Mr. Brower. I would say again that I feel ill-placed to embark on an enumeration detailing the precise hypothetical situations where the President might have authority to commit military forces to action, because I think it is fundamentally extremely difficult, if not impossible, to do.

I mentioned when Congressman Fraser was here before that my testimony should not be understood as maintaining that the President of the United States has totally limitless authority to commit U.S. forces to hostile action in any proportion in any circumstance. I don't think that has been the view of any President of the United States. Certainly we do hold the view that the President has rather broad authority historically to do what is necessary in a variety of circumstances to meet his constitutional obligations for the defense and security of the country.

Now you ask me to explain what are the cases in which he would not...

Mr. Bingham. No, I asked you for the limits. What are the limits of that authority?

Mr. Brower. Well, the limits in what sense? Do you mean temporal limits or territorial limits, or functional limits?

Mr. Bingham. Any limits whatsoever to the President's authority to take us into hostilities.

Mr. Brower. I think it is explicit in what I have said that they are.

Mr. Bingham. But you can't define them?

Mr. Brower. I have spent some time this afternoon saying that no one can precisely define what the limits are. As I mentioned before, the Constitution is a pretty old document; it never said the U.S. Congress should provide an air force. Well, in those days there was not an air force, there were no airplanes. But we have an air force, and nobody doubts the authority of Congress to provide an air force. It is construed, it is inferred from the authority to raise armies and provide navies.

Now, that is a very simplistic example of the growth and the flexibility, adaptability of the Constitution. I wish I had more ability to see into the future, but I do not have and I do not claim the ability to see all the kinds of predicaments which might confront a President some 5, 10, or 20 years from now. If I were trying to enumerate them, I would only be proving the wisdom of the proposition that I have been presenting this afternoon; namely, that it cannot be done.

Mr. Bingham. Well, let me suggest a line of thinking, a line of analysis that I think might be helpful, and that is that in using the term "Commander in Chief" what the authors of the Constitution were thinking of was something like the powers of a commanding general in a given situation. I think this may be a useful analogy. A commanding general of a sector of the continental coast presumably has authority if that coast is attacked to take defensive action without authority from anywhere else. Similarly, a commander of American forces in
a given situation outside the country presumably has the authority to
defend those forces.

THE AUTHORITY OF A COMMANDING GENERAL

Nobody would contend that a commanding general of American
forces, say, placed at Clark Field in the Philippines would have the
authority to undertake offensive action against, say, Philippine forces.
I would suggest to you that there is an analogy here that maybe is
worth thinking about.

Nobody can say for sure just how far the authority of the Com-
mander in Chief goes, but I think that, in saying that the Congress
has the power to declare war, the constitutional fathers were declaring
a very broad principle which is fully applicable today, and that prin-
ciple is that the Congress should have the basic authority to determine
the large questions of war or peace, that is, as to whether this country
is to be involved in major hostilities.

Now let me turn to some of your specific comments on H.R. 317,
which is the bill that I introduced.

In the second paragraph you say that whether it is
necessary for the Congress to be convened immediately under the cir-
cumstances stated in section 3 of my bill and you say that this might
negate the advantages of quiet diplomacy in the case of “an under-
stated show of strength.”

RELEVANCE TO SECTION 3 OF H.R. 317

Well, I could understand that if you were talking about simple
deployment and I think you may have a point which has relevance to
section 3 of House Joint Resolution 2, but I don’t think it has any rele-
ance to the section 3 in my bill because that section refers only to
hostilities in the absence of a declaration of war.

Now, how can you have “an understated show of strength” and have
hostilities? I just don’t know how these two terms can be reconciled.

Mr. BROWER. I see your point. I think the fundamental point to be
made is that there may be circumstances where H.R. 317 would
require a report because, as you point out, hostilities would be involved.

Mr. BINGHAM. You see, there is a difference.

Mr. BROWER. I understand.

Mr. BINGHAM. There is a distinct difference between my section 3
and section 5 of House Joint Resolution 2 in that section 5 of House
Joint Resolution 2 is not limited to hostilities.

Mr. BROWER. I understand that. In precise terms I see your point, I
think the remark I made may well be more accurately or precisely
directed to House Joint Resolution 2. The fundamental proposition,
however, really is the same, and that is this: When you have a report-
ing requirement which encompasses a wide range of possible events,
is it really proper to determine in advance that whenever such a re-
port is filed, whether it is a minimal hostility or a large hostility,
whether it is a small show of force or a large event, whether in the
case of House Joint Resolution 2 it is simply an increase in station
forces in the country where things are pretty quiet, should the Con-
gress determine in advance that the President of the United States must convene an extraordinary session of Congress to receive that report? I think it requires unusual foresight to be sure that that will be the case.

**SUBSTANTIAL ENLARGEMENT OF U.S. FORCES**

Now in House Joint Resolution 2, for example, there is, as I mentioned, a provision that a report be filed with the Congress in the event there is any substantial enlargement of military forces already located in a foreign nation. Now if a test of substantiality is a comparison between the increase and the number of forces already in that particular country, you may have a proportionately substantial increase of a small force, and is Congress really to be called back—

Mr. BRAGHAM. Let me interrupt you, Mr. Brower, to say on that point I think you may be right, and in the revision of my bill that I am currently undertaking, which adopts most of the language of section 5 of House Joint Resolution 2, I am trying to meet that. I personally would feel that the Congress ought to be convened whenever hostilities are involved, recognizing that it is only a matter of accident if Congress is not in session, and that to provide in advance that this will be done automatically would minimize the effect of the action.

I can imagine the type of situation that you are talking about where it might make matters worse if there were to be a sudden sort of crisis atmosphere. But at least as far as where there are hostilities, I think that the Congress ought to be in session. Since the Congress does not have the power to call itself into session when it is out of session, it seems to me that that should be provided for, the President should automatically do that.

**PRESIDENTIAL AUTHORITY TO DEPLOY FORCES**

Now let me pass to the next paragraph of your comment on my bill. I think that you have a point that the authority of the President to deploy armed forces is very broad. So I think we should be more cautious in attempting to limit the President’s authority to deploy forces than we are in terms of limiting the President’s authority to engage in hostilities. I see a difference there, and in my revision of my bill I am going to refer only to cases of hostilities where the equivalent of something like the declaration-of-war power is being exercised.

Let me pass to the comment that you make at the bottom of page 12, in which you suggest that allowing one House of the Congress to have a veto is all wrong.

May I call your attention to the fact that you state at the top of page 13 that the authority to approve funds clearly depends on the consent of both Houses of the Congress. Now, the other side of the coin is that either House can say no to the appropriation of funds. Equally you would have to agree that either House can say no to a declaration of war. All that I am doing is extending that principle to the tacit consent that the Congress gives to the Presidential use of force when it does not take action. My contention is that that tacit approval by both Houses can be negated by the action of either House.
NEED TO TAKE POSITIVE ACTION

Mr. Brower. I see your point, Congressman Bingham, I think the position that Congress is in, in the circumstances you indicate, is that constitutionally it must take positive action; namely, through act of Congress, or appropriate joint resolution, to bring about a nonauthorization, as you will, or a nonappropriation, inasmuch as the forces that are out in the field presumably are funded by an existing authorization or appropriation, and you really put the President or the executive branch in a position of a man who wants to marry siamese twins—if one says “yes,” and one says “no,” what is the answer?

Mr. Bingham. Well, I think in a matter of such importance as hostilities where there is no declaration of war that both Houses should concur with what the President is doing. Once he loses the support of one House, then it is quite appropriate to say that he should no longer have the authority. But I don’t expect you to agree with that.

Mr. Brower. Well, if I may, Congressman Bingham, I think what you are suggesting is that the disapproval of authority contained in your bill may from case to case rest on different constitutional foundations, and I think that will require very—

Mr. Bingham. I am not aware that that is what I am saying. Why is that what I am saying?

ENGAGEMENT OF FORCES IN ACTION

Mr. Brower. Well, it seems to me you are saying that if the President has engaged military forces in an action which by all rights is of such a fundamental, massive, comprehensive nature that it should be authorized by a declaration of war, then inasmuch as the declaration of war can be withheld by one House of Congress, then by extrapolation one House of Congress should be able to turn back the clock in this situation.

Now, I think you are saying beyond that, if there is a situation where forces are engaged on the order of the President in hostilities which do not have the character which you would think require a declaration of war, you are then maybe relying on the authorization and appropriation powers of Congress and the prospective nonexercise of those powers in order to achieve withdrawal of the forces. I think very clearly in that case you certainly would require the concurrence of both Houses.

All I am suggesting is what appears on the face as reasonably facile may be constitutionally far more complex than one might think at first blush.

Mr. Bingham. Do I understand you to say from this last argument that if the bill provided for the action of both Houses by concurrent resolution that you would have no problem with it?

OTHER PROBLEMS OF H.R. 317

Mr. Brower. I think that would be going a little too far, Congressman Bingham, because the bill obviously has some of the other problems which I have recited with respect to other bills. It would perhaps have one less.

Mr. Zablocki. The gentleman’s time has expired.
Mr. Bingham. With the indulgence of the chairman, may I make just one final comment. It seems to me that you are asking us to trust the President not to abuse his authority and trust him to consult with Congress in this field, and I would just submit that the record does not justify that kind of faith on the part of the Congress in the actions of the President.

When you consider the move into Cambodia without consultation, and at last December's escalation without consultation, when you consider the assertions of authority that have been made that there is virtually no limit to the authority of the Commander in Chief, then I think you have no right to ask the Congress to trust the Chief Executive to engage in what is adequate cooperation.

Mr. Brower. Congressman Bingham, I think it is certainly fundamental to the administration approach to this legislation, as I believe it is fundamental to our constitutional system of government, that a certain amount of faith in fellow mankind is required. Certainly a great amount of cooperation between the branches—and I am clearly expressing the view that that cooperation which is necessary from both our points of view, as necessary in the national interest—can best be achieved when both branches have the fullest capability, whether through mutual interchange or through development of each one's independent capability to have knowledge, to have understanding, to be able to exercise intelligent analysis as to any given situation. I simply think that if that basic, fundamental, cooperative exercise of our respective constitutional authorities and obligations is not present we will have difficulty under any circumstances, and we both must participate.

Disenchantment over Southeast Asia

With respect to your specific comments about the events of the past few years, I would allude, I think, to what I said before. It is curious in a sense, it is noteworthy, that our consideration of this legislation comes at a time when there has been noticeable disenchantment in some elements in the country with events in Southeast Asia over a period of the last 10 years approximately, and extending before that. It also comes at a time when the President of the United States now occupying office has brought about the most fundamental and profound achievements in foreign policy of many recent years, and which I think may mark a change of direction, a new era into which we will now proceed.

I think one must be very circumspectly and with very careful consideration address this quite serious constitutional issue. I think caution and restraint are certainly the order of the day. I think that the actual results produced, the product if you will, of the last 4 years is by any measure phenomenal. There has been argument along the way about the methods. If you like the product, I suggest we be cautious about tinkering with the factory.

Mr. Bingham. Thank you, Mr. Chairman.

Mr. Zablocki. Before calling our next colleague I would like to register a few comments. Faith and cooperation is something that we are all urging and would like to see happen, but in view of what has been the practice of the Executive in the recent past it appears that Congress must exert itself.
In using your analogy of marriage, it is like a wife who is not faithful. As a matter of fact, you might as well tell her you have a loaded gun and you are going to use it, and in some States such drastic action is permitted in such cases. Although we are not going to go that far, I think Congress must pass some legislation.

I will have some questions later, but now I would like to call on Congressman Findley of Illinois.

OMITTING PRESIDENTIAL AUTHORITY TO DEPLOY FORCES

Mr. Findley. Mr. Brower, on page 8 your language raises a lot of questions in my mind. You state: "S. 440 noticeably 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."

Then you refer to that authority as a historic prerogative.

Now, I realize that as you stated often this afternoon it is impossible to list in complete detail all of the circumstances in which a President might find it in the national interest to use military forces. Yet to get down to a very particular and nonhypothetical case, how about the present situation in Indochina? As our colleague, Mr. Fraser, indicated there are still bombing operations in Cambodia.

Now I can understand a rationale that justifies these bombing operations as a part of our program to withdraw our own forces from an area of danger, but I would really be troubled if you would seek to defend the bombing attacks as representing the Presidential authority to deploy Armed Forces abroad in order to resist aggression, and I take these words from that single paragraph.

Can you tell us the legal foundation for the President's action in undertaking bombing raids in Cambodia?

Mr. Brower. I see Congressman Fraser left me off the hook with a written summation. He impaled me on it again.

FUNDAMENTAL TO WAR POWERS QUESTION

Mr. Findley. It is a very important question. I don't think there could be anything more fundamental or appropriate to the war powers question now before us.

Mr. Brower. I realize it is a very important question, Congressman Findley, not only to you but to this committee, and to others.

When the Secretary of State appeared earlier this year before the full Committee on Foreign Affairs and was asked some rather similar questions with respect to Presidential authority in certain situations in Southeast Asia, he expressed a view in which I concur, that the present time, today, simply is not an appropriate time for me to engage in a specific discussion of Presidential authority, or from specific Presidential authority in hypothetical situations in Southeast Asia.

Mr. Findley. But this is not hypothetical at all. Cambodia is under bombing attack.

Mr. Brower. I understand that. But you basically are asking me about a hypothetical situation. You are asking when you no longer are protecting troops what is the authorization?

Mr. Findley. Well, Mr. Fraser did, but I did not. I am glad to have you elaborate on that, but I hope you will also respond to the question.
on the legal basis of what the President is doing now. I think a legal foundation can be made for it.

**LACK OF AGREEMENT IN CAMBODIA**

*Mr. Brower.* I naturally concur in that. I must say, however, I think this afternoon is not the appropriate time for me to engage in that analysis while we do not have an agreement with respect to Cambodia. At the present time there are peace agreements being implemented which affect our own military forces and our own prisoners of war in Southeast Asia, and while the parties are in the still somewhat early stages of implementing what we believe should be a successful agreement on peace and reconciliation in that area of Southeast Asia I think it would not be appropriate for me to engage in a discussion of contingencies, theories, and so forth with respect to any portion of that area.

*Mr. Findley.* Will you answer the question in detail in writing to this subcommittee when our last forces have been removed from South Vietnam?

*Mr. Brower.* As I indicated to Congressman Fraser, I accept your inquiries and will do what I can with them.

*Mr. Fountain.* Don't overcommit yourself. [Laughter.]

*Mr. Brower.* I think that is a careful statement of the situation.

*Mr. Findley.* I am sure you recognize that it is a serious matter we are discussing. I pose the question in a serious vein. It seems to me in hearings like this the executive branch ought to be willing to state its own position, its own legal justification. If it can't see fit to explain even in a classified manner to a subcommittee of the Congress what the legal foundation for the use of military forces in Cambodia is today, I don't see how we can reasonably expect at a future date that a reporting requirement we might write into law would bring about a candid response in such circumstances. Then too it could easily be cited that the times are simply too delicate for the executive branch to go into such detail.

Will you respond?

**U.S. ACTIVITIES IN CAMBODIA**

*Mr. Brower.* Congressman Findley, as you have indicated, our activities in Cambodia at the present time have some connection with the rest of the situation in Southeast Asia where we have forces present and we have prisoners still in captivity. I believe it has been pointed out by the administration that our activities with respect to Cambodia have been undertaken at the request of that Government. I am not prepared at the present time to go beyond those statements which are on the record, and to engage in any discussion on this subject with respect to that part of the world.

*Mr. Findley.* The House last year passed a bill on this subject and to the best of my recollection the executive branch did not state opposition to that language. The same language has been reintroduced as House Joint Resolution 96 by Mr. Pepper of Florida. Would the executive branch enter any opposition to the enactment of such language this year?

*Mr. Brower.* You are referring to House Joint Resolution No. 1 of the 92d Congress, the Zablocki bill of last year?

*Mr. Findley.* Yes.
Mr. Brower, you are correct in your characterization of the administration position with respect to that bill in the last Congress.

Quite clearly I believe now, as we believed then, that this represents a fundamentally more sound approach to war powers legislation than legislation such as S. 440 or H.R. 317.

Mr. Findley, returning once more to page 8, and your references to Presidential authority to deploy Armed Forces abroad. Can you elaborate on your use of the word "authority"? Where does that authority rest? Is there something in the Constitution that you would cite as the basis for that statement?

Mr. Brower, you are referring to the statement that S. 440 omits the Presidential authority to deploy Armed Forces abroad as an instrument of foreign policy?

Mr. Findley, yes.

Mr. Brower. That derives principally from the President's authority as Chief Executive. He has various authorities as Chief Executive which add up to his authority to conduct the foreign policy of the United States, and of course his authority as Commander in Chief.

As in many constitutional questions, we must look to the practice of a series of Presidents and a series of Congresses over a period of many years, now reaching almost 200. I think we would say that the provisions I have cited from the Constitution as elaborated by unbroken constitutional practice, by Presidents and Congresses over nearly 200 years indicate that that authority does exist.

LIMITS ON PRESIDENTIAL AUTHORITY

Mr. Findley. What limits exist on the authority of the President as Executive and as Commander in Chief to move military forces to foreign territory?

Mr. Brower. I think this parallels the question that Congressman Bingham was asking me before. In a couple of words the President does not have and does not lay claim to absolute authority to do anything, anyplace, anytime under any circumstances with any amount of military power. That is not what our Constitution provides.

If you ask me what are the limits specifically, I think I have to say it is inherent in our approach to this constitutional problem that one simply cannot specify a whole list of circumstances in which the President will have authority or will not have authority.

Mr. Findley. It sounds like he can almost do whatever he can get by with.

Now you cite the use by Congress of the power of the purse as one restraint, admitting the severe limitations of that particular restraint.

Mr. Brower. I do not recall having engaged in discussion on what the limits of the appropriation and authorization power are. It obviously is a different kind of power and its implementation by Congress is necessarily somewhat different than its implementation of other powers.

Mr. Findley. Thank you, Mr. Chairman.
EXECUTIVE BRANCH POSITION ON EARLIER LEGISLATION

Mr. Zablocki. Mr. Brower, you replied to Mr. Findley that the executive branch did not have any objection to House Joint Resolution 1 of the 92d Congress. As you know, the only additions in the 93d Congress version, House Joint Resolution 2, are section 3 and section 6.

Now, section 3 was added as a result of the discussion and debate when House Joint Resolution 1 was considered. After all, section 2 states that the Congress reaffirms its powers under the Constitution to declare war, while also recognizing the extraordinary circumstances under which the President may act.

Section 3 therefore merely attempts to clarify where the emergency or extraordinary circumstances lie. Subparagraph 1 of section 3, House Joint Resolution 2, spells out that U.S. Armed Forces may be used to respond to any act or situation that endangers the United States, its territories, and its possessions, or its citizens or nationals when the necessity to respond to such act or situation in the judgment of the President constitutes extraordinary and emergency circumstances.

Of course, subparagraph 2 provides authority if there is a specific prior authorization by statute or concurred resolution of both Houses of Congress, as was the case in the Tonkin Gulf resolution.

Therefore, I cannot agree with the observation on page 14 of your statement, that the provision in section 3 could be read as limiting the fundamental authority of the President. This leads me to the question: Do you have any constitutional objections, as opposed to practical objections, to House Joint Resolution 2? In other words, do you doubt that Congress could constitutionally enact it into law? Is there any question in your mind as to the right of Congress under the Constitution to restate its prerogatives as spelled out under article I, section 8?

RESTRICTING PRESIDENT'S AUTHORITY

Mr. Brower. I think, Mr. Chairman, I have to dissect that question somewhat. I said, and my words were carefully selected, that this section could be read as restricting the President's—

Mr. Zablocki. I appreciate your saying it “could” be read and not saying definitively it “will” be read.

Mr. Brower. How it is intended to read, or how it will be read, is perhaps up to others. The statement, for example, that the forces may be committed to respond to any act or situation that endangers the United States, its territories or possessions, or its citizens or nationals, could seem to imply a territorial approach, a physical approach. If there is an immediate, direct danger to the continental United States or 50 States of the United States, or to American citizens, or nationals overseas, it is all right to use the forces, but if there is some situation overseas which less directly, less immediately, physically affects our national security, but nonetheless does affect it, this provision would preclude the President's authority to act in such a situation, and I think it would pose constitutional difficulties.

The problem, of course, in this whole field is, the more precise the language is, the more problems you may run into constitutionally; but
the less precise you are, the more questions you are likely to have in any national debate following the national emergency as to what was intended, and what the President was authorized to do, and not authorized to do.

I think this dilemma underscores the fundamental difficulty in trying to spell out outside the Constitution itself—to rephrase or to clarify, as it were—exactly what the President's authorities are, established over 200 years ago and through subsequent practice.

**MERELY RESTATING CONSTITUTION ON WAR POWERS**

Mr. Zablocki. I am rapidly coming to the conclusion that you would probably object even to a resolution which would merely restate what the Constitution provides in article I, section 8, as to the war powers of the Congress, and in article II, section 2, stating that “the President shall be Commander-in-Chief of the Army and Navy of the United States and of the militia of the several States, when called into actual service of the United States.” That would also be questioned as to whether we were limiting the power of the President.

You apparently would object no matter what the Congress would restate in legislative form. Under your interpretation, even by restating what is already in the Constitution we would allegedly be limiting the President's power.

Mr. Brower. Well, I think, Mr. Chairman, the fundamental difficulty is this: Lawyers are trained to adhere to a canon of construction, which says fundamentally that every word used must be attributed some meaning; words are not invoked uselessly. Therefore, if you have a statement in a statute purporting basically to restate a constitutional requirement, the very fact of the use of different words necessarily gives rise to discussion over the specific meaning to be attributed to those words.

Mr. Zablocki. But I suggested the introduction of legislation restating exactly what is in the Constitution, word for word.

Mr. Brower. Well, I would have to say in that event then it seems to me adequate that it is stated in the Constitution. I am not sure what the purpose of the restatement would be.

Mr. Zablocki. The purpose would be simply to make more clear the respective responsibilities of the President and the Congress in the area of war-making powers. But you would perhaps interpret even that as limiting the prerogatives that former Presidents and this President have taken as far as war-making powers are concerned. Such action would merely be restating the Constitution and saying this is what we intend to live up to.

Mr. Fountain. Would the gentleman yield?

Mr. Zablocki. Glad to.

**BY HISTORICAL ACTS AND PRECEDENTS**

Mr. Fountain. I think he is saying with substantial validity that down through the years, we as a people, and we as a Congress, by historical acts and by precedents, have interpreted the Constitution to give the President more real power than the exact precise language of the Constitution gives him.
Mr. Zablocki. Exactly, and that is why I would want to restate the Constitution and limit his powers to what our Founding Fathers had intended.

Mr. Fountain. But, Mr. Chairman, what concerns me is that once we limit the powers of the President, if we don’t do it in a proper way, and that is the difficulty——

Mr. Zablocki. What could be more proper than restating the Constitution?

Mr. Fountain. Except that the Constitution has been interpreted by history and Presidents.

I don’t think the power of the President altogether resides after 200 years of practice in the exact language of the Constitution.

Mr. Zablocki. Well, to that I do not agree. I took my oath of office as a Congressman to live up to the Constitution, and indeed if history has changed or has interpreted the Constitution, then indeed the executive branch should ask for a constitutional amendment to legitimize what is historical practice.

CONGRESS PLACING ITSELF IN STRAIGHTJACKET

Mr. Fountain. What bothers me is the fact that in view of our experience on the domestic scene recently, it may now be possible for the President to exercise more power than he actually legally has. What we would like to do is limit that power, but at the same time not put ourselves in a straightjacket in the process. We happen to be a people who will accede to the President’s exceeding his power if he ends up doing the right thing, or ends up acting in the best interest of the country.

Mr. Zablocki. What happens when he does the wrong thing? That is what bothers me.

Mr. Fountain. Then we all take the consequences.

Mr. Zablocki. Well, only he should take the consequences if he errs.

Let me ask you, Mr. Brower, if indeed a restatement of the Constitution was provided in a resolution as I outlined earlier, would you find that a constitutional process?

Mr. Brower. You mean if Congress were to enact as a statute——

Mr. Zablocki. A mere restatement of what is in the Constitution.

Would that be constitutional?

Mr. Brower. Would that include the entire Constitution?

Mr. Zablocki. Those provisions in the Constitution dealing with war powers.

ONE PIECE OF CONSTITUTION IN ISOLATION

Mr. Brower. I am not sure just how you take one piece of the Constitution in isolation from the rest of the Constitution. It is a unitary document. There is a periodic accretion through constitutional amendment, but it does seem to me to take it apart in pieces and to enact part of it as statute without enacting another part of it could also give rise to questions as just what the intention of Congress was in doing this.

Mr. Zablocki. Well, the short title would be just as it is now in our joint resolution concerning the war powers of Congress and the President. And section I would also be the same. The measure may be cited
as the "war powers resolution of 1973." The policy and purpose section would be the same. Then the resolution would just list those sections in the Constitution which deal with war powers, period. The proposal would not change a comma or a word. This would only be restating the Constitution, and I don't see how this would change anything as far as the interpretation. It is the same as restating the Ten Commandments as to what they mean.

Mr. Brower. That depends on whether you pick up all Ten Commandments, I think.

I think you make a suggestion which is—

Mr. Zablocki. Let's take the one Commandment dealing with adultery and deal with that Commandment. Would that invalidate the rest of the Commandments?

Mr. Brower. I am not sure I want to get in the middle of that argument, Mr. Chairman.

Mr. Zablocki. Well, I am not very well versed in that area myself. [Laughter.]

PROVIDING A REPORTING MECHANISM

Mr. Fountain. There is some question about the interpretation of that today, you know.

Mr. Zablocki. The only purpose for adding section 6 into House Joint Resolution 2 was to provide a reporting mechanism. House Joint Resolution 1 was silent as to what should be done after Congress receives the report. We felt the need for some statement or some provision of what should be done, what congressional action should be anticipated when reports are presented after the commitment of troops to foreign areas which would involve our troops where there are hostilities. I really can't see why you find difficulty with this section.

Mr. Brower. I understand the concept of your approach, Mr. Chairman, and I should emphasize as I think I have mentioned before, that the fundamental approach taken by this subcommittee under your leadership I think has been in the direction much more in conformity with our constitutional history, and the requirements of the present circumstances.

Our concern with respect to section 6 is twofold. There is an implication when you say that both Houses of Congress shall proceed to a consideration of the question of whether Congress shall authorize the use of the Armed Forces of the United States and the expenditure of funds for purposes relating to those hostilities that Congress in fact possesses the constitutional authority to order the President to cease any kind of military activity despite the fact that there are certain kinds which I think we would all agree the President is constitutionally able to do without the express approval of Congress and which he is constitutionally obliged to do perhaps regardless of the feelings of Congress at the time. There are obligations such as those to defend the United States which are so fundamentally rooted in our Constitution as to be unsusceptible for legislative tinkering by the Congress.

Now to the extent that this section does imply that there are such limitations on the President's authority it could be constitutionally unsound.
CALLING AN EXTRAORDINARY SESSION OF CONGRESS

The second and perhaps lesser problem which appears in the second paragraph of section 6, to which I have alluded previously, is the necessity to call an extraordinary session of Congress if it is not in session for receipt of reports which might be required under section 5, which includes some potential reports on reasonably significant events overseas.

I also note I think some discrepancy between the provision of the first paragraph of section 6 which refers only to hostilities or imminent hostilities, whereas the reports required under section 5 cover a wide variety of situations, including whether there would be no hostilities or imminent threat of hostilities.

Mr. Zablocki. Of course section 6, the convening of Congress, would only be required if the action on the part of the President was within the provisions of section 5.

Mr. Brower. Pardon me, Mr. Chairman. That is correct, but section 5 calls for a report even in the case of a substantial enlargement of military forces already located in a foreign nation. If you had a 50 percent increment of a very small force in a relatively less troublesome country, in the current environment, would you really want to require the President to call Congress into extraordinary session to receive it?

Mr. Zablocki. Well, Mr. Brower, if there is a substantial enlargement of military forces in order for Congress to fulfill its obligation under the Constitution as provided in article I, section 8 to raise and support the armies, should not the Congress be called in to provide the funds and authorize the funds for that purpose? Otherwise isn’t Congress indeed abrogating its rightful constitutional authority and responsibility?

CIRCUMSTANCES OF TROOP INCREASE

Mr. Brower. I would say in the very least that depends upon the circumstances. If the United States has 10,000 forces in country “X” and for particular reasons wants to increase that by 5,000, or a total of 50 percent at 5,000, that is not very much measured against the total U.S. military forces. If it is a situation where there are no hostilities or imminent threat of hostilities, there are just some particular local or strategic tactical reasons for doing that, I wonder if in every case it is really appropriate to have the President call an extraordinary session of Congress in order for Congress to receive that report when he simply transfers 5,000 men from one place to another.

Mr. Zablocki. I conclude from your statement that you suggest the possibility of establishing a joint congressional committee which could act as a consultative body with the President in times of emergency.

I presume this would enable the President to report to the joint congressional committee when a substantial enlargement of the military forces was in his judgment—

Mr. Brower. I did not mean to indicate that I have a blueprint in mind. I was reiterating Secretary of State Rogers’ statement made before the Senate Foreign Relations Committee in his testimony of May 14, 1971, that we have heard such suggestion, and if there is
interest in this idea in Congress we would be willing to discuss the possibility and see if we can determine how best we might cooperate.

Mr. Zablocki. Is it advisable to delegate an important issue like war powers to a joint committee rather than the entire Congress?

CONFLICTING CONSTITUTIONAL INTERESTS

Mr. Brower. It depends on what you mean by delegation, Mr. Chairman. I am not sure what circumstances you are contemplating. It may be we have conflicting constitutional interests here. Congress wishes to play the maximum role foreseen for it under the Constitution in decisions involving hostilities which may require authorization and appropriation of funds and raise other considerations in Congress.

On the other hand, the executive branch has the responsibility to respond effectively, quickly in execution of its constitutional duties in some emergency situations. You have described them in some respects as extraordinary and emergency situations.

Now we all know that an animal with 535 pairs of legs just does not move as fast as one with 1 pair of legs and if the exigencies of such quick response is required clearly in the national interest there are situations where it would not be possible. Historically it has not been possible to engage from the start in a broad-range discussion of this with the entire membership of Congress.

It has been suggested in the past by some Members of Congress that one way to facilitate useful consultation and information sharing and opinion sharing and deliberation on important national security issues in emergency situations might be to provide for a small group of representatives in Congress that would have the responsibility to engage in these consultations. I simply express and reiterate our broad willingness and our specific willingness in this area to consider with you and with your committee proposals that have been made and might be made in this regard.

NOT DENYING PRESIDENTIAL POWER TO ACT IN EMERGENCY

Mr. Zablocki. Mr. Brower, not any of the resolution or proposals in this area now pending before Congress intend to deny the President the power to respond to any act or situation that endangers the United States, so that is not the question, not at all. As you eloquently stated, certainly the executive branch wants to protect its warmaking powers under the Constitution, and likewise does the Congress. However, there is a gray area, and on page 7 of your statement you suggest that “necessary and proper” clause of the Constitution has little or no meaning in the area of war powers because it cannot limit the principle of separation of powers. Is it not true, however, that the war powers are shared powers and the line of division between the legislative and executive branches is in a kind of zone of twilight, a gray area under the Constitution? In such a situation as that, would not a plain reading of the “necessary and proper” clause give Congress the right to define the authority of the President, so long as it did not impinge on those powers, which clearly are recognized as being his?
Mr. Brower. Mr. Chairman, I think you have hit the nail on the head in saying that there is a gray area here. That in a nutshell is the problem with which we deal. The committee recognizes there is a gray area, and historically a twilight zone as you have termed it. There is not absolute precision in the Constitution and that has frankly been part of its genius, and the reason we have had one Constitution for nearly 200 years rather than a series of patchwork arrangements, as we might otherwise have had.

CONGRESSIONAL AUTHORITY UNDER NECESSARY AND PROPER CLAUSE

Now the question, as I understand it, is this: "Is it not true that the 'necessary and proper' clause gives Congress the authority to go in to this gray area and say where black stops and white begins?" I think clearly it does not. The "necessary and proper" clause is important in the war powers area. It is the application of the "necessary and proper" clause that Congress has enacted much of the legislation it has over the past, nearly, 200 years in carrying out its specific constitutional obligations or responsibilities with respect to the raising of armies and the maintaining of navies.

The "necessary and proper" clause was designed to insure that the States, which we always have to recall were like foreign countries which got together and formed the union—was to insure that the States would not be able to take the position that Congress was not entitled to enact any statute except those precisely spelled out in the Constitution itself. In effect it says Congress can go beyond the precise language of the Constitution vis-a-vis the States. That was the purpose of it. It was not intended to be a license as it were for Congress to try and discern black from white in what we all agree is a gray area.

Mr. Zablocki. It is not the intention in House Joint Resolution 2 to codify the powers or define them. But in this twilight zone, or the gray area, all I would like to accomplish is for the executive branch and the Congress to get together and let us reason together, and that is why the consultation and the reporting provisions were provided.

PROVIDING MORE INFORMATION TO CONGRESS

My final question is do you truly believe that if Congress will remain silent on this particular warmaking powers problem that indeed the executive branch will be more apt to give Congress more information, which you so well stated is extremely important if Congress is to act responsibly in the warmaking powers? Or don't you think we have to nudge the executive branch which has quite clearly been necessary over the last few decades in order to get the executive branch to reasonably consult and to report to Congress without usurping some of the prerogatives of Congress?

Mr. Brower. Mr. Chairman, the Congress definitely has not been silent on the subject of war powers.

Mr. Zablocki. We probably were vocal, but we did not act.

Mr. Brower. Well, Congress, or at least the respective Houses of Congress have acted. I think what we need to keep in the forefront of
our minds in addressing this issue is that like all fundamental questions of national importance under our Constitution in the last analysis this is basically a political question and not one really to be resolved as a legal question. Our Constitution was so constructed that we would have three branches of Government, and the one in which you participate is in many ways the most active. It was foreseen that a neutral interaction, interplay of forces, some nudging this way, some nudging that way, the whole panoply of political events and interplay would collectively lead this Government and our Nation to the best achievable results as a political entity. I believe very strongly in that, and I know you, Mr. Chairman, as is evident from your long and careful devotion to this particular subject, believe in that also.

**BASICALLY A POLITICAL PROCESS**

I think we have to remember that it is basically a political process; it depends upon the interplay of political forces of which congressional views on the question of war powers are an element. It will not in the last analysis be successfully resolved by legalistic intrusions. There is a very good reason why the judicial branch of the U.S. Government has traditionally treated many questions as so-called political questions. There are questions into which it simply does not go, intrude itself because they are questions of fundamental importance to be resolved by the interplay of a variety of political forces, particularly between these two branches of Government.

I believe in the fundamental soundness of that form of government and I think that we should be very careful in approaching any proposals to alter its basic structure.

Mr. ZABLOCKI. Basically I would agree with you, but when any branch encroaches upon the other then we have to put up barriers.

Any further questions?

Mr. Biester.

Mr. Biester. I don't think so. Mr. Chairman. I believe that last colloquy is helpful to have on the record. I don't happen to believe that what we are doing here is overly legalistic. It seems to me that we are doing exactly what the process implies we should do, recognizing that we have been deficient and recognizing that we have not been sufficiently responsible and sufficiently active in fundamental decisions in this field and out of that recognition pursuing within the gray area a defined, a more effective and reasonable role for the people's House, at least in this warrnaking decision.

**RESOLUTION NOT UNCONSTITUTIONAL**

Mr. ZABLOCKI. Mr. Fountain, any further questions?

Mr. Fountain. No questions, Mr. Chairman.

I would like to say this. I personally don't think that this resolution would be unconstitutional.

Mr. ZABLOCKI. You personally think it would not?

Mr. Fountain. I don't think it would be unconstitutional, but the question that confronts me is whether or not it would be unwise. That is one reason I had you put into the record the provisions of the Con-
stitution which support the power of the President. I don't think the precise language of the Constitution itself is broad enough to give the President all of the powers he has exercised. But, I think by tradition, by precedent, by acquiescence, by some of the things we have done down through the years we have helped to interpret the Constitution and given the President more power than he actually has in the Constitution. In the type of world in which we live today with nuclear weapons, I think in calling upon the President to consult with us, and not to use excessive power under unreasonable circumstances, we have to be extremely careful that we don't become so precise, as you say, that we tie the hands of the President. I think we also must be extremely careful that we don't become so precise that we say to a potential enemy there are certain circumstances on which the President cannot act and thus prompt an attack.

Thank you, Mr. Chairman.

Mr. Zanlock. Thank you, Mr. Brower. You have been an excellent witness.

The subcommittee stands adjourned until 2 p.m., Wednesday, March 14, when our witnesses will be two respected constitutional law experts, Prof. Arthur Schlesinger, Jr., of the City University of New York, and Prof. Alexander M. Bickel of Yale University.

The subcommittee stands adjourned.

Thank you very much.

Mr. Brower. Thank you very much.

[Whereupon, at 4:46 p.m., the subcommittee adjourned, to reconvene at 3 p.m., Wednesday, March 14, 1973.]
Mr. SCHLESINGER. Thank you. I will summarize portions of my statement on the assumption that the statement, as a whole, can be put in the record.

Mr. ZABLOCKI. Without objection, the entire statement will be made part of the record.

Mr. SCHLESINGER. As one much concerned with these questions both as a former Government official and as a student of American history, I welcome the opportunity to set forth certain views on the range of questions embraced by the war powers resolutions before this committee.

These resolutions address themselves to a question of wide import and deep significance: the question of the democratic control of that most vital of national decisions, the decision to go to war. I am glad
that this committee is conducting so careful an inquiry into the alternative modes of action open to Congress and the country.

Of the various proposals before the committee, I shall refer first to the war powers bill as passed so emphatically by the Senate last year—S. 440.

Let me begin by emphasizing that I heartily endorse the purposes of this bill. Nor do I have any question about its constitutionality.

I will skip the passages in my statement having to do with the constitutionality. I will be glad to go into that later if there is any doubt about that.

THREE ELEMENTS OF S. 440

S. 440 contains three separable elements: (1) A definition of the circumstances in which the President can send armed forces into battle without a declaration of war by Congress; (2) a provision requiring the President to report periodically to Congress on the status of hostilities; and (3) a provision enabling Congress to terminate hostilities by statute or joint resolution.

My difficulties with this bill arise from the first of these elements. Section 3 of the bill attempts to define the possible contingencies in which the President would be authorized to commit armed forces on his own initiative. History is exceedingly unpredictable, and the attempt to specify in advance all the circumstances that might justify unilateral Presidential action seems to me hazardous in the extreme.

"The circumstances that endanger the safety of nations are infinite," Hamilton wrote in the 23d Federalist. Able and perspicacious as the sponsors of this legislation are, one wonders whether they can see so much more clearly into the future than the men who designed the Constitution.

TOO LIMITING AND TOO EXPANSIVE

In attempting to specify these contingencies, section 3 has the peculiar character, or so it seems to me, of being at once too limiting and too expansive. While on the one hand it seeks to pin down the particularity of circumstance that would legitimize unilateral Presidential action, on the other hand it gives its blessing to the theory that has justified the most extravagant instances of such action; that is, the theory of defensive war.

I call your attention to the relevant phrases—the power proposed in paragraph (1) to send armed forces into battle "to forestall the direct and imminent threat" of attack on the United States; the power proposed in paragraph (2) to send armed forces into battle "to forestall the direct and imminent threat" of attack against the armed forces located outside the United States and its possessions; the power proposed in paragraph (3) to send armed forces into battle in any country where American citizens are "subjected to a direct and imminent threat to their lives."

Since no provision is made as to who shall make the judgment about the directness and imminence of such threat, it is to be assumed that the judgment is left to the President.

I hardly need recall to this committee the warning issued by a Member of the House of Representatives exactly 125 years and 1 month ago: "Allow the President to invade a neighboring nation, whenever he
Though this proposition did not apply to the Mexican War, where Congress had formally recognized the existence of a state of war, it does apply with great precision to S. 440.

There is nothing more elastic than the theory of defensive war once that theory is extended beyond actual attack to alleged threat of attack. Presidents of a certain temperament may easily see direct and imminent threats on every hand; and, if Members of Congress fail to see such threats, “Be silent; I see them, if you don’t.” When one has seen this highly expansive concept of defensive war invoked to justify American attacks on neutral countries, one recalls Joseph A. Schumpeter’s description of the foreign policy of the Roman Empire: “Here,” he wrote, “is the classic example of that kind of insincerity in both foreign and domestic affairs which permeates not only avowed motives, but also probably the conscious motives of the actors themselves—of that policy which pretends to aspire to peace but unerringly generates war, the policy of continual preparation for war, the policy of meddlesome interventionism.

There was no corner of the known world where some interest was not alleged to be in danger or under actual attack. If the interests were not Roman, they were those of Rome’s allies; and if Rome had no allies, then allies would be invented. When it was utterly impossible to contrive such an interest—why, then it was the national honor that had been insulted. The fight was always invested with an aura of legality. Rome was always being attacked by evil-minded neighbors, always fighting for a breathing space. The whole world was pervaded by a host of enemies, and it was manifestly Rome’s duty to guard against their indubitably hostile designs.

EXPANSIVE THEORY OF DEFENSIVE WAR

Nothing seems to me more perilous in S. 440 than the congressional sanction thus bestowed on the expansive theory of defensive war. The President has always had the power to repel sudden attacks on his own responsibility. But this bill would give him blanket congressional authorization to send armed forces into battle whenever he sees within the first three categories what he pronounces, by his own personal, independent, unilateral, and unchecked judgment, as “direct and imminent threat” of attack.

As Senator Javits has frankly said, the bill “gives the President more authority to do what is necessary and proper in an emergency than he now possesses” and provides “ample play to the need of the Commander in Chief to have ‘discretionary’ as well as ‘emergency’ authority.”

The President must, of course, have the power to respond to emergency. But it would seem to me far better that he exercise this power on
his own and not with the color of congressional authorization. I see no advantage in Congress thus giving away its independence and compromising its position in advance.

**A President Accountable to Congress**

On this issue, I agree with Senator Fulbright that a President "would remain accountable to Congress for his action to a greater extent (if he acted on his own responsibility) than he would if he had specific authorizing language to fall back upon. Congress, for its part, would retain its uncompromised right to pass judgment upon any military initiative undertaken without its advance approval."

I have equal difficulty with the provision in section 5 of S. 440 requiring congressional authorization for the prosecution of hostilities after a period of 30 days. This raises first of all a problem that is more tricky than it may seem: how to ascertain the date on which hostilities begin?

Nor does the bill make this quandary any easier of solution by mentioning, in an additional endorsement "where imminent involvement in hostilities is clearly indicated by the circumstances."

What in the world does this mean? At what point does the commitment of armed force in response to actual attack or to speculative threats of attack trigger the 30-day authorization period? Had S. 440 been on the statute books in 1960, at what point would the 30-day deadline have applied to the American involvement in Vietnam? These are not frivolous questions. They go to the heart of the proposed legislation.

**Thirty-Day Deadline Filled with Boobytraps**

The 30-day deadline seems to me to be filled with boobytraps. Most wars are popular in their first 30 days. These are the 30 days when the President who ordered the action overwhelms Congress and the press with his own rendition of the facts and his own interpretation of the crisis.

It generally takes a good deal more than 30 days for other facts to emerge and other interpretations to win a hearing. With the President's immense advantages in his control of information, in his ability to define the emergency, in his capacity to rouse the Nation, it would take a very stonetharted Congress indeed to veto his request for the authorization of continued hostilities—except in those infrequent cases where differences have already crystallized in advance of the commitment of force.

This bill, S. 440, I greatly fear, would be more likely to become a means of inducing formal congressional approval of warlike Presidential acts than of preventing such acts. Moreover, the principle on which the bill is based—that the President must carry out the policy directives of Congress in the initiation and prosecution of military hostilities—is founded on the unstated assumption that Congress can be relied upon to be more peace-minded than the Executive.

**War Imposed on a Different Executive**

This assumption finds little sustenance in the historical record. In two of our five declared wars in American history—the War of 1812
and the Spanish-American War—Congress imposed war on a diffident Executive.

One need go back no further than the Cuban missile crisis to recall, as Robert Kennedy has told us, that the congressional leaders, when informed by President Kennedy of the quarantine policy, “felt that the President should take more forceful action, a military attack or invasion, and that the blockade was far too weak a response.”

A bill constructed on the supposition that the President is always a force for war and Congress always a force for restraint may have unexpected consequence when, as has been so often the case in our history, it is the Congress which is seeking war and the President restraint.

As a historian, I feel that a legislative proposal of this consequence must be subjected to the historical test, by which I mean that we must carefully consider what its effect would have been had it been on the statute books in times of crisis in our past.

CAPACIOUS THEORY OF DEFENSIVE WAR

I will not enter here into the question whether S. 441 would have prevented the action undertaken by President Truman in Korea and by President Kennedy in the Cuban missile crisis. Both conceivably could have slipped through under the capacious theory of defensive war sanctioned in the bill, and neither probably would have been hampered by the 30-day deadline.

I will concentrate rather on two other situations of equal significance: the undeclared naval war with Germany in the North Atlantic in 1941, and the war in Vietnam. In 1941 Britain, fighting alone in the West against Hitler, depended on American aid for survival. The Roosevelt administration felt that British collapse and Nazi victory would jeopardize the security of the United States.

Accordingly, Roosevelt announced a “shoot-on-sight” policy in order to protect the British lifeline. It is not at all clear that this action falls within the categories of initiative permitted to Presidents by S. 440. In any case, it is fairly certain that Congress would not have sustained the shoot-on-sight policy after 30 days.

For this was one of those cases where policy differences had been well crystallized before the commitment of force. One has only to recall the fact that in August 1941 the House of Representatives came very close to disbanding the American Army when it extended the draft by but a single vote.

It is hardly conceivable that this same Congress would have authorized Roosevelt to pursue an undeclared war in the North Atlantic.

CONGRESSIONAL BLESSING ON VIETNAM WAR

As for the Vietnam war, President Johnson could unquestionably have got all the congressional blessing he wanted at any point up to 1968 and probably even then and thereafter. If S. 440 had been on the books, it would not have arrested American participation in the war; it would only have locked Congress deeper into the escalation policy.

In short, the war powers bill would have prevented President Roosevelt from protecting the British lifeline against Nazi subma-
rines; and it would not have prevented President Johnson from in-
tensifying the war in Vietnam nor President Nixon from carrying
that war into Cambodia and Laos. If all this is so, then the bill will
serve neither the purpose for which it was drafted nor the national
interest of the United States.

All these considerations constrain me to believe that sections 3 and 5
of S. 440, however constitutional they may be, are ill considered, un-
wise, and filled with danger for public policy. Now, indeed, do these
sections seem to me essential to attain the declared purposes of the bill.

For these purposes can be effectively attained, in my judgment, by
the provisions in S. 440 providing for the reporting and the recall of
hostilities. For this reason, Congressman Bingham’s proposal, H.R.
317, seems to me to represent a greatly preferable approach to this
complex problem.

FORESEEING ALL FUTURE CONTINGENCIES

H.R. 317 omits the impossible attempt to foresee all future con-
tingencies; it omits the placing of the congressional imprimatur on
expansive theories of defensive war; it avoids the perplexities and
dangers created by the 30-day deadline. H.R. 317 retains, however,
the usable and useful provisions of S. 440.

Section 3 of H.R. 317 provides for periodic Presidential reports to
Congress on the status of hostilities. My only comment on this section
is to wonder whether the requirement that the President must report
to Congress at least once every 6 months is sufficient. It would seem
to me safer to require such reports no less often than every 3 months.

Sections 4 and 5 provide for the termination of hostilities upon
the adoption by either House of a resolution disapproving continuance
of the action taken. I am in agreement with the congressional priority
provision in section 3.

As for the mode of termination prescribed in section 4, this is based
on the precedent of the Executive Reorganization Act; and the rea-
soning behind it in this case is evident—that, since one House of Con-
gress could defeat a declaration or authorization of war, one House
of Congress should be able to prevent the continuation of undeclared
or unauthorized war.

JOINT RESOLUTION AS APPROPRIATE FORM OF ACTION

From some viewpoints, a joint resolution passed by both Houses of
Congress would seem a more appropriate form of action. I am not
sure, for example, whether section 4 of H.R. 317, if on the statute
books in 1941, might not have resulted in the termination of Ameri-
can protection of the British lifeline, though, since it would have
required positive action by one or the other House, such termination
could not have been achieved without a most intense national debate.

On the other hand, with the Presidential power to veto joint reso-
lutions, the warmaking power would rest in the hands of one-third of
each House, and this surely was not the intention of the Constitution.
So, on balance, I am inclined to feel that the mode prescribed in sec-
tion 4 is a feasible solution.

With this perplexity noted, I would urge on this committee the con-
sideration of H.R. 317, which will, I believe, fulfill the purposes of
S. 440 without saddling the country with that curious melange of rigidity and permissiveness I find in S. 440.

As for House Joint Resolution 2, this proposal seems to me to suffer from two defects. It would appear to endorse the expansive theory of defensive war on Presidential initiative by authorizing the President to commit forces when "the necessity to respond" to situations endangering the United States constitutes in the Presidential judgment "extraordinary and emergency circumstances as do not permit advance congressional authorization."

PRESIDENTS COMPULSORY BY EMERGENCY

While Presidents may be compelled by emergency to take action without congressional sanction, it does not seem to me, as I have noted before, essential that Congress should encourage them to do so by providing an appearance of sanction. The reporting provisions in section 5 seem to me admirable and might well be incorporated in H.R. 317. The provision for congressional action in section 6 seems to me vague and less satisfactory than the more specific provisions in H.R. 317.

In the interests of time, I will not comment in this statement on the other resolution before the committee, though I will be glad to do so to the best of my ability in the course of the hearing.

Before closing, I would beg the indulgence of the committee to suggest two other aspects of this general problem for your consideration. One means by which Congress could get a grip on the problem of war powers is through the exertion of its control over the deployment of armed force outside the United States.

I recognize that the constitutional authority of Congress to determine the commitment of forces outside the country has been in dispute. Nevertheless, I would recall to you the statement made on the floor of the Senate in 1912 by the eminent lawyer, Elihu Root, who had served as Secretary of War under McKinley and Secretary of State under Theodore Roosevelt. While expressing the hope that it would never do so, Root conceded that "Congress could by law forbid the troops' being sent out of the country."

GREAT DEBATE OF 1951

The more venerable among us can remember the "great debate" of 1951 when President Truman proposed to send four additional divisions to Europe. That debate ended inconclusively with the passage of a "sense of the Senate" resolution in which the Senate approved the sending of the divisions but added, over administration opposition, that no additional ground troops should be sent to Western Europe "without further congressional approval." Among those voting against inherent Presidential authority and for the principle of congressional control of troop deployment was Senator Nixon of California.

I would call this committee's attention to the statement by the Research and Policy Committee of the Committee for Economic Development in February 1972 entitled "Military Manpower and National Security."

This statement argues persuasively for a procedure by which Congress could regularly authorize and control the overseas deployment...
of military manpower. The report recommends that Congress should annually and explicitly authorize the major overseas areas the number of troops that may be deployed outside the United States.

This need not limit the President's power to act in an emergency, for Congress can require of the President an after-the-fact accounting for emergency action; but it would give Congress a continuing voice in peacetime overseas deployments. This would go far, in my judgment, in restoring the proper balance between Congress and the Presidency.

My second point has to do with the vital question of information. Nothing has been more effective in obstructing the democratic control of foreign policy and in perpetuating monopolistic control by the national security bureaucracy than the myth of inside information—the "if you only knew what we knew" attitude.

SOUND AND INFORMED JUDGMENT

There is absolutely no reason why Congress should not have before it all the facts essential to sound and informed judgment on the large decisions of foreign affairs. This would require a marked change of attitude on the part of the Executive.

It would require the substitution of genuine consultation for unilateral briefing. It would require the end of the abuse of executive privilege. It would require the transmission of all executive agreements to the foreign affairs committees of both Houses, with appropriate provisions for secrecy when secrecy is really necessary.

It would require, it seems to me, the establishment of a Joint Committee on Intelligence on the model of the Joint Committee on Atomic Energy. It might well require, as Benjamin V. Cohen has proposed, the establishment by Congress of a commission with representatives from both Houses and from the executive branch empowered to exchange information and views on the most delicate and critical questions of foreign affairs.

SYSTEMATIC AND AGGRESSIVE EFFORTS BY CONGRESS

It will require above all more systematic and aggressive efforts by Congress to avail itself of the vast resources of knowledge in the public domain; for, in my experience, the great bulk of information necessary for intelligent political judgment is available to any citizen who will take the trouble to seek it out.

If Congress will arm itself with knowledge, with the control of overseas troop deployment and with some means of terminating hostilities undertaken on unilateral Presidential initiative, it will make long strides toward bringing the wamaking power under responsible democratic control.

Thank you.

Mr. Zablocki. Thank you, Professor Schlesinger.

[Mr. Schlesinger's prepared statement follows:]

STATEMENT OF ARTHUR SCHLESINGER, JR.

As one much concerned with these questions both as a former government official and as a student of American history, I welcome the opportunity to set forth certain views on the range of questions embraced by the war powers resolution before this Committee. These resolutions address themselves to a question
of wide import and deep significance: the question of the democratic control of that most vital of national decisions, the decision to go to war. I am glad that this Committee is conducting so careful an inquiry into the alternative modes of action open to Congress and the country.

Of the various proposals before the Committee, I shall refer first to the War Powers bill as passed so emphatically by the Senate last year—S. 440.

Let me begin by emphasizing that I heartily endorse the purposes of this bill. Nor do I have any question about its constitutionality. I am aware that objection has been made that, in seeking to define the powers of the President, the bill is in derogation of his authority as Commander in Chief and is therefore unconstitutional. This objection seems to me without force. The notion of the office of Commander in Chief as a source of independent and inherent peacetime authority is relatively novel in our constitutional history. The Founding Fathers would surely have regarded it as a latter-day heresy.

For the men who drafted the Constitution made clear their very narrow interpretation of the office of Commander in Chief. "It would amount," Hamilton carefully explained in the 8th Federalist, "to nothing more than the supreme command and direction of the military and naval forces"—and he went on to distinguish this limited authority from the much broader authority of the British King. The President's powers as Commander in Chief, in short, was simply the power to issue orders to the armed forces within a framework established by Congress; it was, in particular, the power to conduct war once Congress had authorized war. As Commander in Chief the President would have no more power than the first general of the Army or the first admiral of the Navy would have as professional military men.

This view prevailed through the early republic. In 1850, the Supreme Court, in reviewing "the power conferred upon the President by the declaration of war" in the case of *Fleming v. Page*, said bluntly that, when he assumed the role of Commander in Chief, "his duty and his power are purely military." The theory that the Commander in Chief had larger powers first appeared during the Civil War, but it was justified, as Lincoln repeatedly said, by the emergency, noted in the Constitution in connection with the suspension of habeas corpus, of rebellion and invasion. Lincoln's successors did not claim that their role as Commander in Chief conferred on them any special peacetime authority. In his S3 presidential addresses in 1941 up to Pearl Harbor, during the anxious time when our nation entered into an undeclared naval war with Germany in the North Atlantic, Roosevelt never once claimed that he had any special powers to bypass Congress by virtue of his office as Commander in Chief.

The Second World War gave Presidents the theory that this office was a residuum of inherent and independent authority, and in peace as well as in war. This theory did not have judicial sanction. In the steel seizure case of 3952, Justice Jackson rejected the expansive reading of the Commander in Chief clause. The office of Commander in Chief as this invoked was, he said, a "loose appellation" advanced as support for any presidential action involving the use of force, "the idea being that it vests power to do anything, anywhere, that can be done with any army or navy." The President's powers as Commander in Chief, Jackson insisted, were to be "measured by the command functions usual to the topmost officer of the army and navy." Subsequent executive interpretations have ignored the Court but, despite self-serving pronouncements by members of the executive branch, cannot be accorded the status of constitutional gospel.

In any case, the idea that S. 440 is unconstitutional because it interferes with the President's authority as Commander in Chief is based on a conception of that office unknown to the men who wrote the Constitution—unknown indeed, to most Presidents of the United States until very recently in our history.

Section 3 of the bill attempts to define the possible contingencies in which the President would be authorized to commit armed force on his own initiative. History is exceedingly unpredictable; and the attempt to specify in advance all the circumstances that might justify unilateral presidential action seems to me hazardous in the extreme. "The circumstances that endanger the safety of nations are
infinite," Hamilton wrote in the 23rd Federalist. Able and perspicacious as the sponsors of this legislation are, one wonders whether they can see so much more clearly into the future than the men who designed the Constitution.

In attempting to specify these contingencies, Section 2 has the peculiar character, or so it seems to me, of being at once too limiting and too expansive. While on the one hand it seeks to pin down the particularity of circumstances that would legitimize unilateral presidential action, on the other hand it gives its blessing to the theory that has justified the most extravagant instances of such action—that is, the theory of defensive war. I call your attention to the relevant phrases—the power proposed in paragraph (1) to send armed forces into battle "to forestall the direct and imminent threat" of attack on the United States; the power proposed in paragraph (2) to send armed forces into battle "to forestall the direct and imminent threat" of attack against the armed forces located outside the United States and its possessions; the power proposed in paragraph (3) to send armed forces into battle in any country where American citizens are "subjected to a direct and imminent threat to their lives." Since no provision is made as to who shall make the judgment about the directness and imminence of such threat, it is to be assumed that the judgment is left to the President.

I hardly need recall to this Committee the warning issued by a member of the House of Representatives exactly one hundred and twenty-five years and one month ago. "Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion," said Congressman Lincoln of Illinois, ". . . and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect . . . If, to-day, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, 'I see no probability of the British invading us' but he will say to you 'be silent; I see if you don't.' " Though this proposition did not apply to the Mexican War, where Congress had formally recognized the existence of a state of war, it does apply with great precision to § 440.

There is nothing more elastic than the theory of defensive war once that theory is extended beyond actual attack to alleged threat of attack. Presidents of a certain temperament may easily see direct and imminent threats on every hand; and, if members of Congress fail to see such threats, Be silent; I see them, if you don't. When one has seen this highly expansive concept of defensive war invoked to justify American attacks on neutral countries, one recalls Joseph A. Schumpeter's description of the foreign policy of the Roman Empire. "Here," he wrote, "is the classic example of that kind of insincerity in both foreign and domestic affairs which permeates not only avowed motives but also probably the conscious motives of the actors themselves—of that policy which pretends to aspire to peace but unerringly generates war, the policy of continual preparation for war, the policy of meddlesome interventionism. There was no corner of the known world where some interest was not alleged to be in danger or under actual attack. If the interests were not Roman, they were those of Rome's allies; and if Rome had no allies, then allies would be invented. When it was utterly impossible to contrive such an interest—why, then it was the national honor that had been insulted. The fight was always invested with an aura of legality. Rome was always being attacked by evil-minded neighbors, always fighting for a breathing space. The whole world was pervaded by a host of enemies, and it was manifestly Rome's duty to guard against their indubitably hostile designs."

Nothing seems to me more perilous in § 440 than the congressional sanction thus bestowed on the expansive theory of defensive war. The President has always had the power to repel sudden attacks on his own responsibility. But this bill would give him blanket congressional authorization to send armed force into battle whenever he sees within the first three categories what he pronounces, by his own personal, independent, unilateral and unchecked judgment, as "direct and imminent threat" of attack. As Senator Fulbright has frankly said, the bill "gives the President more authority to do what is necessary and proper in an emergency than he now possesses" and provides "ample play to the need of the Commander in Chief to have 'discretionary' as well as 'emergency' authority."

The President must of course have the power to respond to emergency. But it would seem to me far better that he exercise this power on his own and not with the color of congressional authorization. I see no advantage in Congress thus giving away its independence and compromising its position in advance. On this issue I agree with Senator Fulbright that a President "would remain accountable to Congress for his action to a greater extent [if he acted on his
I have equal difficulty with the provision in Section 5 of S. 440 requiring congressional authorization for the prosecution of hostilities after a period of thirty days. This raises first of all a problem that is more tricky than it may seem: how to ascertain the date on which hostilities begin? Nor does the bill make this conundrum any easier of solution by mentioning, in an additional endorsement of the expansive theory of defensive war, situations “where imminent involvement in hostilities is clearly indicated by the circumstances.” What in the world does this mean? At what point does the commitment of armed force in response to actual attack or to speculative threats of attack trigger the 30-day authorization period? Had S. 440 been on the statute books in 1960, at what point would the 30-day deadline have applied to the American involvement in Vietnam? These are not frivolous questions. They go to the heart of the proposed legislation.

The 30-day deadline seems to me to be filled with booby-traps. Most wars are popular in their first 30 days. These are the 30 days when the President who ordered the action overrules Congress and the press with his own rendition of the facts and his own interpretation of the crisis. It generally takes a good deal more than 30 days for other facts to emerge and other interpretations to win a hearing. With the President’s immense advantages in his control of information, in his ability to define the emergency, in his capacity to rouse the nation, it would take a very stout-hearted Congress indeed to reto his request for the authorization of continued hostilities—except in those infrequent cases where differences have already crystallized in advance of the commitment of force. This bill, S. 440, I greatly fear, would be more likely to become a means of inducing formal congressional approval of warlike presidential acts than of preventing such acts.

Moreover, the principle on which the bill is based—that the President must carry out the policy directives of Congress in the initiation and prosecution of military hostilities—is founded on the unshakable assumption that Congress can be relied upon to be more peace-minded than the executive. This assumption finds little sustenance in the historical record. In two of our five declared wars in American history—the War of 1812 and the Spanish-American War—Congress imposed war on a diffident executive. One need go back no further than the Cuban missile crisis to recall, as Robert Kennedy has told us, that the congressional leaders, when informed by President Kennedy of the quarantine policy, “felt that the President should take more forceful action, a military attack or invasion, and that the blockade was far too weak a response.” A bill constructed on the supposition that the President is always a force for war and Congress always a force for restraint may have unexpected consequence when, as has been so often the case in our history, it is the Congress which is seeking war and the President restraint.

As an historian, I feel that a legislative proposal of this consequence must be subjected to the historical test, by which I mean that we must carefully consider what its effect would have been had it been on the statute books in times of crisis in our past. I will not enter here into the question whether S. 440 would have prevented the action undertaken by President Truman in Korea and by President Kennedy in the Cuban missile crisis. Both conceivably could have slipped through under the capacious theory of defensive war sanctioned in the bill, and neither probably would have been hampered by the 30-day deadline. I will concentrate rather on two other situations of equal significance: the declared naval war with Germany in the North Atlantic in 1941, and the war in Vietnam.

In 1941 Britain, fighting alone in the west against Hitler, depended on American aid for survival. The Roosevelt administration felt that British collapse and Nazi victory would jeopardize the security of the United States. Accordingly, Roosevelt announced a “shoot-on-sight” policy in order to protect the British lifeline. It is not at all clear that this action falls within the categories of initiative permitted to Presidents by S. 440. In any case, it is fairly certain that Congress would not have sustained the shoot-on-sight policy after 30 days. For this was one of those cases whose policy differences had been well crystallized before the commitment of force. One has only to recall the fact that in August 1941 the House of Representatives came very close to disbanding the American Army when
it extended the draft by a single vote. It is hardly conceivable that this same Congress would have authorized Roosevelt to pursue an undeclared war in the North Atlantic.

As for the Vietnam war, President Johnson could unquestionably have got all the congressional blessing he wanted at any point up to 1968 and probably even then and thereafter. If S. 440 had been on the books, it would not have arrested American participation in the war; it would only have locked Congress deeper into the escalation policy. In short, the War Powers bill would have prevented President Roosevelt from protecting the British lifeline against Nazi submarines; and it would not have prevented President Johnson from intensifying the war in Vietnam nor President Nixon from carrying that war into Cambodia and Laos.

If all this is so, then the bill will serve neither the purpose for which it was drafted nor the national interest of the United States.

All these considerations constrain me to believe that Sections 3 and 5 of S. 440, however constitutional they may be, are ill-considered, unwise and filled with danger for public policy. Nor, indeed, do these sections seem to me essential to attain the declared purposes of the bill. For these purposes can be effectively attained, in my judgment, by the provisions in S. 440 providing for the reporting and the recall of hostilities. For this reason, Congressman Bingham's proposal, H. R. 317, seems to me to represent a greatly preferable approach to this complex problem.

H. R. 317 omits the impossible attempt to foresee all future contingencies; it omits the placing of the congressional \textit{imprimatur} on expansive theories of defensive war; it avoids the perplexities and dangers created by the 30-day deadline. H. R. 317 retains, however, the usable and useful provisions of S. 440.

Section 3 of H. R. 317 provides for periodic presidential reports to Congress on the status of hostilities. My only comment on this section is to wonder whether the requirement that the President must report to Congress at least once every six months is sufficient. It would seem to me safer to require such reports no less often than every three months.

Sections 4 and 5 provide for the termination of hostilities upon the adoption by either House of a resolution disapproving continuance of the action taken. I am in agreement with the congressional priority provision in Section 3. As for the mode of termination prescribed in Section 4, this is based on the precedent of the Executive Reorganization Act; and the reasoning behind it in this case is evident—that, since one House of Congress could defeat a declaration or authorization of war, one House of Congress should be able to prevent the continuation of undeclared or unauthorized war. From some viewpoints, a joint resolution passed by both Houses of Congress would seem a more appropriate form of action. I am not sure, for example, whether Section 4 of H. R. 317, if on the statute books in 1941, might not have resulted in the termination of American protection of the British lifeline, though, since it would have required positive action by one or the other House, such termination could not have been achieved without a most intense national debate. On the other hand, with the presidential power to veto joint resolutions, the war-making power would rest in the hands of one-third of each House, and this surely was not the intention of the Constitution. So, on balance, I am inclined to feel that the mode prescribed in Section 4 is a feasible solution. With this perplexity noted, I would urge on this Committee the consideration of H. R. 317, which will, I believe, fulfill the purposes of S. 440 without saddling the country with that curious melange of rigidity and perquisiveness I find in S. 440.

As for H. J. Res. 2, this proposal seems to me to suffer from two defects. It would appear to endorse the expansive theory of defensive war on presidential initiative by authorizing the President to commit forces when "the necessity to respond" to situations endangering the United States constitutes in the presidential judgment "extraordinary and emergency circumstances as do not permit advance Congressional authorization." While Presidents may be compelled by emergency to take action without congressional sanction, it does not seem to me, as I have noted before, essential that Congress should encourage them to do so by providing an appearance of sanction. The reporting provisions in Section 5 seem to me admirable and might well be incorporated in H. R. 317. The provision for congressional action in Section 6 seems to me vague and less satisfactory than the more specific provisions in H. R. 317.

In the interests of time, I will not comment in this statement on the other resolutions before the Committee, though I will be glad to do so to the best of my ability in the course of the hearing.
Before closing, I would beg the indulgence of the Committee to suggest two other aspects of this general problem for your consideration.

One means by which Congress could get a grip on the problem of war powers is through the exertion of its control over the deployment of armed forces outside the United States. I recognize that the constitutional authority of Congress to determine the commitment of forces outside the country has been in dispute. Nevertheless I would recall to you the statement made on the floor of the Senate in 1912 by the eminent lawyer Elihu Root, who had served as Secretary of War under McKinley and Secretary of State under Theodore Roosevelt. While expressing the hope that it would never do so, Root conceded that “Congress could by law forbid the troops’ being sent out of the country.” The more venerable among us can remember the “great debate” of 1951 when President Truman proposed to send four additional divisions to Europe. That debate ended inconclusively with the passage of a “sense of the Senate” resolution in which the Senate approved the sending of the divisions but added, over administration opposition, that no additional ground troops should be sent to Western Europe “without further congressional approval.” Among those voting against inherent presidential authority and for the principle of congressional control of troop deployment was Senator Nixon of California.

I would call this Committee’s attention to the statement by the Research and Policy Committee of the Committee for Economic Development in February 1972 entitled “Military Manpower and National Security.” This statement argues persuasively for a procedure by which Congress could regularly authorize and control the overseas deployment of military manpower. The report recommends that Congress should annually and explicitly authorize by major overseas areas the number of troops that may be deployed outside the United States. This need not limit the President’s power to act in an emergency, for Congress can require of the President an after-the-fact accounting for emergency action; but it would give Congress a continuing voice in peacetime overseas deployments. This would go far, in my judgment, in restoring the proper balance between Congress and the Presidency.

My second point has to do with the vital question of information. Nothing has been more effective in obstructing the democratic control of foreign policy and in perpetuating monolithic control by the national security bureaucracy than the myth of inside information—the “if you only knew what we knew” attitude. There is absolutely no reason why Congress should not have before it all the facts essential to sound and informed judgment on the large decisions of foreign affairs. This would require a marked change of attitude on the part of the executive. It would require the substitution of genuine consultation for unilateral briefing. It would require the end of the abuse of executive privilege. It would require the transmission of all executive agreements to the foreign affairs committees of both Houses, with appropriate provisions for secrecy when secrecy is really necessary. It would require it seems to me, the establishment of a Joint Committee on Intelligence on the model of the Joint Committee on Atomic Energy. It might well require, as Benjamin V. Cohen has proposed, the establishment by Congress of a commission with representatives from both Houses and from the executive branch empowered to exchange information and views on the most delicate and critical questions of foreign affairs. It will require above all more systematic and aggressive efforts by Congress to arm itself of the vast resources of knowledge in the public domain; for, in my experience, the great bulk of information necessary for intelligent political judgment is available to any citizen who will take the trouble to seek it out.

If Congress will arm itself with knowledge, with the control of overseas troop deployment and with some means of terminating hostilities undertaken on unilateral presidential initiative, it will make long strides toward bringing the war-making power under responsible democratic control.

Mr. Zarlocki. We will next hear from Professor Bickel.

STATEMENT OF ALEXANDER M. BICKEL, PROFESSOR OF LAW, YALE UNIVERSITY

Mr. Bickel. Thank you, Mr. Chairman. I am delighted to be here today and delighted to be side by side with Mr. Schlesinger.
I hope you will forgive me if I begin in a somewhat autobiographical vein. I was here once before, nearly 3 years ago, in June 1970, speaking to the same issues. My views have evolved somewhat since then, and I think it may be of interest for me to tell you how and why.

I affirmed on that earlier occasion, as I do now, the necessary and proper power of Congress to fill in the constitutional outline by prescribing in greater detail than does the Constitution itself, the allocation of warrmaking power between the President and the Congress.

THE POWER OF CONGRESS

When I speak of the power of Congress, I mean, of course, the legislative process, which includes the President. In order to make law, Congress may have to act by a two-thirds vote, if it should encounter a Presidential veto.

But I expressed the natural doubt of a common-law trained lawyer about efforts at codification, which seemed to me to run the risk, as Mr. Schlesinger noted, of being either too restrictive in their definitions of Presidential power, or else of becoming, like the lamentable Tonkin Gulf resolution, blank checks.

This doubt extended to the Javits bill, what is now S. 440, of which I had then had a chance only hastily to examine an early draft. My conclusion was—and as I say, this was as of the summer of 1970—that the most desirable form of congressional action would have been the exercise of some immediate control over the Vietnam situation and of the power of Congress over deployment of troops.

I said I believed it was Senator John Sherman of Ohio, the general's brother, who some time after the Civil War expressed the view that the way to resume specie payments was to resume, and I remarked that the way for Congress to resume control over the foreign and war policy of the United States was to resume, by specific action, then.

PRESIDENT REJECTS ADVICE

Needless to say, there was very little specific action then or in the years since then. In the Military Procurement Authorization Act of 1971, there was a provision declaring it to be “the policy of the United States” to end the war “at the earliest practicable date” and to undertake a “prompt and orderly withdrawal * * * subject to the release of all American prisoners of war.”

The President rejected this advice, because advice was all it was. The amendment, said the President, describing its language and the intent behind it with total accuracy, “is without binding force or effect,” Congress had shied from using mandatory language—“the President shall”—because it shied from the responsibility, and because it tried to avoid a veto which it very likely could not have overridden.

By the summer of 1971 I had become convinced that Congress could not be brought to resume exercise of its share of the war power through specific actions until it had in declarative fashion reallocated a share of the responsibility to itself.

The people tend not to hold Congress responsible, and its own Members shy from the responsibility. It became apparent to me that some
quasi-constitutive act on the part of Congress, an act of standing forth before the people as responsible, was necessary before Congress could be expected to take any specific measures.

**SERIOUS IMBALANCE BETWEEN PRESIDENCY AND CONGRESS**

And so I became convinced that unless a declarative statute on the model of the Javits bill was passed, a great opportunity to redress what in my view was a serious imbalance between the Presidency and the Congress would be wholly lost.

The problem, I have long thought, is very serious. It is in the nature of our institutional arrangements that any power vacuum will be filled by the President. Hence, in future as in the recent past, the President will act if there is nothing on the books that validly circumscribes his freedom.

Yet I think the Vietnam experience should have taught us that, barring a Pearl Harbor sort of exigency, or something that can convincingly be made to resemble an imminent Pearl Harbor, we cannot well fight Presidential wars.

It is useless, it is in the end an act of self-flagellation which helps nobody, including the ally we are supposed to be rescuing, and which does to ourselves domestically what the Vietnam war did. We need to reassert and refurbish the constitutional arrangements which in my judgment were intended precisely to see to it that the country did not get into wars unless it knew that it wanted to, or had been persuaded that it should—as a nation, through the two institutions, the Presidency and the Congress, that together are fit to express the national will.

At the same time, successive drafts of the Javits bill, each an improvement on an earlier one, stilled my common-law doubts, taught me that general legislation, a kind of codification, is possible in this area, and that the risks and pitfalls are less forbidding than I had first thought.

**SPELLING OUT LIMITS OF PRESIDENTIAL POWERS**

A law spelling out the limits of presidential warmaking power should not be necessary ideally; we would be better off if it weren't. It would not be necessary if Congress had exercised its undoubted powers in recent crisis situations, including Korea and Vietnam.

A responsible Congress would, I hope, have agreed to undertake the Korean action—there was time, if only a matter of days—and would, I hope, have refused to allow the massive intervention in Vietnam.

I cannot guarantee it. I am just expressing what I hope would have happened. But Congress stood by, partly at least because it shared a general confusion about the division of war-making powers between itself and the President, despite the fact that the Constitution is, and used to be commonly understood as being, fairly clear on the subject.

When a Tonkin Gulf resolution or a Formosa resolution is put before the Congress, it goes through quickly because a substantial part of the membership is under the misapprehension that Congress is merely being asked to stand patriotically by the President, who is acting within the constitutional sphere of his own independent authority.

Thus, the late Senator Richard Russell, we are told, advised against
intervention in Vietnam. But told President Johnson that he would stand by him loyally if the President should act. The President for his part does not feel obliged to put his whole case before Congress, to bare his mind and reveal his intentions and thus defend his proposal and persuade Congress and the country to accept it.

**PLAUSIBLE REASONS FOR MAXIMUM SECRECY**

For, after all, he is not proposing, he is merely asking Congress to stand with him in united ranks behind something he has authority to do anyway. There is no need for Congress to know everything, since it is not Congress that is assuming the responsibility, and there are always plausible reasons for maximum secrecy.

The sum of it is that a vast ambiguity now shrouds the allocation of the warring power, even though it ought not and need not. Consequently, Congress does not answer responsibly when asked to act, and certainly takes no responsible initiatives.

A war powers bill is necessary because it is apparent that Congress must declare its own responsibilities to itself and assume them in principle before the country, if it is ever to exercise them in practice in particular situations.

Restoring a proper share of responsibility to Congress will by no means insure its wise exercise. This is the point Mr. Schlesinger emphasized. There is no assurance of wisdom in Congress any more than in the Presidency, on domestic problems any more than on foreign

**DEFINE NATIONAL INTEREST BY EVOKing IT**

The only assurance there is lies in process, in the duty to explain, justify, and persuade, to define the national interest by evoking it, and to act by consent, Congress will sometimes fail to assent to wisdom and hold out for foolishness or rush into it.

At such times, the President, who is differently constituted, has enormous leverage as a persuader, and great power as a brake. Singly or together, President and Congress can fall into bad errors, of commission and omission. But together they are all we’ve got; except that in emergencies requiring instant action, or for purposes of command decision, we must rely on the President alone, as S. 440 fully recognizes.

S. 440 would allow the President to act, as the Constitution intended him to do, in the event of an attack or of an imminent threat of attack against the United States or the Armed Forces of the United States. He may take the measures necessary to forestall an attack on the United States or its forces anywhere in the event of a “direct and imminent threat” to repel the attack if it occurs, and to retaliate, if it is an attack on the United States itself, its territories or possessions.

S. 440 would also allow the President, and this is somewhat extra-constitutional, to protect and evacuate Americans caught in fighting on the high seas or in a foreign country. That, in all reason, in the contemplation of the framers of the American Constitution, and in light of the experience of nearly two centuries, including a quarter century of the nuclear age, describes the sort of emergencies in which the automatic use of force is called for, and in which a purpose to use force
automatically and take the consequences can be imputed to our people without testing that purpose in the institution that reflects and represents the people in all their diversity; namely, the Congress.

SPECIFIC PROSPECTIVE AUTHORIZATION

Looking beyond the emergencies just described, S. 440, in its section 3(4) (A) and 3(4) (B), makes provision for specific prospective authorization of the use of force, and the emphasis is on the word “specific.”

There are to be no more Tonkin Gulf resolutions authorizing everything and nothing, and no other ratifications, prospective or post facto, without the assumption of responsibility, as by appropriating money.

To appropriate money in support of a war the President is already waging is no more to ratify his action in responsible fashion than to appropriate for the payment of his salary. Under the sections I am discussing, the United States will be able to undertake credible international commitments through specific legislation implementing treaties or other agreements.

These commitments will be more credible than any we supposedly now have, which do not validly authorize automatic action, and exist at best in the miasma of ambiguity and misapprehension that has of late surrounded our domestic allocation of warraking power.

Section 3 of House Joint Resolution 2, which is the operative section, by contrast with the closely drafted provisions of S. 440, seems to me to constitute a blank check, and for that reason to leave us worse off than we are now.

“ENDGARS THE UNITED STATES”

The operative phrase of this operative section is “endangers the United States”—not directly or immediately, but in any sense. The phrase suggests, not a question of fact, but of judgment; and not a judgment tied to present circumstances, but a prophesy.

I do not think any President, including President Johnson in 1965, ever acted except in the good-faith belief that he was responding to a situation that, in a large sense, and looking to a distant future, endangered the United States, or ever thought, to continue quoting the language of section 3, that he was in anything but such “extraordinary and emergency circumstances as do not permit advance congressional authorization,” if for no other reason than that he thought it wise to keep his decision private and his options open to the last minute.

House Joint Resolution 2, therefore, amounts, in my judgment, to no more than a reporting statute, and the reporting provisions of its section 5 are not terribly rigorous at that. Section 4, providing for consultation, is simply hortatory.

SINGLE HOUSE TERMINATION OF HOSTILITIES

H.R. 317, Mr. Bingham’s bill, is again a reporting bill, except that it would authorize a single House of Congress to terminate hostilities that a President had engaged in. That is an extraconstitutional arrangement that has seemed to me undesirable in the few other condi-
tions in which it now prevails, and more undesirable as applied to matters of war and peace.

H.R. 926 seems to me similar in intent to S. 440, but the latter is simply a better and more detailed draft. H.R. 3046 I think is, again, little more than a reporting bill.

I came to the conclusion that S. 440 is a wise proposal which will redress what has come to be a dangerous and uncharacteristic imbalance in our institutional arrangements. I urge the committee to give it its favorable consideration.

Mr. Zablocki. Thank you, gentlemen, for your excellent statements in support of your positions.

I detect that both of our witnesses this afternoon agree that all of the bills in this area now pending before Congress, and primarily S. 440, House Joint Resolution 2, and House Joint Resolution 317, contain, in my opinion, constitutional provisions.

As I gather from your testimony, there is no question of constitutionality in legislating in this area.

Mr. Bickel. There is none in my mind.

Mr. Schlesinger. I am only a historian, so I yield to Professor Bickel.

Mr. Bickel. Constitutional law draws its sustenance from an enabling alliance with history. I see no argument at all.

CONGRESS SHOULD BE MORE FULLY INFORMED

Mr. Zablocki. Another agreement I find is that you both think Congress should be more fully informed.

Mr. Bickel. Yes, sir.

Mr. Schlesinger. Yes.

Mr. Zablocki. I also find another area of agreement that the Congress indeed should enact some legislation in this area.

Mr. Schlesinger. Yes.

Mr. Zablocki. Professor Bickel, specifically you believe that only by legislation the war powers of the President of the United States can be resolved?

Mr. Bickel. Yes, sir; I am wholly convinced now and have been for some time that the only way to begin is to have a broad declarative act.

Mr. Zablocki. Then the President would either have to tacitly accept or formally approve the legislation by signing it into law.

Mr. Bickel. He would have to sign it unless you succeed in passing it over his veto, but it is not less law when you do.

Mr. Zablocki. That is true. However, witnesses we have had before us, including the sponsors of S. 440, agreed that the President would likely veto that bill, and there would not be enough votes to override the veto.

Then it would be an exercise in futility; would it not?

Mr. Bickel. I guess so; this is the area of your expertise more than mine.

REESTABLISHING CONGRESSIONAL AUTHORITY

Mr. Zablocki. Then from a practical standpoint, we should attempt to bring out legislation which would deal with this problem respon-
sibly and which may become a statute. Otherwise, why not just pass a strong concurrent resolution? This would not, in your opinion, accomplish what we want to accomplish; namely, reestablishing congressional authority in the war powers area by preventing the President from acting on his own.

Mr. BICKEL. It would not have the force of law, but it would not be a futile exercise. We are dealing in an area where the Constitution is the Constitution of practice.

We are also dealing in an area where one of the questions is the assumption of constitutional responsibility. I would regret if it came to a resolution, but if it did come to that, it would be a statement that enters the constitutional tradition, and it would be a statement by Congress to itself about what it thought its function was for the future. I would prefer the statute, of course.

Mr. ZABLOCKI. We in the House did not go through an exercise in the 92d Congress nor in the 91st session.

In the 91st Congress the House passed a resolution in this area. The Senate did not act. In the 92d Congress both Houses passed resolutions, but because the Senate action came late in the session the differences were not resolved.

Mr. BICKEL. I think the President, facing the decision President Johnson faced in 1965, would not have made it in the same atmosphere that it was made in then.

RAISING THE CONSCIOUSNESS OF THE EXECUTIVE BRANCH

Mr. SCHLESINGER. I think one of the problems, in the language of the women liberation movement, is to raise the consciousness of the executive branch and make it far more sensitive to these issues than it was in the past.

I speak with some repentance about this because I was in the executive branch in the early 1960's, and I did not have the sensitivity to this range of issues that I have acquired since and that Vietnam has given to us all.

I feel that, had Congress declared itself by a sense of the House or sense of the Senate resolution, had it even made an effort to enact a bill which the President might have vetoed, it still would have raised the consciousness of the Executive.

I think that rather than to try to measure things which would be acceptable to the President one might argue that exercises which do not produce an immediate legislative result may produce a more enduring result in increasing awareness and Executive sensitivity to the constitutional issues and the need for involving Congress in these things.

Mr. ZABLOCKI. As one individual, I can assure you I don't feel our efforts in the past were complete failures or exercises in futility, nor are we frustrated, otherwise, we would not continue in our efforts.

DIFFERENCES ON SECTION 3 OF HOUSE JOINT RESOLUTION 2

I gather both of you disagree with section 3 in House Joint Resolution 2. Professor Bickel said this section practically gave the broader
power to the President. Yet, the State Department's witness yesterday said this particular section 3 would cause difficulties in meeting certain emergencies as far as the President is concerned.

Since there is a difference of opinion in this area, I am coming to the conclusion, since the Department is not satisfied and you think it is too broad, it must be a good section. Would you care to comment further?

Mr. Bickel. The Department takes, and this is not the first instance of it, what seems to me to be an incredibly far out position. It seems to me the only way you can come to this section and view it as an inhibition on the President's power is if you start with the premise that his powers are wholly independent, that Congress has no business saying word one about them, and that they are not only unlimited but illimitable in the sense that nobody can foresee in what fashion he may seek to use them.

That is an imperial view of Presidential power that I certainly don't hold. I think the section is too broad because as I said in my testimony, the phrase, "Endangering the United States," with no reference to the immediate circumstances, with no reference to factual situations, but as a matter of prophetic judgment is a phrase that would cover every single Presidential action I can imagine.

EFFORTS AT CODIFICATION

Mr. Zablocki. To pursue the question, in your testimony in the past, and again today and I quote from your testimony today, ... "efforts at codification, which seemed to me to run the risk of being either too restrictive in their definitions of Presidential power, or else of becoming, like the lamentable Tonkin Gulf resolution, blank checks."

What you appear to be saying is that Congress should not attempt to codify. Doesn't S. 440 do just that?

Mr. Bickel. I said that view I expressed nearly 3 years ago was my initial view. I have been taught, so to speak, by the drafting processes of S. 440 in which I took some small part, by Senators Javits, Eagleton, and others, and by their staffs, that the thing is doable. S. 440 as I now read it as a lawyer seems to me to avoid pitfalls and to codify in language that is precise and, to me, satisfactory, those conditions in which the President has constitutional authority to act and those conditions in which he must have congressional authority.

Mr. Zablocki. You mean in S. 440 all possible imaginable conditions are included?

Mr. Bickel. Well, Mr. Chairman, within the limits of reason, one must guard against counsels of despair applicable to any legislation at all. Of course, nobody can sit here and say we are 100 percent certain we have taken care of everything. The Constitution of the United States has been amended 20 some times and this bill may be amended sometime in the future.

THE BEST JUDGMENT OF MEN

But it is my judgment that this bill, S. 440, now contains the best judgment of men now living so far as they can foresee the future. That is the process of legislation, Mr. Chairman.

Mr. Zablocki. Thank you.
Mr. SCHLESINGER. May I comment?

Mr. ZABLOCKI. Yes.

Mr. SCHLESINGER. I agree with what Professor Bickel says about section 3 in the joint resolution. But it seems to me that S. 440 suffers from the same defect and that S. 440, too, involves Congress in, as I say, an endorsement of a very expansive theory of defensive war.

If I may ask Professor Bickel, S. 440 would have authorized the recent actions in Cambodia?

Mr. BICKEL. No; not in my judgment. I think there has been a great deal of confusion about that. The Cambodian actions nobody could have stopped, authorized or not authorized. They were taken as actions in a de facto war by a commander in chief. They were no different than, say, what FDR did in 1941. He did not come to Congress to ask whether he could invade North Africa. Once there is a war, the Commander in Chief can move his forces any place he wants to, to achieve safety and victory.

PRIOR ENDORSEMENT BY CONGRESS

Mr. SCHLESINGER. S. 440 does say among the particular categories, "To repel an armed attack against the Armed Forces of the United States located outside the United States, territories, or possessions and forestall a direct attack." This was the ground on which Mr. Nixon invaded Cambodia.

I agree with Professor Bickel's actual description of the powers of the thing, but it seems to me there is no great virtue in Congress giving a prior endorsement to these things.

I agree with Senator Fulbright that Congress would be in a much less compromised position if the President, in undertaking this form of attack, could not cite statutes passed by Congress as authorities for what he was doing.

Mr. ZABLOCKI. We don't intend to have a debate between our witnesses; however, we do want to have a full discussion of the issue without getting too lengthy.

Mr. BICKEL. If S. 440 had been on the books, Congress would have had to authorize the massive presence of troops in Vietnam.

Then I agree that the Cambodian invasion could have taken place on the President's authority, of course. But what S. 440 intends to do is disable the President from the massive placement of troops in a place such as Vietnam.

INDEPENDENT PRESIDENTIAL ACTIONS

Therefore, the Cambodian situation could not have arisen. Second, sure the section of S. 440 which authorizes independent Presidential actions is a restatement, except for the provision about rescuing Americans who were caught in somebody else's country, is a restatement of the constitutional Presidential power which could not be taken away.

The virtue in the restatement that I see is that by a creeping practice over the past few decades that irreducible power has been enlarged by Presidents so that they have used it well beyond what the Constitution means. This is a restatement which says only this far do you have independent power and no farther. That is for me the virtue of it.
Mr. Zablocki. Thank you, gentlemen, Governor Thomson?
Mr. Thomson. I will reserve my time, Mr. Chairman.
Mr. Zablocki. Congressman du Pont?
Mr. du Pont. Thank you, Mr. Chairman.

We have heard over the past few days from a great many witnesses arguing a great many points of view. It seems to me if we are all agreed that we want to enact some kind of meaningful legislation, we ought to turn our attention to the subject of what that legislation ought to contain. There are three principal elements. I would like to get your opinion on problems I see with all of them.

The first is, it seems to me we are necessarily dealing only with offensive situations. Do either of you gentlemen see any problem in giving the President of the United States carte blanche in order to defend the United States?

Mr. Schlesinger. Against actual attack, none.

STOP DEFENDING THE UNITED STATES IN MIDSTREAM

Mr. du Pont. But both the Javits' bill and Bingham bill would put restrictions on it.

In the Javits' bill if no resolution was passed by Congress, the President would have to stop defending the United States in midstream.

Mr. Bickel. No, I don't agree with that. The Javits bill says that if he has engaged in hostilities in defense of the United States or placed troops he has to report and within 30 days he has to stop, but not in the sense that he is required to disengage if in his judgment it is not possible to disengage.

The Javits' bill doesn't tell him, and you could not constitutionally tell him, at the end of 30 days when a bell rings in Congress, "Cease fire."

That is an encroachment on the power of the Commander in Chief and the Javits' bill does not do it.

Mr. Schlesinger. Indeed, the Javits' bill in section 2 says this act does not intend to encroach upon the right of the President as Chief Executive to respond to attacks or threat of imminent attack.

PROTECTING FORCES WHILE DISENGAGING

Mr. du Pont. In section 5 in lines 15 onwards, the President doesn't have to stop if he determines that the safety of the Armed Forces while disengaging from this threat I would if—that is the Vietnam argument, protecting your forces while you disengage. I wouldn't consider fighting a defensive operation in the Aleutian Islands a disengagement.

As I read this bill, you would have to stop.

Mr. Bickel. As I read it, if he had this happen in 1967 or 1968 he might have spent a year to get out and might have gone to Cambodia in the process of getting out of there.

One must assume good faith on his part. This gives him the mission. It says if the 30 days run out, your mission is to get out. If Congress acts, it may say, go conquer Vietnam or fight China.

If there is no action, the mission is disengagement but disengage-
ment within the judgment and powers of the Commander in Chief which is a considerable amount of power.

Mr. SCHLESINGER. I agree with Professor Bickel's reading of the bill. I don't think this touches the Presidential authority to repel an attack. But if my reading were incorrect, it doesn't seem conceivable that if the United States were under attack that Congress would tell the President to cease and desist.

Mr. DR. PONT. This brings me to the second part of the problem. That is the problem with the Bingham bill.

CONGRESS CAN TERMINATE HOSTILITIES

Mr. SCHLESINGER. The Bingham bill does not have an automatic 30 days outline that has to be met for the hostilities to continue. The Bingham bill imposes a form by which the Congress can terminate hostilities. Therefore, I don't see where there would be any problem.

Mr. BICKEL. The problem would be the other way around.

Mr. DU PONT. The third important thing I think in drafting the legislation is to try to draw a bright line so that everybody understands, both from the congressional and Executive side, where we stand.

How would you gentlemen define the operative word, "hostility," in these bills? We had quite a discussion with Senator Javits and Congressman Bingham and others as to just what "hostilities" mean. I believe Congressman Findley asked whether hostilities was using U.S. aircraft in the Congo operation for example. There are lots of thoughts that can be raised. Do you have any comments?

Mr. BICKEL. I have been in that discussion with the Senate Foreign Relations Committee. It is at this point that I become Mr. SCHLESINGER, although I can't confirm that he becomes Bickel at this point.

It is at this point that my urge to codify vanishes. There is no way in which one can define that term other than a good faith understanding of it and the assumption that in the future Presidents will act in good faith to discharge their duty to execute the law.

THE TAYLOR-ROSTOW MISSION

I would suppose that if you were President Kennedy in the very early 1960's after the Taylor-Rostow mission, and you were sending 12,000 men into Vietnam, you would have to be very disingenuous not to have thought you were throwing them into a place where there was a threat of hostilities.

I suppose if you were sending rescue planes to the Congo you would have a different judgment. If you were sending the Marines into Lebanon as President Eisenhower did, you would again have felt you were sending them into an area where there was an imminent threat of hostilities. I think hostilities is a reasonable word as words go, and I just don't know if one can do better.

Mr. DU PONT. Thank you.

Mr. ZABLOCKI. The gentleman from Minnesota, Mr. Fraser.

Mr. FRASER. Thank you very much, Mr. Chairman.

I am delighted to welcome both Professor Bickel and Dr. Schlesinger here. Do either of you believe that had either of these resolutions been on the statute books, the ones you respectively advocated, that it
would have prevented the Bay of Pigs, the Dominican Republic invasion, or Vietnam?

**APPLICATION TO BAY OF PIGS**

Mr. Schlesinger. On the question of the Bay of Pigs, this was not something that involved the commitment of American forces. It was an expedition which was sponsored, organized, trained, and armed by the United States, but I would take it that none of these bills would apply to the Bay of Pigs.

I think the way of getting at that if there were ever to be such a clandestine operation by the CIA again, would be through a joint committee on intelligence. The pretext for the Dominican invasion was the protection of lives of Americans in the Dominican Republic. It may be that to protect the lives of Americans who were threatened may not in the light of reason seem to require the dispatchment of 24,000 troops. But the pretext was that, and therefore, it would not be affected by either of these bills. What was the other?

Mr. Fraser. Vietnam.

Mr. Schlesinger. I think in the case of Vietnam, if the Javits bill had been on the books it would have dug the Congress in much deeper and systematically than the Gulf of Tonkin resolution did because it seems to me realistically the Congress would have renewed the mandate every 30 days or whatever the requirement was in the bill.

Mr. Bickel. I would say the same thing on the Bay of Pigs. I would have two different answers on the other two. On the Dominican Republic that seems to me, as Mr. Schlesinger said, a disingenuous action, and I think a President would be given pause if there were a bill on the statute books which said he could act only to rescue American citizens and then you get out.

**EFFECT ON DOMINICAN REPUBLIC SITUATION**

So, I think it might have had an effect upon the Dominican Republic situation. Vietnam is different. It could have been that Congress would have cheerfully started that war. But that goes to the point that neither this bill nor anything else we can do now will insure wisdom.

If the Congress had passed a bill to fight in Vietnam in 1965, and had been responsible for it, then at least we would know now that we had made the mistake with the best and brightest of our institutions, not just the best and brightest of our men.

I would be satisfied that way. I don’t want to make infantile statements, but I believe in the Constitution.

Mr. Fraser. From what both of you said, I gather that in practical terms these provisions, given the climate that existed at the time each of these occurred, that these would not have constituted hindrances or limitations on what the President did.

Mr. Bickel. With the qualification on the Dominican Republic.

**THE PRESIDENT SHALL MAKE EVERY EFFORT**

Mr. Fraser. This clause 3 of section 3 says down toward the end. "The President shall make every effort to terminate without using the Armed Forces of the United States and shall, where possible, ob-
tain the agreement of the subject country.” That was the name of the

game down there to protect the Government against the international
effort to overthrow it.

Once we went in to save American lives, and we had not only the
consent but appreciation of the host Government to stay there as we
did——

Mr. Bickel. Not under this section. It says he can go in, evacuate
as rapidly as possible, and then get out. For that he needs the consent.

Mr. Fraser. By the time we had our U.S. nationals out we had put
down the revolution.

Mr. Bickel. But that would have been disingenuous and bad faith
action if this act were on the books.

Mr. Fraser. Disingenuous seems to be the name of the game where
Presidents are concerned. We might put an outline in the law about
that.

I have thought it might be a good idea to make it unlawful and a
criminal act for a Government official to lie.

Mr. Bickel. Do you have enough jails?

Mr. Fraser. It seems to me it would get closer to the problem than
other efforts. Professor.

INFLUENCE ON PRESIDENTIAL DECISIONS

Mr. Schlesinger. The provisions in H.R. 317 for the recall of hos­
tilities might, it seems to me, have had some possible influence on
Presidential decisions because this permits recall by the action of one
House. Whether the Senate passed the Javits bill by such a large
margin, whether the balance might have been close enough in 1970
or 1971 for the Senate to take a resolution of disapproval, whether this
might have had a restraining effect on the President, I don’t know,
but it might have.

Mr. Fraser. But in H.R. 317 that is operative only if there is not
specific authority for what is going on. I think we both should agree
that the executive branch, faced with this on the books, would have
nail down the specific authority in the early months when Congress
would have adopted the declaration of war by a 3-4-1 vote.

Mr. Schlesinger. In that case, it would have the effect of having
forced Congress to assume some responsibility on it.

Mr. Fraser. That is an interesting but——

Mr. Bickel. That is the constitutional concept.

Mr. Fraser. Your disclaimer that an appropriation for a war doesn’t
constitute an endorsement, I am prepared to support that in a legal
sense.

When one recognizes that really the ultimate authority we have is
the power of the purse and the right to withhold funds, I have to say
in my judgment the Congress shared with the President throughout
the Vietnam war the responsibility for its continuation because we
clearly could have terminated it.

LACKING THE POLITICAL WILL

As you pointed out, we should have terminated it, but we did not,
and we lacked the political will to terminate it.
Mr. Schlesinger. May I say in general the appropriations do constitute an implicit ratification of hostilities taken by the President unless Congress by appropriate action cancels that authorization. This is the view Judge Collin—a former member of this body—took in the first circuit, and it has much to commend it.

In 1847, Lincoln and Adams continued to vote for appropriations. Some Congressmen did not. Joshua Giddings of Ohio reminded his colleagues that during the War of the Revolution, antiwar members of British Parliament declined to vote for appropriations.

Despite that, Lincoln and Adams did vote for appropriations.

Mr. Fraser. They were then operating on the basis that amendments to a bill of which there was no record and then the problem became the final passage of the appropriations bills. That probably included the general support of the Armed Forces.

That was the practical problem we faced in the first years. On the record, bills on final passage we were financing all kinds of things. That procedure was prevalent then.

Lincoln and Adams challenged

Mr. Schlesinger. Lincoln and Adams were both challenged by Giddings. I am ashamed to say I don't know what form these appropriations took, whether they were for the army in Mexico. The bulk were probably for that purpose.

However, the House of Representatives did in 1848 cancel the implied ratification of the war through the appropriations process when it passed a resolution saying that the law had been illegally and unconstitutionally initiated by the President of the United States.

So, I do think it is within the power of Congress to eliminate the notion that appropriations imply approval by taking positive action as they did in 1848.

Mr. Fraser. Except for the testimony of the Legal Department of the Department of State yesterday, which claims such vast powers for the President that I was enormously disturbed, I am really reluctant to try to have passed something in which nobody can tell me would have any practical consequences in the war I think has been a mistake in the past 10 years.

It seems to me that gets me in trouble, the attitudes we have viewed and fashioned in the short term rather than taking a longer term perspective.

If passing this would not have prevented the things I don't like, I can't see much value in it.

A Procedure for Consciousness-raising

Mr. Schlesinger. S. 410, I don't think would have prevented the things you don't like, and would have prevented things which were in the interest of the United States in 1941. That objection doesn't seem to me to apply to H.R. 317. I think it is consciousness-raising to have a procedure hanging over the head of Presidents by which Congress can terminate hostilities. It might have a restraining effect.

Mr. Boeker. I really think, if I may say so with great respect, Mr. Fraser, you are not here to legislate retroactively about the mistakes
that have been made. You are here to legislate first of all on the relatively abstract issue of what proper institutional arrangements should be.

You are here to legislate about things that are bound not to be anything like the three past instances. They will never reoccur. History does not repeat itself except as Mr. Schlesinger writes it up.

There is no such thing. There is the future and that is all. The Constitution has a great deal to say on this. We have gone astray from it, gone wrong as compared to the scheme. The Constitution doesn’t say you ratify wars by appropriation.

MISTAKING CONGRESS FOR HOUSE OF COMMONS

You mistake the Congress for the House of Commons of the 18th century. Your main power is not the purse. You are the legislative organization of this Government and you have the necessary and proper power to legislate for all portions of it.

The appropriations power is not even mentioned. You have the power to pass laws. What the Constitution provides is that money can’t be spent unless you say so, but the assumption is that the appropriation is dependent on lawmakers.

Mr. Fraser. But the practical thing is, that the failure to appropriate is not subject to a veto.

Mr. Bickel. That is true.

Mr. Zadlock. Mr. Bister.

Mr. Bister. Thank you. I served for 6 years on the Committee on the Judiciary. Mr. Bickel testified many times before us. Now I am surprised to find him over here.

I admire the working of his mind as he deals with this problem, but also the relevance of his thought on many subjects. I would like to come back to the Constitution if I might, and confirm my belief that section 8, article 1 spells out in it an emphasis of ways an emphasis on the Congress with respect to war-making, the declaration of war, events which authorize military action not going to the extent of declaration of war, and with respect to appropriations limiting appropriations for the military to 2 years which is a kind of 440 with a different time period.

CONGRESS AS MAIN DECISIONMAKER ON WAR

I am wondering if you gentlemen with your various disciplines agree that the framers intended the Congress to have the dominant role in determining whether we went to war?

Mr. Schlesinger. Yes, it did intend to have a dominant role, and at the very least an equal role. It did assign certain powers to the President.

There was a certain ambiguity here, and experience showed that the powers assigned to the President which enabled the President to present to Congress fait accomplis that, in a sense, thwarted the Constitution.

But I would agree with your general statement.

Mr. Bickel. The only problem that the framers faced was how to vest this power in Congress without getting themselves into the kind
of problem they faced under the Articles of Confederation where Congress began to wage war as a committee.

That is why they chose "declare" as against "make." They came entirely from the other direction. There was no doubt in their minds that the war power was to be legislative. The problem was how to keep the President as effective Commander in Chief.

**NOT EVEN A SHARED POWER**

It was not even a shared power, I think, in their minds.

Mr. BURSTEIN. The second question is with respect to criteria. In making the judgment with respect to the role of the Congress, what criteria should we apply? Should we apply the criterion that it was the intention of the framers?

Should we apply the criterion that it is likely to be the wisest reciprocatory? Should we apply the criterion that if it is a congressional responsibility, it is more likely to be a whole and national undertaking or do we apply a mix of the three or what?

I would appreciate your comments with respect to this. What criteria do we apply in making this judgment?

Mr. BICKEL. I think that I would accept the three you mentioned as constituting a very appropriate mix. There is a constitutional provision, and most of us are of the persuasion that on the whole the constitutional arrangements are wise.

There is, then, the question of present policy, of the wisdom of present policy. It seems to me the constitutional arrangement, its wisdom, has been confirmed by the experience of the past two decades. It seems to me ultimately as to the wisdom of institutional arrangements, we have to seek, for war more than for any other policy the Government pursues, the broadest possible base of consent which I think is the foundation of effective government all together anyway.

**CONGRESS AND PRESIDENT ACTING TOGETHER**

I am at a loss to see how anybody can argue against the proposition that the broadest base of consent for governmental action in our system is obtained when, in accordance with the constitutional scheme, Congress and the President act together.

As I read S. 440, that is what it intends to do.

Mr. SCHLESINGER. I would agree with that. I think the objective of the Founding Fathers was to make sure that no one man would have the power to, as Lincoln said, get us into this distress of war. That is an essential part of wisdom. But, if I understand you to say that Congress was a wiser branch than the executive, I do not think that is necessary to the argument.

Mr. BURSTEIN. I was asking whether as a criterion we would use wisdom of either institution.

Mr. SCHLESINGER. No, I think that both institutions are capable of wisdom and both capable of folly. On the war question, as I suggested in my opening remarks, it is not the case that Congress is notably less bellicose than the Executive.
This was the impression that both Madison and Jefferson had. Madison wrote in 1798 about the Executive as being prone to war and so on, but when Madison was President, 14 years later, it was the Executive who was more prone to peace, and the legislature more prone to war.

So, I do not think that element, as I would see it, would enter into the argument. I think the essential point to keep in mind is the constitutional intention to make sure that no one man has the right to get us into war.

Mr. Zablocki, Mr. Fountain?

Mr. Fountain. Thank you, Mr. Chairman.

I want to thank Professor Bickel and Mr. Schlesinger for taking the time to come before this subcommittee and giving us the benefit of their thought-provoking discussion of this extremely complicated, difficult and, at the same time, sensitive subject. I say complicated because we have already found it to be difficult to write an appropriate statute in a manner of this kind.

I joined with the chairman in introducing House Joint Resolution 2, not because I think it is necessarily the exact wording we ought to have, but because I thought it was a start and that maybe something ought to be done. However, I am beginning to feel somewhat as I did on the prayer amendment. I think all Americans feel that children have been deprived of the right of reading Scripture and prayer in the public schools. Yet after having studied the matter, I can see the difficulty in writing a law that doesn't leave us in worse shape than we are in, either in breaching the doctrine of separation of church and state or restricting the rights of people.

BALANCING POWERS OF EXECUTIVE AND CONGRESS

I am beginning to think we are maybe in the same situation here, trying to write something that will not overlimit or will diminish the power of either or both branches of government. I would like to ask both of you one question—I note that you, Professor Bickel, support S. 440 as it is written. I gather from your statement, Mr. Schlesinger, that you are not satisfied with S. 440—you think we ought to develop another approach.

I am sorry I did not hear your entire statement, but I wonder if each of you would briefly summarize just the substance of what you think the legislation ought to contain.

First, let me ask you, do I understand that both of you agree we ought to have something?

Mr. Bickel. Yes.

Mr. Schlesinger. Yes.

Mr. Bickel. I do think the heart of the problem right now—and I would not have said this 2 years ago, because I was in hopes that Congress would do something immediately—I like Mr. Schlesinger's phrase consciousness raising, although I don't like where he borrowed it—is the need of Congress telling the country, we are in this game also.
CONSTITUTIONAL ARGUMENT FROM THE EXECUTIVE

It seems clear that some vacuous statement that says merely what I have just said would not do it. It does require some description of the responsibilities that Congress assumes. That, in turn, it seems to me, is impossible without running into strong constitutional argument from the Executive. It is impossible to do without, at the same time, putting aside and confirming what are the Executive's constitutional powers. You wind up with a thing like the Javits bill which says we recognize what the President can do under the Constitution, but it is limited, and that which is described in the next section he cannot do without specific authorization from us.

I think that is called for and I think the Javits bill does do it fairly satisfactorily.

Mr. SCHLESINGER. I accept Professor Bickel's argument about the need for some form of congressional declaration which I think he argues with great subtlety and force in his statement. This does not, however, lead to S. 440 as the inevitable conclusion. I, for reasons set forth in the statement, feel that in certain regards this weakens the position of Congress with regard to the Executive by providing the Executive forms of language which will enable him to claim congressional support for actions which previously he would have to undertake on his own responsibility and if undertaken on his own responsibility, it would seem to me Congress would be in a better position to deal with them than if Congress had authorized the action by language in a statute.

ONE MAN MAKING FEARFUL DECISIONS

It would seem to me that the purpose of the declarative act, along with the efforts to try to make it impossible for one man to make these fearful decisions, could be accomplished by a bill to concentrate on reporting and recall. I do disagree with Professor Bickel. I think the provisions for reporting in the chairman's bill are good. They seem to me better than the provisions in Congressman Bingham's bill. I was just handed a new version of the Bingham bill in which he appears to have incorporated the chairman's provisions.

I think a provision for recall by action of the Congress is essential. Therefore, I would think that the reporting and recall would do the job, including the job of consciousness raising without getting into the difficult problems raised by the other sections of the Javits bill, the 30-day provision and the blessing it does give to expansive Presidential interpretations of defensive war.

Mr. FOUNTAIN. What part do treaties play in this picture?

Mr. BICKEL. As things stand now, as you know, treaties, the main ones, NATO, SEATO, have applicable provisions which I don't think are credible to anyone. I think Charles de Gaulle expressed the true view about those. He didn't believe them for a minute because they are circular. They say we will go to war automatically in accordance with our constitutional processes.
CREDIBLE CAPABILITY TO ACT IN CRISIS

Nobody knows what those are. Any statesman with his head screwed on right will know that whatever Presidential power was 10 years ago, it is likely to be less now. So I think treaties do not give us credible capability to act in crises. Under the Javits bill Congress would be empowered and, therefore, having passed that bill have the obligation to look over our so-called treaty commitments and to decide which ones it did, and in what circumstances, wish to make more credible than they are now.

The Javits bill provides that under a treaty or any other agreement that the only way we can have a commitment to action on a fairly automatic basis is pursuant to a specific implementing statute. The Javits bill, among its other virtues, would be conducive to a coherent examination by the Congress of the foreign policy of the United States throughout the world.

Mr. Fountain. Just one other observation. I am tremendously impressed by Mr. Schlesinger’s emphasis upon a joint committee of some kind. I don’t trust completely the wisdom of the President or the Congress. I think one of our big difficulties has been not having accurate and adequate information upon which to form an opinion or to advise our people when they contact us. It seems to me that even the Congress, if it should declare war, ought to have access to all the information available before it makes such a decision.

GULF OF TONKIN RESOLUTION PASSED HURRIEDLY

I think the Gulf of Tonkin resolution was passed hurriedly, and in an emotional atmosphere. The language was too broad, but hindsight is always better than foresight. However, if Congress is going to declare war on the basis of such limited information as we had then—of course, when we were attacked at Pearl Harbor, it was different—I just wonder if maybe we don’t need something like Mr. Schlesinger says we need. What is your view?

Mr. Bickel. I don’t disagree other than to say that action by joint committees, the oligarchs of Congress, the higher-ups, and this is true of the Foreign Relations Committee in the Truman administration—that to me is not responsible action after the fashion of representative democracy.

I have no more faith in the Executive acting with a congressional bureaucracy in tow than in the Executive acting by himself. I do have such faith as I have in free institutions, and it is great, in action in accordance with the constitutional structure by the Congress and the President together. That means Congress, not a committee.

I would hesitate to institutionalize the informing function in some new congressional hierarchy which becomes the place the Executive goes and consults, draws them in and they sort of become half-Executive and half-Congress and become an oligarchy themselves.

Mr. Fountain. I appreciate that, too.

Mr. Zablocki. Do you have a comment, Professor Schlesinger?
INVO|NG THE QUESTION OF EMERGENCY

Mr. Schlesinger. Yes; I feel there are occasions where there are problems of secrecy of information. In such cases it seems to me that a body like this might serve some purpose. In general where there are no such considerations obviously Congress as a whole should be informed. In this connection it might be relevant to say a word about the question of emergency which is often invoked as a reason for the concentration of power on the Presidency on the grounds that in the nuclear world it is necessary to make instant decisions.

Actually that was much more of an argument, it seems to me, for Executive decision in the 1790's when it took a month to convene Congress together, when a Congressman from outlying States took several weeks to get to Washington, than there is today in the day of the telephones and jet aircraft.

I think the emergency argument is greatly overemphasized. Since the Second World War, there has been only one emergency which could arguably not permit full congressional participation and that was the Cuban missile crisis. Even in the case of Korea Congress was in session. President Truman should and could have gotten a resolution except he was persuaded by the constitutional argument of his Secretary of State, a former law clerk of Justice Brandeis, who told him he did not need congressional authorization. I think Secretary Acheson was wrong.

VALUE OF JOINT COMMITTEE ON INTELLIGENCE

Mr. Zablocki. The Chair would like to comment that certainly a joint committee on intelligence has some value. However, since joint committees would have to be approved by the rules committee this committee would be exceeding its prerogatives by trying to incorporate such a proposal in any legislation it might approve. Perhaps we can deal with this issue in our report. We may be able to persuade the Rules Committee to amend by adding a section to the resolution providing for a Joint Committee on Intelligence which would be the receiving body when Congress is not in session, thereby precluding the necessity of the President to convene Congress whenever an emergency would arise when Congress is not in session.

We will explore this fully when we mark up the bill in its final size.

Our colleague from Illinois, Mr. Findley.

Mr. Findley. Mr. Schlesinger, if I made any meager contributions to the war power discourse we have had here for about 18 years, it lies in the construction of the reporting provision that was passed by the House last year and is still embodied in House Joint Resolution 2, which is now before us. It is very gratifying for me to hear you use the word "admirable" to describe that reporting provision. It seems to me that the reporting provision has not had nearly the attention by witnesses and by the subcommittee up to this point that it really deserves.

IMPOSING THE 30-DAY TIME LIMIT

I have been inclined to feel that it is most unlikely that Congress would ever use the 30-day time limit requirement to cut off fighting