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

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

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

Mr. Bingham. It is.

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

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

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

DECLARING WAR ON NORTH VIETNAM

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

Mr. Bingham. I agree with that.

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

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

Mr. Fraser. That is right.

Mr. Bingham. I don’t think you can—

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

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

Mr. Fraser. Well, supposing for example, that the Gulf of Tonkin were written in the light of this section and would have been fashioned in a way that the Department lawyer said, OK, this satisfies the requirement. General as the language is, it is specific enough to comply with section 3 of this law.
Now in that case in order to stop the President you would then have had to repeal that authorization.

Mr. Bingham. That is right.

Mr. Fraser. Which is subject to veto.

Mr. Bingham. Right.

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

Mr. Bingham. Right.

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

PRESERVING PRINCIPLE OF CONGRESSIONAL AUTHORITY

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

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

Thank you, Mr. Chairman.

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

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

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

If I may just ask one further question, and I asked this of the Senator yesterday. In section 6 of your bill, the congressional priority provision, you recall Senator Javits said he was concerned about an improvident decision—the improvident decision, for example, some critics claim the Congress made in passing the Tonkin Gulf resolution. Under emotional stress, unfortunately, Congress may react by making such decisions.

DOES NOT BYPASS NORMAL PROCEDURES

Under your section 5 the disapproval is sponsored or cosponsored by one-third of the Members of the House of which it originally had
been considered reported to the floor of such House no later than 1 day following its introduction unless the Members, of course, of such House otherwise determined by yeas or nays.

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

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

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

Mr. Zablocki. Any further questions?

Mr. Bingham. Thank you, Mr. Chairman.

Mr. Zablocki. Congressman Matsunaga.

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

Mr. Matsunaga. Thank you, Mr. Chairman.

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

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

H.R. 2053, as the chairman has observed, is virtually identical to legislation which passed the Senate last year by the overwhelming margin of 88 to 16. It starts from the premise that the President must obtain prior congressional approval before committing American Armed Forces in any hostilities. However, the President would not be required to seek prior congressional approval—

EXCEPTIONS TO NEED OF SEEKING PRIOR CONGRESSIONAL APPROVAL

1. In the event of an invasion of the United States or its territories, or to prevent an imminent invasion;
2. To protect our Armed Forces overseas;
3. To rescue Americans from dangerous situations in other countries; or
4. Pursuant to a specific grant of authority by Congress to cover the particular situation in which the forces are to be used.
Whatever troops are committed without prior congressional approval, they must be withdrawn within 30 days, unless Congress specifically authorizes an extension or is physically unable to meet, or the President certifies that a further period is needed for a safe disengagement of our troops.

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

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

DEFINITE PROCEDURES NEEDED TO PREVENT FUTURE VIETNAMS

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

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

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

What was it that the framers of our Constitution had in mind when they gave to the Congress the exclusive power to declare war? To declare war is to decide to go to war, to commit this Nation to active participation in hostilities. It was intended that after the Congress had decided to depart from the normal state of affairs and declare war, and only after such declaration, the President, as Commander in Chief of our armed forces, was to exercise the power to conduct and direct the war. That this was the intent is clearly spelled out in the writings of one of the strongest advocates of executive power, Alexander Hamilton. In Federalist No. 69 he wrote that the President’s authority as Commander in Chief “would amount to nothing more than the Supreme Command and direction of the military and naval forces, as First General and Admiral of the Confederacy.”

CONGRESS SOLE REPOSITORY OF POWER TO DECLARE WAR

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

Of course, there are those who contend that such a view of the war-making powers of Congress is hopelessly archaic. We are told that we live in a world of instantaneous communication where momen-
tous decisions need to be made in less time than it takes to complete a quorum call. Perhaps so. But there are two compelling responses to that argument:

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

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

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

CONGRESSIONAL ACQUIESCENCE ON USURPATION OF POWERS

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

We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

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

Thank you, Mr. Chairman, for your attention.

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

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

DEPLOYING U.S. FORCES WITHOUT DECLARATION OF WAR

Under these conditions of circumstances on which the Armed Forces may be deployed without a declaration of war, on the one hand appear to bind the President under your bill so inflexibly by such rules that he will not be able to act expeditiously in future situations
which cannot be envisioned now, as the Congressman from Minnesota has pointed out in the colloquy with Mr. Bingham. On the other hand, the President will actually use the legislation by your own definition to provide an explanation, to provide himself with an excuse to act when justification might otherwise be lacking, since the ultimate determination of what the words of the statute will mean will be his, whether it is a dire emergency or a crucial moment.

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

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

EXECUTIVE CLAIMS NO NEED FOR CONGRESSIONAL AUTHORIZATION

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

Mr. Zablocki. There is no doubt in my mind that we all are striving for legislation which would prevent future undeclared wars. Could I have your comment: your version does not provide for consultation as House Joint Resolution 1 of the last Congress and House Joint Resolution 2 that is now before us does provide in section 4, namely that the President when acting pursuant to the provisions of section 3 would seek appropriate consultation with the Congress before introducing the Armed Forces.

This provisions calls for the President to consult with Congress before he acts. Your proposal is that Congress would have to act after he took action. Don't you think there is a likelihood that undeclared wars would be prevented if he consulted with the Congress before the
fact? I wondered why you didn’t include that in your version. Personally, I feel very strongly about that section.

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

VALUE IN CONSULTATION?

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

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

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

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

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

Mr. Thomson.

Mr. Thomson. No questions.

Mr. Zablocki. Mr. Fraser.

Mr. Fraser. Thank you, Mr. Chairman.

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

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

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

DISCRETION LEFT TO EXECUTIVE

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

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

Mr. Matsunaga. I agree.

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

Mr. Matsunaga. Well, what we are trying to do in my bill is to prevent Vietnams. Within the designated 30 days the President must justify his actions or the engagement will be terminated by Congress.
Now you might ask, "Does this not lead to expeditions of 29 days?"
Even if it did, 29-day expeditions would be preferable to expeditions of 11 years duration. I think at least it is a step in the right direction and a step which is much more important toward a restoration of the war powers to the Congress.

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

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

Mr. Matsunaga. Never did, no.

IMMINENT INVOLVEMENT IN HOSTILITIES

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

What would you say about that?

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

Mr. Fraser. Not as I read your bill.

Mr. Matsunaga. Well, section 3.

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

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

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

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

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

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

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

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

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

Mr. Matsunaga. Yes.

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

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

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

FROM THE CUBAN VIEWPOINT

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

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

Mr. Matsunaga. Yes.

Mr. Fraser. In other words, an attack on France or West Germany would be construed as an attack on the United States. Under the provisions of subparagraph 4 of your bill that would not be sufficient to
authorize the President to act if there were an attack, say, on West Germany unless the NATO agreement or perhaps the law ratifying the treaty indicated specifically that the President would be authorized to proceed notwithstanding the restrictions of this bill. In other words, it would have to spelled out specifically that it was an exemption.

Mr. Matsunaga. Right.

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

WARMAKING POWERS IN BOTH HOUSES OF CONGRESS

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

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

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

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

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

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

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

Mr. Fraser. Without further congressional action?

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

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

Mr. Zablocki. Yes, 2 more minutes.

Mr. Fraser. I am sorry.

Mr. Matsunaga. I have an 11:30 engagement in town.

NUCLEAR ATTACK ON WESTERN EUROPE

Mr. Fraser. Suppose there were a nuclear attack on the Western European countries. What you are saying is that the President, in order to respond against the Soviet Union, would have to come to Congress?

Mr. Matsunaga. That is correct.

Mr. Fraser. This obviously would mean the lapse of a measureable period of time; 6, 12, 24 hours.
Mr. Matsunaga. Yes. But the President could obtain advance approval of Congress in support of a treaty.

Mr. Fraser. At that point Western Europe has been devastated and then the question facing the American people through the Congress would be, should they authorize an attack on the Soviet Union which would guarantee the destruction of most of the United States. I would myself see some difficulty in the Congress approving that course of action since it would simply result in destroying the Soviet Union and the United States.

In other words, what we would have done through the position you are advocating—and I realize I am asking you for offhand judgments here—we would have destroyed the element of uncertainty which the Soviet Union now has to accept. In fact, we may now respond immediately with a nuclear attack on the Soviet Union if they should attack any of our allies because unlike any other treaty to which we are a party the NATO treaty says that an attack on one shall be treated as an attack on all.

I want you to think about the implications of that. In other words, the nuclear shield that we presently provide Western Europe, would it in effect disappear in your judgment?

Mr. Matsunaga. I repeat what I said earlier, although I am not positive about what the actual situation is. In the case of NATO I believe we have congressional authorization passed by both the House and the Senate permitting military support of the treaty. In other words, the Congress has already granted that authority—the authority which those of us who are for this type of legislation say belongs exclusively to the Congress. That authority has already been granted in the case of NATO.

Mr. Fraser. But I understood you to say that you didn’t favor allowing the President to use our—

Mr. Matsunaga. Not without congressional authority.

ADVANCE APPROVAL OF NATO ARRANGEMENT

Mr. Fraser. But you would give advance approval of this NATO arrangement?

Mr. Matsunaga. In a case like that, yes, I would; otherwise, the treaty would be meaningless.

Mr. Zablocki. In S. 440 there is a disclaimer where NATO would be exempt there would not be any question as to the President’s authority.

Mr. Matsunaga. Oh, yes.

Mr. Zablocki. I don’t know whether your bill is identical in that respect or not. In preparing your revised version you may want to give some thought to that.

Mr. Matsunaga. This is another area which I am sure the subcommittee can delve into in detail and come up with some language which would be acceptable to cover the exact situation.

Mr. Zablocki. Mr. du Pont.

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

Mr. Matsunaga yesterday two very distinguished Senators, Senator Javits and Senator Eagleton, were appearing before us and we had the Javits bill. A question was asked of both of them that seemed to
cause some confusion. Let me ask the same question of you and perhaps you can help us.

The question was asked Senator Javits: When does the 30 days begin? If your bill had been in effect in the Vietnam conflict, when in your opinion did the 30 days begin?

Mr. Matsunaga. There is a lack of exact definition of the terms, I concede to the gentleman, in H.R. 2053 as well as in the Javits bill. This is an area I believe the committee would need to go into in order to clarify the terms used, such as "the introduction of hostilities." I would say if I were to give my own interpretation, the 30 days would begin when military advisers are dispatched to the battle areas.

Mr. Du Pont. Would you think that the dispatching of military advisers today to the Middle East, to Israel, would constitute the beginning of the 30-day period?

Mr. Matsunaga. My interpretation would be yes.

CUBAN MISSILE CRISIS, BAY OF PIGS OPERATION

Mr. Du Pont. All right. One other question.

You mentioned several examples in your testimony. Do you see a basic difference between the Cuban missile crisis and the Bay of Pigs operation?

Mr. Matsunaga. Yes; I do. Had I then been a Member of Congress, I would have supported the President in the missile crisis, but not in the Bay of Pigs situation.

Mr. Du Pont. Exactly, and the difference is in one instance we were conducting a defensive operation and in the other an offensive operation.

Mr. Matsunaga. I agree.

Mr. Du Pont. Let me just suggest to you that I have not formulated this fully in my own mind but you might consider this between now and whenever we get action in the committee here.

Might it not be appropriate to attempt to draft a resolution that somehow distinguishes between defensive operations to protect the United States and offensive excursions which I think is the chief reason that this legislation has been needed?

Mr. Matsunaga. Section 3 of my bill, of course, intends to do just that, but in discussing this matter more in detail in committee, especially during the markup sessions, I suppose much could be done to clarify the language.

Mr. Du Pont. Thank you very much.

Thank you, Mr. Chairman.

Mr. Zablocki. Mr. Biester.

Mr. Biester. Thank you, Mr. Chairman.

I apologize to Mr. Matsunaga for being late.

Mr. Matsunaga. I am late for an appointment.

Mr. Biester. I will therefore simply make that apology, note the gentleman's observation, and say that I have been to a briefing on the tragic situation at Sudan and I will defer questions.

Thank you.

Mr. Matsunaga. I thank you.

Mr. Zablocki. Thank you, Congressman Matsunaga. We certainly appreciate your coming before this committee and sharing your views.
We certainly will look forward to your recommendation and revisions to your own version.

Mr. Matsuoka. Thank you very much, Mr. Chairman, and members of the subcommittee.

Mr. Zablocki. Mr. Leggett.

STATEMENT OF HON. ROBERT L. LEGGETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Leggett. Thank you, Mr. Chairman.

Mr. Zablocki. I understand you are pressed for time, that you had an 11:30 appointment.

Mr. Leggett. I have to go to a luncheon for Mr. O'Neal.

I would like to give a short summary and then submit my statement for the record, Mr. Chairman.

I do not know whether the committee has before it my House Joint Resolution 315 but it is my rather simplified approach to the overall problem. What it does, it puts the war power article 1, section 8, clause 13—it puts the war power in the Congress and I don't think that anything that we do here that requires a further signature of the President of the United States is going to be signed by him very frankly. If the President does not sign it, I don't think that the Congress has shown any less inclination to give two-thirds support to overrule him in any international area.

WAR IS WHEN THE CONGRESS DECLARES IT

Therefore, the question is if we want to exert some kind of control in a Vietnam situation I think we have to do it simply by assisting the courts in declaring what war is, and in my House Joint Resolution 315 I purport to do that very simply. We say in the first section that war is when the Congress declares it, and No. 2, the term "war" shall not include a state of international combat where less than 5,000 personnel of land, sea, and air force are committed to armed combat outside the United States for less than 10 days unless expressly so declared by the Congress in accordance with the first section of this joint resolution.

Then the third section states simply that no action of either house authorizing or appropriating funds shall either directly or by implication declare war. I go on in my statement to explain that this would not rule out hot pursuit situations. If we have a nuclear onslaught on the United States, we all presume that the President, as Mr. Fraser has indicated, has the power to effect instantaneous retaliation and if our ships are attacked overseas, just as in criminal cases we have the hot pursuit theory we would have the hot pursuit theory in war situations where we could actually pursue the aggressor on the spot wherever he might be.

I would tend to think that with this simple declaration by both Houses of Congress we would then not be No. 1, ratifying the power of the President to involve us for 30 or 60 or 90 days without the consent of Congress. Second, I don't think that we should necessarily presume that a declaration like this would precipitate us into war situations because I don’t think that we would necessarily have to come in and pass a declaration of war in an unlimited volume or time...
any time the situation warranted an involvement of more than a fixed number of men for longer than a fixed time period.

NEED FOR LIMITATIONS

There is nothing magic about 5,000 men or nothing magic about 10 days. I wanted to put some limitations on that to get the attention of the committee. I do think though that we did exactly the wrong thing in the Gulf of Tonkin by all of us voting for this ratification that in fact ratified a long war that we did not have any control of in the Congress. We should have fixed some limits on that, and the way we do it is to do it under the war power where if we declare war, we declare a fixed war if it is going to be this type of slow, sucking in type of thing such as Vietnam was.

I would apply that to like we are in Thailand today—we have 37,000 troops over there, maybe 47,000, depending on how we re-deploy the Vietnam forces. We are obviously using those forces. Even if we execute the Laotian agreement, if we are parties to something there and the Vietnam agreement, the question is at what point do we need further authority to support Thai troops in Thailand. I think that if we are using more than 10,000 personnel in an active combat role bombing different Thai installations within Thailand, which we are, why then I think they would have to come back to the Congress and get our approval on a form of declaration of war. It might not say we declare war against the guerrillas in Thailand but within the war power we have got considerable power and the President would be forced to come back and consult with the Congress and reach some kind of an accommodation and we could put fixed time limits on that.

[Mr. Leggett's prepared statement follows:]

STATEMENT OF HON. ROBERT L. LEGGETT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman and Members of the Subcommittee: I am pleased to have the opportunity to testify on legislation designed to clarify the President's authority to engage in foreign military actions without the express consent of Congress.

These hearings come at a particularly crucial time. We appear to be concluding the longest, and one of the most painful wars in our history. Vietnam has cost us some 58,000 lives and $200 billion in direct expenditures. It has obligated us for another $200 billion in veterans' benefits, and has caused the greatest national rift since the War between the States. Yet, technically Vietnam was not a war, as it was never declared by Congress.

The Vietnam tragedy began within the impermeable walls of the Executive Branch, and it was largely conducted within those same walls with little or no Congressional input. As disturbing as this fact is, we must realize that Vietnam is only the last installment in three decades of Presidential infringement upon Congressional authority in the war-making area.

This infringement began with the 1941 occupation of Greenland, Iceland, and Dutch Guinea. It continued with the 1958 landing in Lebanon, and escalated with the Bay of Pigs invasion in 1962 and the Dominican Republic invasion of 1963. The termination of the conflict in Indochina affords us a unique opportunity to turn back this record and re-establish Congressional authority in this area.

It is certainly clear that the framers of the Constitution intended the war-making powers to reside with the Legislative Branch. For example, Thomas Jefferson wrote to James Madison in 1789 that, "we have already given in one example one effectual check to the dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay".
The record shows that for some 150 years Thomas Jefferson's brag was no boast. This is not to say that the Executive Branch did not ever commit American forces to foreign hostilities without Congressional consent. There have been, in fact, over 100 occasions in which an American President has used the military of the U.S. to intervene in foreign affairs, but nearly all of these interventions were of a very short duration and limited to the Western Hemisphere. Moreover, the few instances of American intervention outside the Western Hemisphere, such as the introduction of troops into Shanghai in 1856 and China in 1911, were an attempt to protect American lives and property from mob violence or revolution.

As History Professor Henry Steele Commager has testified, "it is only in the last 20 years that Presidents appear to have thrown caution and even constitutional scruples to the wind and ventured, on their own authority, into military operations that could only be termed acts of war.

The arguments for allowing the Executive Branch to engage in foreign military operations without the consent of Congress, are simple. The heightened pace, complexity and hazards of contemporary existence often require rapid and clear decisions without having those decisions subjected to prior publicity. We are told that secrecy in foreign affairs is invaluable, and that a credible military deterrent depends on a perception by other nations that our country is resolute in its determination to take decisive immediate action. Such action, the reasoning goes, is intrinsic to the nature of a deliberative body such as the U.S. Congress.

I am well aware that secrecy has its place in modern political institutions. I have no doubt that last year's détente with the People's Republic of China, for example, was at least partially due to Dr. Kissinger's ability to steal off into the night. The function of secrecy, however, ends when we begin talking not about détente, but the commitment of American men and material to a foreign military action.

The country is based on the apparent conviction that the best government is not necessarily the most efficient one. It is very disconcerting to hear it argued that the U.S. Constitution must be circumvented because speed and efficiency demand it. If the framers of the Constitution thought speed and efficiency demanded anything, they certainly would not have devised a system of government whose byword is caution, deliberation and compromise.

It is very disconcerting to hear it argued that the U.S. Constitution must be circumvented because speed and efficiency demand it. If the framers of the Constitution thought speed and efficiency demanded anything, they certainly would not have devised a system of government whose byword is caution, deliberation and compromise.

Let's look at the record of these five actions. The Bay of Pigs was marked with ill-conception, mis-management and poor intelligence from start to finish. The invasion of the Dominican Republic began as an attempt to protect American tourists and ended as a massive intrusion into a foreign civil conflict. It precipitated a serious disintegration of the U.S. position within O.A.S. The Cambodian "incursion", billed as the Normandy invasion of the Vietnam conflict, succeeded only in capturing bags of rice and caches of outdated Communist weaponry, and the attacks on North Vietnam and Laos speak for themselves. They destroyed a countryside, but failed to bring either a speedy or honorable end to the war, and really only created two more wars that required a negotiated "Peace with Honor".

In retrospect, Mr. Chairman, it is clear that the long run interests of the Nation in all of these instances would have been better served if the President had submitted to the healthy delays of the legislative process. There have been a number of bills before this committee which seek to prevent a recurrence of past mistakes by placing restraints on the President's ability to commit U.S. troops in foreign actions. Most of these measures fail to take into account the central fact of the last eight years. The Congress always had the power to end the Vietnam war. It could always withhold money for the war, but it never did.

The Executive Branch controlled the debate on the war. Presidents Eisenhower, Kennedy, Johnson and Nixon, with their vast access to the media, succeeded in defining for the country and the Congress what Vietnam was all about—what constituted victory and what constituted defeat. The Congress was faced with a
fait accompli; it was either support the troops or face the extermination of those troops in South Vietnam. Given this state of affairs, it is not surprising that the Congress tended to accede to the President.

Thus, the bills before you that allow the President to commit troops for 30 to 90 days without the consent of Congress will fail to re-establish Congressional authority in this area. What Congress would vote for "surrender", as defined by the President—since our soldiers have been fighting in some foreign land for a month? Congressional power to make war depends on our ability to control debate before the fact, before the Executive Branch establishes a stranglehold on information sources and the media.

I have introduced a resolution, H.J. Res. 315, which would sharply limit the President's ability to ease us into a war by placing concrete limits on his prerogative as Commander and Chief. My resolution would explicitly define "war" as used in the Constitution as any international combat situation to which 5,000 air, sea or land armed combat forces are committed outside the U.S. for more than 10 days. This Joint Resolution does not require Presidential approval which is the basic flaw in all the other bills before you. NO President will voluntarily limit his powers and NO Congress in recent years has had nearly two-thirds support to reverse Presidential intent on an international issue. I would, of course, except by implication a certain situation of "hot pursuit" where our forces were overtly attacked including the President's powers to effect immediate nuclear retaliation in case of a nuclear onslaught.

The President could respond to a Pearl Harbor type situation, but if he intended to commit troops for more than ten days he would have to come to the Congress for support. It may be that even ten days is too long. It is conceivable that even in this short span of time the President could exert enough influence to make Congressional input moot. Nevertheless, I am convinced that we must establish a clear and hopefully effectual, limitation on Presidential prerogative in this area, and retrieve our Constitutionally authorized "power to make war". The passage of House Joint Resolution 315 would be a step in that direction.

Mr. ZABLOCKI. I shall not try to have a colloquy upon what the impact is when Congress formally declares "war. However, we were told in hearings last Congress that some very serious complications follow. That is why in recent decades wars were not declared; but we had undeclared wars because of the problems associated with declared wars.

PROBLEMS OF UNDECLARED WARS

Mr. Leggett. I think we found out that the problems associated with undeclared wars are far more complicated.

Mr. ZABLOCKI. That is the very reason we are now trying to find some legislative solution which can prevent wars of any kind or at least involvement in wars without the consultation and the approval of the Congress.

Your resolution is so brief that it intrigues me.

Mr. Leggett. I think you have to be simple to get involved in this area. Everything that I agree with, all of the objections to some of the resolutions that are on file with this committee, as far as I am concerned it ratifies far too much and gives away far too much and just opens the door for reinvolvemonts in Vietnam-type situations.

I am of the view that I am no total pacifist, but I think when you involve yourself in war, it should not be a simple extension of diplomacy, it ought to be a situation where you have got the total commitment of the country.

We have seen the problems that have arisen where you don't have the total commitment as Mr. Matsunaga indicated. Even President Roosevelt had the time to come to Congress to get the declaration, I think if we are going to be involved in these slow wars of attrition in
the future, we ought to put some fixed limits on and we are going to have to do that relatively unilaterally because I cannot envision any President of the United States watering down his benevolent dictatorial powers in any way whatsoever in this general field.

Mr. Zablocki. Under section 2, do you mean that the President should be completely free to take military actions of less than 10 days duration and fewer than 5,000 men? After all, the President could send 5 aircrews with nuclear weapons to a small nonnuclear country. That then would be an act of war; would it not?

Mr. Leggett. Well, the thing is, you can't cover every situation, and I would not purport to try to respond to all of the hypothetical situations that obviously this very energetic committee might conjure up.

GETTING A HANDLE ON WAR POWERS

I think what we want to do is to try to get a little bit of a handle on war power which is in the Constitution. That is the only purport of my resolution. I think you can only do it unilaterally. If the President has got the power to press a button and involve us in total nuclear war, he has obviously got certain other powers too, and I would presume that in the courts he would take this resolution at its face value and would interpret it in a reasonable way.

Mr. Zablocki. I know your time is limited. Mr. Biester.

Mr. Biester. Thank you, Mr. Chairman.

I will be very brief in my questions also. You intrigue me with the proposition about too much flexibility in the action of the Congress with respect to war. Would you suggest that when we declare war that we set the conditions under which it would be stopped?

In other words, would we say unconditional surrender objectives or what?

Mr. Leggett. Well, implied would be peace with honor, of course, but I would say that certainly having been burned as I think everybody, hawk and dove alike, admits we have been burned to date, without attributing any cause or effect or victory or like that, I think we recognize that in these situations we need to relate more of the Executive with the Congress and with the country.

In certain situations, you might relate to a time limit, you might relate to a force structure, you might relate it to a division and again you would not be tying the hands, but you would be suggesting that they come back again.

Since we are getting involved in war piecemeal, let's go ahead and involve the Congress piecemeal in these declarations so we can get out of it in the same fashion.

Mr. Biester. In other words, the Congress should have a hand not only in starting it but in determining under what conditions it might end.

Mr. Leggett. Exactly.

Mr. Biester. Thank you.

Mr. Zablocki. Mr. Fraser.

INNOVATIVE APPROACH COMMENDED

Mr. Fraser. Thank you, Mr. Chairman.

I want to commend our colleague for an innovative approach which I think clearly recognizes some of the difficulties in the other ap-
approaches. I think this effort, imaginative and creative as it is, leaves a lot of unanswered questions, but I do think it represents quite a different approach which may help stimulate the subcommittee thinking on this.

Mr. Leggett. Very good. I don't purport to have the answers to all the questions that you obviously have.

Mr. Zablocki. Should we have difficulty, we will call upon you.

Mr. Leggett. Very good. I will be on the consulting committee.

Thank you very much.

Mr. Zablocki. Congressman Dennis.

We wish to welcome you, Congressman Dennis, to the committee and to hear your testimony on your bill cosponsored by Mr. Rhodes, Mr. Smith, Mr. Erlenborn, Mr. McClory, and Mr. Buchanan, H.R. 3046.

STATEMENT OF HON. DAVID W. DENNIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. Dennis. Thank you, Mr. Chairman. I am privileged to appear before this distinguished committee on such an important matter as this. I do appear, as the chairman has said, on behalf of my bill, H.R. 3046, of which I am the author and which these other distinguished gentlemen have cosponsored with me.

If I may, I think I will open my remarks by trying to give briefly and in outline form what the provisions of the bill are, and they are as follows:

First, when there has been no declaration of war by the Congress, nor any attack on American territory, the President shall not commit the Armed Forces of the United States to combat or to situations abroad where combat is imminent or likely without prior congressional approval, except in cases of emergency or necessity—the existence of which emergency or necessity shall, however, be determined completely by the President.

Second, if the President determines that an emergency exists which justifies and requires the commitment of our Armed Forces to combat or to a combat situation abroad without prior congressional approval, and he goes ahead and does so, he shall immediately make a report in writing to Congress concerning his action.

Then, under my proposal, the Congress shall within 90 days after receipt of that report take appropriate legislative action either to approve or disapprove the action taken by the Executive.

Fourth, if Congress approves the action taken, the President is thereafter required to make periodic reports on the situation at intervals of not more than 6 months, and at the time of each such report the Congress is again required, within 30 days of receipt of such report, to take legislative action to approve or disapprove what the President has done.

Fifth, if on receipt of the first report by the President or at the time of any subsequent report by the President, the Congress shall affirmatively disapprove what is done, and only in case the Congress does affirmatively disapprove, then the President shall terminate the
action taken and disengage the troops involved as expeditiously as it may be possible to do so “having regard to, and consistent with, the safety of the Armed Forces of the United States, its territories and possessions, the safety of citizens and nationals of the United States who may be involved, and the reasonable safety and necessities, after due and reasonable notice, of allied or friendly nationals and troops.”

Sixth, the bill does not apply to hostilities which might be in progress at the time of its passage.

Lastly, it is prospective in character, and it does not in any way abrogate or alter existing treaty obligations, whatever they may be.

Now, if you will permit me to analyze with you these provisions for just a moment, I think we can notice a few principles here. In the first place, this proposed bill applies only when there has been no declaration of war nor any attack on American territory; it does not apply at all in either of those situations.

Second, in those situations, it recognizes the principle that the President should have prior congressional authority to act. Under the circumstance where there is no declaration of war, no attack on the United States, he should normally have that authority before he engages in hostilities.

The next thing is that we recognize that emergencies may exist where it is not practicable to get prior authority, and the President is given full authority to act in these situations, and I do not make any attempt to list or categorize or set forth what these emergency situations may be.

Now that, I think, is the great difference between my bill and that of Senator Javits, the very distinguished Senator from New York, and in my judgment it is a great superiority my bill has over his, for the reasons pointed out here by Mr. Fraser a moment ago, that I don’t think you can possibly foresee all of the emergency situations which may arise and spell them out ahead of time as the Javits bill attempts to do.

So I have made no effort to do that at all. I leave that to the President. But if he takes such action, the next thing is that he has to report to the Congress. Now, the point of that is that the Congress gets early information. Congress is required, under my bill, to act on that information—so it has got to take part in the decision and in its continuance; and the President knows before he acts that he has got to justify his action which, I think, has a salutary effect on what he may do.

Then, if Congress acts and acts approvingly, the next principle of the bill—and I think this is highly important—is that periodic reports are required so that he must keep us up to date at regular intervals.

Again we are required to act. Therefore, if we go ahead and conduct the war, we are conducting it, we are taking part in this thing.

REPORTING PROVISIONS OF DENNIS BILL

Now, the reporting provisions are very similar to those of the measure introduced by the chairman, Mr. Zablocki. I must say, I can
certainly go along with the chairman's version of this much easier than I personally can go along with the version of the Senator from New York.

But the next thing—and here is where the chairman's bill and my bill are very different—I provide specifically in my bill that if at the time of any of these reports, when the Congress is required under the bill to take action, the Congress should act to disapprove what the President has done, then the President is required to bring his action to a termination as speedily as it can practically be done.

Now, that is a strength which is not in the resolution submitted by the chairman, and which I believe is an important point in this case. If you don't have that provision, although there is a report, what can Congress do about it?

Well, we can pass a sense of the Congress resolution, which might or might not have much force or effect. We can cut off funds, which I personally consider a very unhandy and not very good way to attempt to handle the situation at all.

My bill provides a remedy: Action with force and effect that we could take under those circumstances.

Now my bill stays away from the treaty problem, because I realize, as we discussed in here, just what we are obligated to under previous treaties is debatable. My own thinking would be that the requirement of "constitutional process" requires some action on the part of the Congress, but that language is not as specific as it might be, and in a way it begs the question, because it does not say what the constitutional process is.

I have preferred not to get into that problem here, and to draw something for the future; so I have simply said, without trying to determine what these preexisting treaty obligations may be, that we don't affect them by this bill; this bill is something that takes effect from now on.

That, basically, is an analysis of the provisions of the bill.

OLD AND CONTROVERSIAL PROBLEM

As the committee knows, this is not a new problem. It is one we have had ever since the founding of the Republic and it is a very controversial problem because there is nothing in the Constitution which dots the "i's" and crosses the "t's" and exactly gives you a crystal-clear answer; and there is nothing in the gloss put on the Constitution by practice which does that either. Consequently it is possible to argue this thing, as people do.

But I am prepared to support the general position that the intent and purpose of the Constitution is that the decision to make war is basically a congressional decision, except in the case of an emergency situation; and that the role of the Executive, except in the case of an emergency situation, is to conduct the war after the Congress has decided to undertake it.

I think the specific language of article 1, section 8, of the Constitution and these various interpretations—some of which I cite here in my statement and some of which have been made this morning by others—tend to support that position.

Now Madison, of course, spoke about the power of the President to "repel sudden attacks" and that has been translated, and I think not
entirely improperly, in present times, to include the power to act in any emergency which was necessary to the national defense.

This is basically what Secretary Rogers told the Foreign Relations Committee of the Senate when he testified in the spring of 1971. He cited, of course, a great many instances where that had been done without any prior congressional authority, and I cite some of them here in my statement which is before the committee.

LEAVING IT TO PRACTICE AND GOOD WILL

It is perfectly possible to make an argument that this is such a difficult and delicate proposition, and it is so difficult to draw the lines, and it is so hard to define it, that you should not make any effort at all, and that you should leave it to practice and to the good will and good sense of the Executive and of the legislative branch, rather than trying to draw legislative lines in this constitutional field.

That is essentially what Secretary Rogers said to the committee. He recognized that both the President and the Congress should participate, but he objected to the idea of a legislative effort to draw the line.

Now, I think the difficulty with that position is that, whereas the Executive in the past showed considerable respect for congressional prerogative, over recent years—partly because of our default, partly no doubt because of modern situations—the Executive continually has taken more power in this field, and now, instead of doing minor things without congressional approval, we are getting into major operations and major wars without congressional approval.

Therefore, I have come to the conclusion that if we can legislate in this field in a way which will assure the congressional participation which I think everybody conceded there should be, and at the same time will not unduly circumscribe and hamper the necessary flexibility of the Executive, we should try to do it; and this bill is a serious minded effort, on a long-range view, to try to do that.

Now, there is one other problem that I think should be pointed out with Senator Javits' approach. I have already spoken about his attempt to categorize the situations where the Executive can commit troops.

SERIOUS FLAW IN JAVITS BILL

I think it is also a very serious fault with his bill—and this was pointed out by Senator Cooper, as you may know, in the Senate report on the bill when it was first reported out—that the first three of his four categories, and particularly that which allows defense of the United States, are inherent constitutional rights on the part of the Executive.

That being true, how can we possibly pass a statute here which says that the President can exercise a constitutional right for only 30 days? Let alone the impracticality of that, I don't believe it is a constitutional proposition.

I don't think we can pass a valid law which will say to the President of the United States, "You can act to defend the country from an armed attack for only 30 days."

I think he can do it for 10 years if he has to, and I think that is a fatal defect in the Javits approach.
So, I have tried, as I said a moment ago, to draw a bill which would meet most of the criticisms of the other war power bills which have been presented, and which would assure the principle of congressional participation—and continuing participation.

I think the continuing or periodic reporting, and the continuing requirement of action by Congress, is probably the heart of the measure and very important. This would give us in the Congress a method of bringing hostilities to a halt if we actually ever wanted to do so, and at the same time would leave the President, the Executive, the flexibility to act when he needed to act.

I think those are the objectives in which we are all interested, and I say to you, gentlemen, that I have made a serious effort to meet them in this bill. I submit it to you for your consideration, and I am glad to discuss it with you further as you may wish.

[The prepared statement of Mr. Dennis follows:]

**Prepared Statement of Hon. David W. Dennis, a Representative in Congress from the State of Indiana**

Mr. Chairman and members of the committee: I appear before your distinguished Committee in behalf of H.R. 3046, of which I am the author and of which Mr. Rhodes of Arizona, Mr. Smith of New York, Mr. Erlenborn of Illinois, Mr. McClory of Illinois, and Mr. Buchanan of Alabama are cosponsors.

This is a measure entitled: "A Bill to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress of the United States or of a military attack upon the United States." Briefly, and in outline, its provisions are as follows:

1. When there has been no declaration of war by the Congress, nor any attack on American territory, the President shall not commit the armed forces of the United States to combat or to situations abroad where combat is imminent or likely without prior Congressional approval, except in cases of emergency or necessity—the existence of which emergency or necessity shall, however, be determined by the President.
2. If the President determines that an emergency exists in such situations which justifies and requires the commitment of our armed forces to combat or to combat situations abroad without prior Congressional approval, he shall immediately make a report in writing to the Congress respecting his action.
3. The Congress shall within 90 days thereafter take legislative action to approve or to disapprove the action of the executive.
4. If the Congress approves the action taken, the President shall thereafter make reports on the situation to the Congress at intervals of not more than six months, and the Congress shall thereupon (and within 30 days from the receipt of such reports) again approve or disapprove the action of the executive.
5. If, on receipt of the first Presidential report or at the time of any subsequent report—as above provided—the Congress acts to affirmatively disapprove the action of the executive, the President shall thereupon terminate the action taken and disengage the troops involved as expeditiously as it may be possible to do so "having regard to, and consistent with, the safety of the armed forces of the United States, its territories and possessions, the safety of citizens and nationals of the United States who may be involved, and the reasonable safety and necessities, after due and reasonable notice, of allied or friendly nationals and troops."
6. The bill does not apply to any hostilities which are in progress at the time of the passage of the bill.
7. The bill does not abrogate or alter existing treaty obligations of the United States.

I am pleased to be afforded the opportunity to appear before this distinguished Committee on the exceedingly important topic of the war powers of the President and the Congress—or the distribution between Congress and the President of the war power of the United States, for I know of no topic, Mr. Chairman, which could be more vital to our nation or more worthy of our most painstaking consideration.

The problem before us is not a new one—it has been with us since the early days of our Republic.
It is a problem fraught with controversy because neither the presumed intentions of the framers, the language of the Constitution itself, nor the gloss given to the Constitution by years of interpretation by means of actual practice, has served to bring about a crystal-clear and indisputable resolution to conflicting points of view.

I am prepared, however, after some study and consideration of the subject, to accept and to defend the point of view that the intention of the framers was, basically and in general, to lodge with Congress the power and authority to commit the Nation to war (subject to a right in the executive to act in emergency situations to—In Madison's words—"repel sudden attacks") while placing in the President as Commander-in-Chief the conduct and direction of the war once the commitment to war has been made.

I base this view on the rather specific language of Article I, Sec. 8 of the Constitution, plus such early and authoritative interpretations as that of Thomas Jefferson, writing to James Madison in 1789, when he said:

We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

and that of Alexander Hamilton who, in Federalist 69, wrote as follows:

The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy, while that of the British king extends to the declaring of war to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.

The Supreme Court in The Prize Cases, 2 Black (67 U.S.) 655 (1862), moreover, while upholding the executive declaration of a blockade, remarked that "Congress alone has the power to declare a national or foreign war," and that "He [the President] has no power to initiate or declare a war." Chief Justice Marshall in Talbot v. Seaman, 1 Cranch (6 U.S.) 28 (1809) spoke of "The whole powers of war being, by the constitution of the United States, vested in Congress ...", and Congressman Abraham Lincoln showed his understanding of the matter when he wrote to his law partner, Bill Herndon, and said: "The provision of the Constitution giving the warraking power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention undertook to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us."

Proponents of the executive power argue that the rationale of the concept that the President might act "to repel sudden attacks" (which Madison stated as the reason for changing the proposed words giving Congress the power "to make war" to the words "to declare war") was, and is, broad enough to justify independent action by the President to use the armed forces to protect the nation's security in a variety of emergency situations; and they can and do point to a long list of actual occasions on which such executive action has, in fact, been taken. See, in this connection, the testimony of the Honorable William P. Rogers, the Secretary of State, before the Committee on Foreign Relations of the United States Senate on May 14, 1971. Secretary Rogers cited the cases of Mr. Jefferson and the Barbary pirates, President Polk and Mexico, President McKinley and the Boxer Rebellion, Theodore Roosevelt and Panama; actions by Presidents Theodore Roosevelt, Taft, Wilson and Coolidge in Mexico, other parts of Latin America, and the Caribbean; President Franklin D. Roosevelt's destroyers-for-bases agreements, with dispatch of troops to Greenland and Iceland; President Truman's action in Korea; President Eisenhower's landing of Marines in Lebanon; President Kennedy's quarantine of Cuba, and President Johnson's landing of Marines in the Dominican Republic, all as executive actions using and committing our armed forces without a declaration of war and often without prior Congressional authorization, and in that connection he said:

"I cite these historical precedents not because I believe they are dispositive of the constitutional issues your Committee is considering—far from it—but to illustrate how the constitutional system adapts itself to historical circumstances.
Whatever the reasons for presidential initiatives during this period, they seem to have been responsive to the times and to have reflected the mood of the nation. Some argue, and it is a legitimate argument worthy of serious consideration, that whatever ambiguity there may be in this field of the respective war powers of the executive and legislative branches, it is better left alone; that the task of legislative definition is an impossible one, requiring a rigidity not adapted to the varying and unforeseeable forms in which the problem may arise; and that while legislative and executive cooperation in the field are important this is best left to the good will and the good judgment of both branches, without any legislative attempt to delineate areas in this field of Constitutional powers. Thus Secretary Rogers, in his testimony already referred to, while recognizing that:

... the framers of the Constitution intended decisions regarding the initiation of hostilities to be made jointly by the Congress and the President, except in emergency situations.

and while stating that:

The recognition of the necessity for cooperation between the President and Congress in this area and for the participation of both in decision-making could not be clearer than it is today.

nevertheless held that:

What is required is the judicious and constructive exercise by each branch of its constitutional powers rather than seeking to draw arbitrary lines between them.

I concede that this is a difficult field in which to legislate, and I am of the opinion—for example—for reasons which I will state in a few moments, that the proposed bill of the distinguished Senator from New York, Mr. Javits, which passed the Senate in the 92nd Congress, falls fatally short of these very arguments and, for that reason, ought not to be adopted.

The difficulty with the No Congressional Action thesis, however, lies in the fact that the executive (which earlier in our history was rather careful of the Congressional prerogative) increasingly in recent years—due in part to Congressional acquiescence and in part, no doubt, impelled by the necessities of modern conditions—has taken more and more power to itself in this field, and has engaged in military operations of increasing magnitude without prior Congressional authority with the result that we are in danger of losing that degree of Congressional participation and cooperation which all concede is necessary to the satisfactory conduct of military operations by the United States.

For this reason I have become convinced that a legislative effort to preserve and to further this Congressional participation is in order and is important, constructive and worthwhile, provided that this can be successfully accomplished while still preserving to the executive the flexibility to act promptly in the national interest which the realities of the modern world may require.

H.R. 3046 is presented as a serious effort to accomplish this important task.

If you will permit me to briefly analyze H.R. 3046 you will note the following:

First.—The bill recognizes the principle that when there has been no Congressional declaration of war, nor any attack on the United States, the President shall not ordinarily commit our armed forces to combat abroad without prior Congressional authorization.

Second.—It recognizes that situations of emergency or necessity may nevertheless occur which warrant such executive action without prior Congressional authorization.

Third.—It does not attempt to define, to list, or to categorize what those cases of emergency or necessity may be, and it leaves to the President the determination of whether such emergency or necessity exists.

This is important; and it is an important point of difference from, and, in my respectful judgment, of superiority over, Senator Javits' bill, to which I have already referred.

The distinguished Senator from New York does attempt to list four cases, and four cases only, where the executive can act to commit troops to combat without a Congressional declaration of war.

In my judgment this is unrealistic and unduly restrictive—for the simple reason that it is impossible to foresee all the different and varying situations which may arise, and which may perhaps imperatively require such executive action.

Fourth.—Whenever such executive action without prior Congressional authority is taken, prompt report must be made by the executive to the Congress.

This will keep the Congress informed, and this legal necessity for reporting
and for justifying the action taken, I think, have a salutary effect in discouraging ill-considered executive action.

Fifth.—Congress is thereafter required to take prompt action to approve or to disapprove the action of the executive. This assures Congressional consideration of what has been done and of participation in the decision.

Sixth.—If Congress approves (or, alternatively, fails to disapprove) the action taken, the President is required to make subsequent and continuing reports to Congress, at not to exceed six-month intervals.

Seventh.—Congress, on receipt of such subsequent reports, must again consider them and must again act thereon. These provisions—6th and 7th—are designed to assure continuing Congressional participation, and I believe and submit that for this reason they are highly important, and are probably the heart of the bill.

Eighth.—If Congress affirmatively disapproves the action taken, the President must terminate it as expeditiously as possible.

Finally.—The bill is prospective in character and in operation and does not apply to any hostilities in progress when it is adopted; nor does it alter or abrogate pre-existing treaty obligations, whatever these may be.

I believe and submit that H.R. 3046 meets most of the objections which have been urged—and I believe urged with some force—against other war power bills. I have already noted what I believe to be the fallacy of the effort to confine independent executive action in this field to four specified categories on a “use” basis.

Senator Javits’ bill, moreover, seeks to limit action even in these categories to only 30 days’ duration, which, I submit, is certainly unrealistic and, since the categories so limited include even the case of an armed attack on the United States, is also probably unconstitutional—because surely the executive has the Constitutional right and duty to defend the country against an armed attack, and this Constitutional right and duty can hardly be limited by Congressional enactment to an exercise of only 30 days. H.R. 3046, on the other hand, does not apply or become operative at all in the case of an attack upon the United States, its territories or possessions.

The bill H.R. 3046 is thus submitted to your consideration as a bill designed as a long-range measure, which will not rigidly or unrealistically circumscribe necessary action by the Chief Executive, but which will assure, in the future, that cooperation and co-participation between the executive and the legislative branch, in the vital matter of peace and war, which was contemplated and intended by our fathers the framers of the Constitution, and which, in my judgment, is absolutely necessary to our continued functioning as a representative Republic.

Mr. Zablocki. Thank you, Congressman Dennis. I want to comment you for a well-prepared statement and your presentation this morning, and also commend you for your efforts in this particular field.

One concern I have that you have not touched in your remarks regards section 6 of your bill. That section provides that failure to act by the Congress is to be taken as approval of Presidential action.

Now, I pose this question: What if the majority of the Congress wishes to stop a deployment of American Armed Forces into hostilities abroad, but is prevented from passing a bill by a filibuster in the Senate or by priorities that occur in the scheduling of legislation within the time limit of 90 days that your bill provides? Could such a development be taken as a positive endorsement for what the President had done?

“CONGRESS SHALL ACT” BILL

Mr. Dennis. Well, my bill in the first place, Mr. Chairman, requires action. It is not a “may” bill; it says, “Congress shall act.”

Perhaps you could stop right there, but it occurred to me that although we might pass a law saying we shall act, maybe for some reason we would not act anyway, and we will just violate the law to that extent. Then the question might arise, well, what is the effect of that?

So I thought in drawing section 6 that I would make it clear that should something like that happen, we didn’t have a situation where
the President had to bring his action to a halt; that that could happen only if we in fact acted to tell him to do it, because I thought we ought to meet the possibility of inaction. That is the reason for section 6.

Now, I did not try to spell out in a parliamentary sense as Senator Javits did the steps of action, but what I said is, you have to act within a certain length of time: 90 days the first time, 30 days thereafter.

That means you have got to get busy on this and act promptly, and that I think will meet the situation. The reason, as I said, that I said anything about nonaction at all was just to give an answer to the question, "What would be the effect here if for some reason we didn’t do what the law plainly says we must do?"

Mr. Zablocki. Congressman, you are absolutely correct. House Joint Resolution 1 did not provide for congressional action. However, as a result of further hearings and of recommendations made to the subcommittee, section 6 was added in House Joint Resolution 2. At the same time, the 30-days or 90-days provision was avoided. Thus, section 6 of House Joint Resolution 2 provides for accurate reporting. It would require that consideration be given to the question of whether Congress shall authorize the use of the Armed Forces of the United States and the expenditures for imminent hostilities cited in the reports received from the President.

PROCEED IMMEDIATELY TO CONSIDERATION OF QUESTION

Mr. Dennis. Yes, I am aware of that, Mr. Chairman, and I didn’t mean to say, if I did say it, there was no such provision here. The point I am making is that it says we shall proceed immediately to the consideration of the question, and I agree that that means we have got to consider it, there is no question about that.

I think I have gone a little bit further because I have provided specifically that if we take an action to disapprove it, he has got to quit, and I don’t think that is in your bill.

Mr. Zablocki. Well, I think if the action of the President were of such nature that it would incur the displeasure of Congress, we would take action.

Mr. Dennis. How would you do it? You could cut off the funds, sure, but under my bill you could pass a resolution which said you must withdraw the troops, and he would be bound to withdraw them.

Now, I don’t think you can do that constitutionally, maybe, when he is defending the country. I don’t think you can. But when he is carrying on undeclared war over in Asia, I believe you can; and I think he would be required to do it, or there would be a possible impeachment action or something of that kind, and I would not accept the idea that he would not do it if we passed such a resolution.

Mr. Zablocki. One further question, Mr. Dennis. Do you believe there is any value in providing for consultation, requesting the President to consult with the Congress, before introducing Armed Forces?

Mr. Dennis. Yes, I do, and I think something of that kind might well be added here, although my bill requires that ordinarily the President should have prior congressional authorization, and I believe that such authorization would necessarily require some consultation.

Mr. Zablocki. Mr. Biester.
Mr. Biester. Thank you, Mr. Chairman.

I will not set us on the same running tour we got into yesterday, because of my questions at the time of the quorum call. I will be very, very brief.

I just would like to welcome our colleague to the hearings. He is an able and astute constitutional lawyer. I also commend him on the clarity of his statement.

I am wondering if it is assumed that in the congressional action which takes place along the way here, under your plan would the Congress from time to time be able to set and reset the objectives and goals of the military action in which we are involved?

Mr. Dennis. Well, I think the Congress probably has the right to do that anyway. Of course, what I specifically provided for here is a reconsideration of what has been done, but I would think in the course of reconsidering what has been done that we could certainly have a wide-ranging discussion of the goals in arriving at our conclusion as to whether we arrive at an approval or a disapproval.

Mr. Biester. But you don’t see it as just simply yes or no, lack of giving even what the President may have done. Would you have a role in that in your plan?

Mr. Dennis. I would think so. I would think so. Possibly we could even to some degree—I am just thinking out loud—regulate the extent of what is being done; but I am not quite so sure about that because I think perhaps there you may get into the President’s role as the Commander in Chief.

Mr. Biester. One last question, and that is that even under your plan, don’t we finally hit the point at which there are troops committed under the command of the Commander in Chief, some prisoners have been taken and in which the forces deployed may be at some hazard with respect to their redeployment, and we run into the same kind of problem we ran into the last several years in the Vietnam war in which there was an assertion of implied authority to redeploy those troops in the safest and most rational way.

Some problems inescapable

Mr. Dennis. Well, I think some difficulties here frankly are inescapable. What I have said is, supposing we pass a resolution now which says we disapprove this and the President has to stop, I have not tried to cut him off in the next 5 minutes. What I say is that under those circumstances, the President shall discontinue the action so taken by him and shall terminate any hostilities which may be in progress and shall withdraw, disengage, and redeploy the Armed Forces of the United States which may be involved just as expeditiously as may be possible, “having regard to, and consistent with, the safety of the Armed Forces of the United States, the necessary defense and protection of the United States, its territories and possessions, the safety of citizens and nationals of the United States who may be involved, and the reasonable safety and necessities, after due and reasonable notice, of allied or friendly nationals and troops.”
Now, I admit that leaves him a wide latitude, but I don’t believe you can leave him anything else. I don’t think you can say, “You have to do it in 24 hours or 10 days or 30 days.” But it still is inescapable in this language, I think, that under these circumstances he has to do it, and he has to do it just as fast as he can, having regard to those considerations.

Mr. Zablocki. Mr. Fraser.

Mr. Fraser. Thank you, Mr. Chairman. I will try to make this very brief.

I have difficulty with your phrase “necessity.” I can’t believe that there has ever been a President who has ever committed troops to hostilities abroad who didn’t feel there was a necessity, and I fear that you maybe opening up a constitutional loophole which may exist now.

NECESSITIES BORN OF DIFFERENT CIRCUMSTANCES

Let me pass from that though. You say in section 5——

Mr. Dennis. I would say just in passing, I might have in mind your missile crisis, for instance, which easily could be a necessity.

Mr. Fraser. I think we could agree on that.

Mr. Dennis. Also, an emergency.

Mr. Fraser. I think we could agree on necessities, but necessities are born of different circumstances. One necessity is to show our determination to the other side that we are not pansies or we are not weak.

It is widely believed that that is why President Kennedy decided to go into Vietnam as far as he did, after the meeting with Khrushchev in Vienna.

But you say, “At any time.” Did you mean to extend the 90 days when you say, “At any time”?|  
Mr. Dennis. No. What I mean is that——

Mr. Fraser. If you act within the 90 days that you provide for in 3 and 4.

Mr. Dennis. What I mean is that “at any time” there has been a report. You could say, “If the Congress shall ever.”

Mr. Fraser. I don’t see why, if you require periodic reports, you should not give the Congress the authority at any time to disapprove. Why limit it to 90 days?

Mr. Dennis. I would say this, Mr. Fraser. I think Congress could act. I think we probably now have the right to do this; but all the bill says is, not that you could not do it quicker if you wanted to, but you are required to do something about it every 6 months; and you must act within 90 days of the first report and within 30 days after subsequent reports.

Mr. Fraser. Finally, you say, “By the enactment of the resolution.” Now a bill clearly would require Presidential signature.

Mr. Dennis. That is probably right.

CONCURRENT VS. JOINT RESOLUTION

Mr. Fraser. Looking at the word “resolution” in conjunction with the bill, I would assume it has to be a joint resolution which also requires the Presidential signature—a concurrent resolution would not be sufficient. Do you intend that the President must sign this?
Mr. DENNIS. I don’t know whether I thought that completely through. I intended to leave it rather flexible to the Congress what they wanted to do, but I would think “resolution” is broad enough to cover your concurrent resolution if that was what the Congress decided was the method to take.

Mr. FRASER. I would think that you would have to make that explicit or you would have difficulties.

Mr. DENNIS. Well, I would have no particular quarrel with it; although I think if you say “resolution,” that that includes any kind of a resolution within our prerogative.

Mr. FRASER. I think it might have, except you say “bill or resolution.”

Mr. DENNIS. Well, bill or concurrent resolution or joint resolution.

My only idea, really, was to let us determine at the time what is the best route.

Mr. FRASER. I think you have in your draft, if I may say so, dealt with many of the difficulties we have seen in other drafts. I want to commend you for a good effort.

Mr. DENNIS. Thank you.

Mr. ZABLOCKI. Gargantuan effort. Thank you, Mr. Dennis.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Unfortunately, because of our running later than we thought and conflicts in his own schedule. Mr. Harrington will be unable to appear as scheduled. His statement will therefore follow as though read at this point.

[The statement follows:]

STATEMENT OF HON. MICHAEL HARRINGTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. HARRINGTON. Mr. Chairman, I wish to thank you for the opportunity to testify today on my war powers legislation—an issue which I regard as vitally important.

During the last century, the United States has witnessed an unparalleled expansion of Presidential warmaking power. This expansion has now reached dangerous limits which could undermine the system of checks and balances underpinning our constitutional system of government.

This history of the last 10 years offers striking evidence of the danger of increased Presidential power. We slipped into a war which no one wanted, and once in, found ourselves unable to get out, despite widespread public dissatisfaction and disillusionment of our course of action.

FROM STRICT CONSTITUTIONAL VIEWPOINT

From a strict constitutional viewpoint, I believe the various war powers proposals before this committee are both proper and justified. Article I, section 8 of the Constitution clearly vests the authority to initiate war in the Congress. The absence of extended debate over the war powers in the Constitutional Convention and the historical record of the next 150 years clearly attest as to where that authority properly belonged.

However, since World War II, Congress power to initiate war has been severely eroded. The executive branch has pointed to changes in the world political situation, the emergence of the United States as
a world power and protector, the revolution in travel and communication, and the development of atomic weapons, as justifications for the increased power.

The Congress, up to now, has accepted the President's explanations, and therefore must share the blame for any constitutional imbalances that have occurred. There was barely a word of protest when President Johnson asked for the Tonkin Gulf resolution.

But I believe most Members of Congress now believe that a mistake was made—that we have gone too far in delegating responsibility to the executive branch.

One of the major political phenomenon of the last decade has been the simultaneous assumption of concentrated power by the President and the decentralization of that power within the executive branch. The Pentagon papers and David Halberstam's excellent book, "The Best and the Brightest," both document the fact that not only the Congress lost control over the decision to go to war in Vietnam, but the President himself lost control over the bureaucracy.

STRATEGIC DECISIONMAKING DONE BY TECHNICIANS

This disturbs me as much, if not more, than the Congress-President debate. In recent years, strategic decisionmaking has been turned over to the technicians, and the record shows the bureaucratic momentum has overwhelmed both Presidents Kennedy and Johnson. If these men, who are both generally acclaimed to be strong Presidents, lost control over the decisionmaking process, a real danger exists that future Presidents will be equally unable to control events.

The answer to this problem lies not in reform of the executive branch, but in a return of authority to the Congress. The two branches of Government respond to separate sets of pressures. The bureaucratic momentum which can overwhelm a President is not so strongly felt in the Congress, where power is diffused and the Members are more attuned to local interests, rather than to the interests of the departments and agencies.

There are legitimate circumstances in which Executive commitment of the Armed Forces are valid. But it is necessary to balance this authority with congressional authority. The legislation I have introduced established this balance. At this point, I will briefly outline the provisions of the bill:

Section I: Provides that this bill governs the use of Armed Forces "in the absence of a declaration of war by the Congress." In this bill we are dealing with undeclared wars—wars which have come to be called Presidential wars because of the constitutional process of obtaining congressional authorization has been shortcircuited.

FULFILLING INTENT OF FRAMERS OF CONSTITUTION

Section II: It sets out the purpose of the bill to fulfill—not to alter, amend or adjust—the intent of the framers of the Constitution to insure that the collective judgment of both Congress and the President is brought to bear in decisions involving the introduction of Armed Forces into hostilities.

Section III: It defines the emergency conditions in which, in the absence of a declaration of a war by Congress, the Armed Forces of
the United States may be introduced into hostilities or in situations where eminent involvement in hostilities is indicated by the circumstances. The conditions are:

1. To repel an armed attack on the U.S.A., its territories and possessions; to take necessary and appropriate retaliation in the event of such an attack and forestall the threat of such an attack.
2. To repel an immediate attack upon the Armed Forces of the U.S.A. located outside the United States or forestall such an attack.
3. To protect the evacuation of U.S. citizens from foreign lands.

These conditions give the President a chance to act forcefully against any aggressor and provide a deterrent for any potential aggressor, but they do not give him a carte blanche.

Pursuant to specific statutory authorization

Subsection 4 of section 3 sets forth the criteria by which the Congress can "pursuant to specific statutory authorization" give the President advance authority to take emergency action. In codifying this authority, the Congress is exercising its own constitutional power "to make all laws which shall be necessary and proper for carrying into execution ** all other power vested by this Constitution in the Government of the United States, or in any other department or officer thereof." It was judged important to specify that the authority to use Armed Forces is not to be inferred from any provision of the law including appropriations, unless such authority is explicitly provided. This includes treaties past, present or future unless legislation is implemented to authorize the use of Armed Forces. These requirements provide first for an exchange of knowledge between the Congress and the President; second, this subsection provides against "area resolutions" such as the controversial Tonkin Gulf Resolution. The subsection also requires specific statutory authorization for the assignment of members of the Armed Forces to participate in combat related to military activities of the regular or irregular forces of any foreign country—this clause provides against the gradual escalation of war without congressional consent by the introduction of military advisers such as in Vietnam.

Section IV: Specifies that the President shall report promptly to the Congress in the event of an outbreak of hostilities. This section provides against the gradual escalation of war without congressional consent, also the hampering of action by Congress due to lack of information and above all it makes the President accountable for his actions.

Sections V and VI: The 30-day authorization period—these sections resolve the modern dilemma of reconciling the need for speedy and emergency action by the President in this age of instantaneous communication and intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate. This 30-day period can be shortened or lengthened by the Congress.

Insuring priority consideration by Congress

Section VII: Establishes strict procedures to insure priority congressional action to extend or foreshorten the 30-day period as pro-
vided in sections V and VI. This section eliminates the possibility of delaying actions.

Section VIII: Contains a separability clause specifying that if any provision of the bill should be held invalid, the remainder would not be affected thereby.

Section IX: Specifies that the bill would take affect on the date of its enactment but would not apply to the hostilities in which the Armed Forces of the United States were involved prior thereto.

I hope that in this short analysis and summary that the members of the subcommittee will see this bill as a flexible and sensible method to restore Congress constitutional powers.

Since 1970 we have seen a great number of war powers bills, resolutions and joint resolutions introduced. They have all been of varying degrees of comprehensiveness. My bill outlined the entire problem in great depth. It provides a solution which is both necessarily flexible in the advent of unforeseen circumstances yet is firm enough to assure that Congress maintains its warming authority. It does this by outlining in great detail when the President can use Armed Forces in emergency conditions. But as it gives the President power in emergency conditions, it also includes provisions that make sure first, that he can't act against the public will; and second, the bill by its constitutional priority provisions makes sure that any initiation of war can be discussed in Congress as soon as possible. In addition, my bill and the Javits bill have widespread support in Congress. The Javits bill passed the Senate in the last session. This year it has 58 Senators cosponsoring it, including both the majority and minority leaders.

Mr. ZABLOCKI. The subcommittee stands adjourned until 2 o'clock Tuesday, March 13, when we will hear Department of State witnesses.

(Whereupon, at 12:20 p.m., the subcommittee adjourned, to reconvene at 2 p.m., Tuesday, March 13, 1973.)
WAR POWERS

TUESDAY, MARCH 13, 1973

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

The subcommittee met at 2:40 p.m., in room 2200, Rayburn House Office Building, Hon. Clement J. Zablocki (chairman) presiding.

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

This afternoon we resume our hearings on war powers legislation pending before the Congress. This is the third of 5 days of hearings. Our witness today is Hon. Charles N. Brower, Acting Legal Adviser for the Department of State. His testimony will express the administration position on the war powers issue.

Mr. Brower, we are pleased to have you with us. If you will proceed, please.

STATEMENT OF HON. CHARLES N. BROWER, ACTING LEGAL ADVISER, DEPARTMENT OF STATE

Mr. Brower. Thank you, Mr. Chairman.

I appreciate very much the opportunity to testify before you this afternoon on the very important subject of proposed war powers legislation.

I should say I am particularly pleased to be able to testify on what I consider to be a unique occasion. This I think is the first time in the long history of these deliberations on such legislation that we can consider such legislation free from the distraction of major American involvement in hostilities overseas, and divorced from the special political pressures of an election year.

I believe also that the stunning foreign policy successes which President Nixon has achieved in his first term precisely through the judicious exercise of his constitutional authority must also be considered as part of the background to these deliberations. I would hope that the general perspective on these issues can now be somewhat broader.

CHANGES IN PUBLIC ENVIRONMENT

The changes in the public environment are particularly significant since war powers legislation has undoubtedly had its genesis in disenchchantment with the protracted hostilities in which the United States became engaged during the last decade. Blaming those events on the
Presidents who were in office during that time, the proponents of the more restrictive forms of war powers legislation seek to avoid similar policies in the future by diminishing the fundamental authority of the Presidency, now and forever after. Many such advocates do concede, albeit reluctantly, that Congress itself played a role in past policies, but they would argue that Congress was led to act unwisely because it was supplied inadequate information and therefore was unable to exercise its responsibilities competently.

I do not myself accept this view of history, but I think it is worth noting because the conclusions drawn from it by advocates of restrictive war powers legislation are not in fact logically consistent with this view. These advocates have sought to place arbitrarily defined legal obstacles in the way of expeditious executive branch action. I think at the same time they ignore what from their point of view should be the real source of concern, namely, a need for Congress to have more complete and timely information, to be capable of better analysis, and to maintain a more thorough exchange of ideas in the development of particular foreign policies.

It is, I would suggest, only through availability and knowledgeable use of adequate information, on a timely basis, and with the best possible analysis of what that information means, that the executive branch or the Congress can exercise its respective constitutional responsibilities in the foreign policy field to the very best of its ability. Imperfect performance by one branch of Government cannot be remedied by attempts to undercut or diminish the fundamental constitutional authority of another branch. Because the war powers are distributed between the Congress and the executive by the Constitution, those two branches must cooperate closely in order for either to exercise its powers effectively. Each must make the particular contribution assigned it by the Constitution. Performance is more likely to be enhanced by the increased and improved flow of information to and between those bodies in an effective and timely manner.

ARBITRARY LEGAL OBSTACLES

The negative approach to war powers legislation—namely, the interposition of arbitrary legal obstacles hindering the exercise of executive responsibilities—has an additional serious fault which I think is particularly worth calling to the attention of this body. Proponents of such restrictive legislation overlook the fact—and I believe it is a fact of political life—that it is impossible for Congress to tie the hands of the executive branch without itself suffering a similar limitation of its freedom to act. Every proposed reduction of Presidential authority in this area effects a comparable diminution of congressional freedom. I might give two brief examples from the legislation we are considering. If the President's exercise of certain powers were restricted to a period of 30 days, as a practical matter the President would also become the beneficiary of a 30-day blank check, endorsed by the Congress. If congressional debate were required in all cases immediately upon the submission of a report from the President or at predetermined intervals which might have no relevance to the course of events, Congress would also lose its flexibility to adjust its own schedule of activities to the uneven pace of unforeseen events.
These are but two examples, yet I think they are illustrative of the fact that in declaring the executive branch incompetent to act except in prescribed circumstances, Congress would also be inhibiting its own ability to act except in precisely delineated fashion.

The correct balance, I submit, between the Congress and the Executive in the exercise of war powers is struck by each branch exercising the powers assigned to it in the most informed, and hence the most responsible, way; that balance cannot be established or maintained, indeed it could well be destroyed, by legislative attempts to alter the basic scheme which the drafters of the Constitution so carefully established. What is needed, I suggest, are processes designed to increase the likelihood that our Government as a whole, including both the executive branch and the Congress, will be able to exercise its responsibilities on the basis of maximum information, rather than as a result of sterile confrontation. The answer to dissatisfaction with a particular foreign policy is not to be found in alteration of constitutional authority; it is rather to be found through enhancement of our respective abilities, exercised within that authority, to formulate wise foreign policies for the future. From this point of departure, Mr. Chairman, I would like to address the three bills on which our comments have been particularly requested.

PROVISIONS OF THE JAVITS BILL

I would address myself first to the Javits bill, S. 440, which would allow the President to employ the Armed Forces in hostilities or situations where imminent involvement in hostilities is indicated by the circumstances in only four categories of situations absent a declaration of war. In each of those four situations, the President would be barred from continuing to use those troops beyond 30 days without the affirmative consent of Congress unless, of course, Congress is physically unable to meet as a result of an armed attack on the United States, or unless it were necessary to use troops to protect their own prompt disengagement.

Mr. Chairman, the Department of State continues to believe as in the past very strongly that it would be unwise and unconstitutional for the Congress to adopt this bill. S. 440 seeks by statute to redefine specifically and restrictively the constitutional allocation of the war powers. The drafters of the Constitution, however, recognized the extreme difficulty of anticipating all circumstances which might in the future call for the use of the Armed Forces.

As Alexander Hamilton said, writing in the Federalist, and I quote: “It is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.” This difficulty was underscored by the repeated amendments to the same bill as it was being debated last year in the Senate.

The Founding Fathers wisely avoided a precise definition of the interface between congressional and executive authority. They established instead a general structure of shared powers requiring the cooperation of both branches, predicated on the assumption that the form of that cooperation would remain, within certain limits, sufficiently flexible to accommodate many different kinds of circumstances.
S. 440 would change that historical scheme of flexibility by imposing technical legal prerequisites to action, and in so doing would insure that every important national security debate following emergency action by the President, instead of being argued entirely on the merits, would be obscured by procedural arguments as to whether or not the President had acted in accordance with this new legislation. When the question might be whether the President has acted rightly, might become whether the President has acted correctly in accordance with certain procedural rules. The scheme envisaged in S. 440 is a significant departure from that established in the Constitution, and hence could legitimately be effected only by a constitutional amendment, not by legislation, even if it were desirable.

I should say something about the “necessary and proper” clause in light of the growing role it appears to play in the presentation of S. 440. Contrary to the apparent assertion of section 2 of this bill, nothing in the “necessary and proper” clause of article 1, section 8, of the Constitution gives Congress this power to alter the war powers. As Alexander Hamilton also made clear in the Federalist, the “necessary and proper” clause was intended principally to guard against an excessively narrow construction of the authority of the Union vis-a-vis individual State authority. There has never been a judicial decision which has held that the “necessary and proper” clause was intended to limit the principle of separation of powers. In fact, the case of Myers v. United States, 272 U.S. 52 (1926), in which the Supreme Court held that Congress did not have the power to condition the President’s removal power on the concurrence of the Senate, indicates clearly that the separation of powers is not limited by Congress’ power under the “necessary and proper” clause. While this provision gives Congress the authority to implement both congressional and executive powers, it does not empower Congress to change the balance between those powers by defining and limiting the President’s authority.

S. 440 is notably deficient in that it omits Presidential authority to deploy Armed Forces abroad as an instrument of foreign policy in the absence of an actual attack or imminent threat of attack on American territory or forces. Yet this historic Presidential prerogative for nearly 200 years has been essential to the resistance of aggression and the protection of American security interests. As Secretary of State Rogers has said, “Such a restriction could seriously limit the ability of the President to make a demonstration of force to back up the exercise of our rights and responsibilities in Berlin or to deploy elements of the 6th Fleet in the Mediterranean in connection with the Middle East situation.” Elimination of this weapon from the Presidential arsenal could very seriously undermine our security posture, and likewise cannot properly be achieved except by constitutional amendment, not by legislation.

DEFENDING THE UNITED STATES AGAINST ARMED ATTACK

S. 440 also purports to restrict the authority of the President to defend the United States itself against an actual armed attack, by limiting to 30 days his right to use the Armed Forces in such cas-
utilities, unless Congress specifically authorizes a continuation or is physically unable to meet as a result of the attack. The defense of the United States of America against armed attack, however, it seems to me, is a core area of Presidential authority; Congress cannot affect the President’s constitutional authority in this area.

Even the States—the 50 individual States—have constitutional authority to provide for their own defense when invaded or in imminent danger of invasions, article I, section 10. Surely the President of the United States can have no less authority or responsibility for defense than the States. This is particularly so when you realize the Federal Government has an unlimited constitutional obligation to defend the States, article IV, section 4, and the President as Chief Executive, article II, section 1, and Commander in Chief, article II, section 2, has the responsibility and the authority to provide that defense. Surely the Congress cannot by legislation reduce these constitutionally prescribed rights and obligations.

Since Congress already has the authority to conduct at any time the same kinds of review that S. 440 proposes to mandate within 30 days, it is difficult to see what advantages Congress gains by legislating an arbitrary deadline. Congress in any particular case can undertake its consideration in a manner and within a period of time appropriate to the circumstances.

ARBITRARILY FIXED TIME LIMITATION

An arbitrarily fixed time limitation on Presidential authority contributes nothing to the right of Congress to exercise its constitutional authority, and at the same time it could seriously impede action or undermine negotiations in the future in a manner not desired by either the President or the Congress at that future time. To seek to terminate Presidential authority if, for whatever reason, the Congress does not expressly affirm an action within an arbitrary time limit is neither helpful to the interests of either branch nor a constructive contribution to the development of a wise foreign policy.

I now turn to the second bill which I have been asked to consider, and this is H.R. 317, which is known, I believe, as the Bingham bill. This second bill avoids some of the serious problems of S. 440. It does not propose to specify the constitutional powers of the President. Neither does it propose a fixed and arbitrary time limitation for congressional action in response to Presidential initiatives. It would call for prompt reports from the President to the Congress whenever the armed forces are used in hostilities absent specific congressional authorization or a declaration of war.

We do question the necessity, and I would say we question the advisability of requiring, as H.R. 317 would, that the Congress be convened if not in session at the time the President submits such a report. It is certainly conceivable that the formality and attention given to a special session of the Congress could negate the advantages of quiet diplomacy in the case of an understated show of strength. A decision to convene Congress in extraordinary session constitutionally lies within the discretion of the President, and should depend on the circumstances prevailing at the time.
Section 4 of H.R. 317, entitled "Termination of Authority," presents difficulty in two respects. This section proposes that the authority of the President to deploy the armed forces or to direct or authorize them to engage in hostile action, absent specific congressional authorization or a declaration of war, is terminated if either House of the Congress—either the House of Representatives or the Senate—adopts a resolution disapproving continuation of an action the President has taken.

First, the proscription of Presidential action would seem far too broadly drawn for both constitutional and policy reasons. Although within its constitutional authority Congress clearly can decide, for example, whether or not to appropriate funds to support policies or programs of which it disapproves, it is extremely doubtful, as I have mentioned earlier, that Congress could terminate Presidential authority to deploy forces as the President saw fit, for example to protect the United States itself against an armed attack.

A second, and I think grave difficulty with section 4 of H.R. 317 is that it purports to terminate the authority of the President upon the passage of a resolution by either House of Congress. This must be considered an unworkable standard for a number of reasons. We are dealing here with a division of power between the Congress and the Executive, not a division between the Senate or the House on the one hand and the Executive on the other. When one branch purports to impose legally binding restrictions on the exercise of the authority of the other, it clearly must be acting with its own full authority. The Congress clearly has authority to approve or not to approve funds for use by the executive branch. Such a decision, of course, governs to some extent the activities of the Executive, and clearly depends on the consent of both Houses of the Congress.

**Impairing Constitutional Authority of Congress**

A law which states that the same effect can be accomplished by the passage of a simple resolution by only one House of Congress is constitutionally defective. It impairs the constitutional authority of Congress itself as well as that of the Executive. Furthermore, I might pose the following interesting question. What would be the true position of Congress if, for example one House passes a resolution supporting the President's action and the other a resolution calling for its termination? It is clear that in matters of such significance the Congress must speak with one voice in order to have legal force.

Let me now turn to the third measure I have been asked to discuss, Mr. Chairman, and this is House Joint Resolution 2, introduced by you for yourself and others. It is primarily oriented toward increasing the flow of information on which Congress can base its decisions in exercising its constitutional responsibilities. As I have discussed at some length, it is this general approach, rather than that of attempting to change the underlying authority of either branch of Government that we strongly feel is the more constructive and positive way to proceed. I would like to mention, Mr. Chairman, that we have the greatest respect and the sincerest appreciation for your efforts over
the past several years to conduct a balanced, responsible and searching investigation into the issues raised by war powers legislation. The country is indebted to you in this respect and it is indeed a high honor for me to participate this afternoon in the deliberations in which you have been so long engaged.

Unlike the Zablocki bill passed last year by the House of Representatives, however, House Joint Resolution 2 includes provisions in section 3 which could be read as limiting the fundamental authority of the President to introduce the Armed Forces into hostilities or situations where imminent involvement in hostilities is clearly indicated.

DIFFICULT CONSTITUTIONAL PROBLEMS

As I have discussed earlier, this type of provision as so intended leads us into very difficult constitutional and general policy problems. It does not, in my view, take us very far along the road to developing responsible and forward looking foreign policy in the future. I do note that House Joint Resolution 2 does not impose any artificial deadline for congressional response to a Presidential initiative. That is an improvement over other bills and of course it maintains the option for such a response at any time.

In addition, section 6, which provides that Congress should meet after the President has committed Armed Forces as described in section 5 in order to decide whether to authorize such use of the Armed Forces or the expenditure of funds for that action, seems to imply that the President may not have authority to act in the first place. It is clear from what I have already said, however, that the President possesses broad constitutional authority to commit military forces in cases contemplated by section 5. Finally, as I have indicated, I do not think it necessarily appropriate that Congress be mandatorily convened in extraordinary session by the President of the United States as required by section 6 if Congress is not in session upon the receipt of each and every report rendered pursuant to section 5.

Mr. Chairman, it is my hope that Congress will reject the highly restrictive approach to war powers legislation, which is unsound and that instead it will concentrate on enhancing its own ability to participate in the development of future foreign policies with the executive branch, as the drafters of the Constitution intended.

To help move us toward that goal, I would like to repeat for your serious consideration several proposals which the Secretary of State made to the Congress in his war powers testimony of May 14, 1971. We are prepared, as we were then, to explore with you ways of reinforcing the information capability of Congress on issues involving war and peace. For example, we would be prepared to have each geographic assistant secretary provide on a regular basis full briefings on developments in his respective area. Such briefings would help the Congress to stay abreast of developing crisis situations as well as to build up a deeper background of information in many areas.

THE NEED TO ACT SPEEDILY

There is, as we have noted many times, the need to be able to act speedily and sometimes without prior publicity in crisis situations. I
think the Cuban missile crisis in 1962 is the most commonly cited example of such a situation. We should concentrate on efforts to find better institutional methods to keep these requirements from becoming an obstacle to the exercise by Congress of its full and proper role, rather than on counterproductive efforts to impede the executive in exercising its role. We have heard a number of suggestions concerning the possibility of establishing a joint congressional committee which could act as a consultative body with the President in times of emergencies, and, as Secretary Rogers indicated in his testimony which I mentioned previously if there is interest in this idea in the Congress we would be willing to discuss this possibility with you to determine how best we might cooperate.

Mr. Chairman, we in the executive branch, those in the Government, those in Congress— we must all retain flexibility for we are living in a dynamic world. We must both work together. I think the hallmark of a successful foreign policy over the years is cooperation and working together. The decisions we make in this area are frequently momentous and profound. Let us join together to improve the quality and facility of our individual and joint decisions rather than inhibiting our capacity individually or collectively to make them.

I thank you very much, Mr. Chairman, for the opportunity to participate in these hearings with you this afternoon. I am ready to answer such questions as you and the other members of the committee might have on this subject.

Mr. Zablocki. Thank you, Mr. Brower, for your statement.

The chairman will yield his time at this point to Mr. Fraser. I understand you have a prior commitment.

Mr. Fraser. Thank you, Mr. Chairman.

REPRESENTATIVE FRASER POSES FOUR QUESTIONS

Mr. Brower, I am going to read some questions into the record, and if you will respond in writing I would appreciate it.

First, let me say I was unsympathetic to any legislation in this field until I read your statement this afternoon. Your assertion of the rights of the President to use armed force without apparently any constraint of any kind that I can discover in your statement astonishes me.

Mr. Brower. If I might address myself to that, if we have the opportunity, Congressman—

Mr. Fraser. I am sure you will be asked about that.

First, would you list specific instances where Senate 440 would be unconstitutional, specific fact situations.

Second, would you be willing to provide for the record the authority for the President to carry on bombing missions in Cambodia today, and, then, his authority to carry on bombing missions in Cambodia after all American troops are out of Vietnam.

Third, if the President is found to act beyond constitutional authority with respect to the use of armed force, what remedy is there for a citizen of the United States?

LIMITING FUNDAMENTAL AUTHORITY OF PRESIDENT

Fourth, on page 14 you say that section 3 could be read as limiting the fundamental authority of the President to introduce Armed Forces
into hostilities or situations where imminent involvement in hostilities is clearly indicated. I would like to have specific examples of how that might be read.

Finally, could the Congress pass a law, for example now, which would say that if there was a case in which our forces were in armed combat under no specific authority, in such a case a concurrent resolution would be sufficient to put constraints upon the President's actions, having in mind the concurrent resolution does not require a signature of the President.

I am sorry that I have to go, but I do want to get these questions in the record, and then if you could supply answers later, I would appreciate it.

Mr. Brower, I say in all candor I don't know what my own reaction is, Mr. Congressman, I will certainly endeavor if we can to supply the answers to the questions which you have placed in the record. I would not want you to leave on the assumption that I was intending to allege or advocate total Presidential authority to do anything without any role or constraint or participation by Congress. I think that truly is not intended by my testimony; in any event, it was not intended. I am sure we will be going into that in other questions.

[The information follows:]

RESPONSES TO QUESTIONS SUBMITTED BY MR. FRASER

Question. First, would you list specific instances where Senate 440 would be unconstitutional, specific fact situations.

Answer. Any legislative attempt to limit the authority of the President to less than that granted to him by the Constitution would obviously be unconstitutional. Section 3 of S. 440 purports to limit the authority of the President to use the armed forces in an emergency absent a declaration of war to four types of situations, and in those cases the President's authority would continue only for a maximum of thirty days unless the Congress specifically affirmed the President's action. Such enumeration would clearly limit Presidential authority more than the Constitution does, rather than implement that authority, and hence would be unconstitutional.

For example, S. 440 purports to restrict the President's power to defend even the continental United States by limiting to thirty days the period in which he may engage in hostilities unless Congress specifically authorizes an extension or is physically unable to meet because of an attack on the United States. Under the Constitution even the states have authority to provide for their own defense when they are actually invaded or are in imminent danger of invasion (Article 1, section 10).

Surely the President can have no less authority than the constituent states of the Union. Indeed, the federal Government has an unlimited constitutional obligation and authority to defend the states (Article 4, section 4), and the President as Chief Executive and Commander-in-Chief is the officer bearing the responsibility and possessing the authority to ensure that defense. There can hardly be serious doubt that the limitation on continental defense envisaged by S. 440 cannot properly be imposed other than by means of a constitutional amendment.

The Constitution does not necessarily limit the President's emergency authority to these four categories of action, at least in part because the nature of future emergencies and the need for Presidential action cannot be foreseen with sufficient reliability. Constitutionally we cannot change that system by legislating it away; and as a matter of policy as well we believe it would be most unwise to attempt to do.

Question. Second, would you be willing to provide for the record the authority for the President to carry on bombing missions in Cambodia today, and, then, his authority to carry on bombing missions in Cambodia after all American troops are out of Viet Nam?
The President has, since assuming office, had and exercised the constitutional authority as Commander-in-Chief to bring the war in Indochina to an end. The President has not involved the United States in new hostilities through the recent air strikes on Cambodia; he has rather been attempting to wind up the last corner of major fighting remaining from the long war in Indochina. The President had that authority prior to the conclusion of the agreement on peace in South Vietnam and throughout Indochina on January 27, 1973, and the constitutional situation has not fundamentally changed. I might add that this conclusion was supported by a recent study prepared by the Library of Congress at the request of the Senate Foreign Relations Committee which asserts that the President retains the legal authority even to reintroduce U.S. forces into South Vietnam, North Vietnam and Laos, not to mention Cambodia.

Question. Third, if the President is found to act beyond Constitutional authority with respect to the use of armed force, what remedy is there for a citizen of the United States?

Answer. Our constitutional system of checks and balances provides various ways for the citizen's voice to be heard, including through the Congress or the Courts, depending on the circumstances of each individual situation. Without knowing what specific facts the question might presuppose, such as what person or body has made the finding referred to, it is difficult to speculate on what would be the appropriate course to take.

Question. Fourth, on page 14 you say that Section 3 could be read as limiting the fundamental authority of the President to introduce armed forces into hostilities or situations where imminent involvement in hostilities is clearly indicated. I would like to have specific examples of how that might be read.

Answer. Section 3 could be read to permit the President to introduce the armed forces into hostilities or situations where imminent involvement in hostilities is clearly indicated only in response to an act or situation that directly endangers the physical territory of the United States, its territories or possessions or its citizens, etc. Such a reading could make illegal any such action of the President to protect any United States interests abroad, no matter how important, unless United States citizens or nationals were involved, and then such action might be valid only to the extent necessary to protect those individuals.

The rapid deployment of our naval and other armed forces in situations which could fairly be described as presently a risk of imminent involvement in hostilities can be a useful deterrent assisting our own foreign policy interests and discouraging the escalation of hostilities by others. This has been the case in the past with respect to Berlin and the Middle East, for example. If Section 3 were read as suggested above, the President could well lack legal authority to order such deployments abroad even in an emergency. This would clearly constitute a limitation on the President's fundamental authority to deploy the armed forces.

Question. Could the Congress pass a law, for example now, which would say that, if there was a case in which our forces were in armed combat under no specific authority in such a case a concurrent resolution would be sufficient to put constraints upon the President's actions, having in mind the concurrent resolution does not require a signature of the President.

Answer. Whether or not the Congress had passed either a declaration of war or other specific authorization, our armed forces presumably would not be involved in armed combat unless the President had sufficient constitutional authority to so engage them. In any case it is now and has long been clear that a concurrent resolution constitutes an expression of the opinion of the Congress rather than the establishment of binding legal requirements. If the President were authorized by the Constitution or by legislation to take certain actions, that authority could not be negated by a concurrent resolution, even though he would doubtless give such an expression great weight in his policy decisions.

Mr. Fraser. Thank you.

Mr. Brower. Thank you.

Mr. Zarlock. Mr. Findley.

Mr. Thomson.

Mr. Fountain. Mr. Chairman, thank you very much.
Mr. ZARLOCK. Just one moment.

Mr. Thomson.

Under the rule we have to recognize Members in the order that they arrived.

Mr. Thomson, Mr. Brower, I notice you repeatedly assert the theme that what is needed is more exchange of information between the two branches of government, more timely information through an exchange of ideas. Again you say performance is more likely to be enhanced by the increased and improved flow of information to and between those two branches of government.

Is the gist of your statements today that the solution to this problem is simply a closer working relationship between the President and the Congress, rather than the enactment of any legislation that would put restrictions on the President?

Mr. Brower. I think the fundamental thrust of my testimony is that the two branches of government are somewhat like two neighbors living in close proximity. Things work well, things work best, the relationship and the mutual productivity of the relationship are greatest when there is cooperation, mutual understanding, exchanges, the necessary give and take which is fundamental to our constitutional political process as it is to a working relationship between two neighbors.

Interposition of Arbitrary Limits, Rules

I think as between Congress and the Executive, as between neighbors, any ability to achieve something for the community is probably not advanced by the interposition of arbitrary limits, rules, fences, if you will. I think it is just in the fundamental nature of your constitutional system that we must work together and we must always in the executive branch and Congress strive for the highest level of performance, and strive to adopt those methods to acquire that knowledge which will enable us to fulfill to the fullest extent possible the solemn responsibilities which all of us have undertaken in our respective positions.

Mr. Thomson. Well, you said that in a little different way on page 5. You said on page 5—

The answer to dissatisfaction with a particular foreign policy is not to be found in alteration of Constitutional authority.

Mr. Brower. Correct.

Mr. Thomson [continuing].

It is rather to be found through enhancement of our respective abilities, exercised within that authority, to formulate wise foreign policies for the future.

Now what you are really saying is that we can improve the working relationship between Congress and the President, but beyond that we need a constitutional amendment to change any of the authorities that now exist.
Mr. Brower. I am not advocating a constitutional amendment. My position is that a constitutional amendment would be the only legally effective way of altering the present allocation of what are called the war powers between the President and Congress. I do not believe the statement you cited from page 5 of my testimony is at variance with my answer to the previous question.

Mr. Thomson. No, it is not; no, I agree with you. Thank you very much.

Mr. Zablocki. Mr. Fountain of North Carolina?

Mr. Fountain. Thank you, Mr. Chairman.

Mr. Brower, so that our record might have some background material, I think it would be good for us to know something about the witness. How long have you been in the State Department?

Mr. Brower. A little over 3 years and 4 months, sir. I arrived on duty at the Department of State on November 10, 1969.

Mr. Fountain. What was your position prior to joining the State Department?

Mr. Brower. Prior to being appointed to the Department of State I was a partner in a law firm in the city of New York.

Mr. Fountain. How long had you been engaged in practice?

Mr. Brower. Approximately 8 years.

Mr. Fountain. Where did you go to school?

STUDENT IN EUROPE

Mr. Brower. I went to law school at Harvard Law School. Prior to that I was a student in Europe for 1 year as the beneficiary of a Fulbright grant. Prior to that I was a honors graduate of Harvard College.

Mr. Fountain. Thank you very much.

I think all of us are trying to reach the same goal, and probably all of us are in a state of indecision as to how best to reach that goal. I happen to be one who believes in a strong President, as I have said a number of times, and I don't think any of us on this committee want to hamstring the President, or limit his powers to do what is necessary to protect this country. I think what we are hopeful we can do is come to some kind of understanding and put it in language if we can—maybe we won't, I don't know—that will not necessarily limit the powers of the President but prevent the President from exercising excessive powers, or powers which the Constitution has not given him.

For that reason I think we might ask what you conceive to be the war powers of the President under the Constitution and which provision of the Constitution would you make reference to?

Mr. Brower. I should preface my answer by saying I would not undertake to do what I have just described as being legislatively impossible, and that is to catalog in detail every single thing in a hypothetical situation that the President can undertake.

Mr. Fountain. I understand that.
Mr. Brower. I will refer to those provisions of the Constitution which I believe play a role here with the warning that my memory may not be exhaustive and if I omit one or two provisions I would like to supply them for the record later.

You have asked for the war powers of the President.

Mr. FOUNTAIN. Right.

Mr. Brower. They are principally his authority as Commander in Chief of the Armed Forces, to some extent of course his authority as Chief Executive of the Government, to some extent they are found in his responsibility to see that the laws are faithfully executed, inasmuch as those laws include a constitutional obligation to defend the States of the United States against invasion and save them from enemies. They really include all of the laws which provide in some way for the defense of the United States.

The President, of course, also plays some role in authorization and appropriation legislation, and other types of legislation that Congress would enact which would be important in this field.

Now that is a quick survey of what I think are the principal references.

Mr. FOUNTAIN. I guess the only provision in the Constitution which makes any specific reference relating to the Armed Forces is his power as Commander in Chief in article 2, is it not?

AUTHORITY OF CONGRESS UNDER ARTICLE 1

Mr. Brower. There are, Congressman Fountain, also references under, I believe, article 1, with respect to Congress, indicating that Congress has authority to provide for armies and provide for the raising of armies and maintaining the Navy.

Mr. FOUNTAIN. That was the next question I was going to ask you. What do you deem to be the war powers of the Congress, and what are the provisions relating thereto of the Constitution?

Mr. Brower. Well, I would say principally the powers to raise armies, provide for and maintain navies, and by implication other armed forces. They would include all the necessary authorizing and appropriation legislation, and they would include, of course, the power to declare war in the circumstances where that might be appropriate. Congress does of course under the “necessary and proper” clause have authority to a very considerable extent to carry out and execute and provide in detail for the application of its constitutional prerogatives or responsibilities.

Mr. FOUNTAIN. You take the position that the passing of legislation which specifies circumstances under which the President may act would be an unconstitutional piece of legislation?

HISTORICAL CONSTITUTIONAL CONCEPT OF FLEXIBILITY

Mr. Brower. Well, it certainly could be unconstitutional. It is clearly unconstitutional in the sense that it violates our basic historic constitutional concept of flexibility. I think we all agree, for example, if I
may use a somewhat homely example, that today, yesterday, and a hundred years ago people had to eat. Now what they ate and how they nourished themselves is a somewhat different question. If you picked out of an old trunk a grocery list from even 10 years ago, to say nothing of 30 or 40 or 50 years ago, you would be amazed at the things that are on it and the things that are not on it. It is similarly impossible with the pace of technology and the ingenuity of mankind around the world to foresee all of the circumstances that might arise in the future in which the Founding Fathers would have thought that the President has authority to operate in a certain way. That is a general answer.

More specifically, the proposed legislation, certainly the more severe restrictions contained in legislation before us, would be clearly unconstitutional in that, for example, they might limit to a short period of time the President's authority to defend the continental United States. The Constitution very clearly provides that the Federal Government will guarantee a republican form of government to the States and protect them, and the President of the United States, who is Commander in Chief, is sworn by his oath to uphold the Constitution in that respect as well as in every other respect.

BETTER INFORMATION TO CONGRESS

Mr. FOUNTAIN. This problem concerns me. I was one of those who joined the chairman in the last Congress in introducing legislation which would require a greater consultation and better information to the Congress. I think some of us have not been too satisfied with that, and yet I quite agree with you that we can't anticipate all of the circumstances which might call for the use of the armed forces. I am not so sure we can specify in a piece of legislation all of those areas where the President might need to act, or where maybe he should not act, and yet I can't help but feel that something needs to be done, either by way of constitutional amendment or by way of legislation to eliminate some of the ambiguities and to more clearly define just what the war powers of the President are, and what the war powers of the Congress are.

I think if you take the Constitution itself, except for the President being Commander in Chief of the Armed Forces—both in peace and war—more is said about the powers of the Congress than about the powers of the President. The Congress provides appropriations and shall do all things which are necessary to help defend this country through appropriations and shall also declare war if it is necessary, which I think clearly indicates the intent of the Founding Fathers that where we are actually engaged in all-out war it ought to be a declaration by the Congress.

PRESIDENT EXCEEDING HIS AUTHORITY

I am inclined to think that maybe by acquiescence we have permitted the President down through the years to exceed his authority, and actually he may have exceeded his authority. I think that is one reason why it is so difficult to work out something tangible now.
Would you say that it would be proper to pass legislation which would require the President before he embarks upon an act which well may lead this country into war to call upon the Congress of the United States either to approve or to disapprove his action?

Mr. Brower. That is advance approval or disapproval?

Mr. Fountain. Whether he has already acted or whether he is about to act. Under either circumstance.

Mr. Brower. I think such legislation could be quite troublesome, Congressman Fountain, partly for the reasons that I have stated and partly for reasons that I might be able to elaborate. I heartily concur in what you said at the outset that our objectives are the same. We are all Americans. We are all part of the same Government, although different branches. We all hold basically the same things holy, and have the same goals, and the same wishes, the same dreams. The only question between us, it seems to me, on this subject is how best to account for the concern, to adjust conflicting currents of circumstances to which you allude, and which quite clearly underlie your obviously thoughtful approach to this problem.

SUPERIOR WISDOM NOT EXCLUSIVELY IN ONE BRANCH

I think we have to agree that mankind being what it is, humans being what they are, it is not possible constitutionally to conclude that the superior wisdom in all events resides in the executive branch, or that in all events resides in Congress. It always has to be a common effort, and when you come to attempt drawing rules by which individuals and the larger bodies in Government work together it does create very serious difficulty.

Now I think to draw such rules would be a particularly troublesome exercise in a sense at the present time. Although the events of the recent past probably have been the single greatest cause for the interest in legislation which this committee is now considering, it also is a fact that the events of the recent past—certainly of the last 4 years—have included the most monumental changes in the fundamental direction of American foreign policy in approximately 25 years, and may set the direction for this country for many years to come.

Now, those steps have not been undertaken entirely or alone by the President of the United States. Of course Congress and others have had an appropriate role in the events of the past years. The fact is that the President and the entire executive branch have had a very substantial role in these monumental events of the last few years. I think this should give one pause.

PREVENTING FUTURE VIETNAMS

Some are troubled by the fact that we became involved in very extensive hostilities at a cost of many lives and much money over a period of time, and wonder if there is not some way to prevent a future President from doing that. I am sure others would be equally troubled at the prospect that the imposition of arbitrary restrictions might impede a future President from achieving the truly remarkable gains,
revisions in our foreign policy which we have experienced in the last few years.

Now, I think all of this perhaps simply confirms that it is a troublesome issue, and maybe you will conclude, as I think you must conclude, that the answer really does not lie in drawing rules. You cannot operate a Presidential-congressional-constitutional form of government on the basis of rules which get so specific as those you use in baseball games or football games, and that talk about pinch-hitters and two-point conversions; it is just not possible.

How we work toward better cooperation, how we gain more momentum in this area, it is a matter of sitting down and discussing. I don't think anyone has a particular panacea for that. I think the existence of the appropriate will on both sides is probably the fundamental prerequisite, and I am satisfied it exists.

Mr. Fountain. Thank you, Mr. Chairman.

Mr. Zablocki. Mr. Bieser of Pennsylvania.

SHARPENING FOCUS, CHALLENGING ASSERTIONS

Mr. Bieser. Thank you, Mr. Chairman.

I wish to join the others in welcoming your testimony here this afternoon and I would hope the extent to which I may offer questions may bring into sharper focus my own thoughts with respect to this subject and will not be taken amiss or away because they may challenge some of the assertions in your testimony.

Mr. Brower. Well, we are all here trying to provoke thought and I join in that sentiment.

Mr. Bieser. Very good.

I am surprised at your statement on page 9 making reference to the President's responsibility. It refers to his responsibilities in article I, section 2, and article II, section 4, and then offers the phrase, "has the responsibility and authority to provide for the defense," being the defense of the States, without making reference to the fact that the Constitution very clearly spells out in section 5 of article I, referring to the powers of the Congress, that the Congress shall have the power among other things to pay the debts and provide for the common defense and general welfare of the United States. Is that omission by inadvertence?

Mr. Brower. If it is an omission it is inadvertent, but I think perhaps it might not be an omission. The point sought to be made there is that the President, given the existence of armed forces, for which Congress of course is responsible, has the constitutional authority and indeed the constitutional obligation to apply them to the defense of the country when there is an invasion.

CONSTITUTIONAL OBLIGATION OF CONGRESS

You could argue, I suppose, as to whether or not Congress has a constitutional obligation to provide an army or a navy, and I would not propose to discourse on that subject. My only point was that given the existence of such forces the President must invoke them, certainly has the clear authority to commit them to the defense of the 50 States of the United States.
It was not intended in any way to exclude, denigrate, or ignore the very clear congressional role provided for the raising of the military forces.

Mr. Biester. Or the specific congressional role called for in section 8 to provide for the common defense?

Mr. Brower. Correct.

Mr. Biester. And that is not as I see it reflected anywhere in your testimony. Would I be correct about that?

Mr. Brower. I find from long experience with the war powers issue, Congressman, that even what undoubtedly appears to be a fairly lengthy statement of mine is not capable of encompassing all of the fine points, and some of the points that are not even fine points, I tried to make as complete, without exhausting the patience of the committee, a statement and so therefore some things you may have particular questions about that do not appear in the statement.

CONGRESSIONAL POWER TO DECLARE WAR

Mr. Biester. With respect to the congressional power to provide for declarations of war there is also a grant of powers to provide for letters of marque and reprisal. My history is always rusty, but I think marque and reprisal could be issued without declarations of war providing for a kind of surrogate effort on the high seas at distant places for quasi-public and quasi-privateering purposes, but with matters which involved apparently the country's material in exercise of foreign policy but not at the level of war.

Would I be correct about that?

Mr. Brower. If I understand your question, it is whether or not a declaration of war is necessary authorization for exercise of marque and reprisal.

Mr. Biester. Yes.

Mr. Brower. I must confess also to some rustiness on that subject. Are you asking this as a question of U.S. constitutional law or one of international law?

Mr. Biester. My point really was I guess the framers thought of activities which were international in nature and might involve some effort on the part of resources of the United States in quasi-military action, but not rise to the level of war, and gave that power to the Congress and not to the President.

CONGRESSIONAL WARMAKING POWERS IN CONSTITUTION

Mr. Brower. Well, I think it is very clear that Congress did so for this reason. You may recall that the provision in the Constitution giving Congress the power to declare war was actually changed from a previous draft before the Committee on Detail in the Constitutional Convention. That previous draft would have given Congress the power to make war, and the explanation for the change from "make war" to "declare war," I believe the precise language was the President must have the authority to repel sudden attacks. That is the way his emergency powers were described at the time.

So it is quite clear that the Founding Fathers had very much in their minds that the military forces of the United States would be em-
ployed in serious hostilities in the absence of a declaration of war, and it is a fact that in the nearly 200 years of the Republic, although military forces of the United States have been engaged in a number of hostile actions which are variously estimated at between about 130 and close to 200, we have only 5 times in our history had a declaration of war.

This is not a phenomenon of the 20th century. This is typical throughout our history. I think it is worth reflecting on a bit because of the emphasis placed on the congressional authority to declare war by the advocates of the very restrictive war powers legislation.

LIMITATION ON TIME SPAN

Mr. Bister. Excuse me. Would you agree further on in section 8 that the limitation on the time span during which the Congress would raise and support armies and provide appropriations was limited to 2 years, was an expression on the part of the framers that an Executive in the future should not have the power to use those armies nor provide for them without congressional approval?

Mr. Brower. I think the Constitution, and particularly the war powers area, reflects a general concern by the framers of the Constitution to avoid the sort of tradition which grew up in Europe where kings and other forms of absolute sovereigns had total control over military forces and had used them in offensive wars and extensive foreign adventures in a way which really was not to the overall benefit of the country.

If I may avert one moment to the question of the declaration of war; as I say we have only had a declaration of war five times in our history, and I think it is worth reflecting on this. The declaration of war by the United States really is a very strong measure. It is saying to the country or countries to which it is addressed not simply that the United States is going to take the necessary steps to defend its national interest, it is not a minimal act at all. It is a fundamental, broadly based national decision that this country is going to war and it is going to fight a war, and conquer the enemy.

TOTAL CAPITULATION IN WORLD WAR II

As you know, in the case of the Second World War that turned out historically to include total capitulation by the other side in Germany. I think that in many instances in which the United States necessarily is involved in potential hostile activity a declaration of war could be very easily misread, and would not be an accurate reflection of the true mood of Congress, to say nothing of the true mood of the country.

Mr. Bister. Mr. Chairman, I think I have consumed my time.

Mr. Zablocki. Mr. Bingham of New York.

Mr. Bingham. Thank you, Mr. Chairman.

Mr. Brower, your construction of the term “Commander in Chief” and I think this also reflects the construction that has been given to it by other officials of the administration, and perhaps indeed including the President—seems to be so broad that it virtually eliminates the necessity of declaration of war. It almost goes to the point that where the President considers it necessary he can embark on a war on his own authority.

What limitations do you see on that authority as you envision it?