Roosevelt had ordered U. S. warships to convoy supplies sent to Europe to protect military aid to Britain and Russia. By September, our ships were attacking German submarines. There was no authorization from Congress. Corwin, 203.

1946: Trieste.

In July, during the Italian-Yugoslav border dispute in the Trieste area, U.S. Naval units were dispatched to the scene with open warfare imminent. After the Yugoslavs forced down on August 9, and then shot down on August 19, unarmed U.S. Army transport planes flying over the former Italian province of Venezia Giulia, President Truman ordered our troops along the Morgan Line of zonal occupation augmented and the reinforcement of our air forces in northern Italy. The Yugoslav- Russian offensive against Trieste then quieted. Acheson, 195-196.

1946: Turkey.

On August 7, Russia demanded that Turkey allow it to participate in the "defense" of the Straits. On August 14, President Truman met with his chief advisers and approved their recommendation to send a powerful naval force, including the supercarrier Franklin D. Roosevelt, to join the U.S.S. Missouri at Istanbul as an affirmation of U.S. intentions to resist the Russian move against Turkey and the Straits. President Truman informed his advisers that he understood fully that the action could lead to war, but that nevertheless he was determined to prevent Soviet domination of the area. Acheson, 195, 196.

1946: Greece.

In September, during the attempted Communist takeover of Greece, naval units were requested by the U.S. Ambassador. One carrier was on the scene. USN, 15712.

1948: Palestine.

On July 18, a Marine consular guard was detached from the U.S.S. Kearsarge and sent to Jerusalem to protect the U.S. Consular General there. One consular official was assassinated and two Marines were wounded during the Arab-Israeli War. USMC, III, 7.

1948: Mediterranean.

On January 7, Fleet Admiral Nimitz implied Marine reinforcements sent from the U.S. to Mediterranean waters served as a warning to Yugoslavia that the 5,000 U.S. Army troops in Trieste were not to be molested. USMC, III, 5.

1948-1949: China.

A platoon of Marines was sent to Nanking on November, 1948, to protect the American Embassy when the fall of the city to Communist troops was imminent. The guard was withdrawn on April 21, 1949. In November and December, Marines were sent to Shanghai to aid in the evacuation of American Nationals and to protect the 2,500 Americans in the Communist encircled city. USMC, III, 8-9.

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 international 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, but it was not until July, 1953, that an armistice was signed. State, 9-11.

1954-1955: Tachen Islands (China).

From July, 1954, to February, 1955, U. S. Naval units were employed in evacuation of U. S. civilians and military personnel. Five carriers were on the scene. USN, 15712.

1956: Egypt.

On November 1 and 2, a Marine battalion evacuated over 1,500 persons, mostly U. S. nationals, from Alexandria, Egypt, during the Suez crisis. USMC, III, 34.

1957: Indonesia.

On February 14, the 3rd Marines took up station 550 miles northeast of Sumatra ready to intervene to protect U. S. nationals during the Indonesian revolt. USMC, III, 34.

1957: Taiwan.

During Communist shelling of Kinmen Island in July, naval units were dispatched to defend Taiwan. Four carriers were on the scene. USN, 15712.

1958: Venezuela.

In January, when mob violence erupted in Caracas, a company of marines embarked on board the U.S.S. Des Moines and remained on station off Venezuela ready to protect American interests. USMC, III, 36.

1958: Indonesia.

In March, a Marine Company, attack squadron, and helicopter squadron were deployed with elements of the Seventh Fleet off Indonesia prepared to protect U. S. citizens and interests. USMC, III, 36.

1958: Lebanon Operation.

A period of 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 appealed for assistance to President Eisenhower. On July 15 President Eisenhower sent 5,000 marines to Beirut to "protect American lives" and to "assist" Lebanon in preserving its political independence. The President publicly stressed the provocative Soviet as well as Cairo radio broadcasts.



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.

On August 21, the General Assembly passed a resolution calling on the member states to respect one another's territorial integrity and observe strict non-interference in one another's internal affairs. The resolution requested that practical arrangements be made leading to the withdrawal of troops from Lebanon. On September 26, the United States notified the Secretary-General of the United Nations that it had been possible to withdraw a portion of the American forces and to work out a schedule to withdraw the remainder by the end of October. State, 11-12.

1959-1960: Cuba.

In the period from November 20, 1959, to February 15, 1960, the 2d Marine Ground Task Force was deployed to protect U. S. nationals during the Cuban crisis. USMC, III, 42.

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 resssert 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." ERR, 449-500.

1962: Thailand.

On May 17, the 3d Marine Expeditionary Unit landed in Thailand to support that country during the threat of Communist pressure from outside. On July 1, President Kennedy ordered 1,000 Marines in Thailand to return to their ships, and on July 30, the U. S. completed the withdrawal of the 5,000 Marines sent there. USMC, III, 56-57.

1962: Cuban Naval Quarantine.

On October 24, confronted with a build-up of Soviet surface-to-surface missile bases in Cuba, President Kennedy ordered a quarantine 500 miles wide 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 blockade. 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. The President first notified Members of Congress that same day. 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; 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.

On December 6, U. S. Navy planes verified that 42 Soviet jet bombers were being transported home from Cuba. The United States apparently closed the book on the Cuban crisis about this date. LRS, I, 24-25; and LRS, II, 1-18.

1963: Haiti.

On May 4, a Marine battalion was positioned off the coast of Haiti for five days when trouble developed in that country. USMC, III, 61.

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 had 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.

On November 24, the force was airdropped by U. S. transport aircraft in the Stanleyville area and liberated most of the hostages. Belgian paratroopers undertook a second rescue operation on November 26, capturing the rebel town of Paulis. In all, about 2,000 foreigners were rescued. President Johnson assumed "full responsibility" for the United States role in the decision to transport the Belgian troops in American planes. Davids, 296-310.

1964-1973: 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 reprisal. 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. The United States has continued to play a role of air support in Laos to date. State, 30.

1964-1973: 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 a 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, was steadily expanded as Communist guerrilla activity supported and directed from the north intensified. By 1962 there were 12,000 U. S. advisors.

In August, 1964, at the request of President Johnson following an attack on American naval vessels in the Gulf of Tonkin, Congress passed the Gulf of Tonkin Resolution, unanimously in the House and by a vote of 88-2 in the Senate. The Resolution 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 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.

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 judicially determined to represent authority for our engagement there. The Tonkin Gulf Resolution was subsequently repealed by P. L. 91-672 (Jan. 12, 1971).

Since assuming office in January, 1969, President Nixon has ordered the withdrawal of almost 550,000 troops. A peace agreement ending U.S. involvement in the war was announced on January 23, 1973. State, 12-14.

1965: Dominican Republic.

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. 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.

The first United States military contingent to the Dominican Republic consisted of 400 men. 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 contending forces and on May 6 the OAS voted to create an Inter-American Peace Force to assist in restoring peace and order. 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, 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. State, 14-15.

1967: Syrian Coast.

In June of 1967, during the Arab-Israeli War, President Johnson ordered the U. S. 6th Fleet to move to within 50 miles of the Syrian Coast as a message to the Soviet Union it "would have to deal with us" if it entered the conflict. The action was taken as a counter move against the Soviet Union after Premier Kosygin told President Johnson over the hotline that the Soviets had reached an "independent decision" that they were prepared to take "necessary actions, including military" to stop the advance of Israeli troops into Arab territory, and would give the Israelis just five hours to unconditionally halt their operations. Star, D-4; Johnson, 302.

1967: Congo.

In July, Lt. General Mabutu, 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 Mabutu, 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. LRS, III.

1970: Cambodia.

From April 30 to June 30, U. S. troops attacked Communist sanctuaries in order to ensure the success of the program of Vietnamization. LRS, IV, 57.

1970:[2] Jordanian-Syrian Crisis.

On September 17, King Hussein of Jordan moved against Palestinian guerrillas in an effort to reassert the royal authority. Despite a warning by President Nixon, talking to newspaper editors in Chicago, that the U.S. might intervene if Syria or Iraq threatened King Hussein's Government, some 300 Syrian tanks crossed into Jordan during the next three days. Secretary Rogers condemned the Syrian invasion and the U.S. called on the Soviet Union to use its influence to persuade Syria to pull out.

President Nixon moved the Sixth Fleet off the Israeli-Lebanese coast and publicity was given to the dispatch of the helicopter carrier Guam with 1,500 marines to join the Sixth Fleet, to the alert of the 82d Airborne Division in Fort Bragg, N.C., and to the alert of two airborne battalions of the Eighth Infantry Division in West Germany. At the same time the Israelis began a partial mobilization and movements of tanks toward the northern part of the Jordan River Valley in position to attack the Syrian invaders. The U.S. apparently was prepared to intervene militarily, in coordination with Israel, to prevent the overthrow of King Hussein's Government and to rescue 38 American hostages known to be in the hands of Palestinian guerrillas. By September 22, Syrian tanks began withdrawing and on September 25, the crisis ended when King Hussein and Yasir Arafat, the guerrilla chief, agreed on a cease-fire. N.Y. Times, Oct. 8, 1970, at 1, 12.

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[2] Eight military engagements which were subsequently disavowed or repudiated have been omitted from the above list of precedents. These are:

1812: Amelia Island, Spanish territory. United States disavowed General Matthews' occupation of the area when he made himself the head of a revolutionary party. State, 16.

1824: Puerto Rico, Spanish territory. Commodore Porter was later courtmartialed for exceeding his powers when he forced an apology from a group of pirates who had insulted American naval officers. State, 17.

93-626 O - 73 - 24

Continuation of footnote # 2

1842: Mexico. Commodore T.A.C. Jones occupied Monterey in the mistaken belief that war had started between the United States and Mexico. He withdrew and saluted, thereby disavowing his action. State, 18.

1857: Nicaragua. An American naval commander compelled the leader of a rebel group who was trying to seize Nicaragua to leave the country. The American commander's action was tacitly disavowed by the Secretary of State and apparently repudiated by President Buchanan. State, 20.

1866: Mexico. After General Sedgwich obtained the surrender of the Mexican border town of Matamoras, he was ordered to withdraw and his act was repudiated by the President. State, 22.

Late 1880's: Bering Sea. The United States paid nearly $500,000 to Britain in damages resulting from the seizure of British sealers by United States patrol boats outside the three mile limit. U. S., 586.

1893: Hawaii. On January 16, Marines from the schooner U.S.S. Boston landed at Honolulu and were dispatched until April 1 to protect American lives and property, after the deposition of Queen Liliuokalani. The action was later disavowed by the United States. LRS, III, 53.

1912: Honduras. A small naval force landed at Puerto Cortez to protect an American-owned railroad there. Apparently Washington disapproved and the men were withdrawn in a day or two. State, 27.

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[3]Only the primary sources are cited, although in several instances the summary was prepared from a composite of information published in more than one of the sources referred to herein.

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B. FIVE UNITED STATES MILITARY ACTIONS
ABROAD 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. FIFTY MAJOR MILITARY ACTIONS FOR BROAD STRATEGIC AIMS

1798-1800: Naval War with France. The U.S. fought primarily for the protection of its free commerce.

1801-1805: War with Tripoli. The U.S. upheld its right of free commerce.

1814-1825: Caribbean Area. The U.S. sunk or captured 65 vessels to protect American commerce.

1815: Second Barbary War. The U.S. acted to provide effective protection to American commerce.

1844: Mexico. President Tyler deployed our troops to protect Texas one year before annexation.

1846: Mexico. President Polk ordered General Scott to occupy disputed territory between the Nueces and the Rio Grande.

1853-1854: Japan. Commodore Perry's expedition of 2000 men and ten ships advanced American commercial interests.

1858: Cuban waters. President Buchanan ordered a naval force to Cuban waters to protect all vessels of the U.S. on the high seas from search or detention by the vessels of war of any other nation.

1864: Japan. U.S. Naval units participated in a joint effort to force open the Straits of Shimonoseki for the free conduct of international commerce.

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.

1869-1871: Dominican Republic. President Grant sent a strong naval force to protect the Dominican Republic during his efforts to annex the island.

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 U.S. sent 5000 troops and marines to relieve foreign legations in Peking and to keep open communication between Peking and the sea.

1903-1914: Panama. Marine guards landed and remained on the Isthmus to protect construction of the Canal.

1905-1907: Dominican Republic. President T. Roosevelt ordered the administration of the affairs of the Dominican Republic by the U.S. in implementation of the Monroe Doctrine.

1906-1909: Cuba. The U.S. temporarily occupied Cuba to preserve order.

1912: Cuba. American troops remained three months to preserve order.

1915-1934: Haiti. U.S. troops occupied Haiti to forestall European intervention.

1916-1924: Dominican Republic. U.S. troops occupied Santo Domingo and supported a military governor in the Dominican Republic.

1917: Armed Atlantic Merchant Ships. President Wilson armed American merchant vessels with guns and gunners assigned from the Navy.

1917: Cuba. Several American landings were made to preserve order.

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: Dalmatia. U.S. troops were landed in order to police foreign territory during disorder between the Italians and Serbs.

1926-1933: Nicaragua. The occupation of Nicaragua foiled the first attempt of Communism to infiltrate Latin America.

1927-1928: China. Nearly 6000 U.S. troops acted to help stabilize China.

1937-1938: China. Some 2500 marines helped preserve order in Shanghai under the International Defense Scheme.

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: Atlantic convoys. U.S. warships were used to convoy military supplies to Britain and Russia.

1941: Dutch Guiana. American troops occupied Dutch Guiana for the same reason as above.

1946: Trieste. President Truman reinforced U.S. troops along the Italian-Yugoslav border and dispatched naval units to the scene in order to resist the Yugoslav-Russian offensive against Trieste.

1946: Turkey. As a sign of U.S. determination to resist Soviet threats against Turkey and the Straits, President Truman sent a powerful naval force to Istanbul.

1946: Greece. During the attempted Communist takeover of Greece, U.S. naval units were sent at the request of the U.S. Ambassador.

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."

1957: Taiwan. U.S. naval units were dispatched to defend Taiwan.

1958: Lebanon. A primary purpose of using U.S. armed forces in Lebanon 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: Thailand: Some 5000 marines landed to support Thailand during a threat of external Communist aggression.

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.

1963: Haiti. A marine battalion was positioned off Haiti when trouble developed there.

1964: Congo. A task force of four U.S. C-130 transport planes with paratrooper guards was sent to the Congo to provide airlift for the regular Congolese troops against a Communist-assisted rebellion.

1964-1973: Vietnam. American forces have acted to support freedom and protect peace in Southeast Asia.

1964-1973: Laos. The United States has supported the free government of Laos, particularly with air missions.

1965: Dominican Republic. The threat of a Communist takeover and the need to provide humanitarian assistance to the Dominican people were major reasons for the American landings.

1967: Syrian Coast. During the Arab-Israeli war, the U. S. 6th Fleet moved to within 50 miles off the Syrian Coast as a sign to the Soviet Union it "would have to deal with us" if it entered the conflict.

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.

1970: Cambodia. U. S. troops were ordered into Cambodia to assist the program of Vietnamization.

1970: President Nixon augmented and moved the Sixth Fleet off the Israeli-Lebanese coast in preparation to halt, if necessary, the Syrian invasion of Jordan and to rescue 38 American hostages.

D. EIGHTY-TWO HOSTILITIES WITH ACTUAL COMBAT OR ULTIMATUMS

1798-1800: Quasi-war with France
1800: West Indies
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)
1820: West Africa
1820-1822: West Coast of South America
1822: Cuba
1823: Cuba
1825: Cuban Keys
1827: Greece
1828: West Indies
1830: Haiti
1831-1832: Falkland Islands (Argentina)
1832: Sumatra
1835: Samoan Islands
1837: Mexico
1840: Fiji Islands
1841: Drummond Islands (Pacific Ocean)
1841: Samoan Islands
1843: West Africa
1845: African coast
1846: Mexico
1850: African coast
1851: Turkey (Apparently no shots fired, but the force displayed amounted to a compulsory ultimatum)
1851: Johanna Island (East of Africa)
1853: China
1853: West Coast of Africa
1853: Smyrna
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
1854: West Coast of Africa
1854: Okinawa
1855: China
1855: Fiji Islands
1855: Ur guay
1856: China
1858: Fiji Islands
1858: African coast
1859: African coast

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
1867:	Nicaragua
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.)
1891:	Bering Sea
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
1917:	Armed Atlantic merchant ships
1918-1919:	Mexico
1918-1920:	Expeditions to Russia
1926-1933:	Nicaraguan occupation
1927-1928:	Armed actions in China
1941:	Atlantic convoys
1946:	Trieste
1948:	Palestine
1950-1953:	Korean War
1962:	Cuban naval quarantine
1964-1973:	Armed actions in Laos
1965:	Dominican Republic
1964-1973:	Vietnam War
1967:	Syrian coast
1970:	Cambodia

E. NINETY-SEVEN MILITARY ACTIONS 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
1820-1822: West Coast of South America
1823: Cuba
1827: Greece
1831-1832: Falkland Islands
1835-1836: Peru
1838-1839: Sumatra
1843: West Africa
1843: China
1844: Mexico
1846: Mexico
1852-1853: Argentina
1853-1854: Japan
1854: China
1854: Okinawa
1855: Fiji Islands
1855: Uruguay
1856: China
1858: Cuban waters
1858-1859: Paraguay
1858-1859: Turkey
1865-1866: Mexican border
1866: China
1868: Japan
1869-1871: Dominican Republic
1873: Colombia
1873: Cuban waters
1873-1882: Mexico
1885: Colombia
1888-1889: Samoan Islands
1891: Bering Sea
1894: Nicaragua
1894-1895: China
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
1903-1904: Abyssinia
1903-1904: Syria
1904: Dominican Republic
1904-1905: Korea
1906-1909: Cuba
1907: Honduras
1911-1912: China
1912: Panama
1912: Cuba
1912: Nicaragua
1913: China
1914: Haiti
1914: Vera Cruz (Mexico)
1914-1915: Dominican Republic
1915: Occupation of Haiti
1916: Occupation of Dominican Republic
1916-1917: Pershing Expedition into Mexico
1917: Armed Atlantic merchant ships
1917: Cuba
1918-1919: Mexico
1918-1920: Expeditions to Russia
1918-1920: Panama
1920-1922: Siberia
1922-1923: China
1924-1925: China
1924-1925: Honduras
1926-1933: Nicaragua
1926: China
1927: China
1936: Spain
1937-1938: China
1940: Occupation of British possessions in Western Atlantic
1941: Occupation of Greenland
1941: Occupation of Dutch Guiana
1941: Occupation of Iceland
1941: Atlantic convoys
1946: Trieste
1948: Mediterranean
1948-1949: China
1950-1953: Korean War
1954-1955: Tachen Islands (China)
1958: Lebanon
1959-1960: Cuba
1962: Thailand
1962: Cuban naval quarantine
1964-1973: Laos
1964-1973: Vietnam
1964: Congo
1965: Dominican Republic
1967: Congo
1970: Cambodia

THREE
F. ONE HUNDRED/MILITARY ACTIONS BY THE UNITED STATES OUTSIDE THE WESTERN HEMISPHERE

1801-1805: War with Tripoli
1813-1814: Marquesas Islands (South Pacific)
1815: Second Barbary War
1820: West Africa
1827: Greece
1832: Sumatra
1835: Samoan Islands
1838-1839: Sumatra
1840: Fiji Islands
1841: Drummond Island (Pacific Ocean)
1841: Samoan Islands
1843: West Africa
1843: China
1844: China
1845: African coast
1849: Smyrna (Now Izmir, Turkey)
1850: African coast
1851: Turkey
1851: Johanna Island (east of Africa)
1853: China
1853: African Coast
1853: Smyrna
1853-1854: Japan
1854: African coast
1854: Okinawa
1854: China
1855: China
1855: Fiji Islands
1856: China
1858: Fiji Islands
1858: African coast
1858-1859: Turkey
1859: African coast
1859: China
1860: Kissembo (West Africa)
1863: Japan
1864: Japan
1864: Japan
1866: China
1867: Formosa
1868: Japan
1871: Korea
1874: Hawaii
1882: Egypt
1888: Korea
1888-1889: Samoan Islands
1889: Hawaii
1894-1896: Korea
1894: China
1895-1896: Korea
1898-1899: China
1899: Samoan Islands
1899-1901: Philippine Islands
1900-1901: "Boxer" Rebellion (Peking)
1903-1904: Syria
1903-1904: Abyssinia (Ethiopia)
1904: Morocco
1904: Korea
1911-1912: China
1912: Turkey
1913: China
1916: China
1917: Armed Atlantic merchant ships
1918: China
1918-1920: Expeditions to Russia
1919: Turkey
1919: Dalmatia
1920: China
1920-1922: Siberia
1922: Turkey
1922-1923: China
1924: China
1924-1925: China
1926: China
1927: China
1932: China
1934: China
1936: Spain
1937-1938: China
1941: Occupation of Greenland
1941: Occupation of Iceland
1941: Atlantic convoys
1946: Turkey
1946: Trieste
1946: Greece
1948: Palestine
1948: Mediterranean
1948-1949: China
1950-1953: Korea
1954-1955: Tachen Islands (China)
1956: Egypt
1957: Indonesia
1957: Taiwan
1958: Indonesia
1958: Lebanon
1962: Thailand
1964-1973: Laos
1964-1973: Vietnam
1964: Congo
1967: Syrian coast
1967: Congo
1970: Cambodia
1970: Jordanian-Syrian Crisis

C. EIGHTY-ONE MILITARY OPERATIONS ARGUABLY INITIATED UNDER PRIOR LEGISLATIVE AUTHORITY (No Declarations of War)

Year	Military Operation	Legislation	Treaty
1798-1800	Quasi-War with France	X	
1801-1805	War with Tripoli	X	
1813	Spanish Florida	X	
1806-1810	Gulf of Mexico	X	
1813-1814	Marqueses Islands	X	
1814-1825	Caribbean area	X	
1815	Second Barbary War	X	
1817	Amelia Island	X	
1820[1]	West Africa	X	
1822	Cuba	X	
1823	Cuba	X	
1824	Cuba	X	
1825	Cuban Keys	X	
1827[2]	Greece	X	
1828[2]	West Indies	X	
1832[2]	Sumatra	X	
1835[2]	Samoan Islands	X	
1838-1839[2]	Sumatra	X	
1841[2]	Drummond Island	X	
1841[2]	Samoan Islands	X	
1843[1 & 2]	West Africa	X	
1845[1]	African coast		X
1850[1]	African coast		X
1851[2]	Johanna Island, east of Africa	X	
1853[1]	African coast		X
1854[1]	African coast		X
1854	Okinawa		X
1855[2]	China	X	
1856	Panama		X
1858[1]	African coast		X
1859[1]	African		X
1859	Paraguay		X
1860	Panama		X
1864	Japan		X
1865	Panama		X
1867[2]	Formosa	X	
1868	Columbia		X
1870	Mexico	X	
1873	Columbia		X
1885	Panama		X
1888-1889	Samoan Islands	X	X

[1]Indicates operation occurred under Act of 1819 or Treaty of August 9, 1842, with Great Britain, both relative to the suppression of slavery.

[2]Indicates military activity may have occurred pursuant to broad interpretation of authority conferred by certain Acts of Congress against piracy. See Act of March 3, 1819 (3 Stat. 510), Act of January 14, 1823 (3 Stat. 720), Act of August 5, 1861 (12 Stat. 314).

Year	Military Operation	Legislation	Treaty
1891	Navassa Island, Haiti	X	
1894	Brazil	X	
1895	Panama		X
1899	Samoan Islands	X	X
1899-1901	Philippine Islands		X
1901	Panama		X
1902	Panama		X
1903	Panama		X
1904	Panama		X
1906	Cuba		X
1911-1912	China		X
1912	Panama		X
1912	Cuba		X
1913	China		X
1914	Vera Cruz, Mexico	X	
1916	Pershing Expedition into Mexico	X	
1916	China		X
1917	Cuba		X
1918	China		X
1918-1920	Panama		X
1920	China		X
1921	Panama-Costa Rica		X
1922-1923	China		X
1924	China		X
1924-1925	China		X
1925	Panama		X
1926	China		X
1927	China		X
1932	China		X
1933	Cuba		X
1934	China		X
1937-1938	China		X
1950-1953[3]	Korean War		X (U. N. Charter)
1957	Taiwan	X	X
1958[4]	Lebanon Operation	X	
1962[5]	Cuban Naval Quarantine		X (OAS)
1962	Thailand		X
1964-1973	Vietnam	X	X
1964-1973	Laos	X	X
1970	Cambodia	X	X

[3]Though reliance was also placed on the U. N. Charter, the Truman Administration based its authority to commit troops squarely on the President's independent Constitutional authority. Rogers, discussion supra, footnote 55, at S7197.

[4]In fact President Eisenhower sent troops into Lebanon without seeking specific Congressional approval and without specifically basing his authority on the 1957 Middle East Resolution. Id.

[5]According to Secretary of State Rogers, "the Cuban Resolution, unlike the other area resolutions contained no grant of authority to the President." Id.

STATEMENT OF HON. FRANK HORTON OF NEW YORK

Mr. Chairman, I am grateful for the opportunity to address this subcommittee on the crucial question of war powers legislation. As you know, Mr. Chairman, I sponsored legislation in the last Congress which was very similar to the Javits-Eagleton-Stennis war powers bill passed by the Senate. The major difference between my bill and the Senate bill is that I propose the creation of a new joint committee.[1] As a result, my legislation is again pending before our Rules Committee even though its basic thrust is appropriately under this subcommittee's purview.

I should begin by commending this subcommittee for promptly returning to the question of war powers after the failure last year to gain House and Senate agreement on a single bill. I must also voice my hope that this subcommittee will report out a bill that is significantly stronger than those previously sent to the House floor. The subcommittee has numerous measures before it that would accomplish that goal.

In the war powers area, as in others, there is a compelling need for Congress to redress an imbalance of power. I say imbalance because the President not only wields virtually unilateral power to defend our Nation, but also to involve us in future Vietnams. For that reason, many of my colleagues and I are seeking ways to govern the commitment of Armed Forces "in the absence of a declaration of war by the Congress."

While the framers of the Constitution did not envision an era of undeclared warfare, they had much to say about war powers. Article I, section 8 of the Constitution enumerates the comprehensive war powers of Congress as follows:

> Provide for the common defense.
> To define and punish * * * offenses against the law of nations.
> To declare war.
> To raise and support armies.
> 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 * * * and repel invasions.
> To provide for organizing, arming, and disciplining, the milita, and for governing such part of them as may be employed in the service of the United States.

In contrast to this specific enumeration, the war powers actually granted the President are far less clear. Article II, section 1 states:

> The executive power shall be vested in a president of the United States of America.

Article II, section 2 goes on to state without further elaboration:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States.

[1] Membership of the proposed joint committee appears at end of statement on p. 379.

I have taken the time to compare these constitutional authorities because some critics of strong war powers legislation have argued that my bill and others tread on the President's power as Commander in Chief. Senator Jacob Javits addressed the relationship of the Congress' war powers to the President's function as Commander in Chief in an article he prepared for the New England Law Review. His remarks are worth noting:

> Clearly, the drafters of the Constitution had the experience of the 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."

Mr. Chairman, I do not believe that an examination of the Constitution—and its historical underpinnings—leaves much room for doubt about the intentions of our Founding Fathers. The basic premise of the Constitution, with its deliberate system of separation of powers and checks and balances, is that national decisions are the collective work of the people's representatives in Congress and of the President. By enumerating the war powers of Congress so extensively, the framers of the Constitution were intent on assuring the Congress a concurring role in any commitment of the Nation to war.

The problem, of course, is undeclared wars which circumvent the constitutional process of congressional concurrence. My bill, I believe, would return the role of Congress to its proper and contemporary perspective. Under its provisions, the President may act immediately to meet an emergency situation, without waiting for congressional action. He would be required, however, to withdraw U.S. troops within 30 days if Congress had not authorized continuation of the action within that time. My proposal gives the President the latitude and flexibility he needs as Commander in Chief to respond to any crisis. At the same time, it would bring Congress back into the decisionmaking process, a role also dictated by the Constitution. Should the Congress terminate Presidential authority to continue military hostilities, he is given enough flexibility to withdraw our troops safely.

Mr. Chairman, I am not one who is charging that Presidents have usurped congressional warmaking powers. On the contrary, I blame the Congress for not developing a viable procedure whereby we can share in decisions to engage U.S. troops abroad which fall short of declared warfare. For this reason, my bill, unlike other war powers bills, focuses directly on the actual mechanics of congressional responsibility in warmaking decisions by creating a Joint Committee on National Security. This joint committee would bring together the leadership and authoritative Members of Congress in foreign and military affairs. A listing of the 24 members I propose is contained in

an appendix to this statement. The President, at his option, could consult with the joint committee prior to taking a military action which requires congressional ratification. But he must consult with it within 24 hours after taking such action. The joint committee would serve as a liaison between the White House and the Capitol throughout deliberations on the President's action. In short, we will not only be requiring the President to consult the Congress but we will be designating with whom he must consult. I do not envision the joint committee functioning only in times of emergency. Rather, it should perform an ongoing role of consultation and dialog between congressional leaders and the executive branch officials responsible for military affairs. While the joint committee would have no legislative powers and thus would not interfere with the jurisdiction of established House and Senate committees, it would serve as a congressionally designated liaison between Congress and the President on national security matters.

In closing, Mr. Chairman, I would like to touch upon one further point. As you know, many of us who have sponsored war powers legislation so drafted our bills that they would not apply retroactively to the Vietnam war. My bill and the Javits bill, for example, state that the act shall not apply to hostilities in which the Armed Forces of the United States are involved on the date of enactment. However, with the total withdrawal of American forces from hostilities in North and South Vietnam, I believe the provisions of my bill would be applicable to any possible resurgence of that conflict. In addition, I believe that the War Powers Act should apply to the reintroduction of forces throughout Indochina if, by its enactment, there is an effective cease-fire throughout Indochina. I am concerned that unless Congress clearly defines its intentions along these lines, the result will be another battle of interpretation between the Congress and the Executive. Should this subcommittee act favorably on a strong war powers measure, I urge that these potential problems be dealt with as specifically as possible.

MEMBERSHIP OF THE PROPOSED JOINT COMMITTEE ON NATIONAL SECURITY

Chairman: The Speaker of the House.[1]

Vice-Chairman: The President pro tempore of the Senate[1]

Members: The Manority Leader of the House, The Majority Leader of the Senate, The Minority Leader of the House, and 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, and 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.

[1] Rotating chairmanship.

93-626 O—73——25

STATEMENT OF HON. ROMANO L. MAZZOLI OF KENTUCKY

Chairman Zablocki, I wish to commend you and your fellow subcommittee members for your prompt and timely consideration of this most vital legislative issue.

I feel quite strongly that there is no question more important to our long-term national security than the clarification of the limited powers of the President to make war without the express consent of Congress.

Accordingly, I wish you Godspeed in your deliberations, and submit for your hearing record the following newspaper article, which I wrote last month describing my views on this subject.

[The article follows:]

BI-WEEKLY COLUMN NO. 3—BY ROMANO L. MAZZOLI, U.S. CONGRESSMAN, THIRD DISTRICT, KENTUCKY

At long last, America is disengaging from the longest and, in many respects, most costly war in our nation's history.

As our last troops are withdrawn and our prisoners reunited with their families, it will be tempting to dismiss the sordid memories of the Vietnam War from our minds.

But for us in Congress, the crucial moment is at hand. We must face up to the lessons the Vietnam conflict has taught us.

Perhaps, the most important of these lessons is one that our founding fathers foresaw 200 years ago when they drafted the Constitution.

The Constitution makes it clear that the collective judgment of the elected members of the Congress is the necessary buttress of any decision to commit our country to war.

The Constitution states that it is the Congress which shall have the powers to "declare war," "to provide for the common defense," "to raise and support Armies," "to maintain a Navy," and "to make rules for the government and regulation of the land and naval forces."

In the years since World War II, the Constitutional war powers of the Congress have atrophied, while the Presidential powers have expanded.

In 1950, President Truman committed our armed forces to Korea without Congressional authorization. During the 1960s, our nation drifted into full-scale war in Vietnam, largely as the result of Presidential initiatives.

The President, of course, is designated by the Constitution as Commander in Chief of the nation's armed forces. As such, the President must certainly retain full powers to act swiftly in emergency situations.

No sensible legislator would seek, in any way, to hamper the President in repelling an armed attack upon the United States or in taking appropriate action when such an attack is threatened.

Similarly, the Commander in Chief must be capable of fully protecting United States troops and American citizens located in foreign lands.

But, within this practical and Constitutional framework, the Congress must play a role in making these life and death decisions. So, legislation has been introduced describing the "War Powers" of the Congress.

None of the various "War Powers" bills would, in any way, prevent the President from taking prompt action in the defense of our national interests.

However, these bills would require the President—after committing U.S. forces to battle—to inform Congress of his reasons for taking such action.

If, in the judgment of the Congress, it is not in the best interest of the United States to continue the hostilities, the President would be required to disengage our forces in an orderly and prudent way.

Opinion differs on the time period within which the President must present his case to the Congress. One proposal would set the time limit at 30 days. Another 60 days. Still another sets varying periods depending upon whether the troops deployed are draftees or volunteers.

These are details which must be—and will be—carefully studied and debated before a bill is submitted for a vote.

But, I believe that a consideration of "War Powers" legislation is appropriate and necessary now—while the lessons of Vietnam remain fresh in mind.

We must clearly delineate the division of warmaking powers between the Executive and the Congress. Only in this way will the collective judgment, envisioned by our founding fathers, once again control the awesome decisions of war and peace.

STATEMENT OF HON. ALBERT H. QUIE OF MINNESOTA

Mr. Chairman, all of us are extremely pleased that the Vietnam conflict has been brought to a close and sincerely hope that the cease-fire agreements will hold and that a stable political order will be developed in Southeast Asia.

This war has made it abundantly clear that the warmaking powers of the President must be clarified and that the role of the Congress must be expanded to deal with any future situation which may develop along this line.

The first issue concerning initial commitment is, what authority does the President have, acting as Commander in Chief, to commit the Armed Forces to combat abroad.

Constitutional practice in the 18th and 19th centuries supported a Presidential role in the commitment of troops to hostilities abroad, but only in a minor way. Though there were a large number of exercises of Presidential authority, most were relatively minor actions for the protection of nationals, actions directed at pirates, or reprisals for alleged breach of international law.

As America's position of relative isolation began to change at the end of the 19th century, the Presidents began to assume an increasingly powerful role. Twentieth century instances of Presidential commitment of the Armed Forces to combat abroad 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 merchant men with instructions to fire on sight after Germany's resumption of unrestricted 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 Eisenhower's landing of the marines in Lebanon and his involvement of the U.S. fleet in the straits of Taiwan, President Kennedy's use of American naval and air forces in the Cuban Missile Crisis, and President Johnson's commitment of marines to the Dominican Republic.

Therefore, history has demonstrated that there are situations in which military forces must be deployed in the absence of a declaration of war.

These cases rise in circumstances which require combat actions but which are in contemporary conditions—undesirable to enact a declaration of war.

Moreover, it has long been recognized that there are conditions in which there is not enough time, or room of movement for a congressional declaration of war before military hostilities must be undertaken.

Therefore, the heart of the problem concerns the power of the President to initiate and maintain hostilities by the use of Armed Forces in the absence of a declaration of war.

It is of profound distress to many that the role of the Congress in foreign relations in the last 10 years has greatly declined as Congress has not assumed the leadership role in many crisis situations. The courts, though never ruling directly on the power of the President to involve the Nation in situations abroad likely to result in war, limited or otherwise, seemingly have "served more to enlarge the Presidential prerogative over foreign affairs than to restrain it. For example, in *Martin* v. *Mott* the Supreme Court concluded that the President was empowered to act not only in cases of actual invasion, but also "When there was imminent danger of invasion" and "imminent danger" was held to be a fact to be determined by the President.

The President enjoys certain discretionary authority: but it is the discretionary authority of an executive. He conducts the foreign policy of the country, while the Congress passes resolutions and ratifies treaties relative to that policy. The President, however, does not possess the authority to declare war. This is a power which the Constitution granted to the Congress under our system of checks and balances.

In article I, section 8 of the Constitution the Congress is given authority to:

Raise and support armies, but no appropriation of money to that use shall be for a longer term than 2 years.

Provide for the common defense.

To declare war, grant letters of marque and reprisal, and to make rules concerning captures on land and water.

I believe that this authority implies that Congress also has the authority to prohibit Presidential commitment of regular combat units to sustain hostilities abroad if war has not been declared.

But when congressional authorization is necessary, what form should it take? Though the Constitution speaks of congressional power "to declare war," constitutional scholars are in agreement that congressional authorization does not require a formal declaration of war. The purpose of the provision is to insure congressional consideration and authorization of decisions to commit the United States to major hostilities abroad. It would both elevate form over substance and unduly restrict congressional flexibility to require a formal declaration of war as the only method of congressional authorization.

Though reasons supporting executive authority are still relevant to such decisions, the profound effects for international relations and the grave risk of escalation and unnecessary suffering suggest a strong congressional competence in such decisions.

Abraham Lincoln, while in Congress once 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.

He went on to say that:

> Kings have 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 (constitutional) convention understood to be the most oppressive of all kingly oppressions, and they resolved to so frame the Constitution so 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.

The Congress has done very little to adapt its declaration of war power, or its other constitutionally specified war powers to deal with the situations which have evolved from historical experiences. It has reached the point where any effort simply to check the expansion of Presidential 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 at times to be arguing that the President's powers as Commander in Chief are what the President alone defines them to be.

What is needed is new legislation which will define the rules and procedures to be followed in circumstances where military hostilities may be initiated by the Commander in Chief in the absence of a declaration of war. This bill will not affect the war in Vietnam, but instead will permit the Congress to decide how it should be involved in policy formation before any similar military hostility again arises.

I believe that H.R. 926 will help to meet this need. In essence, the President's control over decisions to use force abroad is a perfectly natural and explicit development, but it is not one which has been required by national self-interest. This is not to say that the President should surrender his power over the day-to-day conduct of foreign relations or relinquish his role as a forceful external leader. It is to say that Congress should have a voice in shaping foreign policies and a decisive voice on whether the United States will initiate the use of force abroad.

I believe H.R. 926 will accomplish this. The constitutional right of the Congress to pass this bill is stated in its specific war powers in article 1, section 8, including the power to declare war. Congress has the authority and the precedents for asserting its powers to declare war which must include the power to end war. Because the Congress has not asserted itself in the past in Armed Forces involvement in military hostilities in the absence of a declaration of war, it has fallen upon the Commander in Chief to exercise his executive discretion on an ad hoc, case-by-case basis.

My bill gives full allowances to the President in his executive capacity as Commander in Chief. But most important, this bill asserts congressional responsibility related to declaring war as stated by the Constitution and as expected and demanded by the Nation. Under my bill Congress would specify the four classic cases in which the President, for a limited amount of time may use the Armed Forces in military hostilities in the absence of a declaration of war.

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 abroad.

Fourth, to comply with a national commitment affirmatively undertaken by Congress and the President.

Under H.R. 926 even the 30-day period may be shortened by joint resolution of Congress. Also, the bill contains provisions enabling action to take place in Congress within 30 days.

The danger of extended debate or filibuster is precluded under the terms of the bill because the bill or joint resolution either terminating or extending the military hostilities, after being cosponsored by one-third of the membership in either House, would be considered reported to the floor no later than 1 day following its introduction.

It would be possible, however, for the members to determine by a yea-or-nay vote that the committee would take longer than 1 day in its consideration of the bill or joint resolution.

Any bill or joint resolution reported would become the pending business and would be voted on within 3 days after such reporting. Similar provisions would cover consideration by the other House of Congress so as to assure expeditious consideration.

The bill or resolution for the extension of hostilities could conceivably contain a limitation on the time period for continued actions.

The bill provides that such military hostilities, in the absence of a declaration of war, may not be sustained beyond 30 days from the day they were initiated, "unless affirmative legislative action is taken by the Congress to sustain such action beyond 30 days."

Under my bill, the Congress would not have to be committed initially to any action which the President might take. After 30 days there would be no authority for the Commander in Chief to persist unless the Congress decided that it wanted him to do so.

The present high state of Presidential prerogative has evolved naturally out of a set of historical and institutional factors which enabled the President to respond to contemporary pressures more easily than Congress. If Congress has the will, however, it too can meet the demands of modern foreign policymaking. While certain changes in institutional structure will be necessary, the critical factor will be the development of a congressional willingness to act quickly and wisely on vital issues and to use its existing power to make its influence felt.

STATEMENT OF HON. TOM RAILSBACK OF ILLINOIS

Mr. Chairman, members of the subcommittee, although the peace treaty for the Vietnam War has been signed, debate still continues in the Congress over the respective war-making powers of the executive and legislative branches of Government. Numerous bills have been introduced which seek to clarify the role of the Congress and the President in the event of military hostilities in the absence of a declared war. I commend the subcommittee for holding these hearings, and I thank you for providing me with this opportunity to submit my views on the authority of the President to intervene abroad or to make war without the express consent of the Congress.

Since the beginning of this century—and most dramatically since World War II—the decision to involve American forces in hostilities abroad has been concentrated increasingly in the executive branch of Government. Under the past six Presidents, it has become more common for the executive branch to commit Armed Forces of the United States to foreign lands without congressional approval. Korea and Vietnam, of course, stand out as the primary examples, but other examples, from the Congo to the Dominican Republic, may also be cited as cases in which the President has initiated action without the approval of Congress. Often the situations have been such that the President deemed that immediate action was necessary. However, such crises severely limit the constitutional requirement that the President come before the Congress and ask for a declaration of war.

The Constitution assigns to the President the role of Commander in Chief. To the Congress, on the other hand, the Constitution gives the power to declare war, to raise and support armies, and navies, and "to make rules for the Government and regulation of the land and naval forces." The constitutional role of the Congress to declare war has given way to the maintenance of a military posture at all times ready for war. This, in no way, diminishes the Congress' obligation under the Constitution to play an important part in determining when this Nation should involve its Armed Forces in hostilities. It is clear to me that we must reassert our responsibilities.

Vietnam has certainly taught us that we cannot involve ourselves in future hostilities without the full support and backing of the American people. I know all of us will agree that one of the greatest sources of alienation in our country—especially among young people—has been the war in Vietnam. No one in this country will ever want to be involved in another war like Vietnam. We have paid a terribly high price—nearly 56,000 killed; and untold billions of American dollars spent. Henceforth, war must be the result of a collective decision by the President and Congress, and not an undefined involvement which grows and grows until the entire fiber of our Nation is torn.

It is for precisely this reason that I have sponsored legislation to define rules for action by the President in the absence of a declaration of war by the Congress. Briefly stated, the legislation authorizes the President to act to repel attacks against the United States, or its Armed Forces lawfully stationed on foreign territory, and to protect the lives and property of U.S. nationals living abroad, as well as to fulfill treaty obligations. However, the rules would provide that military hostilities initiated under such authority could not be sustained beyond 30 days unless specifically authorized by the Congress. As such, this legislation will enable the Congress to reassert its constitutional prerogatives and establish firm guidelines to be followed if future hostilities should occur.

In 1971, Secretary of State Rogers stated that war powers legislation should be considered "after the passions of Vietnam have faded into the past." Though it will be years before that occurs, it seems clear to me that now is the time for the Congress to act on such legislation.

I commend the subcommittee for its consideration of the various war power bills which have already been introduced in the 93d Congress. I am convinced it is imperative that a firm agreement on constitutional roles of the executive and legislative branches of our Government be reached in this Congress. Without it, the cooperation which is essential for our national security will not be realized.

Thank you.

STATEMENT OF HON. ROBERT O. TIERNAN OF RHODE ISLAND

Mr. Chairman, I appreciate this opportunity to testify before your subcommittee on behalf of war powers legislation, an issue which I feel is as important now as it was in February of 1971, when I first introduced the "War Powers Act."

My bill, H.R. 2740, states that in the absence of a declaration of war, the President, as Commander in Chief of the Armed Forces, may act (1) to repel a sudden attack against the United States, its territories, and possessions; (2) to repel an attack against our Armed Forces on the high seas or lawfully stationed on foreign territory; (3) as may be required, to protect the lives and property of U.S. nationals abroad; and (4) to comply with a national commitment resulting exclusively from affirmative action taken by the executive and legislative branches of the U.S. Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment, where immediate military hostilities by our Armed Forces are required.

Here we come to the important part of my bill. The President may not sustain these military hostilities beyond 30 days without explicit approval by the Congress. In addition, the Congress may terminate these hostilities before the 30-day period is over.

Mr. Chairman, the need for this type of legislation is unquestionable. Today we face a constitutional crisis unparalleled in our history. The past 20 years have seen a growing willingness by our Presidents to disregard the Congress in involving American Armed Forces in "undeclared" conflicts. Thus, the President has been the one to decide when our troops will be used, where they will be sent and how large the conflict will be. The Congress has been disregarded completely. We have been delegated to the role of putting up or shutting up. Surely if we are to "preserve, protect, and defend the Constitution of the United States" then we must act and we must act now.

The intent of our Founding Fathers is clear. Article I, section 8 of the Constitution specifically gives to the Congress the power to declare war and make rules for the Government and the regulation of our Armed Forces. The writings of Jefferson, Madison, Monroe, and others, all make it perfectly clear that no warmaking power is given to the President. Lincoln reiterated this when he 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 purpose, and you allow him to make war at pleasure".

So why now do our Presidents commit us to war without congressional approval? Indeed, what has happened to the Constitution? I would like to briefly state what I feel has happened and how we can return to true democratic rule as envisioned by our forefathers.

In the entire history of our Nation, Congress has declared war five times. Four times we authorized direct military operations. More than 125 military operations were carried on with no direct

authorization by Congress. Most of these, obviously, were of a very limited nature. Recently, however, this has not been the case. In the past decade alone, Presidents have intervened five times in foreign nations with American Armed Forces and without prior congressional consent: The Bay of Pigs, the invasion of the Dominican Republic, and the attacks on North Vietnam, Cambodia and Laos. Can any of us say that these constituted genuine emergencies? Did any justify bypassing Congress because they were an immediate threat to the United States?

This use of excessive war powers by the President has risen partly from the cold war and the nuclear age; partly by congressional acquiescence, inertia and indifference; partly by Presidential assumption, and partly by the positive delegation of Congress. Four examples of Congress readily giving up a great deal of its constitutional jurisdiction come to mind: the Formosa Resolution of 1955, the Middle East Resolution of 1955, the Middle East Resolution of 1957, the Cuban Resolution of 1962, and the Gulf of Tonkin Resolution of 1964.

As for the emergence of the nuclear age, it is for this very reason that we must not leave the war making powers with one man, for the results are too devastating. No one man should be allowed to decide whether or not an entire nation will be destroyed, which may in return destroy us. On the other hand, with the threat of nuclear holocaust hanging over our heads, it is likely that in the future we will see a continuation or possibly an acceleration of guerrilla wars. One of our greatest challenges is never again to allow a single man to commit our lives, our resources and our money to future Vietnams in Asia, Africa or Latin America.

Certainly the changed conditions in this world mean that Presidential power must be enlarged to meet altered circumstances. But only to a point. Once beyond that point, the emergence of a totalitarian system is made almost inevitable. In the past few years, we have found ourselves closer to this point than many of us would like to admit. For this reason more than any other, we must enact into the law the War Powers Act this year.

Now let us look for a moment at Congress allowing and the President assuming these excessive powers. Congress must bear a great deal of the burden. Where were our voices when President Truman committed Armed Forces to Korea in 1950 without congressional authorization? Where were our voices in 1969 when President Nixon stated: "And, although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific congressional approval."

We in Congress do not seek to reclaim our right to declare war because we are any wiser than the President. We do so first and foremost because the future of our democratic form of government, as envisioned by our Founding Fathers and established by the Constitution, is at stake. Secondly, it is my belief that Congress would use this authority more sparingly than the President, as one man, would. For war is the most crucial issue anyone can deal with, and it should not and cannot be easy to initiate.

Open debate by the Congress may bring up risks otherwise overlooked or alternative courses never considered. It substitutes the experience of many voices for that of one at a time when no objection is too small. And it may well serve to secure the consent of our citizenry, certainly a vital factor as the Vietnam war has so painfully proved. The President reaches his decision to go to war through private processes, inaccessible to the individual citizen, Congress provides that accessibility. Without the moral sanction of the American people, the consequences of war are no less destructive here in our own country than where the bombs are falling. Only by returning to the dictates of the Constitution can we guarantee that we will never again go to war without the support of our citizens.

Mr. Chairman, those who oppose the War Powers Act do so basically for three reasons: (1) historical precedents of past Presidents acting without congressional approval; (2) only the President has all the facts; and (3) the President has at his command all the experts in the executive branch.

If I may, I would like to briefly refute each of these arguments. First of all, precedents of past Presidents have never been binding. They are meant to serve as guides and that is all. And certainly we can ask here, because one President usurps the warmaking power from Congress, is it automatically constitutional and right for others to do so? With each usurpation, the intent of our Founding Fathers to maintain a balance of power grows weaker and weaker. Let me quote our first President:

> If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

The other two arguments against the War Powers Act stem not from what is customary or what must be, but from almost paranoic public officials. The whole issue of the Pentagon Papers is raised, an issue which is too complex to get into here. But questions can be raised. Must these facts all be kept secret? Is our national security truly at stake? And why should President Nixon be allowed to dictate who can and who cannot testify before Congress? Certainly the President has the right to private counsel. But when that counsel becomes the policy of this Nation, Congress has the need and the right to know.

If the President is allowed to maintain complete control of the warmaking machinery we are in serious danger of him obtaining complete control in other essential areas of our national life. Tocqueville put it this way" "War breeds dictatorship". Certainly if our Founding Fathers made one thing clear, it is that they truly feared an unchecked appetite for power.

The blatant truth is that we have strayed dangerously far from the political system our forefathers envisioned. Madison said:

> There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates.

To this we can add, there can be no liberty if either the legislative or the executive branch acts to the exclusion of the other.

Mr. Chairman, there is no more important legislation at this time in our history than the War Powers Act. For what we are dealing with is the heart of the Constitution and the heart of our democracy, I urge your committee to act expeditiously.

STATEMENT OF HON. AL ULLMAN OF OREGON

Mr. Chairman, I appreciate the opportunity to submit testimony on my bill, H.R. 1454, dealing with war powers. The hearings on this issue are most timely in view of the growing controversy on Federal balance between Congress and the President. I firmly believe that Congress must enact meaningful and effective legislation in this area.

My bill, H.R. 1454, is identical to the bill passed by the Senate in April 1972. The general purpose of the bill is to make rules governing the use of U.S. Armed Forces in hostilities in the absence of a declaration of war by Congress. The fact that the Nation has been bogged down for so many years in the futile quagmire of Vietnam highlights the need for this legislation. This bill attempts to reflect the intent of the framers of the Constitution by insuring that the collective judgment of both the Congress and the President applies to the commitment of Armed Forces in hostilities.

The authority for this legislation derives from article I, section 8 of the U.S. Constitution—"Congress shall have the power to make all laws necessary and proper for carrying into execution the foregoing powers and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof." The bill is not intended to encroach upon the recognized powers of the President as Commander in Chief and Chief Executive to conduct hostilities authorized by Congress, to respond to attacks or imminent threat of attacks, and, under proper circumstances, to rescue endangered U.S. citizens located in foreign countries.

Central to the bill is a requirement that the President seek congressional approval to maintain our Armed Forces in hostile action after 30 days. If Congress does not approve, the President must withdraw our forces. In my judgment, such legislation is needed to fill a very large void that permits dangerous executive latitude.

This legislation does not impair the President's flexibility to meet emergency situations, but will prevent the Nation from being sucked in to a long term, undeclared war like Vietnam. This is a reassertion of the responsibility of Congress. We simply must not allow a President to wage war, declared or undeclared, without asserting the will of the people through the Congress.

Thank you for the opportunity to place this statement before you today.

STATEMENT OF HON. CHARLES H. WILSON OF CALIFORNIA

I would like to begin by thanking this distinguished subcommittee for holding these hearings on this very important legislation to define the authority of the President to intervene or to make war abroad without the consent of Congress.

As the Representative of the people of the 31st District in California, I have been aware, through the mail received by my office and through the many talks I have had with constituents that overwhelmingly our citizens feel that Congress has proved ineffective in dealing in a positive way with the war in Vietnam. Additionally, as a member of the House Armed Services Committee, I have wrestled at great length with the question of how best to assure no more Vietnams. Anytime, anywhere.

After much consideration and study, earlier this year I introduced H.R. 3333, the War Powers Act, to require majority approval by Congress before the United States commits military or civilian assistance to another country. Of course, my legislation would not infringe on those emergency powers of the President which are necessary to secure an adequate defense of this great country.

I quote from my bill:

> The central core of the War Powers Act is contained in sections 3 and 5 of the bill. Section 3 consists of four clauses which define the conditions of circumstances under which, in the absence of a congressional declaration of war, the Armed Forces of the United States "may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances."
>
> The first three categories are codifications of the emergency powers of the President, as intended by the Founding Fathers and as confirmed by subsequent historical practice and judicial precedent. Thus, subsections (1), (2), and (3) of section 3 delineate by statute the implied power of the President in his concurrent role as Commander in Chief.
>
> Subsection (4) of section 3 is perhaps the most significant; while subsections (1), (2), and (3) codify emergency powers which are inherent in the independent constitutional authority of the President as Commander in Chief, subsection (4) deals with the delegation of the Congress of additional authorities which would accrue to the President as a result of statutory action by the Congress, and which he does not, or would not, possess in the absence of such statutory action. Thus, subsection (4) regulates and defines the undertaking of a "national commitment."
>
> Section 5 provides that actions taken under the provisions of section 3 "shall not be sustained beyond 30 days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless—'the continued use of such Armed Forces in hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof.' "
>
> Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the President in this age of instantaneous communications and of intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate and duty with respect to the great questions of war and peace.

As one can see from the above, the conditions in which, in the absence of a congressional declaration of war, our Armed Forces can be introduced into hostilities or into situations where hostilities seem

imminent, are clearly defined. However, an executive action cannot be sustained beyond 30 days from the date of the introduction of our armies unless Congress has authorized such a national, long-term commitment. Thus, while the power of the President as Commander in Chief is protected, the advice and consent of Congress is also upheld.

Indeed, during the last 5 years or so Congress has been faced with the dilemma of dealing with the Vietnam situation only through the difficult and, at any rate, ineffective method of having to resort to the power of the purse to cut off defense funds.

My colleagues, the prolonged tragedy of the Vietnam war has taught us that we cannot afford another tragic waste of our Nation's human and technological resources. For this reason, I advocate the basic institutional reform of the War Powers Act to redress the lop-sided balance of powers which led to the tragedy of Vietnam and to assure that the will of the people, as expressed through their elected representative, be imposed on the grave decisions of whether or not to send American boys to war.

APPENDIX

STATEMENT OF PROF. EUGENE V. ROSTOW, YALE UNIVERSITY LAW SCHOOL, NEW HAVEN, CONN. (MARCH 14, 1973)

DEAR MR. CHAIRMAN: I deeply regret that forces beyond my control have prevented me from keeping my engagement to testify before the subcommittee on March 15. I had looked forward to meeting again with you and your colleagues, which I always enjoy, particularly because my esteemed friend Raoul Berger was scheduled to participate in the discussion.

This letter will constitute a brief statement for the record of my views on the bills before your committee, supplementing that contained in the enclosed article, which was published in the May 1972 issue of the Texas Law Review. I shall confine my letter to issues which have emerged in the debate over war powers legislation since that article was written.

I am still of the view that the wisest course for Congress under the circumstances is to pass no legislation whatever on the subject. In my opinion, the attempt to codify the respective war powers of Congress and of the President is both unwise and impossible. As Hamilton pointed out long ago, the circumstances that may endanger the safety of the Nation, and call for the use of the national force, or the threat to use it, are "infinite," so that "no constitutional shackles can wisely be imposed on the power to which the care of it is committed." You will note that even the most vehement of those who support restrictive legislation in this area avoid the problem of nuclear weapons.

House Joint Resolution 2 is of course the least objectionable of the bills before you. But in my opinion it is unduly restrictive in its operational definition of the President's authority to use force without the prior authorization of Congress. Section 3 would exclude the emergency use of force by the President pursuant to the obligations of the North Atlantic Treaty and other treaties of the United States. It would forbid what President Truman did in the first precarious days of the Korean War, under the authority of the United Nations Charter, and equally prevent the United States in the Security Council from voting for sanctions under chapter VII of the United Nations Charter, or supporting efforts at collective self-defense, as was done in the Korean case. As I read it, it would also exclude the President's effective threat to use force in situations of diplomatic tension, like the Cuban missile crisis, the several Berlin crises, the Middle East crises of 1967 and 1970, or the crisis over Bangladesh. For reasons given in my Texas article, I conclude it would be an unconstitutional interference with the President's inherent power to conduct our foreign relations, and to interpret and apply our treaty obligations in the first instance.

93-626—73——26

I stress that I reach this conclusion as a firm opponent of unlimited Presidential discretion with regard to the use of the armed forces, and a firm believer in the constitutional pattern of shared power between Congress and the President in this regard, as it has evolved in the forge of experience. But that pattern, which requires concurrence and cooperation between Congress and the Presidency, as the exigencies of circumstance permit, cannot be reduced to a simple formula, as the various bills before you demonstrate.

Since my article in the Texas Law Review appeared, there have been several serious and well-considered scholarly studies of the constitutional problem, mainly addressed to "the original intent" of the Founding Fathers. For the reasons offered in part II of that article, I regard the question as important but hardly decisive in the normal processes of our constitutional law.

I shall direct my comments here to the recent articles of Prof. Charles A. Lofgren, Prof. William Van Alstyne, Prof. Francis D. Wormuth, and Mr. Raoul Berger.[1] After reviewing the historical evidence in detail, these writers offer related, but somewhat different hypotheses as restatements of the original intent of the Founding Fathers embodied in the text of the Constitution.

Mr. Berger says that the Constitution "conferred virtually all of the warmaking powers upon Congress, leaving the President only the power 'to repel sudden attacks' on the United States."[2] Professor Lofgren is more cautious. He says: "[t]aken together, then, the grants to Congress of power over the declaration of war and issuance of letters of marque and reprisal likely convinced contemporaries even further that the new Congress would have nearly complete authority over the commencement of war."[3] Lofgren carefully points out that in the cases arising from the undeclared war with France, "none of the Justices explicitly stated that only Congress might wage undeclared war, but that conclusion," he believes, "was clearly implicit in their remarks."[4] He sums up in these terms: "Evidence from the years immediately following ratification of the Constitution thus corroborates the conclusion that Americans originally understood Congress to have at least a coordinate, and probably the dominant, role in initiating all but the most obviously defensive wars, whether declared or not."[5]

Van Alstyne reaches much the same conclusions Berger does, but with important variations on subsidiary issues. To Van Alstyne, the grant to Congress in article I of the power "to declare war" includes by implication the power to authorize every possible use of the national force, save to repel attacks on the United States, its armed forces, or its citizens abroad.

"Specifically, then, the lodgment of the power to declare war exclusively in Congress forbids the sustained use of armed force abroad in the absence of a prior, affirmative, explicit authorization by Congress, subject to the one emergency exception: an interim emergency defense power in the President to employ armed force to resist invasion or to

[1] C. A. Lofgren, War-Making Under the Constitution: The Original Understanding, 81 Yale L. J. 672 (1972); William Van Alstyne, Congress, the President, and the Power to Declare War: A Requiem for Vietnam, 121 U. of Pa. L. Rev. 1 (1972); Raoul Berger, War-Making by the President, 121 U. of Pa. L. Rev. 29 (1972); Raoul Berger, The Presidential Monopoly of Foreign Relations, 71 Mich. L. Rev. 1 (1972); Francis D. Wormuth, The Nixon Theory of the War Power: A Critique, 60 Calif. L. Rev. 623 (1972).
[2] Berger, op. cit. supra, note 1, 121 U. of Pa. L. Rev. 29, 82 (1972).
[3] Lofgren, op. cit. supra, note 1, at p. 700.
[4] Id., at p. 701.
[5] Ibid.

repel a sudden armed attack until Congress can be properly convened to deliberate on the question as to whether it will sustain or expand the effort by specific declaration or, by doing nothing, require the President to disengage our forces from the theater of action."[6]

Berger and Wormuth seem to be willing to accept the rule in the Prize Cases, that Congress can ratify what the President has done in a situation of emergency.[7] Van Alstyne does not. He sums up his conclusions in this way:

> 1. In the absence of a declaration of war by the Congress, the President may not sustain the systematic engagement of military force abroad for any purpose whatever.
> 2. The interim use of military force solely to repel invasion of the United States or to relieve American citizens from an existing attack is an authorized executive war power granted by the Constitution. That power expires *ex proprio vigore* when the Congress has had reasonable opportunity immediately to convene and to authorize the continuation or enlargement of hostilities by express declaration, *i.e.*, even the constitutional authorization of emergency executive war power of immediate self-defense terminates upon opportunity and failure of Congress to sustain it by express declaration.
> 3. In the event that the Congress authorizes the initiation, continuation, or enlargement of military hostilities by express declaration, the constitutional initiative of logistical, tactical, and strategic decision in the conduct of those authorized hostilities belongs to the executive.
> 4. A residual power of review and control is vested in the Congress through its continuing authority over appropriations, levies upon manpower, and its prerogative to modify or to repeal its declaration of war.[8]

On the other hand, Wormuth can accept no advance "delegation" of authority by Congress to the President to determine the occurrence of defined events which, Congress says, require or authorize the use of force.[9] Berger's position is almost the same. But Van Alstyne is willing to allow some small and conservatively construed practical leeway to the necessities or circumstances by way of "delegation" by Congress of authority to the President to use force on certain contingencies.[10]

These nuances aside, all three writers assert congruent positions—that the President can act only as the agent of Congress in the use of force, save for a short time in narrowly defined emergencies directly affecting the territory or the Armed Forces of the United States.

II

According to the laws of logic, one fact inconsistent with a theory disproves that theory. The hypothesis must be discarded, and reformulated in terms which are consistent with all the demonstrable evidence.

There is much that can be said of the related theories of Messrs. Berger, Van Alstyne, and Wormuth as formulations of the original intent of the Founding Fathers—their relationship, for example, to the President's authority over the conduct of foreign relations, which in troubled times has often, and necessarily, involved the use of force or the threat to use it. But one fact looms up as the missing Hamlet of these four articles, a fact which conclusively disproves all their hypotheses at once: The treaty power, and the Founding Fathers'

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[6] Van Alstyne, op. cit. supra, note 1, at p. 9.
[7] Berger, op. cit. supra, note 1, 121 U. of Pa. L. Rev. 29, at pp. 64–67; Wormuth, op. cit. supra, note 1, at pp. 628–629, 699.
[8] Van Alstyne, op. cit. supra, note 1, at p. 13.
[9] Wormuth, op. cit. supra, note 1, pp. 692–703.
[10] Van Alstyne, op. cit. supra, note 1, pp. 15–18.

intimate experience with that power in connection with the Benjamin Franklin's Treaties with France of 1778.[11]

The present debate about the respective war powers of the President and of Congress is a response to the bitter experience of Korea and Vietnam. Those wars were fought under the authority of treaties—the United Nations Charter in the case of Korea, and the Southeast Asia Collective Defense Treaty in the case of Vietnam. Without reference to those treaties, and to the roles of the President and of Congress in making, interpreting, applying, and abrogating treaties, the conflicts in Korea and Vietnam are constitutionally unintelligible, and indeed bizarre. But the treatment of the problem is cursory, at best, in all four of the articles to which this letter is directed.

Van Alstyne recognizes the issue when he writes

> Second, even assuming a limited power in Congress to shift the determination to embark upon war to the President, under specified conditions expressed in clear and definite guidelines, the transfer of such authority cannot be accomplished by *treaty*. The House of Representatives' prerequisite consent to this nation's involvement in war was most deliberately required by the declaration of war clause after consideration of several alternatives, including the specific proposed alternative of vesting the power jointly in the Senate and President alone which was itself rejected. As the House does not consent to treaties, manifestly a treaty cannot be among the possible means of delegating its authority. To imply that the constitutional draftsmen could possibly have formulated a document so specific in its precautions against involvements of war while simultaneously creating an enormous loophole of exclusive Senate power to give it away by simple treaty ratification is wholly without logic or evidence.[12]

Van Alstyne's argument is perfectly logical. But, like so many logical arguments, it is destroyed by a page of history.

While the attempt to reconstruct the state of mind of the Founding Fathers is often shadowy and intangible work, we can be certain of one feature of their original intent: they accepted the possibility that the United States, like every other nation, could if it wished enter into treaties of military alliance. The United States had such an alliance with France, embodied in two treaties, plus a secret annex, a Treaty of Alliance, signed in Paris on February 6, 1778, and ratified on May 4, 1778, and abrogated by Act of Congress on July 7, 1798, and a Treaty of Amity and Commerce, signed on February 6, 1778, and ratified on May 4, 1778. The Founding Fathers regarded the alliance with gratitude and reverence as a pillar of the Nation's existence. Surely these two related treaties are covered by the provision of Article VI of the Constitution, that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." I attach a copy of the French treaties of 1778 to this letter, for ready reference.

For our purposes, two aspects of those treaties are of special importance, the American guarantee of "the present possessions of the Crown of France in America" in Article 11 of the Treaty of Alliance, and the provisions of Articles 21–29 of the Treaty of Amity and Commerce, which France, and many Americans, construed as authorizing France to fit out privateers and to establish consular prize courts in American ports, in the event of war between France and Great Britain, after the end of our War of Independence.

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[11] W. M. Malloy, "Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776–1909," pp. 468–483 (1910).
[12] Van Alstyne, op. cit. supra, note 1, at p. 22.

France declared war on Great Britain in 1793, setting in train a spectacular chain of events which drew the United States into war with both France and Britain at different times, and led to the abrogation by Congress of the Treaty of Alliance, the destruction of the Federalist Party, and the end of the political career of John Adams.

It also led to an intensive examination of the respective constitutional authority of Congress and the Presidency in the conduct of foreign relations and the use of force, especially in relation to the French treaty—the only treaty involving the possible use of force to which the United States was a party between 1798 and 1945, when the Charter of the United Nations was ratified. The more active participants in these decisions, which have proved authoritative ever since, were Washington, Hamilton, Jay, Jefferson, Randolph, and Madison. It would be hard to challenge their credentials as expositors of the original intent.

When war between France and Britain broke out in 1793, President Washington faced a terrible dilemma. The country was passionately pro-French, and anti-English. The state of public opinion was described by John Marshall in these terms:

> Early in April, the declaration of war made by France against Great Britain and Holland reached the United States. This event restored full vivacity to a flame, which a peace of ten years had not been able to extinguish. A great majority of the American people deemed it criminal to remain unconcerned spectators of a conflict between their ancient enemy and republican France. The feeling upon this occasion was almost universal. Men of all parties partook of it. Disregarding totally the circumstances which led to the rupture, except the order which had been given to the French minister to leave London, and disregarding equally the fact that actual hostilities were first commenced by France, the war was confidently and generally pronounced a war of aggression on the part of Great Britain, undertaken with the sole purpose of imposing a monarchical government on the French people. The few who did not embrace these opinions, and they were certainly very few, were held up as objects of public detestation; and were calumniated as the tools of Britain, and the satellites of despotism.
>
> Yet the disposition to engage in the war, was far from being general. The inclination of the public led to a full indulgence of the most extravagant partiality; but not many were willing to encounter the consequences which that indulgence would infallibly produce. The situation of America was precisely that, in which the wisdom and foresight of a prudent and enlightened government, was indispensably necessary to prevent the nation from inconsiderately precipitating itself into calamities, which its reflecting judgment would avoid.[13]

But there was no American Navy, and very little by way of an Army. If French privateers sailed out to raid the seas from American ports, the British would have the right under international law to engage in reprisals, both from Canada and from the sea, and they would surely do so. It was not too much to fear the end of the infant Republic. Determined to preserve neutrality despite the Treaty, Washington confronted conflicting advice. Some argued that only Congress could determine upon a course of neutrality—that the power to determine the status of the Nation under international law in relation to pending hostilities was within the exclusive authority of Congress. Congress alone could issue a formal declaration that the Nation was at war, within the meaning of the law of nations. It followed, these men contended, that only Congress could issue a formal declaration of neutrality. The greater power included the lesser one.

[13] "The Life of George Washington," vol. II, pp. 256–257 (2d ed. 1834).

Hamilton, who agreed with Washington that the only safe course was neutrality, urged the President not to receive Citizen Genet as Ambassador, and not to recognize the revolutionary government in France. These decisions, Hamilton urged, were purely Presidential. If the President refused to recognize the new Government in France, he could treat the French Treaty as suspended until a better day, and avoid the conflict about whether the Treaty was compatible with American neutrality, and whether the President could issue a declaration of neutrality. Jefferson, as Secretary of State, came to support the policy of neutrality (although in deference to his sensibilities the word "neutrality" was avoided), but he was offended by the thought that revolutionary America would refuse to receive the representative of revolutionary France. Washington steered a careful course, balancing his prima donna ministers, and the domestic political forces they represented, and at the same time seeking to reassure both Britain and France, without provoking either to hostility. Thus he decided to receive Genet, in the first instance. Genet came, amid wild excitement, and began to commission privateers and undertook other military and political activities incompatible with American neutrality.

The astute President, with the support of his Cabinet, decided not to call Congress into special session, but issued a proclamation of neutrality on his own authority. Hamilton, who consulted with Jay on the subject, and had his concurrence, believed it to be entirely within the President's authority to determine the operation of national treaties in the first instance, as an important example of the right of the executive to decide upon the obligations of the country with regard to foreign nations.

* * * To apply it to the case of France, if there had been a treaty of alliance, *offensive* and defensive, between the United States and that country, the unqualified acknowledgement of the new government would have put the United States in a condition to become an associate in the war with France, and would have laid the Legislature under an obligation, if required, and there was otherwise no valid excuse, of exercising its power of declaring war.

This serves as an example of the right of the executive, in certain cases, to determine the condition of the nation, though it may, in its consequences, affect the exercise of the power of the Legislature to declare war. Nevertheless, the executive cannot thereby control the exercise of that power. The Legislature is still free to perform its duties, according to its own sense of them; though the executive, in the exercise of its constitutional powers, may establish an antecedent state of things, which ought to weigh in the legislative decisions.

The division of the executive power in the Constitution creates a *concurrent* authority in the cases to which it relates.

Hence, in the instance stated, treaties can only be made by the President and Senate jointly; but their activity may be continued or suspended by the President alone.

No objection has been made to the President's having acknowledged the republic of France, by the reception of its minister, without having consulted the Senate; though that body is connected with him in the making of treaties, and though the consequence of his act of reception is to give operation to those heretofore made with that country. But he is censured for having declared the United States to be in a state of peace and neutrality with regard to the Powers at war, because the right of *changing* that state, and *declaring war*, belongs to the Legislature.

It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.

While, therefore, the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the "executive power" to do whatever else the law of nations, co-operating with the treaties of the country, enjoin in the intercourse of the United States with foreign Powers.

In this distribution of authority, the wisdom of our Constitution is manifested. It is the province and duty of the executive to preserve to the nation the blessings of peace. The legislature alone can interrupt them by placing the nation in a state of war.

But though it has been thought advisable to vindicate the authority of the executive on this broad and comprehensive ground, it was not absolutely necessary to do so. That clause of the Constitution which makes it his duty to "take care that the laws be faithfully executed," might alone have been relied upon, and this simple process of argument pursued:

The President is the Constitutional EXECUTOR of the laws. Our treaties, and the laws of nations, form a part of the law of the land. He who is to execute the laws must first judge for himself of their meaning. In order to the observance of that conduct which the laws of nations, combined with our treaties, prescribed to this country, in reference to the present war in Europe, it was necessary for the President to judge for himself, whether there was any thing in our treaties incompatible with an adherence to neutrality. Having decided that there was not, he had a right, and if in his opinion the interest of the nation required it, it was his duty as executor of the laws, to proclaim the neutrality of the nation, to exhort all persons to observe it, and to warn them of the penalties which would attend its non-observance.

The proclamation has been represented as enacting some new law. This is a view of it entirely erroneous. It only proclaims a *fact*, with regard to the *existing state* of the nation; informs the citizens of what the laws previously established require of them in that state, and notifies them that these laws will be put in execution against the infractors of them.[14]

The concurrent nature of the foreign relations power was soon demonstrated. The Government, seeking to stop the belligerent activities of Genet, brought indictments against several Americans for privateering in behalf of France. Indictments were obtained for violating the law of nations, and committing acts of war in violation of the international law duties of the United States, as proclaimed by the President. But juries would not convict. Congress then passed a Neutrality Act, supporting the President's course, and his interpretation of the Treaty of Alliance.

Of course in 1793, President Washington and then the Congress decided not to join France in war with Great Britain under the treaty, but to declare our neutrality. Suppose the President's initial decision had gone the other way, and had in turn been duly supported, or not opposed, by Congress? Suppose he had put garrisons and naval forces in the French islands of the Caribbean which were among the French possessions in America we had guaranteed to France "from the present time and forever" under article 11 of the Treaty of Alliance. Suppose he had convoyed vessels to those islands, and repelled British attacks on the vessels, or on the islands.

Would it be possible to say under those circumstances that the President could not respond to such "sudden" attacks exactly as if they were "sudden" attacks upon the United States? When through a treaty, or through a joint resolution of the Congress, or both, the United States guarantees the territorial integrity and political independence of an ally, or of another nation, can the President take no steps to implement that guarantee, to head off the danger that it might have to be fulfilled by war itself, without the prior consent in each case of Congress? Is it constitutional for a treaty to declare, as

[14] Alexander Hamilton, Works (H. C. Lodge, ed.) "Pacificus," pp. 442-444, conveniently available, with Madison's answer, in E. S. Corwin, "The President's Control of Foreign Relations" (1917), c. 1.

article 5 of the North Atlantic Treaty does, that an armed attack against one or more of the allies shall be considered an attack against them all? That declaration flies in the face of the supposed constitutional principle Mr. Berger and others find in the original intent of the Founding Fathers. Their version of the Constitution would confine the President's emergency powers to attacks on the territory of the United States. Either the treaty is unconstitutional, or their version of the orginal intent is inadequate and erroneous.

The reasoning of Van Alstyne, Berger and Wormuth would equally disable the United States from participating in the activities of the United Nations, as the policies adopted by the United Nations in Korea, the Congo, Greece, and Rhodesia, among others, demonstrate. That organization does sometimes authorize or indeed require the use of coercive measures, including the use of force, both under article 51 and chapter VII of the charter. Their theory would declare such activities under the charter, and the United Nations Participation Act, unconstitutional.

Berger notes with apparent approval the activities of Presidents Wilson and Roosevelt before the First and Second World Wars, when they convoyed vessels, and, in President Roosevelt's case, established bases in Greenland, Iceland, and Bermuda, without benefit of a treaty obligation to Britain or France, or a joint resolution of the Congress.[15] Would he equally approve preventive and precautionary steps of this order with regard to the obligations of a treaty?

In applying a treaty, there is clearly a spectrum of decisions that can and should be made, from the purely Presidential to the purely congressional. As the experience of 1793 attests, the President has an independent power to interpret and apply the treaty in the first instance as the supreme law of the land which he must enforce, and in the exercise of his share of the national authority to conduct foreign relations. That is what the United States does every day in voting at the United Nations. When those decisions involve coercive measures, or indeed other substantive changes, Congress may tacitly accept the President's construction and application of the treaty, or overrule it, as it did recently in the case of imports from Rhodesia. Exactly the same process occurs in the conduct of our affairs at the North Atlantic Council, the International Monetary Fund, and many other multilateral bodies based on treaties or executive agreements made under the authority of treaties or statutes, or on a purely Presidential basis.

This realistic sense of the wide range of policies and actions which may be involved in carrying out a treaty obligation animates the testimony of Secretary of State Dulles in his exposition of the Southeast Asia Collective Defense Treaty before the Senate Foreign Relations Committee in 1954. Article IV of that treaty provides:

> 1. Each Party 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 in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security 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 by any fact or situation which

[15] Berger, op. cit. supra, note 1, 121 U. of Pa. L. Rev. at p. 66.

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.[16]

The treaty, the Secretary said, was based on the inherent right of individual and collective self-defense recognized in Article 51 of the United Nations Charter—a right whose initial exercise is not subject to the prior decision of the Security Council. So far as the United States is concerned, the treaty includes "the understanding," in the words of President Eisenhower's transmittal statement, "that the only armed attack in the treaty area which the United States would regard as necessarily dangerous to our peace and security would be a Communist armed attack." [17]

So far as action under paragraph 1 of article IV is concerned—that directed against "armed attack"—Dulles said:

> The agreement of each of the parties to act to meet the common danger "in accordance with its constitutional processes" leaves to the judgment of each country the type of action to be taken in the event an armed attack occurs. There is, of course, a wide range of defensive measures which might be appropriate depending upon the circumstances. Any action which the United States might take would, of course, be in accordance with its constitutional processes. [18]

The term "armed attack" in paragraph 1 of article IV is the operative phrase of article 51 of the United Nations Charter. And it is used in a number of other treaties and international documents. It has a considerable gloss, and a long history, embracing the support of revolution in Greece from Yugoslavia, Albania, and Bulgaria in the late forties to the attack on Korea.

Berger does not discuss the problem of what the term "constitutional processes" means in paragraph 1 of article IV: Whether the President can act to initiate and conduct hostilities pursuant to the treaty, as President Truman did in Korea; or take preparatory and precautionary measures "short of war" without obtaining prior congressional approval; or whether every step under the treaty, from diplomatic consultation and secret or public warnings to deter an adversary, to the making of military contingency plans, requires prior congressional assent. Van Alstyne, as was indicated earlier, takes the view that it is constitutionally impossible to consider treaties as a legitimate basis for authorizing war. He therefore reads the treaty not as empowering the President to undertake the use of force, but as setting an international contractual obligation—obliging Congress to make the declaration of war if it intends to fulfill the treaty commitment by the use of force.[19]

As was indicated earlier, I regard this as an impossibly narrow reading of the Constitution. The Constitution authorizes the making of effective treaties addressed to the realities of world politics. It is not, as Justice Goldberg remarked, "a suicide pact."

In his testimony, Secretary Dulles made it clear that he had the full range of possible responses in mind when the President determined that "an armed attack" has occurred, justifying any country

[16] Hearings before the Senate Committee on Foreign Relations, "The Southeast Asia Collective Defense Treaty," 83d Cong., 2d Sess., on Executive K, Part 1, Nov. 11, 1954, p. 6.
[17] Id., at p. 1.
[18] Id., at p. 4.
[19] Van Alstyne, op. cit. supra, note 1, at p. 14.

protected by the treaty in exercising its inherent right of self-defense under the United Nations Charter.

In response to a question from Senator Smith, one of the signers of the treaty, he explained that the obligation under section 1 of article IV was substantially the same as that in the North Atlantic Treaty:

> You will remember, Senator Smith, the constitutional debate which was evoked in relation to that clause in the North Atlantic Treaty, which said that an attack upon one is an attack upon all. It raised the question as to whether that automatically gave the President powers to exercise so that in the event of an attack upon Norway, for example, he would have exactly the same power as he would have if there was an attack upon New York or Washington.
>
> That matter was very fully debated in the Senate at the time. I had the honor of being a Member of your body at that time and participated in that debate.
>
> Therefore, when I had the responsibility of starting to negotiate treaties in the Pacific, I felt that it would be preferable to adopt the language which was taken from the declaration of President Monroe, and which reflects our oldest and, in a sense, most respected foreign policy, the Monroe Doctrine, where we declared that an intrusion would be dangerous to our peace and security.
>
> Now, that was a formula which I recall that Senator Taft, who opposed the North Atlantic Treaty formula, had said would have been acceptable so far as he was concerned.
>
> It seemed to me that the practical difference between the two from the standpoint of its giving security to the other parties was not appreciable, and that it was better to avoid a formula which would reopen the constitutional debate which took place in reference to that provision of the North Atlantic Treaty, so that formula was used in the Philippine Treaty, in the Anzus Treaties, it has been reproduced now in the Korean Treaty, and been reproduced in this treaty.
>
> I think that the difference practically is not great, but that the present formula does avoid at least a theoretical dispute as to the relative powers of the President and the Congress under these different formulas.
>
> RELATIONSHIP TO MONROE DOCTRINE
>
> Senator SMITH. Well, this particular treaty which we have just signed and the other bilaterals that you have initiated might be said to have the Monroe Doctrine approach, which over a period of a good many years now has been very effective. This approach has accomplished the results that were sought originally by the Monroe Doctrine. We are practically giving a Monroe Doctrine warning here against aggression and we are standing by the votes that we took.
>
> Secretary DULLES. The language used here which has now become, I would say, almost conventional with reference to these treaties, makes perfectly clear the determination of our Nation to react to such an armed attack. It does not attempt to get into the difficult question as to precisely how we act and precisely how the responsibilities are shared between the President and Congress.
>
> But as far as our national determination is concerned, it is expressed here; that is the thing that other countries are concerned with, and the question of our internal procedures is not properly a matter of their concern, and, in fact, none of the countries with whom we have dealt are concerned about the difference in the formula.
>
> Therefore I think it is better to use this language, which does avoid constitutional controversy, which has been used in these other treaties, and which stems from one of our oldest foreign policies, that of the Monroe Doctrine.
>
> In a sense, it is perhaps not quite as automatic as the other, but that would depend on circumstances. It is a clear determination of our national resolve, which I think will adequately serve to deter, if it is possible to deter at all.[20]

The obligation of the United States in the event of an armed attack within the treaty area, as he made clear, is of course several, and not dependent upon the prior agreement of other members of SEATO, except for the country concerned. That action could take many forms, including the use of mobile striking power against the source of the attack.[21] Far from repudiating the precedent of President Truman's

[20] Hearings, op. cit. supra, note 16, at pp. 21-22.
[21] Id., at p. 13-14.

handling of the Korean war, Dulles had the following colloquy with Senator Wiley:

The CHAIRMAN. Well, in any case, I take it that paragraph 1 of article IV applies—that part particularly—to meeting the common danger. Would it be in accordance with the constitutional processes?

Secretary DULLES. Yes, sir.

The CHAIRMAN. So whether it were the threat mentioned in section 2 or the common danger resulting from open attack, action could be taken only after consultation with Congress?

Secretary DULLES. Yes, sir.[22]

Thus both the Senator and the Secretary carefully avoided the view that we could act under paragraph 1 of article IV after only a congressional declaration of limited or unlimited war. Consultation is an elastic process, which can and does occur at breakfasts, in the President's office, and elsewhere.

As for threats other than "armed attacks" are concerned, Secretary Dulles testified:

The danger from subversion and indirect aggression is dealt with in paragraph 2 of article IV, which meets this difficult problem more explicitly than any other security treaty we have made. It provides for immediate consultation by the parties whenever any party believes that the integrity of the treaty area is threatened by other than armed attack. The threat may be to the territorial inviolability or integrity, or to the sovereignty or political independence of any party in the treaty area or any other state or territory to which paragraph 1 of the article may from time to time apply. The paragraph contains no obligation beyond consultation, but the purpose of consultation is to agree on measures to be taken for the common defense. In its understanding with reference to article IV, paragraph 1, the United States affirms that in the event of any aggression or armed attack other than Communist aggression it will observe the consultation provisions of article IV, paragraph 2.[23]

He was repeatedly questioned on the distinction between action under section 1 and section 2 of article 4 of the treaty.

Senator SMITH. Now, referring to Indochina where we are all very much concerned. According to a number of reports, one of the areas mentioned in the protocol, the present territory and jurisdiction of Vietnam, is in danger of falling under Communist domination. If that occurs, due to internal or external pressure, will the treaty involve us in measures to resist Communist control of the area? I think you answered that before, but I would like to get a clear answer as to whether a sudden movement toward Communist domination in south Vietnam would bring this treaty into operation.

Secretary DULLES. Are you referring now to armed attack?

Senator SMITH. It would be armed attack; but suppose there were internal pressures—the subversive activity; was that not one of the questions we were trying to include?

Secretary DULLES. Yes. I just was not clear as to whether your question is directed to article IV, paragraph 1, or article IV, paragraph 2.

Senator SMITH. Let us consider them both. Suppose there is an armed attack under article IV, 1. I would think there would be no question in this instance, but if there is subversive activity which is threatening the integrity of south Vietnam—free Vietnam—would we feel that we were called upon under the treaty to give a danger signal and get together with our allies and consider it?

Secretary DULLES. Well, article IV, paragraph 2, contemplates that if that situation arises or threatens, that we should consult together immediately in order to agree on measures which should be taken. That is an obligation for consultation. It is not an obligation for action.

Of course, we are free to and taking measures already, apart from the treaty and before the treaty is enforced to assist in combating subversion in that area.

But we can do much more effectively, I think what needs to be done, if the treaty is in force, and we have procedures for consultation under the treaty as to how to deal with these situations.[24]

[22] Id., at p. 20.
[23] Id., at p. 4.
[24] Id., at pp. 25-26.

Dulles developed the idea further in an exchange with Senator Gillette.

Senator GILLETTE. Mr. Secretary, I have just one question to ask. Referring to article IV again, the first section is clear. It states that each party recognizes an armed attack as threatening all, and agrees to act in meeting the common danger according to its constitutional processes.

But section 2 provides that any similar threat, other than by armed attack will be met by consultation among the parties and agreement as to what action will be taken.

Now, keeping those two things in mind, we come to the concluding paragraph, which states that we only recognize the obligation under section 1 in case of Communist aggression when we will proceed by our constitutional processes.

Now, this is a hypothetical question—very improbable—but one that I should like to have answered. In the event that there is armed attack in this area by other than a Communist country, does that mean that we, as a signatory, cannot take any action in case of such armed attack in accordance with our constitutional processes until we have consulted with all the others and obtained agreement as to what we should do?

Secretary DULLES. No, sir. In that respect we retain entire control of our own policy, according to our own judgment. If there should be an armed attack which is not a Communist attack, affecting one of the parties to this treaty, the question of what we should do would then be determined by us as a matter of national policy. We would not be obligated under this treaty.

Senator GILLETTE. May I supplement my question by saying I do not quite see why that follows. We provide by agreement that in case of an armed attack by a Communist country, we shall proceed, as you have just designated, by our constitutional processes, but we specifically provide in this concluding paragraph that if there is an armed attack by any other than a Communist country that we shall first consult with these associates and obtain their agreement before we take any action.

Secretary DULLES. No. I think you have read into that more than it contains.

Senator GILLETTE. Well, I hope I have.

Secretary DULLES. It does not say that we will only act in agreement or consultation. It does say that in that event we will be willing to consult.

Senator GILLETTE. No; it says that we will consult under the provisions of article IV, paragraph 2.

Secretary DULLES. Yes, sir.

Senator GILLETTE. The language does not state that we will be willing to consult but before we take any action we "will" consult under that provision and obtain agreement as to what action shall be taken.

Secretary DULLES. No, sir; it does not say that we will consult before we act. All it says is we will consult.

Senator GILLETTE. And that may be subsequent to action that we take?

Secretary DULLES. It could be.

Senator GILLETTE. That we take independently?

Secretary DULLES. As you say, it is quite unlikely as a practical matter that we would act first, because, as I indicated, unless the armed attack is of Communist origin, it is difficult to say truthfully that it seriously affects the security of the United States. If communism throws aside all restraints and goes in for armed attack, then I think we can reasonably conclude that it is starting on a course of action which is directly aimed at the United States, that we are the target. We could not say that truthfully in the event that there is an armed attack which occurred between two of the parties to this treaty, which would not be of Communist origin. That would not prove that there was any design against the United States. Therefore, we do not assume the same commitments in that respect.

We do say that we will consult. We do not say that we will consult prior to any action. We merely say we will consult, period.[25]

There is thus no possible way to assert, as many do, that the obligations of the treaty could not be carried out, so far as the Senate was concerned, only by a vote of the entire Congress. Both the Senators and the Secretary preserved the full range of possibilities implicit in past practice, including the precedent of President Truman's pattern of action in Korea.

[25] Id., at pp. 35-36.

As Senator Cooper points out in his memorable statement of Individual Views with respect to the Javits bill, the issue was open, so far as Congress was concerned. There was no basis in constitutional usage for declaring the Korean war unconstitutional. Cooper wished to clarify the point by statute, if he could, by requiring congressional action to justify the use of force in behalf of treaty obligations "beyond the emergency authority of the executive." His position fully accepted the authority of the President to take emergency action in carrying out treaty obligations, as President Truman did in the first few hectic days and weeks of the Korean war, not with regard to the territory of the United States, but with regard to the territory covered by our treaty obligation—in that case South Korea, protected by the Charter of the United Nations. In this, Senator Cooper's position rests on the principles which governed President Washington's handling of the neutrality problem in 1793.

Of course in the Vietnam war, both the Presidency and Congress went far beyond the formal pattern of Korea. Starting in 1957, the executive branch repeatedly invoked article IV of the South East Asia Collective Defense Treaty, and characterized the activities of North Vietnam against South Vietnam as "deliberate aggression," invoking section 1, not section 2 of article IV.[26] So did the Council of the South East Asia Treaty Organization.[27] Congress, of course, fully supported this view of the affair. The Tonkin Gulf Resolution recites that it was passed in accordance with our obligations under the South East Asia Collective Defense Treaty. And the Supplemental Appropriation Act of May 5, 1965, and other statutes and resolutions, were specifically addressed to Vietnam.

As I remarked in my Texas article (p. 880) "the unsettled state of doctrine analyzed by Senator Cooper permitted some to indulge in a meaningless gesture of protest against the war in Vietnam by voting for the repeal of the Tonkin Gulf Resolution, while leaving the SEATO Treaty untouched. By accepting Truman's view of the matter—for the moment, at least—they could enjoy the best of both worlds."

By concentrating on the treaty-power aspects of the problem in this letter, I do not mean to suggest that the President does not have some independent constitutional authority to use force, or to threaten its use, in the absence of treaty or advance congressional authorization through joint resolutions like the Middle Eastern Resolution of 1957

[26] Joint Statement of President Eisenhower and President Ngo Dinh Diem, May 11, 1957 ("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.") State Department Bulletin, May 27, 1957, pp. 851–852; President Johnson, Message to Congress of May 4, 1965, H. Doc. 157, 89th Cong., 1st Sess., "[W]e will do whatever must be done to insure the safety of South Vietnam from aggression . . . South Vietnam has been attacked by North Vietnam. . . . Our commitment to South Vietnam . . . rests on solemn treaties, the demands of principle, and the necessities of American security . . . The Southeast Asia Collective Defense Treaty 'committed us to act to meet aggression against South Vietnam'." State Department Bulletin, May 24, 1965, p. 822, at pp. 823, 824. Secretary Rusk, Viet-Nam Four Steps to Peace, State Department Bulletin, July 12, 1965 ("a cruel and sustained attack by North Viet-Nam upon the people of South Viet-Nam." . . . p. 50 . . . The President "has recognized the obligations of this nation under the Southeast Asia Treaty", p. 53); Undersecretary Ball, May 3, 1965, Statement at meeting of Ministerial Council of the Southeast Asia Treaty Organization, State Department Bulletin, June 7, 1965, p. 920 ("The evidence establishes beyond the shadow of a doubt that South Viet-Nam is the victim of deliberate aggression. . . . We have provided assistance for the same reason that we aided Greece and Turkey in 1947, that we fought in Korea, that we joined in forming NATO, and ANZUS, and SEATO. . . ., p. 921).

[27] Communique of May 6, 1965, State Department Bulletin, June 7, 1965, p. 92, at 924 ("9. The Council reaffirmed its conclusion at Manila a year ago that the defeat of this Communist campaign is essential not only to the security of the Republic of Viet-Nam but to that of Southeast Asia, and would provide convincing proof that Communist expansion by such tactics will not be permitted. Member governments recognized that the state of affairs in Viet-Nam, as described above, constitutes a flagrant challenge to the essential purpose for which they had associated together under the Treaty; to resist aggression.").

and 1961. That aspect of the problem is canvassed in my Texas article.

In closing, may I reiterate the plea, which seems to me central to a wise resolution of this debate, that scholars and Members of Congress alike adhere to the most scrupulous standards of responsibility in their discussion of the evidence, and their examination of the alternatives. This is a matter going to the essence of national safety. In this realm, to adapt Holmes' comment, the price of error is indeed death.

ALLIANCE

Treaty signed at Paris February 6, 1778
Ratified by the Congress of the United States (Continental Congress) May 4, 1778
Ratified by France July 16, 1778
Ratifications exchanged at Paris July 17, 1778
Entered into force July 17, 1778
Declared abrogated by Act of Congress approved July 7, 1798 [1]

8 Stat. 6; Treaty Series 82 [2]

Treaty of Alliance

The most Christian King and the United States of North America, to wit, New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, having this day concluded a Treaty of amity and commerce,[3] for the reciprocal advantage of their Subjects and Citizens have thought it necessary to take into consideration the means of strengthening those engagements and of rendring them useful to the safety and tranquility of the two parties, particularly in case Great Britain in Resentment of that connection and of the good correspondence which is the object of the said Treaty, should break the Peace with France, either by direct hostilities, or by hindring her commerce and navigation, in a manner contrary to the Rights of Nations, and the Peace subsisting between the two Crowns; and his Majesty and the said United States having resolved in that Case to join their Councils and efforts against the enterprises of their common Enemy, the respective Plenipotentiaries, impower'd to concert the Clauses & conditions proper to fulfil the said Intentions, have, after the most mature Deliberation, concluded and determined on the following Articles.

Art. 1

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

[1] 1 Stat. 578. See footnote 1, *ante*, p. 763.
[2] For a detailed study of this treaty, see 2 Miller 35.
[3] TS 83, *ante*, p. 763.

aid each other mutually with their good Offices, their Counsels, and their forces, according to the exigence of Conjunctures as becomes good & faithful Allies.

ART. 2

The essential and direct End of the present defensive alliance is to maintain effectually the liberty, Sovereignty, and independence absolute and unlimited of the said United States, as well in Matters of Gouvernement as of commerce.

ART. 3

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.

ART. 4

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.

ART. 5

If the United States should think fit to attempt the Reduction of the British Power remaining in the Northern Parts of America, or the Islands of Bermudas, those Countries or Islands in case of Success, shall be confederated with or dependant upon the said United States.

ART. 6

The Most Christian King renounces for ever the possession of the Islands of Bermudas as well as of any part of the continent of North America which before the treaty of Paris in 1763.[4] or in virtue of that Treaty, were acknowledged to belong to the Crown of Great Britain, or to the United States heretofore called British Colonies, or which are at this Time or have lately been under the Power of The King and Crown of Great Britain.

ART. 7

If his Most Christian Majesty shall think proper to attack any of the Islands situated in the Gulph of Mexico, or near that Gulph, which are at

[4] Treaty signed for France and Great Britain at Paris Feb. 10, 1763 (*British and Foreign State Papers*, vol. 1, p. 422).

present under the Power of Great Britain, all the said Isles, in case of success, shall appertain to the Crown of France.

ART. 8

Neither of the two Parties shall conclude either Truce or Peace with Great Britain, without the formal consent of the other first obtain'd; 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.

ART. 9

The contracting Parties declare, that being resolved to fulfil 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.

ART. 10

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.

ART. 11

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 & 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.

ART. 12

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 guaran-

tee shall not commence, until the moment of the cessation of the present War between the United States and England shall have ascertained their Possessions.

ART. 13

The present Treaty shall be ratified on both sides and the Ratifications shall be exchanged in the space of six months, or sooner if possible.

In faith where of the respective Plenipotentiaries, to wit on the part of the most Christian King Conrad Alexander Gerard royal syndic of the City of Strasbourgh & Secretary of his majestys Council of State and on the part of the United States, Benjamin Franklin, Deputy to the General Congress from the State of Pennsylvania and President of the Convention of the same state, Silas Deane heretofore Deputy from the State of Connecticut & Arthur Lee Councellor at Law have signed the above Articles both in the French and English Languages declaring Nevertheless that the present Treaty was originally composed and concluded in the French Language, and they have hereunto affixed their Seals

Done at Paris, this sixth Day of February, one thousand seven hundred and seventy eight.

B. FRANKLIN [SEAL]
SILAS DEANE [SEAL]
ARTHUR LEE [SEAL]
C. A. GERARD [SEAL]

RIGHT OF ACCESSION OF KING OF SPAIN TO TREATIES BETWEEN UNITED STATES AND FRANCE

Act separate and secret signed at Paris February 6, 1778
Ratified by the Congress of the United States (Continental Congress) May 4, 1778
Ratified by France July 16, 1778
Ratifications exchanged at Paris July 17, 1778
Entered into force July 17, 1778
Declared abrogated by Act of Congress approved July 7, 1798 [1]

17 Stat. 795; Treaty Series 83 [2]

Act Separate and Secret

The most Christian King declares in consequence of the intimate union which subsists between him and the King of Spain, that in concluding with the United States of America this Treaty of amity and commerce,[3] and that of eventual and defensive alliance,[4] his Majesty hath intended and intends to reserve expressly, as he reserves by this present separate and secret act, to his said Catholic Majesty, the Power of acceding to the said Treatys, and to participate in their stipulations at such time as he shall judge proper. It being well understood nevertheless, that if any of the Stipulations of the said Treatys are not agreeable to the King of Spain, his Catholic Majesty may propose other conditions analogous to the principal aim of the alliance and conformable to the Rules of equality, reciprocity & friendship.

The Deputies of the United States in the name of their constituents, accept the present Declaration in its full extent and the Deputy of the said states who is fully impowered to treat with Spain, promises to sign on the first Requisition of his Catholic Majesty, the act or acts necessary to communicate to him the Stipulations of the Treaties above written; and the said Deputy shall endeavour in good faith the adjustment of the points in which the King of Spain may propose any alteration, conformable to the principles of equality,

[1] 1 Stat. 578. See footnote 1, *ante*, p. 763.
[2] For a detailed study of this act, see 2 Miller 45.
[3] TS 83, *ante*, p. 763.
[4] TS 82, *ante*, p. 777.

reciprocity and the most sincere and perfect amity; he the said Deputy not doubting but that the Person or Persons impower'd by his Catholic Majesty to treat with the United States will do the same with regard to any Alterations of the same kind that may be thought necessary by the said Plenipotentiary of the United States.

In Faith whereof the respective Plenipotentiaries have signed the present separate and secret Article, and affixed to the same their Seals.

Done at Paris, this sixth Day of February, one thousand seven hundred and seventy-eight.

B. FRANKLIN [SEAL]
SILAS DEANE [SEAL]
ARTHUR LEE [SEAL]
Deputy Plenipotentiary for France and Spain
C. A. GERARD [SEAL]

France

AMITY AND COMMERCE

Treaty, with annex, signed at Paris February 6, 1778; declarations signed at Versailles September 1, 1778, suppressing articles 11 and 12
Ratified by the Congress of the United States (Continental Congress) May 4, 1778
Ratified by France July 16, 1778
Ratifications exchanged at Paris July 17, 1778
Entered into force July 17, 1778
Declared abrogated by Act of Congress approved July 7, 1798 [1]

8 Stat. 12; Treaty Series 83 [2]

Treaty of Amity and Commerce

The most Christian King, and the thirteen United States of North America, to wit, New-Hampshire, Massachusetts Bay, Rhodeisland, Connecticut, New York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South Carolina, & Georgia, willing to fix in an equitable and permanent manner the Rules which ought to be followed relative to the Correspondence & Commerce which the two Parties desire to establish between their respective Countries, States, and Subjects, his most Christian Majesty and the said United States have judged that the said End could not be better obtained than by taking for the Basis of their Agreement the most perfect Equality and Reciprocity, and by carefully avoiding all those

[1] 1 Stat. 578. The act declared that, since the treaties concluded between the United States and France had been repeatedly violated on the part of the French Government, and since attempts to negotiate an amicable adjustment had been repelled with indignity, the United States was freed and exonerated from them and that "the same shall not henceforth be regarded as legally obligatory on the Government or citizens of the United States." For details concerning the termination of those treaties, see John Bassett Moore, *A Digest of International Law*, vol. V, pp. 356–358, and Samuel B. Crandall, *Treaties, Their Making and Enforcement*, 2d ed., pp. 462–463. See also art. II deleted from convention of Sept. 30, 1800 (TS 85), *post*, p. 802.

[2] For a detailed study of this treaty, see 2 Miller 3.

burthensome Preferences, which are usually Sources of Debate, Embarrassment and Discontent; by leaving also each Party at Liberty to make, respecting Commerce and Navigation, those interior Regulations which it shall find most convenient to itself; and by founding the Advantage of Commerce solely upon reciprocal Utility, and the just Rules of free Intercourse; reserving withal to each Party the Liberty of admitting at its pleasure other Nations to a Participation of the same Advantages. It is in the Spirit of this Intention, and to fulfil these Views, that his said Majesty having named and appointed for his Plenipotentiary Conrad Alexander Gerard, Royal *Sindic* of the City of Strasbourg, Secretary of his Majesty's Council of State, and the United States on their Part, having fully impower'd Benjamin Franklin Deputy from the State of Pennsylvania to the general Congress, and President of the Convention of said State, Silas Deane late Deputy from the State of Connecticut to the said Congress, and Arthur Lee Councellor at Law; The said respective Plenipotentiaries after exchanging their Powers, and after mature Deliberation, have concluded and agreed upon the following Articles.

ARTICLE 1st

There shall be a firm, inviolable and universal Peace, and a true and sincere Friendship between the most Christian King, his Heirs and Successors, and the United States of America; and the Subjects of the most Christian King and of the said States; and between the Countries, Islands, Cities, and Towns, situate under the Jurisdiction of the most Christian King, and of the said United States, and the People and Inhabitants of every Degree, without exception of Persons or Places; & the Terms herein after mentioned shall be perpetual between the most Christian King his Heirs and Successors and the said United States.

ARTICLE 2nd

The most Christian King, and the United States engage mutually not to grant any particular Favour to other Nations in respect of Commerce and Navigation, which shall not immediately become common to the other Party, who shall enjoy the same Favour, freely, if the Concession was freely made, or on allowing the same Compensation, if the Concession was Conditional.

ARTICLE 3d

The Subjects of the most Christian King shall pay in the Ports, Havens, Roads, Countries, Islands, Cities or Towns, of the United States or any of them, no other or greater Duties or Imposts of what Nature soever they may be, or by what Names soever called, than those which the Nations most favoured are or shall be obliged to pay; and they shall enjoy all the Rights, Liberties, Privileges, Immunities and Exemptions in Trade, Navigation and Commerce, whether in passing from one Port in the said States to another, or in going to and from the same, from and to any Part of the World, which the said Nations do or shall enjoy.

ARTICLE 4

The Subjects, People and Inhabitants of the said United States, and each of them, shall not pay in the Ports, Havens, Roads, Isles, Cities & Places under the Domination of his most Christian Majesty in Europe, any other or greater Duties or Imposts, of what Nature soever, they may be, or by what Name soever called, than those which the most favour'd Nations are or shall be obliged to pay; & they shall enjoy all the Rights, Liberties, Privileges, Immunities & Exemptions, in Trade, Navigation and Commerce, whether in passing from one Port in the said Dominions in Europe to another, or in going to and from the same, from and to any Part of the World, which the said Nations do or shall enjoy.

ARTICLE 5

In the above Exemption is particularly comprised the Imposition of 100 Sols p^{r} Ton, established in France on foreign Ships; unless when the Ships of the United States shall load with the Merchandize of France for another Port of the same Dominion, in which Case the said Ships shall pay the Duty abovementioned so long as other Nations the most favour'd shall be obliged to pay it. But it is understood that the said United States or any of them are at Liberty when they shall judge it proper, to establish a Duty equivalent in the same Case.

ARTICLE 6

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 Attornies all such Vessels & Effects, which shall be taken within his Jurisdiction; and the Ships of War of his most Christian Majesty or any Convoys 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 & 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 7

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 preceeding Article, all the Vessels and Effects belonging to the Subjects of the most Christian King; and use all their Endeavours to recover & 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.

ARTICLE 8

The most Christian King will employ his good Offices and Interposition with the King or Emperor of Morocco or Fez, the Regencies of Algier, Tunis and Tripoli, or with any of them, and also with every other Prince, State or Power of the Coast of Barbary in Africa, and the Subjects of the said King Emperor, States and Powers, and each of them; in order to provide as fully and efficaciously as possible for the Benefit, Conveniency and Safety of the said United States, and each of them, their Subjects, People, and Inhabitants, and their Vessels and Effects, against all Violence, Insult, Attacks, or Depredations on the Part of the said Princes and States of Barbary, or their Subjects.

ARTICLE 9

The Subjects, Inhabitants, Merchants, Commanders of Ships, Masters and Mariners of the States, Provinces, and Dominions of each Party respectively shall abstain and forbear to fish in all Places possessed or which shall be possessed by the other Party: The most Christian Kings Subjects shall not fish in the Havens, Bays, Creeks, Roads, Coasts or Places, which the said United States hold or shall hereafter hold; and in like manner the Subjects, People and Inhabitants of the said United States shall not fish in the Havens, Bays, Creeks, Roads, Coasts or Places, which the most Christian King possesses or shall hereafter possess; and if any Ship or Vessel shall be found fishing contrary to the Tenor of this Treaty, the said Ship or Vessel with its lading, proof being made thereof, shall be confiscated. It is however understood, that the Exclusion stipulated in the present Article shall take place only so long, and so far as the most Christian King or the United States shall not in this respect have granted an Exemption to some other Nation.

ARTCLE 10

The United States, their Citizens and Inhabitants, shall never disturb the Subjects, of the most Christian King in the Enjoyment and Exercise of the Right of Fishing on the Banks of Newfoundland; nor in the indefinite and exclusive Right which belongs to them on that Part of the Coast of that Island which is designed by the Treaty of Utrecht; [3] nor in the Rights relative to all and each of the Isles which belong to his most Christian Majesty; the whole conformable to the true Sense of the Treaties of Utrecht and Paris.[4]

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[3] Treaty signed for France and Great Britain at Utrecht Apr. 11, 1713 (for extract of art. XIII, see *British and Foreign State Papers*, vol. 1, p. 420). Art. XIII renewed by peace treaty of May 30, 1814 (*ibid.*, p. 162).

[4] Treaty signed for France and Great Britain at Paris Feb. 10, 1763 (for extract of art. V, see *ibid.*, p. 422). Art. V renewed by peace treaty of May 30, 1814 (*ibid.*, p. 162).

ARTICLE 11 [5]

It is agreed and concluded that there shall never be any Duty imposed on the Exportation of the Mellasses that may be taken by the Subjects of any of the United States from the Islands of America which belong or may hereafter appertain to his most Christian Majesty.

ARTICLE 12 [5]

In compensation of the Exemption stipulated by the preceeding Article, it is agreed and concluded that there shall never be any Duties imposed on the Exportation of any kind of Merchandize which the Subjects of his most Christian Majesty may take from the Countries and Possessions present or future of any of the thirteen United States, for the Use of the Islands which shall furnish Melasses.

ARTICLE 13

The Subjects and Inhabitants of the said United States, or any one of of them, shall not be reputed Aubains in France, & consequently shall be exempted from the *Droit d'Aubaine* or other similar Duty under what name soever. They may by Testament, Donation, or otherwise dispose of their Goods moveable and immoveable in favour of such Persons as to them shall seem good; and their Heirs, Subjects of the Said United States, residing whether in France or elsewhere, may succeed them *ab intestat*, without being obliged to obtain Letters of Naturalization, and without having the Effect of this Concession contested or impeded under Pretext of any Rights or Prerogatives of Provinces, Cities, or Private Persons. And the said Heirs, whether such by particular Title, or *ab intestat*, shall be exempt from all Duty called *Droit de Detraction*, or other Duty of the same kind; saving nevertheless, the local Rights or Duties as much and as long as similar ones are not established by the United States or any of them. The Subjects of the most Christian King shall enjoy on their Part, in all the Dominions of the s.[d] States, an entire and perfect Reciprocity relative to the Stipulations contained in the present Article.

But it is at the same Time agreed that its Contents shall not affect the Laws made or that may be made hereafter in France against Emigrations, which shall remain in all their Force and Vigour; and the United States on their Part, or any of them, shall be at Liberty to enact such Laws relative to that Matter, as to them shall seem proper.

ARTICLE 14

The merchant Ships of either of the Parties, which shall be making into a Port belonging to the Enemy of the other Ally and concerning whose Voyage & the Species of Goods on board her there shall be just Grounds of

[5] For declarations suppressing arts. 11 and 12, see p. 775.

Suspicion shall be obliged to exhibit as well upon the high Seas as in the Ports and Havens not only her Passports, but likewise Certificates expressly shewing that her Goods are not of the Number of those, which have been prohibited as contraband.

ARTICLE 15

If by the exhibiting of the above said Certificates, the other Party discover there are any of those Sorts of Goods, which are prohibited and declared contraband and consigned for a Port under the Obedience of his Enemies, it shall not be lawful to break up the Hatches of such Ship, or to open any Chest, Coffers, Packs, Casks, or any other Vessels found therein, or to remove the smallest Parcels of her Goods, whether such Ship belongs to the Subjects of France or the Inhabitants of the said United States, unless the lading be brought on Shore in the presence of the Officers of the Court of Admiralty and an Inventory thereof made; but there shall be no allowance to sell, exchange, or alienate the same in any manner, untill after that due and lawful Process shall have been had against such prohibited Goods, and the Court of Admiralty shall, by a Sentence pronounced, have confiscated the same: saving always as well the Ship itself as any other Goods found therein, which by this Treaty are to be esteemed free: neither may they be detained on pretence of their being as it were infected by the prohibited Goods, much less shall they be confiscated as lawful Prize: But if not the whole Cargo, but only part thereof shall consist of prohibited or contraband Goods and the Commander of the Ship shall be ready and willing to deliver them to the Captor, who has discovered them, in such Case the Captor having received those Goods shall forthwith discharge the Ship and not hinder her by any means freely to prosecute the Voyage, on which she was bound. But in Case the Contraband Merchandises, cannot be all receiv'd on board the Vessel of the Captor, then the Captor may, notwithstanding the Offer of delivering him the Contraband Goods, carry the Vessel into the nearest Port agreeable to what is above directed.

ARTICLE 16

On the contrary it is agreed, that whatever shall be found to be laden by the Subjects and Inhabitants of either Party on any Ship belonging to the Enemys of the other or to their Subjects, the whole although it be not of the Sort of prohibited Goods may be confiscated in the same manner, as if it belonged to the Enemy, except such Goods and Merchandizes as were put on board such Ship before the Declaration of War, or even after such Declaration, if so be it were done without knowledge of such Declaration. So that the Goods of the Subjects and People of either Party, whether they be of the Nature of such as are prohibited or otherwise, which, as is aforesaid were put on board any Ship belonging to an Enemy before the War,

or after the Declaration of the same, without the Knowledge of it, shall no ways be liable to confiscation, but shall well and truely be restored without Delay to the proprietors demanding the same; but so as that, if the said Merchandizes be contraband, it shall not be any Ways lawful to carry them afterwards to any Ports belonging to the Enemy. The two contracting Parties agree, that the Term of two Months being passed after the Declaration of War, their respective Subjects, from whatever Part of the World they come, shall not plead the Ignorance mentioned in this Article.

ARTICLE 17

And that more effectual Care may be taken for the Security of the Subjects and Inhabitants of both Parties, that they suffer no injury by the men of War or Privateers of the other Party, all the Commanders of the Ships of his most Christian Majesty & of the said United States and all their Subjects and Inhabitants shall be forbid doing any Injury or Damage to the other Side; and if they act to the contrary, they shall be punished and shall moreover be bound to make Satisfaction for all Matter of Damage, and the Interest thereof, by reparation, under the Pain and obligation of their Person and Goods.

ARTICLE 18

All Ships and Merchandizes of what Nature soever which shall be rescued out of the Hands of any Pirates or Robbers on the high Seas, shall be brought into some Port of either State and shall be delivered to the Custody of the Officers of that Port, in order to be restored entire to the true Proprietor as soon as due and sufficient Proof shall be made concerning the Property thereof.

ARTICLE 19

It shall be lawful for the Ships of War of either Party & Privateers freely to carry whithersoever they please the Ships and Goods taken from their Enemies, without being obliged to pay any Duty to the Officers of the Admiralty or any other Judges; nor shall such Prizes be arrested or seized, when they come to and enter the Ports of either Party; nor shall the Searchers or other Officers of those Places search the same or make examination concerning the Lawfulness of such Prizes, but they may hoist Sail at any time and depart and carry their Prizes to the Places express'd in their Commissions, which the Commanders of such Ships of War shall be obliged to shew: On the contrary no Shelter or Refuge shall be given in their Ports to such as shall have made Prize of the Subjects, People or Property of either of the Parties; but if such shall come in, being forced by Stress of Weather or the Danger of the Sea, all proper means shall be vigorously used that they go out and retire from thence as soon as possible.

ARTICLE 20

If any Ship belonging to either of the Parties their People or Subjects, shall, within the Coasts or Dominions of the other, stick upon the Sands or be wrecked or suffer any other Damage, all friendly Assistance and Relief shall be given to the Persons shipwrecked or such as shall be in danger thereof; and Letters of safe Conduct shall likewise be given to them for their free and quiet Passage from thence, and the return of every one to his own Country.

ARTICLE 21

In Case the Subjects and Inhabitants of either Party with their shipping whether publick and of War or private and of Merchants, be forced, through Stress of Weather, pursuit of Pirates or Enemies, or any other urgent necessity for seeking of Shelter and Harbour, to retreat and enter into any of the Rivers, Bays, Roads or Ports belonging to the other Party, they shall be received and treated with all humanity and Kindness and enjoy all friendly Protection & Help; and they shall be permitted to refresh and provide themselves at reasonable Rates with victuals and all things needful for the sustenance of their Persons or reparation of their Ships and conveniency of their Voyage; and they shall no Ways be detained or hindred from returning out of the said Ports or Roads but may remove and depart when and whither they please without any let or hindrance.

ARTICLE 22

For the better promoting of Commerce on both Sides, it is agreed that if a War shall break out between the said two Nations, six Months after the Proclamation of War shall be allowed to the Merchants in the Cities and Towns, where they live, for selling and transporting their Goods and Merchandizes; and if any thing be taken from them, or any Injury be done them within that Term by either Party or the People or Subjects of either, full Satisfaction shall be made for the same.

ARTICLE 23

No Subjects of the most Christian King shall apply for or take any Commission or Letters of marque for arming any Ship or Ships to act as Privateers against the said United States or any of them or against the Subjects People or Inhabitants of the said United States or any of them or against the Property of any of the Inhabitants of any of them from any Prince or State with which the said United States shall be at War. Nor shall any Citizen Subject or Inhabitant of the said United States or any of them apply for or take any Commission or letters of marque for arming any Ship or Ships to act as Privateers against the Subjects of the most Christian King or any of them or the Property of any of them from any Prince or State with which

the said King shall be at War: And if any Person of either Nation shall take such Commissions or Letters of Marque he shall be punished as a Pirate.

ARTICLE 24

It shall not be lawful for any foreign Privateers, not belonging to Subjects of the most Christian King nor Citizens of the said United States, who have Commissions from any other Prince or State in enmity with either Nation to fit their Ships in the Ports of either the one or the other of the aforesaid Parties, to sell what they have taken or in any other manner whatsoever to exchange their Ships, Merchandizes or any other lading; neither shall they be allowed even to purchase victuals except such as shall be necessary for their going to the next Port of that Prince or State from which they have Commissions.

ARTICLE 25

It shall be lawful for all and singular the Subjects of the most Christian King and the Citizens People and Inhabitants of the said United States to sail with their Ships with all manner of Liberty and Security, no distinction being made, who are the Proprietors of the Merchandizes laden thereon, from any Port to the places of those who now are or hereafter shall be at Enmity with the most Christian King or the United States. It shall likewise be Lawful for the Subjects and Inhabitants aforesaid to sail with the Ships and Merchandizes aforementioned and to trade with the same Liberty and security from the Places, Ports and Havens of those who are Enemies of both or either Party without any Opposition or disturbance whatsoever, not only directly from the Places of the Enemy aforementioned to neutral Places; but also from one Place belonging to an Enemy to another place belonging to an Enemy, whether they be under the Jurisdiction of the same Prince or under several; And it is hereby stipulated that free Ships shall also give a freedom to Goods, and that everything shall be deemed to be free and exempt, which shall be found on board the Ships belonging to the Subjects of either of the Confederates, although the whole lading or any Part thereof should appertain to the Enemies of either, contraband Goods being always excepted. It is also agreed in like manner that the same Liberty be extended to Persons, who are on board a free Ship, with this Effect, that although they be Enemies to both or either Party, they are not to be taken out of that free Ship, unless they are Soldiers and in actual Service of the Enemies.

ARTICLE 26

This Liberty of Navigation and Commerce shall extend to all kinds of Merchandizes, excepting those only which are distinguished by the name of contraband; And under this Name of Contraband or prohibited Goods shall be comprehended, Arms, great Guns, Bombs with the fuzes, and other things belonging to them, Cannon Ball, Gun powder, Match, Pikes, Swords,

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Lances, Spears, halberds, Mortars, Petards, Granades, Salt Petre, Muskets, Musket Ball, Bucklers, Helmets, breast Plates, Coats of Mail and the like kinds of Arms proper for arming Soldiers, Musket rests, belts, Horses with their Furniture, and all other Warlike Instruments whatever. These Merchandizes which follow shall not be reckoned among Contraband or prohibited Goods, that is to say, all sorts of Cloths, and all other Manufactures woven of any wool, Flax, Silk, Cotton, or any other Materials whatever; all kinds of wearing Apparel together with the Species, whereof they are used to be made; gold & Silver as well coined as uncoin'd, Tin, Iron, Latten, Copper, Brass Coals, as also Wheat and Barley and any other kind of Corn and pulse; Tobacco and likewise all manner of Spices; salted and smoked Flesh, salted Fish, Cheese and Butter, Beer, Oils, Wines, Sugars and all sorts of Salts; & in general all Provisions, which serve for the nourishment of Mankind and the sustenance of Life; furthermore all kinds of Cotton, hemp, Flax, Tar, Pitch, Ropes, Cables, Sails, Sail Cloths, Anchors and any Parts of Anchors; also Ships Masts, Planks, Boards and Beams of what Trees soever; and all other Things proper either for building or repairing Ships, and all other Goods whatever, which have not been worked into the form of any Instrument or thing prepared for War by Land or by Sea, shall not be reputed Contraband, much less such as have been already wrought and made up for any other Use; all which shall be wholly reckoned among free Goods: as likewise all other Merchandizes and things, which are not comprehended and particularly mentioned in the foregoing enumeration of contraband Goods: so that they may be transported and carried in the freest manner by the Subjects of both Confederates even to Places belonging to an Enemy such Towns or Places being only excepted as are at that time beseiged, blocked up or invested.

Article 27

To the End that all manner of Dissentions and Quarrels may be avoided and prevented on one Side and the other, it is agreed, that in case either of the Parties hereto should be engaged in War, the Ships and Vessels belonging to the Subjects or People of the other Ally must be furnished with Sea Letters or Passports expressing the name, Property and Bulk of the Ship as also the name and Place of habitation of the Master or Commander of the said Ship, that it may appear thereby, that the Ship really & truely belongs to the Subjects of one of the Parties, which Passports shall be made out and granted according to the Form annexed to this Treaty; [e] they shall likewise be recalled every Year, that is if the Ship happens to return home within the Space of a Year. It is likewise agreed, that such Ships being laden are to be provided not only with Passports as above mentioned, but also with Certificates containing the several Particulars of the Cargo, the Place whence the Ship sailed and whither she is bound, that so it may be known, whether any forbidden or

[e] See p. 774.

contraband Goods be on board the same: which Certificates shall be made out by the Officers of the Place, whence the Ship set sail, in the accustomed Form. And if any one shall think it fit or adviseable to express in the said Certificates the Person to whom the Goods on board belong, he may freely do so.

ARTICLE 28

The Ships of the Subjects and Inhabitants of either of the Parties, coming upon any Coasts belonging to either of the said Allies, but not willing to enter into Port, or being entered into Port and not willing to unload their Cargoes or break Bulk, they shall be treated according to the general Rules prescribed or to be prescribed relative to the Object in Question.

ARTICLE 29

If the Ships of the said Subjects, People or Inhabitants of either of the Parties shall be met with either sailing along the Coasts or on the high Seas by any Ship of War of the other or by any Privateers, the said Ships of War or Privateers, for the avoiding of any Disorder shall remain out of Cannon Shot, and may send their Boats aboard the Merchant Ship, which they shall so meet with, and may enter her to number of two or three Men only to whom the Master or Commander of such Ship or Vessel shall exhibit his passport concerning the Property of the Ship made out according to the Form inserted in this present Treaty, and the Ship, when she shall have shewed such Passport shall be free and at Liberty to pursue her Voyage, so as it shall not be lawful to molest or search her in any manner or to give her chase, or force her to quit her intended Course.

ARTICLE 30

It is also agreed that all Goods, when once put on board the Ships or Vessels of either of the two contracting Parties shall be subject to no farther Visitation; but all Visitation or Search shall be made before hand, and all prohibited Goods shall be stopped on the Spot, before the same be put on board, unless there are manifest Tokens or Proofs of fraudulent Practice; nor shall either the Persons or goods of the Subjects of his most Christian Majesty or the United States be put under any arrest or molested by any other kind of Embargo for that Cause; and only the Subject of that State, to whom the said Goods have been or shall be prohibited and who shall presume to sell or alienate such sort of Goods shall be duly punished for the Offence.

ARTICLE 31

The two contracting Parties grant mutually the Liberty of having each in the Ports of the other, Consuls, Vice Consuls, Agents and Commissaries, whose Functions shall be regulated by a particular Agreement.

ARTICLE 32

And the more to favour and facilitate the Commerce which the Subjects of the United States may have with France, the most Christian King will grant them in Europe one or more free Ports, where they may bring and dispose of all the Produce and Merchandize of the thirteen United States; and his Majesty will also continue to the Subjects of the said States, the free Ports which have been and are open in the french Islands of America. Of all which free Ports, the said Subjects of the United States shall enjoy the Use, agreeable to the Regulations which relate to them.

ARTICLE 33

The present Treaty shall be ratified on both Sides and the Ratifications shall be exchanged in the Space of Six Months, or sooner if possible.

In Faith whereof the respective Plenipotentiaries have signed the above Articles, both in the French and English Languages, declaring nevertheless that the present Treaty was originally composed and concluded in the French Language, and they have thereto affixed their Seals.

Done at Paris, this Sixth Day of February, one thousand seven hundred & seventy eight.

B. FRANKLIN [SEAL]
SILAS DEANE [SEAL]
ARTHUR LEE [SEAL]
C. A. GERARD [SEAL]

FORM OF THE PASSPORTS AND LETTERS, WHICH ARE TO BE GIVEN TO THE SHIPS AND BARKS, ACCORDING TO THE TWENTY SEVENTH ARTICLE OF THIS TREATY

To all who shall see these Presents greeting: It is hereby made known that leave and Permission have been given to ..... Master and Commander of the Ship called ..... of the town of ..... burthen ..... Tons or thereabouts lying at present in the Port and Haven of ..... and bound for ..... & laden with ..... after that his Ship has been visited and before sailing he shall make Oath before the Officers, who have the Jurisdiction of Maritime Affairs, that the said Ship belongs to one or more of the Subjects of ..... the Act whereof shall be put at the End of these presents, as likewise that he will keep and cause to be kept by his Crew on board, the Marine Ordinances and regulations and enter in the proper Office a List signed and witnessed containing the Names and Sirnames, the Places of Birth and abode of the Crew of his Ship and of all who shall embark on

board her, whom he shall not take on board without the Knowledge and permission of the Officers of the Marine; and in every Port or Haven where he shall enter with his Ship he shall shew this present Leave to the Officers & Judges of the Marine, and shall give a faithful Account to them of what passed and was done during his Voyage, and he shall carry the Colours, Arms and Ensigns of the (King, or United-States) during his Voyage. In witness whereof we have signed these Presents and put the Seal of our Arms thereunto, and caused the same to be counter signed by ..... at ..... the ..... Day of ..... A D .....

French Declaration

[TRANSLATION]

The General Congress of the United States of North America having represented to the King that the execution of the eleventh article of the Treaty of Amity and Commerce, signed the sixth of February last, might be productive of inconveniences, and having therefore desired the suppression of this article, consenting in return that the twelfth article shall likewise be considered of no effect, His Majesty, in order to give a new proof of his affection, as also of his desire to consolidate the union and good correspondence established between the two States, has been pleased to consider their representations. His Majesty has consequently declared, and does declare by these presents, that he consents to the suppression of the eleventh and twelfth articles aforementioned, and that his intention is that they be considered as having never been comprehended in the treaty signed the sixth of February last.

Done at Versailles the first day of the month of September, one thousand seven hundred and seventy-eight.

Gravier De Vergennes

United States Declaration

The most Christian King having been pleased to regard the Representation made to him by the general Congress of North America, relating to the eleventh Article of the Treaty of Commerce signed the sixth of February in the present Year, and his Majesty having therefore consented that the said Article should be suppressed on Condition that the twelfth Article of the same Treaty be equally regarded as of none Effect; the general Congress hath declar'd on their Part, and do declare, that they consent to the suppression of the eleventh and twelfth Articles of the abovementioned Treaty,

and that their Intention is, that these Articles be regarded as having never been comprised in the Treaty sign'd the Sixth of February.

Done at Versailles this first of September One thousand seven hundred and seventy eight.

B. Franklin
Arthur Lee
John Adams

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GREAT CASES MAKE BAD LAW: THE WAR POWERS ACT

EUGENE V. ROSTOW*

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

HOLMES, J., dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904).

The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

Alexander Hamilton, THE FEDERALIST No. 23

The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex . . . it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

James Madison, THE FEDERALIST No. 48

I. INTRODUCTION

Responding to the bitterness and tragedy of Vietnam, a group of Senators led by Jacob K. Javits of New York proposes fundamentally to

* Sterling Professor of Law and Public Affairs at Yale University. This article is based on the author's Leon Green Address, delivered at the Fiftieth Anniversary Dinner of the TEXAS LAW REVIEW, March 11, 1972. It is a pleasure to note my admiration for Dean Green, and my enthusiasm for his distinguished service to the law, and to our law schools.

change the constitutional relationship between President and Congress in the field of foreign affairs.[1] They assert that the underlying cause of the Vietnam tragedy is a modern and most unconstitutional excess of presidential power—a shift in the rightful balance of authority between the two branches caused by presidential "usurpations" at least since the time of McKinley, and especially those they claim Lyndon B. Johnson made with regard to Vietnam.

Ignoring their own repeated votes for Vietnam, these Senators say, "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."[2] Although Senator John Sherman Cooper has rightly criticized their theory as a rewriting of history, without factual foundation,[3] these men have offered a Bill which in their view would correct nearly two hundred years of error, strip the Presidency of many of its most essential powers, and restore what they fondly imagine was the constitutional model of 1789.

This contention, which is the major premise of the Senate Foreign Relations Committee Report on the Javits Bill, confuses two concepts, one of international law, the second of American constitutional law. "Undeclared" (or "limited" or "imperfect") war is a category of public international law, used to denote hostilities on a considerable scale conducted in time of "peace" rather than of "war," so far as international

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The present version of the address draws on passages from PEACE IN THE BALANCE: THE FUTURE OF AMERICAN FOREIGN POLICY, to be published during 1972 by Simon & Schuster, Inc., of New York.

1 SENATE COMM. ON FOREIGN RELATIONS, WAR POWERS, S. REP. NO. 92-606, 92d Cong., 2d Sess. (1972), *to accompany* S. 2956, 92d Cong., 2d Sess. (1972) [hereinafter cited as WAR POWERS]; *War Powers Legislation, Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. (1972) [hereinafter cited as *1971 Hearings*]. *See also* SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG., 2D SESS., DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA (Comm. Print 1970) [hereinafter cited as DOCUMENTS]; *Congress, the President, and the War Powers, Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *1970 Hearings*].

2 WAR POWERS, *supra* note 1, at 3.

3 In a statement of individual views, Senator Cooper remarks:

> I do not concur in one underlying theme of the Committee's report—which was never discussed in Committee and never voted on—that the Executive has taken from the Congress its powers. The record, if studied, discloses that the Congress, particularly since World War II, has not only acceded to but has supported Executive resolutions requesting Congressional authority to use the armed forces of the United States, if necessary, in hostilities.
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> These are settled facts of history. We can change our course but we cannot revise and rewrite history.

Id. at 32.

law is concerned. "Presidential" war, as the Committee uses the phrase, obviously refers to hostilities undertaken by the United States, and authorized by the President alone. The United States, like most other nations during the last two and a half centuries, has rarely chosen to invoke the international law of war by solemnly "declaring" that a state of war exists, signalling maximum hostility, and implying the invasion or even the destruction of an enemy state. But a considerable number of our many "limited" or "undeclared" wars, like Vietnam itself, have been authorized by Congress as well as the President through procedures which have been approved in usage and in Supreme Court opinions since the first years of the nation under the Constitution of 1789. Such hostilities cannot therefore be described as "Presidential."

The Javits Bill rests on heady new perspectives the Senate Foreign Relations Committee has discovered in the necessary and proper clause.[4] Its doctrine would permit a plenipotentiary Congress to dominate the Presidency (and the courts as well) more completely than the House of Commons governs England; that is, it would permit Congress to amend the Constitution without the inconvenience of consulting the people.

The battle cry of "constitutional usurpation" quickens the blood of every Congressman, and indeed of every American.[5] Accustomed as we are to treat nearly all questions of policy as questions of constitutional law, we find it easy to conclude that whatever we dislike intensely must also, and therefore, be unconstitutional as well. It is as natural for us to preach a return to the true orthodoxy of the Founding Fathers as it is for devout Moslems to make a pilgrimage to Mecca.

Holmes once remarked that great cases, like hard cases, make bad law. The Javits Bill confirms Holmes' quip more vividly than any proposal since that of the Bricker Amendment, which was in part a response to the Korean War. We should find safer outlets than the Javits Bill for the hydraulic pressure of our present discontents about Vietnam.

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[4] Members of Congress have themselves perhaps underestimated the authority vested in them by the "necessary and proper" clause of Article I, Section 8, of the Constitution. That clause entrusts the Congress to make all laws "necessary and proper for carrying into execution" not only its own powers but "all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof." Strictly interpreted, the "necessary and proper" clause entrusts the Congress not only to "carry into execution" its own constitutional war power, but also, should it be thought necessary, to define and codify the powers of the government as a whole, including those of the President as its principal officer.

Id. at 16. *See* discussion pp. 896-97 *infra.*

[5] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952), (Frankfurter, J., concurring).

We wisely refrained from curbing the powers of the Supreme Court even after the catastrophic error of *Dred Scott*. The same calm prudence should guide our course now, with respect to the Presidency.

The Javits Bill rests on a premise of constitutional law and constitutional history which is in error. Its passage would be a constitutional disaster, depriving the government of the powers it needs most to safeguard the nation in a dangerous and unstable world. Even if a President were to ignore such a statute, assuming that it passed over his veto, on the ground that it is unconstitutional, the passage of the Bill would create uncertainties, and envenom politics, in ways which would themselves be dangerous, both at home and abroad. It would tend to convert every crisis of foreign policy into a crisis of will, of pride, and of precedence between Congress and the President, making the policy process even more athletic than it is today.

The Javits Bill is a more serious attack on the Constitution and the security of the nation than one or another of the Bricker Amendments, which were nearly recommended by the Congress in the middle fifties. Those Amendments dealt only with the legal effect of treaties as internal law. They would have required affirmative action by Congress before treaties become operative as the supreme law of the land.[6]

The Javits Bill is more ambitious. It would allow the President, as the constitutional head of state, commander-in-chief, and representative of the nation in the conduct of foreign affairs, to use the armed forces of the United States in five and only five classes of cases: pursuant (1) to a declaration of war, or (2) to a specific statutory authorization of undeclared war passed after the passage of the Javits Bill itself, and specifically exempting a proposed use of force from its provisions, or like legislation in force at the time of the enactment of the Javits Bill, if it is sufficiently "specific";[7] absent such Congressional mandates, the

[6] Association of the Bar of the City of New York, *Report on the 1957 Bricker Amendment*, 12 THE RECORD 320 (1957); Bricker & Webb, *Treaty Law v. Domestic Constitutional Law*, 29 NOTRE DAME LAW. 529 (1954); Hatch, Finch & Ober, *The Treaty Power and the Constitution: The Case for Amendment*, 40 A.B.A.J. 207 (1954); MacChesney, *The Fallacies in the Case for the Bricker Amendment*, 29 NOTRE DAME LAW. 551 (1954); MacChesney, McDougal, Mathews, Oliver & Ribble, *The Treaty Power and the Constitution: The Case Against Amendment*, 40 A.B.A.J. 203 (1954).

[7] S. 2956, 92d Cong., 2d Sess. § 3 (1972):

> In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only . . . (4) pursuant to specific statutory authorization, but authority to introduce the Armed Forces of the United States in hostilities or in any such situation shall not be inferred (A) from any provision of law hereafter enacted, including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in such situation and specifically exempts the introduction of such Armed Forces from compli-

Bill would permit the use of the armed forces of the United States by the President only (3) to *repel* an armed attack on the United States, or (4) on the armed forces of the United States located outside of the United States; to *forestall* the direct and imminent threat of such an armed attack; to *retaliate* against armed attacks on the United States (not, however, against armed attacks on the armed forces of the United States located outside of the United States); or (5) to protect American citizens abroad being evacuated from a situation of direct and imminent threat to their lives. And in all hostilities except those authorized by a declaration of war—that is—those of "specific" advance statutory authorization of undeclared war; the evacuation of citizens in danger; and of armed attack on the United States or on its forces—the President could not use force for more than thirty days unless Congress ratified his course within that period or had exempted the particular use of force from the Javits Act in advance. The Bill would also require the President to report in writing to both Houses of Congress regarding the introduction of the armed forces "in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances,"[8] and provides that within thirty days Congress could overrule even a President's decision to use force in conformity with the Bill by an act or joint resolution.

The Javits Bill would annul the military provisions of all outstanding treaties, and probably of other legislative commitments dealing with the use of force as well, including the authority specified in the Middle Eastern Resolution and other Resolutions of similar import.[9] We should

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ance with the provisions of this Act, or (B) from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction 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 Armed Forces are engaged, or there exists an imminent threat that such forces will become engaged, in 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 introduction of the Armed Forces of the United States in hostilities or in any such situation, within the meaning of this clause (4); and no provision of law in force at the time of the enactment of this Act shall be so construed unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in any such situation.

How one Congress could constitutionally bind its successors in this way passes my understanding. The problem is hardly comparable to the provisions of § 12 of the Administrative Procedure Act, providing guidelines to the courts in interpreting subsequent statutes as repeals by implication. 60 Stat. 244, (1946), 5 U.S.C. § 559 (1970); Rusk v. Cort, 369 U.S. 367 (1962).

8 S. 2956, 92d Cong., 2d Sess. § 4 (1972).

9 Middle East Resolution, Pub. L. No. 85-7, 71 Stat. 5 (1957), *as amended*, Pub. L.

become the only nation in the world unable to make credible treaties or other security commitments. If the Javits Bill should become law, there would be a difficult and dangerous hiatus, maximizing uncertainty, until new treaties could be negotiated, and new legislation confirming them be considered and passed. With respect to the use of the armed forces by the President acting without prior authorization from Congress, the Bill would abolish at least half the categories in a pattern of practice which extends in an unbroken line of more than 150 instances to the Presidency of George Washington; equally, it would put the Presidency in the straitjacket of a rigid code, and prevent new categories of action from emerging, in response to the necessities of a tense and unstable world. Under the Javits Bill, no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations. And, on those occasions when the Bill would authorize the President to move quickly, the reporting requirements could well of themselves blow every secret diplomatic brush into a major crisis.

The Javits Bill is full of paradox. While its nominal motivation is to assure the nation that a pacific Congress will staunchly keep jingo Presidents from engaging in limited wars like that in Vietnam, the Bill would not have prevented the campaign in Vietnam if it had been enacted thirty years ago. Our participation in Vietnam was specifically authorized by President Eisenhower's SEATO Treaty, and by several

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No. 87-195, 75 Stat. 424 (1961); Formosa Resolution, ch. 4, 69 Stat. 7 (1955); Berlin Resolution, H.R. Con. Res. 570, 87th Cong., 2d Sess., 118 CONG. REC. 22637 (1962); Cuba Resolution, Pub. L. No. 87-733, 76 Stat. 697 (1962); The United Nations Participation Act of 1945, ch. 583, 59 Stat. 619 (1949), *as amended*, ch. 660, 63 Stat. 734 (1949), Pub. L. No. 86-707, 74 Stat. 797 (1960), Pub. L. No. 89-206, 79 Stat. 841 (1965).

The last clause of § 3(4) of the Javits Bill, quoted in note 7 *supra*, is ambiguous on this point. Nor is it clarified in the Senate Report on the Bill, WAR POWERS, *supra* note 1. The important question remains whether the language of outstanding statutes and Joint and Concurrent Resolutions should be regarded as "specific" enough to survive the passage of the Bill, in view of the first sentence of § 3(4), and the flat statement that "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 introduction" of the armed forces in hostilities.

> The Middle East Resolution, for example, provides that the United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East. To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism: *Provided*, That such employment shall be consonant with the treaty obligations of the United States and with the Constitution of the United States.

Pub. L. No. 85-7, § 2, 71 Stat. 5 (1957).

In view of the policies of strict construction and Congressional control embodied in the Javits Bill, would this language be construed to authorize Presidential action to assist Jordan, for example, against an attack from (or by) Syria?

other laws, including the Tonkin Gulf Resolution, which authorized the use of armed force by the President to carry out that Treaty.[10] The procedures used to bring Congress and the Presidency together behind the campaign in Vietnam fully comply with the substantive standards of the Javits Bill. In the case of Korea, the Javits Bill would have prevented President Truman from taking any action whatsoever before obtaining a Congressional Resolution, despite the risks of delay, since the North Korean attack was not directed against the territory or the armed forces of the United States. Such a Resolution could surely have been obtained at the time, although the President and the Congressional leaders thought it unwise and unnecessary to do so.[11]

If the Javits Bill had been on the books, it would have prevented President Kennedy from resolving the Cuban Missile Crisis as he did, by the skillful and minimal deployment of our armed forces as an instrument of diplomatic deterrence and persuasion, in the interest of protecting vital national interests without precipitating nuclear war, or any other kind of war. In its Report, the Senate Foreign Relations Committee, relying on testimony by Professor Bickel, asserts that the Cuban Missile Crisis could have been treated under Section 3(1) of the Javits Bill as a case of forestalling "the direct and imminent threat" of armed attack on the United States. The United States government, however, has made no such claim, even under the "inherent" right of self-defense provision of Article 51 of the United Nations Charter, far broader than the Javits Bill in its reach. Indeed, the notion that the Soviet Union in 1962 was about to launch nuclear missiles against the United States from Cuba, knowing that it would have received a nuclear attack in response, is incredible. The Cuban Missile Crisis, real as it was, must be seen as part of the push and pull of Soviet-American diplomacy, in the context of the Berlin and Laos crises of the period, President Kennedy's Vienna meeting with Khrushchev, the Bay of Pigs fiasco, and other factors.[12]

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10 *See* discussion pp. 872-885 *infra*.

11 *See* discussion pp. 867-870 *infra*.

12 R. KENNEDY, THIRTEEN DAYS 31-33, 111-19, *Afterword* by R. Neustadt & G. Allison, 138-39 (1969); KHRUSHCHEV REMEMBERS ch. 20 (S. Talbott ed. 1971); WAR POWERS, *supra* note 1, at 4; Chayes, *Law and the Quarantine of Cuba*, 41 FOR. AFF. 550 (1963) (expressly refusing to rest the American legal case on "self-defense," even in the ample perspective of Article 51). The most penetrating analysis of the crisis is A. WOHLSTETTER & R. WOHLSTETTER, CONTROLLING THE RISKS IN CUBA (1965). *See also* INTERNATIONAL LAW AND POLITICAL CRISIS (L. Sheinman & D. Wilkinson eds. 1968); MacChesney, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592 (1963); McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963).

In the Cuban case, Congress had passed a Resolution less than a month before the Missile Crisis of 1962, authorizing the President to use force if necessary to prevent "the

Under the Javits Bill, President Johnson could not have employed the implicit threat of force to keep the Soviets out of the Six Day War in 1967,[13] and President Nixon could not have used the same method to avert a general war in the Middle East in September, 1970, or to confine and contain the India-Pakistan War of 1972. Nor could earlier Presidents have used or threatened to use the nation's armed forces to persuade France to leave Mexico in 1865-66, to avoid war with Spain or Britain over Florida, or to send Commodore Perry on his fateful voyage to Japan.

As Senator Javits has said with admirable candor, the purpose of his Bill is to reduce the elective Presidency, which the Founding Fathers were at pains to establish as a third autonomous and coequal branch of the government, to the humble posture of George Washington during the Revolution, when he functioned as commander-in-chief, appointed by the Continental Congress, and its creature, or the creature of its committees, in every respect.[14] I should have supposed that if anything *is* clear about the intent of the Founding Fathers, it is that one of the major goals of the Philadelphia Convention was to remedy what was

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Marxist-Leninist regime in Cuba" from extending its activities by force or the threat of force to any part of the hemisphere. The Resolution also announced our determination to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States. That clause of the Resolution, unlike clause (a), did not mention the use of arms. *See* Cuban Resolution, note 9 *supra*. Mr. Chayes believes, however, that the Resolution was "one of the bases" of the President's authority to do what he did. *1970 Hearings*, *supra* note 1, at 138. It would seem a better reading of the Cuban Resolution, in light of the restrictive policy of the Javits Bill, to interpret it as contemplating what President Johnson did in the Dominican Republic, but not what President Kennedy did before and during the Missile Crisis.

[13] L. JOHNSON, THE VANTAGE POINT 301-03 (1971).

[14] "The Case for War Powers Legislation," Address to the American Bar Association Standing Comm. on World Order under Law, Hearing on War Powers of the President and Congress, Feb. 5, 1972, at 4-5.

Because this important speech is not yet readily available in libraries, it may be convenient to quote its extraordinary conclusion in full:

> Clearly, the drafters of the Constitution had in mind the experience of the Continental Congress with George Washington 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.
>
> 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:
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> "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 historical background clarifies, and gives added meaning to, those phrases in the Constitution concerning the war powers which are the subject of such contemporary controversy.

perceived as a critical weakness of the Articles of Confederation, namely, the absence of a strong and independent executive. The British monarch was much more in their minds as a point of departure than the revolutionary commander.

A wistful and nostalgic chord runs through the testimony and the speeches which favor the Javits Bill. The Founding Fathers, the distinguished and appealing proponents of the Bill say, wanted to make it hard to go to war, and easy to make peace. They wanted America to remain aloof from the quarrels of a naughty world, to eschew the pride and arrogance of power, and to use force only when openly attacked. Let us return to the wisdom of the patriarchs and prophets, these leaders tell us, and require Congress itself—or perhaps even the people through a referendum—to authorize every use of the sword. Thus they would wrap a foreign policy of nearly pacifist isolationism in the priestly mantle of constitutional command.[15]

The Bill's supporters dismiss the fact that the men who made the Constitution had quite another view of its imperatives when they became Presidents, Senators, Congressmen, and Secretaries of State. The words and conduct of the Founding Fathers in office hardly support the simplified and unworldly models we are asked to accept as embodiments of the only True Faith. Nor did the policies the Founding Fathers adopted when they became officials always shine with the innocence of Professor Commager's spirit. Above all, the essence of the Constitution was to build a framework which could last for ages. To suppose that the Constitution binds the nation forever to a particular foreign policy, or even a particular theory for foreign policy, is a fantasy, entirely alien to the chilly realism of No. 23 of *The Federalist*, and of *McCulloch v. Maryland*. The makers of the Constitution built in anticipation of changes in world politics that could not be anticipated in 1787. They wished to endow their successors with the full freedom of democratic responsibility to choose the foreign policy they found best suited to the politics and military technology of the period in which they lived. If the Constitution does not enact the Social Statics of Herbert Spencer, it surely does not enact the foreign policy of William E. Borah or J. William Fulbright. Constitutionally, the United States is as free to follow McKinley's example in making its foreign policy as that of Cleveland.

The constitution of the United States is a process—a process of

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15 *1971 Hearings*, *supra* note 1, at 8-74 (testimony of Professor H. S. Commager), 75-85 (testimony of Professor R. B. Morris).

tension, conducted in a matrix of custom, and guided by certain standards, habits, and rules. Justice Brandeis once said that

> [t]he doctrine of the separation of powers 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.[16]

The same theme runs through the Federalist papers.

In the contest for preeminence between President and Congress which constitutes one phase of Justice Brandeis' vision, the Javits Bill is nearly alone. Congress has made no bid for supremacy so bold, and so foreign to the American Constitution, since the impeachment of Andrew Johnson. The Bill would not restore the constitutional balance of 1787; it would profoundly alter that balance with regard to the conduct of foreign relations, as it has evolved in nearly two hundred years of testing experience.

I reach this conclusion not as an advocate of increased presidential power, but as a defender of the constitutional pattern of enforced cooperation between President and Congress we have inherited, for all the friction it inevitably generates. I disagree with the arguments for enlarged presidential power put forth in recent years by McGeorge Bundy, James McGregor Burns, and Senator Fulbright.[17] No President, and no Congress, can develop or carry out a foreign policy unless in fact they work together. Of course Congress should participate, and participate as early as possible, in decisions involving major and sustained hostilities, through processes of continuous consultation, and, where desirable and feasible, through formal legislative actions approving declared or undeclared war. That is now the pattern of our politics, and of our constitutional usage. The respective powers of each branch are indispensable if the making and execution of foreign policy are to remain under effective democratic control. Our practice is strenuous, and hardly conducive to a quiet, easy life, either for Presidents or for members of Congress. A quiet life for public officials is not, however, the most important goal of our constitutional arrangements and practices. There is no safe way to codify those arrangements and practices,

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16 Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

17 M. BUNDY, THE STRENGTH OF GOVERNMENT (1968); J. BURNS, PRESIDENTIAL GOVERNMENT (1965); R. NEUSTADT, PRESIDENTIAL POWER; THE POLITICS OF LEADERSHIP (1968); *1970 Hearings, supra* note 1, at 81 (testimony of Dr. Burns); Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1 (1961).

especially with regard to the use of nuclear weapons, in ways which could meet all the contingencies likely to arise. It is striking that Senator Fulbright was alone on the Senate Foreign Relations Committee in urging a congressional vote before the President could legally use the nuclear weapon.[18]

Gouverneur Morris remarked that "no constitution is the same on paper and in life."[19] Justice Frankfurter carried the thought further, writing about the relation between President and Congress in regard to the war power:

> [T]he content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes 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 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. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on executive Power vested in the President by § 1 of Art. II.[20]

The Javits Bill repudiates that history root and branch, and seeks to substitute parliamentary government for the tripartite constitution we have so painfully forged.

II. The Background of Constitutional Usage

The most serious illusion of legal positivism is the notion that "the original intention" of those who drafted and voted for a law is thereafter knowable, save as a guideline of broad purpose or principle. The debates of judges and scholars about the legitimacy of *Marbury v.*

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18 War Powers, *supra* note 1, at 26. Even Justice Goldberg, who vigorously urges a return to the "very plain language" of the Constitution, exempts the nuclear problem from his recommendations, *1971 Hearings*, *supra* note 1, at 770-71.

19 1 S. Morison, Oxford History of the United States 103 (1st ed. 1927).

20 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

93-626 O - 73 - 29

Madison, the scope of the commerce power, or the true import of the Fourteenth Amendment are evidence enough of the limited value of such inquests as a guide to later decisions. It is psychologically impossible for a man of the twentieth century, however learned and sensitive, to perceive the world as the men of 1787 did. There is no way for him to reproduce the structure and climate of their universe —to understand as they did the relation of the several parts to each other and the weight which various fears, concerns and ambitions had in their minds.[21] The most important words John Marshall ever wrote were that we should never forget it is a *constitution* we are expounding—a constitution intended to endure for ages to come, and capable of adaptation to the various crises of human affairs—but a *constitution* nonetheless, assuring continuity as well as flexibility, boundaries of power, coupled with a wide freedom of democratic choice.[22]

How did the Founding Fathers intend to allocate the power to use the armed forces between the President and the Congress? I do not start here because I believe that we can conjure up from their few spare words on the subject a sacred norm of Arcadian purity to which at all costs we must "return," a tight model, capable, like a magical computer or coin machine, of providing clear solutions for every contingency likely to arise. The astute men who drafted the Constitution and started it on its way had a much deeper and more realistic sense of the relationship between law and life than that. Nonetheless, it is right as well as customary to start with the document, viewed against the background of their words and their experience, because the animating principles of their project—democratic responsibility, the theory of checks and balances in the exercise of shared powers, and civilian control of the military—have retained their vitality, and must continue to do so if we hope to survive as a free and democratic society.

In the perspective of political theory, the Presidency is one of the two great inventions of the Constitution, the other being judicial review. The weakness of the Executive under the Articles of Confederation was one of the major reasons for convening the Constitutional Convention of

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[21] In 1857, W. H. Trescot, in his DIPLOMATIC HISTORY OF THE ADMINISTRATION OF WASHINGTON AND ADAMS, 1789-1801, at 7-8, remarked that

> [i]t would be almost as easy for a man in the vigorous and varied activity of his matured life to realize faithfully to himself the uncertainty and weakness of his infancy, as for a citizen of the United States at the present day to reproduce the condition of his country at the date of that treaty which secured its independence —the weakness of its institutions, its economic life, and its internal and external situation.

See also id. at 97.

[22] E. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW 121-24 (1962).

1787. Problems of security and of diplomacy were among the dominant preoccupations of the men who met at Philadelphia, and first among their arguments for Union. The nation was surrounded by British, French and Spanish territories, to say nothing of hostile Indian tribes. The Founding Fathers were mortally afraid the United States might be dismembered as a pawn in the Great Game of European power politics. Their Revolution had succeeded because they had the help of France. They knew that France had not assisted the American revolutionaries because the Bourbon King was a secret republican at heart, or a believer in the right of revolution. They feared a turn of the wheel of European politics which might undo all that had been achieved, despite their military alliance with France. Hence their concern with the Presidency and with the establishment of clearly national authority over defense and foreign relations in the new constitution. Of the 85 Federalist papers, 26 are devoted to one or another aspect of the problem.[23]

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23 The basic idea which governed the drafting of the provisions of the Constitution dealing with the safety of the nation was classically stated by Hamilton in No. 23 of THE FEDERALIST:

> The principal purposes to be answered by union are these—the common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.
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> The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.
>
> This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the *means* ought to be proportioned to the *end;* the persons, from whose agency the attainment of any *end* is expected, ought to possess the *means* by which it is to be attained.
>
> Whether there ought to be a federal government intrusted with the care of the common defence, is a question in the first instance, open for discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the *formation, direction,* or *support* of the NATIONAL FORCES.

THE FEDERALIST 142-43 (Modern Library ed. 1937). Hamilton's views on the President's independent role in assuring the security of the nation were developed later in a number of papers. *See, e.g.,* those collected by Professor R. B. Morris in ALEXANDER HAMILTON AND

The Presidency which emerged from the deliberations at Philadelphia as the repository of "the executive power" of the United States was a remarkable office. Its essence was that the incumbents be endowed with ample authority to discharge the executive task, both at home and abroad, but not enough to become tyrants or kings. As Clinton Rossiter concludes:

> Considering the spirit of the age, which was still proudly and loudly Whiggish, the proposed Presidency was an office of unusual vigor and independence. As Hamilton was soon to point out in *The Federalist*, it joined energy, unity, duration, competent powers, and "an adequate provision for its support" with "a due dependence on the people" and "a due responsibility." The President had a source of election legally separated if not totally divorced from the legislature, a fixed term and untrammeled reeligibility, a fixed compensation (which could be "neither increased nor diminished" while he was in office), immunity from collective advice he had not sought (whether tendered by the Court, the heads of executive departments, or a council of revision), and broad constitutional powers of his own. It would be his first task to run the new government: to be its administrative chief, to appoint and supervise the heads of departments and their principal aides, and to "take care" that the laws were "faithfully executed." He was to lead the government in its foreign relations, peaceful and hostile, and he was, it would appear, to be ceremonial head of state, a "republican monarch" with the prerogative of mercy. Despite the allegiance of the Convention to the principle of the separation of powers, it had by no means cut him off from the two houses of Congress. To them he could tender information and advice; over their labors he held a qualified but effective veto; at his request they were bound to convene "on extraordinary occasions." He was, in short, to be a strong, dignified, largely nonpolitical chief of state and government.[24]

THE FOUNDING OF THE NATION 209, 526-27 (1957); IV WORKS OF ALEXANDER HAMILTON 227-489, esp. 432-44 (2d ed. H. Lodge 1903).

[24] C. ROSSITER, 1787: THE GRAND CONVENTION 221-22 (1966).

Rossiter adds that the framers had in mind not an abstraction as President, but George Washington.

> Washington was not a candidate for this or any other office on earth, but when Dr. Franklin predicted on June 4 that "the first man put at the helm will be a good one," . . . every delegate knew perfectly well who that first good man would be. We cannot measure even crudely the influence of the commanding presence of the most famous and trusted of Americans, yet we may be sure that it was sizable, that it pointed (as we know from Washington's recorded votes) toward unity, strength, and independence in the executive, and that the doubts of some old fashioned Whigs were soothed, if never entirely laid to rest, by the expectation that he would be chosen as first occupant of the proposed Presidency, and chosen and chosen again until claimed by the grave. The powers of the President "are full great," Pierce Butler wrote the following year to a relative in England,

In the field of foreign affairs, Congress too was given far-ranging responsibility. While foreign affairs are not mentioned as such in the Constitution, it is apparent from *The Federalist* (for example, Nos. 64 and 69) that the conduct of diplomatic relations is an exclusively executive function, with the Senate sharing in the process of making treaties, and Congress as a whole entrusted with the legislative dimensions of the problem of making foreign policy. Among the legislative powers bearing on the making and conduct of foreign policy, Article I Section 8 mentions the power to appropriate moneys in providing for the common defense and general welfare; to define and punish piracies and felonies committed on the high seas and offenses against the Law of Nations; to declare war, grant letters of Marque and Reprisal, and make rules concerning captures on land and water; to raise and support armies, subject to the important proviso that no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a Navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions; and to provide for organizing, arming and disciplining the militia, subject to a reservation of authority in the states.

What emerges from the text, and from the discussions available in *The Federalist*, in Farrand, in Madison's notes, and in other contemporaneous sources, is a pattern of shared constitutional authority in this vital area, evoking the memory of tyrannies ancient and modern much in the minds of the Founding Fathers. It is not an hermetic separation of powers, but a scheme of divided power—what Hamilton called an intermixture of powers, the only effective way to prevent a monopoly of power in any one branch of government.

Of this problem, Madison said:

> One of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct.
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> . . . .
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> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be

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and greater than I was disposed to make them. Nor, entre nous, do I believe they would have been so great had not many of the members cast their eyes towards General Washington as President; and shaped their ideas of powers to be given a President, by their opinions of his virtue.

Id.

> pronounced the very definition of tyranny. . . . [T]he charge cannot be supported, and the . . . maxim on which it relies has been totally misconceived and misapplied.[25]

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[25] THE FEDERALIST No. 47, at 312-13 (Modern Library ed. 1937). Referring to Montesquieu's famous analysis of the British constitution, and of British experience, Madison continued:

> From these facts, by which Montesquieu was guided, it may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted. . . . This, however is not among the vices of that constitution. The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law; nor administer justice in person, though he has the appointment of those who do administer it. The judges can exercise no executive prerogative, though they are shoots from the executive stock; nor any legislative function, though they may be advised with by the legislative councils. The entire legislature can perform no judiciary act, though by the joint act of two of its branches the judges may be removed from their offices, and though one of its branches is possessed of the judicial power in the last resort. The entire legislature, again, can exercise no executive prerogative, though one of its branches constitutes the supreme executive magistracy, and another, on the impeachment of a third, can try and condemn all the subordinate officers in the executive department.

Id. at 314-15. In another of the Federalist Papers, Madison added:

> [U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.
>
> It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.
>
> Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defence is indispensably necessary for the more feeble, against the more powerful, members of the government. The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.
>
> The founders of our republics have so much merit for the wisdom which they have displayed, that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark, that they seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In what is probably his finest opinion, Justice Jackson commented on the exercise of their war powers by President and Congress in these terms:

> Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.
>
> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[26]

The early years of the nation under the new constitution were a period of acute turbulence which tested the parchment rules of the document in the crucible of intense and sustained experience. The respective authority of Congress and the President with regard to the use

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. . . [I]n a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coördinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence, is thus created in the latter, which gives still greater facility to encroachments of the former.

THE FEDERALIST No. 48, at 321-23 (Modern Library ed. 1937).

26 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

of the armed forces was a matter of active controversy. Several issues of principle were settled not only by the pattern of practice, but by decisions of the Supreme Court as well. The system of ideas that emerged from this period has special weight, since it was produced by the generation of men who had drafted and enacted the Constitution, and launched it on its course. The rules they established have dominated constitutional usage and doctrine ever since.

Among these rules, several are of particular importance to the theory of the Javits Bill. As Hamilton had anticipated, "the actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursements of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war,—these, and other matters of a like nature" were accepted as normal prerogatives of the Presidency.[27] At the other end of the spectrum, it was equally clear that only the Congress can "declare war," appropriate funds, and prescribe rules for governing the armed forces and for calling the militia into national service.

With regard to the actual employment of the armed forces, it is apparent that the term "declare war" in the Constitution referred to the classifications of the law of nations, which makes a sharp distinction between the law of war and the law of peace.[28] The law of nations was

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[27] THE FEDERALIST No. 72, at 468-69 (Modern Library ed. 1937).

[28] *See, e.g.*, J. BRIERLY, THE LAW OF NATIONS (6th ed. H. Waldock 1963); C. HYDE, INTERNATIONAL LAW (2d rev. ed. 1945); M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER, 5-11, 138-43 (1961); L. OPPENHEIM, INTERNATIONAL LAW (8th ed. H. Lauterpacht 1955).

With regard to the construction of the phrase "declare war" in the Constitution, see L. KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 62 (1956); *1971 Hearings, supra* note 1, at 462-64 (testimony of J. N. Moore); Potter, *The Power of the President of the United States to Utilize its Armed Forces Abroad*, 48 AM. J. INT'L LAW 458 (1954). *See also* Miller v. The Ship Resolution, 2 U.S. (2 Dall.) 19, 21-23 (1781).

Professor Wormuth recognizes that the language of Article I § 8 of the Constitution is addressed to the categories of the law of nations, but claims that under Article I Congress has the complete and exclusive right to initiate all forms of hostility recognized under international law, including, *e.g.*, reprisals. *The Vietnam War: The President versus the Constitution*, Occasional Paper No. 1, Center for the Study of Democratic Institutions (1968), reprinted in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 711, 717-18 (R. Falk ed. 1969) [hereinafter cited as FALK]. This is surely going too far. Professor Wormuth, accepting the Hamiltonian view, acknowledges that the "Constitution recognizes that the power to initiate wars is lodged in two places: in Congress, and in a foreign enemy . . . . When a foreign country attacks the United States, war exists and the President as Commander-in-Chief may and must make—that is, wage—the war." Thus he concedes most of the case he opposes, for most Presidential uses of the armed forces rest on the President's judgment that he is resisting, forestalling, or retaliating against the hostile act of another state, illegal under international law, and directed against the security of the United States. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 668, 671 (1863); Durand v. Hollins, 8 F. Cas. 111, 112 (No. 4186) (C.C.S.D.N.Y. 1860); Note, 81 HARV. L. REV. 1771 (1968).

an intimate familiar to the men of the revolutionary generation in America. So far as international law is concerned, nations were then, and are now, free to use force in time of peace by way of self-help against acts or policies of other nations which they deem contrary to international law, and which have remained unredressed after a demand for amends. Different words are used to describe various categories of self-help: retorsion; reprisal; pacific embargoes or blockades; limited intervention to protect nationals; humanitarian intervention to restore order in situations of massacre, natural disaster, or extreme civil disturbance; and others. They are all subsumed under the inherent and sovereign right of self-defense, which has been reenacted in Article 51 of the Charter of the United Nations.[29] In the period before the United Nations, international law also accepted as legal other uses of force which now would be regarded as violating Article 2(4) of the Charter.

It is tempting, but would be incorrect, to suggest, as Hamilton did, that the constitutional allocation of power between President and Congress with respect to the use of the armed forces corresponds to the categories of international law, with the President authorized to use the armed forces as head of state and commander-in-chief in those situations in which international law would acknowledge the use of armed force as permissible self-help in time of peace, while only Congress could move the nation into the juridical world of a state of war, within the meaning of international law. The constitutional pattern is, and should be, more complex than any such formula.

In the formative years of the Republic, Presidents and Congress alike found that the exigencies of diplomacy in a world at war required many uses and threats to use military power which defied simplified classification. When in office, Jefferson, Madison, and Hamilton all discovered that they could not quite live according to the brave rules they had pronounced as theorists of the Constitution. Then, and since, the invocation of force as a tool of national policy ranged from the purely Presidential to the full declaration of war, the latter as rare in the eighteenth century and the early days of the nation as it has been in this century.

In Washington's first administration, Congress passed broad legislation under its power to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions. These

29 D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958); F. KALSHOVEN, BELLIGERENT REPRISALS (1971); M. MCDOUGAL & F. FELICIANO, *supra* note 28, ch. 3; A. ROSS, THE UNITED NATIONS: PEACE AND PROGRESS ch. 4 (1966); Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L LAW 1 (1972) (collecting literature).

early statutes and their application have been little altered by the passage of time, save in their steady enlargement of the President's prerogative. As standing delegations of emergency power, they bespeak the ultimate right of self-preservation which every nation possesses because it is a nation. Jefferson, Fillmore, and Pierce employed the power broadly. Lincoln relied on it during his first anxious months of resisting the Rebellion.[30] Hayes and Cleveland used force in situations of domestic turbulence almost without reference to the militia statutes,[31] exercising inherent Presidential power unaided by legislation, and the Supreme Court upheld what Cleveland did in ringing terms.[32] Truman, Kennedy, and Eisenhower invoked these and cognate statutes during various crises at home and abroad.[33]

In view of current controversies about the constitutionality of congressional "delegations" to the President of the power to use the armed forces, the text of the first militia statute, that of 1789, is significant:

> That for the purpose of protecting the inhabitants of the frontiers of the United States from the hostile incursions of Indians, the President is hereby authorized to call into service from time to time, such part of the militia of the states respectively, as he may judge necessary for the purpose aforesaid.[34]

It was essential for the President to be able to use the militia, since the small Regular Army of the day was fully employed in manning the seacoast and frontier fortifications.[35] Without further action by the Congress, President Washington relied on this statute to call up some militia and undertake military operations against Indian incursions in disputed territory, and beyond.[36]

Under comparably broad legislation authorizing the President to call out the militia in order to enforce the laws of the United States,

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30 E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 130-33 (4th rev. ed. 1957). The evolution of these statutes can be traced in 10 U.S.C. §§ 331-34, and 3500 (1970).

31 E. CORWIN, *supra* note 30, at 134-35.

32 *In re* Debs, 158 U.S. 564 (1895).

33 Act of June 30, 1950, ch. 445, § 21, 64 Stat. 318, *as amended*, Act of June 15, 1951, ch. 138, § 21, 65 Stat. 87 (Truman during the Korean War, 16 Fed. Reg. 6659 (1951)); 10 U.S.C. §§ 332-34 (1970) (Eisenhower during the desegregation of the Arkansas schools, 22 Fed. Reg. 7628 (1957)); 27 Fed. Reg. 9681, 9693 (1962) (Kennedy during disturbances in Mississippi); 28 Fed. Reg. 5707, 5709, 9861, 9863 (1963) (Kennedy during disturbances in Alabama); Act of Aug. 1, 1961, Pub. L. No. 87-117, § 2, 75 Stat. 242 (Kennedy during the 1961 Berlin crisis, 26 Fed. Reg. 6448 (1961)); Joint Resolution of Oct. 3, 1962, Act of Oct. 3, 1962, Pub. L. No. 87-736, § 2, 76 Stat. 710 (Kennedy during the Cuban Missile Crisis, 27 Fed. Reg. 10403 (1962)).

34 Act of Sept. 29, 1789, ch. 25, § 5, 1 Stat. 95, 96.

35 E. CORWIN, *supra* note 30, at 131.

36 C. BERDHAL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 61-63 (1921); H. WARD, THE DEPARTMENT OF WAR, 1781-1795 (1962); 31 WRITINGS OF WASHINGTON 268 (1939).

President Washington put down the Whiskey Rebellion in Pennsylvania.[37] In that famous and colorful instance of riotous resistance to the revenue laws of the United States in the Western counties of Pennsylvania, President Washington dispatched commissioners of conciliation to negotiate a peaceful and agreed submission of the resisters to "the general will"[38] on the basis of an offer of amnesty. When their mission failed, he led a force of 12,000 to 13,000 men, drawn from the militias of New Jersey, Maryland, Virginia, and Pennsylvania, to see to it that the laws of the United States be faithfully executed. The procedures of Article IV, Section 4, of the Constitution—requiring an application of the state legislature, or the governor, when the legislature cannot be convened, before the national force is used to put down domestic violence—were ignored. Indeed Governor Mifflin of Pennsylvania urged that the use of force be delayed until it could be more conclusively demonstrated that judicial enforcement of the laws in the normal course was impossible.[39]

In *Martin v. Mott*, a case testing the legality of a fine imposed by court-martial against a member of the New York militia who refused to obey an order to rendezvous and enter the national service, the Supreme Court upheld the constitutionality of such statutes. Writing for the Court, Justice Story said:

> In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of the militia of the State or States most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are

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[37] Act of May 2, 1792, ch. 28, 1 Stat. 264, Section 2 provides:

> That whenever the laws of the United States shall be opposed, or the execution thereof obstructed, in any State, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshals by this act, the same being notified to the President of the United States, by an Associate Justice or the District Judge, it shall be lawful for the President of the United States to call forth the militia of such State to suppress such combinations, and to cause the laws to be duly executed.

The statute provided also, in a provision subsequently dropped, that the President could use the militia in any given case for this purpose until the expiration of thirty days after the commencement of the ensuing session of Congress. *See generally* L. BALDWIN, WHISKEY REBELS (rev. ed. 1965).

[38] UNITED STATES SENATE, THE PROCEEDINGS OF EXECUTIVE OF THE UNITED STATES RESPECTING THE INSURGENTS, 1794 at 18 (Published by order of the Secretary of the Senate, Philadelphia 1795).

[39] *Id.* at 58-59.

made for the other cases stated in the constitution. It has not been denied here, that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion there is no ground for a doubt on this point, even if it had been relied on, for 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.

The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. 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? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the President? 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. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander in chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance. . . . The power itself is confided to the Executive of the Union, to him who is, by the constitution, "the commander in

> chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. . . . It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since in addition to the high qualities which the Executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.[40]

Similarly, early Presidents used their inherent power to deploy the armed forces, without Congressional authorization, to precipitate confrontations with the "piratical" forces of North African states, and, with and without legislation, to combat them as well.[41]

The most notable episode of the period dealing with the distinction between hostilities pursuant to a declaration of war and those the nation could constitutionally undertake in times of peace was the limited war with France, "John Adams' undeclared war," which arose out of French raids on American shipping and the strains and tensions of the Napoleonic Wars.[42] The restraint and prudence of President Adams and of Talleyrand, opposing the forces in both countries pressing for general war, was one of the important factors preventing the full involvement of the United States in the convulsions of the European war. The domestic political controversies swirling about the episode produced the abrogation of the alliance between France and the United States, made John Adams a one-term President, destroyed the Feder-

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40 Martin v. Mott, 25 U.S. (12 Wheat.) 19, 29-32 (1827). *See* Stewart v. Kahn, 11 Wall. 493, 506 (1870); C. ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 11-17 (1951).

41 J. ROGERS, WORLD POLICING AND THE CONSTITUTION 46-47 (America Looks Ahead No. 11, 1945); *1971 Hearings*, *supra* note 1, at 20 (testimony of Prof. Commager), 352-60 (testimony of Senator Goldwater), 299.

42 A. DECONDE, THE QUASI-WAR 8-10 (1966).

alist Party, and led to the election of Jefferson, and ultimately to the Louisiana Purchase.[43]

Although there were many who advocated a declaration of war against France, the President's resistance brought Congress to the compromise of a series of acts authorizing limited maritime warfare with France.[44] Those statutes did not declare that a state of war existed, in the sense of international law. Such declarations have far-reaching consequences, both in international and domestic law, authorizing many classes of activities otherwise illegal or of doubtful legality, from censorship and blockade to the internment of enemy aliens. They have far-reaching political consequences as well.

The legality of these decisions by the Congress and the President came before the courts in a series of cases concerned with captures at sea and the disposition of prize money. A number of the cases reached the Supreme Court, which decided that the provision of the Constitution regarding declarations of war was not exclusive, but that Congress could authorize hostilities in more restricted ways if it wished to do so. "Congress is empowered to declare a general war," Justice Chase said,

> 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.[45]

The hostilities with France, the Justice declared, were "a limited, partial war," in which Congress had not made France our general enemy: "but this only proves the circumspection and prudence of the legislature."[46] In *Talbot v. Seeman*, a later case dealing with the same subject, Chief Justice Marshall noted with approval that neither side had ventured to claim that hostilities could be authorized only by a declaration of war.[47]

In these early cases the court also sharply defended the civil control

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[43] *Id.* at 336-38.

[44] Act of May 28, 1798, ch. 48, 1 Stat. 561; Act of June 25, 1798, ch. 60, 1 Stat. 572; Act of July 9, 1798, ch. 68, 1 Stat. 578; Act of March 3, 1799, ch. 45, 1 Stat. 743.

[45] Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800).

[46] *Id.* at 43-45.

[47] 5 U.S. (1 Cranch) 1, 28-29 (1801). This is the foundation for Undersecretary of State Katzenbach's unassailable judgment that the Tonkin Gulf Resolution was "the functional equivalent" of a declaration of war, so far as the Constitution is concerned, although of course its effects on international politics, and in international law, are quite different. *U.S. Commitments to Foreign Powers, Hearings on S. Res. 151 Before the Senate Committee on Foreign Relations*, 90th Cong., 1st Sess. 71-110, esp. at 82 (1967).

of the military, and held an officer liable, despite authorization from the President, when the President had empowered him to commit an act not covered by the statute authorizing captures at sea.[48]

The constitutional boundaries sketched by this early experience have remained the guidelines of practice ever since. This is not the occasion for yet another full-scale review of the historical exercise of the power to make war by the President, with and without the support of legislation. There are now several compilations of that experience,[49] and a number of scholars have drawn a variety of conclusions from their study of the entrails.[50] Of these studies, I find Professor Moore's and Professor Ratner's the most judicious, but they all deserve examination, in the perspective of Justice Jackson's comment about Pharaoh's dream.

For present purposes, however, I should refer to one of the most important of these affairs, the handling of problems relating to Florida by President Monroe and his astute Secretary of State, John Quincy Adams. No case in the long history of the debate better illustrates the interplay of Presidential and Congressional authority with regard to the use of force, and the relationship between diplomacy and military power. The credentials of Monroe and Adams as exemplars of constitutional propriety in the exercise of their functions are beyond reproach. Their practice can safely be taken, with *Talbot v. Seeman*, as a benchmark of orthodoxy in applying the principles of 1787 to the complexity of the real world.

The decay of the Spanish Empire in America was the dominant foreign policy problem of Monroe's administration.[51] In one dimension, it led to his promulgation of the Monroe Doctrine, in another, to the Transcontinental Treaty of 1819 with Spain, through which Florida was annexed, the disputes over Louisiana resolved, and the western

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48 Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (per Marshall, C. J.).

49 J. ROGERS, *supra* note 41; *1971 Hearings*, *supra* note 1, at 298-316, 359-79.

50 1 FALK, *supra* note 28; 2 FALK, *supra* note 28, at 597-836; *1971 Hearings*, *supra* note 1; *1970 Hearings*, *supra* note 1. *See also* R. HULL & J. NOVOGROD, LAW AND VIETNAM (1968); R. FALK, THE SIX LEGAL DIMENSIONS OF THE VIETNAM WAR (Research Monograph No. 34, Princeton University Center for International Studies, 1968), reprinted in 2 FALK, *supra* note 28, at 216; Moore & Underwood, *The Lawfulness of United States Assistance to the Republic of Viet-Nam*, 112 CONG. REC. 15519-67 (1966), reprinted in 5 DUQ. L. REV. 235 (1967); Jones, *The President, Congress, and Foreign Relations*, 29 CALIF. L. REV. 565 (1941); Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345 (1955); Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461 (1971); Reveley, *Presidential Warmaking: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243 (1969).

51 H. AMMON, JAMES MONROE, THE QUEST FOR NATIONAL IDENTITY ch. 23-24 (1971); S. BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY ch. 15-19 (1949); P. BROOKS, DIPLOMACY AND THE BORDERLANDS, THE ADAMS—ONIS TREATY OF 1819 (1939); J. LOGAN, NO TRANSFER, AN AMERICAN SECURITY PRINCIPLE (1961); B. PERKINS, CASTLEREAGH AND ADAMS (1964).

boundaries of the United States fixed, so far as Spanish claims were concerned.

Monroe's overriding goal was what came to be called the Transcontinental Treaty, and the avoidance of political or military friction that might hinder the negotiations, or precipitate war either with Spain or with Great Britain, Spain's ally in the Napoleonic Wars just concluded at Vienna.

In order to move Spain to accept the path of negotiation, Monroe used both carrots and sticks. With regard to the revolutions in Latin America, he pursued a course of neutrality, despite the overwhelming popular sympathy in the United States for the revolutionaries. He carefully refrained from recognizing the new national regimes in any way until the Treaty was ratified by Spain in 1821, and sought to curb the procurement of supplies and other assistance for the revolutionaries in the United States. In Florida he employed military force twice to convince Spain that her control over Florida had in fact vanished, and that the transfer of the territory to the United States had become inevitable. In a situation of complex rivalry involving Spain, France, and Great Britain, force was used sparingly, and under close restraint, but it was used effectively by the President alone as a tool of his diplomacy.

Amelia Island—Spanish territory in the mouth of St. Mary's River—had been seized from Spain by a Scots adventurer named Gregor McGregor and a Venezuelan patriot named Louis Aury on the pretext of using it as a base for help to Venezuelan revolutionaries. Under their control, Amelia Island was an active base for privateering against Spanish shipping, and also became a haven for smugglers, slave traders, and pirates. A similar establishment had taken over Galveztown.

Monroe sent an expedition to Amelia Island in 1817, clearing out the occupants, and holding the territory without annexing it.[52] He buttressed his authority by referring to a Resolution and Act passed at a secret session of Congress on January 15, 1811, and withheld from publication until April 29, 1818. This legislation, too, constitutes a remarkable example of what some would regard as Congressional "delegation" of legislative power to the executive; I should prefer to regard it as an instance of cooperation between Congress and the Presidency, and the practical pooling of their powers. The Resolution provided:

> Taking into view the peculiar situation of Spain, and of

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[52] H. AMMON, *supra* note 51, at 412-18, 427-30; S. BEMIS, *supra* note 51, at 305-08.

her American provinces; and considering the influence which the destiny of the territory adjoining the southern border of the United States may have upon their security, tranquillity, and commerce: Therefore,

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, That the United States, under the peculiar circumstances of the existing crisis, cannot, without serious inquietude, see any part of the said territory pass into the hands of any foreign power; and that a due regard to their own safety compels them to provide, under certain contingencies, for the temporary occupation of the said territory; they, at the same time, declare that the said territory shall, in their hands, remain subject to future negotiation.

The statute specified:

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the President of the United States be, and he is hereby, authorized, to take possession of, and occupy, all or any part of the territory lying east of the river Perdido, and south of the state of Georgia and the Mississippi territory, in case an arrangement has been, or shall be, made with the local authority of the said territory, for delivering up the possession of the same, or any part thereof, to the United States, or in the event of an attempt to occupy the said territory, or any part thereof, by any foreign government; and he may, for the purpose of taking possession, and occupying the territory aforesaid, and in order to maintain therein the authority of the United States, employ any part of the army and navy of the United States which he may deem necessary.[53]

The United States had occupied West Florida (as far east as the Pearl River) under this authority on the eve of the War of 1812. The international repercussions of this event were so ominous that Monroe, as Madison's Secretary of State, disavowed responsibility.[54] At that point, of course, the inflammatory statute had not been published.

Although it is difficult to suppose that McGregor's regime constituted a "foreign power" or a "foreign government" within the intendment of Congress—indeed the United States had been assured by Great Britain that it would not take over any Spanish Colonies[55]—President Monroe reported to Congress on January 13, 1818:

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53 3 Stat. 471 (1818).
54 *See* S. BEMIS, *supra* note 51, at 314.
55 *Id.* at 304.

> The path of duty was plain from the commencement, but it was painful to enter upon it while the obligation could be resisted. The law of 1811, lately published, and which it is therefore proper now to mention, was considered applicable to the case from the moment that the proclamation of the chief of the enterprise was seen, and its obligation was daily increased by other considerations of high importance already mentioned, which were deemed sufficiently strong in themselves to dictate the course which has been pursued.[56]

The President carefully put the justification for his action on another ground as well—Spain's inability to exercise effective control over her territory, to prevent its use for purposes hostile to the interests of the United States.

> For these injuries, especially those proceeding from Amelia Island, Spain would be responsible if it was not manifest that, though committed in the latter instance through her territory, she was utterly unable to prevent them. Her territory, however, ought not to be made instrumental, through her inability to defend it, to purposes so injurious to the United States. To a country over which she fails to maintain her authority, and which she permits to be converted to the annoyance of her neighbors, her jurisdiction for the time necessarily ceases to exist. The territory of Spain will nevertheless be respected so far as it may de done consistently with the essential interests and safety of the United States.[57]

During the same year as the Amelia Island expedition, Monroe ordered General Andrew Jackson to proceed into Spanish Florida to put down the Seminoles, who were raiding settlements in Georgia from bases in Spanish Florida, with some encouragement and technical assistance from English advisers who may or may not have represented the British government.[58] The President justified his course—without benefit of any statute—under the international law allowing reprisals by way of self-defense in time of peace.

> We have seen with regret that her Government has altogether failed to fulfill this obligation, nor are we aware that it made any effort to that effect. When we consider her utter inability

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[56] 2 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 24 (1898).

[57] *Id.* at 24-25.

[58] H. AMMON, *supra* note 51, at 414-30, 567-69; S. BEMIS, *supra* note 51, at 313-16, 326, 339. The episode gave rise to a bitter and unresolved controversy about whether Jackson had exceeded his orders, and whether Monroe's disavowal of Jackson's action was an aspect of his own diplomatic tactics. Bemis comments that "Monroe had done this sort of thing more than once before." *Id.* at 314.

> to check, even in the slightest degree, the movements of this tribe by her very small and incompetent force in Florida, we are not disposed to ascribe the failure to any other cause. The inability, however, of Spain to maintain her authority over the territory and Indians within her limits, and in consequence to fulfill the treaty, ought not to expose the United States to other and greater injuries. When the authority of Spain ceases to exist there, the United States have a right to pursue their enemy on a principle of self-defense. In this instance the right is more complete and obvious because we shall perform only what Spain was bound to have performed herself. To the high obligations and privileges of this great and sacred right of self-defense will the movement of our troops be strictly confined.[59]

Monroe was fortunate in that Castlereagh was still British Minister of Foreign Affairs during the second round of the Florida affair. Under Castlereagh, British policy was "to appease controversy and to secure if possible for all states a long interval of repose."[60] Castlereagh had a quite special sense as well of the overriding long-term importance of Anglo-American friendship and collaboration, a subject to which he devoted imaginative attention.[61] Despite the hypersensitive feelings of popular animosity on both sides of the ocean which plagued Anglo-American relations then and for a long time thereafter, Castlereagh was able to pass off Andrew Jackson's invasion of Florida lightly, although Jackson had hanged two Englishmen for inciting the Indians to attack. Sir Charles Webster concludes that "in the delicate question of the Floridas . . . the indefensible conduct of Andrew Jackson in 1819 produced a situation which, in the hands of a diplomatist less zealous in the cause of peace than Castlereagh, would undoubtedly have resulted in war."[62] Our Ambassador in London, Richard Rush, believed that "had the English Cabinet felt and acted otherwise than it did, such was the temper of Parliament and such the feeling of the country [that] *war might have been produced by holding up a finger.*"[63]

Assisted by Castlereagh's forbearance, Monroe's plan had its in-

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59 2 J. RICHARDSON, *supra* note 56, at 31-32.

60 2 C. WEBSTER, THE FOREIGN POLICY OF CASTLEREAGH 449 (2d ed. 1934, reprinted 1963).

61 *Id.* at 437 ("Certainly no other British statesman did more to lay the foundation of the hundred years peace which few in either country at that time expected and certainly many did not desire."). For example, appreciating the depth of anti-British feeling in the United States, and the general American habit of "contentious discussion", as well as Adams' proclivities in that direction, Castlereagh instructed his Ambassadors in Washington to do as much business as possible with the American government through conversations, rather than notes. *Id.* at 438-39. *See* B. PERKINS, *supra* note 51, at 283-98.

62 C. WEBSTER, *supra* note 60, at 447-48.

63 *Id.* at 450.

tended result. Spain decided to negotiate, in the hope of avoiding American recognition of the new regimes in South America.[64]

The President's careful course was complicated by the ambitions of several aspirants to the Presidency, including John C. Calhoun, William H. Crawford, and Henry Clay. Clay denounced the invasion of Florida as an act of war by the President in violation of the Constitution,[65] and excoriated Andrew Jackson, whom he rightly viewed as a rival for the Presidency.[66] In the end, however, constitutional attacks in Congress on the President's authority with regard to recognition, the power to deal with territorial claims and annexations by treaty, and the hostilities in Florida were all beaten down.

The earlier history of our foreign affairs is replete with many episodes of comparable import. Without attempting to encapsulate that experience into a formula, it can be said, I believe, that its diversity reflects reasons inherent in the nature of the problem and of our polity. It matches the classification presented by Justice Jackson in his concurring opinion in the *Youngstown Sheet and Tube Co.* case:

> Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat over-simplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.
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> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
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> 2. 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

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64 S. BEMIS, *supra* note 51, at 308.
65 *Id.* at 315.
66 H. AMMON, *supra* note 51, at 422; S. BEMIS, *supra* note 51, at 315.

> 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. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. 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 powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[67]

The United States has used its armed forces abroad more than 150 times since 1789, and on many more occasions the President has threatened to use force. A declaration of "solemn war," fully invoking the international law of war, has been issued on only five occasions. Some of the remaining uses of force or the threat of force were undertaken pursuant to Congressional authority, although the experts debate about how many were actually responsive to prior Congressional action. In the rest, including some costly and extended campaigns, the President acted, formally at least, on his own constitutional authority.

A number of lists have been compiled, reaching different conclusions as to the number of episodes of hostilities in time of peace actually authorized in any meaningful sense by statute.[68] Naturally, any President will seek to invoke a statute as partial justification for his use of armed force, as Monroe did in 1818. But in many of these cases, the statute was in fact only vaguely and imperfectly linked to the event. Professor James Grafton Rogers, in his pioneer study of the subject, reached the conclusion that there were "only a dozen or two" instances of undeclared war possibly authorized by legislation.[69] In the most recent compilation of this kind, Senator Goldwater lists 153 military actions taken by the United States abroad without a declaration of war, of which he claims 63 were "arguably" initiated under prior legislative authority, 34 under a treaty, 26 under legislation, and, in the

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67 343 U.S. 579, 635-38 (1952).
68 *See* note 50 *supra*.
69 J. ROGERS, *supra* note 41, at 79.

case of Samoa in 1888-89 and 1899, Lebanon in 1958, and Vietnam, both under a treaty and under legislation implementing it.[70] Arguably, one could count the Cuban Missile Crisis of 1962 in this final category as well, although it is more realistic to classify that incident as an example of a use of force by the President alone.[71]

These lists include major events: Commodore Perry's expedition to Japan and those which followed it; the array of 50,000 troops in Texas during 1865 and 1866 to support our diplomatic suggestion that France withdraw from Mexico; the participation of American forces in the hostilities following the Boxer Rebellion in China in 1900-01; the suppression of revolt in the Philippines between 1899 and 1901; the hostilities with Mexico, between 1914 and 1917; the deployments and uses of force by Wilson and Franklin Roosevelt before both World Wars; and the occupations of Haiti, the Dominican Republic, and Nicaragua, to note only the more conspicuous.

This brief evocation of history suggests two conclusions.

First, the pattern against which the Javits Bill protests is old, familiar, and rooted in the nature of things. There is nothing constitutionally illegitimate or even dubious about "undeclared" wars. We and other nations fought them frequently in the eighteenth and nineteenth centuries, as well as in the twentieth. The charge that the practice is an unconstitutional invention of this century, or of Presidents McKinley, Wilson, Franklin Roosevelt, Truman, Kennedy, and Johnson is a myth.

In the development of the foreign relations power of the United States, and of the respective roles of President and of Congress in making foreign policy, and carrying it out, it is clear that certain functions are exclusively those of the President: for example, the power to negotiate with foreign nations; the power to recognize foreign governments; and the power to deploy troops, to command them in hostilities, and to conclude an armistice. Certain authority is shared between Congress and the President; for instance, the power to issue a declaration of neutrality. President Washington proclaimed our neutrality in 1793, after a considerable constitutional debate over his authority to do so in the absence of legislation on the subject. But a confirmatory statute was passed the next year. Congress has passed other neutrality statutes from time to time, and no President has claimed that they were unconstitutional. Only Congress can declare that a "formal" or "solemn" state of war exists; provide for calling up the militia; make rules concerning

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[70] *1971 Hearings*, *supra* note 1, at 359-79.
[71] *See* p. 839 & note 12 *supra*.

captures on land and water, and for the government and regulation of the armed forces; and appropriate funds for the armed forces.

Congress has the last word on matters of peace and war, but the President's authority goes far beyond that to repel sudden attacks, the example Madison gave to illustrate the desirability of changing the language in Article I Section 8 from "make war" to "declare war." As Professor Ratner says:

> But preeminent war-peace authority is not necessarily exclusive war-peace authority, although that congruence has been suggested by some executive and judicial statements. The ultimate decider should not always be the initial decider. Congressional action takes time. Invariably, the President confronts the problem first; may he as commander-in-chief order American forces to fight without waiting for congressional authorization?
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> The Constitutional Convention suggested the answer by approving the motion of Madison and Gerry to amend the congressional power by "insert[ing] '*declare,*' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks"—though the explanatory clause was not included in the constitutional text nor given the scrutiny of proposed inclusion. That clause thus recognized, but did not authoritatively delineate, the war-making authority of the President, implied by his role as executive and commander-in-chief and by congressional power to declare, but not make, war.
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> In 1787, "repel sudden attack" probably meant "resist invasion or rebellion." But constitutional policy for ensuing epochs is not congealed in the mold of 1787 referants. Such policy is derived from the long-range goals that underlie the constitutional language as illuminated by the Convention proceedings, from the implications of the language disclosed by resolution of subsequent problems, and from its function in the context of altered social needs. Aggression beyond the seas could not threaten Americans in the eighteenth century as it can in the twentieth. Underlying the constitutional language and the explanatory clause is a long-range purpose that authorizes the President to protect Americans from external force in an emergency.

Listing eight categories of purely Presidential use of force in time of peace under circumstances recognized as legitimate by international law, Ratner concludes:

> The amorphous distinction between offense and defense does not effectively delineate the scope of the President's emergency war power. In a world where increasingly mobile weapons enhance the advantage of military initiative, the

> distinction turns, for the most part, on an appraisal of motives and intentions. With his heavy load of responsibility, the President may sometimes conclude that offense is the best defense. As the foregoing examples indicate, presidentially-authorized hostilities are always ostensibly "defensive." And, though his characterization may be debatable, the President must necessarily be accorded a broad discretion.[72]

As to sustained hostilities in the absence of a declaration of war, the pattern of constitutional practice offers no sharp and formal lines. There are instances of Congressional action to authorize undeclared wars, and instances in which, nominally at least, Congress was silent. The practice, however, does justify a second general conclusion: It is an illusion to suppose, in the nature of our political system, that the formal silence of Congress on some of these occasions when force was used extensively represents a genuine opposition between Congress and the Presidency. The power of the United States to employ force or to carry on any other sustained policy can be exercised in fact only when Congress and the President cooperate, however unwillingly. The silences and the tacit arrangements of American politics are often more important than its nominal dispositions and documents.

In the closing days of his second Administration, for example, Cleveland, repudiated by his party, was functioning as a lame-duck President, waiting to transfer his office to McKinley. Congress, meanwhile, exercised by the revolution in Cuba and no doubt emboldened by the inherent weakness of the President's position, took a number of initiatives.

The Senate Foreign Relations Committee let it be known that it was proposing to report out the Cameron Resolution, which purported to recognize the independence of the Republic of Cuba. Cleveland's redoubtable Secretary of State, Richard Olney, commented:

> It is, perhaps, my duty to point out that the resolution, if passed by the Senate, can probably be regarded only as an expression of opinion by the eminent gentlemen who voted for it in the Senate, and if passed by the House of Representatives, can only be regarded as another expression of opinion by the eminent gentlemen who vote for it in the House.
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> The power to recognize the so-called Republic of Cuba as an independent state rests exclusively with the Executive.
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> A resolution on the subject by the Senate or by the House, by both bodies or by one, whether concurrent or joint, is

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72 Ratner, *supra* note 50, at 466-69.

> inoperative as legislation, and is important only as advice of great weight voluntarily tendered to the Executive regarding the manner in which he shall exercise his constitutional functions.
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> The operation and effect of the proposed resolution, therefore, even if passed by both houses of Congress by a two-thirds vote, are perfectly plain. It may raise expectations in some quarters which can never be realized. It may inflame popular passions, both in this country and elsewhere; may thus put in peril the lives and property of American citizens who are resident and traveling abroad, and will certainly obstruct and perhaps defeat the best efforts of this Government to afford such citizens due protection.
>
> But except in these ways, and unless the advice embodied in the resolution shall lead the Executive to revise conclusions already reached and officially declared, the resolution will be without effect and will leave unaltered the attitude of this Government toward the two contending parties in Cuba.[73]

The Cameron Resolution was reported out of Committee, but never put to a vote.

In the same period, a number of Congressional leaders called on President Cleveland to discuss an "important matter." They said,

> "We have about decided to declare war against Spain over the Cuban question. Conditions are intolerable."
>
> Mr. Cleveland drew himself up and said, "There will be no war with Spain over Cuba while I am President."
>
> One of the members flushed up and said angrily, "Mr. President, you seem to forget that the Constitution of the United States gives Congress the right to declare war."
>
> He answered, "Yes, but it also makes me Commander-in-Chief, and I will not mobilize the army. I happen to know that we can buy the Island of Cuba from Spain for $100,000,000, and a war will cost vastly more than that and will entail another long list of pensioners. It would be an outrage to declare war."[74]

The project died.

On the other side of the coin, the formal arrangements for carrying on the Korean War give a misleading impression. When South Korea was invaded in 1950, President Truman met several times with the Congressional leadership, as is customary, to consult with them about policy. As Dean Acheson reports the meeting of June 30:

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[73] H. JAMES, RICHARD OLNEY AND HIS PUBLIC SERVICE 168-69 (1923).

[74] 2 R. MCELROY, GROVER CLEVELAND, THE MAN AND THE STATESMAN 249-50 (1923).

> At eleven o'clock I returned to the White House for a meeting with congressional leaders, taking Foster Dulles, just back from Tokyo, with me. The congressional group was perhaps twice as large as the one at the Tuesday meeting. The President reported the situation in Korea, reviewed the actions previously taken by the United Nations Security Council and the United States Government, and the orders he had issued that morning. A general chorus of approval was interrupted by, I think, Senator Kenneth Wherry questioning the legal authority of the executive to take this action. Senator Alexander Smith suggested a congressional resolution approving the President's action. The President said that he would consider Smith's suggestion and asked me to prepare a recommendation. The meeting ended with Representative Dewey Short stating that Congress was practically unanimous in its appreciation of the President's leadership. Short was a Republican from the President's home state of Missouri and ranking minority member of the Armed Services Committee.[75]

After this meeting, according to Dean Acheson's recollection, Senator Taft, the Republican leader in the Senate, offered to support any Resolution the President should propose to put Congress firmly on record behind his actions, and those of the Security Council.[76]

A draft Resolution was prepared. Senator Smith asked for a delay while he took care of some urgent political problems in New Jersey. Acheson's account continues:

> My recommendation was that the President make a full report on the Korean situation to a joint session of Congress. This would, of course, be largely formal but would bring the whole story together in one official narrative and meet the objection of some members that information had come to them only through the leaders and the press. I also recommended that the President should not ask for a resolution of approval, but rest on his constitutional authority as Commander-in-chief of the armed forces. However, we had drafted a resolution commending the action taken by the United States that would be acceptable if proposed by members of Congress.
>
> In the ensuing discussion it appeared that the two houses of Congress had just recessed for a week and the President was unwilling to call them back. Senator Lucas, General Bradley, and Secretary Johnson were opposed to both recommendations: to the report because it would come too long after the events to stand by itself and had better accompany a request

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75 D. ACHESON, PRESENT AT THE CREATION 413 (1969).
76 Conversations of author with Dean Acheson, 1953, 1967.

for money and necessary powers; and to the resolution because the vast majority in Congress were satisfied and the irreconcilable minority could not be won over. They could, however, keep debating and delaying a resolution so as to dilute much of its public effect. The others were divided. My sympathies lay with the Lucas-Bradley view. So apparently did the President's, for he put off a decision until the "Big Four" (the presiding officers and majority leaders of both houses) would be back after the recess. By then we were pretty well won over to Senator Lucas' view.

There has never, I believe, been any serious doubt—in the sense of nonpolitically inspired doubt—of the President's constitutional authority to do what he did. The basis for this conclusion in legal theory and historical precedent was fully set out in the State Department's memorandum of July 3, 1950, extensively published. . . . But the wisdom of the decision not to ask for congressional approval has been doubted. To have obtained congressional approval, it has been argued, would have obviated later criticism of "Truman's war." In my opinion, it would have changed pejorative phrases, but little else. Congressional approval did not soften or divert the antiwar critics of Presidents Lincoln, Wilson, and Roosevelt. What inspired the later criticism of the Korean war was the long, hard struggle, casualties, cost, frustration of a limited and apparently inconclusive war, and—most of all—the determination of the opposition to end seemingly interminable Democratic rule.

Nevertheless, it is said, congressional approval would have done no harm. True, approval would have done none, but the process of gaining it might well have done a great deal. July—and especially the first part of it—was a time of anguishing anxiety. As American troops were committed to battle, they and their Korean allies under brutal punishment staggered back down the peninsula until they maintained only a precarious hold on the coastal perimeter around Pusan. An incredulous country and world held its breath and read the mounting casualties suffered by these gallant troops, most of them without combat experience. In the confusion of the retreat even their divisional commander, Major General William F. Dean, was captured. Congressional hearings on a resolution of approval at such a time, opening the possibility of endless criticism, would hardly be calculated to support the shaken morale of the troops or the unity that, for the moment, prevailed at home. The harm it could do seemed to me far to outweigh the little good that might ultimately accrue.

> The President agreed, moved also, I think, by another passionately held conviction. His great office was to him a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power to send our forces into battle. The memorandum that we prepared listed eighty-seven instances in the past century in which his predecessors had done this. And thus yet another decision was made.[77]

This experience did not prevent Senator Taft, at a later date, from attacking the constitutionality of Truman's decision to fight in Korea under his authority as President to ensure that the treaties of the United States be faithfully executed as the supreme law of the land.[78]

III. The Immediate Context of the Javits Bill

The modern controversies over the division of constitutional authority between Congress and the President with respect to military operations have a special intensity, which reflects the scale of American involvement in world politics since 1940, and the shock and controversy resulting from Korea and Vietnam.

Of course the nation faces foreign policy problems today altogether different from those it faced in 1800, or even in 1900. Between 1815 and 1914, we lived safely within a system of general peace maintained by the Concert of Europe. Our diplomacy, while active, was peripheral to the overriding problem of maintaining the balance of power which allowed the entire world to enjoy an extraordinary century without large scale war. That system broke down in 1914, and collapsed finally in 1945, imposing on the United States for the first time direct responsibility for protecting its primal security as a nation by direct and continuous involvement in world politics.

It does not follow that we live in a world where Presidential primacy in the making of American foreign policy is inevitable, or desirable. All but a few believe that under the Constitution Congress should play an active, responsible, and indeed the ultimate role in making foreign policy. Certainly I am no friend of unlimited Presidential discretion to decide when the nation should go to war.

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77 D. Acheson, *supra* note 75, at 414-15. *See also* 2 H. Truman, Memoirs, Years of Trial and Hope 331-48, 409-10, 420-26, 478 (1956).

78 Taft, *The Place of the President and Congress in Foreign Policy*, in A Foreign Policy for Americans ch. 2 (1951), reprinted in *1970 Hearings*, *supra* note 1, at 557.

The circumstances of modern world politics, however, require Presidents to act quickly, and often alone. They continue to face the delicate problems of diplomatic judgment which John Adams confronted in seeking to protect American shipping without full scale war with France; which Madison and Monroe faced in trying to solve the problem of Florida without precipitating war with Spain or England; which Cleveland met in seeking to avoid war with Spain over Cuba; and comparable dilemmas which have plagued nearly all our Presidents.

That fact does not preclude the possibility of effective cooperation between Congress and the President. Congress should be able to act effectively both before and after moments of crisis or potential crisis. It may join the President in seeking to deter crises by publicly defining national policy in advance, through the sanctioning of treaties or other legislative declarations. Equally, Congress may participate formally in policymaking after the event through legislative authorization of sustained combat, either by means of a declaration of war, or through legislative action having more limited legal and political consequences. Either of these devices, or both in combination, should be available in situations where cooperation between the two branches is indicated at many points along an arc ranging from pure diplomacy at one end to a declaration of war at the other.

The constitutional storm which has given rise to the Javits Bill began shortly after the Korean War. As noted earlier, the United States acted formally in Korea under the United Nations Charter, viewed as a Treaty of the United States, and under the President's inherent constitutional powers in carrying out that Treaty obligation, without benefit of a formal, direct vote by Congress.

The legal posture of American intervention in Korea aroused genuine constitutional concern.[79] There was anxiety at the apparent authority of the Security Council, an international body sitting in New York, to take a vote that would bind the United States to go to war —concern about sovereignty, and concern, too, about the seemingly unlimited powers of the President in relation to those of the Congress. There was, of course, repeated Congressional support for various aspects of the Korean War and for the war itself through appropriations statutes and otherwise. But the war became unpopular and was a decisive factor both in Truman's decision not to seek a second term and in the elections of 1952.

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[79] *See* pp. 867-870 & note 77 *supra*.

Although Senator Bricker's proposals for a constitutional amendment failed, President Eisenhower responded to the outcry by developing the practice of making many treaties embodying national security commitments, and obtaining Congressional Resolutions authorizing him to employ the armed forces in the Mediterranean, and the Formosa Straits, a practice pursued thereafter with regard to Berlin, Cuba, and Vietnam.[80] These formal modes of cooperation between Congress and the Presidency constitute the immediate legal context of our involvement in Vietnam, and of the debates which have resulted in the Javits Bill.

From the point of view of the constitutional argument over the respective war powers of the President and Congress, our engagement in Vietnam rests first on the South East Asia Collective Defense Treaty, generally known as SEATO. The Treaty was negotiated and ratified shortly after the Geneva Conference of 1954, as part of a general strategy of containing the consequences of French defeat in Indo-China, and limiting the outward thrust of Communist bids for power in Malaysia, the Philippines, and Korea, as well as in Indo-China.[81] Under that Treaty, the United States, Australia, France, New Zealand, Pakistan, the Philippines, Thailand, and the United Kingdom became guarantors against direct and indirect aggression not only for the three non-communist successor states of French Indo-China, but for South East Asia as a whole.

In the preamble to the Treaty, the signatories declared their sense of unity publicly and formally, as notice to "any potential aggressor" in the area. In Article II, they undertook, "separately and jointly," to "maintain and develop their individual and collective capacity to resist armed attack and to prevent and counter subversive activities

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80 *See* note 9 *supra*. President Johnson has said,

> I was determined, from the time I became President, to seek the fullest support of Congress for any major action that I took, whether in foreign affairs or in the domestic field. I believed that President Truman's one mistake in courageously going to the defense of South Korea in 1950 had been his failure to ask Congress for an expression of its backing. He could have had it easily, and it would have strengthened his hand. I had made up my mind not to repeat that error, but always to follow the advice I myself had given President Eisenhower.

L. JOHNSON, *supra* note 13, at 115 (1971).

In the event, of course, Dean Acheson's judgment, pp. 868-870 *supra* turned out to rest on a more realistic appreciation of human fallibility. "Johnson's War" joined "Truman's War" and "John Adams' Undeclared War" in the demonology of American politics. In 1964 and 1965, Johnson often said that he knew that if he wanted Congress with him at the landing, it should be with him at the take-off. He remarked later that he had not counted on the availability of parachutes.

81 Southeast Asia Collective Defense Treaty, Sept. 8, 1954, [1955] 1 U.S.T. 81, T.I.A.S. No. 3170. *See* C. COOPER, THE LOST CRUSADE: AMERICA IN VIETNAM (1970); R. RANDLE, GENEVA 1954 (1969).

directed from without against their territorial integrity and political stability." The first paragraph of Article IV provides that "*each* party recognizes that aggression by means of armed attack in the treaty area against any of the Parties" (or against states or territories designated in the protocol to the Treaty, which lists Laos, Cambodia, and what is now South Vietnam, if they choose to be protected) "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" (italics added). In contrast to the individual and categorical obligation of paragraph 1, paragraph 2 provides that if threats or problems other than armed attacks arise, "the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense."[82]

While SEATO has had a checkered history as an international organization, the Treaty did put the United States squarely into the Southeast Asian picture. As Chester Cooper points out, "it was a commitment, albeit one considerably less robust than was originally conceived, to involve the United States in the security and economic development of the countries in that area—a part of the world which until 1954 had been pretty much left to the British and the French."[83]

The United States government has based its policy in Vietnam on the SEATO Treaty, as well as on South Vietnam's inherent right of self-defense, and our right under the U.N. Charter to assist South Vietnam in that defense.[84] For example, President Eisenhower noted in

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82 For the formal relation between SEATO and the Geneva arrangements see R. RANDLE, *supra* note 81, at 539-41.

83 C. COOPER, *supra* note 81, at 114.

84 In the perspective of international law, two related arguments are raised against the American course in Vietnam:—(1) the Vietnamese war is a civil war, internal to the conceptual state, or nation, of "Vietnam"; and (2) the North Vietnamese attack on South Vietnam is justified because no referendum on unifying North and South Vietnam was held in 1956, as contemplated by the Declaration issued at the end of the Geneva Conference in 1954.

The war in Vietnam is not a civil war, but an international war. Two Vietnamese states emerged from the Geneva Conference, and the years of fighting which preceded it. It was clearly understood at Geneva that Vietnam, like Germany and Korea, was a nation divided against its will by the circumstances of the Cold War, and that its reunification, like that of Germany and Korea, would have to come through political agreement, not war.

C. COOPER, *supra* note 81, at 98, 100; R. RANDLE, *supra* note 81, at 429, 444-46. North and South Vietnam are political entities—two states within a single nation, to borrow Chancellor Brandt's phrase—entitled to all the normal rights of states, and entitled also to the protection of the United Nations Charter.

This protection was not suspended by the unsigned Declaration issued at the end of the Geneva Conference—a document that had even nominal support only from four of the nine participants in the Conference. That document cannot authorize North Vietnam to attack South Vietnam, or, if one prefers, to assist revolutionaries within South Vietnam, because no referendum on the possible unification of the two states was held in 1956. South Vietnam did not accept the Declaration of Geneva, and the United States formally

a formal statement in 1957 that South Vietnam is covered by the Treaty, and said "that aggression or subversion threatening the political independence of the Republic of Vietnam would be considered as endangering peace and stability" within the meaning of that document.[85] The theme has been sounded in official speeches and statements ever since. Both Congress and four Presidents have repeatedly concluded that North Vietnam's participation in the war against South Vietnam constitutes "armed attack" within the meaning of Article IV of the Treaty.

The commitment of SEATO was later reiterated, so far as the United States is concerned, in the Tonkin Gulf Resolution, passed in 1964. That Resolution, which has since become a matter of considerable controversy, says:

> 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 of protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.[86]

The Resolution stated the full support and approval of Congress for the President to take all necessary measures to protect our own forces, "and to prevent further aggression."

In a colloquy with Senator Cooper, Senator Fulbright explained that the passage of this Resolution fulfilled the provision of the SEATO Treaty requiring each nation to carry out its obligations under the

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refused to adhere to it. In any event, the failure to hold such elections, or otherwise to unify the two halves of a divided country by political means, could hardly justify its unification by force, even where unification has been promised by the Great Powers, as is the case for Korea and Germany as well as Vietnam. This is precisely what the Security Council decided in 1950 when it held that North Korea had violated the Charter by attacking South Korea; that South Korea was therefore justified in exercising its inherent rights of self-defense assured by Article 51 of the Charter; and that other nations were allowed—indeed required—to assist South Korea collectively in that defense. *See* E. ROSTOW, PEACE IN THE BALANCE ch. 5 (1972, in press); E. ROSTOW, LAW, POWER AND THE PURSUIT OF PEACE 60-67 (1968). For further examination of the justification for American policy in Vietnam as a matter of international law, see J. MOORE, LAW AND INDOCHINA WAR (1972); and materials cited in notes 28 & 50 *supra*.

85 Foreign Policy and Foreign Aid, 36 DEP'T STATE BULL. 851, 852 (1957). *See also* Address by President Eisenhower, The Importance of Understanding, 40 DEP'T STATE BULL. 579-83 (1959); SENATE COMM. ON FOREIGN RELATIONS, BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM, 91st Cong., 2d Sess. 184-91, 208-14, 218-35 (Comm. Print 6th rev. ed. 1970).

86 H.R.J. Res. of Aug. 10, 1964, Pub. L. No. 88-408, § 2, 78 Stat. 384. Section 3 of the Resolution provides that it may be terminated by concurrent resolution of the Congress.

Treaty through its own constitutional processes. That exchange is so central to the present debate as to require its full reproduction here:

> MR. COOPER. I ask these questions for two reasons: One is to get the opinion of the chairman of the Foreign Relations Committee and of the chairman of the Armed Services Committee as to the extent of the powers that are given to the President under the resolution. The second is to distinguish between a situation in which we act in defense of our own forces, in which without question we would risk war, and the commitment to defend South Vietnam.
>
> My first question goes to the first section of the resolution —the operative part which, as the chairman has said, applies to any armed attack or any aggression directed against the forces of the United States.
>
> MR. FULBRIGHT. That is correct.
>
> MR. COOPER. In that case, of course, we confirm the power that the President now has to defend our forces against an immediate attack.
>
> MR. FULBRIGHT. The Senator is a very distinguished lawyer, and I therefore hesitate to engage in a discussion with him on the separation of powers and the powers of the President. We are not giving to the President any powers he has under the Constitution as Commander in Chief. We are in effect approving of his use of the powers that he has. That is the way I feel about it.
>
> MR. COOPER. I understand that, too. In the first section we are confirming the powers.
>
> MR. FULBRIGHT. We are approving them. I do not know that we give him anything that he does not already have. Perhaps we are quibbling over words.
>
> MR. COOPER. We support and approve his judgment.
>
> MR. RUSSELL. Approve and support.
>
> MR. FULBRIGHT. Approve and support the use he has made of his powers.
>
> MR. COOPER. The second section of the resolution goes, as the Senator said, to steps the President might take concerning the parties to the Southeast Asia Collective Defense Treaty and the countries under the protocol—which are, of course, Laos, Cambodia, and South Vietnam. 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 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

93-626 O - 73 - 31

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. That is the reason for the third section.

MR. COOPER. I ask these questions—

MR. FULBRIGHT. The Senator is properly asking these questions.

MR. COOPER. I ask these questions because it is well for the country and all of us to know what is being undertaken.

Following up the question I have just asked and the Senator's answer, I present two situations that might arise.

Under the first section of the joint resolution, the President is supported and approved in action he may take "to repel any armed attack against the forces of the United States and to prevent further aggression."

It has been reported that we have already sent our planes against certain ports in North Vietnam. I am sure that the reason is "to repel armed attack and to prevent further aggression" against U.S. forces.

Under section 2, are we now providing the President, if he determines it necessary, the authority to attack cities and ports in North Vietnam, not primarily to prevent an attack upon our forces but, as he might see fit, to prevent any further aggression against South Vietnam?

MR. FULBRIGHT. One of the reasons for the procedure provided in this joint resolution, and also in the Formosa and Middle East instances, is in response, let us say, to the new developments in the field of warfare. In the old days, when war usually resulted from a formal declaration of war—and that is what the Founding Fathers contemplated when they included that provision in the Constitution—there was time in which to act. Things moved slowly, and things could be seen developing. Congress could participate in that way.

Under modern conditions of warfare—and I have tried to

describe them, including the way the Second World War developed—it is necessary to anticipate what may occur. Things move so rapidly that this is the way in which we must respond to the new developments. That is why this provision is necessary or important. Does the Senator agree with me that this is so?

MR. COOPER. Yes, warfare today is different. Time is of the essence. But the power provided the President in section 2 is great.

MR. FULBRIGHT. This provision is intended to give clearance to the President to use his discretion. We all hope and believe that the President will not use this discretion arbitrarily or irresponsibly. We know that he is accustomed to consulting with the Joint Chiefs of Staff and with congressional leaders. But he does not have to do that.

MR. COOPER. I understand, and believe that the President will use this vast power with judgment.

MR. FULBRIGHT. He intends to do it, and he has done it.

MR. COOPER. I do not wish to take more time now, because the distinguished Senator from Georgia wishes to speak, and I want to hear him.

MR. FULBRIGHT. I have no doubt that the President will consult with Congress in case a major change in present policy becomes necessary.

MR. COOPER. I will speak further later in the day. I wish to say this now: I know it is understood and agreed that in the defense of our own ships and forces any action we might take to repel attacks could lead to war, if the Vietnamese or the Chinese Communists continued to engage in attacks against our forces. I hope they will be deterred by the prompt action of the President.

We accept this first duty of security and honor. But I would feel untrue to my own convictions if I did not say that a different situation obtains with respect to South Vietnam. I know that a progression of events for 10 years has carried us to this crisis. Ten years have passed and perhaps the events are inevitable now, no one can tell. But as long as there is hope and the possibility of avoiding with honor a war in southeast Asia—a conflagration which, I must say, could lead into war with Communist China, and perhaps to a third world war with consequences one can scarcely contemplate today—I hope the President will use this power wisely with respect to our commitments in South Vietnam, and that he will use all other honorable means which may be available, such as consultations in the United Nations, and even with the Geneva powers.

We have confidence in the President and in his good judgment. But I believe we have the obligation of understanding

> fully that there is a distinction between defending our own forces, and taking offensive measures in South Vietnam which could lead progressively to a third world war.
>
> MR. FULBRIGHT. The question concerns the kind of actions taken in this instance. I think the President took action that is designed to accomplish the objective the Senator from Kentucky has stated. That is what I have tried to make clear. I join in the Senator's hope that all-out war can be avoided.[87]

Whether Congressional action of this kind is necessary under the American Constitution, or whether the President can properly act alone in carrying out Treaty obligations, as President Truman did in Korea, remains a matter for debate. As Senator Cooper writes in his candid and thoughtful statement of Individual Views with respect to the Javits Bill:

> I consider it important that the words "constitutional processes" used in existing and in any future bilateral or multilateral defense treaties to which the United States may become a party, be interpreted in S. 2956 to affirmatively require that the engagement of United States forces in hostilities beyond the emergency authority of the Executive shall not be undertaken without the approval of the Congress. This is the purpose of the first amendment which I have discussed above in this statement.
>
> Existing post-World War II defense treaties are under attack today, and I think it proper to recall the background and events under which they were entered into following World War II, and to state that at the time they had practically unanimous support of the Congress, the news media, and the people.
>
> The collapse of Nazi Germany brought the Soviet armies into Eastern Europe at the close of World War II. The Communist coup in Czechoslovakia in 1948, the fall of Nationalist China, the attack upon South Korea and the possibility of a thrust from Communist China toward Southeast Asia, caused great concern in the United States, Europe and Southeast Asian countries as to their security and led to the negotiation of the treaties. There were 8 of these treaties and they included 43 nations. Among them are NATO, SEATO, ANZUS, Inter-American, and bilateral treaties with Japan, Korea, the Philippines and Nationalist China.
>
> While these treaties differ in certain respects—particularly NATO, which recites that an attack upon a vast area defined by the treaty shall be considered an attack upon all the parties—they are similar in substance. Typical is the language

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[87] 110 CONG. REC. 18409-10 (1964).

of the SEATO Treaty, which provides in Article I, Section 1, that:

> Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties . . . 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 process.

The term "constitutional processes" is not defined in the treaties. And the reports of the committees and the debates in the Congress on its meaning show disagreement, without definition. It was not settled whether the requirement of "constitutional processes" meant that the President, acting as Commander-in-Chief, could commit the forces of the United States to the military assistance of another treaty party, or meant that the President should consult with the Congress to determine jointly whether the commitment of military forces was essential to the security of the United States as well as that of other parties to the treaty and that the Executive would not commit our forces until the Congress had given its approval, either by a declaration of war or by a joint resolution.

During the Senate's consideration of the Korean Defense treaty in 1954, several Senators, including myself, but particularly Senator John Stennis and former Senator Watkins of Utah, insisted that the proper interpretation of the term "constitutional processes" as used in that treaty required the authorization of the Congress. There was no authoritative answer. I support such an interpretation.

The record of the hearing before the Senate Foreign Relations Committee and the debates in the Senate disclose that all of these treaties were approved by the Senate Foreign Relations Committee and the Senate with little opposition and without precisely determining the interpretation of "constitutional processes" and the commitment of the United States. Resolutions approved by Congress—some implementing certain of these treaties—uniformly provided to the Executive broad powers to involve the armed forces of the United States in hostilities, whether in the administrations of Presidents Truman, Eisenhower, Kennedy or Johnson. President Eisenhower was particularly insistent upon Congressional approval for military movements that might have involved the United States in a war. He was supported by Secretary of State John Foster Dulles who stated, in response to Committee inquiries, that the Executive would seek approval by the Congress for any such involvement. No involvement in war occurred during the Administration of President Eisenhower.

> In fact, reservations offered in Committee and on the Senate floor during the consideration of several of these treaties, and amendments offered to Executive resolutions—Formosa, Middle East, Berlin, Cuba and Tonkin Gulf—to prohibit the use of the armed forces of the United States without Congressional approval were consistently opposed and rejected in the Foreign Relations Committee and in the Senate.
>
> I present these facts because I do not concur in one underlying theme of the Committee's report—which was never discussed in Committee and never voted on—that the Executive has taken from the Congress its powers. The record, if studied, discloses that the Congress, particularly since World War II, has not only acceded to but has supported Executive resolutions requesting Congressional authority to use the armed forces of the United States, if necessary, in hostilities.
>
> These are settled facts of history. We can change our course but we cannot revise and rewrite history.[88]

Naturally, in facing an issue of this kind, both Presidents and members of Congress will be sensitive to their prerogatives. No President will, or should, acquiesce in a diminution of the historical powers of his office. And Congress can be expected to insist, as best it can, on the claims which Senator Cooper puts forward. Thus far we have been able to devise forms of language which accommodate these conflicting principles in a pattern of cooperative action involving both Congress and the Presidency. For every participant, however proud, thoroughly understands, as Justice Jackson said, that the United States speaks with a stronger voice when the President and Congress act together.

Thus the Senate's action in consenting to the SEATO Treaty, and Congress' action in passing the Tonkin Gulf Resolution and several similar statutes, meant that in Vietnam Congress and the Presidency had acted together, both in giving solemn advance notice of American policy towards Vietnam, and in reaffirming that policy after hostilities began. So far as the constitutional proprieties are concerned, the American involvement in Vietnam occurred through a procedure which is a model for democratic decisionmaking. There is therefore no basis for the charge that the American course of action in Vietnam violates the

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88 WAR POWERS, *supra* note 1, at 30-32. The unsettled state of doctrine analyzed by Senator Cooper permitted some to indulge in a meaningless gesture of protest against the war in Vietnam by voting for the repeal of the Tonkin Gulf Resolution, while leaving the SEATO Treaty untouched. By accepting Truman's view of the matter—for the moment, at least—they could enjoy the best of both worlds. S. Con. Res. 64, 91st Cong., 2d Sess., 116 CONG. REC. 23496, 23710-46, 23965 (1970); SENATE COMM. ON FOREIGN RELATIONS, TERMINATION OF SOUTH EAST ASIA RESOLUTION, S. REP. No. 91-872, 91st Cong., 2d Sess. 13 (1970).

internal law of the United States, or arrogates power to the President at the expense of Congress. In this regard, the constitutional practice with regard to Vietnam was more punctilious and complete in pooling Congressional and Presidential power than that used in Korea.[89]

A. Sauve Qui Peut—*by Parachute: Exorcising the Tonkin Gulf Resolution*

Many attempts have been made to avoid the force of these facts in support of the claim that the actions of the United States in Vietnam are unconstitutional.

We can put to one side the erroneous view that Congress can authorize sustained hostilities only by "declaring" war. While this position has no support in constitutional history, it is surprisingly widespread in public opinion, and strongly colors popular, and even professional attitudes towards "undeclared" war.

A more serious basis for the charge of unconstitutionality with regard to Vietnam is the argument (a) that the constitutional processes of the United States require action by Congress as well as by the President before the obligation of the SEATO Treaty could be translated into action; and (b) that the Tonkin Gulf Resolution and other legislation of like effect can be ignored as public acts of the United States because Congress did not intend to authorize what was done, or was insufficiently informed, or acted hastily in passing these resolutions, or was deceived by the Executive Branch.

The first part of this contention is settled by Senator Cooper's analysis, quoted above. In passing the Tonkin Gulf Resolution, Congress was explicitly aware that it was closing the constitutional gap arguably left open by the procedure adopted in the Korean case, in

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[89] Professor Bickel has suggested elsewhere that President Truman's action in Korea had another constitutional base, the President's power to repel sudden attacks, which might distinguish Korea from Vietnam.

> I would add about Korea that it was a massive attack by organized armies across a previously established border. We had troops with a full-scale establishment in Japan, right across the ditch. Thus, the surmise that this was a venture which threatened the safety of an established American military presence seemed plausible.

The Power to Make War: A Debate Between Alexander M. Bickel and Eugene V. Rostow, 18 YALE L. REP. 3, 6 (1971-72). *See also 1971 Hearings, supra* note 1, at 552. This argument contradicts Professor Bickel's testimony before the Senate Foreign Relations Committee, and the theory and language of the Javits Bill, which would admit a Presidential power to repel sudden attacks only against the territory or armed forces of the United States, not those of the South Korea. *Id.* at 553, 558-59, 566, 572, 574. In any event, Professor Bickel's new contention surely proves too much. In 1968, it would have authorized the President to use force in Czechoslovakia, a country separated from the NATO military establishment in Germany by a land boundary—not even a "ditch."

which, nominally at least, the President acted alone in carrying out the United Nations Charter, viewed as a Treaty of the United States. Whether Congressional action was or was not constitutionally necessary to authorize the use of American military power in carrying out the commitments of the United States under the SEATO Treaty, it was made available, so that under either theory—that of President Truman or that of Senators Cooper and Stennis—the full array of American constitutional authority was formally deployed behind the campaign in Vietnam.

In his attacks on the constitutionality of the Vietnam War, Professor Velvel accepts this critical fact. He writes,

> As the text of the Resolution illustrates, any reasonable man must concede that, if one considers only the language of the Resolution and totally ignores the congressional intent expressed in its ample legislative history, its language is broad enough to authorize the President, in his sole discretion, to fight a large scale land, sea and air war on the continent of Asia.[90]

Like several other scholars, however, Professor Velvel contends that even where legislation is unambiguous, it is permissible, indeed necessary, to refer to its legislative history to determine its true scope. Selectively culling over the messages and debates of the time, and the explanatory comments made later by Senators who came to regret their vote, Velvel urges that the Resolution be given a narrower reading, as authorizing the President only to respond to the immediate attack which precipitated the Resolution.

This argument cannot survive a reasonably dispassionate reading of the debates in the House and Senate. Many were troubled. A few were opposed. All hoped another Korea could be avoided. But all who spoke knew exactly what they were authorizing, or opposing. As Senator Javits said, "We who support the joint resolution do so with full knowledge of its seriousness and with the understanding that we are voting [for] a resolution which means life or the loss of it for who knows how many hundreds or thousands . . . ."[91] "Who knows how

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[90] Velvel, *The War in Vietnam: Unconstitutional, Justiciable, and Jurisdictionally Attackable*, 16 KANSAS L. REV. 449, 473 (1968), reprinted in 2 FALK, *supra* note 28, at 651, 675. Wormuth, *supra* note 28, at 781, recognizes the Resolution as a "blank check," but argues principally that it is void as an impermissible delegation of legislative power. *See id.* at 781-99. The problem of delegation is discussed at pp. 885-892 *infra*.

[91] 110 CONG. REC. 18418 (1964). *See also id.* at 18406, 18410, 18419.

Professor Velvel's treatment of the debate on the Tonkin Gulf Resolution, and other Congressional votes in support of the Vietnam policy, is extraordinarily selective. For

many hundreds or thousands" of casualties is hardly a phrase to be applied to a limited reprisal for an attack on two naval vessels.

But Professor Velvel's argument for treating the Tonkin Gulf Resolution as a nullity is inadmissible for a more fundamental reason, even without invoking Justice Jackson's sardonic comment that some would look to the text of a statute only when its legislative history is ambiguous.

The Congress which passed the Tonkin Gulf Resolution and similar legislative declarations lived in the shadow of the long, bitter, and frustrating campaign of Korea. Of course neither the President nor any member of the Congress wanted to repeat that experience if it could possibly be avoided. Of course they hoped that a firm manifestation of American will would persuade the North Vietnamese government and those who supported it to accept the repeated offers of negotiation and

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example, he refers to an exchange between Senator Brewster and Senator Fulbright in these terms:

> At 112 [110] Congressional Record 18403 Senator Brewster said that he "would look with great dismay on the landing of large land armies on the continent of Asia." He therefore asked Senator Fulbright if the Resolution would approve "the landing of large American armies in Vietnam or China." Senator Fulbright replied, "There is nothing in the resolution, as I read it, that contemplates it. I agree with the Senator that that is the last thing we would want to do." Senator Fulbright, speaking for the Senate Foreign Relations Committee, continued by stating that everyone he had heard agreed that the United States must not become involved in an Asian land war and that the purpose of the Resolution was to deter the North Vietnamese from spreading the war. Senator Fulbright admitted that the *language* of the Resolution would not prevent the President from escalating the war, but he clearly indicated that this was not the congressional *intent*. The intent did not contemplate vast escalation, but deterrence of it.

Velvel, *supra* note 90, at 473-74, in 2 FALK, *supra* note 28, at 651, 675-76.

What Senator Fulbright said, in his exchange with Senator Brewster about the use of the armed forces on the continent of Asia, is this:

> There is nothing in the Resolution that, as I read it, contemplates it. I agree with the Senator that that is the last thing we would want to do. However, the language of the resolution would not prevent it. *It would authorize whatever the Commander in Chief feels is necessary. It does not restrain the Executive from doing it. Whether or not that should ever be done is a matter of wisdom under the circumstances that exist at the particular time it is contemplated. . . .*

110 CONG. REC. 18403 (1964) (emphasis added).

When President Johnson made his decision to send troops to Vietnam on a large scale in the spring of 1965, he sought and obtained another vote from Congress, through an appropriation bill accompanied by a message which said:

> This is not a routine appropriation. For each member of Congress who supports this request is also voting to persist in our effort to halt Communist aggression in South Vietnam. Each is saying that the Congress and the President stand united before the world in joint determination that the independence of South Vietnam shall be preserved and Communist attack will not succeed.

Message of May 4, 1965, in SENATE COMMITTEE ON FOREIGN RELATIONS, BACKGROUND INFORMATION RELATING TO SOUTHEAST ASIA AND VIETNAM, 89th Cong., 1st Sess. 219 (Comm. Print rev. ed. 1965).

The Committee Reports and debates associated with this appropriation make it clear that the vote was indeed a reiteration and reaffirmation of the policy and of its implementation. Comparable debates, and votes, occurred in 1966 as well. These materials are magisterially reviewed in Moore & Underwood, *supra* note 50, at 15553-67.

compromise which the United States put forward, notably that contained in President Johnson's Baltimore speech of April 7, 1965.[92] But these men knew too that of all human enterprises, recourse to military power is the least susceptible to easy prediction or control. It is always replete with nasty surprises, disappointments, and setbacks, campaigns that could not possibly have been anticipated when the initial decision to use force was undertaken. They knew too that solemn and public declarations of this order are addressed not only to the American people, but to those of the world at large, friendly and unfriendly governments alike, who are required to rely on what Congress does, not on the private fears and reservations of some of the men who voted for a text which said what it said.

Nor can the argument of deception be given any weight in evaluating the legal effect of legislation. Astute and worldly men who spoke and voted for SEATO, the Tonkin Gulf Resolution, and other legislative steps into the Vietnam War now claim that they were brainwashed, and that we should therefore treat public acts of the United States as if they never happened. Washington is a living society, not a series of closed enclaves labelled "legislative" and "executive." The atmosphere of that society consists of far more than formal messages and texts, testimony and votes. Congressmen and Senators live in a maze of information, rumor, speculation, and gossip, the product of continuous processes of consultation, leakage, and seepage between the executive and the legislative branches at all levels, as well as the table talk of journalists, ambassadors, and other regular and occasional members of the community—consultants, members of advisory committees, and so on. The key Congressmen and Senators responsible for the passage of the Tonkin Gulf and other Vietnam Resolutions knew what the executive branch knew when they voted. For some of these men to claim now that they were brainwashed is not only unseemly, but incredible.

As the basis for an argument that would justify the courts or anyone else in ignoring these Resolutions, the claim ranks with the historic efforts to treat the fourteenth amendment as a nullity because it was ratified by a number of state legislatures which met in the coercive presence of an army of occupation, and in some instances were elected by dubious and indeed fraudulent procedures. Many of these contentions are true, but a public act of the United States stands on its own

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92 1 PUBLIC PAPERS OF THE PRESIDENTS: LYNDON B. JOHNSON 394, 396 (1966).

foundations, officially and legally, and cannot be collaterally attacked on such grounds.

B. Undue Delegation of Legislative Authority

Professors Velvel, Wormuth, and Bickel advance another contention in their effort to exorcise the Tonkin Gulf Resolution and other legislation supporting the war in Vietnam. To them, the cycle of Presidential, Senatorial, and Congressional decisions with regard to Vietnam, regularly renewed over a period of more than sixteen years, is insufficient to satisfy what they regard as the unambiguous requirements of constitutional orthodoxy. Through a process of reasoning worthy of Justice Black in his most fundamentalist moments, they argue that, save for minor exceptions, hostilities can be authorized only by Congressional action *at the time they begin*, and then by delegations narrowly limited in scope. In their opinion, neither a treaty nor a congressional resolution can authorize a President to use force *in advance of the event*. Such provisions, they argue, unconstitutionally delegate legislative power to the President, because they are not suitably limited to the circumstances of the event which gave rise to the resolution—in the case of the Tonkin Gulf Resolution, the attack on American naval vessels in the Gulf of Tonkin.[93]

The Javits Bill does not accept this theory. Indeed, to Professors Velvel, Wormuth and Bickel, the Javits Bill is as unconstitutional as the Tonkin Gulf Resolution itself.[94] For the Javits Bill concedes that an explicit and advance Congressional authorization of the President's use of force is constitutionally proper, provided it is voted after the passage of the Javits Bill and explicitly exempts the authorization from its restrictions or, if voted before the passage of the Javits Bill, is sufficiently "specific." As a practical matter, the sponsors of the Javits Bill could hardly embrace the Velvel-Wormuth-Bickel theory of delegation. If congressional resolutions or other acts, like those for Formosa, United Nations participation, the Middle East, Berlin, and the expansion of Castro's power, were nullities whose operative provisions had to be repeated every time a President wanted to put them into action, it would be impossible for Congress and the President to cooperate at all

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93 Velvel, *supra* note 90, at 478, in 2 FALK, *supra* note 28, at 651, 680; Wormuth, *supra* note 28, at 780-99; *1971 Hearings*, *supra* note 1, at 549, 554-55, 560-63 (testimony of Alexander M. Bickel). "[T]he 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." *Id.* at 563.

94 *See* testimony cited in note 93 *supra*.

in planning and formulating foreign policy in a way that would be credible.

Velvel, Wormuth, and Bickel discover the source of their rule in what they regard as the original intent of the men who gave Congress the power "to declare war," despite 182 years of opinion and practice to the contrary. The principle of full legislative control of the military power, they argue, precludes much Presidential discretion, and requires Congressional action only at the ritual moment, and then only in terms addressed to defined circumstances. Advance approval for the use of force they regard as a transfer to the President of a power Congress cannot yield even for a moment, even though it retains full authority to change the course of the nation thereafter by repealing, modifying, or reversing its policy, and the President's.

These scholars do not of course claim that Congressional support for the use of force by the President can be given only through a document labelled a "Declaration of War." Nor do they quite deny that the President has some inherent and independent power to use the force of the nation in aid of his conduct of foreign relations, as commander-in-chief of the armed forces, and as chief executive, charged with ensuring that the laws and treaties of the United States be faithfully executed. Without clarifying their views on these questions, however, and above all without considering the constitutional propriety of the Korean War, Wormuth and Bickel in particular conclude that the Tonkin Gulf Resolution, explicitly passed to reinforce and reiterate the policies of the SEATO Treaty, should be regarded as violating the principle they propose.

Actually, the Tonkin Gulf Resolution would appear to be beyond censure even under Bickel's extraordinary rule, since there had been some use of force by the United States in Vietnam, and Congress knew more was being considered at the time the Resolution was passed. Furthermore, the Tonkin Gulf Resolution would seem to contain suitably practical and defined standards to channel and confine the President's authority: it was addressed to what Congress and the President had found to be an "armed attack" by North Vietnam on South Vietnam within the meaning of the SEATO Treaty; and it could be terminated by Congress through a concurrent resolution, that is, without risk of veto. It is hard to conceive of a more precise or controlled "delegation" than one to help defeat a particular attack by one named state against another, pursuant to a policy already embodied in a Treaty.

More broadly, however, the Velvel-Wormuth-Bickel delegation

argument falls before a series of Supreme Court decisions going back at least to *Martin v. Mott*,[95] upholding standing delegations of discretion to the President in areas close to those of his independent constitutional responsibilities, and in areas of purely Congressional concern as well.

In advancing the argument that the Tonkin Gulf Resolution constitutes an unconstitutional delegation of Congress' power to declare war—which is assumed to include an equally unique power to authorize undeclared war—the commentators, especially Professor Bickel, place some reliance on *Kent v. Dulles*.[96] That important case considered the legality of denying a passport to Rockwell Kent on the ground that he was a member of the Communist Party. The basic statute on the subject goes back to 1856, and provides that "the Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify such passports." In modern times the passport has become an important facility of international travel, and indeed a 1952 statute purports to make it unlawful for a citizen to depart from or enter the United States without a valid passport.

The Supreme Court upheld Kent's right to a passport, in an opinion which did not reach the question of constitutionality. Starting with the premise that the right to travel was an aspect of liberty protected by the Fifth Amendment, the court hesitated to infer from a pattern of longstanding administrative practice, which it found ambiguous at best, a Congressional purpose to authorize so drastic a curtailment of the liberty of the citizen. Interpreting the statute to avoid constitutional doubts, the court concluded that it should not construe Congressional silence to permit the Secretary to deny passports to individuals on the basis of their political opinions or associations. "If we were dealing with political questions entrusted to the Chief Executive by the Constitution," the Court said, "we would have a different case."[97] *Kent v. Dulles*, the court wrote, was concerned only with the personal right of the citizen to travel:

> If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. . . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. . . . Where activities or enjoyment, natural and often necessary to the well-being of an American citizen,

[95] 25 U.S. (12 Wheat.) 19 (1827).
[96] 357 U.S. 116 (1958). *See 1971 Hearings*, *supra* note 1, at 555.
[97] 357 U.S. 116, 129 (1958).

> such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. . . . We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen. . . . We only conclude that § 1185 and § 211a do not delegate to the Secretary the kind of authority exercised here.[98]

The limits of *Kent v. Dulles* were explored in *Zemel v. Rusk*,[99] considering the same statute, in the context of the same argument that Congress had acquiesced through silence in a long-standing pattern of administrative practice in construing and applying the passport act. *Zemel* dealt with the Secretary of State's refusal to validate a citizen's passport for travel to Cuba during 1962, a tense period in Cuban-American relations culminating in the Cuban Missile Crisis. In 1961 the Department of State had issued regulations requiring passports for travel to Cuba, and the specific endorsement of such passports by the Department before a citizen could travel to Cuba. Mr. Zemel said the purpose of his trip was "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen."[100]

Reviewing the history of periodic restraints of travel to areas of war, pestilence, famine, or disorder since 1915—that is, both before and since the reenactment of the statute of 1856 in 1926—the Court upheld the Department's position. The issue of statutory construction in *Kent*, the court said, was "whether a citizen could be denied a passport because of his beliefs or associations."[101] In *Zemel*, however, the issue before the court, as a question of both statutory interpretation and constitutional law, was whether the Secretary could refuse to validate a citizen's passport for travel to Cuba "because of foreign policy considerations affecting all citizens."[102]

The Court concluded that the history of the problem justified the inference that the statute did delegate to the President an unreviewable discretion to restrict travel to areas where for reasons of foreign policy,[103] and indeed for weighty considerations of national security,[104] unlimited travel by citizens could "directly and materially interfere with the safety and welfare of the area or the Nation as a whole."[105]

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98 *Id.*
99 381 U.S. 1 (1965).
100 *Id.* at 4.
101 *Id.* at 13.
102 *Id.*
103 *Id.* at 15.
104 *Id.* at 16.
105 *Id.* at 15-16.

In *Zemel*, unlike *Kent*, the Court was therefore required to pass on the constitutional validity of such a delegation of legislative authority. It said:

> Finally, appellant challenges the 1926 Act on the ground that it does not contain sufficiently definite standards for the formulation of travel controls by the Executive. It is important to bear in mind, in appraising this argument, that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.
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> > "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 324.
>
> This does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice. However, the 1926 Act contains no such grant. We have held, *Kent* v. *Dulles*, *supra*, and reaffirm today, that the 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions "which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Kent* v. *Dulles*, *supra*, at 128. So limited, the Act does not constitute an invalid delegation.[106]

Thus, *Kent* and *Zemel* together would seem to confirm, not to challenge, the constitutional validity of the Tonkin Gulf Resolution.

The Courts have upheld other broad delegations of discretion to the President, including many in areas which are purely legislative in character and have no roots in one or another of the inherent powers of the Presidency: in the field of tariffs and of responsibility for banking, to take only two examples.[107] The distinction in *Zemel* between delega-

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[106] *Id.* at 17-18.

[107] 19 U.S.C. §§ 181, 1336-38 (1970) (tariff statutes delegating to the President power over rates and duties); 12 U.S.C. §§ 95-95a (1970) (President's emergency powers over banks).

tions in the field of domestic and of foreign affairs is frequently made, and certainly the conduct of foreign affairs requires the flexibility of broad discretion. Still, it is hard to imagine a "delegation" more complete than that of *Martin v. Mott*, for example, involving the President's power to call out the militia whenever he deems it desirable to do so. Generally speaking, the reasonableness of a delegation should be considered in relation to the nature of the problem Congress was trying to resolve, and its freedom within broad limits to select means which might conceivably contribute to the end it sought to achieve.[108]

No standard even reasonably close to the precedents and their reasoning provides support for the argument that the Tonkin Gulf Resolution can be treated as a nullity because it constitutes an unconstitutional delegation of legislative power. This cannot be the basis for Senator Fulbright's position that the war in Vietnam is "unconstitutional,"[109] since the Javits Bill, which he supports, contemplates the possibility that Congress and the President might well decide to use advance statutory authorizations for the use of armed force by the President.[110]

The argument of undue delegation fails for a deeper reason. It is at war with the "nature of things," those stubborn exigencies of the external world that Montesquieu rightly saw as the true source of law, the nature of things in the late eighteenth century and the nature of things now. The necessities of circumstance in dealing with the hurly-burly of the real world have produced a quite different pattern of practice since 1789, not less democratic than the model in the minds of Professors Bickel, Wormuth, and Velvel, but far more flexible, resourceful, and effective. To treat Resolutions like the Tonkin Gulf Resolutions as nullities would make it nearly impossible to associate Congress with the President in the articulation of an effective deterrent diplomacy. Such a rule would make foreign affairs even more exclusively the province of the President than is the case today.

In Marshall's classic words, echoing those of Hamilton in No. 23

See also Comment, *Federal Taxation and Economic Stability*, 57 YALE L.J. 1229, 1248-55 (1948).

108 E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 369-73 (1940) (a compilation of the discretionary powers of the President in 1940). *See also* E. CORWIN, *supra* note 30, at 119-30; K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.00 (1970 Supp.); Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561 (1947).

109 WAR POWERS, *supra* note 1, at 27; Fulbright, *Congress, the President and the War Power*, 25 ARK. L. REV. 71, 72 (1971). *See also* testimony of Alexander Bickel in *1971 Hearings*, *supra* note 1, at 566-77, 579.

110 S. 2956, 92d Cong., 2d Sess. § 3(4) (1972).

of *The Federalist*, the first rule in interpreting "those great powers on which the welfare of a nation essentially depends" is that

> [i]t must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. . . .[111]

Marshall had noted previously that

> [t]he power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.[112]

What Marshall wrote about the power of Congress to charter a bank in *McCulloch* v. *Maryland* applies even more emphatically to the respective roles of the President and Congress in exercising the great powers of the nation abroad, powers whose constitutional contours derive as much from international law and international life as from the deliberately few words of the document of 1787.

The American nation which entered the family of nations in 1776 was endowed in its external relations with all the attributes of sovereignty. The written constitution which went into effect in 1789 must be read, Justice Frankfurter has said, to recognize in the national gov-

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111 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415-16 (1819.)
112 *Id.* at 408.

93-626 O - 73 - 32

ernment "the powers indispensable to its functioning effectively in the company of sovereign nations."[113]

The delegation theory of Professors Velvel, Wormuth, and Bickel would deny the President and the Congress the most ordinary and elementary tools for protecting the nation in a time of international turbulence. Under their rule, we should be the only nation on earth incapable of making a credible military treaty. Their rule would make it impossible firmly to delineate American interests in advance, and thus to deter and contain processes of expansion which Congress and the President deem threatening to national security. It would emasculate both Congress and the Presidency, and deprive even treaties like NATO of their weight and credibility.

The Constitution, Justice Goldberg once said, is not "a suicide pact."[114] The war power, the Supreme Court has remarked, is the power to wage war successfully. So too, the power of the President and of the Congress over foreign relations is the power to wage peace successfully. There is nothing in the history of the war power and the foreign relations power, since President Washington's first term, to suggest that the United States may not seek to avert the danger of war by giving potential enemies of the nation a credible and effective warning in advance. *McCulloch v. Maryland* teaches that those who oppose the presumptive constitutional validity of the means Congress and the President together select as appropriate to protect the security of the nation face a nearly insuperable burden of proof.[115]

C. *The Political Question Doctrine*

It is sometimes claimed that the "political question" doctrine makes it impossible to reach final decisions—that is, "final" decisions by courts—on the constitutionality of procedures like those used by Presidents and Congress in Korea and Vietnam. This contention misconceives the political question doctrine. It is not, as some contend, a flexible and amorphous idea used by the Courts to avoid questions they do not wish to decide, although judges sometimes use it for this purpose. As Marshall made clear in *Marbury v. Madison*,[116] the doctrine is something quite different: that courts cannot and should not pass on the

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113 Perez v. Brownell, 356 U.S. 44, 57 (1958).
114 Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964).
115 17 U.S. (4 Wheat.) 316, 409-11 (1918).
116 5 U.S. (1 Cranch) 137 (1803).

propriety of decisions entrusted by the Constitution or the laws to the discretion of another branch of government.[117]

In *Marbury's* case, no court could have questioned the propriety of the President's decision to nominate Marbury rather than John Doe or Richard Roe; the Senate's vote in its absolute discretion to advise his appointment, and consent to it; or the President's final decision, having received a favorable vote from the Senate, to sign Marbury's commission, and have it sealed. The question became justiciable, the Court said, only because the political discretion of the President and the Senate was exhausted when the seal was affixed. At that moment, and not before, Marbury acquired a vested legal right, a property interest, in the office.

The question whether Marbury's right to the judgeship should be protected in court, the Court said, "far from being an intrusion into the secrets of the cabinet, . . . respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents."[118]

Like nearly all the intervening cases, *Powell v. McCormack*[119] rests upon the same simple principle. The Court did not attempt to control the political decision of Congress to exclude Adam Clayton Powell, duly elected to membership in Congress. It carefully ruled, however, that while under the Constitution each House was indeed "the Judge of the Elections, Returns and Qualifications of its own members," the discretion of Congress over the admission of members could rest only on the grounds specified in the constitution—age, citizenship, residence, and election. Since it was conceded in this case that Powell met these

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117 The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and the laws, submitted to the executive, can never be made in this court.

Id. at 169-70.

118 *Id.* at 170.

119 395 U.S. 486 (1969).

constitutional qualifications, which were unalterable by the legislature, it followed that the vote excluding him was invalid.[120] The Court took exactly the same position in *Roudebush v. Hartke*: "Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question."[121]

By now many lower courts, faced with the complaint of young men about to be drafted into the armed forces, have passed upon the constitutionality of the war in Vietnam. Such plaintiffs surely have standing to raise the question, in the sense of a direct personal interest in the outcome of the litigation; the possibility that they may be killed or maimed in the course of military operations represents the most direct and most personal of all interests. I can imagine no civil right more profound, and more to be respected, than the right of a conscript to be assured that the war he is required to fight has been constitutionally authorized. All the courts which have passed upon the question have given these plaintiffs the answer Justice Story gave to the militiamen in *Martin v. Mott*: that whether the United States acts or does not act under a treaty; whether it decides to help or not to help a friendly government in measures of self-defense against a rebellion aided or instigated and organized from abroad; whether the President and Congress "declare" war, or choose the course of limited war—all are matters peculiarly within the discretion entrusted to the President, or to Congress, or to both, under our constitution and laws and, therefore "political" questions within the meaning of *Marbury v. Madison*.[122] When Courts decide that the way in which the political arms of the government exercise such discretion is a "political question," they are not *abstaining* from a decision on its legality; on the contrary, they are deciding that the choices made were within the zone of discretion entrusted to the political branches of the government, and are therefore legal.

I should be the last to urge, as some have done, that the courts should refrain from decisions of this kind on the ground that it may be

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120 *Id.* at 518-22, 548-49.

121 92 S. Ct. 804, 807 (1972). *See* Dionisopoulos, *A Commentary on the Constitutional Issues in* Powell *and Related Cases*, 17 J. PUB. L. 103 (1968); Henkin, *Viet-Nam in the Courts of the United States: "Political Questions,"* 63 AM. J. INT'L L. 284 (1969); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966); Schwartz & McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEXAS L. REV. 1033 (1968).

122 *See, e.g.*, Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); United States v. Sisson, 294 F. Supp. 511, 515, 520 (D. Mass. 1968), 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed for lack of jurisdiction*, 399 U.S. 267 (1970).

impractical and undesirable to have the courts pass on such difficult and sensitive problems.[123] On the contrary, I believe that many exercises of the military power do produce justiciable controversies, and that in such cases the courts should review the exercise of the war power by political authority to make sure it is kept within constitutional limits. I believe our national debate about Vietnam might well have been less confused and less poisonous if the Supreme Court, in a great opinion, had said what the lower courts have all said—and what I think any judge under the pressure of responsibility would necessarily conclude—that there is no constitutional basis for challenging the legality of the war in Vietnam. Men can reasonably debate whether the United States should have made the commitment of the SEATO Treaty, or honored its commitment when the Treaty was breached. They can argue about the strategy and tactics of the combat and diplomacy of the war in Indo-China. Equally, with Senator Cooper they can question whether a vote of Congress was necessary, in addition to a Treaty, to authorize the President to use the national force on a large scale in Vietnam. But when President and Congress pool all the war powers they possess, jointly and separately, what is there left to debate? It is difficult, at least for me, to discover any plausible basis for contending that the Vietnam War is unconstitutional, or even constitutionally doubtful.

D. "Necessary and Proper"

In the tense and cautious diplomacy of our present relations with the Soviet Union, as they have developed over the last twenty-five years, the authority of the President to set clear and silent limits in advance is perhaps the most important of all the powers in our constitutional armory to prevent confrontations that could carry nuclear implications. No shots have been fired between the armed forces of the United States and those of the Soviet Union; and the inhibition against firing the first shot has been an immensely powerful factor of restraint in the conduct of the cold war. The basic rule of cold war diplomacy, thus far, has been that the Soviet Union does not use force to challenge our presence, or what we clearly and privately inform them are our state interests, and

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123 *See* Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945), reprinted in E. ROSTOW, THE SOVEREIGN PREROGATIVE 193 (1962); H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 11-13 (1961). *Cf.* A. BICKEL, THE LEAST DANGEROUS BRANCH 69-70 (1962); T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 109-13, 116-21 (1970). The limits of presidential power in war have never been better analyzed than by Justice Curtis in his pamphlet Executive Power (1862), reprinted in II B. CURTIS, A MEMOIR OF BENJAMIN ROBBINS CURTIS, L.L.D. 306 (1879).

that we likewise do not use force to oppose hers. We did not intervene in East Germany, Hungary, or Czechoslovakia. They did not use their own force to oppose our actions in Berlin, in Yugoslavia, in Greece, in Korea, and in Vietnam. In resisting the Berlin Blockade, President Truman carefully chose the air lift, a method of action that would have required the Soviets to fire the first shot. President Kennedy sought to accomplish the same end in his handling of the Cuban Missile Crisis, cautiously choosing a limited naval blockade rather than air strike or invasion, the latter strongly urged upon him by Senator Fulbright and others.[124]

The nature of the problem requires promptness of action, great flexibility in the choice of means, and freedom to shift, from hour to hour, in response to the exigencies of the diplomatic situation. It puts a decisive premium on establishing a deterrent presence, or a credible deterrent threat, before irrevocable steps have been taken, or decisions made.

The Javits Bill purports to abolish this power—essential to diplomacy, and to the process of avoiding war. It is a power which nearly every President has used, at least since 1794, when President Washington sent troops to drive Indians—perhaps supported by the British—from Western territories in dispute. And it is the diplomatic power the President needs most under the circumstances of modern life—the power to make a credible threat to use force in order to prevent a confrontation which might escalate.

I believe that an attempt by Congress to deprive the President of power so crucial to his duties as organ of the nation in the conduct of foreign relations is unconstitutional. It is as unconstitutional as a Presidential assumption of power deemed legislative, or as Congressional invasions of the President's much mooted power to remove subordinate officials of the Executive branch, or his pardoning power, or of the authority of the courts under Article III.[125]

The Senate Foreign Relations Committee claims to have discovered new potentialities in the necessary and proper clause authorizing Congress to control the way in which "any Department or officer thereof"

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124 R. KENNEDY, *supra* note 12, at 32, 119.

125 *See, e.g.*, Wiener v. United States, 357 U.S. 349 (1958); Reid v. Covert, 354 U.S. 1 (1957); Myers v. United States, 272 U.S. 52 (1926); Muskrat v. United States, 219 U.S. 346 (1911); United States v. Klein, 80 U.S. (13 Wall.) 128, 147-48 (1871); *Ex Parte* Yerger, 75 U.S. (8 Wall.) 85 (1869); *Ex Parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); E. CORWIN, THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION (1927). This argument was the heart of the impeachment proceedings against President Andrew Johnson. See B. CURTIS, *supra* note 123, at 343.

exercises its functions. But the necessary and proper clause, impressive as it is, cannot be the source of a bootstrap doctrine, empowering Congress to abolish the principle of the separation of powers. Every piece of legislation has as its tacit predicate a Congressional finding that the statute or resolution is, in the view of Congress, "necessary and proper for carrying into Execution" one or another of the powers allocated to it in Article I, Section 8. Congress has been talking the prose (or poetry) of the necessary and proper clause since 1789.

IV. Conclusion

The Javits Bill and similar proposals represent the passionate conviction that the campaigns in Korea and Vietnam were a mistake. Many proponents of the Bill also contend that Korea and Vietnam were "Presidential" wars, and could have been avoided if only Congress had not been stripped of its rightful powers by the usurpations of overweening modern Presidents. We are therefore in the midst of a constitutional crisis, they tell us, a crisis which can be cured, and equilibrium in the constitutional order restored, only by the passage of a statute like the Javits Bill. Men like Senator Cooper and Senator Stennis, of course, do not accept this step in the argument. They know that Korea and Vietnam did not come about because the Presidency had arrogated Congress' powers over foreign policy; Congress fully supported those efforts when they were undertaken. But Senators Cooper and Stennis support the Javits Bill for another reason: they are trying to take advantage of the present state of opinion about Korea and Vietnam to establish certain Congressional prerogatives they have long urged in the perpetual conflict between Congress and the Presidency over their respective roles in making foreign policy. Their effort is addressed to the constitutional practice of Korea, not Vietnam. It represents Bricker's thesis that treaties are not self-executing, but require Congressional action before they become law.

The nation *is* in the midst of an important foreign policy crisis. It is not a constitutional crisis requiring a redefinition of the relationship between the President and the Congress, but an intellectual and moral crisis caused by a growing tension between what we do and what we think. The ideas that for twenty-five years have shaped American foreign policy, and the foreign policy of our Allies—the visions which dominated the minds of the delegates who met at San Francisco in 1945 to write the Charter of the United Nations—have suddenly lost their power to command. When the delegates met at San Francisco in 1945,

they saw Haile Selassie standing sadly before them, as he had stood in the Palace of the League of Nations ten years before, asking in vain for help against Mussolini's aggression. With equal shame they remembered China, which had also met silence when it besought the League to stop Japan. If the world had acted promptly, and in concert, would Japan have conquered Manchuria, and gone on to wage general war against China, and then against others? Would Italy have attacked harmless Ethiopia? Would Germany and Italy have made war against Spain, by sending arms and men to support Franco's revolution? Would the Rhineland have been occupied, Austria and Czechoslovakia invaded? In short, could the drive towards war have been stopped earlier, before its momentum became irresistible?

To the men of 1945, the answer to these questions was self-evident. World War II could have been prevented, they believed, if Britain, France, and the United States had acted against aggression, firmly, boldly, and above all in good time.

Today there is an outcry against these ideas. Something is wrong with the notion of small wars to prevent big ones, men say, if it produces consequences as ghastly as the campaigns in Korea and Vietnam. There must be a "new" foreign policy that could liberate us from the burdens we have had to bear since 1945.

This demand is the most conspicuous theme of a bellicose literature about how to achieve peace. It is conventional to describe that literature as a "Great Debate." Like many features of the conventional wisdom, the phrase is misleading. There is disagreement to spare in these books and articles, but little or no debate. Few of the protagonists read what their opponents write, or listen to what they say. Generally speaking, arguments are answered by epithets. The devotees of geopolitics, brooding about nuclear deterrence, dismiss their critics as amateurs, demagogues, journalists, dupes, or worse. Their critics return the compliment. Why should they waste time considering the ideas of fascists, war criminals, revisionists (or other lackeys of monopoly capitalism), or burnt-out cases whose minds were paralyzed in cold war postures twenty years ago?

In contemplating our national priorities, I can think of nothing we need more urgently than a genuine debate about what foreign policy is for. Until we come much closer to agreement on this central question, we shall have little opportunity to deal with the others.

Since 1945, there has been acute dissonance in the nation between what we thought and what we did in the name of foreign policy. While

neither the United States nor any other nation has ever dared contemplate the full-throated enforcement of the United Nations Charter —in Eastern Europe, for example—American policy has nonetheless been strongly influenced by the experience of the thirties, and by the ideas of the Charter. President Truman regarded the Korean War as atonement for the League's failure in Ethiopia. His point was underscored by the presence of Ethiopian troops in Korea. And the memory of Munich, and of President Wilson, is a living part of American consciousness.

Truman's view has not, of course, been universally accepted. The United States has offered many explanations for its foreign policy since the Truman Doctrine was announced in 1947: as the "containment" of "Communism," or of the Soviet Union, China, and Cuba; as the protection of "free nations" or of "the free world"; as the manifest destiny of a Great Power; or as the application of the oldest and most nearly instinctive policy in all politics—that of the balance of power.

Public opinion has not yet crystallized around any one of these competing principles as the proper compass for our foreign policy. Since 1945, the American government under five Presidents has felt compelled to act in a certain pattern, from Iran, Greece, and Turkey, to Berlin, Korea, the Middle East and Vietnam. But there is no harmony between this pattern of action, and widespread, and now perhaps prevailing views as to what American and Allied foreign policy ought to be.

The tension between public opinion and the behavior of government is much too great for safety. That tension has already destroyed the careers of two Presidents, Truman and Johnson; divided the nation; split the Democratic Party; and perhaps weakened the Presidency as well. It could have even more serious consequences, for it has given rise to uncertainty all over the world as to what the United States will do to protect its own security, and the security of nations it has undertaken to defend. Uncertainty of this order invites miscalculation, the kind of miscalculation which had led to so many catastrophes already during this brutal and tragic century. It is hardly hyperbole to conclude that the nation must reexamine its foreign policy before its foreign policy destroys the nation.

The real crisis of our foreign policy can be resolved only through a disciplined and scrupulous examination of what the nation must do, given the condition of world politics, to preserve the possibility of surviving as a democracy at home. That process will be difficult at best.

The relevant Congressional Committees, and Congress as a whole, should be leading the nation in a courteous and sustained debate, through which we could hope to achieve a new consensus about foreign policy, as vital, and creative, as that which sustained the line of policy which started with the Truman Doctrine, the Marshall Plan, NATO and its progeny, and the Point Four Program.

Instead, the Senate Foreign Relations Committee has chosen to escape from the demanding but manageable task of reality by retreating into the insoluble and dangerous realm of constitutional myth. No one could possibly write the statute the Javits Bill purports to be—a codification of what the Founding Fathers prudently left uncodified, the respective powers of Congress and the President in relation to the use of the national force. As George Ball pointed out in his persuasive testimony opposing the Javits Bill, the Bill

> 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.[126]

In this time of trouble, almost as threatening to the nation as the Great European Wars of 1789-1815, we should not be diverted from the compelling task of rethinking foreign policy into a ritual purge of evil spirits, and an emasculation of the Presidency we have never needed more. The Javits Bill would turn the clock back to the Articles of Confederation, and destroy the Presidency which it was one of the chief aims of the men of Annapolis and Philadelphia to create.

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[126] *1971 Hearings*, *supra* note 1, at 621.

Statement of Prof. Raoul Berger, Harvard University Law School, Cambridge, Mass., in Response to Statement of Professor Rostow (March 31, 1973)

Mr. Chairman, Prof. Eugene V. Rostow, who was scheduled to appear with me before your committee on March 15 but was prevented from doing so, has favored me with a copy of a statement he submitted for the record of your hearings on the war powers bills. There he takes issue with my published criticism of his article in the Texas Law Review.

Like Professor Rostow, I believe that "scholars and Members of Congress alike [must] adhere to the most scrupulous standards of responsibility in their discussion of the evidence * * *" (Rostow 408). It is in this light that I shall examine his statement, mindful of the remark by the distinguished physicist-mathematician, J. W. N. Sullivan, that the progress of science in large measure is due to the searching criticism to which competing theories are subjected. How much more important is such criticism when, as Professor Rostow justly states, the matter goes "to the essence of national safety." (Rostow 408.)

(1) Speaking in the context of the proposed war powers legislation which, by reaffirming Congress constitutional powers, would restrict the warmaking propensities of a President, Professor Rostow remarks:

> As Hamilton pointed out long ago, the circumstances that may endanger the safety of the nation, and call for the use of national force, or the threat to use it, are "infinite," so that no constitutional shackles can wisely be imposed on the power to which the care of it is committed. (Rostow 395).

In the context of Professor Rostow's discussion the clear implication is that the powers of the President should not be shackled by the proposed legislation. My published critique pointed out that—

> Hamilton was concerned there with the needed surrender by the states to the "federal government" of powers "essential to the common defense," not with a plea that Presidential war powers must not be shackled. Hamilton's argument for lodging power in the nation rather than the states is not convertible into an argument that power is to be vested in the President rather than in Congress. (RB 49).[1]

To persist in manifest error after such criticism is to lose sight of Professor Rostow's own statement that in this area the "price of error is indeed death." (Rostow 408).

(2) Professor Rostow attaches great weight to the discussion before the Senate Foreign Relations Committee of the provision in article IV(1) of the Southeast Asia Collective Defense Treaty in 1954. After quoting a great slab of the 1954 hearings, he concludes:

> Thus both the Senator and Secretary [Dulles] carefully avoided the view that we could act under paragraph 1 of Article IV only after a Congressional declaration of limited or unlimited war. (Rostow 402–405).

What Dulles so "carefully avoided" was squarely faced by the chairman of the committee, Senator Alexander Wiley.

[1] References are to Berger, "Warmaking by the President," 121 U. Pa. L. Rev. 29, 49 (1972, inserted by Senator Jacob Javits in the Congressional Record, Feb. 20, 1973, S2784).

The heart of article 4(1), in Dulles' words, "The agreement of each of the parties to meet the common danger 'in accordance with its constitutional processes'* * *" (Rostow 403), is duplicated in the treaty with Korea, which was discussed in the Senate debates by Chairman Wiley. In response to questions by Senators John Stennis and Arthur Watkins, he stated:

> 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. . . .[2]

Senator Watkins asked, "Congress would have to make the decision whether the United States would go to war or would not go to war?" Wiley replied, "The Senator is correct." [3] The record is studded with such remarks by Wiley.[4] The reason is transparently plain. In making the decision to go to war, the Constitution, as Senator Thomas Eagleton stated, "requires the participation of the House, and in my view the Senate cannot abrogate that responsibility by treaty." (Fulbright hearings 610). That is the view of Professor Rostow's distinguished colleague Prof. Alexander Bickel, and of Prof. Henry Steel Commager. Id. at 563, 61. As Prof. Louis Henkin stated:

> The Founders considered the power to declare war too important to entrust it to the President alone, or even to him and the Senate, and gave it to the Congress (or left it there, as under the Articles of Confederation).[5]

After so fastidiously granting the power to Congress, we cannot impute to the Founders an intention to unravel all their labors by conferring upon the treatymakers—President and Senate—a power to involve the Nation in war without congressional authorization. Certainly the reservation that the Nation must act via "constitutional processes" points back to the necessity of action by the entire Congress, as Wiley, Smith, and Watkins agreed. And this leads to what Professor Rostow regards as the fatal flaw in my position.

(3) After lining me up with Prof. William van Alstyne and Charles A. Lofgren for the proposition that "the President can act only as the agent of Congress in the use of force, save for a short time in narrowly defined emergencies directly affecting the territory or the Armed Forces of the United States," Professor Rostow states that "one fact inconsistent with a theory disproves that theory" (Rostow 397). That "one fact * * * which conclusively disproves all [our] hypotheses at once" is "the treaty power, and the Founding Fathers' intimate experience with that power in connection with the Benjamin Franklin Treaties with France of 1778" (Id. at 397).

As I understand the argument, the Franklin Treaty of Alliance with France (1778) contained an "American guarantee of 'the present possessions' of France in America"; the treaty was ratified by the Constitution (Rostow 398); France became involved in war with Britain. So much is true. Next Professor Rostow asks us to support

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[2] The debates are reprinted in Hearings on War Powers Legislation before the Senate Foreign Relations Committee (March–October 1971) 721 et seq. (hereafter cited as Fulbright hearings). The quotation is at p. 735.

[3] Id. at 736.

[4] Id. at 727, 729, 731, 733, 736. Senator Smith, on whom Professor Rostow relies for the "Monroe Doctrine approach," (Rostow 12), stated that in case of a violation of the Monroe Doctrine in South America, "The President should be prepared to issue a stern warning and have Congress back of him and ask for the support of Congress." He "absolutely agreed" with Senator Watkins that before "he ordered out the Armed Forces * * * the President by all means should come to Congress and get power to take that action." Id. at 747.

[5] L. Henkin, Foreign Affairs and the Constitution 80 (1973).

that the British had stationed troops and naval vessels in the French Islands of the Caribbean and then asks:

> Can the President take no steps to implement that guaranty * * * without the prior consent in each case of Congress? Is it constitutional for a Treaty to declare, as Article 5 of the North Atlantic Treaty does, that an armed attack against one or more of the allies shall be considered an attack against them all? * * * Their [Berger et al.] version of the Constitution would confine the President's emergency powers to attacks on the territory of the United States. Either the Treaty is unconstitutional, or their version of the original intent is inadequate and erroneous. Id. at 9.

Professor Rostow does less than justice to the meticulous way in which Professor Lofgren and myself have set forth the evidence of the original intent—the unmistakable statements by the framers themselves. Our bald recital of the historical facts does not therefore represent our "version of the original intent" nor bare "hypotheses." Only one who resolutely turns his face from those facts will dispute the plainly manifested "original intention" of the founders. Professor Rostow would have us repudiate that clearly articulated intention in order to sustain the constitutionality of a 20th century treaty—as he reads it, when the true test is whether the treaty is compatible with the intention of the framers. And I would remind Professor Rostow that in 1966 the Legal Adviser of the State Department conceded that "the framers probably had in mind attacks upon the United States" as the limit of Presidential power to repel sudden attacks, not attacks on the French possessions in the Caribbean, or on Kamchatka. There is not a shred of evidence that the framers intended to alter the distribution of war powers when President and Senate made a treaty. The very fact that the decision to wage war was confided to the entire Congress, not the President and Senate alone speaks against it.

Let us now consider the Rostow argument in the frame of the 1778 treaty of Franklin. Having so carefully put it beyond the power of a "single man," in the words of James Wilson, to "hurry" us into war (RB 36) when the framers were focusing directly on the distribution of the war powers, they scarcely intended by their ratification of the 1778 treaty to throw these labors into the discard. Rather, the reasonable presumption is that they meant execution of the treaty to be subject to the constitutional provisions respecting the power to wage war. To the extent that effectuation of the "guarantee" to France entailed warmaking, the Constitution left the decision to Congress.

Professor Rostow's mistake, which vitiates both his analysis of the Franklin treaty and the earlier-quoted Hamilton State-Federal passage, is to assume that because there is a necessity for the Nation to act, it necessarily follows that the President must implicitly be empowered to do so. But as Justice Frankfurter stated, the fact "that power exists in the Government does not vest it in the President." (RB 42). The founders left no doubt as to their intention severely to limit Presidential responses to "sudden attacks" on the United States. Thus it is that Professor Rostow's elaborate attempt to turn that intention topsy-turvy is pierced by "one fact."

(4) A few brief comments on several other points in the Rostow statement must suffice. It is true that former Justice Arthur J. Goldberg remarked in another context that the Constitution is not "a suicide pact." (Rostow, 403). But he himself testified with respect to the Javits war powers bill that—

This [remark] is a far cry from recognizing the President's unfettered powers to plunge us into war without congressional sanction. * * * (Fulbright Hearings 770).

Professor Rostow quotes at length from Hamilton's enunciation in 1793 of the novel theory that the Executive was given plenary power, not confined to the subsequent enumeration of powers, and that the congressional war power and Senate participation in the treaty power were "exceptions" which have to be strictly construed. (Rostow 400–401). This view was triumphantly refuted by Madison; it simply does not stand up in the face of the historical record. See Berger, The Presidential Monopoly of Foreign Relations 1, 18025 (1972). Professor Rostow advised me that he read this article; and I suggest that it is not in keeping with the fastidious standard he lays down for scholars to take no account of Madison's refutation and the accompanying documentation. A court would demand of a lawyer that he meet the opposing argument. Legal analysis is not advanced by closing one's eyes to unpalatable facts.

Finally, I reject the imputation that I noted "with apparent approval the actions of Presidents Wilson and Roosevelt before the First and Second World Wars . . ." (Rostow 402). Of Wilson I concluded that "he withstood the temptation 'to resist force with force,' single handedly to commit the Nation to war." (RB 66). My references to Roosevelt were to set forth the facts, concluding with a statement that "While these measures might have involved the Nation in war, they did not commit our troops to battle." (RB 66). It required Pearl Harbor to accomplish that. And, as I testified before your committee, I am not among those who subscribe to the notion that a President must save a benighted nation against its will. Tomorrow a malign President could plunge us into the abyss.

REPLY OF PROF. EUGENE V. ROSTOW TO PROFESSOR BERGER'S RESPONSE (APRIL 10, 1973)

DEAR MR. CHAIRMAN: May I add, for the record, a brief reply to Mr. Raoul Berger's letter of March 31, addressed to my submission of March 14, 1973.

1. When I quoted Hamilton's comment in No. 23 of the Federalist, to the effect that no constitutional shackles can wisely be imposed upon the war power, I did not mean to suggest that the President has an unlimited power to wage war. On the contrary, as I tried to make clear, both in that letter and in my Texas article, the Constitution, in my view, entrusts and commits the care of the national safety both to the President and to Congress. My reference to *McCulloch* v. *Maryland*, in a section of my Texas article addressed to the problem of the "undue delegation" of congressional authority to the President, was intended to support the practice of advance declarations of policy, or ratifications after the event, through which Congress and the President have handled these problems together, as a problem of shared and concurrent authority.

In exercising the war power, effective national policy invariably requires the cooperation of both branches—a pooling of their respective powers in patterns which necessarily vary from case to case, depending upon circumstance. In my opinion, Congress may constitutionally join the President in advance declarations of policy, as it did in the

United Nations Participation Act of 1945, the North Atlantic Treaty or the Middle East Resolution of 1957 and 1961; or it may ratify what the President has done after the President has initiated a line of policy, as was the case in the Civil War, in Korea, and on many other occasions when the national force was used. I am not prepared to say that American policy in Korea, or in the handling of the Cuban missile crisis, or in Commodore Perry's mission to Japan, was unconstitutional. But this is necessarily the premise of all the bills before you.

No one has yet succeeded in drawing a neat and simple map of the division of authority between Congress and the Presidency with regard to the use of the national force, beyond the obvious propositions that only Congress can declare war, and only the President can direct the troops in the field, or conduct the diplomacy of the Nation. In the nature of the problem of national safety, I believe that drawing lines as sharp as those which Mr. Berger attempts is unwise, and indeed impossible.

2. The error of Mr. Berger's views, and those of Professor Van Alstyne, on the relationship between the treaty power and the war power is well brought out in *Diggs* v. *Schultz*, 470 F(2d) 461 (App. D.C., 1972). In that case one of our finest judges, Judge McGowan, had to deal with a conflict between a statute and the President's earlier interpretation and application of a treaty. The statute, being later in time, of course, prevailed, since statutes and treaties have exactly the same constitutional dignity. When valid, they are equally "the supreme law of the land."

In 1966, and again in 1968, the Security Council passed resolutions, supported by the United States, calling on all member states to impose an embargo on trade with Southern Rhodesia. That step was taken under chapter VII of the charter, which deals with the most extreme powers of the Security Council—those of taking binding decisions, requiring members to take appropriate action to restore peace and security. It is the same chapter which authorizes the Security Council to employ military as well as economic coercion.

Economic sanctions are, of course, a use of force. They may, and often do, provoke a response. There are many who believe that American economic measures against Japan in the late thirties led to Pearl Harbor.

In 1945, the United Nations Participation Act created the office of U.S. representative to the United Nations, which functions under the President's direction. Section 5 of the act makes it an offense to violate or evade rules or regulations promulgated by the President to give effect to decisions of the Security Council calling upon the United States to apply economic sanctions. In 1966, the President issued executive orders applying the Security Council decision with regard to American trade with Southern Rhodesia. In 1971, however, Congress adopted a law intended to abrogate the Security Council decision, so far as the United States was concerned.

Judge McGowan's opinion did not conclude that the United Nations Participation Act was an invalid delegation to the President of a power which could not be delegated at all, or that the President's vote was invalid because no joint resolution of the Congress instructing our Ambassador at the United Nations how to vote was obtained within a few days or hours before the vote was cast.

On the contrary, the Court treated the President's power to interpret and apply the United Nations Charter in the Rhodesian case as complete and obvious, and entirely valid until Congress, several years later, overruled the President on the matter. The decision of Congress, the Court said, made the United States "a certain treaty-violator,"[1] and perhaps involved it in international obligations for breach of the treaty, as was the case when Congress abrogated the alliance with France in 1798.[2] But whether the United States decides to carry out a treaty of this character, or to breach it; or how it decides to interpret and apply such a treaty, are political decisions entrusted by the Constitution to the discretion of the President and the Congress—the President in the first instance, and Congress ultimately. Congress can support the President's initial application of the Treaty by its silence, as was the case in the Rhodesian affair for 5 years, or by affirmative action, through joint resolutions, appropriation bills, or otherwise. And Congress can overrule the President.

3. Mr. Berger reproaches me for not commenting on Madison's reply to Hamilton's defense of the constitutionality of the President's Neutrality Proclamation of 1793. The episode was not one of the most attractive in the careers either of Jefferson or of Madison. Jefferson, having supported the President in the decision to issue a Presidential Proclamation of Neturality, "was quite ready to make whatever political capital he could out of the opposition to it," as Professor Corwin points out.[3] Becoming alarmed at the political effect of Hamilton's defense of the constitutionality of a Presidential Proclamation of Neutrality, Jefferson induced Madison to enter the lists, although Madison was reluctant, and took positions at variance with many of his earlier constructions of the Executive power, for example, on the problem of removals. I fully agree with Professor Corwin that in this instance, and on the particular issue of the President's authority to interpret and apply treaties in the first instance, Hamilton's view has prevailed.[4]

4. Mr. Berger refers to Senator Wiley's statements on the floor of the Senate with regard to the Korean Treaty. To me, the differences between Senator Fulbright and Senator Wiley on this point simply confirm the correctness of Senator Cooper's judgment that the issue has never in fact been resolved.

The true problem facing the Nation is not whether Congress has the exclusive power to authorize a state of war—no one contests that fact—but how to distinguish those acts or threats of force which the President may appropriately initiate, in the course of diplomacy, in executing the treaty obligations of the United States, in defense of the United States, or in asserting the rights of the Nation under international law; and (2) when, and how, the concurrence of Congress should be obtained.

In my view, Mr. Berger's answer to these questions is simplistic, and unconvincing.

Yours sincerely,

EUGENE V. ROSTOW.

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[1] *Diggs* v. *Schultz*, 470 F. 2d 461, 466 (App. D.C., 1972).
[2] *Gray* v. *United States*, 21 Court of Claims 340 (1886).
[3] Edward S. Corwin, "The President's Control of Foreign Relations" (1917), p. 16.
[4] Id., at p. 32. See also Corwin, "The President, Office and Powers" (1940), pp. 208–216.

OPINION OF MITCHELL V. LAIRD (No. 71–1510, MARCH 20, 1973) AND ANALYSIS † BY AMERICAN LAW DIVISION, LIBRARY OF CONGRESS

WASHINGTON, D.C., *March 30, 1973.*

To: House Foreign Affairs Committee.
Attention: George Berdes.
From: American Law Division.
Subject: An analysis of *Mitchell* v. *Laird*, a suit to enjoin and declare unconstitutional the war in Vietnam.

Enclosed please find a copy of the opinion in *Mitchell* v. *Laird*, No. 71–1510 (March 20, 1973), a suit filed by 13 Congressmen regarding the war powers of the President, and a brief analysis of the case.

We hope this serves your needs.

RICHARD EHLKE,
Legislative Attorney.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71–1510

The Honorable Parren J. Mitchell, et al, appellants

v.

Melvin R. Laird, et al

Appeal from the United States District Court
for the District of Columbia

Decided March 20, 1973

Lawrence R. Velvel, with whom *Stefan Tucker* and *Christopher Sanger* were on the brief, for appellants.

Gregory Brady, Assistant United States Attorney with whom *Harold H. Titus, Jr.*, United States Attorney, *John A. Terry, Michael A. Katz*, Assistant United States Attorneys and *Hermine Herta Meyer*, Attorney, Department of Justice were on the brief, for appellees. *Thomas A. Flannery* United States Attorney at the time the record was filed

93–626—73——33

and *Walter H. Fleischer*, Attorney, Department of Justice, also entered appearances for appellees.

Before BAZELON, *Chief Judge*, and TAMM, *Circuit Judge* [2] and CHARLES E. WYZANSKI, Jr.,* *Senior United States District Judge for the District of Massachusetts.*

Opinion for the Court filed by *Senior District Judge* Wyzanski.

WYZANSKI *Senior District Judge:* April 7, 1971 thirteen members of the United States House of Representatives, as plaintiffs, filed in the District Court a complaint against the President of the United States, the Secretaries of State, Defense, Army, Navy, and Air Force, and the United States of America. Plaintiffs alleged that for seven years the United States, by the named individual defendants and their predecessors, has been engaged in a war in Indo-China without obtaining "either a declaration of war or an explicit, intentional and discrete authorization of war" and thereby "unlawfully impair and defeat plaintiffs' Constitutional right, as members of the Congress of the United States, to decide whether the United States should fight a war." Plaintiffs prayed for, first, an order that defendants be enjoined from prosecuting the war in Indo-China unless, within 60 days from the date of such order, the Congress shall have explicitly, intentionally and discretely authorized a continuation of the war, and second, "a declaratory judgment that defendants are carrying on a war in violation of Article I, Section 8, Clause 11 of the United States Constitution."

The District Court dismissed the action as to the President, on the authority of *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), and as to the other defendants, on the authority of *Luftig v. McNamara*, 126 U.S. App. D.C. 4, 373 F. 2d 664 (1967), cert. denied 387 U.S. 945 (1967).

By somewhat different paths, the three judges who have heard this appeal from the District Court's judgment of [3] dismissal have concluded unanimously that said appeal should be dismissed.

The first issue presented is whether the case is now moot. Recently, the President has purported formally to end hostilities in Vietnam and Laos. There has been no similar action with respect to Cambodia, another part of Indo-China. The continuation of hostilities there precludes our holding that this case is moot. Furthermore, a declaratory judgment respecting past action might have legal import, inasmuch as, though this point is not specifically pleaded, plaintiffs have a duty under the Constitution to consider whether defendants in continuing the hostilities did commit high crimes and misdemeanors so as to justify an impeachment of the individual defendants, pursuant to United States Constitution, Article I, Section 2, Clause 5.

The second issue is whether the dismissal of the action against the United States was correct for a reason not given by the District Court. We are unanimously of the view that as to the government the dismissal was correct because the sovereign has not consented to be sued.

The third issue is whether the dismissal of the action as to the remaining defendants was proper for another reason not given by the District Court: to wit, that plaintiffs have no standing to sue. None of the judges who heard this appeal is persuaded that plaintiffs are sound in their explicit reliance upon defendants' alleged duty not to interfere with what the complaint alleges is "plaintiffs' Constitutional

* Sitting by designation pursuant to Title 28, U.S.C. § 294(d).

NOTE.—Bold figures in brackets indicate page numbers in opinion.

right, as members of the Congress of the United States, to decide whether the United States should fight a war."

Implicit in plaintiffs' contention is their assumption that the Constitution gives to the Congress the *exclusive* right to decide whether the United States should fight *all* types of war. Without at this point exhaustively considering all possibilities we are unanimously of the opinion that there [4] are some types of war which, without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack, or in a grave emergency he may, without Congressional approval, take the initiative to wage war. Otherwise the country would be paralyzed. Before Congress could act the nation might be defeated or at least crippled. In such unusual situations necessity confers the requisite authority upon the President. Any other construction of the Constitution would make it self-destructive.

However, plaintiffs are not limited by their own concepts of their standing to sue. We perceive that in respects which they have not alleged they may be entitled to complain. If we, for the moment, assume that defendants' actions in continuing the hostilities in Indo-China were or are beyond the authority conferred upon them by the Constitution, a declaration to that effect would bear upon the duties of plaintiffs to consider whether to impeach defendants, and upon plaintiffs' quite distinct and different duties to make appropriations to support the hostilities, or to take other legislative actions related to such hostilities, such as raising an army or enacting other civil or criminal legislation. In our view, these considerations are sufficient to give plaintiffs a standing to make their complaint. Cf. *Flast v. Cohen*, 392 U.S. 83 (1968); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970).

The fourth issue is whether plaintiffs seek adjudication of a "political question" beyond the jurisdiction conferred upon the courts by Article III of the Constitution. Despite *Luftig v. McNamara, supra*, which admittedly indicates that it is beyond judicial competence to determine the allocation, between the executive and the legislative branches, of the powers to wage war, we are now persuaded that there may be, in some cases, such competence. *Massachusetts v. Laird*, [5] 451 F.2d 26 (1st Cir. 1971), aff'ng s.c. 327 F.Supp. 378 (D. Mass. 1971); *Orlando v. Laird*, 443 F.2d 1039 (2nd Cir. 1971). Cf. *Powell v. McCormack*, 395 U.S. 486 (1969).

Here the critical question to be initially decided is whether the hostilities in Indo-China constitute in the Constitutional sense a "war," both within and beyond the meaning of that term in Article I, Section 8, Clause 11. That the hostilities have been not merely of magnitude but also of long duration is plainly alleged in paragraph 4 of the complaint. It is there said that "For at least the last seven years . . . the United States . . . has been engaged in Indo-China in the prosecution of the longest and one of the most costly wars in American history. As of the present, one million human beings, including over 50,000 Americans have been killed in the war, and at least one hundred billion dollars has been spent by the United States in and for the prosecution of the war." There would be no insuperable difficulty in a court determining whether such allegations are substantially true. If they are, then in our opinion, as apparently in the

opinion of President Nixon, as revealed by his use of the word "war" in his second Inaugural Address, delivered January 20, 1973, there has been a war in Indo-China. Nor do we see any difficulty in a court facing up to the question as to whether because of the war's duration and magnitude the President is or was without power to continue the war without Congressional approval.

But the aforesaid question invites inquiry as to whether Congress has given, in a constitutionally satisfactory form, the approval requisite for a war of considerable duration and magnitude. Originally Congress gave what may be argued to have been its approval by the passage of the Gulf of Tonkin Resolution, 78 Stat. 384 (1964). See *Orlando v. Laird*, *supra*. However, that resolution cannot serve as justification for the *indefinite* continuance of the war [6] since it was repealed by subsequent Congressional action, 84 Stat. 2055(1971). Apparently recognizing that point, the Government contends that Congressional approval has been given by appropriation acts, by extension of the Selective Service and Training Act, and by other measures.

We are unanimously agreed that it is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval to a war such as is involved in the protracted and substantial hostilities in Indo-China. See *Massachusetts v. Laird* and *Orlando v. Laird*, both *supra*. Any attempt to require a declaration of war as the only permissible form of assent might involve unforeseeable domestic and international consequences, without any obvious compensating advantages other than that a formal declaration of war does have special solemnity and does present to the legislature an unambiguous choice. While those advantages are not negligible, we deem it a political question, or, to phrase it more accurately, a discretionary matter for Congress to decide in which form, if any, it will give its consent to the continuation of a war already begun by a President acting alone. See *Massachusetts v. Laird*, *supra*, s.c., 327 F. Supp. 378 (D. Mass. 1971): *Orlando v. Laird*, *supra*; *Berk v. Laird*, 317 F. Supp. 715 (E.D.N.Y. 1970). That is, we regard the Constitution as contemplating various forms of Congressional assent, and we do not find any authority in the courts to require Congress to employ one rather than another form, if the form chosen by Congress be in itself constitutionally permissible. That conclusion, however, leaves unanswered the further question whether the particular forms which the Government counsel at our bar refer to as having been used by Congress in the Indo-China war are themselves of that character which makes them *in toto*, if not separately, a constitutionally permissible form of assent.

[7] The overwhelming weight of authority, including some earlier opinions by the present writer, holds that the appropriation, draft extension, and cognate laws enacted with direct or indirect reference to the Indo-China war, (and which have been acutely and comprehensively analyzed by Judge Judd in *Berk v. Laird*, *supra*) did constitute a constitutionally permissible form of assent. *Massachusetts v. Laird*, *Orlando v. Laird*, *Berk v. Laird*, all *supra*, and *United States v. Sisson*, 294 F. Supp. 511 (D. Mass. 1968). Judge Tamm is content to adhere to that line of authority.

But Chief Judge Bazelon and I now regard that body of authority as unsound. It is, of course, elementary that in many areas of the law

appropriations by Congress have been construed by the courts as involving Congressional assent to, or ratification of, prior or continuing executive action originally undertaken without Congressional legislative approval. Without a pause to cite or to examine in detail the vast body of cases involving such construction, it is more relevant to emphasize the special problem which is presented when one seeks to spell out from military appropriation acts, extensions of selective service laws, and cognate legislation the purported Congressional approval or ratification of a war already being waged at the direction of the President alone. This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that [8] placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent. Hence Chief Judge Bazelon and I believe that none of the legislation drawn to the court's attention may serve as a valid assent to the Vietnam war.

Yet it does not follow that plaintiffs are entitled to prevail. When on January 20, 1969 President Nixon took office, and when on the same or even later dates the other individual defendants took their present offices, they were faced with a belligerent situation not of their creation. Obviously, the President could not properly execute the duties of his office or his responsibility as Commander-in-Chief by ordering hostilities to cease on the very day he took office. Even if his predecessors had exceeded their constitutional authority, President Nixon's duty did not go beyond trying, in good faith and to the best of his ability, to bring the war to an end as promptly as was consistent with the safety of those fighting and with a profound concern for the durable interests of the nation—its defense, its honor, its morality.

Whether President Nixon did so proceed is a question which at this stage in history a court is incompetent to answer. A court cannot procure the relevant evidence: some is in the hands of foreign governments, some is privileged. Even if the necessary facts were to be laid before it, a court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. Otherwise a court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs [9] must be allowed to the President if this country is to play a responsible role in the council of the nations.

In short, we are faced with what has traditionally been called a "political question" which is beyond the judicial power conferred by Article III of the United States Constitution. And on that ground the complaint was properly dismissed by the District Court.

Appeal dismissed.

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AN ANALYSIS OF *MITCHELL* V. *LAIRD*, A SUIT TO ENJOIN AND DECLARE UNCONSTITUTIONAL THE WAR IN VIETNAM

In *Mitchell* v. *Laird*, No. 71-1510, — F. 2d —— (D.C.Cir. 1973),[1] the United States Court of Appeals for the District of Columbia in an unaminous opinion affirmed a lower court dismissal of the complaint of 13 Members of the House of Representatives alleging that the execution of the war in Indochina by President Nixon and his predecessors was unconstitutional in the absence of a congressional declaration of war or explicit authorization and that such actions "unlawfully impair[ed] and defeat[ed] plaintiffs' constitutional right, as Members of the Congress of the United States, to decide whether the United States should fight a war." [2] The plaintiffs requested that the defendants be enjoined from prosecuting the war and that the court declare that the defendants' actions are violative of article 1, section 8, clause 11 of the Constitution, which gives Congress the power to declare war.

The court initially disposed of some preliminary issues. It ruled that the case was not moot in light of the signing of the peace agreements purporting to end hostilities in Vietnam and Laos because there had been no similar agreement with respect to hostilities in Cambodia which were and are continuing. Furthermore, the court held that a declaratory judgment respecting the legality of past action by the executive might have legal import in that plaintiffs, as Members of Congress, have a duty under the Constitution to consider whether such actions by the defendants justify impeachment. Because of that constitutional duty and their further duties to appropriate moneys for the war and to take other legislative action related to hostilities, the plaintiffs also had standing to sue, according to the court. In finding standing, the court relied on grounds not formally alleged or raised in the lower court and rejected the grounds relied upon by plaintiffs to sustain their complaint, to wit, the defendants' interference with "plaintiffs' constitutional right, as Members of the Congress of the United States, to decide whether the United States should fight a war." [3] The court found implicit in such a contention the assumption that "the Constitution gives to Congress the exclusive right to decide whether the United States should fight all types of war" [3], and rejected such a contention citing the President's powers in time of attack or other grave emergency to initiate war without prior congressional approval.

The court also held that the dismissal of the United States as defendant was correct because the sovereign had not consented to be sued. This ground for dismissal was not relied upon by the district court.

[1] Citations in brackets are to page numbers of the slip opinion.

The remainder of the opinion concerned the issue whether the plaintiffs were seeking adjudication of a "political question" beyond the jurisdiction of the courts. The "political question" doctrine springs from the concept of separation of powers and it is invoked when the questions raised in a lawsuit are incapable of judicial resolution or inappropriate in light of the article III powers of the judiciary compared with the powers and prerogatives of coordinate branches of the government. The leading case in which the contours of the "political question" doctrine were examined is *Baker* v. *Carr*, 369 U.S. 186 (1962), the reapportionment landmark decision. There, Justice Brennan, speaking for the majority, stated:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identifies it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judically discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. 369 U.S. at 217.

In *Mitchell*, the Court began its discussion of the "political question" issue by holding that, despite contrary authority, there may be cases in which the courts are competent to determine the relative powers of the legislative and executive branches to wage war. The Court stated that the questions whether the hostilities in Vietnam are a "war" within the meaning of article I, section 8, clause 11 of the Constitution and whether the President is or was without power, because of the war's duration and magnitude, to continue it without the approval of Congress posed no insuperable difficulties for judicial determination. The latter question prompted inquiry into whether Congress gave its approval to the war in a constitutionally satisfactory form.

The Court held that there are alternative constitutionally permissible means of approval for a war than formal declaration and that it is a "discretionary matter for Congress to decide in which form, if any, it will give its consent to the continuation of a war already begun by a President acting alone . . . . That is, we regard the Constitution as contemplating various forms of congressional assent, and we do not find any authority in the courts to require Congress to employ one rather than another form, if the form chosen by Congress be in itself constitutionally permissible." [6] So holding, it went on, however, to rule—contrary to what it termed the "overwhelming weight of authority" [7]—that the various legislative actions taken by Congress during the period of the war in Indochina, that is, military appropriations, extensions of the draft, did not constitute assent to the war. As stated by the Court:

> A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable

decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent. Hence Chief Judge Bazelon and I [Judge Charles Wyzanski] believe that none of the legislation drawn to the Court's attention may serve as a valid assent to the Vietnam war. [7–8]. [Judge Tamm, the third member of the panel, was of the opinion that such legislative action did constitute Congressional assent.]

However, it was the posture of the case and the circumstances which prevailed when the defendants assumed office which led the Court to its ultimate conclusion that the plaintiffs' complaint presented a "political question" not justiciable in the courts. The Court noted that "[e]ven if his predecessors had exceeded their constitutional authority, President Nixon's duty did not go beyond trying, in good faith and to the best of his ability, to bring the war to an end as promptly as was consistent with the safety of those fighting and with a profound concern for the durable interests of the Nation—its defense, its honor, its morality." [8] Citing factors similar to those outlined in *Baker* v. *Carr*, *supra*, the Court concluded:

Whether President Nixon did so proceed is a question which at this stage in history a court is incompetent to answer. A court cannot procure the relevant evidence: some is in the hands of foreign governments, some is privileged. Even if the necessary facts were to be laid before it, a court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. Otherwise a court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of the nations.

In short, we are faced with what has traditionally been called a "political question" which is beyond the judicial power conferred by Article III of the United States Constitution. And on that ground the complaint was properly dismissed by the District Court. [9]

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[From The New Republic, January 29, 1972]

The Right To Make War

(By Eugene G. Windchy)*

Last week Alexander M. Bickel discussed the need to limit the President's ability to make war, and he remarked that the Senate is very likely to pass a war powers bill designed to do that. The bill, which recently was approved 13–0 by the Foreign Relations Committee, recognizes a Presidential right to repel attack, and to forestall the imminent threat of attack, but it requires that the President obtain permission from Congress in order to continue hostilities longer than 30 days. The principal author of the war powers bill, Senator Jacob K. Javits, says that legislation of this kind might have prevented the incremental involvement that led to full-scale war in Indochina. The Nixon administration opposes the bill and, apparently, any attempt to limit its ability to make war. Its representatives complain that the proposed restrictions would "narrow the power given the President by the Constitution." A basic question, therefore, is whether the President does have a constitutional right to make war and, if so, under what circumstances.

During 16 of the last 23 years, American Presidents have been waging undeclared wars. In the case of the Korean War, President Harry S. Truman's decision appeared to be the product of emergency—the quick response to aggression. As we shall see later, it was more than that. In the case of the Indochina war, a gradual escalation was obscured by official secrecy, and then facilitated suddenly by the Tonkin Gulf resolution. That resolution has been repealed for more than a year, but the same war continues, hanging legally in midair, supported by an extrapolation of the Constitution known as the President's "inherent" power to commit Armed Forces to conflict. But even before the Tonkin resolution came under heavy fire, the State Department was busy refurbishing the executive branch's claim to an independent, constitutional right to make war. In a memorandum of March 4, 1966, that claim was stated concisely by Leonard C. Meeker, legal adviser to the State Department:

> 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.

To prove his point, the legal adviser appealed to precedents back to the earliest days of the Republic:

> 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

*Author of *Tonkin Gulf*, contributed an analysis of the Pentagon Papers to *The New Republic* of Aug. 7 and 14.

the "undeclared war" with France (1798–1800). For example, President Truman ordered 250,000 troops to Korea during the Korean war of the early 1950s. President Eisenhower dispatched 14,000 troops to Lebanon in 1958.

The present Secretary of State, Mr. Rogers, adds that the "constitutional process so wisely conceived by the Founding Fathers has worked well throughout our history." The secretary met with the Foreign Relations Committee to testify against war powers legislation; he preferred to delay any new arrangements until "after the passions of Vietnam have faded into the past. . . ." He reminded Senators that the judicial system does not like to entertain a challenge to the President's ability to make war. Indeed, the Supreme Court has refused to do so, in the case of Indochina, even when prodded by the Massachusetts legislature.

"America is in the midst of a grave constitutional crisis," the committee was warned by Alpheus T. Mason, an eminent authority on constitutional law. Mason favored trying to rein in the Chief Executive. Another scholar on that side of the fence was Henry Steele Commager, the distinguished professor of American history. In the 1950's Professor Commager defended President Truman's war as sanctioned by law and history. He now feels that the abuse of Executive power subverts political institutions at home and threatens the peace abroad. "We find ourselves turning into a military society," Commager told the committee. However, the legal scholar John Norton Moore argued that the proposed restrictions were of doubtful constitutionality.

According to Secretary Rogers, the "electorate is the ultimate restraint." The individual citizen might be able to decide the issue at the ballot box, if he ever gets a clear choice. But what kind of guidance will the citizen receive? The Nation's political leaders are divided, and so is the academic community. For at least 20 years the doctrine of the President's inherent warmaking power has been supported by many scholars specializing in constitutional law, American history, international relations, and political science. This has been the sophisticated, modern view, reflecting a deeply held belief that the President needed extraordinary powers on the international scene and should have them. Because of the war in Indochina and its attendant domestic evils, however, some of our political and intellectual leaders are beginning to reexamine their position. It is my contention that the executive branch's appeal to historical precedent is not so valid as it has seemed.

When the Secretary of State appealed to the memory of the Founding Fathers, he raised a question that scholars testifying in favor of legislation were eager to deal with: What did the writers of the Constitution mean to do when they designated the President Commander in Chief but gave Congress the power to declare war? An abundance of 18th century documents, including the Federalist and James Madison's Journal of the Constitutional Convention, reflect the Founding Fathers' abhorrence of giving the war power to any individual person. One of the most oppressive of kingly customs had been the arbitrary, even frivolous, use of armed force, followed by the demand that everybody support the conflict as his patriotic duty. Power itself was a corrupting influence, the Founding Fathers agreed. They decided that one way to prevent harm would be to separate powers. Thus the Government was established in three branches: legislative, executive, and judicial. The Executive, true to the spirit of his office, was to

be Commander in Chief of the Armed Forces; but he was not to initiate war. That was to be the prerogative of the legislative branch, which, hopefully, might debate the matter until the source of conflict would fade away. Quite seriously, in part the arrangement was intended to "clog" the process of going to war.

According to Madison's Journal, delegates to the Constitutional Convention discussed giving Congress the power to "make" war, but finally settled on the term "declare" war. That left the President power to repel sudden attack. It was assumed that, as soon as possible, the President would obtain congressional authorization for further hostilities, if such were needed.

Now what about the problem of undeclared war? That came up during the administration of the second President, John Adams. France, because of a grudge against the United States, set privateers to raiding American commerce on the oceans; and so in 1798—contrary to what Leonard Meeker said in his memorandum—the Congress authorized President Adams to protect American shipping. The Navy Department was founded at the same time. It is true that no formal war was declared. Deliberately, conflict was limited to naval hostilities, and it became known as the Quasi-War. A peace treaty was signed in 1800. In the same year, by the way, the Supreme Court held that a state of war could exist in the absence of its declaration. Justice Samuel Chase used the term "limited war." He said, "Congress is empowered to declare a general war, or Congress may wage a limited war: limited in place, in objects, and in time." In short, there is nothing new about undeclared wars or limited wars, except the President's claim to authority for initiating them.

But what about the many other armed actions that are said to have been ordered by the President? An extremely important element in the war power controversy is a series of studies that show American Presidents making use of armed force on as many as 197 occasions. It will be recalled that Leonard Meeker told of 125 instances in which Presidents used armed force without obtaining prior congressional authorization. We already have dealt with one of Meeker's precedents, the Quasi-War. In a recent television debate, law professor Eugene Rostow, brother of economist Walt, told of 150 uses of armed force; and he declared that the warmaking relationship between the President and the Congress had remained "constant" since 1789. Professor Commager, though he was testifying in favor of restrictive legislation, mentioned to the Foreign Relations Committee "100 to 110" uses of military power to "intervene outside the United States."

In examining various claims, I notice that there have been two principal sources of information: the State Department and, oddly enough, the World Peace Foundation.

In 1912, the days of rampant gunboat diplomacy, the State Department's legal office began publishing a series of memorandums titled "Right To Protect Citizens in Foreign Countries by Landing Forces." From the beginning these publications listed many instances of the President's making use of armed force. Apparently the chief purpose of the memorandums was to justify the American position internationally; they are touchy about accusations of intervening in local political affairs. However, the State Department also gave consideration to domestic law. Its lawyers decided that the President

was acting within his rights, and that Congress had only "doubtful" authority to control such uses of armed force since they did not amount to "acts of war." In 1941 somebody culled from the most recent memorandum 85 uses of armed force for "protection purposes," and certain proadministration Senators found the list helpful in justifying short-of-war measures to aid Britain: principally lend-lease and the dispatch of American troops to Iceland. Of course, the American citizens to be protected in Iceland were our own troops. Not only the logic of the argument but its scholarship was nothing to boast of. The initial use of armed force was given as President James Monroe's expelling of pirates from Spanish Florida in 1812, although James Madison was President in 1812 and the Florida expedition of that year did not have as its objective the expelling of pirates. (The seed of this confusion can be found in the 1912 study.)

The World Peace Foundation made its historiographic contribution in 1945. At that time some advocates of establishing world peace were anxious about whether the United States could participate in United Nations peacekeeping actions without having to refer every decision to Congress for a declaration of war. A legal scholar and former Assistant Secretary of State, James Grafton Rogers, set these fears to rest. Rogers looked into the State Department's files and some standard academic histories, and came up with 149 "Military Operations of the United States Abroad." only 5 of the 149, said Rogers, represented "fully declared" wars. The World Peace Foundation published the Rogers study in a book titled "World Policing and the Constitution."

Upon scrutiny, most of the military operations cited by James Grafton Rogers and the State Department are seen to have been minor peacekeeping jobs in primitive and war-torn areas. But some of the operations were formidable. In 1933 more than 3,000 armed Americans were stationed in China, under the sanction of treaties dating back to 1858. Still other uses of armed force could be described as inconsequential and even fatuous. James Grafton Rogers lists, for example, the 1842 landing in Mexico of Commodore T. A. C. Jones, who mistakenly thought war had come. The commodore "discovered peace, withdrew, and saluted." In 1870, according to Rogers, the U.S. Navy forced the U.S. consulate in Honolulu to lower its flag to half-staff in recognition of a royal death.

James Grafton Rogers' book was one of seminal significance. Prof. Edward S. Corwin, a well-known authority on constitutional law, found it useful in defending the constitutionality of the Atlantic Pact, which committed the United States to the defense of Western Europe. In an article for the New York Times magazine of July 31, 1949, Professor Corwin referred to the James Grafton Rogers list of armed actions and said of it:

> 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 take action in accordance with that decision.

A year later President Truman took action in Korea, a nation with which we had no defense treaty, and the State Department Bulletin published an article in support of the President's legal position. The article quoted from James Grafton Rogers and other authorities. It also enumerated 85 previous "landings of American forces." This list had been taken from the Congressional Record of 1941; it omitted

Iceland and again told of President Monroe expelling freebooters in 1812. The Bulletin article justified the Korean intervention by saying that the United States "throughout its history" had "without congressional authorization, acted to prevent violent and unlawful acts in other states from depriving the United States and its nationals of the benefits of peace and security." The State Department now was justifying the legality of a full-scale war, and it was appealing to precedents which, according to its previous argument, did not amount to "acts of war." Perhaps the ordinary citizen can be forgiven for seeing that as a contradiction. (It could be argued that in 1950 neither the President nor the State Department used the term "war." The Korean intervention was called the Korean case, the Korean police action, and the Korean conflict. However, it was a war, as the State Department acknowledged in Meeker's 1966 memorandum.)

Both Professor Corwin's article and the State Department list published in 1950 carried a great deal of weight. A few years ago they still were being cited to me by students of political science as proof that President Johnson did not need any congressional resolution to fight in Indochina. Any writer who said otherwise, I heard, would "just get torn to pieces." Ruhl J. Bartlett, professor of history and political science at the Fletcher School of Law and Diplomacy, shared my impression that the historians were somewhat less convinced than the political scientists. Bartlett himself favored the legislative prerogative.

As the Indochina war became the source of increasing anxiety, the State Department in 1967 bolstered the legal position of President Johnson by preparing a new, Texas-sized list of military precedents. The expanded study told of 137 "Armed Actions Taken by the United States Without a Declaration of War, 1789–1967." It plucked from James Grafton Rogers the abortive landing of Commodore Jones in Mexico, but carefully pruned out the Navy's lowering of the American flag in Hawaii. The new list was prepared not by the State Department's Legal Office but its Historical Studies Division. The document admitted that Presidents "occasionally" had sought congressional authorization for the use of armed force and that was an improvement; but it still exaggerated the degree of initiative exercised by the Presidency, especially during the time the Founding Fathers served in that office. Let us take a look at the earliest military actions cited by the 1967 study.

The newest official list begins with the Quasi-War of 1789–1800. Correctly, it notes that the American naval operations were authorized by Congress.

The second precedent is the struggle with Mediterranean raiders known as the war with Tripoli (1801–05). The official list says Congress passed "enabling acts during the conflict" but never declared war. What happened was that the piratical state of Tripoli declared war on the United States in order to loot our maritime shipping; President Thomas Jefferson dispatched naval vessels to protect the ships and their crews; and the American naval vessels refrained from conducting offensive operations until permission was received from Congress. Whether war was declared is a minor point. However, in looking up the legislation, I discovered that an act of the Seventh Congress mentioned "warfare" and a "state of war." The word "declare" was not used, for what that omission might be worth.

The State Department's third precedent:

1806: Mexico. 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. Pike was imprisoned and later released.

If for many years the executive branch of our Government could say that the Korean war was not a war, I suppose one should not be surprised to see it now referring to the expedition of Zebulon M. Pike as an invasion. Pike, who thought he was a lieutenant at the time, staggered into Spanish territory, half-starved and half-frozen, while exploring the southwestern reaches of the Louisiana Territory. Pike's Spanish captors believed his purpose to be espionage. However, the exhausted little band of Americans had made impressive detours, finding Pike's Peak; and President Jefferson later vouched for the innocence of their orders. Among some writers the suspicion of espionage has been inspired largely by the devious nature of Pike's superior officer, General Wilkinson, who was an associate of Aaron Burr.

The fourth precedent concerns the years 1806–10 when "American gunboats operated from New Orleans against Spanish and French privateers." The quoted sentence was taken by the State Department from James Grafton Rogers' book. But Rogers gave as his source Dudley W. Knox's "*A History of the U.S. Navy*," and Knox said that the gunboats operated "against freebooters *under the guise* [italic added] of French, Spanish, and English privateers." The ultimate source of this precedent has been the false colors employed by Jean Lafitte *et al.*

In 1810 President James Madison ordered the occupation of part of west Florida, which he claimed as belonging to the Louisiana Territory. American settlers had rebelled against Spanish rule, and so the occupying forces met no resistance. President Madison said that his action was authorized by Congress; various laws had been passed concerning the annexation and administration of the very roughly defined Louisiana Territory, including one that authorized the seizure of Mobile Bay in the present State of Alabama. In 1810, however, President Madison did not press the American claim so far east as Mobile. The State Department now calls west Florida "Spanish Territory" and says nothing about congressional support for the President.

In 1811 Congress authorized the occupation of eastern Florida under certain conditions, including the danger of seizure by a third power (meaning England). Part of eastern Florida, Amelia Island, was occupied temporarily beginning in 1812, but President Madison disavowed the Army's action. The State Department's new list mentions the congressional authorization and President Madison's disavowal.

During the War of 1812 American forces occupied temporarily one of the Marquesas Islands in the Southern Pacific. According to the State Department, the island was "claimed by Spain." The island also was claimed by the occupying Americans, whose claim was better than the Spanish one since the Spanish explorer never had seen this particular island, Nukahiva. No solid claim to the Marquesas was established until the French took possession in 1842.

In 1813 Congress again authorized the seizure of Mobile Bay, and a bloodless occupation was effected. The authorization is noted by the official list.

In 1815, as mentioned by the State Department, Congress authorized the renewed conflict with Mediterranean raiders: the War with Barbary Pirates.

From 1814 to 1825 American forces fought pirates and Indians in the Caribbean and the southeastern portion of the continent. Sometimes the hostilities spilled into Spanish territory, chiefly Florida and Cuba. The problem of Florida was solved with the territory's purchase in 1821. As late as 1825 pirates were being captured on offshore Cuban islands. The State Department says nothing about whether these activities were authorized by Congress. A proexecutive study prepared by Senator Barry M. Goldwater who most recently has claimed 197 armed actions, admits that nearly all were "arguably" authorized by legislation. Omitted from Goldwater's list was an 1825 landing on Puerto Rico. In that case, as the State Department neglected to mention, the American commander later faced a court-martial and resigned from the Navy.

The above history takes us up to the administration of President Andrew Jackson, who is not described as a Founding Father. It is clear, I think, that the early Presidents stayed within the bounds of the Constitution as it originally was understood. Their actions do not support the view that Congress, unless it wishes to "declare" a war, has no say in whether hostilities should be initiated with a foreign state.

As for the remaining portion of the 19th century, the State Department offers a proliferation of incidents that I hardly have bothered to investigate. Many involve landings in Latin America, or shows of force there, during times of civil disturbance. A truly major event listed is Commodore Matthew Perry's opening of relations with Japan. This was an "armed action" in that it involved the use of armed ships and the apparent threat of force, but it was not an "armed action" in the sense that fighting occurred. Congress declared the Mexican War of 1846–48, and the Spanish-American War of 1898. In the case of the Mexican War, the conflict was made almost inevitable by President James K. Polk's dispatch of troops into disputed territory. By placing a military force in danger of attack, President Polk set the pattern for some future involvements, including the present one in Indochina. However, President Polk did find it necessary to seek a declaration of war.

Foreshadowing the trend of the 20th century, a dramatic daparture from legality occurred in 1900 when during the Boxer Rebellion in China, President William McKinley ordered 5,000 American troops to help an international force rescue the legations under siege at Peking. Congress was not in session at the time, and it never did approve or disapprove McKinley's action, which not only was politically popular but took place during an election year. Successive Presidents took more and more liberties with the use of armed force—which is why the State Department began issuing its apologia in 1912. The eloquent Woodrow Wilson, a former professor of political science, twice invaded Mexico without a valid congressional authorization; and he dominated the Caribbean through the Navy Department. In 1917 President Wilson returned to constitutionalism by seeking declarations of war against the Central Powers. In 1941 President Roosevelt requested declarations of war against the Axis Powers; by that time events had gone so far that Congress had no choice.

Congress slowness to deal with World War II resulted in a sense of inferiority that Senator Fulbright sees as the cause of its present disinclination to challenge the Executive's use of power.

By 1950 a considerable erosion of congressional power already had occurred; yet, from the constitutional standpoint, it still was an extraordinary event when President Truman undertook a major war without any authorization from the legislative branch of the Government. Truman acted during a time of emergency, and his decision was applauded by lawmakers and public alike. The legal aspect he disposed of by calling the enemy "bandits" and saying, "We are not at war." However, the need for quick action does not fully explain the President's motives. At his leisure Truman could have obtained authorizing legislation from Congress. But he chose not to. Why? An authority on that was the late Dean Acheson, Truman's Secretary of State. In his book of political memoirs, "Present at the Creation," Acheson said, "There has never, I believe, been any serious doubt—in the sense of nonpolitically inspired doubt—of the President's constitutional authority to do what he did." Acheson admitted that "congressional approval would have done no harm." But the process of obtaining it, he thought, might have hurt the morale of the men already fighting in Korea. There was yet another consideration. Acheson said of Truman:

> The President agreed, moved also, I think, by another passionately held conviction. His great office was to him a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige. This attitude would incline him strongly against any attempt to divert criticism from himself by action that might establish a precedent in derogation of presidential power to send our forces into battle. The memorandum that we prepared listed eighty-seven instances in the past century in which his predecessors had done this. And thus yet another decision was made.

The office of the President had become excessively powerful, and even "sacred," through a historical fiction, though legal legerdemain, and through an era of crisis. It is important to bear in mind that this development is relatively recent. It is not what the Founding Fathers "so wisely conceived." It is what they wished to prevent.

Memorandum to Committee on Foreign Affairs, Subcommittee on National Security Policy, House of Representatives, in Opposition to S. 440, War Powers Act

(By Charles A. Weil)

INTRODUCTION

I deeply appreciate the privilege of being heard again by this committee against a suicidal, self-denying ordinance that could well trigger defection of many, if not all, important allies, actual and potential; on which our security and economy depend; driving them into the waiting arms of avowed adversaries, their Finlandization by their regional super powers, and practically assure our conquest by Russia and/or China.

There are three underlying propositions:

1. Our grand policy has been, is, and only can be, to prevent an imbalance of military, repeat military, power, conventional as well as nuclear. We have to cease holding power balance as dirty words.

2. That policy depends on allies, actual or prospective; we can never be strong enough to resist or dominate the whole world's military, repeat military, power.

3. That policy rests on capabilities and will to deliver timely credible diplomatic and material aid to such allies and, if need be, of landing transoceanic expeditionary forces because forced landings can no longer be depended on, as General Bradley testified almost 20 years ago.

Underlying is the assumption that the global balance is between Mahan's sea power and land power, Mackinder's rimland and heartland, Dehio's insular and continental worlds.

My previous testimony to the committee was addressed to legislation to cripple American military efforts to deal with only one potential enemy, strategy in only one war; to deny an important beachhead in only one war, the beachhead to Southeast Asia. I then showed efforts by two potential enemies to deny an American beachhead to the Eurasian mainland.

Since then what may have been only a sham conflict between Russia and China has shown signs of being undissimulated. Since then there have been mobilizations on the Sino-Soviet frontier. Since then Mr. Nixon has visited Peking and Moscow. Since then Sihanoukville remains no longer the point of entry for Russian sophisticated weapons. Since then there has been the Indo-Pak war and Indo-Soviet pact encircling China. Since then Soviet strategy has shown its hands at gaining control of all East-West maritime choke points—Gibraltar, Suez, Panama, Malacca. Since then Soviet strategy has shown it is total; diplomatic, economic, financial, subversive, as well as military and indirect.

The only country besides the United States in central position, with access to both the Atlantic and Pacific Oceans, with capabilities

93-626—73——34

to interdict or interrupt all transoceanic lines of the United States, commercial as well as military, is the Soviet Union.

S. 440 would disarm us, at first diplomatically and then militarily.

Point I

American peace and security, its economy and standard of living rest on two interlocking global power balances, one conventional, the other nuclear

American peace and security has always depended on a global power balance in which no single power controls militarily all Europe or all Asia, a fortiori both.

Six Presidents have stated it and/or acted on the premise.

Two world wars were fought lest such balance be upset.

Our GNP and standard of living also depend on such balance for use of the seas that can be denied, if ever such single power dominated Europe and/or Asia; that is, the "World Island" Mackinder wrote about 60 years ago.

Such a power or bloc, with no large armies to support against major regional continental enemies, would have the resources and manpower to outbuild us at sea, destroy our Navy, and deny the foreign raw materials and foodstuffs we require increasingly, and the foreign markets to pay therefore, as every history book relates Napoleon sought to do with his "continental system" against England.

The hardship to us would be multiplied by extension of such system to all continents and the seven seas with all ports closed to our shipping, exports and imports, necessary to full employment and high standard of living, as well as security.

Secretary Peterson recently stated our need of imported raw materials and foodstuffs was due to increase greatly, and we are now facing an energy crisis because of the depletion of our oil and gas reserves and the need for increasingly greater imports of petroleum that could be denied to us if such balance were to be upset, particularly in the Middle East by diplomatic, or military actions.

Every American, even the most underprivileged, therefore has a personal vital interest, not at all adequately understood, in the equilibrium in which we now are the only power with capability, geographical and industrial, to be the conventional "world balancer" Theodore Roosevelt predicted in 1910 we would have to be, and Franklin Roosevelt led us to continue to be in 1941.

Remains the nuclear aspect. But since resort to nuclear war would result in all concerned being losers, the only policy to avoid the nuclear spasm is to maintain second strike nuclear capabilities, at least sufficient to insure that the cost to any potential enemy would be such as to deter resort thereto by them and, by maintaining, with allies, an equilibrium of conventional, or general purposes, capabilities, to make certain of overall global balance, failing which we might have to resort to nuclear war to preserve our independence, territorial integrity, GNP, and standard of living.

According to its sponsor, this bill is predicated on this country being the dominant power in the world. This it has never been. It may still have the largest surface navy. But since World War II it has never had more than 20 operational ground force divisions and

is planning now to have only 13. Its air force is no greater than the Soviet's, and since the SALT agreement Soviet nuclear capability is perhaps greater than our own.

The most we can hope for is the capability to be the balancer or stablizer. The distinction between being balancer and being dominant is what makes this bill suicidal.

For this bill would serve notice on all the countries that vital interests presently parallel to our own, on the basis on which we have entered into commitments with them; that our undertaking to support them against aggression; that they can no longer count on, including NATO, that would throw them into the waiting arms of the Soviets and/or the Chinese.

From then on we would have to go it alone militarily and economically.

Point II

THE ALTERNATIVE TO A POWER BALANCE, IN WHICH THE UNITED STATES ACTS AS STABILIZER IS THE GARRISON STATE, WITH A $500 BILLION DEFENSE BUDGET, NIL FOR WELFARE, AND EVENTUAL DEFEAT AND CONQUEST BY RUSSIA OR CHINA

Going it alone would mean we could not count on any adequate effort, to defeat any Russian war to conquer all of Europe or China, or any effort by China to expel the Soviets from East Asia or by either to conquer the entire subcontinent of India and Africa.

This would compel us to arm to the teeth, to become the Fortress America that, instead of demanding only 8 percent of our GNP for military defense, might well demand half of it, $500 billion, with nothing left for welfare only to find that even if our entire GNP went for military preparedness, it would not suffice and only end in defeat and dismemberment of the country and its enslavement with our people working only to serve foreign masters.

We or they; stabilizers of peace, or pawns.

Point III

FACTORS IN THE POWER BALANCE EQUATION, WHAT IT TAKES

Splitting the atom also split the concept of power balance into two, but interlocking, parts, with really two balances; the conventional balance of power and the nuclear balance. Now there are two equilibria to preserve; the former so as not to involve resort to the latter in extremis or surrender, if the conventional equilibrium be irretrievably upset. We are here concerned with the conventional general purpose forces.

The objective of the conventional balance is the same as it was prior to the nuclear age, which is perhaps 90 percent of geostrategic position. Let me define the term:

Geostrategy relates foreign policy to strategic capabilities as affected by geography.

The objective was to avoid hegemony. It was the 18th and 19th century policy of the English; to prevent any one nation on the continent of Europe becoming so powerful it would have no land frontiers to defend and could then use all the continent's resources

to build a navy that could wipe out Britain's navy and merchant marine from the seas.

With the development of the United States and then Japan it was not only necessary to prevent a European hegemony, but also an Asiatic one. We fought World War I to help England forestall European hegemony under German control. In World War II it was to prevent an Asiatic as well as a European hegemony or, in the words of General Marshall and Admiral Stark, our objective, if we had to fight, was—

* * * establishment in Europe and Asia of balances of power which will most nearly insure political stability in those regions and/or the security of the United States.

Power equilibrium developed a grand policy and strategy on the part of maritime insular countries like Britain, and now this country, as stated by the top career man at the British Foreign Office, Sir Eyre Crowe in 1907:

* * * now the first interest of all countries is the preservation of national independence. It follows that England (now the U.S.) more than any non-insular power has a direct and positive interest in the maintenance of the independence of nations and therefore must be the natural enemy of any country threatening the independence of others.

Liddell Hart described the British strategy of supporting the independence of continental powers as follows:

Our historic practice—was based on economic pressure exercised through seapower. This naval body had two arms; one financial, which embraced the subsidizing and military provisioning of allies; the other military, which embraced seaborne expeditions against the enemy's vulnerable extremities. By our practice we safeguarded ourselves where we were weakest and exerted our strength where the enemy was weakest.

We also found it necessary to vouchsafe for the nations on whose independence we relied for our own, a stake in our way of life. This we did for Germany and Japan after defeating their bids for hegemony with the Marshall plan and what we did for Korea and propose to do now for North and South Vietnam.

Meantime the world power pattern still remains bipolar between seapowers and landpowers, and to implement the conventional balance we must assure the use of the oceans for ourselves and our allies with parallel interest in independence and a high standard of living. As Sir Eyre Crowe also set forth:

* * * it has become almost an historical truism to identify England's (now read the United States) secular policy with the maintenance of this balance by throwing her weight now in this scale and now in that, but ever on the side opposed to the political dictatorship of the strongest single state or group at a given time.

That is why U.S. troops are in Europe. It was, and still is weaker than the Soviet bloc. It is why we may have to support China if attacked by Russia now, but help Russia later if China becomes strong enough to expel Russia from East Asia. Yet we must also be prepared against a Sino-Soviet volte face, like the 1939 Molotov-Ribbentrop deal which unleashed World War II. Likewise as to a Sino-Japanese or Russo-Japanese revers d'alliance.

In addition to command of the seas and its denial to the threatening hegemony, we have to use indirect strategy, the strategy of outflanking an enemy by geographic escalation, by mobility which command of the sea confers, and by a military industrial complex capable of supplying the fighting forces of our allies and ourselves—"the

arsenal of democracy"—with fighting forces of our own to turn the scales of military power, to prevent upsetting the power balances.

Since our only danger can come from landowners, such as Germany was, and Japan sought to become, it is obvious that if transoceanic regional landpowers we support were inadequate and that only landforce could help them, the fetters on despatch of our own ground forces this bill would prevent would make a shambles of our policy, strategy, and the diplomacy that alone is made credible by our readiness and willingness to despatch them.

As General Marshall put it in the same report with Admiral Stark in 1941:

* * * by themselves—naval and air forces seldom, if ever win important wars. It should be recognized as an almost invariable rule that only land armies can likely win war.

That is why Gneisenau, the German strategist, advised Britain to employ ground forces against Napoleon by forcing him—

* * * to have his armies run from one end of his empire to another.

Franklin Roosevelt adopted it against Hitler:

The enemy must be hit and hit hard from so many directions he will never know which is his bow and which is his stern.

And that is why we have commitments to defend 42 transoceanic countries of which 40 are littoral.

The question is what countries do we need as allies, what countries occupy areas important to us that must be denied to a potential enemy.

At the present there are very few, if any, countries south of the equator in either category. Most countries we need as allies, or must deny to an adversary, are in the Northern Hemisphere. Therefore, we must have access to a country that has geostrategic value. Most of them are transoceanic, except perhaps Canada and Mexico, and must, therefore, be on the littoral of transoceanic areas; that is, offer safe beachheads to deliver material and/or expeditionary forces, and insular countries like England, Japan, Australia, Iceland, or the Azores and Taiwan as staging areas and for antisubmarine war and transoceanic effectiveness.

Then such countries must have depth for operational purposes. With the speed of modern armored and mechanized forces such depth is indispensable. For that reason peninsulas are important. Also, countries with defendable frontiers to delay enemy forces are important considerations; high mountains like the Himalayas that cover much of India's frontier; wide rivers like the Rhine that cover much of the Franco-German border; deserts like the Sahara or the Middle East desert of Israel or the Sinai desert south of it, or jungles between Thailand and Vietnam, North and South.

Then there are countries with resources; raw materials and food stuffs, oil, gas, and other energy producing materials such as in the Middle East.

We must also avoid choke points in danger of control by an enemy such as Panama, Gibraltar, Suez, or Malacca, which might prevent access to the Mediterranean or Indian Oceans, or nations within effective radius. For example, Japan showed in 1941–42 that with control of South Vietnam she was able to capture Singapore and deny access to the Indian Ocean which was perhaps why Chou en Lai in 1954

is reported to have asserted that, having thought to have gained control of South Vietnam, he had caused the balance of power to shift in favor of the then Sino-Soviet bloc.

Then there are buffer countries like Belgium, Israel, Laos, and South Vietnam that serve to delay the advance of a potential perturbator or serve as barriers.

Then come the countries which must be denied to hegemony, seekers because they are regional bones of contention, apples of discord, which some countries would deny any other countries in the same general area, such as Belgium was in the 19th century to Europe and as Korea and Indochina are to the Asiatic power balance and stability.

A word as to the latter two is in order. It would be a great source of trouble to Russia were any potential Asiatic enemy to gain control over Singapore or Korea that could cut communications between European Russia and her maritime provinces in Asia. For the Trans-Siberian Railroad is inadequate to support large armies or navies defending Vladivostock if attacked by either China or Japan. It would pose a great threat to India likewise were Malacca and Suez to come under Russian control and would pose a real threat to Japan if Korea or Singapore came under military control of some potential enemy, whether Russia or China. Such control must therefore be denied any potential aggressor to preserve the peace and balance in East Asia and the Indian subcontinent.

Even the French begin to concede again what the former French Governor in Indochina urged on me prior to the 1954 agreements; the importance of Indochina to the world power balance.

In two articles of the recent semiofficial "Strategie" the leading French analysts, General Beaufre and Michel Garder wrote ominously of the Soviet encirclement of China, and Garder writes:

> Vietnam resumes raising a preponderant issue, which could have important consequences at the global level

while the French Foreign Minister Schuman stated:

> The absorption of one part of Vietnam by another or the establishment in South Vietnam of a government which mirrors that of North Vietnam will not facilitate the search for a political solution. The chances for a negotiated settlement (that will stick) are proportional to the chances for establishing an independent and neutral government in South Vietnam.

On top of the above geostrategic factors are the geopolitical which determine the staying power of allies, actual or contingent. Such attributes haven't the slightest relevance to their form of government or internal workings, whether corrupt or not.

It depends not only on their geographic position but on their military-industrial capabilities, the capabilities of their populations; whether literate or not; that is, the capability to use sophisticated weapons; whether they have high standards of living to defend, morale (not morals), discipline, military and industrial, and fighting forces in being of the kind and quality to delay an aggressor until help could come from other regional powers and in the last instance from the United States.

Then arises the question how to assess the different capabilities of military forces in terms of their equipment, readiness, training and logistical support.

There are countries vital to our survival. That is the policy of the present administration as set forth by Mr. Nixon that would be crippled by S. 440:

> We shall provide a shield if a nuclear power threatens the freedom of a nation allied with us or of a nation whose survival we consider vital to our security and the security of the region as a whole.

and it depends on—

> * * * the importance we attach to the threat and the significance of the threatened country.

And who but a military professional or analyst, with up to the minute information that must remain secret, is qualified to say which is vital under the constantly shifting combinations and permutations of power themselves, their power factors and positions in relation to any particular threat or conflict?

What are the qualifications of a hillbilly elected from Squeedunk for pork barrel purposes or a professor of poetry to assess the risks against stakes compounded by relative capability, or the effect of loss to us, or accretion to an adversary of any piece of foreign real estate involved in armed conflict and what it would take on our part to help them in such a conflict?

Does it require an expeditionary force, or can we help effectively with only diplomacy, lend lease of material, financial support for which confidence in our dollar may suffice?

Even if Senator Javits sponsored as he urged, and succeeded in having passed, legislation to have U.S. Forces continue to participate fully in the NATO command, it overlooks that the Asiatic balance is just as vitally important to the overall global balance.

Even now Russia is prodding India into making territorial claims against China on the Assam border which would bring Indo-Russian capabilities near to Chunking and close the ring around China in a way the Japanese were never able to do and threatened China with a two-front war which Chinese internal communications are inadequate to wage.

We cannot afford to let Russia conquer China or allow China to expel Russia from Vladivostock and the maritime provinces. We showed the latter in 1921 by sending an expeditionary force there despite our moves against Bolshevik Russia in Europe.

So according to Sir Eyre Crowe's dictum we would have to help whichever was being beaten, or put ourselves on the horns of a dilemma whether to fight a nuclear power alone or stand by in acquiescence to a fat hegemony in East Asia Mr. Nixon and Chou En-lai pledged each other against.

Such whole grand strategy is jeopardized by S. 440 which could, and probably would, cause all nations of importance to our security to lose confidence in our will and readiness to help defend them and result in their "Finlandlization." We cannot afford to have such a piece of nonsense on our statute books that denies to our diplomacy all semblence of flexibility, mobility, or credibility.

Point IV

S. 440 is unconstitutional because of facts and circumstances that could not have been foreseen by its framers, or even its responsible interpreters, the Supreme Court, until comparatively recently

While others, legalistically better qualified than myself have expressed conflicting opinions on its constitutionality, I submit the State Department views relative S. 2956 are applicable, so I will not impose on this committee's time to indulge in the tweedle dum and tweedle dee of self-appointed, but irresponsible, pedants relative a law the President would, and should, veto for reasons of wisdom set forth in point III, a veto unlikely to be overridden but that, if overridden, would probably be held unconstitutional by those really responsible, the Supreme Court, and which if not so held might well become moot by the abandonment of indispensible allies, with presently parallel vital interests, and our consequential total defeat by avowed adversaries who watch these proceedings with bated breath hoping for a congressional measure surpassing in asininity the Ludlow and Bricker amendment straitjackets.

But there are a few factual considerations I ask leave to submit on the principle that uncontroverted and uncontrovertible new facts make new law.

Let me first express sympathy with the provisions of section 4 requiring Presidential reports to Congress. I have always held in previous testimony to this, and other, congressional committees the desirability of the President "leveling" with Congress and the people provided it not involve a case of "telegraphing punches" or "Macy's telling Gimbels."

I cannot do better than paraphrase Mahan:

> In a democracy, the clear comprehension by the people of the vital national interests and the national purpose, and the clear enunication by its government of the policy therefrom resultant, coupled with the evident and adequate means to implement such policy; is the surest safeguard against such nation drifting into wars that do not concern it

The grand policy of power balance has been enunciated frequently, not only by the present incumbent of the White House, but by many of his predecessors, by acts and in explicit terms. We only entered the two world wars because Germany was winning and would have upset the balance to our jeopardy. It was only to preserve the Asiatic balance that Franklin Roosevelt took measures that drove the Japanese to the Pearl Harbor attack. It was because of their influence on the Asiatic balance we fought in Korea and Vietnam.

Unfortunately the naked assertions of Presidents Johnson and Nixon were not understood by too many Members of Congress or the people—why and how Korea or Vietnam were important to our peace and security.

Senator Javits makes much of the contention the Founding Fathers meant to establish—

> * * * different relationship of the Parliament and the King

relative the power of English kings to involve their countries in war. It overlooks the king and his advisers realized Senator Fulbright's point (*infra*) that members of Parliament represented parochial

interests and were not elected for their qualifications to assess matters of power politics vital to British security, and parliaments realized it also.

Against this is the crucial new fact; the Constitution was drafted and judicially construed in the 20th century largely when American independence and security were founded on oceans protected by a power balance and the navy of its balancer.

Since World War I, many concur, as I do, with Theodore Roosevelt, as set forth in point I, that the United States has inherited the British burden; without the benefit of an overseas empire; of being the global balancer. In the alternative (point II) it would only become a satellite or colony of Russia or China or history is only an empty chronicle of inconsequential dates and happenings.

The chairman of the Foreign Relations Committee put it years ago, before Vietnam and prior to the constitutional crisis engendered by the President being Republican while the Congress is Democratic:

> We must give the executive a measure of power in the conduct of our foreign affairs that we hitherto jealously withheld—certain to become more rather than less compelling in the decades ahead. The preeminent responsibility of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has all powers which the Constitution does not vest elsewhere in clear terms:

rather than in—

> * * * in the hands of a decentralized, independent minded and largely *parochially* minded body of legislators. [Italics supplied.]

The Constitution is a living document. Its construction has been extended to a point that has been severly criticized. So if it has been extended, and I agree, properly for domestic, social, and economic reasons, I submit that when it comes to saving our necks, the Court can, and will, stretch a point. It predicates judgment in which what is needed is not pedantry and legalism, but sound judgment based on full information on all national and relevant consideration. Such judgment in such matters is nothing if not military, geostrateic, especially in the age of lightning wars and nuclear strikes.

Since combat is only continuation of policy by other means, it follows as a matter of logic and plain common sense, S. 440 puts cart before horse.

If Congress has any function relative war or war powers, it should be as to policy; grand policy; the takeoff, not the crash landing; not the ad hoc manifestations and measures of policy execution and implementation, which may involve combat, if other means are inadequate.

How can Congress perform such deliberative function in the formulation of policy; that is, ascertain if such policy is to prevent a power imbalance, unless it debates it objectively; unless it is educated to debate it; unless the people is likewise eduated to understand it or to abide by the judgment of its government; unless the education, paid for by tax moneys, teaches the influence on American history and security of power balance; unless the media publishes information and opinion, instead of suppressing or disparaging it?

The point made by Jefferson:

> To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us, abruptly sacrificing the ends to the means.

I particularly share Senator Cooper's difficulty, pragmatically as well as legally, with any arbitrary, perhaps capricious, 30-day period and apprehend lest Justice Jackson's "zone of twilight" between distinct areas of Presidential and congressional war powers be precursor to nightfall's darkness on the country itself. Rather sure than sorry.

Nor is it necessary to depart very far from previous Court rulings concerning the plenary powers of the President in foreign relations and the Court's denial of jurisdiction over political questions as between the executive and legislature on which this committee need no briefing from me.

However, much as I would eschew carrying Mr. Fulbright's above quoted remarks too far relative the parochialism of the Congress, it must be pointed out that Members of Congress are not elected on the basis of qualifications, even education, to judge comparative capabilities or threats thereto, effective with the balance of power essential to our security as more fully set forth in point III.

Entirely apart from the education of their constituencies and parochial interest in the premises and the fact that many judgments of Presidents have to be based on secret information, technologies, and protocols that cannot be divulged even to Members of Congress lest they embarrass or provoke foreign nations, that the less discrete or overzealous Members of the Congress make public, and hence to enemies actual or potential.

Finally the terms of the bill are sufficiently indefinite to bedevil matters in a crisis, terms like "imminent," "clearly indicated by the circumstances," until construed by the Supreme Court which could even hold them so indefinite as to render the entire statute void for uncertainty while the word's "direct" and "imminent" are inconsistent with the words "to forestall," that can only add to the bedevilment and delay in a crisis.

In fine S. 440 presents an issue of wisdom, of security, not of constitutional theory; a condition of survival, the supreme law of nature.

Point V

Many Members of the Senate and House Appear to Have Misread Public Opinion on Vietnam

Congress should not misread the 1972 election returns to signify disapproval of the President's conduct of foreign relations in general or with Southeast Asia in particular, or to signify approval of the misconduct of those Members of Congress as in relation thereto who have upset the national applecart with misleading aid and encouragement to the enemy that has prolonged the war in Southeast Asia.

The reelection of a Democratic Congress has not been because, but in spite of the misconduct of so many on the Southeast Asia issue and because the electorate has had confidence in the President's continuing capability to stymie such misconduct, without affecting the conduct of Congress on parochial domestic matters that have been handled to the satisfaction of the separate constituencies.

Accurate reading of the opinion polls shows the people overwhelmingly support measures to defend the national security in general, and in particular relation to its stake in South Vietnam that has been suppressed in Congress and the media.

This is confirmed by the "Gallup Opinion Index" of December 1967 showing public approval of the policy to deny Vietnam to potential enemies despite that the public did not fully understand the particulars how and why Vietnam was vital to our peace, security, and prosperity as enunciated by Presidents Eisenhower, Kennedy, Johnson, and Nixon and proved by the actions of Presidents Franklin Roosevelt and Truman.

I personally asked the Gallup and Harris polls to make a survey of how many people understood the national security aspects of the Vietnam controversy so our leaders could, if necessary and possible, make such particulars plain.

Even this was suppressed, but for which it would have been incumbent on those leaders, political and intellectual, to explain it in terms comprehensible to anyone with an IQ of 100 without divulging any properly classified information or material. This has been despite suppression by the academic-media complex of the reasons for our involvement in Indochina and which would have brought out how Indochina fits into the big picture of our overall policy of power balance, the reasons therefor, and ways and means to implement it as set forth in point III of this memorandum and point III of the memorandum to the Foreign Affairs Committee in July 1970 I ask to have made part of it, and appendix to, the present brief.

Point VI

THE CONGRESS IS, UNFORTUNATELY, NOT QUALIFIED TO ASSESS THE CIRCUMSTANCES AND SECRET INFORMATION THAT CALL FOR PREVENTIVE ACTION, BY THEIR EDUCATION, NOR ARE THEY ELECTED FOR THEIR QUALIFICATIONS THEREFOR, AND ARE EVEN PREVENTED FROM ACQUIRING SAME BY THE ACADEMIC MEDIA COMPLEX WHICH SUPPRESSES, AS IT DID RELATIVE INDOCHINA, FACTS AND OPINIONS THAT WERE PRIMA FACIE RELEVANT AND MATERIAL TO THE NATIONAL SECURITY ASPECTS OF THE CONTROVERSY

Nor are members elected for their grasp of grand strategy, including geostrategy, as practiced by adversary nations, avowed or potential, more particularly Russia and/or China, which respected modern analysts and theorists like Liddell Hart and Beaufre describe as "indirect" involving taking for themselves, or denying to this country positions and capabilities that cumulatively would leave no alternative between surrender and nuclear spasm.

Neither are their constituencies, including the intellectual elite, educated to appreciate the enemy's insidious and arcane indirect strategy and the application to policy of the good old proverb that a stitch in time saves nine.

Nor are either electors or elected qualified to evaluate geostrategic positions and comparative capabilities, including those threatened, effective with power balance, many of whose factors are, and must remain secret.

Point VII

We must defeat S. 440 and any other fettering self-denying ordinance and educate our people on our balance of power policy and strategy, its relevance to our history, our future security and economy and standard of living

Instead of "black studies" as condition to funding of educational institutions let us make such funding conditional on the proper interpretation of American history in elementary schools, high schools, and institutions of higher learning.

Respectfully submitted,

Charles A. Weil.

TEXT OF HOUSE JOINT RESOLUTION 542

[H.J. Res. 542]

JOINT RESOLUTION concerning the war powers of Congress and the President

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

SHORT TITLE

SECTION 1. This measure may be cited as the "War Powers Resolution of 1973".

CONSULTATION

SEC. 2. The President in every possible instance shall consult with the leadership and appropriate Committees of the Congress before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent, and after every such commitment, shall consult regularly with such Members and Committees until such United States Armed Forces are no longer engaged in hostilities or have been removed from areas where hostilities may be imminent.

REPORTING

SEC. 3. In any case in which the President without a declaration of war by the Congress—

(1) commits United States Armed Forces to hostilities outside the territory of the United States, its possessions and territories;

(2) commits United States Armed Forces equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, replacement, repair, or training of United States Armed Forces; or

(3) substantially enlarges United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating his action;

(B) the constitutional and legislative provisions under the authority of which he took such action;

(C) the estimated scope of activities;

(D) the estimated financial cost of such commitment or such enlargement of forces; and

(E) 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.

CONGRESSIONAL ACTION

SEC. 4. (a) Each report submitted pursuant to Section 3 shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same day. If Congress is not in session when the report is transmitted, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable, shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Senate Foreign Relations Committee for appropriate action, and each such report shall be printed as a document for each House.

(b) Within 120 calendar days after a report is submitted or is required to be submitted pursuant to Section 3, the President shall terminate any commitment and remove any enlargement of United States Armed Forces with respect to which such report was submitted, unless the Congress enacts a declaration of war or a specific authorization for the use of United States Armed Forces.

(c) Notwithstanding subsection (b), at any time that the United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or other specific authorization of the Congress, such forces shall be disengaged by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURE

SEC. 5. (a) Any resolution or bill introduced pursuant to section 4(b) at least 45 calendar days before the expiration of the 120-day period specified in said section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Senate Foreign Relations Committee, and shall be reported out by such committee, together with its recommendations, not later than 30 days before the expiration of the 120-day period specified in said section.

(b) Any resolution or bill so reported shall become the pending business of the House in question and shall be voted on within 3 legislative days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a resolution or bill passed by one House shall be referred to the appropriate committee of the other House and shall be reported out not later than 15 days before the expiration of the 120-day period specified in said section. The resolution or bill so reported shall become the pending business of the House in question and shall be voted on within 3 legislative days after it has been reported, unless such House shall otherwise determine by yeas and nays.

SEC. 6. (a) Any resolution introduced pursuant to section 4(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Senate Foreign Relations Committee as the case may be, and shall be reported out by such committee together with its recommendations within 15 calendar days.

(b) Any resolution so reported shall become the pending business of the House in question and shall be voted on within 3 legislative days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a resolution passed by one House shall be referred to the appropriate committee of the other House and shall be reported out by such committee together with its recommendations within 15 calendar days and shall thereupon become the pending business of such House and shall be voted upon within 3 legislative days, unless such House shall otherwise determine by yeas and nays.

INTERPRETATION OF ACT

SEC. 7. Nothing in this resolution (a) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties;

(b) shall be construed to represent congressional acceptance of the proposition that Executive action alone and satisfy the constitutional process requirement contained in the provisions of mutual security treaties to which the United States is a party; or

(c) shall be construed as granting any authority to the President with respect to the commitment of United States Armed Forces to hostilities or to the territory, airspace, or waters of a foreign nation which he would not have had in the absence hereof.

EFFECTIVE DATE

SEC. 8. This resolution shall take effect on the date of its enactment.

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