STATEMENTS SUBMITTED FOR THE HEARING RECORD

STATEMENT BY PROF. JOHN NORTON MOORE, THE UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA.

Thank you for the invitation to submit a brief statement for the record supplementing my testimony last June concerning the constitutional aspects of the role of Congress and the President in the use of the Armed Forces abroad. In responding to this opportunity I would like to present three points for your consideration.

First, in testifying before the subcommittee last June I discussed seven principal issues in defining the congressional and presidential roles. A complete analysis of the range of constitutional issues in the use of the Armed Forces abroad, however, would require discussion of additional issues. Since failure to focus on the full range of these issues is a potent source of confusion about the war powers it seems important that the full range be articulated for the record. The full range of issues includes:

I. National commitments to use the Armed Forces abroad:
   (a) What authority does the President have, acting on his own, to commit the Nation to a contingent future use of the Armed Forces?
   (b) What authority does Congress have to limit presidential authority to commit the Nation to a contingent future use of the Armed Forces?
   (c) When, if at all, are national commitments for contingent future use of the Armed Forces self-executing without subsequent authorization?

II. The deployment of the Armed Forces abroad:
   (a) What authority does the President have, acting on his own, to deploy the Armed Forces abroad?
   (b) What authority does Congress have to limit presidential authority to deploy the Armed Forces abroad?

III. The commitment of the Armed Forces to military hostilities:
   (a) What authority does the President have, acting on his own, to commit the Armed Forces to military hostilities?
   (b) When congressional authorization is necessary, what form should it take?
   (c) What authority does Congress have to limit presidential authority to commit the Armed Forces to military hostilities?

IV. The conduct of hostilities:
   (a) What authority does the President have, acting on his own, to make command decisions incident to the conduct of a constitutionally authorized conflict?
   (b) What authority does Congress have to limit command options incident to the conduct of a constitutionally authorized conflict?

V. The termination of hostilities:
   (a) What authority does the President have, acting on his own, to terminate or negotiate an end to hostilities?
   (b) What authority does Congress have to require termination of hostilities?
   (c) When Congress terminates hostilities, what form should it take?

The hearings conducted by your subcommittee are an historic step in clarifying the relationship between Congress and the President throughout this range of issues. The hearings have also demonstrated a need to upgrade the congressional role in war-peace decisions. The challenge facing Congress is how to vitalize this congressional role without impinging on areas where constitutional authority is properly entrusted to the President. In meeting this challenge it would be a mistake to simply react against past congressional and presidential inadequacies by sweeping legislation which fails to make the difficult distinctions that are inherent...
in the full range of issues. The solution is not a legislative victory for the views of either Pacificus or Helvidius but is instead the far more difficult quest for reasonable lines which will optimize the strengths of both Congress and the Executive. Second, because of the need to upgrade congressional involvement in decisions to commit the Armed Forces to hostilities abroad and to encourage greater cooperation between Congress and the President on major war-peace issues it seems appropriate and useful to require a reporting requirement for presidential commitments of the Armed Forces abroad. In this respect the reporting requirement contained in H.J. Res. 1 seems a useful model and I support it. On the other hand, efforts to limit presidential authority by precise advance delimitation of the independent authority of the President, as those contained in S. 731, H.J. Res. 431, H.R. 5709, H.R. 4763, and H.R. 6940 run a dual risk of unconstitutionality and impracticality. For the reasons set out in my testimony before the Senate Foreign Relations Committee on April 26, 1971, a copy of which I enclose, I would oppose any such efforts to specifically delimit presidential authority in advance. If any such substantive limits were to be placed on presidential authority it would be far preferable that they be developed in quantitative terms based on the size of the force committed to combat than that they be developed in terms of overly neat specification of the purposes for which such forces can be committed. For example, an upper limit for independent presidential authority to commit the Armed Forces to military hostilities of commitments involving 25,000 or more troops would seem far more responsive to the constitutional purpose in division of authority between the President and Congress than the detailed specification of purposes contained in S. 731 and H.R. 6940. Such a limit would roughly separate the major and sustained hostilities constitutionally requiring congressional authorization from those which may be taken on the independent authority of the President. It would also include all of the foreign wars in which U.S. forces have suffered sustained major casualties while excluding the great bulk of instances in which historically the Armed Forces have been committed abroad on presidential authority. In addition, such a quantitative limit would not require that all possible use of force situations be anticipated in advance.

Third, in view of the importance of the issue it may be useful to add a few words to my earlier testimony on the authority to require termination of hostilities. There is little doubt that hostilities may be constitutionally terminated by the President acting pursuant to his powers as Commander in Chief and as Chief Representative of the Nation in foreign affairs. Similarly, it is clear that hostilities may be terminated by the President and the Senate acting together pursuant to the treaty power. The record of the Constitutional Convention suggests that the framers probably had the treaty power in mind when they adverted to the power to make peace. Moreover, Article VI of the Constitution provides that treaties made "under the Authority of the United States, shall be the supreme law of the land * * * * * * Beyond these two modalities of termination there is somewhat greater doubt about the constitutional structure, and particularly the extent of congressional power, with respect to termination of U.S. participation in hostilities abroad.

On the one hand, the Articles of Confederation assigned Congress the power to determine "on peace" as well as on war. Yet at the Constitutional Convention a motion by Mr. Butler "to give the legislature [the] power of peace, as they were to have that of war," failed of adoption. The remarks of Mr. Gerry who recorded the motion suggest that the delegates expected that the Senate rather than Congress would make decisions "on peace," probably through the treaty power. These factors have created expectations in at least one constitutional scholar that Congress has no power to terminate hostilities over the objection of the President. In a course of lectures delivered at the University of Pennsylvania School of Law and revised into treatise form in 1889, Prof. J. I. C. Hare wrote:

"Take, for instance, the case of a war which Congress thinks unnecessary or unjust, and wishes to close on terms that the enemy are willing to accept. Still, it
is the right of the President, and not of Congress, to determine whether the terms are advantageous, and if he refuses to make peace, the war must go on. Under such circumstances it would clearly be the duty of Parliament to withhold the supplies necessary for carrying on the war, because such a vote on their part would produce a change of ministry, followed by the return of peace; but as a corresponding action on the part of Congress will not lead to a cessation of hostilities, it is as clearly their duty to provide the means for prosecuting the contest with effect and bringing it to an honorable termination."

On the other hand, Congress has a number of powers which suggest a broader role in termination decisions than is indicated by Professor Hare. These include the powers "to raise and support Armies," "to provide and maintain a Navy," "to make rules for the Government and regulation of the land and naval forces," and to serve as the only source of authorization for treasury appropriations. And in the case of support of the Army the Constitution specifically provides that such appropriations may not be for a longer term than 2 years. In addition, it seems probable that Congress retains the power to repeal any legislation authorizing major hostilities abroad and that to the extent that constitutional authority is based on such legislation it may be withdrawn by a repeal clearly intended to withdraw authority. This, in fact, seems to have been the principal basis for congressional action in the two instances in our history in which Congress recognized termination of hostilities. The first of these was a declaratory resolution establishing a state of technical peace with Germany following World War I. Although an earlier effort to recognize termination of hostilities had failed when President Wilson vetoed it, in 1921 President Harding called for and joined in such a resolution. At the time, however, actual hostilities had been over for several years and the principal legal effect of the resolution was the repeal of domestic emergency legislation enacted during the war. Similarly, in 1931 President Truman requested and joined in legislation revoking the 1941 declaration of war against Germany. As with the World War I legislation actual hostilities had long been ended. Since these instances did not involve congressional termination of actual hostilities over the objections of the President they have only limited precedential value. They do, however, suggest that the proper modality for congressional termination would be formal legislation which may be vetoed by the President and presumably the veto of which may also be overridden by Congress. This conclusion is also given some support by the case of Ludecke v. Watkins, in which Mr. Justice Frankfurter, writing for the Court, stated in dictum that: "The state of war may be terminated by treaty or legislation or Presidential proclamation." The case, however, presented the narrow issue of the power of the President to deport enemy aliens under the provisions of the Alien Enemy Act of 1798 after actual hostilities had ceased but before the state of war had been officially terminated by either Congress or the President. As such it does not provide a focused judgment that legislation is an equivalent route to the treaty power or presidential proclamation in decisions to terminate actual hostilities abroad.

Policy considerations inherent in the functional strengths and weaknesses of Congress and the President suggest that Congress should have substantial power in termination decisions. Termination decisions do not characteristically require immediate decisions and in general the kinds of goals thinking which they require do not require extensive access to secret documents or detailed information about the conduct of hostilities. In addition, in recommending congressional and presidential roles in the full range of use of force decisions a stronger congressional termination power may create greater independent presidential authority in deployment and commitment decisions. On the other hand, a functional case can also be made for presidential participation in termination decisions. If detailed information on the conduct of hostilities is not critical in major termination decisions it is certainly highly useful in assessing the costs of alternative proposals for disengagement. Moreover, if termination involves an element of negotiated settlement the President would seem to have an important role which in many cases may be adequately handled only by the President.

1 J. Hare, I AMERICAN CONSTITUTIONAL LAW 171-172 (1980).
2 See Legal Memorandum on the Constitutionality of the Amendment to End the War, printed in Congress, The President and the War Powers, Hearing before the Subcommittee on National Security Policy and International Development of the Committee on Foreign Affairs of the House of Representatives, 95th Cong., 2d Sess. 25 (Comm. Print. 1978).
3 62 Stat. 120 (1921).
4 63 Stat. 451 (1941).
5 285 U.S. 190 (1946).
6 Id. at 266. [Emphasis added.]
On balance Congress probably does and should have authority to enact legislation withdrawing prior authority to commit the Armed Forces to hostilities abroad or withholding appropriations for the continuation of conflict. Any such legislation must be enacted by the same process as any other formal law, that is either with active or passive presidential sanction or over a presidential veto. Such legislation must not place undue constraints on the President with respect to command decisions incident to the conduct of hostilities or with respect to the President's obligation to safeguard the Armed Forces during disengagement.

The importance of both the presidential and congressional roles in termination decisions suggests the critical need for initiatives from both branches of government in promoting cooperation rather than conflict. The President should make every effort to candidly inform Congress of the goals, costs, and progress or lack of progress of the conduct of hostilities. Similarly, a congressional policy for termination of hostilities which conflicts with a presidential plan for disengagement should be adopted only with the greatest reluctance. Specifically, recent proposals to require total withdrawal of U.S. forces from Vietnam by a particular date would seem to greatly undercut the President's negotiating role. Though such proposals may be constitutional in a formal sense, they should be adopted only if Congress has strong reason to doubt the wisdom of presidential policies.

STRENGTHENING THE CONGRESSIONAL ROLE IN THE USE OF THE ARMED FORCES ABDRO

(By John Norton Moore*)

Mr. Chairman, it is a pleasure and a privilege to appear before the Senate Committee on Foreign Relations to discuss proposals for strengthening the congressional role in the use of the Armed Forces abroad. Throughout our history the proper allocation of authority between Congress and the Executive in the use of the Armed Forces has been surrounded by controversy. This controversy has been invited by a skeletal constitutional structure which gives Congress the power "to declare War" and to "raise and support Armies" but makes the President the "commander in chief" and the principal representative of the Nation in foreign affairs. That the criticism has persisted suggests that there is a greater need than said for both the executive and the congressional roles. It also suggests that the issue is not simply the triumph of the views of either Pacifists or Hymnists but is instead the far more difficult quest for reasonable lines which will optimize the strength of both the executive and the legislative branches. The starting point is to recognize that the war power controversy embraces more than one or two issues concerning initial commitment of the Armed Forces to military hostilities. Rather, it includes a wide range of issues encompassing a broad process of decision about initial as well as continuing commitments of forces abroad, the commitment of forces to combat, the conduct of hostilities and the termination of hostilities. To be most effective proposals for strengthening constitutional processes should be sensitive to this range of issues and their interrelation. Inadequate focus on the full range of issues may lead to an overgeneralized response which threatens the proper balance between congressional and presidential authority. The principal issues in this process are:

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I. National commitments to use the Armed Forces abroad:
   (a) What authority does the President have, acting on his own, to commit the Nation to a contingent future use of the Armed Forces?
   (b) What authority does Congress have to limit Presidential authority to commit the Nation to a contingent future use of the Armed Forces?
   (c) When, if at all, are national commitments for contingent future use of the Armed Forces self-executing without subsequent authorization?

II. The deployment of the Armed Forces abroad:
   (a) What authority does the President have, acting on his own, to deploy the Armed Forces abroad?
   (b) What authority does Congress have to limit Presidential authority to deploy the Armed Forces abroad?

III. The deployment of the Armed Forces to military hostilities:
   (a) What authority does the President have, acting on his own, to commit the Armed Forces to military hostilities?
   (b) When congressional authorization is necessary, what form should it take?
   (c) What authority does Congress have to limit Presidential authority to commit the Armed Forces to military hostilities?

IV. The conduct of hostilities:
   (a) What authority does the President have, acting on his own, to make command decisions incident to the conduct of a constitutionally authorized conflict?
   (b) What authority does Congress have to limit command options incident to the conduct of a constitutionally authorized conflict?

V. The termination of hostilities:
   (a) What authority does the President have, acting on his own, to terminate or negotiate an end to hostilities?
   (b) What authority does Congress have to require termination of hostilities?
   (c) When Congress terminates hostilities, what form should it take?

Although time precludes a systematic analysis of each of these issues, it may be helpful to briefly review several issues which seem most relevant to the specific proposals before the committee. They are: What authority does the President have, acting on his own, to commit the Armed Forces to military hostilities, and what authority does Congress have to limit Presidential authority to commit the Armed Forces to military hostilities?

I. The Authority of the President, Acting on His Own, To Commit the Armed Forces to Military Hostilities

The Constitution provides that "Congress shall have Power * * * to declare War * * *". It seems evident from Madison's notes of the debates in the Constitutional Convention that this provision was intended to lodged with Congress the power to commit the Nation to war. It seems equally evident that in changing the initial draft language empowering Congress "to make war" to language empowering Congress "to declare war" the Convention intended to leave to the Executive the power to repel sudden attacks and to make command decl-

1 I have dealt briefly with the issues subsumed under headings III, IV and V in Moore, "Congress and the Use of the Armed Forces Abroad," supra note 1. On issues I and II see Hearings Before the Committee on Foreign Relations of the United States Senate on Senate Resolution 151, supra note 1; Remarks of Senator Fulbright, 97 Cong., 1st Sess. 589 (1943).

"One important issue has been quite clearly defined. That issue is whether the President should seek the advice of Congress on the question of sending troops to Europe now, or whether his discretion should be subject to the consent of Congress. Apparently the President is agreeable to the idea that it is proper for Congress to give him its advice on this question, leaving to him the full responsibility for making the final decision. He is willing, however, to accept the principle that the consent of the Congress is necessary to validate his decision. In other words, he does not agree that his decision in this matter must be subject to the approval of Congress."

"Personally, I agree with the position of the President. I do not agree with the proposal of the minority leader. The Congress has the right and power to raise the Armed Forces, but the President has the responsibility for the command of those forces. If, in the exercise of his best judgment, the defense of this country requires the sending of troops to Europe, he has the power and the duty to do so. Congress, of course, can refuse to appropriate the money for the troops but that is a decision for which Congress must take the responsibility. In the last few decisions on military strategy are best left to the Executive. That is the plain intent of our constitutional system. It would be dangerous for our future welfare to change the underlying principle simply because a strong minority or even a majority of the Congress may lack confidence in the wisdom of the Executive in some particular instance such as the present one."

id. at 589-91. See also S. Res. 85 expressing the sense of the Senate relative to commitments to foreign powers.
sions incident to the conduct of hostilities. Beyond these broad outlines the Constitution left broad gaps. Thus, it was uncertain which branch would have the authority to commit the Nation to force short of war or indeed what "war" meant. Similarly, the scope of the Executive's power "to repel sudden attacks" was uncertain. Since no constitutional language is self-interpreting, particularly the broad brush strokes with which the framers set out the war powers, constitutional history, the practice of successive Congresses and Presidents, changed global conditions, and functional distinctions between Congress and the Executive are all relevant to defining constitutional policy.

During the 18th and 19th centuries, there were approximately 100 instances of use of U.S. armed forces abroad. Only three of these, the War of 1812, the Mexican War, and the Spanish-American War, were fully declared. Congress, however, did participate in authorizing a number of other instances during this period such as the undeclared naval war with France. Moreover, most of these instances were relatively minor actions for the protection of nationals, for the suppression of piracy, or for the punishment of violations of international law. As American involvement in world affairs increased during the first half of the 20th century and particularly as it reached a high plateau of involvement following World War II, instances of use of the armed forces abroad have reflected a stronger Presidential role. From 1900 to 1970 there have been over 60 instances of the use of U.S. armed forces abroad of which only two, World War I and World War II, were fully declared by Congress. Although many of the instances were either minor or authorized by Congress, a number evidenced a broad expansion of the Presidential role. Thus, major instances of Presidential commitment of the armed forces to military hostilities during this period include President McKinley's commitment of several thousand troops to the international army which rescued Western nationals during the Boxer Rebellion, President Wilson's arming of American merchantmen with instructions to fire on sight after Germany's resumption of unrestricted submarine warfare in 1917, President Franklin Roosevelt's Atlantic war against the Axis prior to the United States entry into World War II, President Truman's commitment of a quarter of a million American men to the Korean war, President Kennedy's commitment of substantial numbers of military advisory personnel to Vietnam, and President Johnson's commitment of marines to the Dominican Republic.

1 Madison's notes indicate that "Mr. Madison and Mr. Gerry moved to insert 'declare,' striking out 'make' war, leaving to the Executive the power to repel sudden attacks." They also indicate that Mr. Elsworth, who initially voted against this motion, changed his vote to one in favor of the motion after "the remark by Mr. King that 'make' war might be understood to 'conduct' is which was an Executive function."

2 One authority on the concept of war in contemporary history and international law writes: "The laws of the American Constitution which regulate the initiation of war obviously deal with war in the formal sense. The Constitution provides that only the Congress shall have the power to declare war. On the other hand there is little doubt that the President has been recognized as having frequently, if not generally, the power to utilize the armed forces for the defense of national rights and interests, which in many instances gave rise to a waging of war in the literal sense. Hence the legal right and the practical power of the President of the United States to put into operation the country's armed forces outside of the United States has been a subject of considerable discussion. The question at stake was whether or not the Presidential use of armed force controlled the terms of the Constitution according to which only Congress was entitled to initiate war.

3 From the standpoint of modern international law the competence to initiate war under the American Constitution must be considered differently according to whether formal or material war is concerned. While the competence of the Congress to initiate war in cases where war in the formal sense is engaged, the President, owing largely to his position as Commander-in-Chief, is entitled, if need be, to engage his military forces in material war.


5 That the framers were aware of the distinction between declared war and measures short of war is suggested by the presence of hostilities without a formal declaration of war during the 19th Century. A study of hostilities in the absence of a declaration of war, compiled as long ago as 1853, indicated that historically the nation of the United States had frequently utilized the power to engage in hostilities without a formal declaration of war. In fact, the author of the study found that "Circumstances have occurred in which declaration of war have been omitted prior to hostilities; but during the years 1790 to 1870 inclusive, less than ten instances of the kind have occurred."

6 "On the other hand, 70 cases are recorded in which hostilities have been commenced by the subjects of European Powers or of the United States of America against other powers without declaration of war."

7 MacMurray, HOSTILITIES WITHOUT DECLARATION OF WAR 4 (1950). This study was concerned with cases in which hostilities were commenced prior to formal declaration of war, and the number of cases in this study in which there was never a declaration of war would be substantially lower.

8 See the list of instances of use of United States Armed Forces abroad from 1796-1917 in Background Information on The Use of United States Armed Forces in Foreign Countries, Subcommittee on National Security Policy and Scientific Developments of the Committee on Foreign Affairs, Senate, 80th Cong., 2nd Sess. (Comm. Print Rev. 1949), at 50, Appendix II.

9 H. at 54-55.
In view of the decision of the Constitutional Convention to lodge with Congress the power to commit the Nation to major hostilities abroad, the expanded Presidential role may have gone too far. In particular, the waging of a sustained major war in the Korean conflict without explicit congressional authorization, a war in which the United States sustained more than 140,000 casualties, seems a poor precedent. On the other hand, experience suggests a need for some independent Presidential authority in committing troops to combat abroad. There may be a need for defense against sudden attacks on American forces abroad, sudden attacks on areas which the Nation is committed by treaty to defend, minor commitments such as humanitarian intervention, the protection of nationals or regional peacekeeping operations, defensive actions such as the Cuban missile crisis requiring secrecy and negotiating responsiveness, and ongoing command decisions concerning day-to-day operations of military assistance programs or defense deployment of American forces. These may all be areas in which the need for decisiveness, speed, secrecy, negotiating responsiveness or simply the difficulty in informing Congress on a day-to-day basis call for some room for Presidential authority. These functional needs should neither be exaggerated nor underestimated. With the exception of the Korean war the need for speed has probably been exaggerated. On the other hand, more subtle linkages to Presidential bargaining power in contexts of threat and negotiation may have been generally underestimated.

It is clear that American constitutional history supports a substantial role for the President in the initial commitment of the Armed Forces to combat abroad in defending against attacks on U.S. forces or territory and in situations short of war or sustained major hostilities. The real issue in allocating authority between Congress and the President in initial commitment decisions is not whether the President has a role but rather what the limits are on that role and how it might be adequately policed. In this respect several kinds of tests have been suggested. One would look to the purpose of the Presidential use of force. Along these lines a thoughtful recent note in the Harvard Law Review suggests that we might allow Presidential initiatives which are "neutral" with respect to foreign political entities." Other purposes commonly suggested as a basis for independent Presidential authority are protecting American nationals abroad and repelling attacks on U.S. territory or Armed Forces. A second kind of test would look to the actual or probable magnitude of hostilities. For example, I have suggested that congressional authorization should be required in all cases where regular combat units are committed to hostilities which are likely to become or do become sustained hostilities. This test is a rough effort to separate major hostilities from those not involving substantial casualties and commitment of resources. Prof. Quincy Wright rephrases this test as "the President should obtain congressional support in advance for military action which will probably require congressional action, as by appropriations, before it is completed." None of the tests suggested to date are wholly satisfactory and all are frayed at the edges. Nevertheless, my own feeling is that some version of the test based on probable or actual magnitude of hostilities is preferable to a purpose of the use test. A magnitude test seems more functionally responsive to the major policy decision of the Constitutional Convention to require congressional authorization before the Nation can be committed to major hostilities abroad. Moreover, constitutional history demonstrates too many diverse purposes for presidential commitment to minor hostilities to make a purposes test workable.

The judgment that Congress should oversee the Nation's involvement in major hostilities abroad remains as valid today as it was in 1789. Congressional support of that policy, however, should not destroy needed presidential flexibility.

II. The Authority of Congress To Limit Presidential Authority To Commit the Armed Forces to Military Hostilities

At a minimum, independent Presidential authority to commit the Armed Forces to hostilities includes authority to repel sudden attacks on the United States or its Armed Forces. Both constitutional experience and policy suggest that Presidential authority also extends to a range of activities short of war and to responses...
to situations of genuine emergency in which prior congressional authorization is not feasible. It is doubtful how far this independent authority may be constitutionally restricted by Congress. On the one hand, a number of factors point to broad congressional authority to limit independent Presidential authority. Thus, under the Articles of Confederation the Continental Congress seemed to take a broad view of its own authority and a narrow view of the authority of George Washington as Commander in Chief. Similarly, The Federalist Papers suggest that the framers were concerned to distinguish the war powers of the President from the broad inherent powers of the British monarch. Moreover, Congress has authority not only "to declare war" but "raise and support Armies [and a Navy]," "to make rules for the Government and regulation of the land and naval forces," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." 19 Several Supreme Court decisions also lend some support to this position. In a line of cases growing out of the undeclared naval war with France the Supreme Court seemed to subordinate Presidential directives on capture of ships to detailed congressional regulations authorizing the modalities of capture. 20 In the famous "Steel Seizure" case the Court held that President Truman could not validly direct the Secretary of Commerce to take possession of the steel mills to avert a strike during the Korean war in the face of congressional legislation precluding such action. 21 In a concurring opinion Mr. Justice Jackson pointed out that Presidential authority is highest when the President acts with congressional authorization and is at its lowest ebb when the President acts in opposition to Congress. 22

On the other hand, there are a number of at least equally strong reasons for suggesting that congressional restrictions on the independent authority of the President would be unconstitutional. First, the general historical argument for broad congressional authority proves too much in terms of history and in terms of principles of constitutional interpretation. The historical evidence is fragmentary at best that there was any thought given to the specific issue of congressional authority to limit independent Presidential authority. Yet it was clear that the Constitutional Convention at least intended the President to have the independent authority to repel sudden attacks and to conduct the course of hostilities. Furthermore, reliance on the experience under the Articles of Confederation seems a frail reed for interpreting a Constitution promulgated in large measure as a result of dissatisfaction with the experience under the Articles. Perhaps more to the point, historical evidence as to the intent of the framers, however realistic an approximation, is only one source for interpreting a living document such as the Constitution. As Mr. Justice Frankfurter pointed out in a concurring opinion in the Steel Seizure case: "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them." 23 Nowhere is this statement or that of Mr. Justice Holmes that "the life of the law has not been logic; it has been experience" 24 been more apt than in the interpretation of the war power. In the more than 180 years following the adoption of the Constitution there have been numerous instances of Executive action committing the Armed Forces to hostilities abroad yet there are few instances in which Congress has sought to place restraints on Executive action. One such restraint was enacted by Congress as a proviso to the Selective Training and Service Act of 1940.

It provided:

"Persons inducted into the land forces of the United States under this act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands." 25

The proviso, however, was partial in that it did not apply to volunteer personnel of naval forces and was in any event repealed almost at once following the outbreak of World War II. A more recent example is the proviso in the Defense Appropriation Act of 1969, which provides that none of the funds appropriated

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19 See generally A Brief on S. 781, To Make Rules Respecting Military Hostilities in the Absence of a Declaration of War, Con. Rec. 82d Cong. 1st Sess. 2977 (daily ed. March 6, 1951).
21 See generally A Brief on S. 781, To Make Rules Respecting Military Hostilities in the Absence of a Declaration of War, Con. Rec. 82d Cong. 1st Sess. 2977 (daily ed. March 6, 1951).
25 Id. at 592, 610.
26 See I MARK DEW HOWE, JUSTICE OLIVER WENDELL HOLMES, 26 (1957).
27 Act of September 16, 1940 (54 Stat. 825, 886).
by the act "shall be used to finance the introduction of American ground combat troops into Laos or Thailand." In comparison with the active history of Presidential initiatives in the use of the Armed Forces abroad the lack of congressional restrictions suggests a cautious estimate of congressional authority to limit independent Presidential authority. Perhaps because of this lack of historical precedent for broad congressional authority, at least two American Presidents have urged that such restrictions might be unconstitutional. President Taft said:

"The President is made Commander in Chief of the Army and Navy by the Constitution, evidently for the purpose of enabling him to defend the country against invasion, to suppress insurrection, and to take care that the laws be faithfully executed. If Congress were to attempt to prevent his use of the Army for any of these purposes, the action would be void."11

And President Fillmore said that:

** *** no legislation could add to or diminish the power ** *** [of the President to use the regular Armed Forces] but by increasing or diminishing or abolishing altogether the Army and Navy.** 14

With respect to the principle of the Steel Seizure case that the President's authority is at its lowest ebb when he acts in opposition to congressional action, it does not follow that in all such situations the congressional action will prevail. In this respect the Steel Seizure case is hardly on point when the issue is the authority of the President to use the Armed Forces abroad, since the case involved a domestic aspect of the Presidential war power and at that a domestic aspect which was far from clear even in the absence of limiting congressional legislation. In many ways a case which is more on point in Myers v. United States18 in which the Supreme Court struck down an act of Congress which sought to require the concurrence of the Senate in Presidential decisions to dismiss certain postmasters. The Court held that the President's removal power over executive agencies was an exclusive power even though the Constitution provides for the concurrence of the Senate on the initial appointment and even though the experience under the Articles of Confederation had been to allow congressional exercise of the removal power. Another Supreme Court case suggesting limitations on congressional authority to limit the independent authority of the President is Ex Parte Milligan.21 In that case Chief Justice Chase pointed out that congressional authority did not extend to interference with Presidential command decisions. According to the Chief Justice, congressional authority "necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander in Chief."22

Although this statement in Ex Parte Milligan deals specifically with the core areas of command decisions in the conduct of hostilities which is one of the strongest areas for exclusive presidential authority, the principle that there are some areas of exclusive presidential power in the use of the Armed Forces abroad is clear. In fact, this principle enumerated in Ex Parte Milligan seems more applicable than the line of cases growing out of the undeclared naval war of France which are suggested to be indicative of broad congressional authority.23 Although Little v. Barreme,24 the principle case in this series, applied a congressional act limiting lawful naval captures during the war rather than a presidential interpretation of that act, the issue in the case was a narrow one of civil liability for damages for capture and detention rather than the validity of a broad restriction on independent presidential authority. Moreover, these cases involved an issue
squares within a specific grant of authority to Congress. That is, the power "to make Rules concerning Captures on Land and Water." Under the circumstances it hardly seems surprising or relevant that a congressional act concerning rules for captures was preferred by the Court to a presidential interpretation of that act.

If the arguments for and against a broad congressional authority to limit the independent presidential authority to commit the Armed Forces to hostilities abroad are inconclusive, at least one astute constitutional observer, Prof. Quincy Wright has unambiguously urged that:

"[I]f he considers such action essential for the enforcement of acts of Congress and treaties and for the protection of the citizens and territory of the United States, the President is obliged by the Constitution itself to use his power as commander in chief to direct the forces abroad, and this duty resting on the Constitution itself cannot be taken away by act of Congress." 28

On balance, Congress would seem to have the authority to limit Presidential use of the Armed Forces abroad in areas which fall within exclusive congressional authority. Using my earlier test, I believe that Congress would have the authority to prohibit, or place restrictions on Presidential commitment of regular combat units to sustained hostilities abroad. In areas which do not fall within exclusive congressional authority, however, it is unclear whether Congress could limit Presidential authority. The same policies which suggest some independent Presidential authority also suggest that except in extreme cases of Presidential abuse Congress should not be able to limit such authority.

III. An Analysis of Current Proposals for Strengthening the Congressional Role in the Use of the Armed Forces Abroad

The proposals for strengthening the congressional role in the use of the Armed Forces abroad which are before the committee, S. 731, introduced by Senator Javits, Senate Joint Resolution 59, introduced by Senator Eagleton, and Senate Joint Resolution 18, introduced by Senator Taft, differ in substance but are similar in that they all delineate in advance the independent authority of the President to

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28 Q. Wright, supra note 26, at 337 (emphasis added). On the same page Wright reiterates that:

"In the creation of the military and naval forces of the United States, however, is vested the sole power to declare war or authorize the employment of the military or naval forces of the United States," Wright says; (emphasis added) and adds: "The Constitution itself cannot be taken away by act of Congress." 28


Writing in 1929 Professor W. Willoughby of The Johns Hopkins University said:

"There has been no question as to the constitutional power of the President of the United States, in time of war, to send troops outside of the United States when the military exigencies of the war so require. This he can do Commander-in-Chief of the Army and Navy, and his discretion in this respect can probably not be controlled or limited by Congress."


"As Commander-in-Chief, the President can send United States forces outside the country in time of peace when this is deemed by him necessary or expedient in pursuance of an agreement.'


For example, in 1917 the President sent American forces to France for the purpose of supporting the Allies in their war against Germany. The President's action was justified by the fact that France was at war with Germany and that the President was Commander-in-Chief of the Army and Navy. This action was taken in pursuance of a treaty which had been negotiated by the President and the Senate. The treaty was ratified by the Senate, and the President was authorized by Congress to send American forces to France in support of the Allies.


As Commander-in-Chief of the armed forces, the President has full responsibility, which cannot be shared, for military decisions in a world in which the differences between safety and calamity can be a matter of hours or even minutes."
commit the Armed Forces to hostilities. The purpose of these initiatives is commendable in seeking to clarify the constitutional balance on a vital issue. But to the extent that they restrict Presidential authority beyond the area of exclusive congressional competence they are of doubtful constitutionality. To use S. 731 as an example, it limits independent Presidential authority to four categories. Even in those four categories Presidential authority is only recognized as initial and "shall not be sustained beyond 30 days from the date of their initiation except as provided in legislation enacted by the Congress to sustain such hostilities beyond 30 days." But the independent authority of the President is probably substantially broader than the four categories in the bill. Thus, Presidential authority would also seem to include certain low-level commitments such as regional peacekeeping, actions in defense of U.S. interests in free transit of international straits, humanitarian interventions such as the Stanleyville operation, defensive quarantines such as were involved in the Cuban missile crisis, and the commitment of military assistance advisory groups provided that such commitments stop short of the commitment of regular combat units to sustained hostilities. Though some of these situations might be brought within the language of the bill, most seem prohibited or at least doubtful in the absence of a prior declaration of war. In attempting to restrict the area of independent Presidential authority, then, this bill may be unconstitutional. Even if the bill is constitutional, it seems unwise to attempt a specific codification by statute.

Regardless of the resolution of the constitutional issues, a fundamental objection to proposals which seek to delimit independent Presidential authority is the difficulty and consequent danger in attempting to specify in advance a policy-responsive division of authority. As an illustration of this difficulty it may be useful to examine several initiatives historically within Executive competence which would be prohibited by these proposals in the absence of prior congressional authorization. By way of illustration I will refer to the specifics of the carefully drafted S. 731, but each of the parallel proposals could be similarly analyzed. In the absence of a prior declaration of war S. 731 would prohibit, among others, the following kinds of Presidential initiatives: Humanitarian intervention similar to the joint United States-Belgian operation in the Congo if the intervention were not for the protection of U.S. nationals, an attack on U.S. naval vessels in transit in international straits or engaged in innocent passage in the territorial sea, a threat of imminent attack against the United States or U.S. forces similar to that facing Israel prior to the 6-day war, collective defense against a sudden armed attack on a nation to which we have no "national commitment" under this standard President Truman would have required a prior declaration of war before engaging North Korean forces in the Korean war as it was not until 1954 that the mutual defense treaty with Korea entered into force. Since we have no specific defense treaty with Israel, or for that matter with Egypt, a parallel problem is not impossible under present conditions in the Middle East, low level or intermittent counterintervention, for example a hypothetical airstrike made at the request of the Jordanian Government against Syrian tank columns intervening in the recent civil war, military hostilities arising from efforts to prevent foreign warships from engaging in espionage activities within U.S. territorial waters, the naval quarantine of Cuba against the emplacement of Soviet IRBM's if "military hostilities" were necessary to maintain the quarantine (in this case apparently the only lawful route for the Cuban quarantine of 1962 which the President could rely on would have been a prior declaration of war against the Soviet Union or Cuba). In addition to these areas which seem fairly clearly to require a prior declaration of war under the bill, a large number of other important areas are ambiguous. For example, as written the Bill might require a prior declaration of war in order for the United States to participate in a United Nations or OAS peacekeeping operation, to participate in a Big Four peacekeeping operation in the Middle East, to proceed in hot pursuit of attacking forces, and to provide military assistance advisory teams in insurgency settings. My own feeling is that it would be unwise in the extreme to deprive the President of needed flexibility in the many situations such as these which are clearly or ambiguously prohibited by the bill. Even if it is possible to seek prior congressional action in some of these cases, the bill does

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not make adequate provision for fast action in situations in which Congress is not in session (for example during an election year). Moreover, in requiring a formal declaration of war as the only means of authorization for categories other than the four listed, the bill rejects the constitutional practice which properly treats any specific form of congressional authorization as sufficient, a practice which was specifically adopted by the committee during the "National Commitments" hearings. It also seems inconsistent with the United Nations Participation Act of 1945 which provides that "[the President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said charter and pursuant to such special agreement or agreements an art. 43 agreement] the Armed Forces, facilities, or assistance provided for therein."

Though no article 43 agreement has yet been concluded, the recent Bremer report of the United Nations Association recommends a renewed effort to negotiate such an agreement. In light of the critical need to strengthen the capability of the United Nations it seems wise to discard the United Nations Participation Act even if it has not yet been implemented.

S. 751 may also be overly restrictive with respect to the operation of the 30-day limitation and the applicability of the procedures for expedited consideration. Inexplicably, the commendable procedure for expedited consideration is only available with respect to continuation of hostilities within the four categories of initial Presidential authority. Other situations would not even benefit from these expedited procedures, yet the President would be prohibited from acting even on an emergency basis until he first secured a congressional declaration of war. Even in the areas in which the expedited procedure is applicable, Congress may still be unable to affirmatively act within 30 days, possibly because of disagreement about the modalities of action or restrictions on the action rather than because of any disagreement about whether the action should be taken. The bill would also remove any flexibility now possessed by Congress in exercising discretion about the advisability of a full congressional debate at the time of the action.

These examples suggest the difficulty if not impossibility of satisfactorily delimiting Executive authority in advance (and particularly of satisfactorily delimiting it in advance by a purpose of the action test). Efforts to delimit in advance despite these difficulties are likely to lead to a rigidity which would destroy presidential independence needed for the management of crisis situations. Perhaps for these reasons the witnesses testifying before the House Subcommittee on National Security Affairs last summer on similar proposals then pending before the House, largely agreed on the danger of approaches which sought to delimit Presidential authority in advance even though they disagreed on the constitutional implications of such measures.

Finally, though the congressional interest in improving constitutional processes in the use of the Armed Forces abroad should be encouraged, efforts aimed principally at restricting Presidential authority in advance may prove too much. Congress already has constitutional authority to terminate major hostilities, at least where such hostilities require initial congressional approval. As such, any gain from restricting Presidential authority or from an automatic 30-day authorization deadline hardly seems worth the price. Conversely, as a result of his power as the principal representative of the Nation in foreign affairs, the President may frequently be in a position to precipitate or avoid war by the diplomatic posture...
which he selects. Prior to the Japanese attack on Pearl Harbor, it was the President who played the predominant role in war-peace decisions. After the attack, the congressional declaration of war was little more than a formality. And in the European theater, President Roosevelt's decision to convey allied shipping made it more likely that American Armed Forces would be attacked. Similarly, President Truman's decision to deploy seven divisions in Germany or the recent effort prior to the six-day war to join with other maritime nations to send shipping through the Strait of Tiran, might have precipitated an escalating series of events making congressional action inevitable. The issues in the use of the Armed Forces abroad involve a process of decision rather than a single commitment decision. Control of this process requires congressional involvement in decisions both prior and subsequent to initial commitment of the Armed Forces to combat. A vigorous congressional involvement in each of these areas would probably be more effective than reliance on mechanical tests for delimiting Presidential authority.

IV. Recommendations for Strengthening the Congressional Role in the Use of the Armed Forces Abroad

Strengthening the congressional role in the use of the Armed Forces abroad is largely a problem in achieving balance throughout a range of decisions from the decision to make a national commitment to the decision to terminate hostilities. Decisions on any one issue may be predominately executive or predominantly congressional, but the overall effect must be to reinforce the functional strengths of each branch and the essential partnership between both branches. The starting point in this process is the decision to make a national commitment. Congress should play a major role in considering national commitments which may subsequently lead the Nation into major hostilities. The setting of national priorities and goals is certainly a paradigm function of the more broadly based Congress.

With respect to decisions to commit the Armed Forces to military hostilities, the President should seek meaningful congressional authorization prior to the commitment of the Armed Forces to sustained military hostilities. In conflicts like the Korean war, in which there may be a genuine need for speed, the President would be required to submit his action to congressional scrutiny at the earliest opportunity. And in conflicts which gradually escalate, the dividing line for requiring congressional authorization might be the initial commitment to combat of regular U.S. combat units as such. The President also should seek congressional involvement whenever feasible in other circumstances and should not rely on exaggerated claims of speed or secrecy. In any sustained hostilities the President is dependent on congressional cooperation, and to fail to obtain congressional involvement when such involvement is feasible is to needlessly weaken the Presidential action as well as to weaken the constitutional structure. For its part, when considering initial commitment decisions, Congress should consider carefully the scope of its authorization and the probable implications of its action. In retrospect, although the Tonkin Gulf resolution was a valid congressional authorization for increased U.S. involvement in the Indochina war, the unnecessary sense of urgency surrounding its passage and the ambiguity of the congressional debates suggest that both Congress and the President share responsibility for a sloppily exercised congressional authority. In this respect the standards developed for such authorization during the course of the national commitments hearings are a useful starting point.

It seems probable that in a post-Vietnam world, Congress will be particularly sensitive to the need for care in authorizing sustained hostilities. Even so it might be helpful in confirming the congressional role in the commitment of the Armed Forces to military hostilities if Congress would require a report from the President whenever there is a substantial shift in the deployment of troops abroad or a commitment of the Armed Forces to military hostilities. The reporting idea in the proposals before the committee and in House Joint Resolution 1, which is the parallel legislation in the House, is sound and might be adopted by Congress as a useful step. Such a requirement also has the advantage of avoiding the constitutional and practical dangers in efforts to delimit Presidential authority in advance while operating to trigger congressional action where needed and to hasten an

Footnotes:
37 For a discussion of the legal effect of the Tonkin Gulf Resolution see Moore, The National Executive and the Use of the Armed Forces Abroad, supra note 1, at 36-37 & nn. 19. And with respect to the constitutional issues in the Cambodia Incursion see Moore, Legal Dimensions of the Decision To Intercede in Cambodia, 65 Am. J. Int'l L. 38, 63-72 (1971).
orderly common law growth in the division of authority between Congress and the President. It might also be useful in encouraging greater Executive cooperation with Congress if Congress were to adopt expedited procedures for the authorization of certain kinds of non-major hostilities. Senator Douglas suggested such procedures at the time of the constitutional debate during the Korean war and if such procedures were carefully safeguarded to assure meaningful congressional authorization they might encourage greater cooperation between Congress and the Executive. Finally, in the exercise of its concurrent authority to terminate major hostilities, Congress should play a continuing role in reexamining major policy. To facilitate this role it might be helpful to create a mechanism for continuing cooperation between Congress and the President during the course of major hostilities. For example, it might be useful to encourage periodic meetings between the President and congressional leaders during the continuance of sustained hostilities. Similarly, it might be useful for Congress to create new machinery to facilitate such continuing communication with the Executive. One possibility would be a joint congressional body composed of appropriate representatives from the Foreign Affairs, Appropriations, and Armed Services Committees of both Houses. Whatever the mechanism, there is a major need to improve the communication between Congress and the Executive concerning the exercise of the war powers. I would also urge the importance of congressional oversight continuing to proceed on a nonpartisan basis.

In considering proposals for strengthening the congressional role in the use of the Armed Forces abroad Congress should not let the present dissatisfaction with the Indo-China war lead to a proposal which may alter the proper balance between Congress and the Executive. The Indo-China war will come to an end, but the need for balance between the Executive and Congress will continue. In August 1937 the Young Democrats of America voted unanimously at their national convention to endorse the Ludlow amendment requiring a national referendum before declaration of a foreign war. Five years later as the Nation fought World War II the proposal seemed strangely dated. History teaches that we tend to respond to past problems rather than anticipate future dangers. In the long run a commitment to a balance between congressional and Presidential authority seems the best safeguard to avoid this trap.

38 See Douglas, supra note 7, at 4649. "I submit, moreover, that we of the Congress could make it easier for the President to consult us in the event of such a national emergency, and to share any attendant responsibility, by so revising our rules that congressional action in such matters can be speeded up. The House, for example, might waive for the range of subjects the formal engrossing of a bill and the Senate could for such issues permit the vote on cloture to come more quickly after the submission of the petition."

39 See 86 CONG. REC. 2055 (1939).
STATEMENT BY CHARLES A. WEIL, OF NEW YORK, N.Y.

Thanks for your kind invitation to supplement my testimony of last July 9 opposing presidential war power legislation, that would fetter the Executive, the only branch qualified and staffed to implement a strategy of power balance requiring forward deployment and, if necessary, preventive war.

This invitation is particularly appreciated evidencing Mr. Zablocki's objectivity though sponsor of House Joint Resolution 1, the least exceptionable of the pending bills. For House Joint Resolution 1 calls for the leveling with the people and Congress my testimony recommended ad hoc; under the special circumstances of the Indo-China war, if the suppressed justification I sought to lay before the Fulbright and Symington committees was the undisputed beachhead doctrine, particularly since the Sino-Soviet were aware of it. (Prior testimony, point III at pp. 250, 251-254, pp. 258, 262-263.) However, such special circumstances may not always obtain, as for example, those testified to by Ambassador Sullivan, pages 399, before the Subcommittee on U.S. Security Agreements Abroad of the Committee of Foreign Relations, U.S. Senate part 2, relative Laos.

There is one point only to add to the objections I was privileged to raise to the then pending war powers bills (hearings, pp. 248-251 and 256 of the printed record) submitted hereunder:

That is the capability; under present rules of procedure, not expressly provided for in the Constitution; of concealment by a Foreign Relations Committee chairman; a position likewise not expressly provided for in the Constitution; from other members of his committee, the two Houses of Congress, and the public; of the real political and military objectives of combat, as in Indochina, where in the informed discretion of the President, for reasons of State, such reasons and objectives could not be enunciated by the last five Presidents.

To leave such absolute discretion in the hands of one mortal; perhaps unqualified, subject to human infirmities, and/or not necessarily privy to top secret intelligence and professional advice available to the executive branch; is something never contemplated by the framers of the Constitution, who also could not have foreseen the United States becoming the global arbiter or power balancer. What is worse, it involves a gamble on the security of 200 million Americans and of the billions in other countries dependent on the power of this country; that no man in his senses could contemplate today.

FIAT FULBRIGHTS PEREAT U.S.A.?

Since 1967 I have been in protracted correspondence with Senator Fulbright seeking to lay before his committee one such geostrategic objective or explanation fully disclosed, without avail to him. I have read thousands of pages of Senate Foreign Relations Committee hearings, that have received wide coverage in the media and from which hearings it appears Senator Fulbright has asked only witnesses he knew, or should have known, did not know the answer, or were not authorized to answer frankly, fully, his queries relative the only relevant, material questions; as to the overall objectives and national security geostrategic justification for fighting in Indochina (e.g. CORDS hearings pp. 13-16).

Finally, in November, 1969, Mr. Fulbright wrote me to submit a memorandum on the subject for his committee, which I did at once. He discretely ignored the plea therein to be cross-examined on it. There is no evidence any other member of the committee or Senate saw it until it went to the printing office many months later. I charged Senator Fulbright with concealment and on May 26, 1971, offered to apologize if one member of the committee would write he had seen it prior to closure of the hearings. At date of writing no such communication has been received. (CF. CORDS hearings p. 746.)

For that memorandum gave an answer, he has, I believe, never really wanted answered, to use his own words, "to help inform the American public opinion" (CORDS hearings p. 1). All of which is entirely apart from his own qualifications to be the discretionary security guardian of 200 million Americans in light of his allegation geopolitics is "hocus pocus" (speech to the Senate August 24, 1970).
Seven of the 15 members of the Senate Foreign Relations Committee were
elected from States which cast only 2,311,000 votes compared to the 73,198,000
who voted in the Presidential election. Borah was elected from Idaho (291,188
total votes in 1968). Nor is the possible perversion of congressional hearings into
ex parte proceedings or kangaroo courts the only, though principal, objection to
the pending legislation.

The Vice President set them forth; that is: the distortion and private censorship
of crucial facts and considerations by the academic-media-complex; including
what he overlooked, the pollsters and book publishers, mentioned in my prior
testimony, point 11 (pp. 248-51 and p. 258) of the printed hearings and more
fully covered in my book, "Curtains Over Vietnam" (pp. 11-17 on the "Copper-
head Curtain" and pp. 65-70 on "The Educational Gap").

The conjecture of such misconduct in committee and a subverted media make
the proposed limitations on the President's powers at best a piece of personal
power greediness, at worst a recipe for suicide of a Nation whose security, pros-
perity and standard of living rest on being the global power balancer.
STATEMENT BY PROF. THEODORE J. LOWI, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF CHICAGO

The following statement is drawn from my book “The Politics of Disorder” (Basic Books, June 1971). It is an elaboration of remarks made to this committee in July, 1970, and, as before, it refuses to address itself directly to the various resolutions under consideration by Congress regarding a statutory ending of the Vietnam war.

I consider these resolutions a dangerous precedent, but not because of their specific provisions or because of their assertion of congressional power in international affairs. They are bad precedents because they arise out of a specific crisis and are too closely designed for those particular problems. They represent no long range solution, even if they hastened the end of the present war.

My concern in this statement is, therefore, for the next war. It is concerned with making adjustments in the separation of powers consonant with the third quarter and the fourth quarter of this century. It is concerned with making an adjustment to the discovery that “World Leadership” is an empty phrase.

On the positive side, my concern is for how to make democracy safe for the world, how to make democracy a rational and restraining force in world affairs rather than the goading and volatile force it has so often been. This necessarily means putting Congress into the center of the action. But how? This is what I try to demonstrate in the following essay, a statement for Congress, but one that is calculated to praise, not to please.

PRESIDENT AND CONGRESS: WAR AND CIVIL LIBERTIES

(By Theodore Lowi)


The credibility gap is a new name for an old affliction. It is an affliction of the process of communication between a people and its Government. And it is an affliction to which foreign policy in a democracy is particularly susceptible. During the Vietnam war the affliction has achieved epidemic proportions. For many thousands of Americans, opposition to the war is based more on what was said than on what was done.

There may be no way for mass democracies to avoid this sort of affliction. Secret diplomacy is extremely unstable and problematic, and there is still yearning for “open agreements openly arrived at.” Machiaveli to the contrary notwithstanding, lying is the greatest risk of all. Appearances may be deceiving at first; but in a free country the lies of the past have a way of being round out and creating the credibility gaps of the future. By spreading suspicion, small lies, once discovered, have a horrible tendency to corrupt larger truths. On the other hand, overcommunication can be risky as lying. One of the characteristic features of American foreign policy conduct since World War II has been overkill not overkill. It is a variant of Potter’s gamesmanship; how to deceive without actually lying. President Truman did not lie when he promoted the United Nations and Marshall plan. He oversold the threat of communism and World War III, and he oversold United Nations membership and the Marshall plan as remedies. President Johnson oversold the threat of North Vietnam (and China) to our world interests; he then oversold each successive expansion of our military involvement.

Congress reacts angrily to credibility gaps, especially to the widening of the gap through oversell. The 1970 controversy over Presidential and congressional war powers is far from unprecedented. Almost exactly 20 years earlier Congress put its prerogatives on the line with almost exactly the same kind of assertions. Much of the debate then focused on the Wherry resolution, which declared that no troops would be stationed in Europe under NATO “pending the adoption of a policy with respect thereto by the Congress.”

This kind of controversy is extremely important. It raises fundamental questions that need raising at least once every decade. But more important it raises
questions that may ultimately narrow the credibility gap. We will never get off dead center, we may never close the ceaseless inflationary gap of war in Southeast Asia, unless we eliminate the general distrust that renders every specific step suspect. Because of the widespread distrust in public authority and public officials, America has become a paranoid society. The most sincere, effective steps toward disengagement in Southeast Asia can never be taken so long as thousands of people suspect that such steps are meaningless or mean something different from the official justifications provided for them. Restoring an effective balance between formal powers is one of the most effective means of restoring trust in public authority. And effective means counterpoise; it means confrontation in setting the general contours and standards of foreign policy—in determining real and lasting national interests rather than imagined affronts to international credibility.

Once general trust in public authority is restored, there can be a restoration of the clear constitutional power of the President to run the foreign ministry of the country. But until this is done within well-established constitutional roles and processes, it is unlikely that it will be done very well or at all. There is a derangement of powers at present, and no amount of assertion of presidential rights and prerogatives will right earlier wrongs, however well-founded those assertions may be. History cannot be rewritten, and the past that created distrust cannot be changed. The credibility gap can be reduced, and trust can be restored, only insofar as the people are satisfied that proper constitutional roles and formalities are being carried out, because ultimately these formal means are about the only dependable means of keeping the lying and the overselling to a minimum.

This means a substantial increase in congressional participation in foreign affairs. This increase is desirable for all the previously stated reasons, and it was desirable even before a pro-Congress position served the goal of deescalation in Vietnam. Congress' role must be defined with extreme care. It cannot be done in such a way as to merely serve immediate interests in bringing the Vietnam crisis to an end. It must, in fact, begin with the full recognition that the Presidency is our repository of war and diplomatic powers and that no one or bundle of acts and resolutions is going to alter that fact. Nonetheless, there is an important role for Congress, and the reduction of the credibility gap and the moving of American foreign policy off dead center is very likely to depend on the proper identification of that role.

A step in this direction would begin by reviewing three interrelated developments that account in large part for the decline of congressional relative to executive power in foreign affairs. From this analysis will also emerge realistic steps toward restoration of Congress in the scheme of separation of powers. (1) Congress has delegated—virtually alienated—much of its power in foreign and domestic matters. (2) Congress has, by inaction, failed to check a serious and completely unnecessary drainage of its powers and functions. (3) And most important, Congress has failed to seize opportunities for the exercise of powers that are, as a consequence, hardly being performed at all by any agency of Government.

Delegation

Ever since the rise of big government, Congress has made a practice of alienating its power. Legally, this is called the delegation of power, and it amounts in practice to the enactment of "enabling legislation," which provides almost no guidance for the administrator. But Congress has not only given away its powers; it has done so in the worst possible manner. Rather than attempting to maintain its constitutional role by accompanying the delegations with clear standards and guidelines, Congress has sought instead to create new agencies and maintain old agencies with intimate relationships to congressional committees and independent of the President.

In foreign affairs, the congressional practice of maintaining autonomous agencies produced a veritable cascade of action following World War II. Unification never reduced the autonomy of the separate military services, and even went so far as to create a new major service. The original arrangement for the Secretary of Defense did not even include an Office of the Secretary. Congress sought to keep the civilian Secretaries as weak as possible.

Congress gave us a completely autonomous foreign aid program. The debate, the statute itself, and all of the organic documents implementing the Marshall plan made its independence of the State Department unmistakably clear. The same is true, only more so, of the Atomic Energy Commission. Here the intention of congressional intimacy was made still more explicit by the creation of the Joint Committee on Atomic Energy. This relationship continues to this day.
There are still other examples of this kind of subpresidential delegation. But they all add up to the same pattern. Congressional action has, in a sense, put foreign policy and war making powers in a no-man's-land, a Jacob's ladder cut off at the bottom and at the top. While retaining the power to deal on a piecemeal basis with individual agency activity, Congress has, at the same time, prevented the development of a unified and systematic foreign affairs capacity.

Little wonder that there should be a "military-industrial complex." But there is also an atom complex, an international trade complex, an agricultural complex, and so on. These complexes are simply highly stabilized, triangular relationships among a congressional committee, one or more sub-presidential agencies, and some private interests of one sort or another. The real world is defined from within these complexes, and it becomes extremely difficult to impose a different definition of reality that would tend to break down the internal values within each complex and replace them with values over which none of the complexes have any control.

Once the pattern is defined this way, it is obvious that Congress must eliminate it in order to take on the kind of power it now seeks. But it is extremely important to recognize that if Congress expands its power by eliminating these complexes, the expansion will not come at the expense of presidential power in foreign affairs. Congressional delegation of power to agencies has not commensurately expanded the Presidency; in fact it has imposed new responsibilities on the office, for which there are never sufficient resources or authority. Thus, if Congress ever really seriously sought to regain a role in foreign affairs, the power of the President would very likely go up, not down. The losers would be the lower level agencies, particularly in the Defense Department. Congressional determination of the criteria that govern the pursuit of national interest would strengthen the hand of the President vis-à-vis his own generals and bureau chiefs while impressing other countries with the determination of the United States to face them and to utilize its resources.

Drainage

Congressional inaction, of course, is not unrelated to delegation. But sins of omission imply inchoate powers, which could reemerge simply in the using. The most dramatic and concrete example of the derangement between the two branches resulting from inaction is the rise of the executive agreement. By now, the executive agreement surely enjoys constitutional status. But acceptance of it came during the 1930's, when Congress was giving away everything and the courts were justifying it. And, the Supreme Court in granting the President the right to make such agreements did not suggest that Congress was obliged to accept them.

A thorough examination of the political and legal implications of the executive agreement has never really taken place. The Bricker amendment controversy of the early 1950's raised the question, but the social motives of the Bricker proponents tended to discredit bonafide efforts to evaluate the executive agreement properly. The Bricker people were worried about the fact that executive agreements have the statutory status of treaties, and treaties can be a source of Federal domestic power in addition to the express powers of article I of the Constitution. If, for instance, the United States had become party to an international agreement affecting civil rights, the internal obligations of the agreement would have enabled the Federal Government—so it was feared—to legislate on matters for which Congress would otherwise have no constitutional power. The opponents of executive agreements were concerned about States rights, whether their invasion came from a treaty or an executive agreement; they were less concerned about congressional prerogatives and the drainage of congressional power in foreign affairs. Yet, the executive agreement combines the worst features of all the means of conducting diplomacy. It combines the formal and advanced commitment of a treaty with the ambiguous and uncertain status of a diplomatic note.

But the executive agreement is only one manifestation of congressional evasion of its responsibilities to evaluate and guide America's national interest. The role of Congress, especially the House, has indeed expanded through the increased international financial involvement of the United States. However, the appropriations process was never good for anything but the consideration of incremental issues, and a preoccupation with such issues has only succeeded in further blinding Members of Congress to the real issues.

This "appropriations approach," coupled with the above-mentioned preference for agency autonomy, the passive acceptance of executive agreements, and probably a sense of being browbeaten by the executive wrapped in the flag, has prevented any serious parliamentary reexamination of America's posture in the world during the last revolutionary decade or two. As a result, some mighty old doctrines and concepts continue to guide our specific actions, not because we
necessarily believe in them, but because they are all we have. For example, we continue to operate in the world, particularly in Southeast Asia, as though communism were a single, monolithic worldwide conspiracy. Within that context we still tend to view every outbreak of violence and every "coup d'etat" in the world as interrelated and cumulative and to assess every outcome in terms of whether it is "a loss to the free world." A major argument for our being in Vietnam on an expanded basis, for example, has been not only the so-called domino theory, but also the assumption that the Vietcong are puppets of the North Vietnamese, that the North Vietnamese are puppets of the Chinese, and that the Chinese and the Russians are running the show together, so that if we can just win there "we've got 'em licked all over the world."

One cannot fail but be appalled by the overwhelming power of unexamined premises. It is these premises more than any economic interest, or any contractual or treaty commitments (or even the prior presence of American troops), that push us on into the Asian Continent. And we hold onto these premises despite the fact that the notion of communism as monolithic was weakened in Yugoslavia, emaciated in Hungary, and annihilated in China, not to mention its drawing and quartering in Africa and the third world, in Czechoslovakia, and Lord knows where else. Although the breach between China and Russia is more profound than any breach we have ever had with our historic allies, at least since the War of 1812, the Congress has never on a full-scale basis examined the possibility that there are many communisms, that nationalism is now a stronger force than communism. In the absence of a full and open reevaluation, even the most sophisticated Members of Congress, the executive branch, and the press frequently refer indiscriminately to any adversaries in Southeast Asia as the "Communists." Body counts refer simply to "2,000 Communists." A prisoner is a "Communist prisoner," whether he is Lao, Chinese, or Vietnamese. Do all those yellow men really look alike, or is it our racism? I think it is neither. I think it is the blindness imposed by ancient criteria, learned by rote, as to the character of the enemy and the threat against vital national interests.

This is the result of the inaction that has drained so much power away from Congress. Congress cannot have the power to direct a war. But it can define what war is, what the terms of victory are, and, most important, what the stakes shall be. Instead, Congress has allowed the executive, and especially the military, to define the guiding concepts and define the terms of victory. That way we can never win. Winning is a matter of definition. If in order to justify our presence we magnify at each step the stakes and the terms of the conflict, victory becomes unattainable at each step. When we place each conflict in the general context of world Communist conspiracy and then depend on executive agencies, particularly the military, to find ad hoc justifications for particular actions, no limit is set on the character of our burdens. In fact there is an inverse relationship between the scope of the conflict and the scope of the justification: The weaker the adversary the greater the need for justification.

There is no reason in the world why laymen, especially when assembled in Congress, cannot set the parameters of international conflict. War is a specialty, and when the laymen replaces the specialist, he has a fool for a client. But the conditions of victory and the character of the world environment are not the exclusive domain of the specialist. In fact the specialist may be the least qualified for these kinds of judgments.

This is particularly true when we are speaking of the specialists in war and violence. De Toqueville expressed grave concern about this particular problem in 1830. In aristocracies, he observed, there is a natural and accepted ranking in society, of which the military career is merely a reflection. There is little pressure or competition among officers of noble rank, for the social distinction between captain and major is not so very great. But in democratic armies the pressure of competition for a limited number of upper ranks is extreme, for these ranks are the only source of available status. Thus, he concludes, the urge to put a military definition on ambiguous, diplomatic relationships is far more common in democratic countries. His essay, "Why Democratic Nations Are Naturally Desirous of Peace, and the Democratic Armies of War," is an ungenerous and anachronistic statement of the case. However, what citizen today is willing to stake his life on the ability of the military specialist to set properly the very conditions within which he himself is to operate?

Power unseized and unexercised

If Congress represents a nation desirous of peace, Congress is not bound to oppose all war. But Congress is responsible for establishing political guidelines of military action, and in the past 20 or 30 years the reverse has more often been the
case. Under conditions of crisis, Congress often seeks to do what it cannot do because it will not do what it must. Congress cannot direct this war or any other war. What it can do, and what it has not done, is to set guidelines for direction and limits on the extent of America’s commitment.

Congress war powers, like the President’s, are lodged in the Constitution. As Corwin observed, “* * * the Constitution, considered only for its affirmative grants of power capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy. And in addition to constitutional powers, there is also ample political support for successful congressional participation.

Congress has the constitutional power, which it has not sought to use, to define the objectives and limits of war. If it has the power to declare war, it also has the power to set the terms of war and the character of victory. In the 20th century, especially since America’s emergence as a world power, declared war has come to mean total war, involving a total commitment of population and industrial capacities and, if necessary, the total annihilation of the enemy. But war, including declared war, is a continuum. To treat it otherwise in our age is to combine medieval religious outlooks with modern technology.

Yet, it is Congress that has tended to be the more militaristic and uncompromising, whereas the executive has tended to recognize that war is a continuum. Once American troops are involved in violence abroad, Congress tends to assume responsibility for the war. In any case, if a declaration of war does not mean total war, then the congressional declaration could include a number of “wheresoever” and “now therefore.” A state of war is not a state of being but a state of commitment to a certain amount of violence, the degree and character of which are well within the grasp of a body of laymen in Congress assembled.

Some are concerned that the declaration of war is a poor technique for anything short of the actual intent to engage in total war because a declaration of war automatically reduces domestic civil liberties. There is ample basis for such a concern, but it is only as true as we allow it, through inaction, to be. In fact, the very involvement of domestic civil liberties gives Congress’ war powers its potentially strong political base as well as an additional source of constitutional power. Let this be put as bluntly as possible: Most of Congress’ effective war powers derive from domestic powers.

If total war means total involvement of resources and population, then limited war means limited involvement of resources and population. Congress has the power to limit or expand war and other international involvements by setting limits on the amount of domestic involvement. Such limits are directly effective to the extent that they put resources in the hands of the President and the military. Such actions are also effective in symbolizing to the executive and to the world the degree to which the country intends to be involved.

Two brief examples: In the area of conscription, Congress has turned over virtually total powers to the executive. Manpower requirements and the conditions of recruitment, which should be jealously guarded by a great democratic assembly, are considered means by which Congress serves the military. A second sorry example is the general field of civil liberties, of which conscription is a part, where Congress could guard effectively against the more insidious problems of declared war. True, during our two most important involvements in undeclared but real wars—Korea and Vietnam—the right to dissent was in large part maintained. But this was owing far more to solid American traditions and the Supreme Court than to any efforts by the popularly elected branches. On the contrary, what President Truman started in his loyalty program became a route through which Congress virtually tried to define the Korean conflict as an undeclared but total involvement. The House Committee on Un-American Activities is but one of those very important instruments by which Congress has tried internally to
treat limited war as though it were total war by defining internal dissent as internationally relevant. During the Vietnam war, Congress went still further by cynically adding to the civil rights law a totally unconstitutional amendment to make it a crime to organize for dissent. This is the first Federal sedition law since the John Adams administration.

And yet it is in civil liberties that Congress will find political base sufficient "to struggle for the privilege of directing American foreign policy." As De Tocqueville pointed out, and as 20 years of public opinion polls confirm, there are two systems of opinion in the United States, perhaps in any democracy. One system of opinion is nationalistic. It is based on consensus, and, as regards the outside world, is mobilizable and militaristic. The second system of opinion is domestic and libertarian. It is based more on dissent, is selfish, and in a word, noninternationalist. These two systems of opinion are not produced by two entirely different peoples; nor are they the Dr. Jekyll and Mr. Hyde in each of us. Both are essential parts of any country and any people dedicated to its own freedom. But each operates in different contexts, and each responds to different stimuli. In our constitutional scheme, it was inevitable that the two systems of opinion would attach themselves to different institutions. One of these systems of opinion is attached to the Executive. The other tends to be congressional, though there is little effort by Congress as a body to draw from it.

Tables 4-1 and 4-2 only begin to suggest the profound differences in the two systems of politics. Each table is based on a question asked on virtually every poll taken by the American Institute of Public Opinion concerning how individuals feel in general about the way the President is doing his job. The question is asked regularly and is not timed or pitched according to any particular national or international event. That is, it does not seek a referendum on a particular issue but only a very general feeling about the President at a given point in time.

### Table 4-1. The President's Relation to His Public—International Events

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Yes (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 1950</td>
<td>Before Korean outbreak</td>
<td></td>
</tr>
<tr>
<td>July 1950</td>
<td>After U.S. entry</td>
<td></td>
</tr>
<tr>
<td>August 1956</td>
<td>Before U.S., British, French attack on Suez</td>
<td>37</td>
</tr>
<tr>
<td>December 1956</td>
<td>Before Lebanon</td>
<td>40</td>
</tr>
<tr>
<td>July 1958</td>
<td>After U.S. opposition to the attack</td>
<td>68</td>
</tr>
<tr>
<td>August 1965</td>
<td>After U.S. marine landing</td>
<td>65</td>
</tr>
<tr>
<td>June 1965</td>
<td>Before U-2 incident</td>
<td>78</td>
</tr>
<tr>
<td>March 1967</td>
<td>Before Bay of Pigs</td>
<td>80</td>
</tr>
<tr>
<td>April 1961</td>
<td>After Bay of Pigs</td>
<td>83</td>
</tr>
<tr>
<td>October 1962</td>
<td>Eve of Cuba crisis</td>
<td>83</td>
</tr>
<tr>
<td>December 1962</td>
<td>After missile crisis</td>
<td>83</td>
</tr>
<tr>
<td>October 1964</td>
<td>Before U.S. landing</td>
<td>83</td>
</tr>
<tr>
<td>November 1966</td>
<td>Before tour of Pacific</td>
<td>83</td>
</tr>
<tr>
<td>June 1967</td>
<td>Before Glassboro conference</td>
<td>83</td>
</tr>
<tr>
<td>June 1967</td>
<td>After Glassboro conference</td>
<td>83</td>
</tr>
</tbody>
</table>

These two tables are the result of the following experimental situation. Each item involves some action or event unambiguously associated with the President and his administration. The polls chosen were taken immediately before such action and as soon after the action as polls were available. Inasmuch as no other event of equal importance occurred during the period in question, there seemed some basis for attributing at least some of any observed variance to the events themselves. It should also be emphasized that the analysis does not rest on any single before-and-after example, but with the overall pattern as determined by the repetition of identical before-and-after results.

The results demonstrate that the American public is in fact quite capable of expressing very specific responses within very brief periods of time to important leadership situations. We have what V. O. Key in his posthumous work called "responsible electorate." But it is even more interesting to note the character of that responsibility. On matters of international affairs, an event involving the Presidency received consistently strong supportive responses. No matter what the situation was, no matter whether the event was defined as a success or a disaster, the people tended to rally around the President in significant proportions. A generally agreed on disaster, such as the Bay of Pigs, tended to rally people to the President apparently without regard to their attitude toward the event itself. In fact, that costly adventure seems to have been responsible for helping to bring President Kennedy's support to an almost historic high. But even a less important action, such as President Johnson's 1966 visit with former Premier Ky in the Pacific, bolstered the President's faltering popularity.

The figures in table 4-2 provide a strong contrast. First, domestic leadership actions do not evoke the same degree of responsiveness. But more important, the direction of the responses is almost opposite of those observed on table 4-1. In the eight important instances on table 4-2, there was only one in which support for the President actually increased, and this may have been owing to the fact that the follow-up survey was taken very soon after President Truman announced his retirement plans. (Two months later he enjoyed the approval of 32 percent of the public.) The 1962 event helps best to show how clearly the public seems to discriminate between a domestic action and an international one. In September 1962, immediately before the dispatch of Federal troops to the University of Mississippi campus, President Kennedy's handling of the job was approved by 67 percent of the sample. Immediately following the occupation of the campus, President Kennedy's standing dropped noticeably to 61 percent. This was mid-October, which happened to be the eve of the Cuban missile crisis. The results of the first AIPO poll following the missile crisis, in December, reveal that general support of the President had jumped well beyond the status quo ante—the Mississippi crisis—to the very high level of 74 percent approval.
These figures strongly bear out the general impression that there are two systems of politics, one international and one domestic. The former is attached to the presidency because it symbolizes sovereignty and international involvement. The latter is congressional to the extent that Congress, the spirit of faction and party, chooses to involve itself in these matters. The political system involved with international affairs is consistently supportive of the Government, and is usually supportive on the basis of a two-thirds and three-fourths consensus. The closer we move to total war the closer we can expect this system to move to total consensus. This would naturally be the case, but consensus is artificially moved still higher through patriotic campaigns, propaganda, and legal suppression of dissent.

The other system is not consistently below majority consensus, but its tendency is always downward. This is an inevitable part of our electoral and local party process; these figures are simply a dramatic representation of the restraint that an active electorate is supposed to put on those who are elected. Congress has an obligation to protect and maintain this system of downward tendencies. But if ever there were a practical and selfish argument for civil liberties, here it is. When at any point it is the opinion of Congress that a war is not a total war, it is the time to express this opinion by expansion rather than contraction of civil liberties. There is a basis of power as well as a fundamental obligation. Joseph McCarthy, HUAC, and many others have proven clearly enough that it is easy to mobilize public opinion against unpopular dissent, especially when the dissent is connected with international issues. But a full analysis of Congress constitutional power should show that any limitation on dissent eats up Congress own political base. Total war is, of course, the exceptional case of no public opinion and total executive power. But how often is there total war?

AFTER VIETNAM

It is never sufficient, especially in matters regarding a large democratic assembly, merely to state desirable goals and available powers. Time and again throughout our history we have discovered that good habits must be institutionalized. Congress will never use its constitutional and political powers in an effective foreign policy manner unless it develops a routine and a habit for their use. Thus, what we need is an equivalent in foreign policy to the "automatic stabilizers" built into our domestic economic policy: the Employment Act of 1946, the welfare system, the graduated income tax, monetary powers, and general countercyclical compensatory policy.

The automatic stabilizer in the foreign policy field would have to begin with an organic statute which would require an annual assessment of the state of the world. Pure rhetoric could be avoided by specifying precisely the matters to be covered by the President and by setting up a joint committee, much like the Joint Economic Committee, through which professional papers and regular teach-ins could provide frequent, frank, and unashamed reassessments of such outmoded dichotomies as communism versus the free world.

Congress could require a state of the world report that would go beyond rhetoric. It would include assessments of the state of nationalism in the world and the relation between nationalism and such internationalisms as communism, capitalism, and Zionism. Congress could also require that such a report include a review of the state of dissent in this country. Such legislation would require regular evaluation of all laws and practices pertaining to and affecting speech and assembly. It would be ideal if such assessments would lead to regular congressional resolutions regarding the status of the individual in the civil war. Some of the matters might be quite rhetorical, but the habit of self-evaluation would be most healthy, and appropriate rhetoric often does limit future conduct. Such habits would work as though Congress had temporary injunctive powers against the President, suspending and exposing certain practices until the President has fulfilled some kind of "show cause" requirements. The advantage would be that such injunctions would occur regularly and not merely when crisis renders the power impossible to use. Such a process could also be compared to the budgetary process. It would be elaborate, and it would be a year-round endeavor to review the relation between present effort, present resources, and upcoming stress.

Automatic stabilizers could also be built into international economic activity. A profoundly important stabilizer could, for example, be built by statute into American business through the internationalization of large American corporations. Vastly increased foreign holdings of shares in American corporations would inevitably contribute to world political stability. The United States has been no more eager than the Soviet Union or China to cooperate with international political bodies, owing to fear of the loss of sovereignty. But internationalizing our corpora-
tions involves no loss of sovereignty while it is increasing the potential for world stability by increasing actual interdependence and by increasing the credibility of our own commitments to world peace.

Congress also could with very little trouble case the application of antitrust laws against mergers involving a foreign corporation and a domestic corporation. Hitherto, the Department of Justice has applied these laws with far greater strictness to these than to totally domestic mergers. Congress could also very easily work out programs to encourage more foreign buying of American stock. Precautions against control in certain sensitive industries could easily be written into the statutes.

The purpose of all this, however it might technically be done, would be to introduce the kind of monetary interdependence that was fairly obviously the foundation of what Polanyi has called “the hundred years of peace” of 1814-1914. Countries are far more likely to enter into substantial agreements and to live contentiously by the terms of those agreements if each country has a substantial stake in the other country. As Polanyi has suggested, the houses of Morgan and Rothschild had more to do with the hundred years of peace than the combined influence of the European armies and the British navy.

There are other automatic stabilizers that a well-motivated imagination could conjure up. Their enactment is Congress’s power and obligation. And they should be contrived for the future and not designed for the particular crisis at hand. And their desirability should be obvious to anyone who appreciates the extent to which the whole of the American constitution is built on the principle of automatic stabilizers. Separation of powers, check and balance, federalism, bicameralism are the most formal of the stabilizers built into the system as faith that better government has a better chance when it is the outcome of confrontation.

Confrontation between the Executive and Congress is both natural and desirable, in foreign as well as domestic policymaking. One source of serious error after World War II was bipartisanship, largely because it shackled Congress in its relations with the President. Bipartisanship declared open confrontation off limits; this contributed to the direct delegation of power to the lower level agencies and nonpolitical bureaucrats without adding power or legitimacy to either the President or Congress. A careful study of the history of bipartisanship would tend strongly toward the conclusion that confrontation is better than cooperation between President and Congress. Such a review would also support the proposition that an independent Congress boldly exercising its war and peace powers is far more dependable and effective than the party system in governing America’s international conduct. Parties as suggested by bipartisanship, are not dependable in the foreign policy area. No better instance of this can be found than the present situation regarding the Vietnam war. Each pot has called the other kettle black, and they are both correct. Parties are good to a limited extent in inflicting electoral punishment, to use Kenneth Waltz’s felicitous term, on the international policies of the party in power. But this method is not regular and dependable. More important, it is not a constitutional process, and therefore in addition to being unpredictable and ineffective it also grants little legitimacy to antiwar dissent until the war drags on long enough to make attacks on it a matter of political advantage. When those who made the war, later attempt to assume a dovish leadership in opposition, they are simply not very plausible. A more independent Congress might have encouraged some of these people to resign and take their case to the public at a time when their opposition might have meant something. To wait for their party to leave office to say they were the original peaceniks is neither appropriate nor effective.

As a political institution Congress is, of course, capable of the same kind of opportunism. But it is also true that Congress has always been more noninterventionist than the President. If somehow that kind of spirit can be turned into a mature and subtle restraint rather than kind of flipflop between isolationism and jingoism, we would ultimately develop the kind of responsible American foreign ministry that the world waits for.

It has been said that the military fights current wars with the strategies of each previous war. Congress’ obligation is to fight current wars with the concerns of the next. Otherwise, there will be no system within which to realize the hopes for which wars are supposedly fought.

This is what the present constitutional debate is, or should be, all about. Long periods of preparedness—which in our day we call cold war, limited war, police action, and so on—are a serious threat to democracy. Preparedness means mo-
bilitation, and mobilization means limitation of personal freedom. At some point in a long period of preparedness, a people can lose the habit of freedom. And this spells out the dual obligation of Congress in foreign policy. Congress must seek, and has the power to seek, to protect democracy from cold war. And Congress must simultaneously seek to use democracy to set directions and limits on our preparedness. When these two obligations, and their concomitant power, are used to reinforce each other, Congress is obviously performing in a way ideally suited for a mature democratic participation in world affairs.
STATEMENT BY PROFESSOR W. T. MALLISON, JR., NATIONAL LAW CENTER, THE GEORGE WASHINGTON UNIVERSITY, WASHINGTON, D.C.

I appreciate your invitation to submit a further statement to supplement my direct testimony to the subcommittee of June 23, 1970.

It seems appropriate at this particular time to stress the fact that effective congressional participation with the executive branch in exercising the war and peace powers under the Constitution is dependent upon the Congress obtaining a full and accurate flow of information upon which to act. Any legislation defining more specifically the respective authorities of the President and the Congress will not achieve the desired result without also providing that all pertinent information must be available to the Congress prior to the time its action is required. There is now a widespread recognition that the Congress did not have adequate factual information at the time it adopted the Southeast Asia Resolution in 1964 and that had such information been available, its action might well have been quite different.

The conflict situation in Southeast Asia is apparently moving toward termination now, and the opportunity for the Congress is to exercise a more effective decisional role in the future. The pressing problem now is the question of lack of, or distorted, information (such as the "Pentagon Papers" are revealing in the Vietnam situation) concerning the Middle East conflict. Should not the Congress be moving to discover the accurate information concerning our involvement in that area over the past five decades since Woodrow Wilson sent the King-Crane Commission to ascertain the facts concerning Palestine in 1919? This is essential if the United States is to avoid accelerating the military conflict there which could well lead to a third World War. The conduct of diplomacy and the promotion of peace rather than war can only be served by a fully informed Congress and not by secret executive branch manipulations.

In summary, the entire constructive role of the Congress is dependent on its obtaining complete information before it makes decisions. Access to such information, therefore, must be a preeminent part of any new legislation concerning the war powers. In addition, it is extremely important that the members of Congress and key staff members take the time to study existing crucial material which is now available. For example, the material published in Foreign Relations of the United States is particularly enlightening and relevant to our participation in the Middle East. The most recent volumes on this subject are Volume VII for 1946 and Volume VIII for 1945, each of which is entitled "The Near East and Africa." This revealing material has not been sufficiently considered by the Congress and has been completely ignored by the mass media of communication.
STATEMENT BY PROF. LAWRENCE VELVEL, SCHOOL OF LAW, UNIVERSITY OF KANSAS, LAWRENCE, KANS.

In recent months, representatives of the executive branch, a number of Federal legislators, certain academic figures and others have opposed judicial or legislative intervention into the course of the Indochina war. Their arguments have sometimes been political in nature, but at other times have been based upon their reading of the Constitution. I am therefore writing this letter in order to provide a reaffirmation of the fact that there are constitutional lawyers who feel quite differently than the above-mentioned persons. There are many constitutional lawyers who believe that in order to uphold the Constitution there should be both judicial and legislative intervention into a disastrous Presidential war, and who further believe that such intervention may well be critical to the future of the Nation.

In recent years our Nation has seen a terrible erosion of the powers of Congress, with a concomitant aggrandizement of the military and foreign relations power of the Executive. In this way the constitutional balance of power was undermined. This created great danger for the Nation, as illustrated by the fact that an unchecked executive branch got us into, and kept us in, the war in Indochina. Moreover, no one should think that the unpopularity of the Indochina war means that the possibility of a President unilaterally getting us involved in war has been exhausted with Vietnam. Such thinking is illusory and dangerous. There have been many unpopular wars in the past, yet Presidents have continued to get the Nation involved in new wars. The Korean war was highly unpopular by the time it was over, yet, less than 2 years after it was finished, the Executive, prodded by Vice President Nixon among others, came close to intervening in Indochina on behalf of the French. Twelve years after Korea, the Executive did get us massively involved in Vietnam—a war which is now the longest and one of the most costly in American history. In the autumn of 1969, when the outcry against the war was at a tremendously high pitch, it was discovered that the Executive was fighting a secret war in Laos. In 1970, when the war was supposedly being wound down, the Executive mounted a large invasion of Cambodia. Today the Executive is apparently still engaged in large-scale bombing in Laos and Cambodia.

Moreover, the facts of realpolitik indicate that this kind of history can repeat itself. This country has military treaties with many nations, treaties which call for the use of force in certain circumstances. However, the precise circumstances are subject to dispute and, as occurred in Vietnam with regard to SEATO, the Executive might interpret a treaty as requiring the use of force even though others strongly disagree. Over the course of the last two decades, executive officials have constantly made belligerent statements toward other nations. Executive officials have sometimes been forced upon the desire to prevent Communist governments from taking or holding power, and they have sometimes sponsored the use of force to prevent this. They have often felt that force resolves problems and, in general, they have often shown themselves too willing to agree to disastrous plans put forth by the military.

With political facts such as these in mind, and with the example of history to boot, it should be quite obvious that the executive might get us into future unnecessary wars if left to its own devices. Thus, it is critical that the judiciary and the Congress establish judicial and statutory precedents against unilateral executive warring. To some extent, the Congress has already created precedents by enacting restrictions that prevent money from being used to finance ground combat forces in Laos, Thailand or Cambodia. This, however, is not nearly the same as restricting the use of money in Vietnam itself, where American ground forces are fighting. As for the courts, they have done far less than the Congress. The Supreme Court has consistently refused to hear legal challenges to the war, arbitrarily giving no reasons whatever for its refusal. Lower courts have too by and large refused to rule on the legality of the war, although a few courts have recently shown themselves willing to deal with this problem.

Despite the courts' prior general reluctance to deal with the war, it is my hope that in the near future the judicial climate will change in a way that will enable
us to obtain a judicial ruling against the legality of unilateral executive war-making. I might tell you of two efforts which are directed toward attaining this end. First, at the request of Rev. John Wells, who originated the Massachusetts antiwar bill and with whom I was associated in efforts to pass that bill, the Constitutional Lawyers’ Committee on Undeclared War has been formed, with myself as chairman. The committee, which numbers almost 40 members, has filed and will continue to file legal briefs in cases challenging the constitutionality of the war. Second, I have just published a book entitled “Undeclared War and Civil Disobedience,” which I hope will also make a contribution toward changing the legal climate. The book, which has a foreword by Prof. Richard Falk of Princeton University, sets out in detail my views on why the war is unconstitutional and why it is critically important that courts deal with the merits of this question. The book discusses almost all the arguments which have been put forth on these subjects and finds the Executive’s arguments wanting. If you wish, the publisher would be delighted to send you a complimentary copy of the book. The publisher is the Dunellen Co., 145 East 52d Street, New York, N.Y. 10022. You can either write the Dunellen Co. directly or let me know that you want a copy and I will see that one is sent to you.

In conclusion, let me say that you can feel free to use this letter in any way you want, including inserting it in the Congressional Record. Despite the administration’s efforts to suppress the issue of the war, the questions of its political wisdom and constitutional legality are among the paramount issues of the day—I think they are the paramount issues of the day—and everything possible should be done to keep these questions in the forum of public discussion.
STATEMENT OF HON. WILLIAM P. ROGERS, SECRETARY OF STATE BEFORE THE SENATE FOREIGN RELATIONS COMMITTEE, MAY 14, 1971

CONGRESS, THE PRESIDENT, AND THE WAR POWERS

I. Introduction

It is, as always, my privilege to appear before this committee. I am grateful to you, Mr. Chairman, and to members of the committee for the opportunity to testify on the serious questions under consideration.

The committee has helped stimulate an important examination of the war powers of the President and Congress under our Constitution. This administration, of course, fully respects Congress' right to exercise its constitutional role in decisions involving the use of military force and in the formulation of our Nation's foreign policy. We realize that under our constitutional system, decisions in this vital area should reflect a common perspective among the legislature, the executive, and the electorate so that each may play its proper role. We also recognize that this common perspective can only be built through cooperation and consultation between the legislative and executive branches. Generally speaking, the constitutional process so wisely conceived by the Founding Fathers has worked well throughout our history. Any attempt to change it should be approached carefully and should be subjected to long and full consideration of all aspects of the problem.

The issue before us involves the constitutional authority to commit forces to armed combat and related questions. These questions have been the subject of considerable debate and scholarly attention. Unfortunately, they are often approached polemically with one side arguing the President's constitutional authority as Commander in Chief and the other side asserting Congress' constitutional power to declare war—the implication being that these powers are somehow incompatible. The contrary is true. The framers of the Constitution intended that there be a proper balance between the roles of the President and Congress in decisions to use force in the conduct of foreign policy.

In discussing these issues with you today, I wish first to review the historical background of the war powers question, beginning with the Constitution itself and tracing the practice of the Nation throughout our history. I would then like to place the war powers issue in the modern context and discuss with you the factors which I see bearing on the issue of the exercise of Presidential and congressional powers now and in the foreseeable future. Finally, from this perspective I will describe what I believe the national interest requires in terms of a proper balance between the President and the Congress.

First, let me stress that cooperation between the executive and legislative branches is the heart of the political process as conceived by the framers of the Constitution. In the absence of such cooperation, legislation which seeks to define constitutional powers more rigidly can be effective. Conversely, given such cooperation, such legislation is unnecessary. Obviously there is need for and great value in congressional participation in the formulation of foreign policy and in decisions regarding the use of force. But, at the same time, there is a clear need in terms of national survival for preserving the constitutional power of the President to act in emergency situations.

II. Historical Background

A. Textual Authority and the Intention of the Framers

Let me turn, then, to the historical background beginning with the Constitution. Article I, section 8, of the Constitution grants Congress a number of specific powers relevant to our discussion, including the power to "*To declare War ** *; To raise and support Armies ** *; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces ** *.

The Senate, in particular, is given certain foreign relations powers to advise and consent to treaties and to the appointment of ambassadors and other officials. Congress has the power to make all laws which are necessary and proper for carrying out powers vested by the Constitution in the Federal Government. In addition, Congress has the sole authority to appropriate funds—a vital power in the war powers and foreign relations area.

The powers of the President which are relevant to this inquiry are found in article II. The President is vested with the Executive power of the Government, he is named Commander-in-Chief of the Army and Navy, and is required to "take Care that the Laws be faithfully executed." From these powers and the power to make treaties and to appoint and receive ambassadors is derived the President's constitutional authority to conduct the foreign relations of the United States.

The framers of the Constitution were not writing in a historical or political vacuum. Experience during the colonial period and under the Articles of Confederation had shown the need to strengthen the central government. The problem was to create a strong federal system and yet prevent tyranny. Accordingly, the framers established three powerful Federal branches of government and depended upon the independence of each branch and their coequal powers to provide the checks and balances necessary to preserve the democracy.

The division of the war powers between the legislative and executive branches is illustrative of the general constitutional framework of shared powers and checks and balances. By this division, the framers changed prior U.S. practice under the Articles of Confederation where the "sole and exclusive right and power of determining on peace and war" had been vested in the Legislature. They wished to take advantage of the executive, speed, efficiency, secrecy and relative isolation from public passions. At the same time, they wished to avoid the dangers to democratic government exemplified by the unchecked British monarch who, as Hamilton noted, had supreme authority not only to command the military and naval forces, but also to declare war and to raise and regulate fleets and armies. Mindful of the hardships which war can impose on the citizens of a country and fearful of vesting too much power in any individual, the framers intended that decisions regarding the initiation of hostilities be made not by the President alone, nor by the House or Senate alone, but by the entire Congress and the President together. Yet it is also clear that the framers intended to leave the President certain indispensable emergency powers.

The grant to Congress of the power to declare war was debated briefly at the Constitutional Convention and that well-known debate reveals the essential intention of the framers. The Committee of Detail submitted to the general convention a draft article which gave the Congress the power "to make war."
Pursuant to a motion by Madison and Gerry, this was amended to the power "to declare war." This change in wording was not intended to detract from Congress' role in decisions to engage the country in war. Rather, it was a recognition of the need to preserve in the President an emergency power—as Madison explained it—"to repel sudden attacks" and also to avoid the confusion of "making war and conducting war," which is the prerogative of the President. 

The necessity to repel sudden attacks was the case cited by the framers in which the President clearly had power to act immediately on his own authority. That was the one situation, in 1787, in which it was evident that emergency action was required. But I submit that the rationale behind the concept is broader—that is, that in emergency situations the President has power and a responsibility to use the armed forces to protect the Nation's security. This conclusion is borne out by subsequent practice and judicial precedents, as I will show later. In fact, much of the debate at the time centered on the need to curb the executive branch's tradition of precipitating offensive wars and to transfer to the Federal Government the war powers previously exercised by the States; little attention was given to the scope of the President's power to use the Armed Forces for defensive purposes to protect the Nation or its security interests.

The constitutional division of authority in the war powers area, as I see it, parallels the constitutional balance between the executive and legislature in other fields. By dividing these powers between the two branches, the Constitution established a system that, except in emergency situations, would function effectively if decisions to engage the Nation in armed conflict were arrived at jointly by the President and Congress.

B. SELECTED HISTORICAL EXAMPLES

In addition to the textual authority and the framers' intentions regarding the war powers of Congress and the President, we should consider the practical exercise of those powers since the Constitution was adopted. Many scholars have reviewed the historical records and I do not intend to cover all of this ground again. What I think it is important, however, is to identify the trend which developed.

From the earliest years of the Republic we find examples of Presidential use of the Armed Forces without congressional approval. These were, at first, very limited in character. For example, in 1801, President Jefferson sent his own armed forces to protect American vessels from Barbary pirates, but he authorized them to take only defensive actions. The scope of Presidential initiative expanded during the 19th and early 20th centuries. President Polk sent American forces into the disputed territory near the Rio Grande in January 1846, where they engaged in battle with the Mexicans purely on Presi-
The President, as Commander in Chief of the Armed Forces of the United States, has full control of both the treaty and international law which the President subsequently became a declared war. The Truman administration based its authority to commit these troops squarely on the President's constitutional authority. It asserted that "the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof." Citing past instances of presidential use of armed force in the broad interests of American foreign policy, the administration asserted that there was a "traditional power of the President to use the Armed Forces of the United States without consulting Congress." Reliance was also placed on the fact that the action was taken under the United Nations Charter, a part of both the treaty and international law which the President is constitutionally empowered to execute.

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17 Cong., 2d Sess., 313-44 (1818).
18 Rogers, supra at 74-19; Background Info. supra at 49.
19 See supra at 51-38. Although the Mexican War subsequently became a declared war, there was some initial Congressional opposition. See i2 Cong., Globe, 21st Cong., 2d Sess., 372-88 (1848). The opposition had so increased two years later that the House passed a rider to a resolution honoring Gen. Taylor reading "that the Constitution of the United States is so broad as to admit of a necessity and constitutionally begun by the President of the United States." A subsequent motion to strike the rider was defeated. See i3 Cong., Globe, 22d Cong., 1st Sess., 513-44 (1848).
20 Rogers, supra at 50-62; Background Info. supra at 41; Bemis, A Diplomatic History of the United States 515-12 (5th ed. 1965).
21 Rogers, supra at 74-76; Worrall, supra at 78-97; Bemis, supra at 59-36.
22 Rogers, supra at 77-78; Background Info. supra at 43.
23 Worrall, supra at 512-514; Background Info. supra at 41.
24 Note, Congress, the President and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1774, at 1790 (1968).
25 See Single Contract, Hearings on S. 231 before the Senate Energy, 91st Cong., 1st Sess., Mar. 8, 1971. The statement is based on the assumption that the President's emergency powers vary under certain circumstances. Moreover, the president's employment of armed forces as a necessary corollary of his power to defend the United States, its territories and possessions.
26 U.S. Dept. of State, Authority of the President to Repel the Attack in Korea, 32 Dept. State Bull. 172 (1950).
27 Id. at 174.
President Eisenhower sought congressional authorization for possible engagement of American forces in the Middle East and in the area around Formosa. In his request for a resolution on Formosa he stated his view that:

"Authorizing for some of the actions which might be required would be inherent in the authority of the commander in chief. Until Congress can act I would not have the power to protect the safety of American citizens, as I urged days later when the peacekeeping action might be forced if we in order to prevent the rights and security of the United States.

However, a suitable congressional resolution would clearly and publicly establish the authority of the President as commander in chief to employ the Armed Forces of this Nation promptly and effectively for the purposes indicated if in his judgment it became necessary."

When President Eisenhower sent 14,000 troops into Lebanon in 1958 he did so without seeking specific congressional approval and without specifically basing his authority on the 1977 Middle East resolution. He said that the troops were sent "to protect American lives—there are about 2,500 Americans in Lebanon—and by their presence there to assist the Government of Lebanon to preserve its territorial integrity and political independence." He explained, "come to the sober and clear conclusion that the action taken was essential to the welfare of the United States. It was required to support the principles of justice and international law upon which peace and a stable international order depend."

In 1962 President Kennedy ordered the quarantine of Cuba, acting under and by virtue of the authority conferred upon him by the Constitution and statutes of the United States, in accordance with the aforementioned resolutions of the U.S. Congress and the Organ of Consultation of the American Republics, and to defend the security of the United States. The resolution of Congress referred to by the President was passed 1 month before the Cuban missile crisis and the quarantine proclamation. The Cuban resolution, unlike the other area resolutions, contained no grant of authority to the President; it simply declared that the United States was determined to use any means necessary to prevent Cuba from extending its subversive activities through the hemisphere and from creating or security.

In April 1965 President Johnson sent U.S. Marines into the Dominican Republic without congressional authorization, and stated initially that he was exercising the President's power to protect the safety of American citizens. A few days later when the peacekeeping objectives of the action became predominant, he explained his action as an exercise of the President's power to preserve the security of the hemisphere in accordance with the principles enunciated in the OAS Charter. At no time during the Dominican action did the President seek congressional authorization.

When President Johnson began sending American combat troops to South Vietnam in 1965, he relied as authority for his action on a combination of his own constitutional authority as Chief Executive and commander in chief, the Senate's advice and consent to the SEATO treaty, and the authority granted by the Congress in the Tonkin Gulf resolution.

Looking back then over the last 20 years, one can see that Presidents have given varying rationales for executive action and varying interpretations of the necessity of congressional authorization.

I think there are two points to be made regarding this period of our history. First, certainly the area resolutions were some evidence of congressional approval. Usually, however, they arose in an atmosphere of crisis or else in a different factual context than that in which they were eventually relied upon. The question is not whether these resolutions are useful to President—of course they are—but whether each open-ended delegation is an effective means for Congress to exercise its constitutional authority.
Second, it serves no useful purpose to argue today whether or to what extent past presidential decisions regarding the use of military force have served the national interest. The very concept of what best serves the national interest of the United States has undergone significant change since the use of force of the 1950's and 1960's. The Nixon doctrine represents a recognition that protection of our national interest does not require an automatic U.S. military response to every threat. The aim of the Nixon doctrine is to increase the participation of other nations in individual and collective defense efforts. While reaffirming our treaty commitments and offering a shield against threats from nuclear powers aimed at our allies or other nations vital to our security, we now look to the nation directly threatened to assume the primary responsibility for providing the manpower necessary for its defense. I am sure this new approach will be of great help in achieving balanced executive-legislative participation in decisions regarding the use of military force.

C. JUDICIAL PRECEDENTS

Let me turn now briefly to an examination of judicial precedents in the war powers area. There are relatively few judicial decisions concerning the relationship between the Congress and the President in the exercise of their respective war powers under the Constitution. The courts have largely regarded the subject as a political question and refused to take jurisdiction. For example, in Luftig v. McNamara, the District of Columbia Court of Appeals upheld the dismissal of a suit by an Army private to enjoin the Secretary of Defense from sending him to Vietnam on the ground that the war was unconstitutional. The court stated:

"It is difficult to think of an area less suited for judicial action than that into which appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the executive."

Accordingly, to the extent issues regarding the war powers are resolved, their resolution is likely to come, as has been the case in the past, through political interaction of the President, Congress, and the electorate. And, in the final analysis, the most appropriate means for the settlement of fundamental constitutional questions of this character.

There are, however, a few court decisions which contain expressions of judicial opinion relevant to the war powers issue. These cases suggest some rough guidelines. First, the decisions indicate that courts recognize and accept the President's authority to employ the Armed Forces in hostilities without express congressional authorization.

For example, in Durand v. Bolin, the second circuit held in 1860 that in the absence of congressional authorization, the Executive had broad discretion in determining when to use military force abroad in order to respond quickly to threats against American citizens and their property. In the Prize cases, during the Civil War, the Supreme Court upheld President Lincoln's Southern blockade despite the absence of a declaration of war or other specific congressional authorization. The Court held that when war is initiated by the other party, the President is not only authorized but obliged to resist by force of arms and has broad discretion in deciding what measures are demanded by the war. The Court's finding of a general congressional sanction of the war from ancillary legislation and subsequent congressional ratification.


32 Luftig v. McNamara, 357 F.2d 1004, at 984-96 (D.C. Cir. 1967).

33 See, e.g., R.C. v. R.C. (No. 1846) (C.C.S.), 82 N.Y. 95 (1860), involving a suit for damages against a Navy Commander who executed the President and Secretary of the Navy, unspecified and barred by the city of New York.


35 See, e.g., The Case of the Waters of New York, 36 U.S. 554 (1838).

36 See, e.g., R.C. v. R.C. (No. 1846) (C.C.S.), 82 N.Y. 95 (1860).
The Steel Seizure case, Youngstown Sheet & Tube Co. v. Sawyer, 4 in which the Supreme Court held invalid President Truman's seizure of the steel mills during the Korean war, is sometimes cited as indicating the limits of the President's independent constitutional authority. However, it is important to note that the precise issue in that case was not the President's authority to conduct hostilities but the scope of his power over a clearly domestic matter—labor-management relations. Moreover, the Court noted and several Justices based their concurring opinions 5 on the fact that Congress had enacted a number of laws concerning domestic labor disputes and in so doing explicitly withheld the power of seizure from the President.

This aspect of the Steel Seizure case leads to a second observation: That throughout our history a headon collision between legislation and Presidential action has rarely, if ever, occurred in the field of foreign policy. 6 This is a testament to the strength and flexibility of our system, and to the statesmanship of the Nation's leaders.

There are few judicial pronouncements on what would happen in the event of a clear collision in the area of the war powers. In Ex Parte Milligan 7 the concurring opinion of four Justices indicated there were limits to what Congress might do by legislation:

"Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war.

This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interfere with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief." 8

But perhaps Justice Jackson stated the wisest rule when he said that in the event of a clear collision between legislation and Presidential action "the President's power is at its zenith; it encompasses both the authority delegated to him by Congress and whatever independent constitutional authority he may have with respect to the subject matter. It is in this third situation that we find the much-quoted case of United States v. Curtiss-Wright Export Co., 9 in which the Supreme Court held that the normal legal restrictions upon congressional delegations of power to the President in domestic affairs do not apply with respect to delegations in external affairs because of the Executive's extensive independent authority in that realm and the desirability of allowing

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Footnotes:

4 323 U.S. 595 (1945).
5 Concurring opinions of Mr. Justice Frankfurter, id. at 611-612, Mr. Justice Burton, id. at 625-626, Mr. Justice Clark, id. at 622-623.
6 See E. Corwin, The President: Office and Powers 176-177, 206 (1947). "Actually Congress has never adopted any legislation that would seriously encroach the style of a President who was attempting to use his power to assure the safety of the national forces."
7 71 U.S. (4 Wall.) 364 (1867). The case arose as a habeus corpus proceeding contesting the legality of a civil conviction held by a military tribunal in Indiana during the Civil War. The Court invalidated the President's power to constitutionally authorize the trial of a civilian before a military tribunal in a state which had been loyal to the Union during the Civil War, id. at 390-22.
8 Id. at 390.
9 Youngstown Sheet & Tube Co. v. Sawyer, supra at 605. In an early case involving seizure of vessels on the high seas it was held that the President could not act unconstitutionally without legislative authorization. Little v. Barreme (The Flying Fish), 1 F.S.C. (CirCUit) 179 (1803) involved the seizure of a ship sailing from a French port which was made in accordance with presidential orders interpreting the Act of 1791 (which had been constituted unconstitutional, but noted in passing that the President had no authority to act without power to act in the Treaty). The Court held the seizure unlawful, but noted in passing that the President had no authority to act in the Treaty.
10 Ex parte Milligan, 156 U.S. 116 (1895). The case involved the scope of authority for congressional preemption in an area of shared powers, such as the war powers. Chief Justice Marshall in United States v. Nolan, 37 U.S. (12 Pet.) 335 (1839) and, therefore, although it has never been overruled, a similar case would probably never reach decision on the merits today.
11 See U.S. 303 (1936). See also, Martin v. Mott, supra, involving an Act of Congress of 1795 which delegated authority to the President to call forth the militia in the event of an invasion or the imminent threat
There are numerous other examples of wide definition of Presidential powers when acting under and in accordance with an act of Congress.

III. The Modern Context

As we turn from an examination of history to an analysis of the modern context in which the President and Congress operate, I am impressed by the fundamental changes in the factual setting in which the war powers must be exercised. And indeed, it is this very change in setting which has raised difficult constitutional issues that cannot be answered by reference to history alone.

The primary factors underlying this transformation are rather evident and need only be summarized. They include, first, the emergence of the United States as a world power. Since World War II we have found it necessary to maintain a large, standing military capacity which is sufficiently well equipped and mobile to enable the United States to play a major peacekeeping role almost anywhere in the world and often with little delay. This development has generated a reliance upon the United States by other nations to help protect them—which has been translated into a series of defense treaties—and a sense of responsibility on the part of this country to fulfill our commitments in good faith.

Let me say again, because I think it is important to the issue before us, that this administration has begun to reverse the trend of expanding U.S. military involvement abroad. Since World War II we have found it necessary to maintain a large, standing military capacity which is sufficiently well equipped and mobile to enable the United States to play a major peacekeeping role almost anywhere in the world and often with little delay. This development has generated a reliance upon the United States by other nations to help protect them—which has been translated into a series of defense treaties—and a sense of responsibility on the part of this country to fulfill our commitments in good faith.

The second factor which characterizes the modern context is the development of technology, especially in the field of nuclear weaponry. The fear of nuclear war and the importance of deterrence have engendered a sense of need to be able to take prompt, decisive Executive action. On the other hand, the fact that even a minor skirmish could lead to a confrontation of the major powers and raise the specter of nuclear war, serves to emphasize the desirability of appropriate congressional participation in decisions which risk involving the United States in hostilities.

Third, the institutional capacities of the Presidency have facilitated the broad use of Presidential powers. The heightened pace, complexity, and hazards of contemporary events often require rapid and clear decisions. The Nation must be able to act flexibly and, in certain cases, without prior publicity. The institutional advantages of the Presidency, which are especially important in the area of foreign affairs, were pointed out in The Federalist: The unity of office, its capacity for secrecy and dispatch, and its superior sources of information.

Unlike the Presidency, the institutional characteristics of Congress have not lent themselves as well to the requirements of speed and secrecy in times of recurrent crises and rapid change. The composition of Congress, with its numerous members, and their diverse constituencies, the resultant complexity of decision-making processes, and Congress' constitutional tasks of debate, discussion, and diffusion of power among the branches of government, make it more deliberative, public, and diffuse in its decision-making. The Constitution itself did not contemplate a body whose members were also to be the nation's diplomats, its war makers, its rulers, its sovereigns, or its enforcers of foreign policy. In a system of checks and balances, the President is the agent, the implementer, the voice of the Constitution's authorization, the symbol of the Nation's international identity. In this sense, the President is the Constitution's embodiment, the personification of the Constitution's essential roles, which the Supreme Court has interpreted to mean that the President is the only official with the power to make war.

As we turn to a discussion of recent cases, I should note that I have had the opportunity to study Supreme Court cases in which the question of the President's war powers has been raised. The Supreme Court has had occasion to decide whether the President's actions were consistent with the Constitution. In these cases, the Court has required the President to demonstrate that his actions were necessary and proper for the execution of his constitutional duties. The Court has also considered whether the President's actions were consistent with past decisions of the Court. In recent cases, the Court has held that the President's actions were consistent with past decisions of the Court. In one case, the Court held that the President's actions were consistent with past decisions of the Court. In another case, the Court held that the President's actions were consistent with past decisions of the Court. In yet another case, the Court held that the President's actions were consistent with past decisions of the Court. In still another case, the Court held that the President's actions were consistent with past decisions of the Court. In these cases, the Court has had the opportunity to study the history of the President's war powers and to determine whether the President's actions were consistent with past decisions of the Court.

In conclusion, I would like to reiterate that the President's war powers are limited by the Constitution. The President is not a legislative branch of government, nor is he a supra-legislative branch of government. The President is an executive branch of government. The President is not a legislative branch of government, nor is he a supra-legislative branch of government. The President is an executive branch of government. The President is not a legislative branch of government, nor is he a supra-legislative branch of government. The President is an executive branch of government. The President is not a legislative branch of government, nor is he a supra-legislative branch of government. The President is an executive branch of government.

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Yet, in order to balance this picture, we must also note the inherent limitations of the Presidency. There are few significant matters which can be accomplished by Presidential order alone. The essence of Presidential power is the ability to enlist public support for national policy, and in this the President needs the cooperation of Congress. Virtually every Presidential program requires implementing legislation and funding. Through their powers of investigation and supervision, congressional committees have amply demonstrated their ability to inspire national debate, focus public opinion, and thereby influence Presidential policy. The Senate's power to advise and consent to treaties and appointments serves as a constant reminder of the Senate's indispensable role in foreign policy.

Of course, the electorate is the ultimate restraint upon the President and Congress in the exercise of the war powers. As President Nixon said in his "State of the World" message: "Our experience in the 1960's has underlined the fact that we should not do more abroad than domestic opinion can sustain." The President and Congress must be sensitive to the people's willingness to suffer the potential physical, economic, and political costs of military actions. The Nation's ability to sustain long-term military action depends on the ability of the President and Congress to convince the people of the wisdom of their policies.

IV. The Proper Balance Between Congress and the President

Thus far I have discussed what has happened to the war powers over the course of our history and described the modern context in which these powers must be exercised. The most difficult question is still before us: What should we seek for the future—what is the proper balance between the Congress and the President?

It seems to me that we must start from the recognition that the exercise of the war powers under the Constitution is essentially a political process. It requires cooperation and mutual trust between the President and Congress and wise judgment on the part of both if the Nation's interests are to be well served.

Your committee now has before it several bills which attempt to define and codify the war powers of the President and Congress in a way that I believe would not serve the Nation's long-term interests. I believe that the objectives of the sponsors of these bills, including Senator Javits, Senator Taft, and Senator Eagleton, and most recently Senator Stennis, are the same as the objectives of this administration. We both want to avoid involving the Nation in wars; but if hostilities are forced upon us, we want to make certain that U.S. involvement is quickly and effectively undertaken and is fully in accordance with our constitutional processes. So the difference is not in our objectives but in how to achieve those objectives.

I am opposed to the legislation before you as a way to achieve these objectives because (1) it attempts to fix in detail, and to freeze, the allocation of the war power between the President and Congress—a step which the framers in their wisdom quite deliberately decided against, and (2) it attempts in a number of respects to narrow the power given the President by the Constitution.

Regarding the first point, these bills reflect an approach which is not consistent with our constitutional tradition. The framers of the Constitution invested the executive and legislative branches with war powers appropriate to their respective roles and capabilities, without attempting to specify precisely who would do what in what circumstances and in what time period, or how far one branch could go without the other. This was left to the political process, which is characteristic of the constitutional system of separation of powers. Our constitutional system is founded on an assumption of cooperation rather than conflict, and this is vitally necessary in matters of war and peace. The effective operation of that system requires that both branches work together from a common perspective rather than seeking to forge shackles based on the assumption of divergent perspectives.

As for the second aspect, although the bills recognize to a significant extent the President's full range of constitutional authority, they do tend to limit the Presi-

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1 See R. Neustadt, Presidential Power: The Politics of Leadership (1960). The President of the United States has an extraordinary range of formal powers of authority in statute law and in the Constitution. He may give orders. He may issue extraconstitutional orders. He also has extraordinary duties, as with the customs of our government and the powers of the President to persuade."

dent in some questionable ways. It appears, for example, that two of the bills do not cover situations like that of the Cuban missile crisis. In failing to recognize the need for immediate action and the propriety of a Presidential response to such situations, the bills are unduly restrictive. It is inconceivable, for example, that the President could have carried out the delicate diplomatic negotiations with the Soviets which led to the removal of the missiles from Cuba if there had been a full-scale congressional debate prior to his deciding on a course of military and diplomatic action.

Some of the bills would also seek to restrict the President's authority to deploy forces abroad short of hostilities. This raises a serious constitutional issue of interference with the President's authority under the Constitution as Commander in Chief. Moreover, requiring prior congressional authorization for deployment of forces can deprive the President of a valuable instrument of diplomacy which is used most often to calm a crisis rather than enflame it. For example, such a restriction could seriously limit the ability of the President to make a demonstration of force to back up the exercise of our rights and responsibilities in Berlin or to deploy elements of the 6th Fleet in the Mediterranean in connection with the Middle East situation.

At least two of the bills would require that action initiated by the President within his specified authority be terminated after 30 days unless Congress enacts sustaining legislation; and three of the bills would permit Congress to terminate presidential action in less than 30 days. The bills would provide for expedited action on such legislation but would not and could not insure definitive congressional action within the 30-day period. This raises another constitutional issue, that is whether the President's authority under the Constitution—for example, that which was used in 1962 to terminate the Cuban missile crisis—could be limited or terminated by congressional action or inaction. The 30-day limitation also raises practical problems regarding the conduct of our forces. Once our forces are committed to military action, the President might proceed without consulting Congress if he believes that the action is necessary to protect the Nation against sudden attack.

There is another consideration. To circumscribe presidential ability to act in emergency situations—or even to appear to weaken it—would run the grave risk of misinterpretation 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.

I do not believe we have sufficient foresight to provide wisely for all contingencies that may arise in the future, and we should be most reluctant to reverse judgment. Moreover, I firmly believe that Congress' ability to exercise its constitutional powers does not depend on restricting in advance the necessary flexibility which the Constitution has given the President.

At the same time, I want to make clear that I do not interpret "flexibility" as a euphemism for unchecked executive power. Some have argued that Congress' power to declare war retains real meaning in the modern context. While the form in which the power is exercised may change, nevertheless the constitutional imperative remains: If the Nation is to be taken into war or to embark on actions which run serious risk of war, the critical decisions must be made only by the Congress.

58 Fornal declarations of war are often deliberately avoided because they tend to indicate both at home and abroad a commitment to total victory and may impede settlement possibilities. The issuance of a formal declaration also has certain legal results: treaties are suspended, trade relations are altered, national wealth and property of the United States are subject to seizure abroad, and the legal relations between belligerents are altered. See Eaton, The Form and Function of the Declaration of War, 20 Am. J. Int'l L. 29-30, 22-23 (1926). On the other hand, Professor Moore argues that "Probably the most compelling reason for not using a formal declaration... is that there is no reason to state it. As the most compelling reason for not using a formal declaration... is that there is no reason to state it... The most compelling reason for not using a formal declaration... is that there is no reason to state it..." Moore, The National Executive and the Use of the Armed Forces Abroad, 31 Nav. War Coll. Rev. 25, at 38 (1969). See generally, John Maurice, Hostilities Without Declaration of War (1881).
after the most searching examination and on the basis of a national consensus and they must be truly representative of the will of the people. For this reason, we must ensure that such decisions reflect the effective exercise by the Congress and the President of their respective constitutional responsibilities.

V. Conclusion

What needs to be done to insure that the constitutional framework of shared responsibility for the exercise of the war powers works in the Nation's best interests?

First, we are prepared to explore with you ways of helping Congress reinforce its own information capability on issues involving war and peace. For example, I would be prepared to instruct each of our geographic assistant secretaries to provide your committee on a regular basis with a full briefing on developments in its respective area, if you believed this would be helpful. Regular and continuing briefings would enable the committee to keep abreast of developing crisis situations. This would be in addition to the numerous official and informal contacts which regularly take place between members of the two branches.

Second, there needs to be effective consultation between Congress and the President, and we have tried to follow this policy. It is not only Congress that is weakened by a lack of consultation. Our Nation's foreign policy is itself weakened when it does not reflect continuing interaction and consultation between the two branches.

Third, the Congress must effectively exercise the powers which it has under the Constitution in the war powers area. In its 1969 report on the national commitments resolution, your committee recognized that "no constitutional amendment or legislative enactment is required" for Congress to assert its constitutional authority. "If Congress makes clear that it intends to exercise these powers," the Report states in referring to Congress war powers, "it is most unlikely that the Executive will fail to respect that intention." I agree with that conclusion.

Fourth, there is the need to act speedily, and sometimes without prior publicity, in crisis situations. We should try to find better institutional methods to keep these requirements from becoming an obstacle to Congress exercising its full and proper role. Suggestions have come from a number of quarters for the establishment of a joint congressional committee which could act as a consultative body with the President in times of emergencies. If, after study, you believe this idea has merit, we would be prepared to discuss it with the committee and determine how best we could cooperate.

Fifth, there is, in my view, the clear need to preserve the President's ability to act in emergencies in accordance with his constitutional responsibilities. This ability to act in emergencies, by its very nature, cannot be defined precisely in advance. Let me emphasize that I am not suggesting a Presidential carte blanche. As I indicated at the beginning of my statement, I believe the framers of the Constitution intended decisions regarding the initiation of hostilities to be made jointly by the Congress and the President, except in emergency situations. I believe that constitutional design remains valid today.

In conclusion, I would like to refer to the suggestion which the distinguished Senator from Mississippi, Senator Stennis, made last Tuesday that the war powers question requires thorough consideration and full study. He said, "I think this matter should be pending for a year or more. It must be understood in every facet and the people must understand fully the question that is involved." I believe that is wise advice. This is a basic question affecting our constitutional structure and the security of our Nation. It is most important that such a matter be considered deliberately and calmly, in an atmosphere free from the emotion and the passions that have been generated by the Vietnam conflict.

We in the executive branch are prepared to continue the discussion of the war powers question with you. Our sole objective is to insure that the Nation's interests are best served in this vital area.

My own view is that the constitutional framework of shared war powers is wise and serves the interests of the Nation well in the modern world. The recognition of the necessity for cooperation between the President and Congress in this area and for the participation of both in decisionmaking could not be clearer than it is today. What is required is the judicious and constructive exercise by each branch of its constitutional powers rather than seeking to draw arbitrary lines between them.

Footnotes:
1 Doc. on the War Power 1970, supra at 82.
STATEMENT BY LEON FRIEDMAN, SPECIAL COUNSEL, AMERICAN CIVIL LIBERTIES UNION

On behalf of the American Civil Liberties Union, I appreciate the opportunity to communicate our views to the members of this subcommittee on the pending bills and resolutions relating to the powers of the Congress and the President to commit the Armed Forces of the United States to hostilities.

The American Civil Liberties Union believes that the circumstances surrounding the decision to begin and to continue American participation in the war in Vietnam document clearly the need for congressional reassertion of its traditional powers and responsibilities in this area. Most of the resolutions pending before this committee have the beneficial effect of requiring explicit congressional approval before the President may start and continue hostilities. All recognize the need for congressional control of the President's war power.

The American citizens abroad. Of the proposals before this committee, the ACLU has concluded that House Joint Resolution 431 affords the best protection against unilateral exercise of the war power by the President. We, therefore, urge that it be reported favorably by this committee.

Our reasons for preferring House Joint Resolution 431 are as follows:

1. It makes clear that existing treaties do not by their own authority permit the President to initiate hostilities in defense of treaty signatories.

The SEATO treaty has often been cited as the authority for our involvement in Vietnam, but by its own terms it requires that a treaty member must act "in accordance with its constitutional processes." This language is contained in most of our existing defense treaties. It can only mean that the Congress must explicitly authorize military action before hostilities can legally commence.

2. It also makes clear that appropriations acts are not to be considered an exercise of the war power. Specific, separate authorizing language is necessary. We think this is an important point since the courts have interpreted defense spending bills as authorizing military action.

3. It also defines "hostilities" very specifically to include the deployment of American troops only under circumstances where an imminent involvement in combat activities with other armed forces is of a reasonable possibility. Some such definition is desirable since otherwise the President may deploy troops or send military advisers abroad to places where they are sure to be fired upon. At that point the President should not be permitted to start a full-scale war on the claim that he is defending American troops in the field.

4. House Joint Resolution 431 contains very specific limiting language on what constitutes "defensive action." In this day when both sides call the other an aggressor, it is desirable to try to define what is or is not "defense.

5. It also limits the President's ability to use military force to defend American property abroad.

Inadequacies of House Joint Resolution 1

The reasons set forth above which have caused us to endorse House Joint Resolution 431 have also led us reluctantly to the conclusion that House Joint Resolution 1, sponsored by the chairman of this subcommittee, which requires only that the President report to the Congress on the military steps he has taken, is an inadequate check on presidential usurpation of the war power. For that reason we do not think that House Joint Resolution 1 meets the constitutional problem which urgently demands resolution.

Both President Johnson and President Nixon have insisted that they sought appropriate consultation with the Congress during the Vietnam hostilities. Furthermore, both Presidents have cited the constitutional, legislative, and treaty provisions which they claimed granted them authority for what they did. President Johnson cited the SEATO treaty as support for his actions and President Nixon cited the SEATO treaty as support for his actions. In short, if House Joint Resolution 1 had been in force in 1964, the President could have taken the same actions as were taken over the past 7 years with no thought of seeking further authority from Congress.
But the Vietnam war has shown that the President has assumed too much military power and has gone far beyond the constitutional limits established in 1787 and followed into the 1930's. The way for Congress to redress the balance is to require that Congress act before the President's authority to commit troops is complete.

We must emphasize again that House Joint Resolution 431 and other resolutions before this subcommittee recognize the right of the President to meet emergency situations. But the danger revealed by Vietnam which must be faced is the possibility that the President will commit this Nation to sustained hostilities in a nonemergency situation without explicit authorization from Congress. Any resolution that does not meet that problem is inadequate.

Summary of supporting reasons

In support of our endorsement of House Joint Resolution 431, we would like to cover three areas:

First, we would like to comment on the civil liberties aspect of this problem, an area which we believe has thus far been overlooked. There can be no doubt that, in time of war, great restrictions are placed upon the freedoms of the people and their exercise of first amendment rights. Under those circumstances the decision to go to war must be made by as broad a consensus as possible. It should not be left to the President alone.

Secondly, we will briefly discuss the constitutional restrictions on executive exercise of the war power. It is our position that not only do the constitutional texts and the debates make clear that the President cannot wage war on his own authority, but that our entire military history supports the notion that Congress must be the body to decide whether we begin a war—a position recognized by Congress, the President and courts alike since the beginning of our history.

Thirdly, we would like to bring to the attention of the subcommittee recent judicial decisions in cases initiated by the American Civil Liberties Union which, we believe, give some urgency to the need for legislation to define the way the Congress will exercise its military powers under the Constitution. A Federal Court of Appeals in New York has within the past few weeks held that any congressional support or recognition of a presidentially-initiated war, whether through appropriations or extension of the draft law, amounted to an exercise of the war power. Orlando v. Laird, Nos. 477 and 478 (Apr. 20, 1971). This decision makes absolutely necessary a more precise delineation of responsibility between the President and Congress with respect to the war powers. We have attached a copy of the Orlando decision as appendix A to this statement.

A. Civil liberties problems

The importance of prior congressional authorization of any military activity is not an abstract constitutional problem. The smallest military adventure may lead to an unforeseen confrontation between the superpowers. An unanticipated excursion into enemy territory by an erring plane, an overeager response by a radar station and atomic missiles may be launched. Even if the danger of an atomic holocaust could be kept to a minimum any major military action by the government immediately produces severe curtailments of civil liberties. Men must be drafted for the Army. Any criticism of the administration for its war policy may be punished by the government as giving aid and comfort to the enemy. A spirit of national fear and hysteria may bring about even more restrictive personal rights.

In the face of this erosion of personal rights in time of war, the decision to go to war must be made by as broad a consensus as possible. It is unthinkable that the President alone can start the Nation on this deadly and dangerous path without the consent of Congress. Their approval expressed through Congress, is absolutely necessary before war can begin.

We have only to look at the wars in this century to see how war affects personal rights. During World War I many groups in this country opposed our participation in the war and the conscription of the Nation's youth to fight in Europe. Innocent meetings called to protest the draft law were broken up by police and vigilante groups, the participants beaten, arrested and often sentenced to long jail terms. Socialist literature suggesting the illegality of conscription was seized by the police and denied mailing privileges by the Post Office Department. Statements of opposition to the war led to indictment under the Espionage Act as encouragement to draft evaders.
During World War II there was also a breakdown in the protection of personal rights guaranteed by the Constitution. More than 100,000 American citizens of Japanese extraction were moved from their homes on the west coast and sent to detention centers for the course of the war. Merely because of their racial background, these citizens were forced to live in concentration camps for years. These actions resulted from wartime hysteria and the unthinking fears and hatreds produced by the pressures of World War II.

In addition, the Army took over the administration of Hawaii, declared martial law, and ruled it as if it were a military base for most of the war. The civil courts were closed and Army court-martials tried civilians for any and all criminal offenses. The Supreme Court did not declare this procedure unconstitutional until the war was over (Duncan v. Kahanamoku, 327 U.S. 304 (1946)).

The Korean war exacerbated the great civil liberties crisis of McCarthyism. Unsubstantiated charges of communist-affiliation led to loss of government jobs for hundreds of professional men and women who had spent years in their positions. For the same reason, teachers were fired from their posts. Writers, scientists, and artists found themselves on employer blacklists so that they could not be gainfully employed. Military personnel were given less than honorable discharges from the Army because of alleged communist activities by their parents or relatives. Numerous restrictions on personal rights were enacted into law in the McCarran Act, the Subversive Activities Control Act and many others.

The Vietnam war has also led to a serious curtailment of the people's civil liberties. The military involvement of this country in a war opposed by a large part of our society has had a highly detrimental effect on the enjoyment of these personal rights.

The present draft system, with its severe deprivation of personal liberty and its administrative inequities, still continues. The right of nonobstructive dissent by service personnel and civilians who oppose the war has been curtailed, often by harsh measures. Because of their antwar activities a group of East Coast intellectuals including Dr. Benjamin Spock, were indicted for conspiring to counsel young men to refuse service in the Army—a sad throwback to the World War I when any kind of criticism under the Espionage Act. Dissident groups in this society who vigorously fight against the war and other social evils find themselves indicted for conspiracy to cross State lines to incite a riot or are subpoenaed to appear before Federal grand juries to tell of their involvement in antwar activities. The threat of criminal prosecution hangs over the heads of young men and women for various forms of peaceful expression and symbolic speech, such as flag offenses and draft card burning. Freedom of the press has been undermined by subtle and not so subtle threats by high government officials who do not like the growing antwar criticism in the newspapers and television networks. Wiretaps, electronic surveillance, and police spies, techniques employed widely to gather information on antwar activists, all intrude upon the people's right to privacy.

Many of these actions have been taken to blunt the impact of the antwar movement, as the Government attempts to create an illusion of national unity while it wages an unwanted war in Vietnam. Worse still the basic values of this society are torn apart and the legitimacy of its institutions seriously questioned because the war continues over the opposition of growing numbers of Americans.

As Senator Sam Ervin said on the floor of Congress:

"The consequences of this failure to observe the Constitution are all too evident. True no Supreme Court decision has adjudged the war in Vietnam as unconstitutional on the grounds that Congress adopted no formal declaration of war and because the Senate gave no effective advice and consent. Instead, the declaration of unconstitutionality has come from the judgment of the people. We see the decree everywhere. For the first time in our memory an incumbent President was forced from office. Young men whose fathers and brothers volunteered to serve their country now desert to Canada and Scandinavia rather than bear arms in the country's cause. Thousands march on Washington and picket the White House, the Capitol, and the Pentagon. Now we have riots and violence in our university campuses. ROTC programs are being forced out of schools, and there is dissension and antwar activity even among those in uniform.

"Perhaps not all the anarchy we see today has been caused by the Vietnamese war and the way in which we became involved. No one can say. But no one can say that the war was not the cause, or at least the catalyst. And I cannot shake the feeling that ultimately the reason so many are now disrespectful and unresponsive to authority is because authority was disrespectful and unresponsive to the Constitution in the making of our policy in Vietnam." (115 Cong. Rec. 17217 (June 25, 1969).)
The best way to mitigate against the problems outlined by Senator Ervin is to make sure that the people's approval of war is secured through their Representatives in Congress, to ensure that a national consensus exists to launch any military action.

B. Constitutional limitations on presidential war power

We think it important to note at the outset of this part of our statement that the limitations on the presidential war-making power outlined in the bills and resolutions before this committee are already contained in the Constitution. Nevertheless, we believe it highly desirable to articulate them more fully by legislation.

Professors Commager, Kelly, and Mason have already testified about the historical purpose of the war powers clause and why the power was universally considered legislative in nature. The debates at the Constitutional Convention leave little doubt that the President was to be allowed to start war on his own. Over 100 years ago, Justice Joseph Story, the great Supreme Court justice and legal scholar, made the following comments about the war power in his "Commentaries on the Constitution":

"* * * the power of declaring war is only the highest sovereign prerogative, but that it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the Nation. * * * The representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted as to its time, and the ways and means of making it effective. The cooperation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation, as it is in all others" (sec. 1171 (5th edition, 1891), p. 92).

The meaning of the war power clause, and its specific application to concrete situations, has been faced numerous times in our history. It has become recognized that the Executive has the power to initiate certain limited forms of military activities, along with the more general power to repel direct attacks on the United States. Included in the limited emergency instances are numerous cases where the President used military force to protect American citizens or property located in foreign countries, or to commit reprisals against politically unorganized bandits or pirates.

Beyond these very limited powers, it has been recognized, declared and accepted by President, Congress, and Court alike that the Executive has no power to initiate or prosecute hostilities without having been first authorized to do so by Congress. Set out in Appendix B to this testimony are the statements of Presidents Jefferson, Madison, Jackson, Polk, Buchanan, Lincoln, Grant, Arthur, Taft, Roosevelt, and Eisenhower, all of which confirm the recent National Commitments Report of this committee to the effect that--

"* * * the founders of our country intended decisions to initiate either general or limited hostilities against foreign countries to be made by the Congress, not by the Executive. Far from altering the intent of the framers, as is sometimes alleged, the practice of American Presidents for over a century after independence showed scrupulous respect for the authority of the Congress except in a few instances. The only uses of military power that can be said to have legitimately accrued to the Executive in the course of the Nation's history have been for certain specific purposes such as suppressing piracy and the slave trade, 'not pursuit' of fugitives, and, as we have noted, response to sudden attack. Only in the present century have Presidents used the Armed Forces of the United States against foreign governments entirely on their own authority, and only since 1930 have Presidents regarded themselves as having authority to commit the Armed Forces to full-scale and sustained warfare "(S.R. 91-129 to accompany S. Res. 85, 91st Cong. 1st sess., Apr. 16, 1969, p. 31).

The power of Congress to declare war has also followed the pattern described above. As it has evolved, the power has not been restricted to an inflexible and mechanical requirement that the talismanic words "We declare war" be uttered but rather a flexible instrument to be used by Congress to give precise authorization to the President to take action as the purpose and scope of military hostilities to be conducted by the President.

Congress has declared war five times: to begin the War of 1812 (2 Stat. 750), the Mexican War of 1846 (9 Stat. 9), the Spanish American War of 1898 (30 Stat. 738), World War I (40 Stat. 1) and World War II (53 Stat. 777). It also gave the President unlimited powers to meet the emergencies of the Civil War (12 Stat. 326).

In numerous other cases Congress has authorized the Executive to involve the Nation in military hostilities of a secondary nature, involving a less than maximum commitment of the Nation's military resources. Even in these secondary military
commitments, falling far below the level of commitment reached in the Vietnamese conflict, explicit congressional approval was sought and forthcoming.

For example, the naval war with France, waged from 1798-1801, was authorized by explicit congressional resolution, 1 Stat. 561; 1 Stat. 572, extended 2 Stat. 39 (Apr. 22, 1800); 1 Stat. 574; 1 Stat. 578; 1 Stat. 743; see discussion in Ex parte Tingen, 4 Dall. 37 (1800); Talbot v. Seaman, 1 Cranch 1 (1801). The naval war against Tripoli (1802) was authorized by explicit congressional resolution, 2 Stat. 129. The naval war against Algiers (1815) was authorized by explicit congressional resolution. 3 Stat. 230 (Mar. 3, 1815).

In 1839 Congress specifically authorized the President "to resist any attempt on the part of Great Britain to enforce, by arms, her claim to exclusive jurisdiction over that part of Maine, which is in dispute ** and for that purpose to employ the naval and military force of the United States, 5 Stat. 565. By joint resolution of June 2, 1858, President James Buchanan was authorized by Congress to use such force as 'may be necessary and advisable' to settle differences with Paraguay, 11 Stat. 370. The President was also empowered to initiate hostilities against Venezuela in 1890 after three American steamships had been seized, 26 Stat. 674. Following the capture of eight American sailors by the Mexican Army in 1914, Congress permitted President Wilson to employ the "armed forces to enforce his demands for unequivocal amends for affronts and indignities committed against the United States," 38 Stat. 770.

All of these declarations, laws, and resolutions show Congress, acting under its constitutional powers, working swiftly in collaboration with the Executive to meet threats or difficulties abroad. None of the supposed problems concerning legislative cooperation with the Executive occurred--there were no endless deliberations or weakening vacillations or compromises, nor were there two governmental voices speaking to the world on behalf of the United States. The constitutional collaboration planned by the framers worked as they foresaw.

C. Recent judicial decisions on the war power

This view of the scope of the Executive's war power is confirmed by a series of recent decisions on the Vietnam war. The Second Circuit Court of Appeals wrote in Berk v. Laird, 429 F. 2d 302, 305 (2d Cir. 1970):

"If the executive branch engaged the Nation in prolonged foreign military activities without any significant congressional authorization, a court might be able to determine that this extreme step violated a discoverable standard calling for some mutual participation by Congress in accordance with article I, section 8.


"Neither the language of the Constitution nor the debates of the time leave any doubt that the power to declare and wage war was pointedly denied to the Presidency. In no real sense was there even an exception for emergency action in the Presidency. And certainly not for a self-defined emergency power in the Presidency. The debates, so often strangely—to our ears—devoid of respect for and alive with fears of the Presidency that the convention was forming, are clear in the view that (as Wilson put it) the power to make war and peace are legislative."

However, despite the clear authority for the proposition that Congress must have exercised its war powers in Vietnam and has thus authorized the war, by the Gulf of Tonkin resolution, by the military appropriations bills passed for Vietnam, and by extension of the draft law: The Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning, and in the broad language which clearly showed the state of mind of the Congress and its intention fully to implement and support the military and naval actions taken by and planned to be taken by the President at that time in Southeast Asia, and has as might be required in the future to prevent further aggression, Congress has ratified the Executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia and by extending the Military Selective Service Act with full knowledge that persons conscripted under that act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conformed to the substantial induction calls necessitated by the current Vietnam buildup."
The court concluded: "There is, therefore, no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war. Both branches collaborated in the endeavor, and neither could long maintain such a war without the concurrence and cooperation of the other. The framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia."

In short, the court has said that instead of a declaration of war or an explicit authorizing resolution, the mere fact that there is "continuing mutual participation in the prosecution of the war" by Congress and the President is sufficient to satisfy the Constitution.

We think that this decision is wrong and it will be appealed to the U.S. Supreme Court. It is wrong because the court of appeals totally ignored the repeal of the Gulf of Tonkin resolution and because the court misconstrued the legal effect and legislative history of the military appropriations bills which were never meant to ratify what the President was doing in Vietnam. However, until the Supreme Court reverses, the Orlando decision appears to be the most authoritative decision on this problem.

What the decision means as a practical matter is that Congress cannot wash its hands of its responsibilities under the war power clauses of the Constitution. It cannot say, this is a matter for the Executive to decide. As soon as any hostilities have begun by the President, there will come a time when congressional participation will become necessary. Most obviously this will happen when funds are requested for the Defense Department, when a conscription act is passed, or when a provision is made for veterans' rights or when foreign aid of the ally we are helping is provided by Congress. Once Congress gets into the picture, by taking any steps in furtherance of the presidentially initiated war, or in recognition of it, the logic of the Orlando case would indicate that those steps are an exercise of the war power and that the war thereby becomes legal. In other words Congress cannot sit idly by when a war begins. Its responsibility is thrust upon it by the Constitution and it must assert its power explicitly or it will find that it has exercised that power without ever making a conscious choice to do so.

The Orlando case would require that Congress must stop a war once the President has initiated it. But whatever the powers of Congress might be, the framers did not intend that Congress would have to take the positive step of exercising them in order to stop a Presidential war. They explicitly committed the initial war power to Congress, requiring the concurrence of a majority of legislators in both Houses before war could begin. Any rule which undermines that power or subjects it to extraneous pressures, whether practical or political, runs directly counter to the wishes of the Constitution's framers.

The best way of stopping a war is to deny funds for the Military Establishment. But is this a realistic alternative? How many Congressmen or Senators can vote to deprive American soldiers in the field of the necessary guns and supplies that our boys in the field may become irresistible after the war has been raging for some period of time. Imposing such a burden on the legislature would in effect facilitate the commencement of a Presidential war, directly contrary to the expressed wishes of the founders.

Indeed, imposing such a requirement on Congress makes it far easier for the President to initiate a large war rather than a small one. The greater the step taken by the President, the more troops he commits to combat, the stronger is the pressure on Congress to vote for their continued force. The legislature might be willing to cut off funds for a small expeditionary force, knowing that the President can easily extricate them. But it would find it impossible to do so when hundreds of thousands of troops are committed to battle.

In addition, the President may insist that any restriction on funds hampers his negotiating capacity and that he should be given a free hand to terminate the war in accordance with military requirements. Obviously the Congress would be reluctant to intervene in the face of such assertions.

In short, once a war is begun by the President, the need to protect the men in the field combined with the judicial reasoning shown in the Orlando case effectively denies the Congress any power to restrict the warmaking ability of the President until the war winds down of its own accord.

Conclusion

All of the above points to the inescapable conclusion that House Joint Resolution 431, or one of the other pending bills or resolutions, is of crucial constitutional
importance. They require that Congress' participation must be established initially through an express authorization, rather than being inferred by ambiguous appropriations bills passed after the war has begun. Without clear, explicit legislation, a Presidential-initiated war will be illegal. They thus would make express what we believe is constitutionally required—that the Congress ratify any Presidential proposal to go to war at the outset.

The Vietnam adventure has taught us that the dangers of war are too serious to be left to the President and his immediate staff. There are reasons why the framers of the Constitution insisted that the broadest consensus must be established before we go to war. We have tried to show that those reasons are still with us. The most horrible result of the Vietnam war may not be the terrible toll in lives and the devastation and destruction in that country. It would be even more horrible if we do not now take corrective action to insure that it will not occur again. We urge this committee to take the steps necessary to prevent that from happening.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Nos. 477 and 478—September Term, 1970
(Argued March 3, 1971 Decided April 20, 1971)
Docket Nos. 35270 and 35535

SALVATORE ORLANDO, Plaintiff-Appellant,
v.
MELVIN LAIRD, individually and as Secretary of Defense of the United States; and STANLEY R. RESEN, individually and as Secretary of the Army of the United States, Defendants-Appellees.

MELVIN LAIRD, individually and as Secretary of Defense of the United States, STANLEY R. RESEN, individually, and as Secretary of the Army of the United States, and COL. T. E. SPENCER, individually, and as Chief of Staff, United States Army Engineers Center, Fort Belvoir, Defendants-Appellees.

MALCOLM A. BERR, Plaintiff-Appellant,
v.
MELVIN LAIRD, individually, and as Secretary of Defense of the United States, STANLEY R. RESEN, individually, and as Secretary of the Army of the United States, Before:
LOMBARD, Chief Judge
KAUFMAN AND ANDERSON, Circuit Judges

Appeal by plaintiff Berk from summary judgment in favor of the defendants and dismissal of his action in the United States District Court for the Eastern District of New York, Orrin G. Judd, Judge, and appeal by plaintiff Orlando from denial of his petition for a preliminary injunction in the United States District Court for the Eastern District of New York, John P. Dooling, Jr., Judge, in actions in which both plaintiffs challenged the constitutional sufficiency of the authority of the executive branch to wage war in Vietnam. Affirmed.