I thank the gentleman.
Mr. Sisk. Thank you very much, Mr. Chairman.
Mr. Zablocki. Mr. Findley?

IMPACT OF SISK BILL ON VIETNAM ACTION

Mr. Findley. Thank you, Mr. Chairman.
Mr. Sisk. I too appreciate your being here today. I think the fact that you have taken the trouble to prepare a statement, introduce the bill and have taken the time to be here shows your commitment to this issue of the relationship between the executive and the legislative branches, which concerns many Members.
You have in your bill the phrase “for other than peaceful purposes.” That is on lines 5 and 6 of the first page. To give you an example, in order to understand more clearly what you mean by this phrase, “for other than peaceful purposes,” back in 1963 or thereabouts President Kennedy ordered some 16,000 personnel—military personnel—to Vietnam. They were sent there under the label of military advisers. Shortly after they arrived they were reorganized and made a part of combat operations. Would the deployment of these 16,000 personnel be an act other than for peaceful purposes within the meaning of the resolution you have introduced?

Mr. Sisk. If I can say to my good friend from Illinois, as I understood the action taken at the time by President Kennedy, it would be my opinion that under the intent of my resolution he might reassign those troops to combat roles but within 24 hours, I would expect him to consult with Congress and explain why.
I say this because it was my understanding that this was to be a peacekeeping operation. There was an implied understanding that those troops would be used to restrain and to keep the peace and literally not to make war.
Again, I recognize we are dealing in a gray area. The interpretations placed on that action and the events that developed we know all contributed to the situation we find ourselves in.
Speaking from hindsight, we can say we wish it had not happened, or that he should not have done so without consulting Congress and getting congressional approval.
But using what I understood to be your analogy, I think he could have taken this or similar action or could do so in the future on the basis that these people are there for peaceful purposes.
Here, again, it comes down to interpretation. I recognize there is no absolute black and white way that these things can be interpreted and carried out without question.

Mr. Findley. Let me put it this way: If H.R. 8446 had been law in 1963, would the President have violated this law in the first instance by sending the 16,000 military advisers to Vietnam and in the second instance by deploying them as military advisers.

Mr. Sisk. I think he would have been in violation of the law to deploy them for combat purposes, yes. That would be my interpretation.

Mr. Findley. Thank you, Mr. Chairman.
Mr. Zablocki. Mr. Fraser?
Mr. FRASER. Thank you, Mr. Chairman.

I want to commend my colleague for the interest he has taken in a subject which is difficult to deal with by statute.

In looking at your resolution, I notice that you require a declaration of war by Congress unless a specific treaty obligation is violated or the United States is under attack.

In Vietnam the question arose as to the wisdom of declaring war. It was argued that a declaration of war might trigger some undisclosed treaty commitments between North Vietnam and the Soviet Union or between North Vietnam and mainland China.

U.S. Armed Forces have participated in hostilities, as for example in the Congo, where we contributed certain logistical support elements as part of a United Nations force that was actually engaged in hostilities.

Is it important for Congress to authorize action by the President in the form of a declaration of war or would it be possible to authorize the President to do whatever is proposed to be done or is being done?

Mr. SISK. I appreciate the gentleman’s question. If my resolution does not make this clear I would certainly want to make it clear in any resolution that we pass. What I would like to see is acquiescence of Congress before men go into combat.

That is the sum and substance of what I seek to get at. Before men’s lives are jeopardized by actual combat except under attack we should exercise our constitutional role. It would be my understanding and certainly my hope that if this resolution is not properly written to do that, then I would want it rewritten so that Congress would be consulted and congressional approval is given for such action.

In a case where we actually sent American troops into combat action either jointly as part of the United Nations or in some other way we would have the authority to delegate that power without declaring war.

I don’t mean to say that in every instance a man cannot be involved in combat without a declaration of war. At least there should be congressional approval prior to his being sent into combat.

Now if my resolution is not broad enough to cover that, then I would want it changed to include that kind of coverage. We recognize that we are apt to be faced with many kinds and types of incidents that may transpire in the future different from anything we have had in the past.

Before a man risks his life on the firing line of any foreign country, Congress should approve that action, not necessarily by declaration of war but at least by resolution in support of the President.

POWERS OF CONGRESS TO RESTRAIN PRESIDENTIAL ACTION

Mr. FRASER. One other question. Suppose that the Congress enacted a law prohibiting the President from stationing troops aboard in certain places. Do you believe that the Congress has the authority to restrain the President in that fashion?

Mr. SISK. Of course. It is my understanding that Congress has the power to restrain him even today through the use of the purse string.
I again refer to our national forces in Europe. I do not think there is any question but what the Congress has the power today without any additional law, through the use of appropriation of money, to force the return of our troops.

On the other hand, I would not propose to restrict the right of a President to assign troops to occupation duty because this falls within the area of what I would consider peaceful use.

Mr. Fraser. I understand that your resolution would not get at that particular question. I am really asking this in a more general way. Let us suppose that Congress enacted a troop ceiling of 100,000 men in Western Europe under NATO. In your judgment if we passed such a law do you think that the President would be bound by it?

Mr. Sisk. Yes, I do.

Mr. Fraser. So do I. The executive branch is arguing that they cannot be bound by such a law. They will have an opportunity later to state their position clearly.

Mr. Sisk. I recognize that we are concerned here with a definition of the constitutional powers of the President as our arbiter in foreign affairs. I hope we are also defining and clarifying his role and ours.

I have tried to lean over backward to avoid constricting or improperly restraining the President as Commander in Chief of our Armed Forces, as well as our principal arbiter in foreign affairs.

However, we are talking about an area where there has never been that occasion or necessity to define the constitutional power which he has. It seems to me that Congress, which raises money, levy men for armed forces by constitutional power, also has the right to approve the number of troops sent into combat.

To me it seems pretty clear. Yet I understand, constitutional lawyers may differ.

Mr. Fraser. Thank you very much for a very useful contribution.

Mr. Zablocki. Mr. Fulton?

**DEFINITION OF TERMS IN SISK BILL**

Mr. Fulton. I am glad to have you here and I think your responses are helpful to the subcommittee.

As we look your resolution over you use a definition on the first page, lines four and five, "outside the United States or any other territory subject to its jurisdiction."

You are therefore defining two terms. Then you go over on page 2. You transpose that definition under subsection 1, line three. "When he finds that the territory of the United States is under attack or under immediate threat of attack . . . ."

Your resolution is different than some of these other resolutions, that if the President once advises Congress that is enough. He does not have to keep Congress informed, does he?

Mr. Sisk. I would certainly expect that he would keep us informed.

Mr. Fulton. There is no requirement according to your resolution.

Mr. Sisk. It is the intent of the resolution. I might say to the gentleman from Pennsylvania, that not only would we be informed in the event he takes actions under certain criteria and then informs us within 24 hours but at that point I would assume certain actions would be set in motion.
Congress would either approve or disapprove, which would okay continuing in the same direction or which would signal a change. It seems to me this restraint is necessary if Congress is to fulfill its policymaking powers.

Mr. Fulton. Then if that is the case, you want action by Congress. The question is what kind of action.

You have used the words “approval” and “acquiescence.” Acquiesce means by definition to comply quietly or accept tacitly or passively. That does not mean approval. That is from the old Latin aequirescere, which means just keep quiet and go along.

You have also used the word “approval” which, of course, comes from the old French and the old English. The old English is “approve.” That approval means something that is much different than acquiesce because that means a specific act of consent, of agreement.

So that what must be done, is distinguish between acquiescence of Congress and approval. Now, which do you mean?

Do you mean Congress must approve the actions of the President specifically and completely or do you mean that we just go along and acquiesce in them?

Mr. Sisko. Let me tell the gentleman exactly how I interpret it. I interpret it to mean approval or disapproval.

Mr. Fulton. So acquiescence is not enough?

Mr. Sisko. So far as I am concerned, no, because we are dealing in an area where Congress has to take responsibility, very definitely. Leaving to the wisdom of this subcommittee the interpretation of language, I specifically mean approval.

In other words, at that point we either approve what the President has done or we disapprove.

SISK BILL: NO TIME LIMIT ON PRESIDENT

Mr. Fulton. The next point is that you have no real requirement, when this is sent to the Congress by the President, of any termination point or any reduction in a point of time.

You do not put any time limit on the President at all, do you?

Mr. Sisko. I am not certain that I understand the question. I am not certain as to why there would be any necessity of time limitation. The Javits resolution only gives the President 30 days to keep on doing whatever he is doing.

I give him 24 hours, because I think the President must have freedom to act very quickly at times as I am sure my colleague from Pennsylvania agrees.

Now, once he has carried out an emergency action because of the imminence of attack or attack underway, then he consults the Congress within 24 hours.

At that point Congress then takes action. At least that is my intent. We either approve what he is doing and support him by resolution or we disapprove and say, no, period.

Mr. Fulton. Suppose Congress does nothing then for a week. What happens?

Mr. Sisko. I cannot, of course, believe——.

Mr. Fulton. We must look at probabilities, of course.
Mr. SISK. Of course, until such time as Congress took action it would seem to me the President in exercising his responsibility as Commander in Chief, would go ahead and do whatever he thought was best.

I have said that he must report to us within 24 hours. If we are not in session he must call an extraordinary session within 24 hours for purposes of reporting.

Certainly, if we in Congress are derelict in our duty if we simply do not act, the President has the responsibility to go ahead and do the best he can under whatever circumstances until Congress has acted.

I would hope that Congress would not be derelict.

WOULD GIVE PRESIDENT FREEDOM TO ACT

Mr. FULTON. When you say the words "go ahead," do you mean maintain the status quo, continue the President's action at the time he made the report, or do you give him leeway?

Can the President escalate, deescalate or deploy or not deploy?

Are you going to say to the President to maintain the status quo even if it is a movement status quo. Or would you hold the President still until Congress approves or disapproves?

Mr. SISK. The President, as I would see this, would have total authority to do what he felt in his judgment best until such time as Congress has acted.

Mr. FULTON. So he could put the 16,000 advisory MAG troops into Indochina in that period and change them over to combat troops if Congress has not acted?

Mr. SISK. That is right. Until such time as we act he will use his best judgment and do as he sees fit. He is, of course, required to report to us within 24 hours.

Then, it is up to the Congress to take action. I question, and again I am not challenging Senator Javits or anyone else, but I question the necessity of time limitation.

The point, it seems to me, is that the American people today are concerned that we are seeing men sent into combat contrary to what some of us believe are the constitutional powers of the President.

Now, in addition to giving Congress certain authority, we are assuming grave responsibilities. If Congress does not act, then we have not lived up to our responsibility.

So, to put in any time limitation seems to me pointless. Maybe I do not see the whole picture.

POSSIBLE APPLICATIONS OF SISK BILL

Mr. FULTON. Would you, for example, in the recent Caribbean situation which almost occurred, permit the President to have a landing force of Marines so that he could act to protect American lives and property but he keeps the Marines on board a carrier or transport just beyond the horizon, within, say, a combat distance of a particular country?

Would you let him do that?

Mr. SISK. As long as they are on an American ship and not in foreign territory and as long as they are not in combat there would not be any automatic restriction under my resolution.

In that event, the President is utilizing his powers under the Constitution for peaceful purposes.
Mr. Fulton. Would you differentiate between combat-purpose troops and supply or logistics-purpose troops or facilities support troops?

Mr. Sisk. Not being a military expert, nor a foreign policy expert, I think we get into a problem in writing legislation of quibbling over semantics.

Mr. Fulton. We are discussing it to see what you mean by your words. You see, we are trying to pin down at what points these various tremendous required steps go into operation upon the American Government actions that affect the American people basically, as basically as you can affect anybody.

Mr. Sisk. If I can just give an illustration. If we sent troops to Vietnam or we sent troops anywhere in combat, where there was danger of American soldiers being killed, even though they were in a supply unit or any other kind of unit, that would fall within the requirement of approval by the Congress.

Anyone in that area having anything to do with the effort it seems to me becomes part of combat troops. Are we sending them for peacekeeping purposes or are we sending them for combat?

This, to me, is really the crux of the question.

APPLICATION TO ATTACK ON TRUST TERRITORIES

Mr. Fulton. The Japanese mandated islands have been taken over by a resolution of this committee whereby the United States is the trustee under the United Nations Security Council with the right to fortify, and we are the sole trustee, not under the General Assembly.

Would any kind of attack on those islands which lie between the Philippines and Hawaii be within the purview of your resolution where we are simply a United Nations trustee?

Mr. Sisk. Yes, sir; they would be.

Having been a member of the committee that spent some months in the trust territories working with the legislature, I would construe an attack upon those just as I would construe an attack on the Hawaiian Islands.

Mr. Sisk. This is an area over which we have sole control. An attack in that area I would call an attack on us.

Mr. Fulton. Do you mean an ally by treaty or an ally by voluntary agreement?

For example, we have a base in the Azores but we don't even have a set agreement with Portugal, oral or written. It is a NATO base and the United States uses that facility. Would you have that kind of informal arrangement as part of your resolution, too?

Mr. Sisk. I am not sure that I follow your question.

Mr. Fulton. In the Azores we have a facility where there is no real treaty. The agreement has run out. Would you, then, as long as the United States de facto has an installation even if it is just temporary, and has U.S. troops there or has Armed Forces supplies and facilities, if there is an attack on that, would you then put into operation your resolution?

Mr. Sisk. Yes, sir; I would.

Mr. Fulton. Thank you, Mr. Chairman.

May I compliment the witness. Mr. Sisk has given very direct and explicit answers. It is a pleasure to have you with us this afternoon.
Mr. Sisk. Thank you, Mr. Fulton.
Mr. Zablocki. Mr. Bingham?
Mr. Bingham. No, thank you, Mr. Chairman. I am sorry that I was not here.

PROCEDURAL QUESTIONS IN WAR POWERS LEGISLATION

Mr. Zablocki. If I may ask one final question of our colleague.
As you know, in the last Congress the subcommittee resolution was considered on the suspension calendar. Could we have the benefit of your wisdom, as a member of the Rules Committee, on the preferable way of having this brought to the floor for action, in view of the fact that it is such a complex matter?

You know there is an inherent objection on the part of some members to consider any bills under suspension or closed rule if we should get such a rule.

Would you give us your observations and considered judgment as to how we should bring a proposal to the floor?

Mr. Sisk. I personally would prefer to see a rule granted because it gives the Members of Congress a better opportunity to express their will. This is a terribly important matter. I can well understand the position of the administration, this administration or any previous administration, because we are dealing with delicate matters.

But it would seem to me that a rule would be properly in order.

Again, I understand the problems of amendments and at times, as the chairman has so well stated, we have considered these under suspension because then, of course, no amendment can be offered.

I would suppose that after your subcommittee has acted, at that point it would be up to the committee to determine whether it should move under a closed rule.

If you justified that before the Rules Committee, as the gentleman knows, we do issue closed rules from time to time.

Now they are sometimes frowned on. I am not against closed rules per se. I would support a closed rule if there is a good and justifiable reason. Other than that a closed rule might lead to a situation which would do more harm than good.

I think this is a judgment matter that this committee, consulting with the Rules Committee, would have to arrive at.

I hope that a rule would be sought and we would be permitted to discuss the matter under a rule which might give us extra time. I think Members should be entitled to express their feelings on this very important subject.

Mr. Zablocki. I certainly agree with the gentleman that additional time would be very helpful.

I think it is a very complex subject matter and it should be fully debated. My only concern is in the amendment stage, about what could happen to the legislation.

Mr. Sisk. I share the gentleman’s concern. It seems to me to be a matter for this subcommittee and your understanding of the problem combined with that of the Rules Committee to decide.

I hope that we could arrive at the right decision.

Mr. Zablocki. I want to thank the gentleman and join my colleagues in expressing appreciation for your testimony.

Mr. Sisk. Thank you, Mr. Chairman.
INTRODUCTION

Our next two witnesses are here today representing the viewpoint of the executive branch.

First, we will hear from the Honorable John R. Stevenson, legal adviser to the Department of State. Mr. Stevenson testified before the subcommittee last year on the war powers issue and it is a privilege to have him back with us this year.

With Mr. Stevenson is a spokesman for the Justice Department, Deputy Attorney General Thomas E. Kauper.

We are pleased to have you with us today, Mr. Kauper.

Mr. Stevenson, if you will present your statement, to be followed by Mr. Kauper’s statement, then we will begin questioning under the 5-minute rule.

You may proceed.

STATEMENT OF HON. JOHN R. STEVENSON, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. Stevenson, Thank you, Mr. Chairman.

Mr. Chairman, it is again my pleasure to testify before this subcommittee on the serious constitutional questions under consideration. This subcommittee’s work last year contributed in an important way to an understanding of the war powers issue.

As you know, Mr. Chairman, on May 14 the Secretary of State testified before the Senate Committee on Foreign Relations on the war powers question. At this point, I would like to introduce into the record the statement Secretary Rogers made.

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

Mr. Stevenson. Thank you, sir.

(Statement of Secretary of State Rogers may be found on page 122.)

Mr. Stevenson. I believe the Secretary’s statement contains a balanced and scholarly presentation of the constitutional issues involved in the war powers question.

I do not wish today to duplicate that presentation or my own statement last year before this subcommittee. I would, however, like to take this opportunity to emphasize a few points which in my view are especially important.

At this stage in our continuing discussion we are all still familiar with the historical background of the war powers question, beginning with the drafting of the Constitution and continuing through recent historical precedents.

CONCLUSIONS TO BE DRAWN FROM HISTORY

I will not review the historical material again, but I do think some useful conclusions can be drawn from those familiar examples.

First, it is clear that the framers of the Constitution intended that decisions regarding the initiation of hostilities be made by the Congress and the President, together, except that the President was recognized as having the authority and the responsibility to use the Armed Forces on his own authority in certain emergency situations.

Second, judicial precedents and subsequent examples of presidential practice support this conclusion. However, the judicial precedents are very sparse since courts have usually regarded the subject of the war
powers as a political question and have refused to adjudicate on the merits.

Recently in refusing to rule on the constitutionality of U.S. participation in the conflict in Vietnam, the D.C. Court of Appeals stated:

'It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the 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.

Moreover, past presidential actions cannot be regarded as dispositive of the constitutional questions now under consideration. The most one can say of these historical examples is that they indicate the substantial number of times in the past that Presidents have felt constrained to take military action without prior congressional authorization and illustrate the wide range of factors which have prompted such actions.

Third, it belabor the obvious to point out the extent to which the world and our concept of the United States' role in it have changed since 1787. For example, it is difficult to underestimate the impact of such factors as the emergence of the United States as a world power or developments in technology, including nuclear weaponry.

SHARED RESPONSIBILITY: IN THE NATIONAL INTEREST

Our primary concern must be to insure that the constitutional framework of shared responsibility for the exercise of the war powers works in the Nation's best interests in this modern context.

The fundamental change in the factual setting in which the war powers are exercised emphasizes the necessity of viewing the national interest in a dynamic fashion. Our concept of that which best serves the national interest has undergone significant change since the end of the 19th and early 20th centuries and, even more recently, since the 1950's and 1960's.

The Nixon doctrine represents our most current assessment of what is required in the national interest and has a direct bearing on the war powers question. The Nixon doctrine means that we will continue to honor our treaty commitments and offer a shield against nuclear threats aimed at our allies or other countries vital to our security; however, we now recognize that our national interest does not require an automatic U.S. military response to every threat. We seek a new partnership with nations of the world in which we continue to play a large and active role in world affairs, but where they become increasingly self-reliant and assume greater responsibilities for their own welfare and security and that of the international community.

I think it is also important to recognize that the constitutional allocation of the war powers between the President and Congress leaves the exercise of those powers essentially to the political process.

COOPERATION AND THE SEPARATION OF POWERS

This is characteristic of our constitutional system of separation of powers. It means that the effective functioning of our system depends on cooperation rather than conflict between the two branches and this, in turn, requires consultation, mutual trust and continuing poli-
ical interaction between the two branches and with the electorate. With this cooperation, legislation defining the President's war powers is unnecessary; without it, such legislation will be ineffective and will only serve to raise false hopes that legal formulas can resolve what must be an essential political accommodation between the President and the Congress, as was intended by the framers of the Constitution.

This administration respects Congress' right to exercise its full and proper role in decisions involving the use of military force and in the formulation of our foreign policy. We emphatically reject the view that Congress' power to declare war should be interpreted as a purely symbolic act without real substance in today's world.

This is more than a matter of good congressional relations or recognition that most presidential programs require implementing legislation and funding. Our respect is based on what we regard as a constitutional imperative grounded in Congress' power to declare war: If the Nation is to embark on war or upon a course of action which runs serious risk of war, the critical decisions must be made only after the most searching examination and on the basis of a national consensus, and they must be truly representative of the will of the people. For this reason, while the form of congressional exercise of its war powers may change, and has changed, the underlying principle remains constant—we must insure that such decisions reflect the effective exercise by the Congress and the President of their respective constitutional responsibilities.

**ROLE OF ELECTORATE AS RESTRAINT ON PRESIDENTS AND CONGRESS**

Finally, we also recognize the role of the electorate as the ultimate restraint on both the President and Congress in the exercise of this Government's war powers. As the President has stated: "Our experience in the 1960's has underlined the fact that we should not do more abroad than domestic opinion can sustain." Report to Congress of February 25, 1971, page 16.

Let me turn now to the proposed legislation before this subcommittee. I believe that enactment of legislation which attempts to define and codify the war powers of Congress and the President would not serve the Nation's long-term interests. In my view, legislation which attempts to freeze the constitutional allocation of the war power raises serious practical and constitutional problems.

Such legislation represents an effort which the framers of the Constitution quite deliberately decided against. The attempt to draw fixed lines in the war powers arena is inconsistent with our constitutional tradition—a tradition which was intended and has worked to keep the basic structure of our Nation flexible and perpetually viable. Some say flexibility is a euphemism for unchecked Executive power. This statement misjudges the nature of our political process. The Congress and the President each have war powers appropriate to their respective roles, but the Constitution does not attempt to specify precisely how far one branch can go without the other or to what extent one branch can use its powers to limit those of the other. Our constitutional framework was designed to be flexible—indeed, flexibility is the key to our nation survival—but the checks and balances inherent in our system of separation of powers provide ultimate limits.
In my opinion we do not have sufficient foresight to define these limits more rigidly and at the same time be sure that we have provided wisely for all emergencies which may arise in the future. The framers of the Constitution acted on this same premise, and we should be reluctant to reverse their judgment. Any effort to modify that judgment, as Secretary Rogers pointed out, should be considered deliberately and calmly, in an atmosphere removed from the emotion generated by the conflict in Vietnam.

CITIES RESTRICTIONS IN WAR POWERS BILLS

Although most of the bills recognize to a significant extent the President's full scope of constitutional authority, they also contain some restrictions which raise serious questions. Some of the bills, for example, would not permit the President to act on his own authority to protect the Nation in situations such as the Cuban missile crisis. These bills would recognize the President's authority only in the event an actual armed attack occurred against the United States. Nor is it clear whether the bills which speak of an "imminent threat of attack" are intended to cover a Cuban missile crisis situation. I doubt very much that the Cuban missile crisis could have been resolved in the manner it was if a full-scale, congressional debate had occurred before the United States acted.

Some of these bills also require that military action undertaken by the President be automatically terminated after 30 days unless Congress enacts sustaining legislation. Some bills contain provisions for expedited action on such legislation, but even this could not insure definitive congressional action within the 30-day period. These provisions raise another constitutional issue, that is, whether the President's constitutional authority, for example, to repel an attack against the Nation or its Armed Forces, could be limited by congressional action or inaction.

PROBLEM OF 30-DAY PROVISION

The 30-day limitation could also cause problems regarding the conduct of military operations and the safety of our forces. Once forces are engaged in military action, it might prove impossible to disengage them in a safe manner within an arbitrary time period. Here, again, the bills containing this provision would impinge upon the President's authority as Commander in Chief and Chief Executive and, to that extent, would be of doubtful constitutionality.

Another problem is the fact that some of this legislation is predicated upon a declaration of war or, in one case, a declaration of national emergency. There are other forms of congressional action which can serve as a legitimate prior authorization for military action and which, in many circumstances, would be preferable from both an international and a domestic standpoint since they reflect more limited objectives.

ALL HAVE SAME OBJECTIVE: SERVING NATION'S INTERESTS

Mr. Chairman, I recognize that in our examination of this vital question many of us share the same objective, that is, to make sure that our Nation's best interests are served. I believe that the kinds of problems I have mentioned today are inevitable in attempts to define precisely in advance the circumstances in which the President and the
Congress may exercise their war powers. Congress has ample powers of its own under the Constitution which, if exercised effectively, enable Congress to play its full and proper role in decisions involving the exercise of the war powers. In my opinion, these decisions must be made jointly by Congress and the Executive in the context of a specific factual situation. In sum, I believe that Congress' right to exercise its full constitutional powers in this area does not depend on restricting in advance the necessary authority which the Constitution has given the President to respond immediately and effectively to unforeseen contingencies in accordance with our constitutional processes.

At the same time, Mr. Chairman, I wish to make once again a suggestion I made before this subcommittee last July: Let us continue broad and searching discussions between the executive and legislative branches as to the best means of achieving that cooperation in the exercise of the President's and Congress' respective war powers which is essential to the effective functioning of our Government in accordance with the constitutional plan.

**SUBCOMMITTEE'S HEARINGS ARE VALUABLE**

In the first place, such discussions, as this subcommittee's hearings have so well illustrated, are valuable in and of themselves. On the one hand, they may, we in the administration hope, lead to greater congressional understanding of the President's responsibility for maintaining this country's capacity to respond speedily and decisively and, in some circumstances without prior publicity, to unforeseen crises. On the other hand, they have already served to make us in the executive branch appreciative of the wisdom and necessity of appropriate congressional participation in decisions to use armed force abroad, as well as the need to provide Congress with the information necessary to participate in such process in a meaningful way.

Second, it would seem to me that such discussions could and should lead to improvements in the existing procedures for cooperation between the two branches. Secretary Rogers has indicated the State Department's willingness to explore ways of helping Congress reinforce its information capability on issues involving peace and war. One example he gave would be to provide full briefings on a regular basis by the Department's regional assistant secretaries with respect to developments in their respective areas. The Secretary also indicated the Department's willingness to discuss with Congress the suggestion from a number of quarters, including Representative Horton, for the establishment of a joint congressional committee to consult with the President in times of emergency. Consultation with such a committee might well be an effective institutional means of keeping the requirements of speed and secrecy from becoming an obstacle to meaningful and current congressional participation in the decisionmaking process.

You, yourself, Mr. Chairman, have been particularly interested in perfecting arrangements for prompt and full reporting to the Congress of Presidential actions involving the use of armed force. I believe you would agree that the administration has not been unresponsive to your thinking in this regard.
CONCLUSION: BELief IN "SHARED RESPONSIBILITY"

In short, Mr. Chairman, while we do oppose strongly any attempt by statute to take from the President the powers and responsibilities which the Constitution has vested in his office, we do respect Congress' constitutional role in the exercise of this Government's war powers and hope to work with you and your colleagues in making the two branches' exercise of shared responsibility for the exercise of the war powers both more harmonious and more effective.

Thank you, Mr. Chairman.

Mr. Zablocki. Thank you, Mr. Stevenson.

The subcommittee will be in recess until 3:30.

(A brief recess was held.)

Mr. Zablocki. The subcommittee will resume its hearing.

We will now hear from Deputy Assistant Attorney General Thomas E. Kauper, Office of Legal Counsel.

STATEMENT OF THOMAS E. KAUPER, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. Chairman, I am pleased to accept the subcommittee's invitation to appear on behalf of the Department of Justice to discuss the constitutional issues with respect to the division of the war-making powers and the legislative proposals now before this subcommittee.

Assistant Attorney General Rehnquist, who appeared before this subcommittee last July 1, is presently recovering from an operation, and he has requested that I appear in his place.

In view of the fact that the broad constitutional issues and precedents have been treated exhaustively by Secretary Rogers in his recent testimony before the Senate Foreign Relations Committee, and by Mr. Stevenson and Mr. Rehnquist in their testimony a year ago, I shall keep my discussion of those issues and precedents rather brief and, instead, direct primary attention to the proposed bills and resolutions on the subject.

The constitutional issues are difficult ones. As the Constitutional Convention debates, historical usage, and limited judicial precedents indicate, the war-making powers to a very considerable extent fall within an area of "shared" authority.

WAR POWERS EXCLUSIVE TO CONGRESS

Unquestionably, Congress has war-related powers which are exclusively within its province; on the other hand, the President just as surely has exclusive prerogatives of his own in this area.

Congress, for example, is the only branch of Government which may declare war or determine the amount of money to be appropriated for the raising and supporting of the U.S. Military Forces.

In contrast, the President alone has the authority to repel sudden attacks, determine the manner in which hostilities lawfully instituted shall be conducted, and protect the lives and safety of U.S. Forces in the field.

These are the clear cases. However, the difficulty which arises is in the middle ground—in those situations in which the question is
whether or not American Armed Forces should be deployed or committed to limited hostilities abroad.

In this area, the framers did not rigidly define the respective constitutional roles of the President and Congress. They opted instead for a more flexible design, one in which responsibility would be joint and in which the procedures and responses would be determined by the particular circumstances of the wide variety of international situations which might confront the Nation.

WISDOM OF "FLEXIBLE APPROACH" TO PRESIDENTIAL WAR POWERS

Without cataloging the numerous situations in which the Armed Forces have been deployed or committed abroad in the past, I think it fair to say that they attest to the wisdom of the flexible approach adopted by the framers.

Congress has, on numerous occasions, specifically authorized the use of troops in advance.

On some occasions, Congress has acquiesced in the President's action without formal ratification; on others, it has formally ratified the President's actions; and on others, no action at all has been taken.

From time to time, individual members of Congress have protested Executive use of the Armed Forces. Indeed, at the close of the Mexican War, on a preliminary vote one House of Congress indicated its disapproval.

The fact that the Congress and the President have interacted in these many ways in the various situations which have arisen seems to me to demonstrate the merit of the framers' scheme.

PENDING PROPOSALS: BURDEN OF JUSTIFICATION

For this reason, I would think that those pending proposals which mark a sharp departure from the salutary lessons of history must bear a heavy burden of justification.

I do not believe that the proposals attempting to define and limit the President's authority in advance meet that burden.

Moreover, the precise, strict definition of Presidential authority contained in some of those proposals is a potentially dangerous action in the highly sensitive area of foreign relations.

Peace in the world depends on maintenance of a delicate balance of power and on the recognition by the various nations of the world that other nations have the ability and determination to react in the event of aggression.

This Nation, therefore, must be able to respond quickly to rapidly developing and highly variant international situations posing a threat to the vital interest of the country.

Our past Presidents have acted to meet such threats in the past, both with and without prior congressional authorization, and I, for one, do not believe that it would serve the interest of world peace to limit the President's authority to meet such threats in the future.

CUBAN MISSILE CRISIS: AN ILLUSTRATION

The Cuban missile crisis poses a stark illustration. Those proposals before the subcommittee attempting to limit the President's powers to
use armed forces to repel attacks on the United States or its forces, and to protect American citizens, would not cover that situation.

Nor is it clear that the Nation was under imminent threat of attack.

Hence most, if not all, of these pending bills would apparently require prior congressional authorization. Yet, the situation was a grave one, posing a substantial threat to our security and requiring immediate action.

I believe there are few who would suggest that the speedy and effective response ordered by President Kennedy was inconsistent with our constitutional framework.

Not only must the Nation be able to act quickly when its security requires such action, but our adversaries must realize that we have the ability to do so.

Otherwise stated, we must be prepared to act and our adversaries must know that we are prepared to act. To the extent that some of these proposals would contribute to a belief among the leaders of foreign nations that the United States would be unable to mount an immediate response to an international crisis, the purposes of the world peace would be ill-served.

Secretary Rogers made the point in his testimony before the Senate Committee on Foreign Relations when he observed:

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.

Apart from the consideration just discussed, and independent of them, it does not seem to me that the necessity for such legislation has been demonstrated.

No President could fail to recognize the need for a popular consensus and a working relationship with Congress in connection with decisions to deploy or commit the Armed Forces.

PENDING BILLS WOULD COERCE PRESIDENT

These bills can only be predicated on a contrary belief—namely, that the Chief Executive must be coerced into recognizing congressional prerogatives. I simply do not believe this is a realistic assumption in view of the checks and balances which exist throughout our political system.

Underlying these bills is the assumption that Congress must assert itself and that the restrictions on the President's authority to deploy and commit troops are an appropriate means to this end.

The fallacy in this, it seems to me, is that the Constitution grants Congress numerous powers in this area. Article I, section 8, contains specific grants of the powers "to raise and support armies", "provide for the common defense", to "declare war, grant letters of marque and reprisal", and "make rules concerning captures on land and water", "provide and maintain a navy", "to make rules for the government of the land and naval forces", and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers * * *".

Can it reasonably and realistically be contended that Congress is without constitutional authority to assure for itself a meaningful role
in relation to the use of the Armed Forces or that bills such as those now pending before the committee are necessary to assure that role?

As a final general observation about these proposals, it must, of course, be noted that legislation cannot alter the constitutional balance. Thus, if the President has certain exclusively Executive powers, as, for example, to repel sudden attacks, those powers may not be intruded upon by conflicting congressional mandates. To the extent then that the proposed legislation would attempt to narrow the President's constitutionally recognized prerogatives, it is unconstitutional.

And, to the extent that any such legislation gives full recognition to Presidential prerogatives, it becomes an unnecessary codification of the status quo entailing the potential consequences to which I have referred.

SPECIFIC DIFFICULTIES IN PENDING PROPOSALS

Let me now turn to a few of the more specific difficulties with the pending proposals.

Most of the bills do recognize the President's constitutional authority to a very considerable extent. There are instances, however, where they do not. Other provisions are unclear.

Each of the bills would contain an exception permitting the President to repel an attack on the United States. As noted, however, it does not appear that any of the bills would have covered the Cuban missile crisis.

Certain of the bills cover "imminent threats" as well as actual attacks, and we agree that the former must be included.

However, even with this addition, the provisions in the bill might be too restrictive to cover the Cuban missile situation.

A number of the bills would permit a Presidential response to attacks on the Armed Forces only if the troops when attacked were "on the high seas or lawfully stationed on foreign territory." What if the troops happened to be lawfully within the territorial waters of a foreign nation at the time they were attacked?

Similarly, the term "lawfully stationed" is ambiguous. Would the term permit a Presidential response to an attack on troops deployed at the President's sole direction?

Historically, the President has repeatedly deployed troops abroad, and we would assume, therefore, that such troops would be "lawfully stationed."

OPPOSE CONDITIONS ON "PROPRIETY" OF ACTION ON TROOPS ABROAD

Any other construction would present a serious constitutional issue. We oppose in principle, moreover, the attempt to condition the propriety of a Presidential response on the location of the troops at the time they were attacked.

With respect to the so-called "national commitment" exception, I would point out the approach followed in Congressman Nix's bill differs from that of the other bills.

The Congressman's proposal would explicitly provide that congressional authorization would be necessary prior to use by the President of the Armed Forces in discharging a treaty commitment.

The other bills, in contrast, would permit the President to employ the Armed Forces in this situation without prior specific authorization.
The sharply differing approaches taken to this question in these bills tend to highlight the extraordinary difficulty in trying to define in advance of actual, concrete circumstances, the authority of the President to act in emergency situations.

In suggesting the deficiencies in the pending bills and implying that certain of these deficiencies might be remedied, I in no way wish to recede from the opposition of the Department of Justice to legislation attempting to define the respective constitutional roles of the President and Congress.

As already noted, these deficiencies in themselves reflect the extraordinary difficulty and danger in attempting to place limitations on the use of Armed Forces well in advance of wholly unpredictable situations.

CONSTITUTIONAL PROBLEMS WITH PENDING LEGISLATION

Moreover, we do not believe that any of the bills recognizes adequately the President's constitutional responsibility to respond immediately to emergencies presenting substantial threats to the vital interests of the Nation.

It is precisely this failure which in my judgment throws a cloud over the constitutionality of each of these bills.

Entirely different considerations are involved in the reporting requirements that each of the bills contain. As Assistant Attorney General Rehnquist indicated last year in his testimony before the subcommittee, the Department does not regard a reporting requirement as raising a substantial constitutional question, the only reservation being that the time allowed is not unduly short and the report is not unduly burdensome.

24-HOUR REPORTING PROVISION NOT REALISTIC

Certain of the bills contain a 24-hour provision, and we would suggest that this may not be realistic. We would prefer the formulation contained in Chairman Zablocki's resolution which requires that the President report promptly.

As to the scope of the report, a full account of the circumstances seems entirely appropriate, but a requirement that the President estimate or evaluate the expected scope or duration may be unwise in that it would appear to call for some degree of Presidential guesswork which could prove adverse to the national interest, to the extent that it requires a disclosure of American intentions.

Finally, we wish to express our reservation about the provision in the chairman's resolution which would require the President to explain his reasons for not seeking specific prior congressional authorization.

If the President explains the legal justification for his action, we would submit that his duty to justify or explain should be at an end.

OPPOSES 30-DAY PROVISIONS

I shall now turn to the provision in a number of bills to the effect that Presidential action falling within one of the exceptions would be
terminated after 30 days unless Congress had affirmatively acted to authorize a continuation of the hostilities.

It seems paradoxical that those who support the assertion of congressional authority in the warmaking field would support a provision which would effectively permit the Congress to assert itself by inaction.

If the President commits the Armed Forces and continues the commitment for 30 days, he would presumably be in favor of a further continuation.

Congress, however, would be in the position of denying the authority for that continuation by taking no action at all. While those in support of the provision contend that it will assure a role for Congress in that the President will be required to consult Congress before continuing beyond the 30-day limit, it would seem that Congress should at least be required to vote the extension either up or down and not escape the issue by silence.

If one, however, agrees that an up or down vote is the appropriate way for Congress to assert itself on a commitment or deployment of the Armed Forces, then the 30-day limit creates an artificial and arbitrary limit which would serve only to impose pressure on the Congress in its deliberations.

The 30-day maximum presents other difficulties. Any time limitation upon the President's authority to repel an attack presents a serious constitutional issue.

Moreover, it may be well nigh impossible in some situations for the President to withdraw the forces immediately upon the tolling of the 30-day period.

The President as Commander in Chief has constitutional responsibility and authority to protect the safety of troops in the field.

Any attempt by Congress to require an immediate withdrawal not taking into account the troops' safety would surely be an unconstitutional application of this provision.

Even were the troops' safety taken into account, a 30-day limitation might be constitutionally objectionable on the ground that the President might at the 30th day be engaged in repelling a sudden attack—an exclusive Presidential prerogative.

Each of these reasons compels us to urge against the adoption of a provision imposing an arbitrary time limit on the President's use of the Armed Forces already committed.

Several of the proposals contain provisions which would explicitly authorize Congress to terminate, prior to the expiration of the 30-day period, the President's authority to commit the Armed Forces.

This provision seems unnecessary.

Either such congressional termination, when enacted, would be constitutionally valid or it would not.

The critical consideration in each instance is not whether authorizing legislation of this nature has been enacted previously, but instead whether the congressionally ordered termination would conflict with any of the President's powers as Commander in Chief.

The point for present purposes, however, is that Congress is in no way required to enact legislation authority itself to terminate hostilities.
CONGRESS HAS TOOLS FOR WAR AUTHORITY NOW

I would conclude with what I think is a point at the heart of the issue.

In my view, Congress has broad authority over matters integrally related to the exercise of the war-making authority.

If, in any given case, Congress is desirous of asserting itself, it has all the tools at its command. I think it derogates the congressional role for Congress to feel the need to assert itself through the rather artificial means embodied in the legislative proposals which would codify what is conceived to be the constitutional allocation of authority.

Such a step would be wholly inconsistent with our historical constitutional traditions, and would in no significant way aid in assuring a meaningful role is war making for Congress.

Thank you, Mr. Chairman.

VIEW OF HOUSE JOINT RESOLUTION 1

Mr. Zablocki. Thank you, Mr. Kauper.

From your presentation and that of Mr. Stevenson, there is no question that consultation with, and reporting to, Congress is desirable?

Mr. Kauper. You are speaking of your resolution?

Mr. Zablocki. Yes.

Mr. Kauper. That is correct from our point of view.

Mr. Zablocki. One page 6 you state that war power bills are predicated on the belief that the Chief Executive must be "coerced into recognizing congressional prerogatives."

Do you believe that description fits House Joint Resolution 1?

Mr. Kauper. That description is intended to refer to the bills which are described in the preceding section, those which define powers.

No; I don't think that is true as to House Joint Resolution 1.

Mr. Zablocki. In your estimation, would House Joint Resolution 1, if enacted, be unconstitutional at any point?

Mr. Kauper. I don't believe it would, Mr. Chairman.

Mr. Zablocki. On page 10---and I don't believe you mean this for House Joint Resolution 1, either---but you state there that you "do not believe that any of the bills recognizes adequately the President's constitutional responsibility to respond immediately to emergencies presenting substantial threats to the vital interests of the Nation."

Earlier, on page 8 you similarly say, "As noted, however, it does not appear that any of the bills would have covered the Cuban missile crisis."

Do you mean to apply that observation also to the House Joint Resolution 1?

Mr. Kauper. No; that observation on page 10, again, relates to our statement of opposition to legislation which attempts to define the respective constitutional roles.

Mr. Zablocki. Page 8 of your statement refers to what particular bill? You make a rather blanket statement, that not any of the bills would have covered the Cuban missile crisis.

Mr. Kauper. I am looking for it on page 8.

Mr. Zablocki. The first full paragraph.

Mr. Kauper. Yes.
This, again, Mr. Chairman, is in the reference dealing with the definitional bills. It does not refer to House Joint Resolution 1.

NO OBJECTION TO ZABLOCKI RESOLUTION

Mr. ZABLOCKI. Mr. Stevenson, nowhere in your statement did you comment on House Joint Resolution 1.

What is your view of that proposal?

Mr. STEVENSON. Mr. Chairman, I thought that I did by implication because I indicated we have not been unresponsive to your own thinking on the question of reporting.

I now will state for the record that we have no objection to House Joint Resolution 1 and I think it is generally consistent with what we are proposing to do.

We are not sure it is necessary to do it by statute.

Mr. ZABLOCKI. I do want to point out there have been some minor changes from the resolution that was passed in the last Congress.

You do not find any troublesome—

Mr. STEVENSON. I am thinking along the general lines. Some of the comments that the Department of Justice made I think have validity, too, but the general lines of the legislation are acceptable to us.

Mr. ZABLOCKI. I believe in our colloquy a year ago I stated that it is not our intention to cause problems for the executive branch but we do want to prod it into increased consultation and to fuller reports.

If it is necessary by resolution I think we should pursue that.

Do you believe that the provisions of House Joint Resolution 1 would place undue restrictions on the President?

Mr. STEVENSON. I do not think they would be unduly restrictive on the President.

Mr. ZABLOCKI. Would the provisions in any way impede his flexibility in time of crisis?

Mr. STEVENSON. I think they would not.

JOIN CONGRESSIONAL COMMITTEE PROPOSAL

Mr. ZABLOCKI. On pages 10 and 11, Mr. Stevenson, you discuss the proposal of Representative Horton to create a joint congressional committee to consult with the President in times of emergency.

I rather like that provision. Unfortunately, under the rules of the House we cannot incorporate it in our resolution. We cannot create a joint committee by legislation in this committee.

But I look upon it as possibly a better means of consultation, as you have implied.

What problems does the President now have in consulting with Congress in times of emergency?

How in your view would such a joint committee solve those problems?

I believe you referred in your statement to secrecy.

Mr. STEVENSON. Mr. Chairman, the question of the function and composition of this joint committee is something basically for the Congress to decide.

We would be delighted to work in consultation with you as to the details of it. This particular suggestion involves a fairly large committee. I am not sure that a committee quite that large would be as
effective as a somewhat smaller committee in terms of acting rapidly and being fully effective in terms of consultation.

But I do think that this is a suggestion that has been made from several different quarters. Secretary Rogers has also indicated his willingness to discuss this proposal further.

Mr. Zamlocki, Mr. Kauper, perhaps this is an unfair question to ask of you, but Representative Horton's proposal includes the chairman and ranking minority member of each committee, Foreign Affairs, Foreign Relations, Armed Services, and Judiciary, rather than Appropriations.

He does not include members of the Appropriations Committee. As a representative of the Justice Department, do you see any reason that the Congressman may have had a preference for the Judiciary over the Appropriations Committee?

Would the Judiciary Committee have unique prerogatives or contributions to make to such a joint committee? I intended to ask that of the Congressman but I forgot.

Mr. Kauper, I suppose the Judiciary Committee might be thought to have some particular expertise with respect to the constitutional issues that may arise.

I guess I am not quite sure what his reasons for preference might be. Mr. Zamlocki, I think a joint committee, if the Senate would agree, would be indeed a vehicle for consultation which, of course, is the intent of House Joint Resolution 1.

That is all I can ask at the moment. My time has expired.

I will call on my colleague, Mr. Findley, and ask Mr. Frazer to take the chair.

THE NEED FOR NEW WAR POWERS LEGISLATION

Mr. Findley. Thank you, Mr. Chairman.

Mr. Stevenson, I believe in your statement you questioned whether there is any need for legislation in the war powers field.

I take a different view primarily because it is my opinion that our Nation is apt to get into major conflicts not after moving forces to foreign territories but by virtue of having forces stationed in areas of potential conflict and hostility.

There is nothing to my knowledge in the statute books or clearly set forth in the Constitution which establishes a relationship between the executive and the legislative branches which would keep the Congress informed whenever the President does see fit to station substantial military forces on foreign territory.

Do you have any comment on that?

Mr. Stevenson. Congressman Findley, our objective is primarily to legislation attempting to define or codify the President's powers.

With respect to the question of reporting and consultation I think it is evident both from the statement I made and also from Secretary Rogers' statement that it is clearly this administration's policy to be as cooperative as possible and to institute some regular procedures to make this more effective.

I think basically what we are saying is that we would propose to do the same things without legislation but clearly a sense of the Congress resolution in this area is not something that the administration is going to object to.
NEED FOR PRESIDENTIAL REPORTING IN CRISIS

Mr. FINDLEY. I draw your attention to the events in Laos in early February in which we introduced heavy air power, military action from the air, and some activities on the ground, although those were very limited.

By then the Gulf of Tonkin resolution had been repealed by act of Congress and the repeal signed by the President, and therefore the President had no resolution by the Congress to draw upon for authority for expanding operations into the Laotian area.

House Joint Resolution 1, had it been law by that date, would have required that he give a formal written prompt report to the Congress stating the circumstances causing him to do this and giving his legal justification.

No such report occurred to the best of my knowledge. So I think that there is a need for a statute which would require reporting in similar circumstances in the future.

Mr. STEVENSON. I think that in fact a number of the requirements that were met, I know on several occasions the question of the President’s authority to take that action has been addressed by administration spokesmen, indicating that this was pursuant to his general policy of effecting withdrawal of our troops in the most effective way, protecting the safety of our troops.

Mr. FINDLEY. In the field of war powers we have but one Commander in Chief and but one Congress. I find anything except a Presidential report, far less desirable than one that is direct. I do not see any substitute for the President as Commander in Chief feeling a personal responsibility to consult with and to report to the Congress.

TREATY COMMITMENTS AND A NUCLEAR SHIELD

Mr. Stevenson, on page 3 you state:

The Nixon Doctrine means that we will continue to honor our treaty commitments and offer a shield against nuclear threats aimed at our allies or other countries vital to our security.

Now I do not know of any treaty provision through which we offer to be a shield against nuclear threats. We do have treaty commitments, of course, but I am curious to know if there is something I have overlooked, any treaty obligations that would obligate our country to be a shield against nuclear threats?

Mr. STEVENSON. This is separate from the treaty commitment provision. This is a statement actually taken from one of the President’s own statements.

Mr. FINDLEY. President Johnson made a statement to that effect.

Mr. STEVENSON. It is a statement of policy rather than a statement of treaty commitment because it indicated that there may be situations where a country is not covered by an express treaty commitment.

Mr. FINDLEY. But you would not leave the impression that the Nixon doctrine means that the President would undertake a military response to protect against nuclear threat without prior consultation with the Congress?

Mr. STEVENSON. No.

Even the treaty commitments in all cases involve a provision for
appropriate consultation for action in accordance with our usual constitutional processes.

So, all the more would that be true in this situation.

UNIQUENESS OF NATO

Mr. Findley. I think that is true with the possible exception of NATO. I know there are some discussions as to how automatic the military response must be under the NATO treaty.

It is unique in its phraseology in that respect.

Mr. Stevenson. In fact, in the NATO treaty they separate the section containing the obligation to act from the section providing for action in accordance with appropriate constitutional procedures.

We take the position that in fact the situation is the same under the NATO treaty as under the other defense treaties.

Mr. Findley. On page 4, you say—

We emphatically reject the view that Congress' power to declare war should be interpreted as a purely symbolic act without substance in today's world.

Under Secretary Katzenbach, in testifying before the Senate Foreign Relations Committee several years back, described the war declaration as outmoded phraseology.

It seems to me that this administration has taken a precisely opposite view from that expressed by Mr. Katzenbach.

Is that a fair interpretation?

Mr. Stevenson. Certainly that is a fair interpretation if his statement is taken to mean that Congress' war powers as set forth in the power to declare war no longer have any substantive reality.

SENATE VIEW OF 30-DAY PROVISION

Mr. Findley. Mr. Stevenson, the Senate Foreign Relations Committee seems to have pretty well bought the idea of a 30-day time limit in some form. At least the responses of committee members and statements by committee members would seem to indicate that and certainly most of the witnesses who testified supported such a concept.

This would run into very serious objections that you have voiced here. There is another form for delimitation that I ran across just recently and that form would be on this basis:

That the President would not be able to commit or engage more than 25,000 combat forces for more than 30 days without express approval of the Congress.

Would you find a delimitation of this type objectionable?

Mr. Stevenson. I think as a practical matter it may avoid some of the practical problems. I think from a constitutional standpoint, I have some of the same difficulties with it because I think basically the question of whether more or less than 25,000 troops are involved does not take away from the President's responsibilities and duties as Commander in Chief.

Clearly the number of troops involved is only one of the facts in the particular situation. You have also to take into account the extent of the threat that is presented to the United States and the consequences for troops that may already be committed of any such restriction.
It might be necessary to protect the safety of troops that are already committed to use additional troops. It also seems to me that perhaps his might defeat some of the very things that you are trying to achieve because it might be taken as suggesting that as long as less than 25,000 troops were involved there is no necessity for consultation and reporting or any other of the suggestions that have been made.

Mr. Findley. It would tend to impede a gradual enlargement of the conflict such as we had in Vietnam. It would establish a point beyond which we could not expand the use of ground forces, but at the same time it would leave to the President tremendous latitude in the use of seapower and airpower and nuclear strike forces.

So, it would be a mixed approach to this gray area.

I have intruded too heavily on time, Mr. Chairman.

PRESIDENTIAL ACTION AND INTERNATIONAL LAW

Mr. Fraser (presiding). Mr. Stevenson, it is difficult when looking at this question to ascertain the extent to which the President may be circumscribed by international law either as embodied in the United Nations Charter or otherwise.

For example, take the Bay of Pigs invasion. Do you think that was lawful under accepted principles of international law?

Mr. Stevenson. Mr. Fraser, I would rather not comment on a previous administration.

I am quite prepared to talk about what this administration has done but I don't think it is appropriate for me to comment on—

Mr. Fraser. Let us put the question hypothetically.

Suppose the United States engineered an invasion of a neighboring Caribbean country because the United States disliked the regime controlling the country.

Mr. Stevenson. Let me put the answer in this fashion:

Under the United Nations Charter we have restrictions on the use of force. Clearly force can be used consistent with the charter where the appropriate organs of the United Nations have authorized such action.

In addition, you have two provisions, one allowing action pursuant to the action of a regional body constituted under the charter and finally you come down to the most important provision of all which deals with the question of collective or individual self-defense.

You have to justify the use of force that is not otherwise authorized under the charter pursuant to the provisions relating to individual or collective self-defense.

So that normally the use of force should be related to one of these areas. Now there are obviously in addition to that the generally accepted rules under international law involving the protection of your own Nation and other matters of that nature.

Mr. Fraser. Are you saying that under my hypothetical case the American action would appear to be a violation of international law?

Mr. Stevenson. Again, I don't think it is useful for me to speculate on hypothetical cases.

When you use the word "invasion," clearly aggressive war, initiation of aggressive war is something that you can't do under the United Nations Charter.
The determination of what you can do in terms of self-defense is something that you have to look at in terms of a particular fact situation to determine whether in fact the response was justified, given all the particular facts.

As you probably know, under the U.N. Charter when you do rely on self-defense you have to report to the Secretary General, indicating why you think the particular response was a justifiable exercise in self-defense.

**PRESIDENTIAL ACTION AND THE U.N. CHARTER**

Mr. Fraser. I do not mean to involve you in old issues. However, I am concerned whether a President, on his own initiative, without authorization from Congress, commit U.S. Forces to actions which would be considered violations of the United Nations Charter.

Let us suppose, for example, that the President's action would be considered a violation of the charter. Does he have that power?

Mr. Stevenson. Basically, we are talking about two different situations.

One is when the President of the Country acts in a particular way and the question is whether the action is consistent with international law and particularly the present highest form of that international law; namely, the U.N. Charter.

If we violate the U.N. Charter, the consequences are basically that we subject ourselves to action by the United Nations and members of the United Nations for violating the U.N. Charter.

The consequences of violating the charter basically do not relate to the question of the President's domestic constitutional authority.

Mr. Fraser. Let us put it in another way.

Treaties are regarded as the supreme law of the land. Is that the constitutional principle?

Mr. Stevenson. That is correct.

Mr. Fraser. Is the President bound by those treaties when the treaties constrain the exercise of his power?

Mr. Stevenson. Basically the section of the Constitution that you are dealing with, and I defer to my colleague from the Department of Justice on this, is the supremacy clause.

Basically this indicates that in terms of litigation and the application of law within the United States in our courts the treaties are to be treated on the same level as other legislation in determining the rights of private citizens.

Now, clearly I think that the responsible officials of this Government are also required to act in accordance with international law because if they don't the United States becomes liable internationally for that violation.

In fact, one of the functions of my own office within the State Department is to make sure that the international law consequences of actions that are taken are appreciated because clearly we do not wish to be in violation of the international laws.

**INTERNATIONAL LAW VERSUS NATIONAL LAW**

Mr. Fraser. I gather there are two different issues here. One occurs when the United States has a relationship with other nations or with international bodies.
My question goes to the power of the President. Does he have the authority to undertake an act which would place this Nation in violation of international law?

I think you said that the President didn't have that authority. But I am not clear exactly what constraints exist on the President's power.

Mr. STEVENSON. We are talking about two different legal systems, the international legal system and our own constitutional legal system.

Mr. FRASER. But our own system recognizes the force of treaties.

Mr. STEVENSON. That is correct, in terms of application in our courts and it gives effect under our supremacy clause to treaties.

Clearly the President's advisers would advise that no action be taken contrary to international law. But I think the issue you are raising is whether international law is also, as it were, incorporated in the constitutional restrictions on the President's authority.

I think my answer to that would be that I think the President's advisers would advise him to act in accordance with international law.

But there can be situations where the legal system is in conflict with international law.

CITES THE DOMINICAN REPUBLIC INVASION

Mr. FRASER. Let me make it more concrete.

Take the Dominican Republic invasion. Assume that the claim that U.S. nationals were in danger was not, in fact, a legitimate claim, as it wasn't. The President nevertheless ordered forces to land. Let us assume that a Marine declined on the grounds that the President, by ordering troops into the Dominican Republic, was in violation of international law.

What then?

Mr. STEVENSON. Here, again, we are not talking about a matter of private right in the usual sense. I think as the case I quoted in my statement indicates, in this area the attitude of the courts would be that this is basically a political question and they would not be inclined to interpose a constitutional objection to the President's action in this area.

Really substantially we are not far apart because in fact the President and the executive branch regard compliance with international law as one of our major responsibilities.

But I do not think that you can link that to the constitutional question.

Mr. FRASER. Mr. Stevenson, it is quite clear the United States, from time to time, flagrantly and substantially disregards international law.

I am not impressed by any contrary assertion on your part. It may well be that the United States advances the cause of international law more often than we impede its advance but it is clear that we violate that law when we think we have an interest in doing so.

But let me come back to my question. You contend that the courts would rule, in the face of a satisfactory demonstration that the President's order was in violation of international law, that they could not sustain the right of a member of the Armed Forces to decline to carry out the President's order?
COURTS NOT APPROPRIATE TO ACT ON INTERNATIONAL ISSUES

Mr. Stevenson. I think the history has been that our courts would not think that they were appropriate tribunals to determine that question.

Mr. Fraser. This is not a very satisfactory state of affairs.

Mr. Stevenson. Again, I go back to the situation. You have indicated that you think we do not comply with international law as much as we should.

I can only again speak for this administration. I think during this administration there has been an attempt to act in accordance with international law. I suggest that sometimes you may have a difference as to what international law permits.

Mr. Fraser. I am trying not to focus on this administration alone.

Mr. Stevenson. I also think that when you say it is not a very satisfactory answer, I think that there are many international penalties for not complying with international law.

Certainly I think this country's record overall has been good in this area.

AUTHORITY FOR TROOPS IN VIETNAM

Mr. Fraser. Under what authority does the President currently maintain troops in Vietnam?

Mr. Stevenson. The authority under which he is presently maintaining troops in Vietnam is his authority as Commander in Chief and his special role in terms of this country's foreign policy.

I think he has indicated on numerous occasions that his interest is in liquidating the war that we were involved in when he came to power and that all of his actions have been taken with a view to terminating that involvement in a way that is consistent with the safety of our troops.

Mr. Fraser. Your view is that the President has the inherent authority to deploy troops to any country?

Mr. Stevenson. I would not say inherent. I think it is based on his power as Commander in Chief.

Mr. Fraser. Inherent in his power as Commander in Chief?

Mr. Stevenson. Yes.

Mr. Fraser. The President could order troops to Israel tomorrow in the absence of any treaty agreement or without authorization from Congress?

Mr. Stevenson. Again, I do not want to speculate on a particular case.

The President clearly does have power to deploy troops abroad. Congress has in the past participated in many respects in this.

We have had a number of treaty commitments involving the deployment of troops abroad. We have many status of forces—

POWER OF THE PRESIDENT TO COMMIT TROOPS

Mr. Fraser. Even without a treaty, you are saying that the President has unrestricted power to commit U.S. Forces anywhere in the world to active hostilities?

Mr. Stevenson. You say commitment. Again, I think you are using, I think it has been recognized that the President does have the right
to deploy troops around the world when he feels this is necessary in discharging his duties as Commander in Chief.

Mr. Fraser. It is that specific statement of the President's power that causes me concern.

Mr. Stevenson. We are talking just about stationing troops at this point.

Mr. Fraser. My question assumes that the troops would become involved in hostilities.

Mr. Stevenson. If we are talking about committing them to hostilities, I think both Secretary Rogers' statement and my own statement have indicated that we feel that this is something that should be done jointly with the Congress, subject to the exception—

Mr. Fraser. I am not talking about what may be desirable or useful. I am talking about what you regard as the power of the President.

Mr. Stevenson. This is something that under our constitutional system of shared powers requires joint action except in an emergency situation.

Mr. Fraser. Let us pursue that.

Is it your view that, except in an emergency the President does not have any authority to commit troops?

Mr. Stevenson. I think we have to be very careful about the words we are using. On the one hand we talk about stationing troops.

Mr. Fraser. Let us leave stationing out.

Defining "Shared Powers"

Mr. Stevenson. In the second situation if what you mean is the question of using troops to initiate hostilities, which basically is what you are talking about, we feel that that is something for a shared power under the Constitution except in an emergency situation.

Mr. Fraser. Let us be precise about shared power.

Are you saying that the President has no authority unless the Congress has authorized it?

Mr. Stevenson. I think here, again, you are trying to make very precise something that the Constitution does not make that precise.

I think that there are many different ways that Congress can in fact exercise its share of this power, I think, as the Secretary himself pointed out last week, that this administration has no interest in having the President, himself, initiate that sort of action without congressional support.

It is only where you have an emergency situation that he must remain free to act without some form of appropriate congressional action.

Mr. Fraser. Mr. Findley?

President's Legal Authority in Vietnam

Mr. Findley. Mr. Stevenson, Mr. Fraser raised the question as to the extent of the President's legal authority to continue military action in Indochina.

Would it be fair to say that his authority is limited to military action required to effect the safe withdrawal of our remaining forces there?
Mr. Stevenson. I think the President has also indicated that he inherited a war and that part of the withdrawal process involves the question of the ability of the Vietnamese to defend themselves.

Therefore, in determining this situation, he is concerned with, on the one hand, the safety of our troops; on the other hand, he is concerned with the situation of the country we are leaving.

Mr. Findlay. Isn't that somewhat fuzzed up by the repeal of the Tonkin resolution?

The repeal of the Tonkin resolution leaves in force, of course, the SEATO Treaty, but that treaty clearly states that military action will not ensue except first of all when a determination has been made that the country is under external attack and second, after that determination has been made and reported to Congress, subsequent congressional approval is secured.

Now, the Tonkin resolution is stripped away. And the SEATO Treaty is all that would remain, at least in my view, that would give the President any legal justification to use military force to get South Vietnam in a position to defend itself except to the extent that this is related to the safe withdrawal of our forces.

U.S. OBJECTIVES IN VIETNAM

Mr. Stevenson. I think the two aspects of his policy are very closely related and, of course, the safety of our troops also involves the problem of the prisoners of war.

So, I don't think you can be that precise in segmenting out a part of the justification.

Here, again, I think it bears repetition that he has indicated that his intention is to terminate this involvement.

Mr. Fraser. Is it not true, Mr. Stevenson, that our involvement will end only after the President secures a specific objective?

The objective being to secure the South Vietnamese nation through the buildup of the capabilities of the South Vietnamese armed forces?

Mr. Stevenson. I think I had better let the President speak for himself. I think he has stated what our objectives are.

Mr. Fraser. My point is that this specific objective is an objective that goes far beyond the safe withdrawal of American forces.

Mr. Stevenson. It is combined with it. I think they are always mentioned together as part of the process of orderly liquidating of the situation that he was presented with when he came to office.

I think he has always linked the two things together.

VIEW OF THE NIXON DOCTRINE

Mr. Fraser. In your view, under the Nixon doctrine, would the President have the authority to commit air and sea support to Thailand without congressional authorization in the event of a Thai internal insurgency?

Mr. Stevenson. Both the Secretary and I have made clear that we are only talking about independent Presidential action in the event of an emergency situation.

It is our clear intention to seek congressional action. Now, I really don't think it would be in the national interest for me to speculate with respect to what we might do in any particular country because you then have to consider what the treaty and other commitments are and the
nature of the emergency, whether or not it would permit the type of consultation which the administration would like to have.

So, I really would not like to comment with respect to any particular situation.

Mr. Fraser. It seems to me, Mr. Stevenson, from our point of view it is not enough that the President indicates that he would like to consult. We are trying to define the limitations on the President’s authority.

The President is to be commended for any effort to consult. There is no reason to believe he would not consult. But we are dealing now with the question of Presidential authority or power under the Constitution.

In your judgment, would the President have the power to commit air and naval forces under the SEATO Treaty if he felt it would be useful to do so?

**Meaning of “Constitutional Procedures” in SEATO Treaty**

Mr. Stevenson. The SEATO Treaty clearly provides that our obligation to act shall be implemented in accordance with our constitutional procedures.

Mr. Fraser. What do the constitutional procedures require?

Mr. Stevenson. In that case I go back again to the statement that Secretary Rogers and I have both indicated, we feel this is an area where there should be joint action except in an emergency situation.

Mr. Fraser. Assume there is no emergency and the Congress does not act. Then do you think the President still has the authority to act?

Mr. Stevenson. I think that is putting in a different way just what I have said.

I think no, where it is not an emergency situation that it is a matter of joint congressional and Presidential action.

In other words, Congress would have to affirmatively act in order to give him that authority?

Mr. Stevenson. That is correct. As I mentioned earlier, the way in which Congress acts is something else again. There are many different ways.

Mr. Fraser. Just one final question:

In your judgment, would an appropriation to support activities of our Armed Forces abroad constitute a ratification or an endorsement of the undertaking?

Mr. Stevenson. I think it is hard to generalize. I think in some cases it could; in some other cases, you have had clearly just the opposite, an indication that they did not want to endorse certain types of action.

Mr. Fraser. For example, it was argued on the floor of the House in connection with the Vietnam appropriations that whatever one thought of the war, the troops were there, they were fighting and if you cut the funds off you endangered their lives.

Do you think that is a legitimate argument?

Mr. Stevenson. I think it is a legitimate argument. I think that if that argument is made, however, it takes away from the other argument that you put forward earlier.

Clearly if you justify the appropriation on the basis of not affecting the safety of our troops in the field, then I am frank to say that it doesn’t indicate approval of what is being done in the same sense
because clearly they are doing it because they want to protect the safety of the troops.

Mr. Fraser. In other words, when that argument is made—

Mr. Stevenson. I think it weakens any ratificatory effect of congressional action.

Clearly, there may have been indications of disapproval of the initial policy but unwillingness to endanger our troops.

Mr. Fraser. Thank you.

Mr. Bingham, would you please take the Chair?

PROBLEMS OF COOPERATION AND CONSULTATION

Mr. Bingham (presiding). Gentlemen, I am sorry that I missed a good deal of this colloquy because of the votes we have been having. If there is some repetition in my questions, I apologize.

First of all, I would like to make a comment which perhaps others have made and I don't know whether you would care to respond to it, Mr. Stevenson, since you stress in a very admirable way the necessity of cooperation and consultation between the executive branch and the legislative branch but it does seem that whenever the crunch comes, whenever something is delicate, difficult, dangerous, and so on, the executive branch decides it is not wise to consult with the Congress and it does not consult with the Congress, at least not until the very last minute when it is more or less a matter of informing the leaders of what is to be done.

That was the case in the missile crisis, in the case of the Jordan crisis last year, in the case of the South Vietnamese move into Laos recently.

Having been in the executive branch, I know that there is a feeling on the part of many in the executive branch that the Congress is not to be trusted. But this does not exactly coincide with the stress in your statement and in many statements of the executive branch for the need for cooperation and full consultation.

Mr. Stevenson. I would suggest that Secretary Rogers and I have gone beyond simply suggesting willingness to cooperate.

He indicated some ways that this might be made more effective, including proposal for periodic and regular briefings by the regional assistant secretaries so that you build up the information capability with respect to the particular area.

He also indicated our willingness to discuss further this suggestion of a possible joint committee which could be in a position to consult on an emergency basis.

So that I think it is not just a general indication of willingness but preparedness to sit down and try to work out some of the better procedures.

We don't necessarily feel this requires legislation.

IN SENSITIVE SITUATIONS NO CONSULTATION

Mr. Bingham. I don't think the problem is a lack of periodic and regular briefings.

Our cooperation is fine on that. In the normal course of things, I think we can get what information we need. But what appears to happen frequently is that when a crisis develops and when information
that is received or actions being taken are very sensitive, just when consultation ought to take place, it does not.

Another example I would give in addition to those already mentioned is the case of the activity concerning the Soviet possibility of the establishment of a Soviet naval station in Cuba earlier this year.

In spite of distinct efforts on the part of the Latin American Subcommittee of the Foreign Affairs Committee, we simply were not able to get the information about what was really going on.

I make that more by way of comment to illustrate the fact that we do feel, many of us feel, that more structured means of providing the Congress with information are needed.

I would like to explore a little further with you your concept of just what the power of the Congress is with respect to hostilities that are not declared.

POSITION ON DECLARATIONS OF WAR

The Constitution does provide that the Congress should have the power to declare war but in recent years it seems the declarations of war have more or less gone out of fashion. What is your concept of the corresponding authority that Congress has in the situation today where wars are more often undeclared than not?

Mr. Stevenson, I have indicated our view that any assertion that because wars are not declared in most cases today that the Congress' power arising from that provision no longer exists is something that we do not accept.

We think that Congress’ power to declare war has to be interpreted in the light of the present-day circumstances and that you, in fact, may have other ways today of Congress acting in this area rather than through a declaration of war because in many situations it is clearly felt that some other type of action will have the effect of limiting the conflict and is therefore desirable.

Therefore, there must be some other way of having Congress participate.

I think both the administration witnesses have indicated that this is an area of shared powers and that Congress has a very definite role and so does the President.

The problem is basically one of carrying out what was clearly the intention of the framers of the Constitution, of finding a way of reconciling and making these two powers, the powers of the respective branches, operate effectively and harmoniously.

Frankly, this is something that is really not for the courts of law but is for the political process to effectuate.

EXPOSITION OF THE BINGHAM RESOLUTION

Mr. Bingham, That is a very good statement. That is really a statement of what we, some of us at least on this subcommittee, are searching for, some way of providing a procedure that can give effect to what you refer to as shared power.

We do not get from the administration any specific proposals of how to provide some mechanism that would make sure that the Congress was in a position to exercise a part of that power.

I would like to call your attention to the fact that just yesterday I introduced a new resolution which is a modification of the resolution
that I had previously introduced and which eliminates the statement of conditions under which the President would be empowered to act in an emergency without a declaration of war.

I came to the conclusion after considerable thought and study of other resolutions and indeed of my own prior resolution that for many of the reasons you mention it is undesirable for the Congress to attempt to spell out those situations in which the President is authorized to move without a declaration of war.

It seems to me that the conditions are either too broad, in which case they are meaningless, or they are too restrictive, in which case they could be dangerous.

I also came to the conclusion some time ago that the 30-day limitation was an arbitrary and unwise limitation of time, again for some of the reasons that you have mentioned, that it might be difficult to determine when the 30 days began, and that Congress should not be forced into taking action at a particular time.

So, this led me to the proposal that either House of the Congress could at any point in the process express disapproval of the continuing use of foreign troops and that the President would be directed to wind up the authority.

I mention that because I think that quite a few of the comments that you have made in your statement don't deal with this type of proposal.

You have emphasized, Mr. Kauper, that any provision to explicitly authorize the Congress to terminate the President's authority to commit the Armed Forces is unnecessary.

That would seem to imply that the Congress has that authority.

Indeed, your suggestion that there is a shared element in the power between the Congress and the President in this situation would seem to assume that the Congress should be at least tacitly in approval or in support of what the President is doing.

What I am suggesting is that if that at least tacit support is discontinued or there is indication that it does not exist by an unfavorable resolution by either House, then the assumption of a shared responsibility and shared power comes to an end and the engagement should be wound up.

Would you care to comment on that?

PROBLEM OF "ONE-HOUSE VETO" BILLS

Mr. Kauper. What you are talking about is, I gather, still essentially the form of what you might call the one-house veto, which appears in your present bill.

Mr. BINGHAM. Yes.

Mr. Kauper. The one-house veto, as I think you may know, has always presented us with some difficulty.

The analogy which is always drawn, of course, is the analogy to the executive reorganization acts.

I am not sure here we are talking about quite the same thing in terms of what might be characterized as reverse legislation. You do not have in the situation you are hypothesizing: the President's coming to Congress and asking for legislation which you then re declaring disapprove of.
But I think one of the more serious difficulties with the idea of the one-house veto is that there are some circumstances where I think at least we can envision you would be using what appears to be the authority of one house to negate a constitutional authority which is clearly the President’s.

If I might use an example, and this may not be quite the kind of thing you are thinking about, the power of the President to repel an attack, it seems to me, is not something that Congress has delegated to him or indeed that Congress need approve. To terminate, just hypothetically now, the President’s action in repelling an attack with a one-house veto arrangement, it seems to me, does not even say you are terminating pursuant to what I would characterize at least as law.

Now, I think part of the problem is that in these conditions, there are variants. There are some where the President has less power than others. We are lumping them together in one bundle of wax here.

**CONSTITUTIONAL INVALIDITY OF ONE-HOUSE VETO**

**Mr. Bingham.** If I may interrupt, I notice this in your statement. You say that congressional action would either be constitutionally valid or it would not. But where does that leave us?

That leaves us with a very unsatisfactory situation at the time you have a confrontation which can’t be determined readily. What we are trying to do is through some device, some ingenuity, to spell out in advance the situations when the veto by the Congress should be effective.

Now, I would have no objection to trying to spell out those situations where the veto might be constitutionally invalid.

But we keep running into the notion that we can’t move now because the circumstances are not so foreseeable, yet, this leaves us with the problem that in a time when there was a difference of opinion between the President and the Congress we would not know how to proceed.

**Mr. Kaufen.** I think one would normally proceed as attempts have been made to proceed at the present time, that is, through the normal legislative process. I think to try to build in a one-house arrangement, and what I am addressing myself now to is the one-house arrangement, is to attempt to curtail some kind of authority which, and I gather what you are doing in your bill by eliminating the conditions you are neither recognizing nor denying the propriety of the authority, but I think you are doing it with the one-house veto arrangement in a way where perhaps we can envision a circumstance where legislation might actually in fact be fully operative as law.

I don’t think a one-house veto would be that effective. That is part of the problem I am having.

**“TACIT APPROVAL” OF CONGRESS**

**Mr. Bingham.** I don’t want to pursue this indefinitely.

I know that you have given a great deal of time already but let me suggest this to you:

If, as I take it, you are inclined to agree that the normal situation is that the President is proceeding with at least the tacit approval of the Congress, and that means the tacit approval of both Houses of the Congress, if there is to be shared responsibility and if the Congress...
has not in fact acted with an explicit authorization, then must it not follow that the congressional role is a kind of tacit approval?

Mr. Kauper. I am not sure that necessarily is so.

Obviously, there have been cases—and I think you refer in the statement to places—where there have been tacit acquiescences; maybe that is a good word to use.

But, I think in many circumstances what we are talking about is something either more or less than that.

There may be circumstances where what we are talking about is the President acting, where I think perhaps we would all agree he need not have the advance approval of Congress.

I am thinking again of the repelling of a sudden attack. There may be other circumstances where, I think we would all agree, if the President decided to invade some country—we are not talking about a crisis situation—where he would presumably need to consult. I am not sure in the first case that a one-house veto would be effective to negate the President’s authority.

I am not sure in the second, if congressional authorization were in fact necessary, that that would suffice to give it.

That is the problem.

POWER OF PURSE IS CLUMSY TOOL OF CONGRESS

Mr. Bingham. It leaves us in a very unsatisfactory situation because it really requires Congress to use the very clumsy tool of the fiscal power to try to influence the course of these events and I think that probably everyone would agree that this is not a very satisfactory way for the Congress to act.

The fact that the Congress has that power is an indication of its underlying responsibility and its underlying authority.

To attempt to direct the course of military action through the use of the fiscal power is a very unsatisfactory way of doing business.

Would you not agree?

Mr. Kauper. Again, I think it depends on the circumstances you are talking about.

Yes, there may be some circumstances where it is. There may be circumstances when we are not depending on what kind of time you are talking about, and so on.

Mr. Bingham. I want to thank you both very much on behalf of the subcommittee for your time and your very thoughtful and interesting testimony.

The subcommittee stands adjourned.

(Whereupon at 5 p.m., the subcommittee adjourned, subject to call of the Chair.)
ADDITIONAL STATEMENTS BY MEMBERS OF CONGRESS

STATEMENT OF HON. THADDEUS J. DULSKI OF NEW YORK

Mr. Chairman, I commend you for calling these hearings on pending legislation to clarify the war powers of Congress and the President. For the record, I am Thaddeus J. Dulski, a Representative from the 41st District of New York.

I am the cosponsor of House Joint Resolution 275 which is before your subcommittee. I also am a cosponsor of House Joint Resolution 664. The texts vary somewhat from each other and from other pending measures. However, the intent is basically the same, and that is really what matters.

Clarification of the war powers of the Congress and the President is long overdue. Congress has allowed the Chief Executive to assume what amounts virtually to a dictatorial role to which he expects the Congress to be subservient.

This is not the way it was meant by the framers of the Constitution. I certainly understand that the Chief Executive cannot be so hamstrung that he cannot react in our Nation's interest in a time of true and critical national emergency.

But giving him that authority should not mean he can overlook explaining his actions promptly to the citizenry through its elected Representatives in Congress.

I recognize that there may be elements of national security involved and I don’t expect to be privy personally to all the details in each instance. I do, however, believe and expect that Members of the appropriate committees in the House and Senate not only are entitled to be but must be fully informed on these matters, preferably before—and absolutely as soon as possible after—the emergency action.

There is no desire on my part to burden further the awesome responsibilities of the Presidency. Neither do I intend to stand idly by while would-be kingmakers chip away at the role and responsibility of the Congress.

Mr. Chairman, there is no subject which is causing greater concern to our citizenry than our endless involvement in the Far East. Congress sought to restrict further involvement but the administration has skirted the congressional directive by falling back on technical loopholes.

The need is clear and urgent for a clarification of war powers for our Nation. I hope your subcommittee will act promptly to make recommendations to the full committee and, in turn, to the House for action.

As part of my remarks, I ask permission to include the full text of a statement I made at the time I introduced my bill last February. I also include the text of a very timely editorial from my home city newspaper, the Buffalo Evening News.
WAR POWERS OF CONGRESS AND THE PRESIDENT NEED TO BE SPelled out

Mr. Dulski. Mr. Speaker, I am today introducing legislation aimed at spelling out the war powers of the Congress and the President.

I have been concerned for some time about the progress of events in Indochina. I am particularly disturbed about the current heavily censored activities which appear to skirt the intent of congressional limitations on U.S. combat participation.

Congress already has restricted combat activities in Indochina, but quite apparently we did not go far enough.

To simply restrict use of ground troops in specified areas leaves a loophole and an opportunity for technically different operations which still result in comparable U.S. participation in violation of congressional intent.

Over most of the years of our Nation's history, the responsibility for putting our troops into combat has been under the control and supervision of the Congress. However, in recent years, Chief Executives have been taking the initiative, moving on their own and then belatedly letting Congress know how they have committed U.S. manpower.

It is my firm conviction that the Chief Executive should have the power to commit our troops to combat only when our Nation is under attack or in clear danger of attack.

I recognize that there can be extraordinary and emergency circumstances that could arise demanding near-instantaneous reaction on the part of the Chief Executive. However, this is not ordinarily the case because usually there are sufficient warnings and intelligence on potential dangers to our national security.

If, however, such extraordinary and emergency circumstances should arise, then the President should be required to inform the Congress immediately in detail, as both the circumstances and to the extent of the reaction.

Our forefathers, in writing the United States Constitution, made it clear that the power to declare war rests with Congress. I believe that Congress needs to reaffirm this power through legislative action in spelling out in the greatest detail possible exactly the circumstances and procedures under which a Chief Executive can act.

In the present circumstances in Indochina it is quite evident and greatly disturbing to me that the administration has not consulted with the Congress about the commitments that already have been made.

Indeed, the manner in which the current Far East circumstances have developed raises real doubt in my mind whether the preliminary facts even were made available to our Chief Executive before it was too late for him to reverse U.S. participation.

I am not a member of the Foreign Affairs Committee and therefore would not expect to be kept informed in continuing detail on these matters. But I do feel the integrity of the Members of Congress who properly need and are entitled to be informed is being questioned by the disturbing reluctance of the administration to inform them on essential details.

With regard to Indochina, I feel we have two prime concerns as we withdraw in orderly fashion. First, we must work for the safe return of the prisoners of war, and second, we must work for the safe return of all remaining U.S. Forces.

The joint resolution which I have introduced in the House seeks to spell out in careful detail the war powers of the Congress and the President.

The need for this legislation is more evident today than when I began studying and analyzing the matter several weeks ago. I am communicating my views to the chairman of the Committee on Foreign Affairs.

[Editorial from the Buffalo (N.Y.) Evening News, May 13, 1971]

CLARIFYING THE WAR POWER

Ever since President Johnson began the great escalation in Vietnam, with the Tonkin Gulf resolution providing the main cover of legality, a growing cross-section of congressional leaders has been seething in frustration over the Chief Executive's assumption of a warmaking power which the Founding Fathers intended to repose in Congress.

While the effort to retrieve some semblance of this lost, stray or stolen power has found its greatest support among Senate doves—with New York's Senator Jacob Javits coming to the fore in recent months as the most articulate exponent—this movement is now immeasurably enhanced by the support of a leading southern hawk, Senator John Stennis (Democrat of Mississippi).
Actually, the aggrandizement of the President at the expense of Congress in this vital war-making area is part of a generations-long pattern which, in the thermonuclear age, could not possibly be reversed in any ultimate sense. Obviously, we cannot have 531 thumbs on the nuclear button; the President must be free to confront any instant challenge to our survival with whatever emergency actions he deems necessary.

But this is not the kind of challenge we faced in Korea or now face in Vietnam, Cambodia and Laos, where this nation has waged prolonged war under presidential direction without either a congressional war declaration or specific congressional regulation of its conduct. Not only that, but the President takes it for granted that he alone has the power to wind the war up or down, widen it or narrow it, continue it or end it—just so long as Congress keeps supplying the money and refrains from imposing any absolute restrictions.

The Javits resolution, which Senator Stennis' proposal seems to echo in most major respects, would authorize the President to commit our Armed Forces under four specific conditions: (1) To repel a sudden attack on the United States; (2) to repel an attack against U.S. Armed Forces on the high seas or abroad; (3) to protect U.S. lives abroad; and (4) to comply with a specific treaty or other formal national commitment.

But whenever such hostilities have been initiated, the President would be required to give Congress a full and prompt account of the circumstances, and, in the absence of a declaration of war, he would be prohibited from sustaining the hostilities beyond 30 days except as Congress may provide by law. To make sure that the whole Congress could act on such war-sustaining legislation within the 30 days, the resolution gives it a special priority guaranteeing it prompt committee clearance and a vote in each house within three days thereafter.

The only point on which Senator Stennis seems to differ with this approach is that he would explicitly exclude any application to the Indochina war. On this point, Senator Javits said in his interview with the News this week that his proposal, while not retroactive and therefore not intended to apply in Vietnam, nevertheless could apply there, too, if hostilities involving American troops should be renewed after they had ceased. But that is a relative quibble compared with the broad constitutional purpose of redefining the war power in a context relevant to this dangerous age.

We think the Javits resolution does accomplish this in a most effective way, and we are impressed by the caliber of the many constitutional authorities who agree that it will help restore the balance intended by the Founding Fathers. The fact that the President must have untrammeled authority to act in bona fide emergencies does not, in our judgment, justify the waging of prolonged hostilities in the absence of either a formal declaration of war or a specific act of Congress. It is time that the basic constitutional responsibility for keeping this nation at war be put, as Senator Stennis says, "where it belongs, on the people's representatives."
STATEMENT OF HON. JACK EDWARDS OF ALABAMA

Mr. Chairman, members of the subcommittee, I have come before you today to express my support and keen interest in the very timely and needed enactment of House Joint Resolution 664.

One very important necessity has emerged from our experience in Vietnam—the necessity of making sure this Nation avoids any future Vietnams.

The U.S. combat role in Vietnam is coming slowly, but steadily, to an end. At the same time, the debate over how we can best avoid future Vietnams is just beginning.

Obviously, the American public is sick and tired of going into wars which ultimately end in a stalemate such as we have been involved with in Korea, and now, Vietnam. We have no business sending our troops thousands of miles away and spending billions of dollars of hard-earned American tax money to fight a battle that doesn't have total victory as a goal.

The best way to avoid such wars is to profit from the lessons of Korea and Vietnam before it is too late.

One way to avert a repetition of Korea and Vietnam is to make sure we don't go to war accidentally or by Presidential decision alone.

That is the vital purpose of House Joint Resolution 664 of which I am a cosponsor—to provide a built-in, guaranteed, legal provision that, whoever the President is, he will not have free rein to place this country into the position it is in today as a result of his unilateral decision.

Whoever the President is, he must not put this nation into another war without explicit congressional approval.

Congress cannot amend the President's powers as Commander in Chief by resolution. Once we are in a war then Congress should not interfere with the President's constitutional power to conduct the war. But, we shouldn't be in a war in the first place if Congress hasn't declared war.

It is for these reasons which I have spelled out here that I strongly urge the subcommittee to render full support and approval of House Joint Resolution 664.
Mr. Chairman, the controversy which has developed because of the war in Vietnam has affected virtually every segment of American society. Fresh cries of dissent greeted President Nixon's decision to intervene in Cambodia, with protests marked by street demonstrations, student dissent, and confrontations with civil and military authorities occurring in every part of the country. At the same time, vigorous support of the President's foreign policy, climax by counterdemonstrations have resulted in a polarization of attitudes.

As scholars, students, political leaders, and the public begin to have second thoughts relative to the powers of the President, it is in order for us to examine the respective war powers of the Congress and the President and to view those which have actually developed in practice.

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 merchantmen 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 arise 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 70 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; and 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. 5709 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. 5709 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. 5709, 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. CLAUDE PEPPER OF FLORIDA

Mr. Chairman, I am pleased to join my distinguished colleague from Florida, Mr. Chappell, in support of his resolution, House Joint Resolution 644, to clarify the war powers of the President and the Congress.

I think this resolution touches one of the most critical issues facing the American people today and I am pleased to be one of the cosponsors.

It seems to me unthinkable that anyone would ever assume that any of the Founding Fathers, when they were writing the U.S. Constitution, would ever in their wildest imagination have contemplated the possibility that the President of the United States would ever assume that he had the power to commit more than one-half million men of the armed services of the United States to a protracted war costing tens of billions of dollars and lasting over many years on the other side of the world. Yet this is what has happened and the result has been a serious division of our country and a weakening of our country at home and in the world.

Thus, it seems to me now that we have got to come to some sort of delineation of the power and responsibility of the President under the Constitution and the power and responsibility of the Congress under that supreme document.

It is clearly evident to me from the central and concise language of the Constitution that, while the President has authority to move the Armed Forces whenever he wants to, that he has the clear authority and the duty to take prompt and necessary action to defend the United States against an attack, but beyond that, beyond meeting emergency situations and repelling an attack or protecting the lives and liberty and property of the citizens of the United States from an immediate threat, it is clear that the President does not have the power to commit the United States to a protracted war on foreign soil.

It cannot be said upon a reasonable constitutional theory that the Presidential prerogative allows him to send an army of over one-half million men to the other side of the world and to engage in what everyone knows is a war, without a declaration of the Congress, without a commitment on the part of the Congress to that conflict. The prerogatives of the Chief Magistrate of our land and of the Commander in Chief of our Armed Forces very clearly, under the terms of our Constitution, do not include the power to initiate war or to involve the country without the consent of the Congress in a war.

Nevertheless, we find ourselves in a situation where we seem to have no recourse against the assertion of Presidential powers except to cut off the funds necessary to maintain the U.S. Armed Forces committed to this undeclared war. This is certainly not a satisfactory solution to this problem.

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We are challenged, therefore, to devise other legislative remedies which will spell out the powers of the Commander in Chief and specify the limitations upon the exercise of those powers. I am confident that this distinguished subcommittee is equal to this challenge and I commend to you the initiative embodied in House Joint Resolution 644.

I must add that, in the meantime, I feel obligated to use what power I have as a Member of the Congress, with a vote on military appropriations and other appropriate legislation, to seek to bring the current abuse of the war-making power to an end. I urge the subcommittee, therefore, to exercise all deliberate speed in providing a more appropriate remedy for the tragic and highly unconstitutional situation in which we find ourselves.

I thank you.
Mr. Chairman, I appear today in support of House Joint Resolution 644 which I am cosponsoring, relating to the war power of Congress. The Constitution assigns only to Congress the awesome responsibility of a declaration of war, yet we find ourselves heavily engaged for the second time in a generation in a war by presidential action and not by act of Congress. It is entirely possible that much of the distaste which has become associated with our current involvement in Indo-China arises from the fact that the representatives of the people, speaking for the people, did not in fact commit us to this engagement.

War in all its aspects is a grievous and destructive business. There must be national will and spirit which supports the war and is convinced of its justification. The current way has been fought without a genuine effort to acquaint the American people with its justification or its requirements. There should be no other wars which do not fully reflect the spirit and determination of the American people to see a cause through to a victorious end.

The Tonkin resolution came before this body after we were in fact committed in Indochina. It gave the President broad authority to send American troops into battle on foreign soil, but it was not a declaration of war. We have good cause for our involvement in Indochina, but we backed into it rather than facing up to all aspects of the responsibility and the magnitude of the task.

A President should not have power unilaterally to commit our Nation to war. This is a responsibility which belongs to the Congress and the President should take the Congress into his confidence in all aspects of an international problem before asking such a commitment. With the adoption of the resolution now before us, the Congress will again be required to accept its own responsibility and, as spokesmen for the people, to commit our Nation. If the resolution accomplished nothing else but this, it would be worthy. But it does more.

It serves notice on the entire world that the American policy of non-aggression is written into the law of the land. The resolution directs that no President may ever send American forces to a foreign land for purposes of armed conflict without having to stand before the Congress and the world and justify his actions.

This resolution, if adopted, will be unique in the universe. I know of no other nation which has either the strength or the courage to act as we now have the opportunity to act by adoption of this resolution. It will support, by congressional action, the policies which have been laid down by nearly every administration for almost 200 years.

This resolution will serve notice on the enemies of freedom that America alone has adopted, and written into law, a provision preventing any President at any time from engaging in war without congressional action. It is entirely possible that this will prevent reckless adventures in future years. It will place the responsibility of war or peace on the Congress where rightly it should rest.
and it will serve notice on the world that the United States truly seeks peace for mankind.

Some critics will argue that the resolution places undue restraints on the President's power to defend the Nation. I disagree with the critics on this point. It allows the President the same freedom to act as he now has. There is nothing in the resolution which prohibits the President from instant reaction to a threat. The only restriction on the President is that he would be required to bring his rationale before the Congress within 30 days of his action and to justify his action. Some might argue that the Congress cannot act with sufficient dispatch to grant a President's request that troops be allowed to remain in a given situation. Those who argue this point must somehow be overlooking the events of December 1941 when Congress acted within hours, not days.

This resolution will place the Congress in its proper role and will serve notice on the world that American Presidents, while restricted from reckless adventures, may act within minutes to meet aggression wherever it appears.

Mr. Chairman, I sincerely hope that your distinguished committee will be able to act favorably on this measure and, I want to thank you for the opportunity of appearing before you today.