WAR POWERS

HEARINGS
BEFORE THE
SUBCOMMITTEE ON NATIONAL SECURITY
POLICY AND SCIENTIFIC DEVELOPMENTS
OF THE
COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS
FIRST SESSION

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FOREWORD

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

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

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

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

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

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

Clement J. Zablocki,
Chairman, Subcommittee on National Security Policy and Scientific Developments.
CONTENTS

LIST OF WITNESSES

Wednesday, March 7, 1973:
Javits, Hon. Jacob K., a U.S. Senator from the State of New York... 1
Eagleton, Hon. Thomas F., a U.S. Senator from the State of Missouri... 29
Fasell, Hon. Dante B., a Representative in Congress from the State of Florida... 77
Bingham, Hon. Jonathan, a Representative in Congress from the State of New York... 80
Chappell, Hon. William, Jr., a Representative in Congress from the State of Florida... 84

Thursday, March 8, 1973:
Bingham, Hon. Jonathan B., a Representative in Congress from the State of New York... 87
Matsunaga, Hon. Spark, a Representative in Congress from the State of Hawaii... 97
Leggett, Hon. Robert L., a Representative in Congress from the State of California... 107
Dennis, Hon. David W., a Representative in Congress from the State of Indiana... 112
Harrington, Hon. Michael, a Representative in Congress from the State of Massachusetts... 123

Tuesday, March 13, 1973:
Brower, Charles, acting legal adviser, Department of State... 127

Wednesday, March 14, 1973:
Schlesinger, Arthur, Jr., Albert Schweitzer Professor of Humanities, City University of New York... 163
Bickel, Alexander, professor of law, Yale University... 173

Thursday, March 15, 1973:
Berger, Raoul, professor of law, Harvard University... 209
Revelle, W. Taylor, III, joint fellow of the Council on Foreign Relations, and the Woodrow Wilson International Center for Scholars... 224

Tuesday, March 20, 1973:
Stevenson, Hon. John, former legal adviser, Department of State, member of New York Bar... 265

MATERIAL SUBMITTED FOR THE RECORD

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

STATEMENTS SUBMITTED FOR THE RECORD
BY MEMBERS OF CONGRESS

Page

Abzug, Hon. Bella S., of New York .................................................. 285
Danielson, Hon. George E., of California ........................................ 288
Dellenback, Hon. John, of Oregon ..................................................... 291
Dickinson, Hon. Wm. L., of Alabama ............................................... 293
Fuqua, Hon. Don, of Florida ............................................................. 284
Goldwater, Hon. Barry, of Arizona .................................................. 296
Horton, Hon. Frank, of New York .................................................... 277
Mazzoli, Hon. Romano L., of Kentucky .......................................... 380
Quie, Hon. Albert H., of Minnesota ................................................. 382
Railstock, Hon. Tom, of Illinois ...................................................... 386
Terry, Hon. Robert O., of Rhode Island ........................................... 388
Ullman, Hon. A1, of Oregon ............................................................. 391
Wilson, Hon. Charles H., of California ............................................ 392

APPENDIX

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

WEDNESDAY, MARCH 7, 1973

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

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

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

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

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

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

SENATOR JAVITS FIRST WITNESS

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

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

It is a pleasure to welcome you before the subcommittee.

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

Senator Javits. Thank you, Mr. Chairman. I greatly appreciate your remarks. Congressman Findley said I was coming home, which is quite correct; I was a member of this committee when I was in the House of Representatives.
I appreciate the honor paid to me by calling on me to be the first witness in these hearings.

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

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

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

**STRENGTH AND VIGOR OF PRESIDENCY**

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

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

The powers of Congress are enumerated in some detail in article I of the Constitution. Under the Constitution the Senate is given a special position in foreign affairs, while the House is given precedence in appropriations. The war powers, spelled out so purposefully in section 8 of article I, are given jointly to the House and the Senate. Those three powers—foreign affairs, appropriations and war powers—tend to converge and mingle inextricably in the exercise of our Nation’s contemporary role as a world superpower. Unfortunately, during the Vietnam period this convergence of foreign affairs, appropriations, and war powers saw the House and the Senate divided on policy, leaving the President an opportunity to neutralize Congress as an institution and to consolidate effective authority within his own office. The House and the Senate never did get together on Vietnam, with the result that Congress failed to play a commensurate role in the painful and protracted disengagement from that ill-starred misadventure.
The conclusion of the Vietnam peace agreement removes the principal issue of policy difference between the Senate and the House, and thereby ought to facilitate the process of joint congressional action on the underlying constitutional challenge which confronts the House and the Senate together.

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

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

OBJECTIVES OF LEGISLATION

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

I find that the provisions of the Senate bill are entirely consistent with the principles stated by this committee in that report. For instance, (a) Reaffirmation of Congress' power to declare war (which stated as a declarative sentence in the House bill) in section 5 of the Senate bill is given concrete and explicitly legislative expression; (b) emergency authority of the President (also expressed as a declarative sentence in the House bill) is delineated legislatively in section 3 of the Senate bill; and (c) prior consultation with the Congress before involv-
ing the Armed Forces in hostilities (which in the House bill of last year expressed the "sense of Congress") is given specific legislative expression in section 3(4) of the Senate bill.

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

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

CORE OF WAR POWERS ACT

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

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

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

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

PROVISIONS OF SECTION 5

Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the President in this age of instan-
taneous communications and of intercontinental ballistic missiles with
the urgent necessity for Congress to exercise its constitutional mandate
and duty with respect to the great questions of war and peace.

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

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

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

CONGRESS MUST IMPOSE POLICYMAKING POWERS

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

If James Madison had pressed his point on September 7, 1787,
during the debate in the Constitutional Convention, we might not be
faced with our current agonizing dilemma. Madison proposed then
that two-thirds of the Senate be authorized to make treaties of peace
without the concurrence of the President. "The President," he said,
"would necessarily derive so much power and importance from a state
of war that he might be tempted, if authorized, to impede a treaty of
peace."

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

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

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

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

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

**PRESIDENT DEFINES COMMANDER IN CHIEF ROLE**

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

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

**OBSERVATIONS ON HOUSE JOINT RESOLUTION 2**

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

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

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

CONGRESS ON TRIAL

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

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

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

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

The constitutional basis of the War Powers Act (S. 440) is the Congress' powers enumerated in article I, section 8, to deal with the organization of the Armed Forces, the establishment of the Armed Forces, the ruling of the Armed Forces, and so on, and the power generally to legislate.
CONGRESS HAS POWER TO PUT US INTO WAR

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

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

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

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

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

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

CANNOT CUT MONEY TO TROOPS IN FIELD

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

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

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

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

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

The other point is the claims, the almost wild claims made for the power of the Presidency, which shows how far this pendulum has swung. I would like to refer to two instances.
One such instance occurred when Nicholas Katzenbach, who, as you know, spoke for President Johnson, said about the Gulf of Tonkin resolution:

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

And even President Johnson said:

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

DEAN ACHESON ON POWERS OF THE PRESIDENCY

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

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

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

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

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

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

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

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

IMPROVEMENTS IN HOUSE JOINT RESOLUTION 2

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

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

Now, I see the following movement—and I think it is real movement—in respect to the House bill this year. One, and very importantly, the House bill now specifies the areas in which the President shall have authority.
This is important to the Presidency, and perhaps the President does not as yet realize it because he is opposed to these measures, but they confirm him in an authority, which could be challenged, to respond not just to sudden attacks, but to other situations such as the imperiling of American citizens or situations in which we have given him statutory authority, as for example, in the three resolutions we have on the books, the Cuba, Formosa, and the Middle East resolutions.

The second point at which I see real movement in the House bill this year is the fact that you call for the Congress to meet and act. Now, the basic difference—and we would beg you to carefully examine your bill in that regard—is that under our bill, the President has to continue his actions. If he does not have it after 30 days unless he persuades us. Under your bill, you have to persuade him, because if you pass legislation saying you do not want our troops in hostilities, he has to sign that legislation to make it law, and if he vetoes it, we can only make it law with a two-thirds vote. Thus, the President could make war with the support of only one-third of either House.

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

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

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

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

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

NO ONE MAN KNOWS THE NATIONAL INTEREST

Nor, Mr. Chairman, can we assume that one man alone knows the national interest. The national interest is the embodiment of the thinking of the Congress and the President, and, if it is necessary to go to war in that national interest, declared or undeclared, only a joiner of the two assures the Nation that that decision will be provident.
I hope, Mr. Chairman, that this time the House will pass a bill and that we will find an identity of interest in the conference and be able to present the President and the Nation with a finished product.

Thank you, Mr. Chairman.

Mr. ZABLOCKI. Thank you, Senator.

Of course, as you stated, we are deeply interested in accomplishing something in this area. The House acted in the last two Congresses. Indeed, we had three votes, Senator. In 1970 in the 91st Congress, the war powers resolution passed by a vote of 288 to 39.

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

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

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

PRESIDENT CAN VETO ANY LEGISLATION

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

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

Would you care to address yourself to that?

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

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

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

STRUGGLE BETWEEN CONGRESS AND PRESIDENT

He is not going to be suited. This is a struggle, between the Congress and the President. This President—whom I helped to elect, and I am
not a bit bashful about it nor do I feel sorry about it at all because he was the best man for the job under all the circumstances which we faced in the last election in my judgment—but nevertheless, his concept of the Presidency is different from mine, and, I think, from a majority of the Congress.

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

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

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

WE HAVE TO HAVE THE CHARACTER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ASSERTING CONGRESSIONAL CONSTITUTIONAL AUTHORITY

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT FOR GULF OF TONKIN

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

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

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

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

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

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

**AUTOMATICITY IN THE NATO TREATY**

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

Mr. Findley, I am impressed with your argument on that point. Another question raised about the 30-day provision is that it might be an invitation to adventurism on the part of some future President. He might read this language as an invitation to act a little bit more adventurously than he would otherwise. What is your comment on that point?

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

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

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

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

**REPORTING REQUIREMENT IMPACT ON VIETNAM**

Had the reporting requirement been on the statute books in 1962 when President Kennedy sent 18,000 troops equipped for combat to Vietnam but identified them as military advisers—under this reporting requirement set forth in the House version, he would have had to give not only the justification for sending the forces but he would also have had to spell out the legal foundation for that action, and he would have been hard put to find anything in treaty provisions, in the Constitution or in the statutes to justify sending 18,000 troops equipped for combat to Vietnam.
This might at that point of decision have caused him to reconsider and not to send them at all. I view this as an important part of the bill, and I would appreciate any comment you would have.

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

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

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

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

Mr. Bingham.

PRESIDENT'S POWERS TO MAKE WAR ON HIS OWN

Mr. Bingham. Thank you very much.

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

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

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

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

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

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

Senator Javits. No. My initial reaction is that if I were President I would not define that as committing us to hostilities or imminent danger of hostilities. What it might have committed us to was having Americans in the area who could become involved with the imminent threat of hostilities and we might have to come to their rescue. However, my mind is not closed on this evaluation. Perhaps the best bench-
mark would be the days President Kennedy ordered U.S. advisers to accompany the ARVN units on combat patrols, with orders to shoot back if attacked.

WHEN DO HOSTILITIES BEGIN?

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

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

Mr. BINGHAM. That preceded.

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

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

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

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

REQUIREMENT OF AFFIRMATIVE ACTION?

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

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

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

That can take place any time—the first week—or it can take place a year later. The 30-day deadline means that the Congress must make up its mind. It may be at a time of enthusiasm; the country may not realize the implications of a particular struggle. Yet the Congress, once having acted, is committed.
Senator Javits. If you were right in your premise, you would be right in your argument, but I believe you are wrong in your premise because our bill permits the Congress to extend the President's authority to a certain date and under whatever conditions that the Congress may specify.

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

CONTINUING AFFIRMATIVE AUTHORITY OF THE CONGRESS

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

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

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

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

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

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

Mr. Zablocki. Governor Thomson?

PROVIDENT ACT OF CONGRESS

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

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

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

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

VALUE OF POWER IS THAT IT EXISTS AS A RIGHT

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

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

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

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

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

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

OVERCOMING PRESIDENTIAL VETO

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

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

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

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

Mr. Thomson. He could veto that, also?

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

Mr. Thomson. That is really the difference between your proposal and the House version?
Senator JAVITS. I think that is true. I think in the House you let him go forward unless you stop him and in the Senate we say, "You do not have the authority to go forward unless we give it to you."

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

**HOUSE ACTS FIRST ON APPROPRIATIONS**

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

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

Mr. THOMSON. Thank you, Senator.

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

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

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

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

Mr. ZABLOCKI. Mr. Wilson?

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

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

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

**CONDITIONS ON GRANT OF AUTHORITY**

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

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

So, the conditions of the grant could be written by the Congress in its judgment at the time it makes the grant of power.
Mr. du Pont. Thank you, Mr. Chairman. I want to say I am wholly sympathetic with what you are trying to do. I think the time has come to redress the balance, to more clearly delineate the responsibility of the legislative versus executive branch in U.S. foreign policy.

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

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

WHAT CONSTITUTES HOSTILITIES?

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

Mr. du Pont. That specific authorization is within the framework of this bill?

Senator Javits. That is correct.

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

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

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

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

SENDING ADVISERS TO THE MIDDLE EAST

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

Mr. du Pont. I agree with you at the present moment. If those 20,000 people had been sent at the height or on the first day of the 6-day war, your answer would be the other way.
Senator Javits. Yes, that is correct, or they had been sent on the eve of the 6-day war—I think that could have been defined as an imminent threat of hostilities. I think the point of imminent threat probably occurred when Nasser ordered the United Nations out of the Sinai.

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

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

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

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

**PRESIDENT’S LEGAL AUTHORITY CEASES**

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

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

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

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

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

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

**DEFINITION OF “DISENGAGEMENT”**

Mr. du Pont. By disengagement, you mean not disengagement of U.S. forces, you mean disengagement of opposing forces?

Senator Javits. We cannot disengage unless they do, obviously because military necessity would continue so long as the forces of the United States were under attack. If that is strange—like in the
case Congressman Bingham raised about the advisors—I am willing, with the House, to develop other language. But the hypothesis seems too strange. I cannot envisage a Congress not willing to repel an attack.

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

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

Mr. Zablocki. Mr. Fountain?

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

However, I do want to ask one question and preface it with a comment. I think all of us can conceive of situations in which the President could well lay the foundation to engage us in war if he wants to, regardless of what the Congress does. Isn't that a fact?

Senator Jayits. Yes.

CONGRESS ACTING CONCURRENTLY WITH THE PRESIDENT

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

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

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

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

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

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

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

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

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

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

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

MANDATING CLAUSE IN LEGISLATION

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

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

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

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

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

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

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

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

Senator JAVITS. I agree.

Mr. ZABLOCKI. Mr. Biester?

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

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

LONESOME HEROIC DECISIONS

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

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

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

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

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

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

CASE OF PREEXISTING ENGAGEMENT

They had a better case than Lyndon Johnson. They had a case of a preexisting engagement and the necessity of protecting troops while
pulling out, but they certainly strained that justification when we went into Cambodia.

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

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

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

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

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

INHIBITING DIPLOMATIC FLEXIBILITY

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

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

I think, however, it strengthens the hands of the Congress in that we challenge him on that issue which we have no methodology for it. Under the present set up our authority must lie dormant. We have no practice for it. S. 440 would codify the situation. I hope you will bear with me when I repeat this is essentially a codification of practice. It cannot change constitutional authority.

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

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

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

CONGRESSIONAL PRIORITY PROVISION OF S. 440

Mr. Zablocki. I have one further question. Senator, you have been an excellent witness. I am deeply impressed with your references to
improvident decisions. I do have some concern with section 7 in S. 440, the congressional priority provision. It appears that section 7 almost insures precipitous action by the Congress on the question of war making powers.

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

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

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

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

STUBBORN MINORITY RESISTANCE

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

That is all I am trying to say.

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

Mr. du Pont. Do you believe that that language effectively Prevents a filibuster in the Senate?

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

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

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

Would you agree with me this is an important distinction?

Senator Javits. I would give the most careful consideration to that. That involves serious questions of policy, and perhaps Jack Bingham and Congressman du Pont would also like to see some other definition
to catch up with the matter of advisers, and that would be the place to do it because that would spark the rest of our bill.

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

INHIBITION ON PRESIDENT'S DEPLOYMENT POWER

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

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

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

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

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

INVENTING CLAIMS TO AUTHORITY

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

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

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

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

Mr. Findley. If the report goes beyond circumstances of hostility, it would seem to me equally important, if not more important, that the legal foundation for the steps be required in the report, and I cannot think of any reason not to be specific on that requirement. Can you?
Senator Javits. No.

DIFFERENCES WILL BE RESOLVED IN CONFERENCE

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

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

Mr. Zablocki. Senator Eagleton is our next witness.

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

The subcommittee is pleased to welcome you here today.

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

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

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

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

NO ONE ABSOLUTE FORMULA

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

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

But deliberation must be an active process. The time has come for Congress to reassert its role within our system. The public is now keenly aware that it is wrong to wage war without the full consent of Congress and the people. We cannot risk the possibility that memories
will fade before we have corrected the deficiencies that contributed to involving us in the most unpopular war in our history.

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

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

THE CONSTITUTIONAL QUESTION

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

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

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

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

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

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

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

I would like to present today a defense of the bill that was passed in the Senate during the last session of Congress by an overwhelming
68 to 16 majority. This bill, which was jointly authored by Senator Javits, Senator Stennis, and me, represents more than 3 years of concerted effort and careful deliberation. I believe that our bill has great merit, and I hope that this committee will give it close consideration.

**CONSTITUTIONAL RESPONSIBILITIES OF CONGRESS AND THE PRESIDENT**

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

First, Congress alone was given the responsibility to decide on the crucial questions of war and peace. The record is clear that those in attendance at the Constitutional Convention were surprised and dismayed at the suggestion that the President be given power to make decisions which might result in offensive military action. As one delegate commented, he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”

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

> * * * The power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not the cause of declaring war * * *

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

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

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

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

**CODIFIED DELINEATION OF POWERS NEEDED**

During most of our history, the legislative and executive branches were able to operate within the gray area that separates their respective war powers with no clarifying legislation. This was possible
because both sides pursued their obligations by exercising mutual restraint and good faith. This is no longer the case. Congressional apathy and Presidential aggressiveness have eroded the partnership in decisionmaking that the founders had originally intended. Our challenge today is to carefully circumscribe that discretion while still permitting enough flexibility to insure the national security.

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

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

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

**DESCRIPTION OF EMERGENCY PROVISIONS**

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

The first emergency provision allows the Commander in Chief to:

- Repel an armed attack upon the United States, its territories and possessions;
- to take necessary and appropriate retaliatory action in the event of such an attack;
- and to forestall the direct and imminent threat of such an attack.

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

> The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.

The granting of a degree of discretion in forestalling an attack, however, is carefully circumscribed in our bill. For instance, the threat which triggers Presidential action must be “direct and imminent.” The President's judgment is even further subjected to congressional scrutiny by the additional requirement to report to Congress at the
earliest possible time and by the 30-day provision, which I will discuss later.

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

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

HOLDING THE PRESIDENT LEGALLY AND POLITICALLY ACCOUNTABLE

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

The second emergency provision allows the President to:

1. Repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack.

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

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

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

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

The tightly worded language of this provision is designed to emphasize that the President has authority only to rescue endangered American citizens. He may not use the circumstance of their en-
dangered position to pursue a policy objective over and above their safe evacuation. Even before the President can take action under this provision he must ascertain that the government of the country in question is either incapable of protecting Americans or is itself presenting a threat to them.

**Expanding Rescue Operation into Invasion**

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

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

**Other Situations Require Specific Authorization**

Beyond the codification of the President's emergency power, the Senate bill then considers the process by which Congress can delegate further authority to wage war in the more classic—offensive rather than defensive—sense of that word. This authority, according to our bill, can only be given as the result of a specific statutory authorization. But we have gone beyond the simple statement that statutory authorization is required by stating that such authorization cannot be inferred from any other legislative action. Such action must include a specific authorization granted by both Houses of Congress. For this reason, treaties are exempted as legal authority for introducing forces into hostile situations.

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

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

The provisions I have just discussed—which are all under the section of our bill entitled "Emergency Use of the Armed Forces"—are, in my opinion, the most important part of the bill. These provisions represent the up-front delineation of the respective powers of Congress
and the President. I consider such a delineation of powers to be the indispensable foundation for any measure of this type. If these provisions are respected, no further enforcement mechanism would be required.

THE 30-DAY PROVISION

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

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

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

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

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

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

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

MUST IMPOSE THE WILL OF CONGRESS

To impose the will of Congress, therefore, we have chosen to limit the President’s emergency powers in a quantitative manner by requiring congressional approval within 30 days if he wishes to continue his action. If such approval is not forthcoming, then the emergency action must be terminated automatically—the only exception being that the President could certify in writing that “unavoidable military necessity” to protect our forces requires continued action to bring about a “prompt disengagement.”
The burden of proof is, therefore, on the President. He must demonstrate: (1) that the emergency action he has taken is legitimate and in accordance with the provisions of our bill; and (2) that continuation of such action beyond 30 days is warranted.

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

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

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

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

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

**APPLICABILITY OF S. 440 TO INDOCHINA CONFLICT**

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

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

Two weeks ago Senator Javits and I issued a joint statement clarifying the applicability of our bill. We stated that the provisions of S. 440 would apply in full to any reintroduction of forces to Indochina after our current military involvement is terminated.
This interpretative statement was necessary because we had originally excluded the ongoing conflict in Vietnam by stating in our bill that the provisions,
shall not apply to hostilities in which the armed forces of the United States are involved on the effective date of the act.

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

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

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

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

MUST SUBORDINATE PERSONAL VIEWS

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

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

It is clear that Presidential decisions shaped the course of the war in Indochina and that an indifferent Congress provided little or no restraint on executive actions. Some politicians will continue to prefer these unclear guidelines, for scapegoats are often popular in politics and the assumption of responsibility often is not.
The Founding Fathers sought to create a process by which important decisions would be reached only after thorough deliberation. They fully expected that the responsibility for committing the Nation to war would be shared—and that Congress would authorize this important commitment. It is time that we return to the spirit, as well as to the letter, of the system they worked so hard to create.

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

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

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

[The material follows.]

Appendix A

[From the Congressional Record, June 23, 1970]

Mr. Fulbright. Well, later, in a different part of his statement, the Senator from New Hampshire does refer to the fact, which appears a little later on down on the same page, and I will read it:

"Then one by one, we have had all of these amendments. And I do not doubt that they are worthy amendments. Like Brutus, they are all honorable, but I do so wish that the distinguished Senator from Arkansas who undertook to rebuke and to look down his nose at the poor young Senator from Kansas who dared to offer an amendment on the floor of this body that had not been offered and considered by the Committee on Foreign Relations, were here. As a matter of fact, it had been considered by the great, sanctified Committee on Foreign Relations."

Well, if I looked down my nose, I was not aware of it; but, anyway, the Senator from Kansas is a very eloquent orator, and I noticed he got a number of laughs, which is most unusual. If anyone has talent enough to generate a laugh in times like this, he deserves a "chromo," as my mother used to say, and the Senator from Kansas has brought a talent to this body unequaled by anybody.

But, to set the record straight, I was not complaining that this matter had not had a hearing. It had had a hearing. What I was complaining about was that the Senator had chosen to ignore this body's own constituted committee. That is not comparable to the situation of offering an amendment on the floor to an appropriations or any other bill that has not had a hearing by anybody at all. That is quite a different matter. At least that I think should be kept straight.

Mr. President, I understand that the distinguished Senator from Missouri (Mr. Eagleton) had, by prearrangement, an understanding with the Senator from Kansas, to whom he wished to put certain questions. I ask unanimous consent that I may yield to the Senator from Missouri without losing my right to the floor, for that purpose.

The Presiding Officer. Is there objection? The Chair hears none, and it is so ordered.
The Senator from Missouri.

Mr. Eagleton. I thank the distinguished Senator from Arkansas for his courtesy. I would like to propound certain questions to the Senator from Kansas, the author and principal sponsor of amendment No. 715.

Mr. Stennis. Mr. President, will the Senator yield to me for a question?

Mr. Eagleton. I am pleased to yield.

Mr. Stennis. Mr. President, I do not object to this procedure, but I came here really to hear the Senator from Arkansas. May I ask him when he expects to resume the floor?

Mr. Eagleton. Mr. President, I hope the Senator from Mississippi will remain for a few minutes to hear some pearls of wisdom from me.

Mr. Stennis. I had another, mandatory meeting, and I really should be there, but I will remain for now.

Mr. Eagleton. Mr. President, I think it would be of interest for the Senate to discover what might follow in the wake of the repeal of the Gulf of Tonkin resolution, which is the gravamen of the Dole Amendment No. 715. Perhaps the best way to get at that would be to propound some questions to the principal author of the amendment (Mr. Dole). If he would be so kind as to respond to these questions, then perhaps we might see a little better down the road where we would be if the amendment were adopted and subsequently enacted by the House and later signed by the President.

First, I would like to ask, in the opinion of the Senator from Kansas, under what authority troops are presently stationed or found in Southeast Asia.

Mr. Dole. Let me respond with the knowledge gained in the short time I have been in the Senate. The Senator from Missouri and I arrived at the same time.

On July 1, 1964, there were approximately 17,000 troops in Vietnam. At the end of August 1964 there were 18,000 troops in South Vietnam. By June of 1965 there were some 22,000 troops in Vietnam.

It is my understanding that the Johnson administration and the Kennedy administration based their commitment in Vietnam on a number of factors: first, the Southeast Asia Treaty, which was almost unanimously approved by the Senate; second, pledges made of promised support by three successive Presidents of the United States; third, an assistance program that was granted annually beginning in 1965 by a bipartisan majority in both Houses of Congress; fourth, the declaration which we joined our SEATO and ANZUS allied in making; fifth, our ministerial council meetings in 1964 and 1965; and finally, of course, the Gulf of Tonkin resolution itself, which was approved August 10, 1964, by a combined vote of the House of Representatives and the Senate of 514 to 2.

Mr. Eagleton. I thank the Senator for his recitation of how the Johnson and Kennedy administrations, especially the Johnson administration, may have viewed their authorization to go into Southeast Asia; but my question to the Senator from Kansas, as author of amendment 715, was under what authority is the present President, in the month of June 1970, found in Southeast Asia? What does he consider to be the present authority for the presence of American troops in South Vietnam?

Mr. Dole. I would suggest that the representation just made would indicate, of course, that they were there in January of 1969, when President Nixon took office. I considered and voted for the Gulf of Tonkin resolution as a member of the other body and am aware of that resolution. I frankly did not consider it necessary at that time, to become more involved in South Vietnam. It may have been necessary at that time, as the Senator from Arkansas and others pointed out, to give some direction and support to the President of the United States.

That was during a time of escalation, I might say to the Senator from Missouri. The Gulf of Tonkin resolution was an instrument of escalation. It was sort of the "get in" resolution passed by Congress. Now we are in the process of getting out. We are not in the process of escalation at this time, so I do not know quite how to respond to the question of the Senator from Missouri, except to say that now we are now descalating. We are bringing troops home. The troop level has been reduced by 115,500 men. Another 50,000 reduction has been announced and will be carried out by October 15; and another 100,000 by next May 1. Now we are in a process of disengagement; we are not in a process of escalation. I would point out, the
committee report which accompanied the resolution to the Senate floor in August of 1964, contained the following statement:

"Senate Joint Resolution 189 is patterned quite closely upon precedents afforded by similar resolutions; the Formosa resolution of 1955, the Middle East resolution of 1957, and the Cuba resolution of 1962.

The phrasing in section 2, "in accordance with the obligations under the Southeast Asia Collective Defense Treaty" comprehends the understanding in that treaty that the U.S. response in the context of article IV(1) is confined to Communist aggression. It should also be pointed out that U.S. assistance, as comprehended by section 2, will be furnished only on request and only to a signatory or a state covered by the protocol to the SEATO Treaty. The protocol states are Laos, Cambodia, and South Vietnam."

So I say that the Tonkin Gulf resolution was only one in a series of justifications or reasons for commitment in South Vietnam, and that as to its repeal, as stated on March 12, 1970, in a letter from H. D. Torbert, Jr., Acting Assistant Secretary of State for Congressional Relations, addressed to the Honorable J. William Fulbright, chairman of the Committee on Foreign Relations:

"We neither advocate nor oppose congressional action—with reference to the Tonkin Gulf resolution."

The point, I might say, is that this administration has not relied upon the Gulf of Tonkin resolution and does not now rely upon the Gulf of Tonkin resolution. I assume the Senator from Missouri favors repeal of the Gulf of Tonkin resolution, as does the Senator from Kansas. There is no opposition to its repeal from the administration. They are not relying on the Gulf of Tonkin resolution. They have not relied on the Gulf of Tonkin resolution. There has been no escalation by this administration. There has been no escalation in the number of troops nor in the bombing.

That is my response.

Mr. Fulbright. Mr. President, could I interject, just to clarify, this inquiry? The Senator says they do not rely on it. What do they rely on?

Mr. Dole. I am not certain, but I believe they rely primarily on the fact that, on January 20, 1969, there were 550,000 troops in Southeast Asia, and the President is charged with their protection in the exercise of his authority as Commander in Chief.

I believe the President relies on the facts, and the facts have been cited, and the President is in the process of disengagement, not as rapidly as some would like, but I believe he is relying on the fact that we were there, that when he took the oath of office American troops were there, and that he had a duty as Commander in Chief, which we have discussed at some length in the past several weeks, not only to protect American troops but, in accordance with a plan announced last May, to pursue the success of the Vietnamization program and to bring those troops home.

Mr. Eagleton. Mr. President, I am not quite certain I fathom what the Senator is saying. If I am doing him an injustice, I am sure he will correct me, but I take it he is saying that one item we can definitely eliminate is the Gulf of Tonkin resolution, that the President of the United States under no circumstances and under no set of facts says he is relying on the Gulf of Tonkin resolution at all; is that correct?

Mr. Dole. From what I understand of the administration's position, I think that is correct.

Mr. Eagleton. There are 400,000-plus troops now in South Vietnam, in various stages of demobilization, deescalation, or whatever term is applicable, but there are 400,000-plus troops there. I take it they are there under some authority, either constitutional, statutory, or by treaty. Is that correct?

Mr. Dole. That is right. Basically it is constitutional authority—the same constitutional authority President Kennedy had, President Truman had, President Eisenhower had, and President Johnson had.

Mr. Goldwater. Mr. President, will the Senator yield?

Mr. Dole. The Senator from Missouri has the floor. Will he yield to the Senator from Arizona?

Mr. Eagleton. Mr. President, I would like to finish this series of interrogations first, if I may.

May we eliminate, by the process of elimination, some of the others? We have eliminated the Gulf of Tonkin resolution. That is not our authorization for being there.
Mr. Dole. If I might respond. That may have been used at the time as a justification for having more troops there. At that time, as I recall, we were of course, threatened. The Turner Joy, the Maddox, and other ships were threatened on the high seas at least that was the report many of us had. We believed that report, and some of us still believe it. But the Gulf of Tonkin resolution was important because it did give new impetus; it did provide a rallying point for America; and it gave President Johnson an opportunity, which I supported, to increase the number of troops in South Vietnam, with congressional support.

Let me say that President Johnson did consult with the leaders. He consulted with the leaders of the House of Representatives and the Senate after there had already been retaliation, but there was consultation. The Gulf of Tonkin resolution was used quite broadly. I shared some of the apprehension of the Senator from Arkansas with reference to its interpretation, and perhaps some of the abuses, of the Gulf of Tonkin resolution. But we were there, American military personnel were in South Vietnam prior to the Gulf of Tonkin resolution, this is the point I am making, so we do not rely on it for getting out.

Mr. Eagleton. Mr. President, I am a bit more confused now. I thought I was on the track of clarification.

At the time of the Gulf of Tonkin resolution, which was passed in August 1964, there were in South Vietnam some 20,000-odd troops.

Mr. Dole. I beg the Senator's pardon.

Mr. Eagleton. At the time of the Gulf of Tonkin resolution, in August 1964, are I correct that there were some 20,000 troops in South Vietnam?

Mr. Dole. That is right. I mistakenly said earlier 180,000. There were about 18,000.

Mr. Fulbright. 16,000 to 18,000.

Mr. Eagleton. 16,000 or 20,000 at the time of the Gulf of Tonkin resolution; and there are today in excess of 400,000 troops in South Vietnam—which I admit, of course, is a reduction from the high of 550,000 plus.

But my question again is, does President Nixon, insofar as the Senator knows, rely on the Gulf of Tonkin resolution as an authorization for having more than 400,000 troops in South Vietnam?

Mr. Dole. Of course, I am not certain what the President may have in mind, but it may be well, at this point, to have printed in the Record, if the Senator from Missouri has no objection, a paper entitled "Legality of United States Participation in Defense of Vietnam," prepared by the Department of State, Office of the Legal Adviser, dated March 4, 1966, which covers the very basic questions now being asked. I can recite from that document, but it might be well to have it in the Record in full.

Mr. Eagleton. Mr. President, I ask unanimous consent that it be printed at this point in the Record.

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

"THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIETNAM"

(This legal memorandum was prepared by Leonard C. Meeker, Legal Adviser of the Department, and was submitted to the Senate Committee on Foreign Relations on March 8.)

"I. THE UNITED STATES AND SOUTH VIET-NAM HAVE THE RIGHT UNDER INTERNATIONAL LAW TO PARTICIPATE IN THE COLLECTIVE DEFENSE OF SOUTH VIET-NAM AGAINST ARMED ATTACK"

In response to requests from the Government of South Viet-Nam, the United States has been assisting that country in defending itself against armed attack from the Communist North. This attack has taken the forms of externally supported subversion, clandestine supply of arms, infiltration of armed personnel, and most recently the sending of regular units of the North Vietnamese army into the South.

International law has long recognized the right of individual and collective self-defense against armed attack. South Viet-Nam and the United States are engaging in such collective defense consistently with international law and with United States obligations under the United Nations Charter.
"A. South Viet-Nam is being subjected to armed attack by Communist North Viet-Nam

"The Geneva accords of 1954 established a demarcation line between North Viet-Nam and South Viet-Nam. They provided for withdrawals of military forces into the respective zones north and south of this line. The accords prohibited the use of either zone for the resumption of hostilities or to 'further an aggressive policy.'

"During the 5 years following the Geneva conference of 1954, the Hanoi regime developed a covert political-military organization in South Viet-Nam based on Communist cadres it had ordered to stay in the South, contrary to the provisions of the Geneva accords. The activities of this covert organization were directed toward the kidnapping and assassination of civilian officials—acts of terrorism that were perpetrated in increasing numbers.

"In the 3-year period from 1959 to 1961, the North Viet-Nam regime infiltrated an estimated 10,000 men into the South. It is estimated that 13,000 additional personnel were infiltrated in 1962, and, by the end of 1964, North Viet-Nam may well have moved over 40,000 armed and unarmed guerrillas into South Viet-Nam.

"The International Control Commission reported in 1962 the findings of its Legal Committee:

"There is evidence to show that arms, armed and unarmed personnel, munitions and other supplies have been sent from the Zone in the North to the Zone in the South with the objective of supporting, organizing and carrying out hostile activities, including armed attacks, directed against the Armed Forces and Administration of the Zone in the South.

"There is evidence that the PAVN (People's Army of Viet Nam) has allowed the Zone in the North to be used for inciting, encouraging and supporting hostile activities in the Zone in the South, aimed at the overthrow of the Administration in the South.

"Beginning in 1964, the Communists apparently exhausted their reserves of Southerners who had gone North. Since then the greater number of men infiltrated into the South have been native-born North Vietnamese. Most recently, Hanoi has begun to infiltrate elements of the North Vietnamese army in increasingly larger numbers. Today, there is evidence that nine regiments of regular North Vietnamese forces are fighting in organized units in the South.

"In the guerrilla war in Viet-Nam, the external aggression from the North is the critical military element of the insurgency, although it is unacknowledged by North Viet-Nam. In these circumstances, an 'armed attack' is not as easily fixed by date and hour as in the case of traditional warfare. However, the infiltration of thousands of armed men clearly constitutes an 'armed attack' under any reasonable definition. There may be some question as to the exact date at which North Viet-Nam's aggression grew into an 'armed attack,' but there can be no doubt that it had occurred before February 1965.

"B. International law recognizes the right of individual and collective self-defense against armed attack

"International law has traditionally recognized the right of self-defense against armed attack. This proposition has been asserted by writers on international law through the several centuries in which the modern law of nations has developed. The proposition has been acted on numerous times by governments throughout modern history. Today the principle of self-defense against armed attacks is universally recognized and accepted. 1

The Charter of the United Nations, concluded at the end of World War II, imposed on important intention on the use of force by United Nations members. Article 2, paragraph 4, provides:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

"In addition, the charter embodied a system of international peacekeeping through the organs of the United Nations. Article 44 summarizes these structural arrangements in stating that the United Nations members:

"Confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties

1 For texts, see American Foreign Policy, 1955—1955; Basic Documents, vol. I. Department of State publication 5446, p. 750.

under this responsibility the Security Council acts on their behalf.

"However, the charter expressly states in article 51 that the remaining provisions of the charter—including the limitation of article 2, paragraph 4, and the creation of United Nations machinery to keep the peace—in no way diminish the inherent right of self-defense against armed attack. Article 51 provides:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'

"Thus, article 51 restates and preserves, for member states in the situation covered by the article, a long-recognized principle of international law. The article is a 'saving clause' designed to make clear that no other provision in the charter shall be interpreted to impair the inherent right of self-defense referred to in article 51.

"Three principal objections have been raised against the availability of the right of individual and collective self-defense in the case of Viet-Nam: (1) that this right applies only in the case of an armed attack on a United Nations member; (2) that it does not apply in the case of South Viet-Nam because the latter is not an independent sovereign state; and (3) that collective self-defense may be undertaken only by a regional organization operating under chapter VIII of the United Nations Charter. These objections will now be considered in turn.

"C. The right of individual and collective defense applies in the case of South Viet-Nam whether or not that country is a member of the United Nations

"1. South Viet-Nam enjoys the right of self-defense.—The argument that the right of self-defense is available only to members of the United Nations mistakes the nature of the right of self-defense and the relationship of the United Nations Charter to international law in this respect. As already shown, the right of self-defense against armed attack is an inherent right under international law. The right is not conferred by the charter, and, indeed, article 51 expressly recognizes that the right is inherent.

"2. The United States has the right to assist in the defense of South Viet-Nam although the latter is not a United Nations member.—The cooperation of two or more international entities in the defense of one or both against armed attack is generally referred to as collective self-defense. United States participation in the defense of South Viet-Nam at the latter's request is an example of collective self-defense.

"The United States is entitled to exercise the right of individual or collective self-defense against armed attack, as that right exists in international law, subject only to treaty limitations and obligations undertaken by this country.

*While nonmembers, such as South Viet-Nam, have not formally undertaken the obligations of the United Nations Charter as their own treaty obligations, they should be recognized that much of the substantive law of the charter has become part of the general law of nations through a very wide acceptance by nations the world over. This is particularly true of the charter provisions bearing on the use of force. Moreover, in the case of South Viet-Nam, the South Vietnamese Government has expressly its ability and willingness to abide by the charter, in applying for United Nations membership. Thus it seems entirely appropriate to appraise the actions of South Viet-Nam in relation to the legal standards set forth in the United Nations Charter. [Footnote in original]*
It has been urged that the United States has no right to participate in the collective defense of South Viet-Nam because article 51 of the United Nations Charter speaks only of the situation 'if an armed attack occurs against a Member of the United Nations.' This argument is without substance.

In the first place, article 51 does not impose restrictions or cut down the otherwise available rights of United Nations members. By its own terms, the article preserves an inherent right. It is therefore, necessary to look elsewhere in the charter for any obligation of members restricting their participation in collective defense of an entity that is not a United Nations member.

Article 2, paragraph 4, is the principal provision of the charter imposing limitations on the use of force by members. It states that they:

"shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

"Action taken in defense against armed attack cannot be characterized as falling within this proscription. The record of the San Francisco conference makes clear that article 2, paragraph 4, was not intended to restrict the right of self-defense against armed attack."

"One will search in vain for any other provision in the charter that would preclude United States participation in the collective defense of a nonmember. The fact that article 51 refers only to armed attack 'against a Member of the United Nations' implies no intention to preclude members from participating in the defense of nonmembers. Any such result would have seriously detrimental consequences for international peace and security and would be inconsistent with the purposes of the United Nations as they are set forth in article 1 of the charter. The right of members to participate in the defense of nonmembers is upheld by leading authorities on international law."

"D. The right of individual and collective self-defense applies whether or not South Vietnam is regarded as an independent sovereign state"

"1. South Viet-Nam enjoys the right of self-defense.—It has been asserted that the conflict in Viet-Nam is 'civil strife' in which foreign intervention is forbidden. Those who make this assertion have gone so far as to compare Ho Chi Minh's actions in Viet-Nam with the efforts of President Lincoln to preserve the Union during the American Civil War. Any such characterization is an entire fiction disregarding the actual situation in Viet-Nam. The Hanoi regime is anything but the legitimate government of a unified country in which the South is rebelling against lawful national authority.

"The Geneva accords of 1954 provided for a division of Viet-Nam into two zones at the 17th parallel. Although this line of demarcation was intended to be temporary, it was established by international agreement, which specifically forbade aggression by one zone against the other.

"The Republic of Viet-Nam, in the South has been recognized as a separate international entity by approximately 60 governments the world over. It has been admitted as a member of a number of the specialized agencies of the United Nations. The United Nations General Assembly in 1957 voted to recommend South Viet-Nam for membership in the organization, and its admission was frustrated only by the veto of the Soviet Union in the Security Council.

"In any event there is no warrant for the suggestion that one zone of a temporarily divided state—whether it be Germany, Korea, or Viet-Nam—can be legally over-run by armed forces from the other zone, crossing the internationally recognized line of demarcation between the two. Any such doctrine would subvert the international agreement establishing the line of demarcation, and would pose grave dangers to international peace.

"The action of the United Nations in the Korean conflict of 1950 clearly established the principle that there is no greater license for one zone of a temporarily divided state to attack the other zone than there is for one state to attack another state.

3 See 4 UNICO Documents 459. [Footnote in original.]
4 In particular, the statement of the first purpose:
To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. [Footnote in original.]