South Viet-Nam has the same right that South Korea had to defend itself and to organize collective defense against an armed attack from the North. A resolution of the Security Council dated June 25, 1950, noted "with grave concern the armed attack upon the Republic of Korea by forces from North Korea," and determined that this action constitutes a breach of the peace.

2. The United States is entitled to participate in the collective defense of South Viet-Nam whether or not the latter is regarded as an independent sovereign state.—As stated earlier, South Viet-Nam has been recognized as a separate international entity by approximately 60 governments. It has been admitted to membership in a number of the United Nations specialized agencies and has been excluded from the United Nations Organization only by the Soviet veto.

There is nothing in the charter to suggest that United Nations members are precluded from participating in the defense of a recognized international entity against armed attack merely because the entity may lack some of the attributes of an independent sovereign state. Any such result would have a destructive effect on the stability of international engagements such as the Geneva accords of 1954 and on internationally agreed lines of demarcation. Such a result, far from being in accord with the charter and the purposes of the United Nations, would undermine them and would create new dangers to international peace and security.

E. The United Nations Charter does not limit the right of self-defense to regional organizations

Some have argued that collective self-defense may be undertaken only by a regional arrangement or agency operating under chapter VIII of the United Nations Charter. Such an assertion ignores the structure of the charter and the practice followed in the more than 20 years since the founding of the United Nations.

The basic proposition that rights of self-defense are not impaired by the charter—as expressly stated in article 51—is not conditioned by any charter provision limiting the application of this proposition to collective defense by a regional arrangement or agency. The structure of the charter reinforces this conclusion. Article 51 appears in chapter VII of the charter, entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," whereas chapter VIII, entitled "Regional Arrangements," begins with article 52 and embraces the two following articles. The records of the San Francisco conference show that article 51 was deliberately placed in chapter VII rather than chapter VIII, where it would only have a bearing on the regional system.

Under article 51, the right of self-defense is available against any armed attack, whether or not the country attacked is a member of a regional arrangement and regardless of the source of the attack. Chapter VIII, on the other hand, deals with relations among members of a regional arrangement or agency and authorizes regional action as appropriate for dealing with "local disputes." This distinction has been recognized ever since the founding of the United Nations in 1945.

For example, the North Atlantic Treaty has operated as a collective security arrangement, designed to take common measures in preparation against the eventuality of an armed attack for which collective defense under article 51 would be required. Similarly, the Southeast Asia Treaty Organization was designed as a collective defense arrangement under article 51. Secretary of State Dulles emphasized this in his testimony before the Senate Foreign Relations Committee in 1954.

By contrast, article 1 of the Charter of Bogota (1948), establishing the Organization of American States, expressly declares that the organization is a regional agency within the United Nations. Indeed, chapter VIII of the United Nations Charter was included primarily to take account of the functioning of the Inter-American system.

In sum, there is no basis in the United Nations Charter for contending that the right of self-defense against armed attack is limited to collective defense by a regional organization.

F. The United States has fulfilled its obligations to the United Nations

A further argument has been made that the members of the United Nations have conferred on United Nations organs—and, in particular, on the Security Council—exclusive power to act against aggression. Again, the express language

1 UNCTO Documents 288. [Footnote in original.]
of article 51 contradicts that assertion. A victim of armed attack is not required
to forgo individual or collective defense of its territory until such time as the
United States takes collective action and takes appropriate measures.

To the contrary, article 51 clearly states that the right of self-defense may be
exercised "until the Security Council has taken the measures necessary to
maintain international peace and security."

As indicated earlier, article 51 is not literally applicable to the Viet-Nam
situation since South Viet-Nam is not a member. However, reasoning by
analogy from article 51 and adopting its provisions as an appropriate guide for
the conduct of members in a case like Viet-Nam, one can only conclude that
United States actions are fully in accord with this country's obligations, as
a member of the United Nations.

"Article 51 requires that:

"Measures taken by Members in the exercise of this right of self-defense
shall be immediately reported to the Security Council and shall not in any
way affect the authority and responsibility of the Security Council under the
present Charter to take at any time such action as it deems necessary in order
to maintain or restore international peace and security."

"The United States has reported to the Security Council on measures it has
taken in countering the Communist aggression in Viet-Nam. In August 1964
the United States asked the Council to consider the situation created by North
Vietnamese attacks on United States destroyers in the Tonkin Gulf. The
Council thereafter met to debate the question, but adopted no resolutions. Twice
in February 1965 the United States sent additional reports to the Security
Council on the conflict in Viet-Nam and on the additional measures taken by
the United States in the collective defense of South Vietnam. In January 1966
the United States formally submitted the Viet-Nam question to the Security
Council for its consideration and introduced a draft resolution calling for dis-
cussions looking toward a peaceful settlement on the basis of the Geneva
accords."

"At no time has the Council taken any action to restore peace and security in
South Viet-Nam. The Council has not expressed criticism of United States actions.
Indeed, since the United States submission of January 1966, members of the Coun-
cil have been notably reluctant to proceed with any consideration of the Viet-Nam
question.

"The conclusion is clear that the United States has in no way acted to interfere
with United Nations consideration of the conflict in Viet-Nam. On the contrary,
the United States has requested United Nations consideration, and the Council
has not seen fit to act.

"G. International law does not require a declaration of war as a condition
precedent to taking measures of self-defense against armed attack"

"The existence or absence of a formal declaration of war is not a factor in
determining whether an international use of force is lawful as a matter of inter-
national law. The United Nation's Charter's restrictions focus on the manner
and purposes of its use and not on any formalities of announcement.

"It should be noted that a formal declaration of war would not place any
obligation on the conflict by which that side would not be bound in
any event. The rules of international law concerning the conduct of hostilities in
an international armed conflict apply regardless of any declaration of war.

H. Summary

"The analysis set forth above shows that South Viet-Nam has the right in
present circumstances to defend itself against armed attack from the North and
to organize a collective self-defense with the participation of others. In response
to requests from South Viet-Nam, the United States has been participating in
that defense, both through military action within South Viet-Nam and actions
taken directly against the aggressor in North Viet-Nam. This participation by the
United States is in conformity with international law and is consistent with our
obligations under the Charter of the United Nations.

8 An argument has been made by some that the United States, by joining in the collective
defense of South Vietnam, has violated the peaceful settlement obligation of article 33
in the charter. This argument overlooks the obvious proposition that a victim of armed
aggression is not required to sustain the attack undefended. While efforts are made to find
a political solution with the aggressor, Article 51 of the charter illustrates this by making
perfectly clear that the inherent right of self-defense is inspired by 'Nothing in the
present Charter,' including the provisions of article 33. [Footnote in original]

9 For text of statement made by U.S. Representative Adlai E. Stevenson in the Security

10 For background and text of draft resolution, see ibid., Feb. 14, 1966, p. 231.
THE UNITED STATES HAS UNDERTAKEN COMMITMENTS TO ASSIST SOUTH VIETNAM IN DEFENDING ITSELF AGAINST COMMUNIST AGGRESSION FROM THE NORTH

The United States has made commitments and given assurances, in various forms and at different times, to assist in the defense of South Vietnam.

A. The United States gave undertakings at the end of the Geneva Conference in 1954

At the time of the signing of the Geneva accords in 1954, President Eisenhower warned that any renewal of Communist aggression would be viewed by us as a matter of grave concern, at the same time giving assurance that the United States would not use force to disturb the settlement. And the formal declaration made by the United States Government at the conclusion of the Geneva conference stated that the United States would view any renewal of the aggression in violation of the aforesaid agreements with grave concern and as seriously threatening international peace and security.

B. The United States undertook an international obligation to defend South Vietnam in the SEATO Treaty

Later in 1954 the United States negotiated with a number of other countries and signed the Southeast Asia Collective Defense Treaty. The treaty contains in the first paragraph of article IV the following provision:

"Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations."

"Annexed to the treaty was a protocol stating that:

"The Parties to the Southeast Asia Collective Defense Treaty unanimously designated for the purposes of Article IV of the Treaty the States of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam."

"Thus, the obligations of article IV, paragraph 1, dealing with the eventuality of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations."

"The treaty was intended to deter armed aggression in Southeast Asia. To that end it created not only a multilateral alliance but also a series of bilateral relationships. The obligations are placed squarely on 'each Party' in the event of an armed attack. The treaty does not require a collective determination that an armed attack has occurred in order that the obligation of article IV, paragraph 1, become operative. Nor does the provision require collective decision on actions to be taken to meet the common danger. As Secretary Dulles pointed out when transmitting the treaty to the President, the commitment in article IV, paragraph 1, leaves to the judgment of each country the type of action to be taken in the event an armed attack occurs."

Thus, the United States has a commitment under article IV, paragraph 1, in the event of an armed attack, independent of the decision or action of other treaty parties, to act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.
parties. A joint statement issued by Secretary Rusk and Foreign Minister Thanat Khoman of Thailand on March 6, 1962, reflected this understanding:

"The Secretary of State assured the Foreign Minister that in the event of such aggression, the United States intends to give full effect to its obligations under the Treaty to act in accordance with its constitutional processes. The Secretary of State reaffirmed that this obligation of the United States does not depend upon the prior agreement of all other parties to the Treaty, since this Treaty obligation is individual as well as collective."

"Most of the SEATO countries have stated that they agreed with this interpretation. None has registered objection to it.

"When the Senate Committee on Foreign Relations reported on the Southeast Asia Collective Defense Treaty, it noted that the treaty area was further defined so that the 'Free Territory of Vietnam' was an area 'which, if attacked, would fall under the protection of the instrument.' In its conclusion the committee stated:

"The committee is not impervious to the risks which this treaty entails. It fully appreciates that acceptance of these additional obligations commits the United States to a course of action over a vast expanse of the Pacific. Yet these risks are consistent with our own highest interests."

"The Senate gave its advice and consent to the treaty by a vote of 82 to 1."

"C. The United States has given additional assurances to the Government of South Vietnam"

"The United States has also given a series of additional assurances to the Government of South Vietnam. As early as October 1954 President Eisenhower undertook to provide direct assistance to help make South Vietnam 'capable of resisting attempted subversion or aggression through military means.' On May 11, 1957, President Eisenhower and President Ngo Dinh Diem of the Republic of South Vietnam issued a joint statement, which called attention to 'the large build-up of Vietnamese Communist military forces in North Vietnam' and stated:

"Noting that the Republic of Vietnam is covered by Article IV of the Southeast Asia Collective Defense Treaty, President Eisenhower and President Ngo Dinh Diem agreed that aggression or subversion threatening the political independence of the Republic of Vietnam would be considered as endangering peace and stability."

"On August 2, 1961, President Kennedy declared that 'the United States is determined that the Republic of Vietnam shall not be lost to the Communists for lack of any support which the United States Government can render.' On December 1 of that year President Diem appealed for additional support. In his reply of December 14, 1961, President Kennedy recalled the United States declaration made at the end of the Geneva conference in 1954, and reaffirmed that the United States was 'prepared to help the Republic of Vietnam to protect its people and to preserve its independence.' This assurance has been reaffirmed many times since.

"III. ACTIONS BY THE UNITED STATES AND SOUTH VIET-NAM ARE JUSTIFIED UNDER THE GENEVA ACCORDS OF 1954"

"A. Description of the accords"

"The Geneva accords of 1954 established the date and hour for a cease-fire in Viet-Nam, drew a 'provisional military demarcation line' with a demilitarized zone on both sides, and required an exchange of prisoners and the phased
regroupment of Viet Minh forces from the south to the north and of French Union forces from the north to the south. The introduction into Viet-Nam of troop reinforcements and new military equipment (except for replacement and repair) was prohibited. The armed forces of each party were required to respect the demilitarized zone and the territory of the other zone. The adherence of either zone to any military alliance, and the use of either zone for the resumption of hostilities or to 'further an aggressive policy,' were prohibited. The International Control Commission was established, composed of India, Canada and Poland, with India as chairman. The task of the Commission was to supervise the proper execution of the provisions of the cease-fire agreement. General elections that would result in reunification were required to be held in July 1956 under the supervision of the ICC.

"B. North Viet-Nam violated the accords from the beginning"

"From the very beginning, the North Vietnamese violated the 1954 Geneva accords. Communist military forces and supplies were left in the South in violation of the accords. Other Communist guerrillas were moved north for further training and then were infiltrated into the South in violation of the accords."

"C. The introduction of United States military personnel and equipment was justified"

"The accords prohibited the reinforcement of foreign military forces in Viet-Nam and the introduction of new military equipment, but they allowed replacement of existing military personnel and equipment. Prior to late 1961 South Viet-Nam had received considerable military equipment and supplies from the United States, and the United States had gradually enlarged its Military Assistance Advisory Group to slightly less than 900 men. These actions were reported to the ICC and were justified as replacements for equipment in Viet-Nam in 1954 and for French training and advisory personnel who had been withdrawn after 1954."

"As the Communist aggression intensified during 1961, with increased infiltration and a marked stepping up of Communist terrorism in the South, the United States had to increase significantly the numbers of our military personnel and the amounts and types of equipment introduced by this country into South Viet-Nam. These increases were justified by the international law principle that a material breach of an agreement by one party entitled the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligations."

"In accordance with this principle, the systematic violation of the Geneva accords by North Viet-Nam justified South Viet-Nam in suspending compliance with the provision controlling entry of foreign military personnel and military equipment."

"D. South Viet-Nam was justified in refusing to implement the election provisions of the Geneva accords"

"The Geneva accords contemplated the reunification of the two parts of Viet-Nam. They provided for general elections to be held in July 1956 in order to obtain a 'true expression of the national will.' The accords stated that 'consultations will be held on this subject between the competent representative authorities of the two zones from 20 July 1955 onwards.'"

"There may be some question whether South Viet-Nam was bound by these election provisions. As indicated earlier, South Viet-Nam did not sign the cease-fire agreement of 1954, nor did it adhere to the Final Declaration of the Geneva accords."

[Footnote in original.]
conference. The South Vietnamese Government at that time gave notice of its objection in particular to the election provisions of the accords.

"However, even on the premise that these provisions were binding on South Viet-Nam, the South Vietnamese Government's failure to engage in consultations in 1955, with a view to holding elections in 1956, involved no breach of obligation. The conditions in North Viet-Nam during that period were such as to make impossible any free and meaningful expression of popular will.

"Some of the facts about conditions in the North were admitted even by the Communist leadership in Hanoi. General Giap, currently Defense Minister of North Viet-Nam, in addressing the Tenth Congress of the North Vietnamese Communist Party in October 1956, publicly acknowledged that the Communist leaders were running a police state where executions, terror, and torture were commonplace. A nationwide election in these circumstances would have been a travesty. No one in the North would have dared to vote except as directed. With a substantial majority of the Vietnamese people living north of the 17th parallel, such an election would have meant turning the country over to the Communists without regard to the will of the people. The South Vietnamese Government realized these facts and quite properly took the position that consultations for elections in 1956 as contemplated by the accords would be a useless formality."

"IV. THE PRESIDENT HAS FULL AUTHORITY TO COMMIT UNITED STATES FORCES IN THE COLLECTIVE DEFENSE OF SOUTH VIETNAM"

"There can be no question in present circumstances of the President's authority to commit United States forces to the defense of South Viet-Nam. The grant of authority to the President in article II of the Constitution extends to the actions of the United States currently undertaken in Viet-Nam. In fact, however, it is unnecessary to determine whether this grant standing alone is sufficient to authorize the actions taken in Viet-Nam. These actions rest not only on the exercise of Presidential powers under article II but on the SEATO treaty—a treaty advised and consented to by the Senate—and on actions of the Congress, particularly the joint resolution of August 10, 1964. When these sources of authority are taken together—article II of the Constitution, the SEATO treaty, and actions by the Congress—there can be no question of the legality under domestic law of United States actions in Viet-Nam.

"A. The President's power under Article II of the Constitution extends to the actions currently undertaken in Viet-Nam"

"Under the Constitution, the President, in addition to being Chief Executive, is Commander in Chief of the Army and Navy. He holds the prime responsibility for our foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.

"At the Federal Constitutional Convention in 1787, it was originally proposed that Congress have the power 'to make war.' There were objections that legislative proceedings were too slow for this power to be vested in Congress; it was suggested that the Senate might be a better repository. Madison and Gerry then moved to substitute 'to declare war' for 'to make war,' 'leaving to the Executive the power to repel sudden attacks.' It was objected that this might make it too easy for the Executive to involve the nation in war, but the motion carried with but one dissenting vote.

"In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States. In the 20th century, the world has grown much smaller. An attack on a country far from our shores can impinge directly on the nation's security. In the SEATO treaty, for example, it is formally declared that an armed attack against Viet-Nam would endanger the peace and safety of the United States.

"Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the 'undeclared war' with France (1798-1800). For example, President Truman ordered 250,000 troops to Korea during the Korean war of the early 1950's. President Eisenhower dispatched 14,000 troops to Lebanon in 1968."

Footnote: In our view, if North Viet-Nam considered there had been a breach of obligation by the South, its remedies lay in discussion with Saigon, perhaps in an appeal to the cochairman of the Geneva conference, or in a reconvening of the conference to consider the situation. Under international law, North Viet-Nam had no right to use force outside its own zone in order to secure its political objectives.
"The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.

B. The Southeast Asia Collective Defense Treaty Authorizes the President's Actions

"Under article VI of the United States Constitution, 'all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.' Article IV, paragraph 1, of the SEATO treaty establishes as a matter of law that a Communist armed attack against South Viet-Nam endangers the peace and safety of the United States. In this same provision the United States has undertaken a commitment in the SEATO treaty to 'act to meet the common danger in accordance with its constitutional processes' in the event of such an attack.

"Under our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered. If he considers that deployment of U.S. forces to South Viet-Nam is required, and that military measures against the source of Communist aggression in North Viet-Nam are necessary, he is constitutionally empowered to take those measures.

"The SEATO treaty specifies that each party will act 'in accordance with its constitutional processes.'

"It has recently been argued that the use of land forces in Asia is not authorized under the treaty because their use to deter armed attack was not contemplated at the time the treaty was considered by the Senate. Secretary Dulles testified at that time that we did not intend to establish (1) a land army in Southeast Asia capable of deterring Communist aggression, or (2) an integrated headquarters and military organization like that of NATO; instead, the United States would rely on 'mobile striking power' against the sources of aggression. However, the treaty obligation in article IV, paragraph 1, to meet the common danger in the event of armed aggression, is not limited to particular modes of military action. What constitutes an adequate deterrent or an appropriate response, in terms of military strategy, may change; but the essence of our commitment to act to meet the common danger, as necessary at the time of an armed aggression, remains. In 1954 the forecast of military judgment might have been against the use of substantial United States ground forces in Viet-Nam. But that does not preclude the President from reaching a different military judgment in different circumstance, 12 years later.

C. The joint resolution of Congress of August 10, 1964, authorizes United States participation in the collective defense of South Viet-Nam

"As stated earlier, the legality of United States participation in the defense of South Viet-Nam does not rest only on the constitutional power of the President under article II—or indeed on that power taken in conjunction with the SEATO treaty. In addition, the Congress has acted in unmistakable fashion to approve and authorize United States actions in Viet-Nam.

"Following the North Vietnamese attacks in the Gulf of Tonkin against United States destroyers; Congress adopted, by a Senate vote of 85-2 and a House vote of 416-0, a joint resolution containing a series of important declarations and provisions of law. Section 1 resolved that 'the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.' Thus, the Congress gave its sanction to specific actions by the President to repel attacks against United States naval vessels in the Gulf of Tonkin and elsewhere in the western Pacific. Congress further approved the taking of 'all necessary measures . . . to prevent further aggression.' This authorization extended to those measures the President might consider necessary to ward off further attacks and to prevent further aggression by North Viet-Nam in Southeast Asia.

"The joint resolution then went on to provide in section 2:

* The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the

* For text, see BULLETIN of Aug. 24, 1964, p. 242.
United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

"Section 2 thus constitutes an authorization to the President, in his discretion, to act—using armed force if he determines that is required—to assist South Viet-Nam at its request in defense of its freedom. The identification of South Viet-Nam through the reference to 'protocol states' in this section is unmistakable, and the grant of authority 'as the President determines' is unequivocal.

"It has been suggested that the legislative history of the joint resolution shows an intention to limit United States assistance to South Viet-Nam to aid, advice, and training. This suggestion is based on an amendment offered from the floor by Senator [Gaylord] Nelson which would have added the following to the text:

"'The Congress also approves and supports the efforts of the President to bring the problem of peace in Southeast Asia to the Security Council of the United Nations, and the President's declaration that the United States, seeking to end or halt the present military conflict, will respond to provocation in a manner that is 'limited and fitting.'"

"'Our continuing policy is to limit our role to the provision of aid, training assistance, and military advice, and it is the sense of Congress that, except when provocation by the other side requires it, the President should not respond by military action.

"Senator [J. W.] Fulbright, who had reported the joint resolution from the Foreign Relations Committee, spoke on the amendment as follows:

"'It states fairly accurately what the President has said would be our policy, and what I stated my understanding was as to our policy: also what other Senators have stated. In other words, it states that our response should be appropriate and limited to the provocation, which the Senator stated as 'respond to provocation in a manner that is limited and fitting,' and so forth. We do not wish any military bases there. We are not seeking to gain a colony.

"We seek to ensure the independence of these people to develop along the lines of the United States without domination by communism.'"
who is the United States, would then take such action as might be appropriate, after resorting to their constitutional processes. I assume that would mean, in the case of the United States, that Congress would be asked to grant the authority to act.

"Does the Senator consider that in enacting this resolution we are satisfying that requirement of article IV of the Southeast Asia Collective Defense Treaty? In other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?"

"Mr. Fulbright. I think that is correct.

"Mr. Cooper. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?"

"Mr. Fulbright. That is the way, I would interpret it. If a situation later developed in which we thought the approval should be withdrawn it could be withdrawn by concurrent resolution."

"The August 1964 joint resolution continues in force today. Section 2 of the resolution provides that it shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress. The President has made no such determination, nor has Congress terminated the joint resolution."

"Instead, Congress in May 1965 approved an appropriation of $700 million to meet the expense of mounting military requirements in Viet-Nam. (Public Law 89-18, 79 Stat. 109.) The President's message asking for this appropriation stated that this was 'not a routine appropriation. For each Member of Congress who supports this request is also voting to persist in our efforts to halt Communist aggression in South Vietnam.' The appropriation act constitutes a clear congressional endorsement and approval of the actions taken by the President.

"On March 1, 1966, the Congress continued to express its support of the President's policy by approving a $4.6 billion supplemental military authorization by votes of 88-4 and 98-2. An amendment that would have limited the President's authority to commit forces to Viet-Nam was rejected in the Senate by a vote of 94-2.

"D. No Declaration of War by the Congress is required to authorize United States Participation in the collective defense of South Viet-Nam

"No declaration of war is needed to authorize American actions in Viet-Nam. As shown in the preceding sections, the President has ample authority to order the participation of United States armed forces in the defense of South Viet-Nam.

"Over a very long period in our history, practice and precedent have confirmed the constitutional authority to engage United States forces in hostilities without a declaration of war. This history extends from the undeclared war
with France and the war against the Barbary pirates at the end of the 18th century to the Korean war of 1950-53.

"James Madison, one of the leading framers of the Constitution, and Presidents John Adams and Jefferson all construed the Constitution, in their official actions during the early years of the Republic, as authorizing the United States to employ its armed forces abroad in hostilities in the absence of any congressional declaration of war. Their views and actions constitute highly persuasive evidence as to the meaning and effect of the Constitution. History has accepted the interpretation that was placed on the Constitution by the early Presidents and Congresses in regard to the lawfulness of hostilities without a declaration of war. The instances of such action in our history are numerous.

"In the Korean conflict, where large-scale hostilities were conducted with an American troop participation of a quarter of a million men, no declaration of war was made by the Congress. The President acted on the basis of his constitutional responsibilities. While the Security Council, under a treaty of this country—the United Nations Charter—recommended assistance to the Republic of Korea against the Communist armed attack, the United States had no treaty commitment at that time obligating us to join in the defense of South Korea. In the case of South Viet-Nam we have the obligation of the SEATO treaty and clear expressions of congressional support. If the President could act in Korea without a declaration of war, a fortiori he is empowered to do so now in Viet-Nam.

"It may be suggested that a declaration of war is the only available constitutional process by which congressional support can be made effective for the use of United States armed forces in combat abroad. But the Constitution does not insist on any rigid formalism. It gives Congress a choice of ways in which to authorize the President. In the case of Viet-Nam the Congress has supported the determination of the President by the Senate’s approval of the SEATO treaty, the adoption of the joint resolution of August 10, 1964, and the enactment of the necessary authorizations and appropriations.

"V. CONCLUSION

"South Viet-Nam is being subjected to armed attack by Communist North Viet-Nam, through the infiltration of armed personnel, military equipment, and regular combat units. International law recognizes the right of individual and collective self-defense against armed attack. South Viet-Nam, and the United States upon the request of South Viet-Nam, are engaged in such collective defense of the South. Their actions are in conformity with international law and with the Charter of the United Nations. The fact that South Viet-Nam has been precluded by Soviet veto from becoming a member of the United Nations and the fact that South Viet-Nam is a zone of a temporary divided state in no way diminish the right of collective defense of South Viet-Nam.

"The United States has commitments to assist South Viet-Nam in defending itself against Communist aggression from the North. The United States gave undertakings to this effect at the conclusion of the Geneva conference in 1954. Later that year the United States undertook an international obligation in the SEATO treaty to defend South Viet-Nam against Communist armed aggression. And during the past decade the United States has given additional assurances to the South Vietnamese government.

"The Geneva accords of 1954 provided for a cease-fire and regroupment of contending forces, a division of Viet-Nam into two zones, and a prohibition on the use of either zone for the resumption of hostilities or to “further an aggressive policy.” From the beginning, North Viet-Nam violated the Geneva accord through a systematic effort to gain control of South Viet-Nam by force. In the light of these progressive North Vietnamese violations, the introduction into South Viet-Nam beginning in late 1961 of substantial United States military equipment and personnel, to assist in the defense of the South, was fully justified; substantial breach of an international agreement by one side permits the other side to suspend performance of corresponding obligations under the agreement. South Viet-Nam was justified in refusing to implement the provisions of the Geneva accord calling for reunification through free elections throughout Viet-Nam since the Communist regime in North Viet-Nam created conditions in the North that made free elections entirely impossible.

"The President of the United States has full authority to commit United States forces in the collective defense of South Viet-Nam. This authority stems from the
constitutional powers of the President. However, it is not necessary to rely on the Constitution alone as the source of the President's authority, since the SEATO treaty—advised and consented to by the Senate forming part of the law of the land—sets forth a United States commitment to defend South Viet-Nam against armed attack, and since the Congress—in the joint resolution of August 10, 1964, and in authorization and appropriations acts for support of the U.S. military effort in Viet-Nam—has given its approval and support to the President's actions, United States actions in Viet-Nam, taken by the President and approved by the Congress, do not require any declaration of war, as shown by a long line of precedents for the use of United States armed forces abroad in the absence of any congressional declaration of war."

Mr. EAGLETON. May I readdress my question to the Senator?

Mr. DOLE. I cannot respond as to what may be going on in President Nixon's mind.

Mr. EAGLETON. As the author of the Dole amendment, which would repeal the Gulf of Tonkin resolution, does the Senator, as the principal author of the amendment, view the Gulf of Tonkin resolution as authority for 400,000 troops being in South Vietnam today?

Mr. DOLE. No, and President Nixon has not relied on it.

Mr. EAGLETON. Now, can we go down the list and eliminate further? Does the Senator view the SEATO Treaty as being authority for the presence of 400,000 plus troops in Vietnam?

Mr. DOLE. As I indicated earlier; that is one of the pegs that might have been cited previously.

Mr. EAGLETON. Perhaps it was the peg that might have been used in the past. I am not going to quarrel with the Senator's recitation of history, at least through the Johnson administration. The history through that period has a way of changing even now.

I want to know whether the Senator from Kansas, as the proponent of this amendment, views the SEATO Treaty as authority for the presence of 400,000 plus troops in South Vietnam.

Mr. Dole, I would guess not, but again, I do not know whether it can be answered precisely yes or no. There are a number of considerations. I would guess not, if that would satisfy the Senator.

Mr. EAGLETON. The Senator's guess today is that the SEATO Treaty is not authority for troops being in South Vietnam?

Mr. DOLE. I refer to paragraph 1, article 4 of the SEATO Treaty, which provides that each party thereto "recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger" of the other signatories.

Mr. EAGLETON. I wish the Senator would read on.

Mr. President, I ask unanimous consent that article IV of the SEATO Treaty be printed at this point in the Record.

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

"ARTICLE IV

1. Each party recognizes the aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Senate Council of the United Nations.

2. If, in the opinion of any of the Parties, the inviolability or the integrity of the territory of the sovereignty or political independence of any Party in the treaty area or of any other State or territory to which the provisions of paragraph 1 of this Article from time to time apply is threatened in any way other than by armed attack or is affected or threatened by any fact or situation which might endanger the peace of the area, the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense.

3. It is understood that no action on the territory of any State designated by unanimous agreement under paragraph 1 of this Article or on any territory
so designated shall be taken except at the invitation or with the consent of the
government concerned."

Mr. EAGLETON. The Senator read up to the words "common danger." It goes
on to say "in accordance with its constitutional processes."

Mr. DOLE. That is correct.

Mr. EAGLETON. Then it goes on to say:

"...measures taken under this paragraph shall be immediately reported to
the Security Council of the United Nations."

The Senator is guessing that the SEATO Treaty really is not any authority
for our being there. Is that correct?

Mr. DOLE. I am guessing that it is one of many pegs used by previous adminis­
trations to become involved in South Vietnam.

Mr. EAGLETON. I am speaking as of this date, in June 1970. Is it authority for
400,000 troops being there today?

Mr. DOLE. I would guess it may be some authority, but not the sole authority
for our presence there today.

Mr. EAGLETON. It is some authority. Is that like being a little bit pregnant?
Is it authority upon which a President of the United States or a Congress that
appropriates money can rely insofar as retention of 400,000-plus troops in South
Vietnam is concerned?

Mr. DOLE. Of course, I could not respond to the Senators' first question, but,
with reference to the second part of the question, I would point out that the
underlying authority that any President has in this area is his rights and powers
as Commander in Chief.

Mr. EAGLETON. With respect to the SEATO Treaty, the Senator from Kansas
read from article 4. Is it his opinion that under that authority, affirmative action
by Congress is necessary?

Mr. DOLE. Affirmative action was necessary to do what?

Mr. EAGLETON. Under the SEATO Treaty, in order to comply with section 4,
when each party recognizes that aggression against the one would endanger its
own peace and safety and agrees that it will, in that event, act to meet the
common danger in accordance with its constitutional processes. Is affirmative
action by Congress necessary in order to trigger the application of the SEATO
Treaty?

Mr. DOLE. Let me say to the Senator from Missouri that I did not find that
statement included in the report from the Committee on Foreign Relations, dated
August 6. It might be done under Executive authority. But I do not find that
as a requisite in the report of the committee chaired by the Senator from
Arkansas when the Gulf of Tonkin resolution was reported to the floor of the
Senate.

Mr. EAGLETON. My question related to the SEATO Treaty and especially to the
words, "in accordance with its constitutional processes." Is not affirmative
action by Congress necessary in order to actuate the SEATO Treaty, and could
not that affirmative action be, among other things, a declaration of war or the
Gulf of Tonkin resolution?

Mr. DOLE. Or the ratification of the SEATO Treaty.

Mr. EAGLETON. I beg to differ with the Senator from Kansas. There is nothing
self-implmenting about the SEATO Treaty, by its own language, because, in
order for it to be binding and for it to be implemented in an actual situa­
tion, it has to be done in accordance with the constitutional processes of each
Nation that is a signatory.

Mr. DOLE. That is correct. Of course, the constitutional processes mentioned
could include executive action under our Constitution. The President, of course,
is the chief maker of foreign policy; he is the Commander in Chief; he does have
a right to take executive actions. I assume that is included in the broad phrase
"constitutional processes."

Mr. EAGLETON. Then, the Senator says that the Gulf of Tonkin resolution,
which he deems to be surplusage, is a historical appendix that can be done
away with. In the Senator's opinion, it is not construed to be the congressional
action that would comply with the phrase "in accordance with its constitutional
processes."

Mr. DOLE. Would the Senator please rephrase the first part of that?

Mr. EAGLETON. The Gulf of Tonkin resolution, in the Senator's opinion, is no
current authority for the continued maintenance of troops in South Vietnam;
hence, it can be done away with.

Mr. DOLE. That is correct.
Mr. EAGLETON. I, therefore, ask, in reading the SEATO Treaty, especially article 4, is not the Gulf of Tonkin resolution congressional authorization of the war in Southeast Asia, and thus would it not be in compliance with the language "in accordance with its constitutional processes"?

Mr. DOLE. I do not share the view just expressed. But I would point out again that, of course, in the Gulf of Tonkin resolution there is a provision—which made possible congressional action by concurrent resolution. I recall this was an effort to placate some of those in Congress concerned about it being used as a declaration of war. In fact, if the Senator will read the House debate on the Gulf of Tonkin resolution, he will find that one of the Members of the House referred to the Gulf of Tonkin resolution as a declaration of war. I never considered it a declaration of war but the congressional processes were carried out.

As I said before, and, so far as the junior Senator from Kansas is concerned, it is not needed now, because we are not in the process of escalation. We are in the process of disengagement.

Mr. EAGLETON. One final question—perhaps I can get at it this way: Standing alone, since the Gulf of Tonkin resolution is no authority for the presence of 400,000 troops today in South Vietnam—standing alone and by itself, in its pristine glory, would the SEATO Treaty, in and of and by itself, be authority for the presence of 400,000 in Southeast Asia today?

Mr. DOLE. Again, the junior Senator from Kansas is not certain he understands the basic nature of the question. But the Senate did ratify the SEATO treaty, as I recall, by a vote of 82 to 1. It took effect on February 19, 1955. It was in effect in 1964 when the Gulf of Tonkin resolution was adopted. It is in effect now.

Again, if I were going to rely on anything—and I am not the President—I would rely on basic powers, as clearly defined under the Constitution as Commander in Chief, rather than on some treaty. Again the basic fact is that President Nixon, when he took office, found a number of troops in South Vietnam. I supported President Johnson in that, as I did President Kennedy. But I do not say today, that the President is relying on the SEATO Treaty for the presence of 400,000 American troops. I do not know why he would rely on that treaty, and do not think the Senator from Missouri does.

Mr. EAGLETON. Let me summarize it this way, to see if I am stating it accurately: That is the Senator's interpretation of it, because he is the principal author of the amendment to strip away the Gulf of Tonkin resolution, but this raises the basic question of the authority for the presence today of 400,000 troops in South Vietnam, notwithstanding past history. You have cleared up the Gulf of Tonkin issue. It is not authority for the presence of 400,000 men there today. The Senator stated he believes it is exclusive of the authority that the President has as Commander in Chief.

I take it the Senator does not think he needs SEATO, but it is a little bit of something extra there, a little bit of frosting on the cake.

Mr. DOLE. He did not get that from SEATO.

Mr. EAGLETON. He gets it in terms of authority under SEATO.

Mr. DOLE. It depends on how one interprets SEATO. The Senator from Missouri has interpreted it as a little bit of frosting. It might be interpreted by the President in some other way. I do not interpret it as being binding whatsoever upon the President, I would rely on the Constitution and the inherent powers of the office of the Presidency.

Mr. EAGLETON. As Commander in Chief.

Mr. DOLE. And as the Chief Executive officer of this country, with authority to carry out the rules promulgated under the Constitution. By being the Chief Executive, he is also the chief foreign policymaker.

Mr. EAGLETON. I should like to strip away a little more of the deadwood. I think the Senator has stripped away the Tonkin Gulf issue and has also stripped away the SEATO issue.

Does the Senator think that the presence of 400,000 American troops in South Vietnam today is in any way authorized by President Eisenhower's letter of October 1, 1954, to President Diem?

Mr. DOLE. Would the Senator please read that letter?

Mr. EAGLETON. It is four paragraphs long. I will read it. It is a letter from President Eisenhower to President Diem dated October 1, 1954:

"Dear Mr. President: I have been following with great interest the course of developments in Vietnam, particularly since the conclusion of the conference
at Geneva. The implications of the agreement concerning Vietnam have caused
grave concern regarding the future of a country temporarily divided by an
artificial military grouping, weakened by a long and exhausting war and faced
with enemies without and by their subversive collaborators within.

"Your recent requests for aid to assist in the formidable project of the move­
ment of several hundred thousand loyal Vietnamese citizens away from areas
which are passing under a de facto rule and political ideology which they abhor,
are being fulfilled. I am glad that the United States is able to assist in this
humanitarian effort.

"We have been exploring ways and means to permit our aid to Vietnam to be
more effective and to make a greater contribution to the welfare and stability
of the Government of Vietnam. I am, accordingly, instructing the American
Ambassador to Vietnam to examine with you in your capacity as Chief of
Government, how an intelligent program of American aid given directly to your
Government can serve to assist Vietnam in its present hour of trial so
that your Government is prepared to give assurances as to the standards of per­
formance it would be able to maintain in the event such aid were supplied.

"The purpose of this offer is to assist the Government of Vietnam in develop­
ning and maintaining a strong, viable state, capable of resisting attempted sub­
version or aggression through military means. The Government of the United
States expects that this aid will be met by performance on the part of the Gov­
ernment of Vietnam in undertaking needed reforms. It hopes that such aid,
combined with your own continuing efforts, will contribute effectively toward an
independent Vietnam endowed with a strong government. Such a government
would, I hope, be so responsive to the nationalist aspirations of its people, so
enlightened in purpose and effective in performance, that it will be respected
both at home and abroad and discourage any who might wish to impose a for­
eign ideology on your free people.

"Sincerely,

"Dwight D. Eisenhower."

Now, that is the letter which President Eisenhower wrote to President Diem.

Does the Senator in any way consider that letter as authority for the presence
today of 400,000 American troops—
Mr. DOLE. No.
Mr. EAGLETON. In South Vietnam?
Mr. DOLE. No.
Mr. EAGLETON. Insofar as the right to wage a defensive war, relating back
to the debate and the exchange with the Senator from North Carolina (Mr.
ERVIN) a day or so ago, insofar as that concept is concerned with the established
constitutional concept, that is, the right of a President to wage a defensive
war, does the Senator consider the presence of 400,000 American troops in South
Vietnam today as being authorized under that constitutional precept—to wit,
the right to wage a defensive war?
Mr. DOLE. First of all, of course, we have undertaken steps and commitments.
President Eisenhower did so in the letter which the Senator just read. President
Kennedy did so in sending troops to South Vietnam. President Johnson did so,
and President Nixon has. They have the right under international law to partici­
pate in the collective defense of South Vietnam against armed attack. But our
country made a commitment to give assistance back as far as President Truman’s
time, in various forms and at different times, in the defense of South Vietnam.
At the time of the Geneva Accords in 1954, President Eisenhower warned:
"Any renewal of Communist aggression would be viewed by us as a matter
of grave concern."

At the same time he gave assurance that the United States would not, with
force, disturb the settlement. The formal declaration made by the United States
Government at the conclusion of the Geneva Conference stated that the United
States would view any renewal of aggression in violation of the aforesaid
agreement with grave concern which seriously threatens international peace
and security.

Later, in 1954, the United States negotiated with a number of other countries
and signed the SEATO treaty. It contains in addition to the paragraph previously
quoted, of course, other provisions.

So I would say "No" in answer to the question with reference to President
Eisenhower’s letter, and "Yes" with reference to the Senator’s last question.

Let me add that if the Senator from Missouri is attempting to justify the
presence of 400,000 American troops in Southeast Asia today, then I cannot answer that. I do not know precisely why President Johnson sent 550,000 American troops to Southeast Asia—

Mr. Eagleton. I do not, either.

Mr. Dole. The Senator from Kansas was not privy to that.

Mr. Eagleton. I share the Senator's mystery. Let me rephrase the—

Mr. Dole. If the Senator is trying to charge the presence of 400,000 American troops in South Vietnam today to President Nixon, we may be here for some time, because they were there when he took office.

Mr. Eagleton. I am not making any charges or countercharges. All I know is that there are 400,000 plus American troops in Southeast Asia today and I want to find out under what authority they are there. But let me phrase my question this way, if I may: Let me read two sections of the Constitution and ask the Senator if either one of those sections is authority for the presence of 400,000 American troops in Southeast Asia today.

Article I, section 10, clause 3 of the Constitution reads, in part:

"No State shall, without consent of Congress, engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

That is one section.

Let me read Article IV, section 4 of the Constitution:

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; . . ."

Now my specific question: Are either one of those two constitutional sections authority for the presence today in South Vietnam of 400,000 American troops?

Mr. Dole. They might be, in part.

Mr. Eagleton. They might be in part. Could the Senator elaborate on how 400,000 troops in Southeast Asia today could be protecting any one of the 50 sovereign States from invasion?

Mr. Dole. Mr. President, I am certain the Senator from Missouri has read the excellent law review article that was printed in the Record a few weeks ago on the subject of the Gulf of Tonkin resolution, and how this section and other sections of the Constitution referring to the power of the President as Commander in Chief and chief maker of foreign policy have been interpreted through the years by many of the Presidents.

I go back basically to the power of the President as Commander in Chief and as to what he may have gotten out of the SEATO Treaty, out of the aid programs, and our commitments by Presidents Truman, Eisenhower, and Kennedy.

When we add all of these up, there was enough justification for sending troops to Southeast Asia.

I am still at a loss to know what the Senator from Missouri really wants to know.

Mr. Eagleton. My question, I think, is quite simple. It has been phrased and rephrased in different ways to try to elicit a more precise answer.

I am not quarreling with the Senator from Kansas about what President Johnson thought he ought to do in 1965, or what he thought the Gulf of Tonkin resolution provided him to do.

I am concerned more about the present and the future. I am concerned about the President today, in the month of June 1970. There are 400,000 troops in Southeast Asia. I want to know under what authority they are there.

The Senator tells me they are not there under the Gulf of Tonkin resolution. He tells me they are not there under the Eisenhower letter. The Senator tells me they are not there under the SEATO Treaty. The Senator has not told me why they are there under these two sections of the Constitution involving the right of the 50 States to be protected from invasion without authorization. But that would not answer the question of the Senator from Missouri.

We have a right to collective self-defense between our Nation and other nations.

Again, I will attempt to respond, but do not know why President Johnson sent all of these American troops to South Vietnam.

Mr. Dole. I do not know either. But I want to know why and under what authority President Nixon is maintaining 400,000 troops in Southeast Asia, under what constitutional or legal justification.

I am mystified by the actions of Lyndon Johnson, too. We can be in agreement on that. But as of today in relation to the amendment of the Senator from Kansas, what is the opinion of the Senator as to the authority for the 400,000 troops being in Southeast Asia today?
Mr. Dole: Mr. President, I do not know the justification used by President Johnson. However, President Nixon is now engaged in the process of bringing American boys home. He is not in the process of retaining troops in Southeast Asia for any longer than it might require to have the Vietnamization program become effective.

If I were President, I would rely on my power as Commander in Chief and on any of the allied agreements we might have, and on commitments made by other presidents.

We cannot isolate it and say that this is the reason they are there, that this is the reason that they were sent, or that this is the reason they are still there.

There are a number of reasons and justifications.

As I view the action of President Nixon, it is one of disengagement. Perhaps the Senator from Missouri does not recognize we are disengaging in Vietnam.

Mr. Eagleton: Mr. President, I am not certain. But perhaps that can be the subject of a future discussion.

Mr. Dole: Will the Senator yield?

Mr. Eagleton: I have the floor at the sufferance of the Senator from Arkansas. I was about to elaborate, but the Senator may go ahead.

Mr. Dole: Mr. President, I have said many times that another justification for the action was the action taken by the great Missourian, President Truman, when he ordered troops into Korea. The justification for that was never made clear.

He came to Congress after it was done. Congress had 4 months of debate on that, as I recall. There was no declaration of war. There was no Gulf of Tonkin type resolution passed by Congress.

Mr. Eagleton: Mr. President, I think this has been a very useful debate. The Senator says that there is no justification. He says that he finds no justification and no authority for the presence of 400,000 troops in Southeast Asia today.

Mr. Dole: No. You see, Congress does play a role. We do not do it always by declaring war. We appropriate money in Congress from time to time. We cannot maintain an army without money.

Congress wanted to go further with respect to the Korean war. There was, if I might say so, a rather "hawkish" Congress then. Many Members of Congress were ready to do more than Truman wanted. But they did appropriate money. And that fact, in and of itself, amounts to tacit approval and tacit endorsement by the Congress.

So, that was justification. This Congress, the last Congress, and the previous Congresses have appropriated money for the war in South Vietnam.

That may be another justification for the presence of troops. We are still appropriating money. Congress is a partner in this matter.

As the Senator knows, it is proposed in the Cooper-Church proposal, and perhaps will be later in the Hatfield-McGovern proposal, that funds be cut off. We have that constitutional power.

The debate has been helpful. It might not have been helpful to the Senator from Missouri, but it has been helpful to the Senator from Kansas.

Mr. Eagleton: Mr. President, it is becoming more helpful, because I think it is now becoming clear to me—and I ask the Senator if this is his position—that the authority for the presence of troops in Southeast Asia today is one involving the authority of the President of the United States coupled with the appropriations process. Is that in the opinion of the Senator the authority for having troops there today?

Mr. Dole: That is part of it.

Mr. Eagleton: What are the other parts of it?

Mr. Dole: Mr. President, a quiz program like this is a new experience for the Senator from Kansas. It takes a little while to think. However, yes, it was the SEATO Treaty; yes, it was the pledges made by President Truman—who was a great President—by President Kennedy, and President Johnson; yes, it was by appropriations of Congress; and yes, it was by the Gulf of Tonkin resolution. So we have to consider all of these.

And we will probably appropriate some more money this year. That would be justification for the action. But let me point out a very basic difference, and not to discredit President Johnson, because as a Member of the House, I supported President Johnson and voted for the Tonkin Gulf resolution.

The Senator from Missouri did not have that opportunity, but the Senator from Kansas voted for the Gulf of Tonkin resolution.
Congress has participated very actively. We have appropriated over $100 billion for South Vietnam. But the basic difference now is that we are in the process of disengagement. We can disengage from any conflict with the kind of power he has under the Constitution.

Mr. Eagleton. Where there was light, there is now darkness.

Mr. Dole. It is getting later.

Mr. Eagleton. I thought we had established that as far as the presence of troops in Southeast Asia today is concerned, the Gulf of Tonkin resolution was no authority or authorization for them being there.

I had already checked that point off, because that was the answer the Senator had given me earlier.

Do I understand that, after a few minutes have expired, the Senator contends that the presence of troops in Southeast Asia today is in some way buttressed on the Gulf of Tonkin resolution in part, a little bit?

Mr. Dole. The Senator is talking about numbers and I am discussing Vietnamization and disengagement.

Mr. Eagleton. I am just talking about American bodies in Vietnam, soldiers, airmen, and so forth—400,000-plus. I want to know under what authority they are there. I thought we had gotten it down to authority under the Commander in Chief plus the continuing appropriation process. I thought we had eliminated the Gulf of Tonkin resolution, that we had eliminated SEATO, and Eisenhower was never in the picture.

Mr. Dole. In fairness we must share the burden in this matter. There was a commitment by President Eisenhower with respect to material aid. When he left office in 1961 there were 600 or 700 Americans in Vietnam. None of them had been killed but they were there.

The aid programs go back to President Truman's time. This is not the fault of one party as opposed to the righteousness of the other.

But to be candid with the Senator from Missouri, the presence of American troops there now is justified in large part by the constitutional power of the President and the acts of Congress in appropriating money; but underlying and under, I thought we had been the Gulf of Tonkin resolution. President Johnson did not send 40,000 men there until after the Gulf of Tonkin resolution was approved on August 10, 1964.

Mr. Eagleton. Again, I was with the Senator from Kansas until he threw in the phrase "underlying and underscoring" in reference to the Gulf of Tonkin resolution.

If the Gulf of Tonkin resolution is repealed, and it is eliminated by being repealed, then, is there still remaining some authority for the presence of troops in South Vietnam?

Mr. Dole. Oh, yes.

Mr. Eagleton. And that authority is the power of the Commander in Chief coupled with the appropriation process?

Mr. Dole. There are a number of bases. The SEATO Treaty, the pledges made by three or four Presidents now, the appropriations made by Congress, plus the constitutional power which any President has and that President still has.

Mr. Eagleton. If I may, I would like to ask a few final questions on the Gulf of Tonkin resolution. Is there any basic difference between what the Senator from Kansas seeks to do by amendment 715, and that which is sought to be accomplished by Concurrent Resolution 42?

Mr. Dole. The intent is the same.

Mr. Eagleton. The Senator earlier in this exchange referred to a letter from Mr. H. G. Torbert, Jr., Acting Assistant Secretary for Congressional Relations, in March 1970.

Mr. Dole. Yes, March 12.

Mr. Eagleton. March 12. I would like to call the attention of the Senator to a letter dated December 4, 1969, by the same Mr. Torbert.

Mr. Dole. That would be prior to March 12.

Mr. Eagleton. That would be an earlier letter, yes. In that letter he said, speaking for the State Department on the Gulf of Tonkin resolution: "The existence of the Tonkin Gulf Resolution also has consequences for Southeast Asia which go beyond the war in Viet-Nam. The question of its termination must be considered carefully in terms of our other international obligations in the area, particularly the Southeast Asia Collective Defense Treaty which the Tonkin Gulf Resolution specifically cites. He states: "We would oppose passage of this resolution."
My first question is, Why did Mr. Torbert and the State Department change their minds, in the Senator's judgment, between December 4, 1969, and March 12, 1970?

Mr. Dole. I have been around 10 years, and have never been able to fully understand why the State Department changes its mind.

Mr. Eagleton. But it goes without saying they had a change of heart as far as the utilitarian value is concerned, as expressed in these two letters.

Mr. Dole. Basically there was a recognition when the Vietnamiization program was implemented by President Nixon that it was successful and that we were on our way out of Vietnam. It is generally believed that we have passed the road of no return insofar as further escalation is concerned. I cannot, however, answer the question as to why someone in the State Department changed his mind.

Mr. Eagleton. Could the Senator speculate on what Mr. Torbert meant by this sentence in his December 4 letter, the first letter that opposed repeal of the Gulf of Tonkin resolution:

"The existence of the Gulf of Tonkin Resolution also has consequences for Southeast Asia which go beyond the war in Vietnam."

Can the Senator interpret that for me? Does that convey any message to the Senator?

Mr. Dole. Yes.

Mr. Eagleton. Would the Senator care to elucidate for my benefit what message that conveys?

Mr. Dole. I do not speak for anyone in the Department of State—not that I do not have great respect for the Department of State and the person who may have written that letter—

Mr. Eagleton. Mr. H. G. Torbert, Jr., the same man who wrote the letter of March 12.

Mr. Dole. I believe he was accurately stating a real fear that if the Gulf of Tonkin Resolution were repealed then it might create some apprehension or fear on the part of other free countries in Southeast Asia that we were pulling out prematurely, pulling the rug out from under our friends and allies. But again, I cannot answer the question. I do not know why that particular language was used but would guess there was a feeling in some way it would undermine our policy in Southeast Asia.

Mr. Eagleton. Mr. President, I am about finished, to the delight of the Senator from Arkansas.

Mr. Fulbright. It is very interesting but I did not realize the Senator was going to be quite so long. I do have a speech to make.

Mr. Eagleton. Mr. President, I am about finished, to the delight of the Senator from Arkansas.

Mr. Fulbright. The Senator is talking about the presence there now?

Mr. Eagleton. Yes; the presence there today.

Mr. Dole. Yes.

Mr. Eagleton. Would that Commander in Chief authority, followed up on an annual basis by appropriations, be enough for him to send additional troops to South Vietnam?

Mr. Dole. Perhaps as we have discussed in the Senate, it would depend on the purpose for which they might be sent. If it is to expand the war it might be questionable. Perhaps he can do it, as President Truman did in Korea.

Mr. Eagleton. My question is now, predicated on the repeal of the Gulf of Tonkin resolution.

Mr. Dole. Yes. We have established the fact that the President does have rather broad powers as Commander in Chief. It has been the subject of debate for several days on the floor of the Senate. It has been argued by the proponents of the Cooper-Church amendment that the President can go back into Cambodia, order air strikes in Cambodia, send troops into Cambodia, and clean out sanctuaries in Cambodia; so if it were necessary, God forbid, that we send more troops to South Vietnam that it could be done. We are not talking about President Nixon, but rather the office of the President and the occupant of the office of the President.
Mr. EAGLETON. And this would be done under his authority as Commander in Chief?
Mr. DOLE. Yes; that and other related items the Senator from Kansas has mentioned two or three times.
Mr. EAGLETON. But not the Gulf of Tonkin resolution; we are repealing that.
Mr. DOLE. Is the Senator from Missouri for repeal?
Mr. EAGLETON. I am going to vote for repeal.
Mr. DOLE. That resolves one question I had.
Mr. EAGLETON. Would that authority be broad enough for the Commander in Chief, without the Gulf of Tonkin resolution to initiate bombing raids against China?
Mr. DOLE. Under what circumstances?
Mr. EAGLETON. Under circumstances wherein the President thought it would be propitious to strike out certain productive areas of Red China wherein they were making war machinery, armaments, etc., that were finding themselves in the hands of the North Vietnamese or the Vietcong.
Mr. DOLE. Perhaps the question is a little speculative. Unless there were some imminent danger to American forces or some imminent danger to American nationals or some imminent danger to American property, then I certainly would think any President would first consult with the Congress and obtain some congressional approval. But again, the junior Senator from Kansas, having been in this body only 17 months, does not have the precise answer to that very difficult question.
Mr. EAGLETON. But the Senator predicates his answer on the assumption that the President would consult with Congress before he made that decision.
Mr. DOLE. Yes; contrary to what President Nixon did in Cambodia or what President Truman did in Korea, it would be my suggestion, at least, that they call someone.
Mr. EAGLETON. Would this be a suggestion or would it be required under the Commander in Chief authority that they consult with Congress?
Mr. DOLE. It is not required.
Mr. EAGLETON. It is not required. So it is the thought of the Senator that as Commander in Chief, with no Gulf of Tonkin resolution, the President could have an air strike in Red China?
Mr. DOLE. That is right. I assume so. I am not advocating it, as the Senator from Missouri knows.
Mr. EAGLETON. But the Commander in Chief authority is, in its phraseology and in its historical implications, broad enough to embrace that of action unilaterally by the President without consultation with Congress, even though consultation might be had if he had time?
Mr. DOLE. That is right. Before World War II we sent troops into Greenland and Iceland and committed other warlike acts before becoming involved directly in World War II and before Congress declared war.
Again I would refer, and surely the learned Senator from Missouri has read it, to the Harvard Law Review article, 51 Howard Law Review 1771, previously referred to with reference to the powers and rights of the President from the time of George Washington down to the present time. There have been actions taken by the Commander in Chief—yes, without consultation with the Congress. In some cases the President reported to Congress afterward. In some cases he notified Congress in advance.
But there have been cases, and they are recited in great detail, whether it was Polk who went into Mexico, or Jefferson who got involved in the Bay of Tripoli. There are numerous examples of where the President of the United States exercised his right as Commander in Chief. These acts were generally followed by some voice of dissent from Congress. In fact, George Washington had the first confrontation with Congress when he obtained the treaty or proclamation of neutrality with France and England. As I understand it, some Members of Congress did not agree with it and thought it went beyond his constitutional powers.
So, if we want to speculate, we can assume the Commander in Chief's powers are quite broad; but the junior Senator from Kansas does not want to state on the floor that any President should bomb any place without consulting Congress.
Mr. EAGLETON. But the Senator does state that the powers are broad enough to permit him to act, and that such consultation with Congress comes after the fact, by courtesy of the President, after the decision has been made or after the die has been cast?
Mr. Dole. The invasion of Korea is an historical precedent, to answer the Senator from Missouri, but that action taken by the President marked a clear departure from precedent in exercising the powers of Commander in Chief. Commanders in Chief had been rather timid up to that time, but President Truman was not a timid man. He acted when an emergency required him to act. He acted wisely. And since that time, more and more power has been vested in the Commander in Chief.

Mr. Eagleton. Well, then, the Commander in Chief power for the President to act by himself is broad enough to permit the bombing of China, the invasion of Korea, or any unilateral military decision the President sees fit to make, being the Commander in Chief?

Mr. Dole. Will the Senator repeat the first part of the question?

Mr. Eagleton. The Commander in Chief power, as the Senator views it, is broad enough to support what President Truman did in Korea, and a unilateral decision to invade or move into South Korea, his premise being assistance of Syngman Rhee, or is broad enough to have deployed troops to South Vietnam, bomb North Vietnam, or bomb anywhere in the world, if he is promising it on his authority as Commander in Chief?

Mr. Dole. I would, in a general sense agree, but that is the view only of a junior Member of this body. It is not the President's view, probably. It may not be another President's view. It may not be the view of the Senator from Arkansas. It depends on circumstances. Are Americans in danger? I would not have given President Johnson the power to deploy troops to Vietnam or bomb anywhere if Americans were not in danger, and I would not have given the authority to deploy forces to any other country if Americans were not in danger. And I would not have given the authority to deploy forces in any other country under the theory of the Senator from Kansas, solely and exclusively under the Commander in Chief authority, buttressed on occasion by the appropriations process. I consider this to be a very dangerous constitutional precedent.

I thank the Senator from Arkansas for yielding to me.

Mr. Fulbright. First of all, I appreciate the opportunity to discuss what is a very vital area of this debate with the junior Senator from Missouri. His wrap-up does not reflect the views of the junior Senator from Kansas completely. It does occur to the junior Senator from Kansas that, of course, the President has rather vast powers as Commander in Chief, and I could read the Senator the statement made by the junior Senator from Arkansas when the Gulf of Tonkin resolution was being considered by this body on August 7, 1964. But we are not in Vietnam just because of the appropriation process and the authority of the President as Commander in Chief. As the Senator intimated, there are certain other factors involved. So when the Senator characterizes my assessment, it is only the assessment of the junior Senator from Missouri and it is only the assessment of the junior Senator from Kansas, and not the assessment of anyone in the administration or of any President or of anyone in the State Department.

I thank the Senator from Arkansas for yielding.

Mr. Goldwater. Mr. President, will the Senator from Arizona yield for an observation? I tried to get the Senator to yield, and he did not feel he could.

Mr. Fulbright. Of course, I am going to make some remarks and then I shall be delighted to yield to the Senator from Arizona, if he wishes me to.
Mr. Goldwater. I think it would be more appropriate at this time.

Mr. Fulbright. How long does the Senator wish?

Mr. Goldwater. Maybe 2 minutes.

Mr. Fulbright. Mr. President, I yield for that purpose.

Mr. Goldwater. Mr. President, I have been more and more impressed, throughout this lengthy debate, with the need for a different approach to the two problems we face than we are making here.

I do not think there is any question about the power of the President as Commander in Chief. I agree with the language of Prof. Edgar E. Robinson, of Stanford University, that:

"The President's power as Commander-in-Chief of the Armed Forces are of greater significance than all the other powers prescribed in the Constitution."

I have detected, during the course of this debate, in the mail I have received, and at talks I have made around this country, that the American people really do not understand the limited action that we as Congress can take in the area of war, or the extreme action the President can take in the area of war.

I have come to the conclusion, Mr. President, particularly after having listened to this very interesting discussion today, that we would be better off discussing two constitutional amendments: one to better describe and prescribe the powers of Congress in the area of warmaking, and a second to describe and prescribe, if we have to, the powers of the President; because until we do either, I think we are going to go on with a very misunderstood idea of what the Constitution gives to both Congress and the President as powers. I would hope, Mr. President, that when we have finished voting on the Cooper-Church amendment and the McGovern-Hatfield amendment, this body can get down to the serious business of discussing—I do not say writing, but discussing—the need for a constitutional amendment.

Personally, I think we have to have one or two, if we are going to better understand what we were trying to understand today and what we have been trying to understand through 6 weeks of discussion on the Cooper-Church amendment.

With those words, Mr. President, I thank my distinguished friend from Arkansas for yielding.

Mr. Gurney. Mr. President, will the Senator yield very briefly for an observation?

Mr. Fulbright. I yield.

Mr. Gurney. I, too, was present during the colloquy between the junior Senator from Missouri and the junior Senator from Kansas—a very interesting and illuminating discussion of the whole subject of the powers of the Commander in Chief.

My own impression, though, was that the last statement by the junior Senator from Missouri of his impression of the position of the junior Senator from Kansas was not accurate, and I take exception to it.

I did not gain any impression from the colloquy that the President of the United States at any time, any place, anywhere has the power or the right to inject American troops or to launch this country into war. It is my impression from what the Senator from Kansas said that the powers of the Commander in Chief are very broad, and that under certain facts and circumstances, when, indeed, American lives and the national security are in danger, the President does have broad powers to react, and I would go back to just one example—perhaps one of the very latest examples—which I think bears out what the Senator from Kansas is talking about. That was during the Cuban missile crisis, when President Kennedy declared a quarantine around Cuba and against the Russians, and mobilized the Air Force, the Army, and the Navy—as a matter of fact, my State of Florida was like an armed camp, with airplanes flying over day and night and troops moving in. We were actually on the threshold of war.

I think what President Kennedy did was exactly right. In this day and time, when we have to move quickly, he had to move quickly, too, in that instance, to protect the national security of this country.

That is what I think the Senator from Kansas was talking about, that the Commander in Chief does have broad powers in matters of emergency such as this to do the things that are necessary for the national security of this country.

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

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

Much has transpired since this body last considered the War Powers Act of 1972—passing that Act on April 13, 1972 by an overwhelming 68 to 16 vote. After elevating the hopes of the American people with the now famous peace-is-at-hand statement in October, President Nixon conducted one of the most brutal bombardments in the history of aerial warfare over Hanoi and Haiphong in December. I am sure that the President made his decision because he felt that it was in the best interests of the country. But even now, after the bombing has been halted, the President has refused to come to the American people to explain why such action was necessary. If decisions of such moment as to involve war and peace are made in secrecy and kept from the arena of public opinion, the democratic process will be undermined.

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

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

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

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

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

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

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

In February 1971, Senator Javits submitted a revised and superior version of his war powers legislation of the previous year. This bill was designed to make rules respecting military hostilities in the absence of a declaration of war. In this bill,
Senator Javits introduced for the first time the concept of placing a quantifiable limitation on the authority of the President to act in certain emergency situations spelled out in the bill. The justification for establishing a 30-day period—within which the Congress must act to authorize the President to continue his use of forces in an emergency—is still applicable in the bill we introduce today. While recognizing the authority of the Commander in Chief to take emergency action—to repel an attack on the United States, or on U.S. Forces stationed abroad, or to rescue under carefully circumscribed conditions American citizens in foreign countries—we establish a procedure whereby Congress must be immediately notified of the emergency circumstances that justify the commitment of American Forces. By placing a 30-day limitation on the President’s emergency authority we recognize that a defensive emergency action can develop the offensive character of war. If Congress is to be involved in the decision to pursue, define, or, alternatively, to reject that war, it must be notified immediately of any emergency and convene to determine, first, whether such action was legitimate in the first instance, and second, if continued action of a retaliatory nature is either necessary or prudent.

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

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

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

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

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

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

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

In addition, my resolution questioned a basic premise of post World War II foreign policy—that our treaty commitments are self-executing. The power to declare war was assigned to both houses of Congress. Treaties are, of course, ratified only by the Senate and cannot represent even an implicit American commitment to wage war at the discretion of the Commander in Chief alone.
Our treaties are also to be implemented only in accordance with the constitutional processes of the signatory nations. The constitutional processes of the United States specify that Congress—not the President—has the authority to declare war.

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

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

Senate Joint Resolution 59 also went further in defining the areas in which affirmative congressional action would be necessary. It defined "hostilities" as including the deployment of U.S. forces outside the United States under circumstances where an imminent involvement in combat activities is a reasonable possibility. It also included the assignment of U.S. soldiers to accompany, command, coordinate, or participate in the movement of regular or irregular armed forces of any foreign country when such forces are engaged in any form of combat activity.

There was well-founded precedent for such limitations. In the absence of limiting congressional legislation, presidential power to move Armed Forces of the United States in international waters and to station them on territory of our allies has generally been accepted, except where such action could reasonably be expected to lead to hostilities. Only once has this principle flagrantly been abused. In 1846, after the annexation of Texas, President James Polk ordered American troops to enter the disputed territory between the Nueces and Rio Grande Rivers. Hostilities immediately broke out and Congress thereafter declared war against Mexico. However, some 18 months later, the House of Representatives concluded that the President had unconstitutionally begun the war and, in effect, Polk was justly censured.

Presidential power to move the Armed Forces of the United States is not, and should not, be viewed as extending to place American men in situations where combat is almost inevitable.

And, as Vietnam has illustrated, limited deployments of U.S. military advisers to countries where combat activities are in progress or could be expected to commence shortly has become increasingly more dangerous in an era when "brushfire" wars and guerrilla warfare are becoming even more common.

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

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

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

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

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

Presidents have alleged a long list of powers to justify the commitment of American Forces in Indochina. The Gulf of Tonkin Resolution, the SEATO Treaty, congressional appropriations, and the powers of the Commander in Chief have all been cited at various times as legal authority for our presence in Vietnam. President Nixon has, however, in statements attributed to him and to his administration, relied almost exclusively on the powers of the Commander in Chief. Such a reliance, of course, does not in any way necessitate the involvement of the Congress of the United States. If this claim of power is allowed to stand without challenge, Congress will continue to lose its powers by attrition and our Constitution will undergo a major restructuring.

Alexander Hamilton, our most eloquent defender of increased executive power at the Constitutional Convention, gave his interpretation of the powers of the Commander in Chief in Federalist Paper No. 69:

"... would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies—all of which by the Constitution under consideration, would appertain to the legislature."

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

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

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

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

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

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

OTHER ENFORCEMENT METHODS?

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

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

Senator Eagleton. That is right. I prefer the 30-day provision because it is a precise mechanism. I concede that perhaps a qualitative approach would have some merit, but I am not deserting the 30-
day provision. The qualitative approach would require the same intensive examination of the qualities that comprise offensive versus defensive war that we went through to delineate the emergency powers.

Mr. ZABLOCKI. You do find some merit in the qualitative approach?
Senator EAGLETON. I don't dismiss it but until I could examine a specific construction my preference is for the 30-day approach.

Mr. ZABLOCKI. In drafting S. 440, I presume that approach was thoroughly explored?
Senator EAGLETON. Explored. I query the word, "thoroughly," but it was explored.

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

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

Would you please elaborate on that?

TONKIN GULF RESOLUTION GAVE BROAD AUTHORITY

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

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

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

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

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

LANGUAGE MUST BE CAREFULLY DRAWN

None of us would want to leave that implication, I am sure. Unless the language is carefully drawn, I think it could backfire and tend to
give the President at least the feeling that he had greater authority
to move forces and to engage forces than he does under the
constitution.

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

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

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

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

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

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

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

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

DEVISING WORTHWHILE TESTS

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

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

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

Do you have any comments to make? Do you think that the report-
ing requirement should set forth the legal justification for the intro-
duction of military forces equipped for combat?

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

I think that could be redrafted along the lines you are suggesting.
I think the President should be required to set forth what legal au-
thority he is proceeding under, because, again, getting back to the In-
dochina situation, at one time or another both President Nixon and
Johnson talked in terms of SEATO.
CITE VARIED AUTHORITY SOURCES FOR VIETNAM INVOLVEMENT

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

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

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

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

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

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

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

WHEN REPORTS REQUIRED

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

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

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

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

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

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

EAGLETON DISSENTS FROM JAVITS' VIEW

In further amplification of my position, I feel I must dissent from Senator Javits' answer, as I heard it, with respect to the deployment of troops to Israel.
Today, suppose the President sends 20,000 "advisers" to Israel. I think that he would have to obtain congressional approval, because I think that is a situation where imminent involvement in hostilities is clearly indicated by the circumstances. But there is, of course, room for debate on this point. That is why we would subject such questions to a majority vote.

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

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

I yield to Congressman Bingham.

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

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

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

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

PRESIDENT ACTS ON IMPLIED CONSENT FROM CONGRESS

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

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

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

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

Senator Eagleton. That is correct.

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

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

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

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

**WHEN DOES 30-DAY PERIOD BEGIN?**

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

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

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

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

Senator Eagleton. That is the way I viewed it.

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

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

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

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

Mr. du Pont, any questions.

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

Mr. Zablocki. Begin the questions.

Mr. du Pont. Thank you very much.

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

**GIVING CONGRESS STRONG HAND IN DECISIONMAKING PROCESS**

Senator Eagleton. We think that the basic decision in terms of how and why and when and where to go to war is Congress’ decision
under the intention of the Constitution, and we want to give Congress the strong hand in that decision-making process.

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

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

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

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

Mr. Du Pont. And you also intend it to apply unilaterally to U.S. forces?

Senator Eagleton. That is correct.

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

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

PREVENTING A FILIBUSTER IN THE SENATE

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

Senator Eagleton. We intend that it does.

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

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

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

Mr. Bister. Senator, I am concerned about whether, and if so to what extent, adoption of 440 would involve an offer to amend any of our treaty obligations such as NATO?
Senator Eagleton. I don't think it does. This was raised by Senator Sparkman at the Foreign Relations Committee hearing last year on a similar war powers bill.

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

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

Authorization to Become Engaged in War

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

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

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

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

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

Senator Eagleton. I guess with an airlift.

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

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

Mr. Biester. I agree.

Treaty Obligations to Allies

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

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

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

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

Senator Eagleton. I don't know what the constitutional authorization is in Britain or Belgium or any of the other NATO countries.
Mr. Bresner. That has not established our relationship.
Senator Eagleton. No.
Mr. Bresner. And we assume any change in ourselves would stabilize theirs.
Senator Eagleton. Since it is clearly worded in the NATO alliance that actions will be taken pursuant to constitutional role of each power, it is already there and they are on notice of it.
Mr. Zablocki. Thank you, Senator. The subcommittee stands adjourned until 10 a.m., tomorrow morning.
(Whereupon, at 12:25 p.m. the subcommittee adjourned, to reconvene at 10 a.m., Thursday, March 8, 1973.)
[The statements of Congressmen Fascell, Bingham, and Chappell follow:]

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

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

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

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

RESOLVING DIFFERENCES BETWEEN HOUSE, SENATE MEASURES

The House has on two occasions passed legislation reported by this committee. Last year, the Senate also passed war powers legislation by a substantial margin, which has been reintroduced this year by the distinguished Senator from New York, Mr. Javits, and at least 57 of his colleagues. The task before us is to resolve the differences between the two measures.
The resolution introduced by Chairman Zablocki, which I am pleased to have cosponsored, includes several modifications of the war powers resolutions passed by the House last year. House Joint Resolution 2, as now written, includes a provision specifying those emergency circumstances under which the President may commit U.S. Armed Forces without a declaration of war. The comparable Senate provision is substantially more specific, and delineates in detail authority which the Presidency has assumed over the years by Executive action and Executive interpretation of the Constitution. Actually, this authority has accrued to the office not from any legal or constitutional basis, but simply from its exercise. The House language is more general, and, I suggest, more in line with our objective.

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

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

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

**PRESIDENT NEEDS EMERGENCY POWERS**

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

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

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

We now have the benefit of State Department briefings from time to time—generally after the fact and after we’ve all read about it in the newspapers. But we all know that the high-level foreign policy decisions which could involve the commitment of U.S. forces are made
not in the State Department, nor in the Defense Department, but in the White House—in the Office of the National Security Affairs Advisory and among the Joint Chiefs of Staff. It is these officials who should keep the Congress apprised. I say this with all deference to the State Department, of course.

**MEANS OF KEEPING CONGRESS INFORMED**

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

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

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

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

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

**PRESIDENT'S EMERGENCY ACTION ONLY TEMPORARY**

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

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

While there are those who subscribe to the theory that it is better to act than not to act, even though the action could predictably be a resounding vote of confidence in the President, I question that theory. It is my contention, that a requirement for congressional action within a specific time period would result, from a practical standpoint, in the automatic, pro forma ratification of the President's action. The pressure of taking action within the 30 days—or even an extended time, as provided for in the bill—would almost demand congressional approval.
The House proposal, on the other hand, provides for immediate congressional consideration regarding future authorization, but does not require action within any specific time frame nor provide for the cessation of the President’s authority. Herein lies the crux of the issue.

A STRUCTURE FOR INFLUENCING THE PRESIDENT

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

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

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

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

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

Thank you, Mr. Chairman.

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

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

Senator Javits and others have eloquently argued the need for legislation to reassert the authority of the Congress over basic ques-
tions of peace and war. I shall not take the time to repeat these arguments. Let me just point out that President Nixon has in effect asserted the authority to take this country into wars without the consent of Congress and has acted as if he had that authority.

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

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

SOLEMN OBLIGATION OF CONGRESS

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

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

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

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

GRAVE FAULTS OF JAVIS BILL

I should like to turn now to what I regard as the grave faults of the Javits bill. I realize, of course, that this is the same bill that was overwhelmingly passed by the Senate last year and that has been widely accepted by those who believe, as I do, that the Congress should act to limit the President’s power to make war; and I have the greatest respect for Senator Javits and others who support his bill.

Yet, I am constrained to say that, for all its good intentions, the Javits bill might well turn out to be worse than no bill at all.

First, I believe it is a mistake to attempt to define, as section 3 of the Javits bill does, those situations in which the President has the authority to engage in hostilities without prior congressional approval. Any such list is likely to be either too broad or too narrow, or both, as is indeed the case with Senator Javits’ list.
His list is too narrow because it is easy to imagine a situation not covered by the bill when a President ought to be in a position to move rapidly.

Moreover, section 3(4) of the Javits bill appears to rule out a quick response to an attack on a fellow NATO member. At the same time, Senator Javits' list can be said to be too broad and subject to abuse. Protection of American citizens has often been used in the past as an excuse for American military intervention, and section 3(3) of the Javits bill would expressly permit such action in certain circumstances.

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

**Presidential Authority to Take Action Subject to Challenge**

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

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

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

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

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

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

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

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

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

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

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

PRESIDENT'S WARMAKING POWERS DANGEROUS

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

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

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

I intend shortly to circulate my bill, omitting this section and making certain other minor revisions and to invite those members who are so disposed to cosponsor it. I will then reintroduce it, as amended.
Mr. CHAPPELL. Mr. Chairman, for 12 long years I watched the shadow of a war creep over this land bringing with it anguish, frustration, and despair as our people endeavored to understand America's involvement on another soil 10,000 miles away.

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

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

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

DOES NOT ALTER PRESIDENT'S POWER

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

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

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

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

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

Indeed, the framers of the Constitution recognized that the President under certain circumstances might have to take defensive action to repel and subdue a sudden attack on this great Nation. But that was the extent of the warmaking power they were willing for him to exercise.
I deeply believe that the Constitution is a living document. The Congress of the United States must activate its responsibilities under the document for determining war and peace.

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

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

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

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

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

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

THURSDAY, MARCH 8, 1973

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

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

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

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

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

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

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

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

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

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

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

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

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

VETO BY ONE HOUSE OF CONGRESS

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

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

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

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

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

PROVIDING MECHANISM FOR CONGRESS TO SAY NO

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

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

Mr. BINGHAM. That is right.

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

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

Mr. ZABLOCKI. You do not?

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

May I say, too, Mr. Chairman, that I think House Joint Resolution 1 of the 91st Congress, even though it did not spell out when the President has this authority, implied that the President did have the authority because of the very fact that it says, “When the President enters into such hostilities, he must report to us.” That implies that he has that authority, so I don't think we can get away from that problem by silence. That is why I feel it is so important to provide specifically for a mechanism whereby the Congress can say no.
Mr. Zablocki. One final question, Mr. Bingham. As you recall, Senator Eagleton stated yesterday that it would be preferable to have strong legislation—even though questionable in constitutionality nevertheless it is better to approve such legislation or nothing at all.

Do you agree?

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

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

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

Mr. Bingham. Thank you, Mr. Chairman.

Mr. Zablocki. Mr. Thomson.

Mr. Thomson. I have no questions.

Mr. Zablocki. Mr. du Pont.

Mr. du Pont. Thank you, Mr. Chairman.

CONGRESSIONAL ACTION TO STOP HOSTILITIES

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

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

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

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

What I am proposing is that we provide a mechanism whereby this no vote by either House can be expressly provided for by law.
To put the matter another way, as I see it what happens when the President moves to embark on hostilities is that he is proceeding with the tacit consent of the Congress and he can proceed as long as that tacit consent applies but that tacit consent of the Congress can be negated by action of either House saying no. That is the justification.

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

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

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

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

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

Mr. Bingham. I don't think it is. Mr. du Pont. I think that, as section 3 in House Joint Resolution 2 recognizes and as the corresponding section of the Javits bill recognizes, it is quite arguably within the responsibility of Congress to determine when the President has this authority. I think that really the burden of proof is on those who support the authority of the executive branch for the President.
to move on his own. So I think that, under the terms of House Joint
Resolution 2 or the Javits bill, the effect is to grant a certain authority
to the President and then to provide mechanism for approving or
disapproving the President’s action and the disapproval could be, as
in my bill, effected by action by one House.

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

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

Mr. du Pont. Thank you.

Thank you, Mr. Chairman.

Mr. Zablocki. Mr. Fraser.

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

My questions may cover ground that you have already covered.

**DEFINITION OF “HOSTILITIES”**

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

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

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

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

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

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

Mr. Bingham. I suppose it could be.

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

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

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

OPPOSED TO SPELLING OUT CIRCUMSTANCES OF PRESIDENTIAL ACTION

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

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

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

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

Mr. Fraser. Would a specific enactment by the United Nations Security Council calling for the use of armed forces in an international
conflict constitute "specific authorization" through our commitment to the U.N. charter.

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

U.N. ACTION ON WAR AND PEACE ISSUE

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

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

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

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

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

CONGRESSIONAL OPPOSITION SHOULD CONTROL

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