when the guns are blazing or even when the military forces of our Nation seem to be under threat of attack. Such a highly charged emotional atmosphere is generated here on the Hill as well as elsewhere in the country, that it is most unlikely that the Congress would turn its back on what the President wanted. I think it is most unlikely that the Congress would fail to give him the continuing authority that he might want under those circumstances. I don't see that as a very likely avenue for the Congress to use in keeping us out of wars or conflicts which don't serve our national interest.

It seems to me far more profitable for us to try to establish a very definite, precise reporting requirement under which we can be informed whenever military forces equipped for combat are placed in foreign territories, air space, or waters and in that reporting requirement insist that the Executive not only act promptly and put it in writing, but in addition give his justification for not coming to Congress first and also cite in detail the legal foundation for the action he is taking.

Now maybe it is wishful thinking on my part, but I would like to believe that back in 1962 when President Kennedy sent some 18,000 troops to Vietnam, identified at that time as military advisers, but nevertheless equipped for combat, had he been confronted by a very precise reporting requirement in which he would have had to cite the legal justification for taking that action, it might have given him pause for thought. It might have caused him to put off the decision.

Is that wishful thinking, Doctor, would you say?

**IMPORTANCE OF REPORTING REQUIREMENT**

Mr. Schlesinger. I agree with the importance of the reporting requirement. I think that so far as legal foundation is concerned Government lawyers are sufficiently resourceful, having been trained at institutions like the Harvard and Yale Law Schools, so that they can give an appearance of constitutionality or constitutional argument for many things the President may wish to do.

I wish there had been such a reporting requirement in 1962 or 1963, but I am not so sure whether it would have restrained any action because it would have been easy enough to prepare an argument saying this or that was constitutionally justified. That is why, it seems to me, a reporting argument by itself may not be enough and it ought to be associated with a recall possibility, in which case I think you get more serious reporting.

Mr. Findley. I would like to have you elaborate on recall, but first of all, do you have any suggestions for improvement of the reporting requirement provisions of House Joint Resolution 2?

**STATING LEGAL POSITION OF REPORTING REQUIREMENT**

Mr. Bickel. I would, Mr. Findley. I have to preface it by saying it is difficult for me to see a reporting requirement that is not preaced somewhere with an attempt to state the legal position because if you don't so preface it, you fall into what seems to be me to be the fault of this one. For example, you ask the President to tell us under what constitutional, legislative, and treaty provisions he has acted. That
is by implication a ratification of the theory which the Executive now holds, President Johnson held, that somehow the SEATO treaty or various other agreements and engagements justify and legally support his action, which is regrettable. I don't think they do. I don't think Congress ought to even by implication suggest that they do.

If you don't have anything prefacing a reporting section that says, "Here, this is our view of where your authority ends and where ours begins," you necessarily fall into that pitfall because you assume that there is legal authority out there beyond the Constitution.

The other day, I was not there but I saw reports, at Senator Ervin's Subcommittee on Separation of Powers, the Deputy Attorney General, the distinguished former dean of the Duke Law School, Mr. Sneed, was asked how he supported the current Presidential claim to the impounding power?

He said, "Under articles 1, 2, and 3 of the Constitution." I think that is what you invite with a reporting provision such as this.

Mr. FINDLEY. Do you recommend it be omitted?

Mr. BICKEL. No, sir. I recommend that it be part of a bill, the heart of which is an effort to circumscribe the exercise of Presidential power, which has exceeded all limits by now.

Mr. FINDLEY. Do you think there is value in causing the executive branch to face up to the necessity for legal justification at the time the fundamental decision is made?

Mr. BICKEL. Yes, sir; if there is, in terms that they have to take account of, a statement of a legal position which disables them from answering simply, "Articles 1, 2, and 3 of the Constitution." If there is not such a statement, that is what you get, "The SEATO Treaty, Mideast resolution, and Commander in Chief," of course.

Mr. FINDLEY. If the President is required to put in writing a report which includes suspicious legal justification, the ball is in the court of the Congress. It could hold hearings and call in witnesses to find the legal justification. It could pass judgment on the wisdom or the action taken.

Mr. BICKEL. You and Mr. Schlesinger and many others have said, and it is a judgment I cannot gainsay, that in that 30-day, 60-day, 1-year period right after hostilities Congress will go right along with the President. Those chances are not going to be minimized by a reporting provision or a recall provision as Mr. Schlesinger advocates unless there is a prior statement that Congress has made and spread upon the statute book which says, "Here is the legal position" and which enables Congress to say, "Well, he is out of bounds" or "We have a responsibility to act."

STANDING BEHIND THE PRESIDENT

We cannot sit back and say he is President and has acted under the Constitution, articles 1, 2, and 3, and let's stand beside him. I think that is all you will get if there is nothing but a reporting provision plus recall.

Mr. FINDLEY. If the movement of forces is to an area where combat has not yet broken out, there would not be this overtone of emotion.
Hopefully the requirements of that reporting provision might cause the President some second thoughts about moving the forces.

Mr. Bickel. I am not here to say there is no value in it at all. I am arguing for more.

Mr. Zablocki. Would the gentleman yield to the gentleman from North Carolina?

Mr. Fountain. How about a provision requiring the President to discuss with the appropriate Members of the Congress, whoever they may be, the facts, not just legal arguments, but the actual facts and necessity or lack of necessity before the decision is made?

Mr. Zablocki. As provided in section 4 of House Joint Resolution 2.

Mr. Fountain. Yes.

PRESIDENT SEEKING CONSULTATION WITH CONGRESS

Mr. Schlesinger. I think anything we can have in the way of consultation is great, but I do agree with Professor Bickel that section 4 seems to me hortatory. Obviously the President should seek consultation with Congress. Consultation which consists of inviting large bodies from Congress over to the White House to be briefed by the Secretary of State and the President's Assistant for National Security Affairs, that it seems to me is not what you had in mind.

Mr. Findley. Chairman Zablocki posed a serious question, when he stated the dilemma which faces us is getting something enacted by the Congress which the President will sign. The administration has indicated it will not object to House Joint Resolution 1 of last year which essentially is a reporting requirement and has been reintroduced by Representative Pepper of Florida.

Now do you gentlemen feel that the language enacted by the House last year is a sufficient forward step to justify passage this year?

Mr. Bickel. My answer, Mr. Findley, is "No." I would prefer a veto and a repassage, let's say, as a concurrent resolution of S. 440 and that kind of accretion by Congress to the constitutional tradition rather than a relatively bland, and I am afraid, harmless provision, which merely causes everybody to breathe a sigh of relief that the constitutional crisis has passed.

Mr. Schlesinger. I would agree. I don't think S. 440 is the answer. I think it is better to try to get something that has some meaning. I think a test of meaning is whether it will be unacceptable to the administration.

RAISING THE LEVEL OF CONSCIOUSNESS

I don't say this about the administration only. I think administrations of the other party have been just as bad on this. I think it is better to pose the issue in some way. I would get something that has a chance of being passed by Congress, and get a veto and have a fight over the veto. I think that would have a chance of raising consciousness. That fact alone, known by the American people, would have an effect on them.

Mr. Zablocki. I would like to point out that the executive branch did not find House Joint Resolution 1 acceptable. The only thing apparently acceptable to the executive branch would be silence. I think
we are moving in an area where we could at least have tacit approval. Perhaps the President would never sign any resolution.

Mr. Findley. There was no hint of a veto at any point that I detected. Was there on your part?

Mr. Zabriskie. As a result of the lack of enthusiasm and no action in the other body, it would indicate that everything was done by the Executive to prevent any resolution from being enacted during the last Congress.

Mr. Bickel. In my judgment the President could let it become law without his signature or even sign it and accompany it with a statement, in which he fully reasserts the farthest extension of Presidential power and as a matter of rebuilding the Constitution you are exactly where you started.

GOING THE CONCURRENT RESOLUTION ROUTE

Mr. Findley. The other possibility I feel does deserve some attention is the extent to which the Congress can go by the concurrent resolution route without Presidential signature. I don’t know that a declaration of war has ever been vetoed. I think the War of 1812 was authorized by Congress over Presidential objection.

Mr. Schlesinger. No; Madison was willing to do it. You are right. None has been vetoed. Grover Cleveland, I think, said if we get into war over Cuba, he would veto it, but it never arose.

Mr. Findley. Is there any question whether a declaration of war can be avoided by a Presidential veto?

Mr. Bickel. None at all. It is a statute and can be vetoed. I don’t think you can do anything in which you are free from the President’s signature. You can pass a sense of Congress resolution, but that is not a law.

Mr. Findley. Even though we have every reason to expect a veto of S. 440 or any version of it, you nevertheless both feel it would be right to press forward with a joint resolution or a bill, accept the veto and then consider a concurrent resolution?

Mr. Bickel. Yes.

EFFECT OF CONCURRENT RESOLUTION ON PRESIDENT

Mr. Findley. What effect do you think the concurrent resolution might have on Presidential action?

Mr. Bickel. As I said before, this is the Constitution of practice we are dealing with. In that area of the Constitution a statement by the President about his own power, the thing he did on Executive privilege the other day, a concurrent resolution by Congress, indeed major speeches by respected Senators on the floor of the Senate or respected Members of the House of their power are the equivalent of the opinions by the Supreme Court. That is how the Constitution of practice grows and develops. Of course, it develops best by statute, as law.

But second best is that. In fact, we are in some measure making the Constitution of practice right here. It is difficult to imagine, but it is true.

Mr. Findley. Thank you.
Mr. Zablocki. If I may pursue the issue of a veto of S. 440 by the President. If either House could not override the veto would we not be in a worse position?

Mr. Bickel. I think not, Mr. Chairman. I think if Congress reasserts itself, repasses it as a concurrent resolution, the debates that have been had—I think the next time the issue comes up that would be a major source of materials to anyone who looked into the question of what can the President do, what is the position on Presidential power under the Constitution, just as today major sources of materials are what Lincoln said during the Mexican War.

CONTRIBUTING TO THE LAW

If Congress passed a bill after lengthy consideration, then it failed because of the veto, and Congress repassed it as a concurrent resolution, I think you may have had a contribution to the law greater than something which is hortatory and harmless.

Mr. Zablocki. Then if the Congress failed to override and the President issued a statement which said, well, I do have this power and Congress has so reasserted, then in the future, as you referred to Lincoln's statement in the Mexican War, the President's statement would be a precedent?

Mr. Bickel. Yes; the next time the Secretary of State or Attorney General would have to advise the President, the President would have to be told "President Nixon took this position but Congress, by repeated majorities, took the opposite position and here is the text of the resolution it passed and President Nixon's position was stated in general terms." This was very specific by the Congress and this is what they thought twice. The Senate passed it in the 92d Congress. It was passed twice in the 93d. That becomes a fact of constitutional life, not binding, but a fact of constitutional life.

Mr. Zablocki. Certainly the Congress can bring about the same interpretation in our report restating the determination of Congress in this area? Would that not be legislative history?

SPELLING OUT THE INTENT OF CONGRESS

Mr. Bickel. In my judgment the more specific the better.

Mr. Zablocki. An expression would be in the statute books augmented by the reports and legislative history spelling out the intent of Congress.

Mr. Schlesinger. I would agree in general with what Professor Bickel said except I would favor as the vehicle for congressional expression a combination of H.R. 371 and House Joint Resolution 2 as suggested rather than S. 440.

Mr. Zablocki. Mr. Findley.

Mr. Findley. I don't recall that any of the witnesses have considered the possibility of a constitutional amendment. Is there a form of a constitutional amendment dealing with war powers which strikes either of you as desirable?

Mr. Zablocki. Professor Bickel.

Mr. Bickel. If S. 440 were proposed as a constitutional amendment, I would hesitate a great deal more. Of course, you avoid the
President that way. I start with a powerful bias. I hope I don't find myself here 3 years hence reneging on this position as well. I start with a powerful bias against constitutional amendments unless the need is very clear and unless the issue can be dealt with in constitutional terms which seems to me in a sentence or two. This is not that kind of an issue.

Mr. Schlesinger. I think the committee would like to look at the congressional control of overseas troop deployment as an example. I think this has been in the area of constitutional dispute. I think the argument for congressional power is pretty strong to specify the size and assignment of troops overseas.

THE TERMINATION OF HOSTILITIES

Mr. Findley. Would you spell out more in detail what you meant by recall?

Mr. Schlesinger. I meant the termination of hostilities.

Mr. Zablocki. Mr. du Pont?

Mr. du Pont Thank you. I have one more question for Professor Bickel. Professor Bickel, I am still grappling with the fact that you seem to wholeheartedly endorse a piece of legislation that I just find loaded with pitfalls. I am not trying to take you by surprise, but during the course of the hearing we were passing out a roughed-out version of Mr. Bingham's new bill. I hope you have a copy.

Mr. Bickel. I have not had a chance to read it, but I have it.

Mr. du Pont. Let me read you section 5 of that and ask your opinion about that: "If the President in any case shall assume the authority to direct or authorize the Armed Forces of the United States to engage in armed conflict outside of the United States," et cetera "such authority shall terminate on the adoption by either House, et cetera." Doesn't that language "engage in armed conflict outside of the United States" avoid the 30-day pitfall of the Javits bill, the positive action pitfall, and the hostilities pitfall? It seems to me on first reading that that is a much better formula. I wonder what you think of it.

AVOIDING PROBLEMS BY NOT SOLVING THEM

Mr. Bickel. It seems to me that that language avoids a great many problems by not solving them. The 30-day pitfall of the Javits bill is something to me that is negotiable. That is not the heart of the Javits bill. The heart of the Javits bill is the effort to delineate the power of the President and its limits by both stating it in its constitutional terms and coming around from the other direction and saying here is the power of Congress and here is how we mean to assert the power of Congress.

Now this leaves that entirely open. A President, under this language, is indeed encouraged more than he is now to engage in hostilities and armed conflict outside of the United States any time he chooses and thinks it is right on the basis of his own constitutional view, which is bound to be expansive, and his own political judgment. He knows that if he does so, he of course as a Commander in Chief may be engaged in those hostilities for 2 or 3 years.
Once he is engaged, it is very difficult to keep him out of Cambodia. So this allows him to be engaged and he knows that at some point one House of Congress can bring him out. I have objection, as I said in my main statement, to this extra constitutional arrangement of letting one House of Congress act.

Mr. du Pont. I agree with you.

Mr. Bickel. Passing that objection, what this recall provision does is ratifying by implication the most expansive view of Presidential authority by simply telling the President, "We assume you act in many instances..." It then says Congress will come along and stop you.

A STATEMENT OF LIMITS

Mr. Findley told us and others have told us convincingly that Congress will not do that. The heart of the Javits bill is a statement of limits which I assume that any future President, having taken a good-faith oath to support the Constitution, which includes the oath to faithfully execute the laws, will abide by and we will not have the recall problem.

Mr. Schlesinger. I disagree; I think there is more encouragement to Presidential initiative in the Javits bill. I don't care for its endorsement of the elastic theory of defensive war Senator Javits says the bill gives the President more authority than he now possesses.

Mr. Bickel. I think Homer nodded that time.

Mr. du Pont. I think the difference is that, Professor Bickel, you approach this from the point of view of elucidation of constitutional powers and I approach it from the point of view of wanting to be able to pin him down if something happened. You didn't do that in the Javits bill. Perhaps you cannot do it in this.

Mr. Findley. Would you yield?

Mr. du Pont. Yes.

Mr. Findley. Can you suggest language changes that you think would be an improvement on the definition of powers in the Javits bill?

IMPLICATING CONGRESS IN PRESIDENTIAL ACTION

Mr. Schlesinger. It seems to me that what section 3 does is to implicate Congress in action the President feels he may have to take on his own, but which Congress would be in a better position to react to if the President did not invoke language of a statute passed by Congress in support of the action. I see no advantage in section 3.

Mr. Findley. You would eliminate it?

Mr. Schlesinger. I would eliminate it.

Mr. Findley. In view of Dr. Bickel's comments you just gutted the bill.

Mr. Schlesinger. I would say section 2 is declarative.

Mr. Bickel. That would not make anything happen.

Mr. Schlesinger. I don't think section 3 does much except tell the President he can do anything he wants, with congressional authority.

Mr. Bickel. Section 2 has much the same language except section 2 is a statement of purported congressional power. It is self-serving.
Mr. Zablocki. I wonder if we could have your analysis and views on section 3 of House Joint Resolution 2 in this regard?

Mr. Schlesinger. This, it seems to me, to again err in the way of endorsement of defensive war. I think paragraph 1 in section 3 gives the President a very large blank check in conducting defensive war, with defensive war as I have said, having a very elastic definition.

REPORTING PROVISIONS OF HOUSE JOINT RESOLUTION 2

Mr. Zablocki. In your discussion of House Joint Resolution 2 you suggest that the reporting provision of the legislation, section 5, is and I quote, “not terribly rigorous,” whereas Professor Schlesinger said it was acceptable and to the point and he applauded Congressman Bing­ham for incorporating section 5 of House Joint Resolution 2 into his new version.

Now, Professor Bickel, what additions in the language of this section would you suggest to improve the reporting aspects?

Mr. Bickel. Let me tell you where it troubles me. It really goes in part to the coloquy Mr. Findley and I had before. There being no predicate to it, no prior statement of limits of presidential power that I think is terribly effective, when you ask him to report certain events necessitating his action, fine, then the constitutional and legislative and treaty provisions under whose authority he took action you impliedly say he is authorized to act on his own initiative under existing treaty provisions.

He can say what do you mean by treaty provisions? You take a look, SEATO, NATO, this is evidence of the congressional view that present treaties empower him or indeed any treaty could empower him, which I doubt, to act on his own initiative in situations other than those described in section 3 of the Javits bill. That seems to me an implicit enlargement of his power and an invitation for him to come back and say, “Articles 1, 2, and 3 of the Constitution and all the treaties signed.”

ESTIMATED SCOPE OF ACTIVITIES

Under 2, “Estimated Scope of Activities,” that is fine. Then (E), “Powers,” information he deems useful to Congress, that seems to me to be all kinds of executive privilege and security and whatnot. He can be trusted to invoke that anyway, but the language as drafted seems to invite it. It seems to say that Congress naturally expects that there is all kinds of information that he may not deem useful.

I would much rather have a provision that turns that around and says “such other information as Congress may request,” putting the affirmative on the power of Congress and the implication that, of course, Congress can have most all information it wants. There may be limits, but we will see when they arise.

Mr. Zablocki. If the committee amends section 5 to comply with the recommendations you have made, where would House Joint Resolution 2 stand in your estimation as a desirable piece of legislation?

Mr. Bickel. It would need a predicate; namely, the predicate of a statement of what the limits of his powers are.

Mr. Zablocki. And if we then included the predicate which would be section 3 of S. 440, would then, in your opinion, House Joint Resolu-
tion 2 be a preferable legislative vehicle than S. 440 with some of the shortcomings that Professor Schlesinger has so well pointed out?

30-DAY PROVISION LEAST IMPORTANT

Mr. Bickel. If you include section 3 of S. 440 and your own reporting section, in essence you would be leaving out the 30-day provision. I am not prepared to say whether it is an improvement, but the 30-day provision seems to be the least important thing.

Mr. Zablocki. All testimony tends to indicate that the 30-day provision is nothing but a headache. Indeed, all we are looking for is an aspirin.

Mr. Bickel. I can understand that position. I think it would certainly be a strong bill as you describe it, even without the 30-day provision as in the Javits bill. That doesn't seem to be the heart of the Javits bill to me.

Mr. Findley. I appreciate your precise comments about the reporting provision. The reason I recommended the inclusion of treaty provision was solely because I was then under the illusion, and maybe it was just an illusion, that the NATO Treaty was something exceptional and that there was an element of "automaticity" in it. I think that most people argue that it is not in that category.

Mr. Bickel. I am quite clear it is not. I think if you look at the legislative history in the Senate when it was ratified, Secretary Acheson was brought in. He said no, it was not an automatic provision. When they brought SEATO around, it was drafted to say that.

IN ACCORDANCE WITH CONSTITUTIONAL PROCESSES

Mr. Schlesinger. The phrase "in accordance with the constitutional processes" appears in the NATO Treaty.

Mr. Findley. I thought it was exceptional in that the SEATO and CENTO Treaties had the phrase and NATO did not.

Mr. Bickel. The history is that NATO was deemed imprecise. The Senate raised a furor about it. Mr. Acheson came in and clarified it as to the role of Congress. Then they ratified it, and when they came to SEATO they wrote against that background.

Mr. Schlesinger. I disagree. I think you will find that "in accordance with constitutional processes" is in the NATO Treaty.

Mr. Findley. I think you are right, but in any event, the interpretation now currently given to the treaty, I believe, by the administration does not recognize any automatic situation. In light of that, I am inclined to agree that treaty provisions ought to be stricken.

I like your suggestion that Congress should require such information as it deems useful. I think both strengthen the reporting part. I think there is a virtue in causing the Executive to put down the legal foundation for his action.

We are supposedly a nation of laws and the President ought to give a legal foundation for the use of military force.

Thank you.

Mr. Zablocki. I believe section 9 of S. 440 was intended to deal with the problem of NATO in the other body.
SPECIFIC IMPLEMENTING LEGISLATION

Mr. Bickel. Yes. And also very specially in sections 3 and 4, where it is quite clear that it takes specific implementing legislation to get any authorization. In section 9 they take care of any supposed existing one.

Mr. Zablocki. Professor Bickel, the Department of State witness yesterday stated that the "necessary and proper" clause of the Constitution does not permit Congress to delineate Presidential war powers, since to do so would violate the separation of powers.

Since we have been bandying about this issue indirectly, what is your view of the use of the "necessary and proper" clause in the war powers area?

Mr. Bickel. Well, Mr. Chairman, if the premise were well taken that a bill like the Javits bill is unconstitutional because it makes inroads on Presidential power, which Congress may not do because it makes inroads on the power of the Commander in Chief, then of course the "necessary and proper" clause would not help because the "necessary and proper" clause is not in there to enable Congress to do unconstitutional things.

That is, however, not true. The Constitution empowers him to be the Commander in Chief and it empowers the Congress to declare war. There are in that outline open spaces which the Constitution does not necessarily settle. In my judgment it does, but there are questions.

NECESSARY AND PROPER POWER OF CONGRESS

Now that being the case, the "necessary and proper" power enables Congress to act because it authorizes Congress in this, as in all other instances, to make all laws that shall be necessary and proper for carrying into execution the foregoing powers; namely, its own, including the power to declare war, and all other powers vested by the Constitution in the Government of the United States as a whole or in any department or officer thereof, which includes the President.

So, on the premise which I take that the most that can be said is that there is an open texture in the Constitution here, I would say the Constitution is quite clear on who has power to do what, and the President has been doing—President Johnson did in 1965 an unconstitutional thing—that is a matter of opinion. I may be wrong, but at most what can be said is that it is an open texture, it is a matter of opinion, in the Constitution.

That being the case, Congress has the power to fill that open texture. That is the "necessary and proper" power.

I think the legal adviser of the State Department begged his question. He took the premise that the bill is unconstitutional. Then, of course it follows that no power the Congress possesses can enable it to do an unconstitutional thing. That is a circular argument.

Mr. Zablocki. If I may ask another question of Professor Schlesinger, Mr. Brower of the State Department yesterday stated that the idea of a one-House veto was defective. His argument was that the concept impairs the constitutional authority of Congress itself as well as that of the Executive.
THE TRUE POSITION OF CONGRESS

What is the true position of Congress if, for example, one House passes a resolution approving the President's action and the other passes a resolution calling for its termination?

It is the view of the administration that Congress must speak with one voice. Would you please respond?

Mr. Schlesinger. A resolution declaring war would have to be passed by both Houses. If one House called for it, it would not pass.

It seems to me that on that argument, since the dissent of one House of Congress can prevent a war being declared or authorized, one House could prevent a war from being continued.

Mr. Zablocki. Don't you think that both Houses of Congress should voice their opinion on such an important issue?

Mr. Schlesinger. I think that both Houses of Congress would voice their opinion. But take the case of a declaration of war. Say one House favors a declaration of war or authorization of war and the second House does not. The House that declines to authorize war would prevent an authorization of war.

If one House of Congress can prevent the authorization of war or the declaration of war, it seems to me reasonable to argue that one House of Congress should be able to prevent the continuation of war.

ONE-HOUSE ACTION UNCONSTITUTIONAL

Mr. Zablocki. I believe that Professor Bickel referred to the one-House action provided in the Reorganization Act as unconstitutional.

Mr. Bickel. I have constitutional doubts about it.

On this issue I agree with the State Department.

Mr. Zablocki. I realize, Professor Schlesinger, you are not a constitutional lawyer, but as a historian, would you comment?

Mr. Schlesinger. If it is constitutional for the Executive Reorganization Act, I don't see why it can't be constitutional for this.

Mr. Zablocki. But Professor Bickel says it is not.

Mr. Schlesinger. Has it been tested?

Mr. Bickel. No. The Court has respected it as applied to its own rulemaking. The Court's broad rulemaking power has been dissented from by powerful voices, not excluding Hugo Black, Justice Frankfurter, and Justice Brandeis. I think they are the authoritative voice.

Mr. Zablocki. Some Members of Congress would prefer that the Supreme Court would not enter into any further questions of constitutionality.

Mr. Fountain.

Mr. Fountain. Is it constitutional for the President to issue an Executive order or otherwise repealing a program of the Congress for which funds have already been appropriated?

Mr. Bickel. That is a question that requires a long answer.

No "yes" or "no" answer

Mr. Fountain. I will take "yes" or "no."

Mr. Findley. Just give us the last sentence.
Mr. Bickel. I will say briefly there is no “yes” or “no” answer to it. If the question is “Does Congress have the constitutional power to force the President to spend money?” my answer to that is flatly “Yes.” But in the present statutory position, “Are all impoundments by the President unconstitutional?” I cannot answer that “Yes” or “No.”

Mr. Fountain. Many of these bills, regretfully, said, “The President is authorized” to do thus-and-so. Now we are saying, “The President shall.”

Mr. Bickel. When you say that, there is something of a different matter. But now you have on the books something called the Anti-Deficiency Act, which makes a difference.

Mr. Zablocki, Mr. Biester.

Mr. Biester. I have a brief question. It relates to the idea that since the power to declare war requires the vote of both Chambers, that one Chamber could veto a war that is underway. It seems to me you start with a situation when you declare war, but once a war has been underway for some period of time, that a great number of events may create a host of problems which would occur if there were a dislocation from the event of war, a recall.

TWO HOUSES NEEDED TO DECLARE WAR

Aren’t we dealing with a different quality of act at that point than just simply to say in the abstract that if it took two Chambers to declare war it ought to take two to continue it?

Mr. Schlesinger. As my statement suggested, I was not altogether happy with this provision. In the end, it seems to me there were arguments to doing this by joint resolution rather than by the action of one House. But then a joint resolution could be vetoed. This means that one-third plus one of either House could prevent a joint resolution from going into effect, which would in effect seem to me to confine the war-continuing power to one-third plus one of one House. I don’t think that is very satisfactory either. So I just don’t know.

I see the force of your point. As my testimony indicates, I am worried about it somewhat, myself.

Mr. Bickel. The constitutional difficulty is that the Constitution pretty clearly says that anything you do that is to have the force of law has to be approved by both Chambers and submitted to the President for signature.

ONE HOUSE VETO EXTRA-CONSTITUTIONAL

As I read the Constitution I suspect the Supreme Court would look at it; these things are extra-constitutional. They are not what was foreseen.

Mr. Biester. Thank you.

Mr. Zablocki. Any further questions?

I do not remember verbatim Senator Javits’ testimony in reference to section 3, but I do recall that not only did he say it was an improvement but he didn’t find in the provision of section 3 of House Joint Resolution 2 the alarm that you find, Professor Bickel. Did he nod again?
Mr. Bickel. I see there are people from his office here, and I am going to hesitate with my wisecracks. I don't know what he said. I am here to represent my own opinion.

Mr. Zablocki. You don't blame me for trying to defend House Joint Resolution 2 to the fullest?

Mr. Bickel. Not in the least.

ENLIGHTENING TESTIMONY HELPFUL.

Mr. Zablocki. On behalf of the entire subcommittee, I want to thank you for your very enlightening testimony. Your views were most helpful.

I believe the subcommittee will probably incorporate some of your suggestions. I say "probably" advisedly.

The subcommittee stands adjourned until 2 p.m., Thursday, March 15, when we will have as our witnesses Professor Raoul Berger of Harvard University and Professor W. Taylor Reveley, a Fellow of the Council on Foreign Relations and Woodrow Wilson International Center for Scholars.

[Whereupon, at 4:35 p.m. the subcommittee adjourned.]
WAR POWERS

THURSDAY, MARCH 15, 1973

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

The subcommittee met at 2 p.m., in room 2200, Rayburn House Office Building, Hon. Clement J. Zablocki [chairman of the subcommittee] presiding.

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

We continue this afternoon our hearings on war powers legislation. Our objective throughout this set of hearings has been to gain a better understanding on this complex issue.

To assist us today in that effort are two respected constitutional experts and legal scholars. They are Prof. Raoul Berger, of Harvard University, and Mr. W. Taylor Reveley, a joint fellow of the Council on Foreign Relations and the Woodrow Wilson Center of the Smithsonian Institution.

Gentlemen, we are honored that you accepted the subcommittee’s invitation. Professor Berger, if you will proceed please.

STATEMENT OF RAOUL BERGER, PROFESSOR OF LAW, HARVARD UNIVERSITY

Mr. BERGER. It is a privilege to appear before you and to congratulate you for facing up to the unceasing takeover of congressional functions by the President.

“The history of the Presidency,” said Edward Corwin, “has been a history of aggrandizement”; it is a history of ever-expanding encroachment on congressional prerogatives.

Because I believe that the maintenance of our democratic system and indeed the protection of individual liberty is bound up with the preservation of the separation of powers, I am here to uphold your efforts to curb Presidential expansionism.

My chief concern is to defend the Javits war powers type of bill against charges by Secretary of State William P. Rogers and Prof. Eugene V. Rostow that it is unconstitutional.

OPINION ON CONSTITUTIONALITY OF BILLS

Yesterday Prof. Alexander Bickel and Arthur Schlesinger gave their opinions that the bills are constitutional. Before the Senate For-
eign Relations Committee, four distinguished historians—Henry Steele Commager, Alpheus Mason, Richard Morris, and Alfred Kelly agreed the bills are constitutional.

But I don't think Mr. Chairman, that this issue ought to be settled on a count of noses. I think it is of the highest importance that every Member of Congress have a real grip on the basic facts which underlie the position of the Congress.

If you know the facts yourself, and are familiar with them, you will more confidently proceed with the resumption of your powers.

I may interpolate, I came here prepared to discuss various issues with Professor Rostow and learned only late yesterday that he will not be here and that my coworker in the vineyard would be Professor Reveley.

I am pleased that Mr. Reveley has come as a substitute because he and I will come to issue on a tremendously important fact.

I don't think that Professor Reveley disagrees on the original intention of the founders; but he has a theory, and has presented it in its most sophisticated form, which has found favor with a group of academicians, not may say with the Supreme Court, and which is really a silky rationalization for presidential power grabs.

**BASIC CONSTITUTIONAL FACTS**

So we will come to that issue; but in the meantime I want to come to grips with some of the basic constitutional facts.

I should say it is not my purpose here to defend the wisdom of your several bills, for as stated by John Marshall, "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional."¹

Opponents of the bills summon remote hypothetical contingencies which might demand instant, unfettered presidential response. Against such a parade of horribles I would pose the actual horror of our ever-deepening involvement in the Vietnam quagmire. One who can't learn from past mistakes is destined to repeat them. Most presidential adventures, as Prof. Henry Steele Commager points out, lacked the element of urgency, and in almost every case there was time to consult Congress.² I cannot improve on his statement that "great principles of government are not to be decided on the basis of the argument ad horrendum—by conjuring up hypothetical dangers and insisting that the structure and operations of government must be based on the chance of these rather than on experience." (Fulbright Hearings 16.)

**WISEST POSSIBLE SOLUTION TO PROBLEM**

Whether or not your bills represent the wisest possible solution of the problem—the legislature is yet to be born that can draft a perfect bill—is not nearly so important as the fact that you are taking a step toward resumption of your constitutional powers. Congress, the

¹ Raoul Berger, "War-making by the President," 121 University of Pennsylvania Law Review, pp. 29, 31 (1972) hereinafter cited as "R. B."
² Hearings on War Powers Legislation before the Senate Committee on Foreign Relations, p. 14 (1971), hereinafter cited as "Fulbright Hearings."
Supreme Court has often held, cannot abdicate its powers. The corollary of that axiom is that Congress is under a duty to exercise those powers itself.

Another good reason for such a bill, to borrow some words from Mr. Reveley, is that it is less easy for a President to evade an explicit congressional denial of authority than for Congress to negate a presidential fait accompli. It will provide—again to borrow from Mr. Reveley the—initial thrust and spark a consensus.

You will not merely raise consciousness as Mr. Schlesinger said yesterday, of the executive, but you will educate the public. Until the public realizes that the presidential powers have been grossly abused, that they must be resumed by Congress, Congress itself will not go very far.

Let me then focus on the issue of constitutionality. Roughly speaking, the several war powers bills before you seek to limit presidential warmaking in the absence of authorization by Congress, leaving the President free to defend the United States and its Armed Forces against sudden attack.

CONSTITUTION VESTS CONGRESS WITH POWER TO WAGE WAR

The power to wage war, it may be confidently asserted, was vested by the Constitution in Congress, not the President. If this be so, your bills merely seek to restore the original design. It cannot be unconstitutional to go back to the Constitution. Here I can only sketch the materials which demonstrate the purpose of the founders, referring for documentation to my article, "Warmaking by the President," supra, note 1, which was inserted in the Congressional Record of February 20, 1973, by Senator Javits.

The best index of constitutionality is the specific provisions of the Constitution respecting the war powers plus the explanation of the founders as to what they intended to accomplish thereby.

I find unacceptable in this context Professor Reveley's suggestion that the plain meaning is an illusory goal. There is nothing illusory, nothing obscure about the meaning of the framers of the Constitution, as I hope to demonstrate in very short order.

The war powers of the President are expressed in three little words—Commander in Chief, which Hamilton explained to a people in dread of creating another George the Third, merely meant the President was to be the first general. (RB 35.) As Professor Henkin recently observed, generals—

even when they are "first," do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others (L. Henkin, Foreign Affairs, 50-51 (1972)).

ROLE OF THE COMMANDER IN CHIEF

The Commander in Chief was to lead the Armed Forces once war was commenced by Congress or by a sudden attack on the United States. No more can be squeezed out of those three little words. Indeed Hamilton, in explaining them, said it was the first general function only of the monarchs of England that was being given to the president; the rest of the war powers were being given to Congress.
In contrast to these three words the over-towering bulk of the war-making power was lodged in Congress. James Wilson, with Madison, the leading architect of the Constitution, explained:

The power of declaring war, and the other powers naturally connected with it, are vested in Congress. To provide and maintain a Navy—to make rules for its government—to grant letters of marque and reprisal—to make rules concerning captures—to raise and support armies—to establish rules for their regulation—to provide for organizing ** the militia, and for enlisting them forth in the service of the Union [there was no standing army]—all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress.

To this may be added that Congress is also empowered to provide for the common defense and to make appropriations for the foregoing purposes. Since all the powers naturally connected with war-making are vested in Congress, it follows, as several founders expressly stated, that they are not to be exercised by the President. (RB 41 n. 93.)

**EXECUTIVE IS SIMPLY NAMED COMMANDER IN CHIEF**

Let me pause to read something from Mr. Reveley on this score, because on this I believe we concur. In a recent article in the Virginia Law Review, Mr. Reveley stated as follows:

The executive is simply named commander in chief and given the power to commission officers. His appointment prerogative mentioned previously also comes into play in the military sphere—

And I may interpolate, subject to Senate consent. He continued:

Congress on the other hand has a battery of responsibilities including inter alia, the power to raise and support the armed forces and the power to declare war.

Professor Reveley, therefore, agrees with me that all that the Constitution gave to the President were the three little words, “commander in chief”; the remaining battery of powers was given to Congress.

You may think, Mr. Chairman, that I, too, easily glide from a power to “declare” war to a power to “make” it. Originally it was proposed that Congress be empowered to “make” war; this was changed to “declare” (RB 39–41), for reasons well summarized by Secretary of State Rogers. In his testimony before the Senate Foreign Relations Committee in 1971, he confirmed that the “change in wording” from “make” to “declare” “was not intended to detract from Congress’ role in decisions to engage the country in war. Rather it was a recognition of the need to preserve in the President an emergency power—as Madison explained it—to repel sudden attacks and also to avoid the confusion of ‘making’ war with ‘conducting’ war, which is the prerogative of the President” as commander in chief. (Fulbright hearings 488.)

**DECISIONS INVOLVED IN CONDUCTING WAR**

But for the decisions involved in conducting war, all the rest of the war-making power remained in Congress. In the words of Hamilton’s proposal to the Convention, the Executive would “have the direction of war when authorized or begun” (RB 37), implying it was not for him to begin a war. Though Hamilton was the great proponent of expanded presidential powers, he later stated that “it belongs to Congress only, to go to war.” (RB 42 n. 99) Observe he does not say to
declare war but to go to war, big wars, little wars. The power to declare, i.e. to wage war, was vested in Congress, James Wilson explained to the Pennsylvania Ratification Convention, as a guard against being hurried into war, so that no “single man (can) * * * involve us in such distress” (RB 36).

The severely limited role of the President was a studied response to what Madison called “an axiom, that the Executive is the department of power most distinguished by its propensity to war; hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence” (RB 38). “Those who are to conduct the war,” said Madison, “cannot in the nature of things be proper or safe judges, whether a war ought to be commenced, continued or concluded” (RB 39). I beg you to remember not merely “commenced,” but also “continued or concluded,” meaning terminated by treaty or otherwise. That power was not lodged in the President but in Congress.

George Mason also was against giving the power of war to the President, because not (safely) to be trusted with it (RB 40). So the President was left with the power to repel and not to commence war, as Roger Sherman advised (RB 39).

The Power to Repel Sudden Attack

But for the power to repel sudden attacks on the United States or to direct a war once begun by Congress, the entire warmaking power was vested in Congress. On this eminent scholars are agreed, as the hearings before the Senate Foreign Relations Committee on the Javits War Powers Bill (1971) amply testify.

I may add, Mr. Chairman, I very drastically foreshortened the historical facts that further buttress this position.

Professor John Norton Moore finds uncertainty as to which branch would have authority to commit the nation to force short of war, or indeed what war meant (Fulbright Hearings 462). Such semantic questionings overlook the founders’ anxiety to limit the power of a single man to hurry us into war.

You may say, Mr. Chairman, what are hostilities: my colleagues were loath to comment on that. Being an old man I shall be more indiscreet. I would say about hostilities what Justice Potter Stewart said about hardcore propaganda, “I cannot define it but I think I can recognize it: a cock fight or a fight between two soldiers plainly is not hostilities.” Maybe a fracas between 50 soldiers is not hostilities; but for example, if 1,000 men invade American soil, that is hostilities. If 1,000 soldiers start firing rockets and bombarding American soldiers on German soil I would say that is hostilities, and for a starter that is good enough.

Presidents Starting Brush Fires

Those who feared a blazing forest fire were little disposed to authorize the President to start brush fires. Brinksmanship is an invention of our era. A convention which carefully authorized the President to repel sudden attacks on the United States hardly left him free to engage in foreign adventures short of war. Congress, said the Supreme Court in 1800, may declare a general war or wage a limited war. * * *

E. T. Bivins, 4 Dallas 37, dissipating Mr. Moore’s uncertainty.
Madison’s summary of the matter deserves to be blazoned on your walls in letters of gold:

Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging the cause of war, is fully and exclusively vested in the legislature: that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite and proper (RB 48).

In 1966 the Legal Adviser of the State Department had little quarrel with the view of the original intention of the Founders herein expressed, and said of the President’s power to repel sudden attack that “In 1787 the world was a far larger place, and the farmers probably had in mind attacks upon the United States.” (RB47).

Assuredly the farmers did not conceive that the President might repel attacks on Kamchatka. But the Adviser added:

In the 20th Century the world has grown much smaller, an attack on a country far from our shores can impinge directly on the nation’s security. The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress (RB 50).

NO CONSTITUTIONAL SUPPORT

No member of the executive has ever pointed to a constitutional provision, or to a statement of the founders that supports this astonishing claim.

Recall Madison’s words “the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war.” Whether an attack on a foreign state represents a threat to the national security is a political matter not left to the decision of the first general.

The “power of judging the causes of war,” said Madison, “is fully and exclusively vested in the legislature.” I don’t believe Professor Reavey is going to bring forth any constitutional provision or statement of the framers to the contrary.

In essence, the executive branch appeals to emergency power, and on this we need to bear in mind what Justice Jackson stated when President Truman seized the steel mills in the midst of the Korean War so that production would not be interrupted by labor strife:

Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 652 (1952) (concurring opinion).

EXTRAORDINARY PRESIDENTIAL CLAIMS

I want to stress that the architect of these extraordinary presidential claims was Dean Acheson. When Secretary of State Acheson advised President Truman in 1950 that he had constitutional authority as Commander in Chief to commit troops to meet the invasion of South Korea, he relied on a State Department memorandum which listed
instances in the past century in which prior Presidents had exercised presidential power to send our forces into battle (RB 59). Remember these words "to send our forces into battle." Later Under Secretary of State Katzenbach stated that "most of these [incidents] were relatively minor uses of force" (RB 50-60). The vast majority of such cases, said Edward Corwin—

involved fights with piracies, landings of small naval contingents on barbarous or semi-barbarous coasts to protect American citizens, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border (RB 60).

No possibility of war was presented by these incidents; and one can only marvel at the fantasy that can conjure from such incidents precedents for sending our troops into battle.

EXECUTIVE WAGING OF WAR

Were these incidents to be regarded as equivalent to Executive waging of war, the last precedent would stand no better than the first. Illegality is not legitimated by repetition. So the Supreme Court has held. It was argued in Powell against MacCormack where the House said: "We have been doing this for a long time," and it was argued in the Steel Seizure case where the Attorney General said, "Presidents have done it in the past." But the Court said, "that makes no difference. It was illegal then, it is illegal now."

It is the academicians who have fallen in love with the theory: If you repeat something often enough it becomes embedded in the Constitution. But in the words of Mr. Reveley: "We cannot permit power seeking presidents to broaden their constitutional control through bootstrapping," and that, Mr. Chairman, will be my text from here on out. Some academicians consider that Presidential practices constitute a gloss of life on the Constitution, that the Constitution is a living document which must expand to meet new needs. But the way to such expansion is by amendment not by self-appointed revisionists. Given a presidential takeover of war powers plainly conferred upon Congress alone, and accompanied by an unmistakable intention of the framers to withhold them from the President, his appeal to his own precedents would alter the constitutional distribution of powers in violation of the separation of powers.

HEResy OF EXPANDING LIVING CONSTITUTION

I don’t want to pause here but should you have the patience later in the hearing I would like to briefly comment on this gloss of life and on this expanding living Constitution heresy because I dug up very interesting facts on that, and it is facts that sustain us, not fantasy.

Those who talk to us about a living Constitution are the first who want to amputate it, put a new transplant on it or put new grafts on it. If it is going to be a living Constitution let it live as it was born.

Let me read a couple of statements that I garnered from Mr. Reveley’s article. The rationale is this:

"Even the clear intent of the drafters must be abandoned without the process of formal amendment, if the Constitution is to minister
successfully to needs created by changing times." And he says, "because of the difficulty of the [Constitution's] formal amendment process alteration by usage has proved to be the principal means of modifying our fundamental law."

Undeniably the process of amendment is cumbersome and it was made designedly so, so as to protect minorities against the passions of the moment. But it is a marvelous non sequitur that in consequence of its cumbersomeness the servants of the people may amend this Constitution without consulting the people.

A CLEAR DELIMINATION OF POWERS

Bear in mind in light of what I have said before, Mr. Chairman, we are dealing with a clear delineation of powers. Nothing vague, nothing amorphous. A Constitution, particularly as explained by the founders, which clearly lodges the vast bulk of the warmaking powers in the Congress.

And now comes the President and his adherents and they tell us "Well, the nuclear age, smaller ocean, we have to change this old-fashioned document." Who shall change it—the President. He'll decide it is too cumbersome to go to the people, and ergo he will revise the Constitution.

Professor Rostow inveighs against the Javits bill because "it would permit Congress to amend the Constitution without the inconvenience of consulting the people," (RB 31) this about a return to the Constitution! If Congress cannot by legislation thus "amend" the Constitution, how can Presidential proponents defend the President's amendment of the Constitution by his own practices?

Hamilton, the daring pioneer advocate of broadly read Presidential powers, regarded it as a fundamental maxim that: "An agent cannot re-model his own commission. A treaty, for example, cannot transfer the legislative power to the executive department" (RB 57). Now the President claims that what Senate and President combined cannot do, he can do single-handed—transfer the legislative power to the executive department.

Let me read something to you from Professor Reveley.

ADHERENCE TO INTENT OF LAWGIVER

"It seems that most people feel that the rule of law necessitates undeviating adherence to the intent of the lawgiver, until the language in which he embodies his intent is physically changed in accordance with formal processes of revision. Nothing less," he says, "will suffice to assure these people that our society is governed according to law and not pursuant to the whim of public officials. Thus pending formal amendment of the language of the framers most people believe their intent ought to remain binding."

I could not have said that half as well, Mr. Chairman. Very well. We have this sound belief of the people, the bulk of the people, that if the Constitution is going to be changed it should be changed by formal revision.

Mr. Reveley proposes a compromise variant: if we are going to revise the Constitution, the ultimate criterion must be the long-term
best interest of the country. Who is to decide that? The President? Deputy Attorney General Sneed said the other day, "Neither Congress nor the courts can interfere with the President when he exercises his powers." He asserts a blanket control. So who is going to take that away from him? Or are we going to put it in the hands of a self-appointed elite, be they "the best and the brightest," or some closet philosophers?

**FORMULA FOR SELECTION OF THE ELITE**

On this Prof. Myres McDougal of Yale said:

"Until we are furnished with the formula for selection of the elite we are entitled to doubt that the minority has any unique monopoly of wisdom. Government, by a self-designated elite like that of benevolent despotism, may be a good form of government for some people but it is not the American way.

Again hallelujah. I believe that is true. I prefer to regard the framers' expectations as "holy writ," to use the words of Mr. Beverley, rather than to permit a headstrong President to rewrite the Constitution at his will.

It is a mark of intellectual confusion that at the very time Secretary of State Rogers was saying of the Javits bill, which merely seeks to insure congressional participation in decisions for hostilities: "I don't think you can change the Constitution, amend the Constitution, by legislation." he could also state:

"Mindful of the hardships which war can impose on the citizens of a country and fearful of vesting too much power in any individual, the framers intended that decisions regarding the institution of hostilities be made not by the President alone * * but by the entire Congress and President together [Fulbright Hearings 481]."

And he agreed that "the Constitution mandates a role for Congress in the making of decisions to use force." [Fulbright Hearings 528]. How can a bill which seeks to secure that role be in violation of the Constitution?

**CONSTITUTION VESTS WARMAKING ROLE IN CONGRESS**

If the Constitution already vests this warmaking role in Congress, it may be asked, why is it necessary so to provide by statute? The reason is that proponents of Presidential warmaking, relying on Acheson's "87 incidents," now swollen to 154, maintain that "a practice so deeply embedded in our constitutional structure should be treated as decisive of the constitutional issue." [RB81] Congress too can construe its powers under the Constitution; and a statute would serve as such a construction. Since, on the view most favorable to the President, warmaking is a shared power, the Presidential power, the Supreme Court has held, would be subject to a countervailing statute. Moreover, disobedience of a statute by the President would place him in the position of a lawbreaker. No man is above the law, not even the President; and a violation of law opens the courts to enforcement of the statute.

Let me emphasize, this issue will not be settled by pious exhortations, even in statutory form. President Eisenhower in 1960 unhesitatingly ordered the Secretary of the Treasury to disobey a statutory
cutoff of funds on the ground that it was unconstitutional. Ultimately
the Supreme Court must decide whether the President may act in
defiance of a statute. Given a dispute about constitutional boundaries
the Court is the inescapable arbiter.

In my judgment, the executive argument for a broader power than
that of first general has no color of law; but as a lawyer I feel that
every man is entitled to his day in court. I no more want to see you
unilaterally decide the powers of the President than I want to see
the President unilaterally arrogate your powers to himself. The only
arbiter is the courts.

ACTING IN DEFANCE OF LAW

I cannot believe that the Supreme Court would prefer to have Con­
gress impeach the President for acting in defiance of law. When the
Reconstruction Congress so proceeded against Andrew Johnson, Chief
Justice Chase wrote that the issue ought to have been submitted to
the courts.

Now I come to a final passage. Without this your war powers bills,
particularly as they permit the President to forestall the imminent
danger of attack on Armed Forces stationed abroad, are virtually use­
less. So whether you write a special statute, or incorporate a provi­
sion in your War Powers Act, you need control over deployments.

You will remember both Professors Bickel and Schlesinger—and
those are fine authorities—had no doubts on the score of deployment
but again I think this ought to be spelled out in your record. It has
not been spelled out in any other hearing that I know of.

Unless Congress establishes control over deployment by statute re­
quiring congressional authorization, the President will in the future
as in the past, station the Armed Forces in trouble spots that invite
attack, witness the “Maddox” at Tonkin Gulf. Once such an attack
occurs, retaliation becomes almost impossible to resist. Although I
agree with Professor Alexander Bickel that “Congress can govern
absolutely, absolutely, the deployment of our forces outside our
borders” (RB 78, n. 318), account must be taken of Secretary of State
Acheson’s categorical statement to the contrary:

CARRYING OUT BROAD FOREIGN POLICY

Not only has the President the authority to use the Armed Forces in carrying
out the broad foreign policy of the United States and implementing treaties,
but it is equally clear that this authority may not be interfered with by Con­
gress in the exercise of powers which it has under the Constitution.

Acheson furnished no citations or reasoning for this extraordinary
claim. His exclusion of Congress is demonstrably without foundation.
It is for Congress to provide for the common defense which implies
the right to decide what is requisite thereto.

Congress also is to raise and support armies, and by necessary im­

2 The incident is described and the documents set forth in Clark Mollenhoff, “Washington
4 Citations for this section will be found in RB 78–80.
deed the constitutional mandate that no appropriation for support of the armies shall be for a longer term than 2 years implies that it is for Congress to decide at any point whether further appropriations should be made and in what amounts. The duty of Congress, in Hamilton’s words, “to deliberate upon the propriety of keeping a military force on foot,” surely comprehends the right to insist that a portion of the military forces should not be kept on foot in Vietnam or Europe.

SPECIFYING HOW APPROPRIATED MONEY IS SPENT

With the power of appropriation goes the right to specify how appropriated moneys shall be spent. This is immediately relevant to impoundment. It is not a mere matter of logic but of established parliamentary principle. After 1665, stated the great English historian, Henry Hallam, it became “an undisputed principle” that moneys “granted by Parliament, are only to be expended for particular objects specified by itself.” That practice was embodied in an early congressional enactment. If, therefore, Congress specifies that its appropriations are to be spent only for troops stationed in the United States, that specification is binding on the Executive. Finally there is the power to make rules for the government and regulation of the Armed Forces, withheld from the Commander in Chief and given to Congress. These words connote a power to govern and control the Armed Forces, and they manifestly embrace congressional restraint upon their deployment.

REQUIREING CONGRESSIONAL AUTHORIZATION

I would therefore urge that your warmaking legislation, whether by separate enactment or by incorporation in a war-limiting bill, make express provision requiring congressional authorization for the deployment of Armed Forces abroad, except in tightly limited circumstances which hold no prospect of involvement in hostilities.

In sum, I consider that the constitutionality of the proposed legislation limiting the President’s power singlehanded to embroil the Nation in war is unassailable. Congress, the sleeping giant, is stirring. Wake up, I say, and resume your place in the sun. Thereby you will profit the Nation and preserve our democratic system.

[The prepared statement of Professor Berger follows:]

STATEMENT OF RAGU1 BERGER

It is a privilege to appear before you and to congratulate you for facing up to the unceasing take-over of Congressional functions by the President. “The history of the presidency,” said Edward Corwin, “has been a history of aggrandizement”; it is a history of ever expanding encroachment on Congressional prerogatives. Because I believe that the maintenance of our democratic system and indeed the protection of individual liberty is bound up with the preservation of the separation of powers, I am here to uphold your efforts to curb presidential expansionism.

My chief concern is to defend the Javits War Powers type of bill against charges by Secretary of State William P. Rogers and Professor Eugene V. Rostow that it is unconstitutional. It is not my purpose to defend the wisdom of such efforts, for as John Marshall stated, “The peculiar circumstances of the moment
may render a measure more or less wise, but cannot render it more or less constitutional. Opponents of the bills summon remote hypothetical contingencies which might demand instant, unfettered presidential response. Against such a parade of horrors I would pose the actual horror of our ever-deepening involvement in the Vietnam quagmire. Most presidential adventures, as Professor Henry Steele Commager points out, lacked the element of urgency, and in almost every case there was time to consult Congress.

I cannot improve on his statement that "great principles of government are not to be decided on the basis of the argument ad hominem—by conjuring up hypothetical dangers and insisting that the structure and operations of government must be based on the chance of these rather than on experience. (Fulbright Hearings 10). Whether or not your bills represent the wisest possible solution of the problem—the legislature is yet to be born that can draft a perfect bill—is not nearly so important as the fact that you are taking a step towards resumption of your constitutional powers. Congress, the Supreme Court has often held, cannot abdicate its powers. The corollary of that axiom is that Congress is under a duty to exercise those powers itself.

Let me then focus on the issue of constitutionality. Roughly speaking the several war powers bills before you seek to limit presidential war-making in the absence of authorization by Congress, leaving the President free to defend the United States and its armed forces against sudden attack. The power to wage war, it may be confidently asserted, was vested by the Constitution in Congress, not the President. If this be so, your bills merely seek to restore the original design, it cannot be unconstitutional to go back to the Constitution. Here I can only sketch the materials which demonstrate the purpose of the Founders, referring for documentation to my article, "War-Making by the President," supra, note 1, which was inserted in the Congressional Record of February 20, 1973, by Senator Javits.

The best index of constitutionality is the specific provisions of the Constitution respecting the war powers plus the explanation of the Founders as to what they intended to accomplish thereby. The war powers of the President are expressed in three little words—"Commander-in-Chief," which Hamilton explained to a people in dread of creating another George the Third, barely meant the President was to be the "first General." (RB 35). As Professor Henkin recently observed, generals, "even when they are 'first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others." (Louis Henkin, Foreign Relations 50-51 (1972)). The "Commander-in-Chief" was to lead the armed forces once war was "commenced" by Congress or by a "sudden attack" on the United States. No more can be squeezed out of those three little words.

In contrast, the over-towering bulk of the war-making power was lodged in Congress. James Wilson, with Madison, the leading architect of the Constitution, explained, "The power of declaring war, and the other powers naturally connected with it, are vested in Congress. To provide and maintain a navy—to make rules for its government—to grant letters of marque and reprisal—to make rules concerning captures—to raise and support armies—to establish rules for their regulation—to provide for organizing * * * the militia, and for calling them forth in the service of the Union [there was no standing army]—all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress." (RB 36).

To this may be added that Congress is also empowered to "provide for the common defense" and to make appropriations for the foregoing purposes. Since all the powers "naturally connected" with war-making are vested in Congress, it follows, as several Founders expressly stated, that they are not to be exercised by the President. (RB 41 n.65).

You may think that I too easily glide from a power to "declare" war to a power to "make." It originally it was proposed that Congress be empowered to "make" war; this was changed to "declare." (RB 39-41) for reasons well summarized by Secretary of State Rogers. In his testimony before the Senate Foreign Relations Committee in 1971, he confirmed that the "change in wording" from "make"
to "declare" was not intended to detract from Congress' role in decisions to engage the country in war. Rather it was a recognition of the need to preserve in the President an emergency power—as Madison explained it—to repel sudden attacks and also to avoid the confusion of 'making' war with 'conducting' war, which is the prerogative of the President” as Commander-in-Chief. (Fulbright Hearings 462). But for the decisions involved in conducting war, all the rest of the war-making power remained in Congress. In the words of Hamilton's proposal to the Convention, the Executive would “have the direction of war when authorized or begin,” (RB 37), implying it was not for him to begin a war. Though Hamilton was the great proponent of expanded presidential powers, he later stated that “it belongs to Congress only, to go to war.” (RB 42 n. 96).

The power to "declare," i.e., to wage war, was vested in Congress, James Wilson explained to the Pennsylvania Ratification Convention, as a guard against being "hurried" into war, so that no "single man [can] . .. involve us in such distress." (RB 36). The severely limited role of the President was a studied response to what Madison called "an axiom, that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." (RB 38). "Those who are to conduct the war, said Madison, "cannot in the nature of things be proper or safe judges, whether a war ought to be commenced, continued or concluded." (RB 39). George Mason also was against giving the power of war to the President, because not "safely" to be trusted with it. (RB 40). So the President was left with the power “to repel and not to commence war,” as Roger Sherman advised. (RB 39). But for the power to “repel sudden attack” on the United States or to direct a war once begun by Congress, the entire war-making power was vested in Congress. On this eminent scholars are agreed, as the Hearings before the Senate Foreign Relations Committee on the Javits War Powers Bill (1971) amply testify.

Professor John Norton Moore finds uncertainty as to "which branch would have authority to commit the nation to force short of war, or indeed what 'war' meant." (Fulbright Hearings 462). Such semantic questionings overlook the Founders' anxiety to limit the power of a "single man" to "hurry" us into war. Those who feared a blazing forest fire were little disposed to authorize the President to start brush fires. "Brinkmanship" is an invention of our era. A Convention which carefully authorized the President to "repel sudden attack" on the United States hardly left him free to engage in foreign adventures “short of war.” Congress, said the Supreme Court in 1800, may “declare a general war” or "wage a limited war." Bas v. Tingey, 4 Dallas 37, dissipating the “uncertainty.”

Madison’s summary of the matter deserves to be blazoned on your walls in letters of gold: "Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, the fundamental doctrine of the constitution, that the power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature: that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite and proper." (RB 48).

In 1969 the Legal Adviser of the State Department had little quarrel with the view of the "original intention" herein expressed, and said of the President's power to "repel sudden attack" that: "In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States." (RB 47.) Assuredly the Framers did not conceive that the President might repel attacks on Kamchatka. But the Adviser added, "In the 20th century the world has grown much smaller, an attack on a country far from our shores can impinge directly on the nation’s security... The Constitution leaves to the President the judgment whether the circumstances of a particular armed attack are so urgent and the potential consequence so threatening to the security of the United States that he should act without formally consulting the Congress." (RB 50.) No member of the Executive has ever pointed to a constitutional provision, or to a statement of the founders that supports this astonishing claim.

Recall Madison's words: "the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war." Whether an attack on a foreign state represents a threat to the “national security” is a political matter not left to the decision of the "first General." The "power of judging the causes of war," said Madison, "is fully and exclusively vested in the legislature."
In essence, the Executive branch appeals to emergency power, and on this we need to bear in mind what Justice Jackson stated when President Truman seized the steel mills in the midst of the Korean War so that production would not be interrupted by labor strife:

"Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them" (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 629 (1952) (concurring opinion)).

When Secretary of State Acheson advised President Truman in 1950 that he had constitutional authority as Commander-in-Chief to commit troops to meet the invasion of South Korea, he relied on a State Department memorandum in which "dastardly incidents" were relative minor uses of force. (RB 59-60). The "vast majority" of such cases, said Edward Corwin, "involved rights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts [to protect American citizens], the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border." (RB 60). No possibility of "war" was presented by these incidents: and one can only marvel at the fantasy that can conjure from such incidents "precedents" for sending our troops "into battle." Were these incidents to be regarded as equivalent to executive waging of war, the last precedent would stand no better than the first. Illegality is not legitimated by repetition. So the Supreme Court has held. (RB 60 n. 200).

Some academicians consider that presidential practices constitute a "gloss of life" on the Constitution, that the Constitution is a living document which must expand to meet new needs. But the way to such expansion is by amendment, not by self-aggrandizing revisionists. Given a presidential take-over of war powers plainly conferred upon Congress alone, and accompanied by an unmistakable intention to withhold them from the President, his appeal to his own "precedents" would alter the constitutional distribution of powers in violation of the separation of powers. Professor Rostow inveighs against the Javits Bill because it "would permit Congress to amend the Constitution without the inconvenience of consulting the people." (RB 31) This is about a return to the Constitution! If Congress cannot by legislation thus "amend" the Constitution, how can presidential proponents defend the President's amendment of the Constitution by his own practices? Hamilton, the daring pioneer advocate of broadly-read presidential powers, regarded it as a fundamental maxim that—

"An agent cannot new-model his own commission. A treaty, for example, cannot transfer the legislative power to the executive department."

Now the President claims that what Senate and President combined cannot do, he can do single-handed—"transfer the legislative power to the executive department."

It is a mark of intellectual confusion that at the very same time that Secretary of State Rogers was saying of the Javits Bill, which merely seeks to insure congressional participation in decisions for hostilities: "I don't think you can change the Constitution, amend the Constitution, by legislation" (Fulbright Hearings 488), that he could also state,

"Mindful of the hardships which war can impose on the citizens of a country and fearful of vesting too much power in any individual, the framers intended that decisions regarding the institution of hostilities be made not by the President alone . . . but by the entire Congress and President together" (Fulbright Hearings 488).

And he agreed that "the Constitution mandates a role for Congress in the making of decisions to use force." (Fulbright Hearings 528.) How can a bill which seeks to secure that role be in violation of the Constitution?

If the Constitution already vests this war-making role in Congress, it may be asked, why is it necessary so to provide by statute? The reason is that proponents of presidential war-making, relying on Acheson's "St Incidents," maintain that "a practice so deeply embedded in our constitutional structure should be treated as decisive of the constitutional issue." (RB 81.) Congress too can construe its powers under the Constitution; and a statute would serve as such a construction. Since, on the view most favorable to the President, war-making is a shared power, the presidential power, the Supreme Court has held, would be subject to a countervailing statute. (RB 76.) Moreover, disobedience of a statute by the President would place him in the position of a law-breaker. No man is above the law; and a violation of law opens the courts to enforcement of the statute.
Let me emphasize, this issue will not be settled by pious exhortations, even in statutory form. President Eisenhower unhesitatingly ordered the Secretary of the Treasury to disoblige a statutory cut-off of funds on the ground that it was unconstitutional. Ultimately the Supreme Court must decide whether the President may act in defiance of a statute. Given a dispute about constitutional boundaries the Court is the inescapable arbiter. I cannot believe that the Supreme Court would prefer to have Congress impeach the President for acting in defiance of law. When the Reconstruction Congress so provoked against Andrew Johnson, Chief Justice Chase wrote that the issue ought to have been submitted to the courts.¹

DEPLOYMENT

One provision of the Javits-type bill requires additional comment, the § 3(2) authorization to “repel an armed attack against the Armed Forces… located outside the United States…” Unless Congress establishes control over deployment by statute requiring Congressional authorization, the President will in the future as in the past station the Armed Forces in trouble spots that invite attack, witness the “Maddox” off Tonkin Gulf. Once such an attack occurs, retaliation becomes almost impossible to resist. Although I agree with Professor Alexander Bickel that “Congress can govern absolutely, absolutely, the deployment of our forces outside our borders (RB 78 n. 318), account must be taken of Secretary of State Acheson’s categorical statement to the contrary: “Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interferred with by Congress in the exercise of powers which it has under the Constitution” (RB 77). Acheson furnished no citations or reasoning for this extraordinary claim.

The exclusion of Congress is demonstrably without foundation. It is Congress that is to “provide for the common Defense,”¹ which implies the right to decide what is requisite thereto. Congress also is “to raise and support armies,” and by necessary implication it can withhold or withdraw that support. In determining the size of the army it will “support” it is entitled to weigh priorities; shall troops be stationed in Germany or deployed in Cambodia? Indeed the constitutional mandate that “no appropriation” for support of the armies “shall be for a longer term than two years” implies that it is for Congress to decide at any point whether further appropriations should be made and in what amounts. The duty of Congress, in Hamilton’s words, “to deliberate upon the propriety of keeping a military force on foot,” surely comprehends the right to insist that a portion of the military forces should not be kept “on foot” in Vietnam or Europe.

With the power of appropriation goes the right to specify how appropriated moneys shall be spent. This is not a mere matter of logic but of established parliamentary principle. After 1865, stated the great English historian, Henry Hallam, it became “an undisputed principle” that moneys granted by Parliament are only to be expended for particular objects specified by itself. That practice was embodied in an early Congressional enactment. If, therefore, Congress specifies that its appropriations are to be spent only for troops stationed in the United States, that specification is binding on the Executive. Finally there is the power to make rules “for the government and regulation of the armed forces,” withheld from the Commander-in-Chief and given to Congress. These words convey a power to govern and control the armed forces, and they manifestly embrace congressional restraint upon their deployment. I would therefore urge that your war-making legislation, whether by separate enactment or by incorporation in a war-limiting bill, make express provision requiring Congressional authorization for the deployment of Armed Forces abroad, except in tightly limited circumstances which hold no prospect of involvement in hostilities.

In sum, I consider that the constitutionality of the proposed legislation limiting the President’s power single-handed to embroil the nation in war is unsatisfactory. Congress, the sleeping giant, is stirring. Wake up, I say, and resume your place in the sun. Thereby you will profit the Nation and preserve our democratic system.

¹ The incident is described and documented set forth in Clark Mollenhop, Washington Cover Up, 173-374, 233-235 (1962).
³ Citations for this section will be found in RB 78-86.
Mr. Zablocki. Thank you, Professor Berger, for your eloquent statement.
Professor Reveley, will you please give your statement.

STATEMENT OF W. TAYLOR REVELEY III, JOINT FELLOW OF THE COUNCIL ON FOREIGN RELATIONS AND THE WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS

Mr. Reveley. Mr. Chairman, I’m pleased to have an opportunity to talk with your committee about the difficult but intriguing problem at hand.

One personal note at the outset. Lest the academic community accuse me of usurping its prerogatives and titles, I should note that I’m a practicing lawyer, not a professor, in the midst of a year’s leave from my law firm to attempt a book on the constitutional law of the war powers.

My written statement deals with two matters: first, constitutional considerations relevant to any analysis of war-powers legislation and second, in light of those considerations, what war-powers legislation, if any, is desirable.

SUMMARIZING PERTINENT CONSTITUTIONAL ISSUES

As my written statement is somewhat lengthy, I will focus my oral remarks on pages 23 through 30 of the statement. Those pages summarize the pertinent constitutional considerations and then suggest the sort of war-powers legislation that I think is most appropriate.

Turning to page 23, in skeletal form, these are the constitutional considerations that in my view must be taken into account.

First, constitutional law governing the allocation of control between the President and Congress over the use of force is presently uncertain and in flux. Belief that the President has a constitutional prerogative to use force as he thinks necessary in the national interest now coexists with belief that he may do so only after obtaining prior congressional approval, except in a few emergency circumstances and then only for only a limited time, unless ex post facto congressional approval is forthcoming.

The former belief springs from 20th-century executive practice, especially that of the cold war; the latter belief is rooted in the framers’ intent and in 19th-century practice.

Second, present constitutional confusion cannot be ended by invocation of the framers’ expectations as holy writ, nor by automatic canonization of recent Executive hegemony as amendment of the Constitution by usage.

CONSISTENT WITH CONSTITUTIONAL TRADITION

An end to confusion more consistent with our constitutional tradition involves, (1) identification of the ends or objectives that the country seeks to achieve by the nature of its allocation of control between the President and Congress, and, (2) a constitutional division of authority between them that is most likely to realize those ends in today’s world.

It follows that I radically disagree with Professor Berger about the mechanics of constitutional interpretation; if the committee is interested, he and I could debate them.
The bulk of my written statement, with which I am not dealing in my oral remarks, concerns (1) identification of those ends that the country has traditionally sought to obtain by the nature of its allocation of control between the President and Congress, (2) the respective institutional capabilities of the President and Congress to realize those ends, and (3) the allocational problem that arises when—as I think is the case—it becomes clear that the President acting alone is more able to realize certain of the objectives, while Congress and the President acting together are more capable of realizing others.

My conclusion, based on inquiry into the purposes behind the allocation of the war powers, is stated on page 24. It is that the division of authority most likely to realize those ends is one that involves less control for Congress than the Framers intended, but also less control for the President than most Chief Executives in this century have claimed.

As regards Presidential prerogative, we should constitutionally concede to the President the right to initiate force on his own authority, whenever he thinks it necessary in the national interest.

"WAR" IN THE CONSTITUTIONAL SENSE

We should further concede him the right to continue any use of force as he thinks necessary, so long as a majority of both Houses of Congress do not vote to limit or terminate that use.

Finally, we should recognize, as was the case in the 19th century, that some uses of force do not amount to "war" in the constitutional sense, and leave them wholly within Presidential control; these uses involve applications of force that have little human or economic cost for this country and do not impair the sovereignty of another country, under current concepts of international law.

As regards congressional prerogative, we should resurrect for Congress two of its dormant constitutional prerogatives: first, the right to be informed promptly by the President that he has begun a use of force involving "war" in the constitutional sense, whatever his reason for doing so; and, second, the right to limit or terminate that use of force, at any time following the President's report, by majority vote of both Houses.

Under such an allocation of control, we would expect as a matter of practical politics, though not of constitutional obligation, that the President would obtain prior congressional approval before initiating force, except when he felt that the need for speed or secrecy compelled his unilateral action.

IMPLEMENTING ALLOCATIONAL ROLES

Is there a role for war-powers legislation in implementing these allocational rules? Yes, but with this fundamental qualification: it is unlikely that a larger congressional voice, such as that described above, can ultimately rest on war-powers legislation. Rather it will depend upon (1) the extent of congressional determination to become involved in use-of-force decisions, as shown by internal reform to strengthen congressional capacity to deal with these questions rationally and, when necessary, swiftly or secretly: (2) congressional willingness to
vote yes or nay on use-of-force policies during their formative periods; and (3) congressional use of existing means, for example, the appropriations and legislative processes, to cajole or coerce the executive branch into meaningful collaboration with Congress, primarily through its pertinent committees, on use-of-force policies from their birth to death.

If these steps are not taken, war-powers legislation by itself will mean little. In fact, it may be counterproductive, representing one last ineffective but very public lunge at congressional use-of-force relevance. Better no law than one that proves meaningless.

Against this background, however, war-powers legislation does have merit on two scores. First, it may provide the initial thrust necessary to break both the President and Congress out of the gravitational pull of present executive hegemony. Without action-forcing, or encouraging, legislation and with the dimming of Vietnam passions, it is easy to envisage continued presidential control over American use of force, rocked only slightly by occasional bursts of congressional rhetoric.

SPEAKING THE DEVELOPMENT OF CONSENSUS

Second, war-powers legislation may effectively spark the development of consensus about the allocation of control. If there are basic elements of the allocation on which the President and Congress can agree, and if these elements can be captured in a war-powers act, signed by the Executive, that concrete, visible agreement could provide a constitutional starting point for the evolution of general accord. In other words, war-powers legislation need not, indeed cannot, deal with all of the allocational dilemmas posed by control over American use-of-force policy. But it can provide a simple, effective point of departure for resolution of those dilemmas.

War-powers legislation with clearly positive effect, in my view, would have terms such as these:

Section 1: Whenever the President, without prior congressional approval, initiates the use of armed force by the United States, he shall submit promptly to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(a) The objectives of the use of force;
(b) The human and economic resources committed;
(c) The geographical areas affected and the length of time that given resources have been committed to given areas;
(d) Projections of future developments as to each of the above;
(e) Domestic and international legal bases for his use of force, including why no prior congressional approval of it was obtained;
(f) Such other information as the President may deem useful to Congress in the fulfillment of its constitutional responsibilities with respect to the initiation of the use of armed force by the United States.

CONVENING CONGRESS TO CONSIDER REPORT

Section 2: Whenever the Speaker of the House of Representatives and the President pro tempore of the Senate receive such a report and Congress is not in session, the President shall convene Congress in
Section 3: Whenever a report is submitted by the President pursuant to this act, both Houses of Congress shall proceed immediately to the consideration of the use of force cited in the report, unless the use of force has already been terminated.

A few comments on the language just proposed may be helpful. Section 1 of the act above avoids the problem of what constitutes “war” in the constitutional sense by requiring the President to report all uses of force to Congress. He would have an opportunity under section 1(c) to indicate those uses that he believes do not constitute “war,” and thus fall within his absolute control. Congress in turn would have an opportunity to disagree with him when it considers his report. Reasonable men may differ in close cases over whether a use of force has significant human or economic cost for this country and whether it impairs the sovereignty of another country, but they are not likely to disagree in the important instances—those in which the use of force is either patently significant or insignificant. Presidents and Congresses through a process of claim and concession over time should be able to reach basic agreement on what is and is not a use of force wholly within executive prerogative.

LEGISLATINGLY DEFINING THE DIVIDING LINE

To minimize confusion over what is and is not “war” for constitutional purposes, however, Congress could legislatively define the dividing line. Any such definition would be arbitrary to a degree, but so long as it embodied the constitutional distinction between significant and insignificant uses of force, the definition should fall within congressional authority to implement the Constitution.

Section 1 of the proposed act also indicates by its use of the phrase “prior congressional approval” rather than “prior congressional declaration of war” that the form of authorization by Congress has nothing whatsoever to do with the constitutional allocation of control.

Definition in section 1 of the minimum content of the executive report is necessary to prevent meaningless presidential compliance. With information of the sort specified in hand, Congress should be equipped to weigh the costs and benefits of the use of force.

Two other problems with the reporting process exist: One that the President may not act quickly enough, if guided only by the adverb “promptly,” and two, that the President may believe that portions of the required report should be transmitted and kept in secret. Both problems could be specifically dealt with in the legislation, or left, as in the act above, to resolution through presidential-congressional claim and concession. “Promptly,” in particular, would be difficult to define rigidly, since there may be occasions when the President needs to delay his report to guard the impact of American action yet unsuspected by the enemy.

CONGRESSIONAL REVIEW OF PRESIDENT’S ACTION

Section 2 insures that Congress will have a timely opportunity to review the executive initiation of force. The “unless the use of force has already been terminated” proviso exists to prevent needless special
sessions. If the force has already been terminated, it very likely did not constitute “war” in the constitutional sense. Should the Speaker and the President pro tempore nonetheless wish a special session, they may urge one on the President. Should Congress upon later considering the matter wish to take a position, it would be free to do so.

Section 3 again assumes that in most cases there will be no need for immediate congressional action once a use of force has ended. It further assumes that Congress will not act on all uses reported to it; those so insignificant as to fall within the President’s absolute control are immune from congressional limitation or termination, and Congress may choose to remain silent for a time, or forever, even on uses that constitute “war.”

Arguably, section 3 should prescribe procedures to force rapid congressional consideration of use-of-force reports. Assuming that statement of such procedures is technically feasible, it could well do more harm than good. There is no merit in having Congress rush to ill-considered decision, whether for or against Presidential action. So long as Congress proceeds “immediately” to consider the question, and refuses to allow its processes to be thwarted by minority will, it should take the time for meaningful consideration by its appropriate committees and on the floor of both Houses.

LEGISLATION DELIBERATELY SIMPLE

The legislation described above is deliberately simple. It does not deal with any aspect of the war powers except the actual initiation of force. And it presents only a few crucial elements of the allocation of authority over the initiation of force, leaving the rest of articulation by the President and Congress through a process of claim and concession in specific cases.

The proposed act does provide Congress with what it presently lacks: The guarantee that it will have the facts and an opportunity to act at the outset of any significant American use of force, except for those few, if any, that end before the President has time to report and Congress to be called into session.

As suggested earlier, a Congress determined to be involved in American use-of-force policy can move from that opportunity to more general collaboration with the Executive via existing mechanisms.

The balance of my written statement lays out a more detailed war-powers act, which embodies more comprehensively the allocational rules described at the beginning of my oral remarks.

I prefer, however, the shorter and more simple act just discussed. It seems to me that the less complex war-powers legislation is, the more likely it is to be understood and respected. It also seems to me that both understanding and respect are vital if a war-powers act is to provide the thrust necessary to escape the pull of existing practice. And, again, the passage of use-of-force legislation that is then ignored by the President and by Congress would have a far more debilitating effect on congressional use-of-force prerogatives than the failure to enact any war-powers legislation at all.
COMMENT ON HOUSE JOINT RESOLUTION NO. 2

In conclusion, let me comment briefly on House Joint Resolution No. 2, which is the principal proposal now pending before Congress that comes closest to the sort of legislation that I believe desirable.

I will go down the resolution section by section.

I do not agree with the assumption in sections 2 and 3 that the President may initiate force on his own authority only in emergency situations. In my view, Executive practice in this century should be recognized as amendment of the Constitution by usage to the extent that it gives the President the right to initiate the use of force whenever he concludes that the national interest requires it.

In section 3, I don't see the need for the "declaration of war" terminology. It seems redundant in light of the "authorization" language in the second clause of the section. We should be aware that any form in which Congress authorizes the use of force is constitutionally acceptable. There is no magic in declarations of war. Congress has often approved uses of force through means other than formal declarations. Thus, rather than focusing on declarations, it would be more accurate to refer simply to congressional authorization, whatever form it may take.

The requirement in section 4 that the President consult Congress before he commits troops pursuant to section 3 is desirable as a matter of practice, but not desirable as formal legislation. I would prefer to see that sort of consultation evolve out of existing mechanisms for interchange between the President and Congress. I don't think legislatively mandating it will do much good, unless other conditions exist: That is, congressional willingness to retaliate against the President if he fails to consult and congressional willingness to put its own house in order so that it can and will meaningfully participate in use-of-force decisionmaking.

REQUIREMENT OF PERIODIC CONSULTATION

The section 4 requirement of periodic consultation during armed conflict, similarly, should evolve naturally if the conditions just noted exist.

Section 5, again, has "declaration of war" language which I think is better replaced by simple authorization language.

Section 5 also deals with deployment and other war-powers action short of the actual use of force. In so doing, the resolution courts unenforceability. Is it likely that the President will report—or that Congress will insist that he report—every time action of the sort described in section 5 is taken? Any requirement not likely to be obeyed, in my view, is best excluded from war powers legislation, lest its inclusion undermine the credibility of the whole.

The matters to be covered in the Presidential report, as noted in section 5, are essentially the same as those that I propose on page 27 of my statement. The requirements stated on page 27 seem to be somewhat more precise than the ones set out in section 5.
Section 6, in my judgment, should simply require Congress to move immediately to the consideration of the use of force cited in the report. Section 7, I would delete after the first sentence. Thank you very much, Mr. Chairman.

[The prepared statement of Mr. Reveley follows:]

STATEMENT OF W. TAYLOR REVELEY III

My comments, first, sketch constitutional considerations relevant to war-powers legislation, and, second, against the background of these considerations, explore what, if any, war-powers legislation is desirable. In the interest of expedition, much of the statement is conclusory. Its organization is as follows:

I. Constitutional Considerations
   A. Many Issues
   B. Description of the Present State of the Law
      1. Language, Intent and Pre-Twentieth Century Practice
      2. Twentieth Century Practice
   C. Resolution of Uncertainty in Present Law
      1. Framers' Intent Versus Amendment by Usage
      2. Purposes, or Ends, Underlying the Constitutional Allocation of Control
      3. Respective Congressional and Executive Capacities to Realize Each of the Desired Ends
      4. Preference Among Ends: The Allocation of Control
      5. Reasons for the Allocation of Control Just Described

II. War-Powers Legislation in Light of Relevant Constitutional Considerations
   A. Recapitulation of Constitutional Considerations
      1. Presidential Prerogative
      2. Congressional Prerogative
   B. The Role of War-Powers Legislation
   C. A Basic War Powers Act
      1. Text
      2. Comment
   D. A More Detailed War-Powers Act

I. CONSTITUTIONAL CONSIDERATIONS

A. Many Issues

Most proposed war-powers legislation focuses on the allocation between the President and Congress of control over decisions to initiate the use of armed force abroad. It is well to remember, however, that control over the initiation of force is only one among a number of constitutional issues regarding the war powers. Crucial questions also exist concerning control over the conduct and termination of force, and concerning the initiation, conduct and termination of other sorts of action: commitments by this country to use force in the future, the raising and deploying of the military, and other provocative diplomacy, legislation or international agreement. Thus, the initiation of force poses only the middle issue of a series of questions concerning the constitutional allocation of control between the President and Congress over American war-powers policy. The initiation of force is a useful starting point for congressional efforts to deal with problems of control, but no more than that.

B. Description of the Present State of the Law

Description involves inquiry into pertinent data of three sorts: (1) constitutional language, (2) intent of the Framers and Ratifiers and (3) war-powers practice by the President, Congress and courts from 1789 to date. My study of these data suggests that the constitutional allocation of control between the President and Congress over the initiation of force is in flux; it wavers uncertain

1 A. B. Princeton, 1965; J. D., University of Virginia, 1968; law clerk to Mr. Justice Brennan, 1969-70; attorney on leave from Hunton, Williams, & Gibson, Richmond, Virginia; presently a joint fellow of the Council on Foreign Relations and the Woodrow Wilson International Center for Scholars, studying the war powers and representaion of the American Society of International Law Panel on the Constitution and the Conduct of American Foreign Policy.
between executive dominance, most apparent since 1945, and a return to the strong congressional voice that existed before this century. A new constitutional consensus on the initiation of force is likely to emerge within the next decade or two. Its nature cannot yet be accurately predicted; and those who claim that constitutional certainty already exists, some taking refuge in the Framers’ dictates of 1789 and others garnering equal if contradictory assurance from presidential practice since World War II, are unrealistic. The facts belie their certainty, as does this country’s method of making constitutional law.

1. Language, Intent and Pre-Twentieth Century Practice

Though the pertinent constitutional language is somewhat ambiguous, the Framers’ intent and pre-twentieth century practice generally support the necessity for prior congressional authorization of any initiation of armed force by the President, except (a) when the United States is physically attacked with such suddenness that a defensive reaction is essential before Congress has an opportunity to act, or (b) when the force has little human or economic cost for this country and does not impair the sovereignty of another country, under prevailing concepts of international law. Under nineteenth century concepts, the party in particular landed frequently to protect American lives and property endangered by disorder in weak nations or stateless areas; took punitive action or reprisals against primitive, stateless peoples who had attacked Americans or their property; pursued fleeing miscreants into weak nations or stateless areas; and enforced laws against piracy and slave trading. Congressional authorization of American use of force also occurred often during the late eighteenth and nineteenth centuries and took a number of forms in addition to formal declarations of war.

2. Twentieth Century Practice

The weight of practice in this century, on the other hand, supports a presidential prerogative to use force as he thinks necessary in the national interest, so long as war is not formally declared. Executive initiative and congressional acquiescence in China at the turn of the century, in Latin America during its first thirty years, before the two World Wars and during the Cold War, all argue for such a prerogative. Since 1945 Chief Executives (with Eisenhower’s ambiguities) have been willing openly to claim the prerogative as their constitutional due. Dominant support for that constitutional reading exists in Congress and among influential commentators from the Second World War to the coming of American involvement in Vietnam. This interpretation of the constitutional war-powers provisions rested on the common assumption that only the President, not Congress, could cope with the pace, complexity and hazards of contemporary international life. Though essential, the congressional role was principally one of support—the giving of advice and enabling resolutions when asked, and the voicing of necessary appropriations and legislation.

In the wake of Vietnam, however, has come reconsideration of the institutional advantages previously assumed for the President in the conduct of foreign affairs, and a reawakening of latent constitutional expectations, drawn from language, intent and pre-twentieth century practice. The reawakening has not been universally experienced, however; many continue to believe that the Constitution vests in the President a broad war-powers prerogative.

In short, a presidential claim to amendment of the Constitution by usage has been suddenly and strongly challenged, just as it was about to set its second foot in the constitutional promised land.

C. Resolution of Uncertainty in Present Law

1. Framers’ Intent Versus Amendment by Usage

Almost certainly, there will be no rollback of the presidential claim to initiation-of-force hegemony simply because the claim departs from the Framers’ intent. To do so would be to deny the possibility of constitutional change in this country through any but the process of formal amendment. Such a Clause-like stance ignores historic reality that, for good and familiar reasons, our Constitution has far more frequently evolved through usage than through formal amendment, when the pertinent constitutional language is ambiguous. The allocation of war powers between the President and Congress has had its fair share of voluntary development, through a process of claim and concession between the political branches and, less frequently, through judicial decision.
But neither, on the other hand, does our constitutional tradition require that a claim be accepted as amendment by usage just because it has existed for a while and been given some substance in practice. The exercise of control by itself is not conclusive of its constitutionality. To so hold would be to permit power-seeking Presidents or Congresses to broaden their constitutional control through bootstrapping.

It is true, though, that persistent bootstrapping over an extended period may ultimately produce amendment by usage, if those with contrary constitutional views choose to clothe them only in rhetoric. This is simply to say that what happens in fact generally proves to be a more potent influence on constitutional development than statements about what ought to happen. Another generation of executive control, in fact, over the initiation of force will conclude the issue. In my judgment, no matter what Congress and commentators may say to the contrary about how control ought constitutionally to have been allocated.

If constitutional certainty cannot be found simply by harking back to the dictates of 1789 or by canonizing recent practice, where do we look for answers?

2. Purposes, or Ends, Underlying the Constitutional Allocation of Control

Control over the use of force is allocated in one manner rather than another in order to achieve certain ends vital to the national good. These purposes provide the standards by which to judge the merit of alternative allocations between the President and Congress. Definition of the underlying ends began with the Framers and Ratifiers and has continued as new national needs emerge that require accommodation in the allocation, and as attempts are made to better adjust it to achieve old ends. Reasonable men may disagree about the nature of these ends, and, more often, about their allocational implications. But, in my view, we will be neither reasonable nor true to our constitutional tradition, if we try to resolve existing uncertainty about the allocation of control over the initiation of force except by (a) identification of the ends, vital to the national good, to be sought in that allocation and (b) choice of the allocation most likely to realize them.

In other words, what is the United States trying to accomplish by its constitutional law governing the allocation of control over the initiation of force? To what extent can the desired ends be achieved by adherence to the intent of the Framers? To what extent are they realized by recent divergent presidential practice? If the Framers' design remains functional, then the executive claim to hegemony over the initiation of force is properly rejected as unnecessary usurpation of authority from Congress. To whatever degree, however, that the claim responds to national needs not met by the Framers' design, to that extent it is properly recognized as amendment by usage.

The following objectives are among those that have been sought in the allocation of war powers:

First, to hinder the use of force by either branch to tyrannize the American public or to establish dictatorial government in this country. The Framers feared overt instances of these evils, for example, use of the military to overthrow the Constitution and establish an American monarchy. The threat today is more subtle. It lies in coercion that stems from keeping a huge military establishment, with civilian adjuncts, for use in foreign wars.

Second, to hinder aggressive use of force by the United States abroad. The Framers did not anticipate any but defensive use of American military power, though aggressive war had greater claim both to international legality and to predictable, tolerable consequences in the late eighteenth and nineteenth centuries than it does today.

Third, to encourage democratic control over use-of-force policy. Democratic control implies the reporting of executive policies with their supporting facts and rationales to Congress and to the interested public; it implies executive responsiveness to congressional and public judgments, when clearly and persistently voiced, and congressional responsiveness, in turn, to executive and public opinion. Admittedly, public judgment has often been viewed as uninformed, irrational, inconsistent and either too militant or not militant enough. The same is frequently said of congressional judgment, as opposed to executive. Consent of the governed, however, is the organizing principle of our polity, and today's increasingly educated and demanding citizens are unlikely to lessen the traditional demand for a government responsive to the governed. That principle has special relevance in use-of-force policy, where the consequences of national decision-making can be so profound. Democratic control remains a basic objective, accordingly,
pending better evidence than now exists that public judgment is consistently detrimental to the national good and impervious to the persuasion of better advised executive officials.

Fourth, to create and maintain national consensus behind American use-of-force policies. Without that consensus, it is difficult for the country effectively to pursue any policy for a significant period of time; and the absence of consensus may plunge the United States into bitter internal controversy, with debilitating effects both internationally and domestically.

Fifth, to permit short-term emergency uses of American force that are neither subject to democratic control nor backed by national consensus. Any attempt to absolutize the necessity for democratic control and consensus founders on those occasions when public opinion has been fatally wrong, and when neither government advocacy nor events have yet managed to win tolerance for the necessary policies. The years immediately prior to American entry into World War II speak eloquently about the potential of public judgment for short-term fundamental error.

Sixth, to encourage rational use-of-force decision-making. That is, the making of decisions by elected officials who are well acquainted with (a) overall American foreign policy objectives and priorities, (b) the basic facts of the situation at hand, (c) realistic alternatives for dealing with it, (d) expert evaluations (both technical and political) of these alternatives, and (e) criticism of each alternative by persons of genuinely independent judgment and persuasive power.

Seventh, to ensure American capacity to consider use-of-force questions and make policy rapidly or secretly, when necessary, and flexibly and proportionately always. The importance of speed and secrecy has been, and will continue to be, crucial in certain circumstances. Flexibility—the capacity to act in a manner responsive to changing events—is vital in an area as volatile and unforgiving of error as that of use of force. The capacity to respond proportionately avoids inadequate or excessive American reaction to foreign provocation.

Eighth, to permit continuity in American use-of-force policy, when desirable. Continuity lends to credibility and predictability. Both are necessary to assure allies, deter enemies and to reach agreement with other countries.

Ninth, to encourage the periodic review and revision, as necessary, of our use-of-force policies. The timely modification or termination of a policy often has an importance equal to its timely initiation.

Tenth, to facilitate the efficient making and execution of American use-of-force policy. Government inefficiency during the Revolutionary and Confederation periods provided strong impetus to the constitution-making of 1787-89. Our need for efficiency has increased radically since 1789, with growth in the complexity and magnitude of the problems with which the government must deal, and with tremendous increases in the pace of events. Consistent inefficiency in making and executing decisions can undermine even wise policies.

Two very important questions remain even after the basic objectives, or ends, of the allocation of control are known. (1) What are the respective capacities of Congress and the President to achieve each of the ends? (2) If certain ends conflict with one another, and if all of them cannot be directly pursued at once, which ends are to be preferred?

3. Respective Congressional and Executive Capacities to Realize Each of the Desired Ends

At issue here are the implications of different institutional characteristics of Congress and the President. What, for example, is the effect on their capacities to achieve the desired ends of their respective terms of office? Of their different modes of election and electoral constituencies? Of the fact that the President is one and Congress many? That only the President is never out of session and never out of contact with the government apparatus? That the President far more than Congress controls the services and day-to-day activities of the overwhelming mass of federal employees? That the executive role is characterized more by recommendation, interpretation and action, and the legislative role more by deliberation, consent and authorization?

At issue also is the extent to which either branch can and will alter its present ways of doing business to increase its capacity to realize the desired ends. If such reform is technically and politically feasible, the prospect of its occurring must be taken into account. Congress, for example, could improve the methods by which it now obtains, absorbs and critically considers information essential to use-of-force decisions. It could further coordinate and set priorities for the
splintered processes by which it now deals with these decisions. It could provide for their more systematic review and revision. And Congress could significantly improve its capacity for rapid and secret use-of-force decision-making.

Assuming, however, that the President's and Congress' institutional capabilities remain essentially as they now are, my conclusion is that the first four ends described above are likely to be most often realized by an allocation of control that requires joint executive-congressional authorization of any initiation of force. In other words, to hinder the use of force to build tyranny at home (end one) or to wage war aggressively abroad (end two), to foster democratic control over use-of-force policy (end three), and to create and maintain national consensus behind that policy (end four), the best allocation of control is one that divides responsibility between the President and Congress.

With certain qualifications, however, this is not my conclusion as regards the last six ends described above. They are likely to be realized in more cases than not by an allocation of control that gives the decisive voice to the President, subject to such congressional consultation and support as he may seek, and subject to congressional power to thwart or reverse his decisions through means other than the right to vote yea or nay on the actual initiation of force (for example, the denial of implementing appropriations and legislation, or the use of hearings to inform and arouse the public against executive policy). In other words, to ensure American capacity for short-term, unpopular use of force that is vital to national security (end five), to encourage rational use-of-force decision-making (end six), to ensure American capacity to consider use-of-force questions and make policy rapidly or secretly, when necessary, and flexibly and proportionately always (end seven), to permit continuity in that policy, when desirable (end eight), to ease the periodic review and revision, as necessary, of American use-of-force policies (end nine), and to facilitate the efficient making and execution of those policies (end ten), the best allocation of control is one that allows the President to act as he thinks wisest, without the necessity to obtain congressional approval.

This judgment must be qualified in three respects: First, it is not clear that Presidents can consistently obtain from any source but Congress an element of rational decision-making: the criticism of alternative courses of action by persons of genuinely independent judgment and persuasive force (end six). Devils-advocate from within the Executive Branch seem all too often to have a modest impact on their leader. Second, it is possible that end nine—the periodic review and revision, as necessary, of use-of-force policies—might be more likely if both Congress and the President were necessarily involved, the one to offset any obsessive preferences of the other for one policy or another. Finally, as noted a moment ago, Congress could alter its ways of doing business so as to narrow significantly the gap between its and the President's institutional capabilities to realize ends five through ten. Thus, the allocational judgment just stated is more tentative than the judgment concerning the first four ends.

The conclusions above do not reflect the impact that unusual personalities in either the White House or on the Hill may have on realization of the desired ends. And they do not pretend to apply to all cases, only most cases. What has been said about ends six through ten might well not hold were abnormality wise and strong Congressmen to confront an abnormally foolish and weak President. And certainly there have been, and will be, occasions when Congress rather than the President proves more capable of realizing any of the last six ends. But in most cases (the more relevant subject for consideration), this does not seem to be true.

The problem remains how control is to be divided when certain of the allocational objectives call for joint executive—congressional responsibility, while others call for executive prerogative.

4. Preference Among Ends: The Allocation of Control

At the outset, it is well to be clear that there is no necessary conflict among the objectives in question. The first four ends may be realized, sooner or later, even if the President alone controls the initiation of force. He may, for example, be scrupulous to avoid aggressive uses of force at home or abroad; he may temper his policy in the fire of congressional and public opinion and successfully build consensus behind it. Similarly, the last six purposes could be achieved even were the President required to obtain congressional approval for the use of force. No iron law compels Congress to vote down unpopular action vital to national security; to reach irrational decisions; to prove incapable of speedy, secret, flexible
and proportionate action; to toss aside essential continuity in policy or refuse its
review and revision; nor is Congress inexorably doomed to sit astride the efficient
making and execution of American policy.

But practically speaking, ends one through four do now compete with ends
five through ten. For as noted, our chances of realizing the first group are measure-
surely better if the President and Congress share authority, while our chances of
realizing the second set are measurably enhanced by executive prerogative.
Which group of ends is to be preferred in the allocation of control over the initia-
tion of force?

In my judgment, neither group is dominant except as to the time of preference
during the process of initiating force. Three stages are important during that
process:

First, at the outset of initiation, realization of ends five through ten should
dominate. In other words, we should concede the President a constitutional pre-
rogative to initiate the use of force when he deems it in the national interest. To
that extent, we should recognize as amendment by usage executive practice dur-
ing this century, especially during the last thirty years.

Second, however, immediately after the President has unilaterally begun the
use of force, our dominant concern should become realization of ends one through
four. In other words, we should preserve from the Framers' intent and nineteenth-
century practice two congressional prerogatives: (1) the constitutional right to
be promptly informed by the President that he has begun the use of force; and
(2) the constitutional right, then or at any time thereafter, to limit or terminate
that use of force by majority vote of both Houses. These rights should come into
play irrespective of the reason that the President initiated the use of force. For
example, Congress should not be denied the report and a timely opportunity to
act just because the President is, or claims to be, engaged in response to an at-
tack on American territory or security interests. But any congressional resolution
that a use of force be limited or ended, of course, must not infringe the Execu-
tive's control as Commander-in-Chief over military tactics or the safe withdravnll
of committed units. It is doubtful, too, that Congress could constitutionally order
the President to limit or cease military operations essential to the direct defense
of American territory.

Third, pending such time as both Houses vote to limit or terminate the Presi-
dent's use of force, his prerogative to wage war as he deems in the national
interest should continue. Congress may fail to vote yes or no for many reasons
other than to realize ends one through four. Thus to permit Congress to pocket
veto presidential use of force would risk frustration of ends five through ten
for frivolous reasons.

This is an appropriate time to note a fourth allocational rule: the President,
of course, should retain his absolute constitutional prerogative to use force when
it involves little human or economic cost to this country and when it does not
infringe the sovereignty of any other state. Executive use of American planes in
1964 to help Belgium paratroops rescue whites trapped by rebellious elements in
the Congo, with the permission of the Congolese government, provides an apt
instance of this prerogative. Occasions for executive action of this sort, however,
are significantly less extensive now than during the nineteenth century, both
because of the absence of stateless but inhabited territory in today's world and
because of today's more stringent international rules against landing troops in,
or taking reprisals against, any state, no matter how weak or unworthy.

5. Reasons for the Allocation of Control Just Described

Why should the President have a constitutional prerogative to initiate force,
and to continue it as he thinks best, so long as Congress fails to vote to the
contrary? Because ends five through ten are more important to the country
today than was the case in the late eighteenth and nineteenth centuries.

First, international events arise, progress and alter their complexion much
more rapidly now than they did then. Thus there is a premium on the govern-
ment's capacity to respond quickly, flexibly and proportionately to emerging
developments.

Second, international events today are far more complex than before, both in
themselves and in their relation to other aspects of reality. It is increasingly
important, accordingly, that the government take the steps required for coordi-
nated, informed, expert and critical decisionmaking, as outlined in end six above.
Finally, international life is far more hazardous for the United States than ever before. True, during the first generation under the Constitution, this country suffered the tribulations of a small, weak nation caught up, if only at a distance, in the wars of the prevailing superpowers. But even during that period, the United States was protected by geography, the modest state of existing military technology and the slight American interdependence with the rest of the world. During most of the nineteenth century, the country was further sheltered from international dangers and threats by a European balance of power, for whose workings it had no direct responsibility. Thus, American government rarely then confronted the possibility that an unpopular or secret use of force might be vital to national security. It did not face the necessity to make use-of-force policy, including commitment to other countries, on whose credibility and predictability American security and world order would depend to a measurable degree. And the rational review and revision of our use-of-force policy, as well as its efficient making and execution, had a second-order importance akin to that of the policy itself. For similar reasons, none of these happy circumstances exist today.

In short, we live in a more fast-moving, complex and dangerous international world than existed before this century. We do not enjoy the peaceful isolation that the Framers expected or that the country in fact enjoyed during much of the nineteenth century. The changed needs of the United States call for greater presidential control over the use of force than existed prior to 1900, because the Presidency is institutionally more capable than Congress of realizing ends five through ten.

It is doubtful, moreover, that any person capable of election as Chief Executive for the foreseeable future would accept a use-of-force prerogative more narrow than the one described. As has been the case with rare exception during this century, Presidents are likely to continue to initiate force on their own authority whenever they believe it essential to the physical protection of American citizens or military units abroad or to the defense of national security. To persuade contemporary Presidents (a) to report meaningfully to Congress immediately after initiating force, and then (b) to accept congressional limitations or, if termination of that force should they be voted, is the greatest rollback in recent executive practice that realistically can be made, in my judgment.

Why is even that rollback desirable, in light of existing international circumstances? Because ends one through four remain at least as important to the country as they have ever been, and because Congress is best positioned to realign national priorities when a President acts either through malice or incompetence, fails himself to realize them. A bona fide, constitutionally guaranteed opportunity for Congress to express its views on significant initiations of force is the best means to ensure that the President does not use foreign war as a route to tyranny at home; that he does not act aggressively abroad with unpredictable and potentially catastrophic consequences; that he does not obstruct and ignore the development of majority sentiment after he and events have had an opportunity to shape it; and that he does not persistently act unsupervised by national consensus, essential to avoid debilitating controversy over policy.

Congressional involvement is important also as more than a failsafe against executive error. Though the President may have a comparative advantage in the realization of ends five through ten, Congress too can contribute significantly to them. Two of the most important areas for legislative contribution have already been suggested: (a) the critical scrutiny of executive policy to expose both its weaknesses and the merit of alternatives, and (b) the impetus to review and revision of executive policies that have outlived their usefulness.

If the allocation of control described above were to become American practice, there would be great pressure on the President to involve Congress in the use-of-force decision-making process before, not after, the commitment of the military. With the chilling awareness that he must report any use of force to Congress and then risk limitation or termination by majority vote of both Houses, the President would be driven to seek either the fact or high probability of congressional approval before acting himself. Such executive-legislative consultation and collaboration, through channels now already in existence, would constitute the war-powers millennium. Thus, as a matter of practical politics, the President would be likely to present congressmen with use-of-force facts accomplished only when, in his judgment, immediate or secret action was essential to the physical protection of American citizens or military units abroad, or to the defense of national security.
Should the allocation of control described above satisfy devotees of presidential prerogative traumatized by what Congress did, and would have done given the opportunity, to Franklin Roosevelt before the Second World War? Or, on the other hand, should it satisfy devotees of congressional prerogative traumatized by what Presidents Johnson and Nixon, in particular, did to Congress in Indochina? Very probably not, for their positions rest on certain inescapable dilemmas. Roosevelt, had he been forced candidly to report to Congress and seek its approval, might well not have been able to take steps vital to American security. And the Johnson-Nixon buffettings of Congress over Indochina make clear congressional disarray in the face of executive facts accomplished. In other words, there is no avoiding the fact that, given an opportunity to decide, Congress may make dismally poor judgments, or the fact that the President, given an opportunity to shape events before seeking congressional views, may notably narrow the legislators' decision-making freedom.

The problem symbolized by prewar Roosevelt is the more acute, in my view: it would be less easy for a President to evade a presidential fait accompli. Four mitigating considerations exist, however. First, Congress has grown in foreign-affairs wisdom since the 1930's and has the capacity to take significantly greater strides in that direction. Second, a President believing force vital to the national interest may always act under the allocation noted above and then rely on the persuasive power of his office and events to win either congressional approval or inaction. Third, in times of national emergency Presidents have acted beyond their constitutional powers, as then understood, and presumably would do so again. Fourth, to read Congress out of our constitutional process for initiating force, let it do to later Presidents what it did to Roosevelt, would obliterate one evil while ignoring the other president fallibility, against which Congress is our best defense.

II. WAR-POWERS LEGISLATION IN LIGHT OF RELEVANT CONSTITUTIONAL CONSIDERATIONS

A. Recapitulation of Constitutional Considerations

Reiterated in skeletal form, these are the constitutional considerations that in my view must be taken into account by any war-powers legislation. First, constitutional law governing the allocation of control between the President and Congress over the use of force is presently uncertain and in flux. Belief that the President has a constitutional prerogative to use force as he thinks necessary in the national interest now hotly contends with belief that he may do so only after obtaining prior congressional approval, except in a few emergency circumstances and then often for only a limited time. Second, the allocation of authority between them that is most likely to realize those ends in today's world.

Third, the allocation of control that most realizes those ends, in my judgment, is one that involves less control for Congress than the Framers intended, but also less control for the President than most Chief Executives in this century have claimed:

1. Presidential Prerogative

We should constitutionally concede to the President the right to initiate force on his own authority, whenever he thinks it necessary in the national interest. We should further concede him the right to continue any use of force as he thinks necessary, so long as a majority of both houses of Congress do not vote to limit or terminate that use. Finally, we should recognize, as was the case in the nineteenth century, that some uses of force do not amount to "war" in the constitutional sense, and leave them wholly within presidential control; these uses involve applications of force that have little human or economic cost for this country and do not impair the sovereignty of another country, under current concepts of international law.
2. Congressional Prerogative

We should resurrect for Congress two of its dormant constitutional prerogatives: first, the right to be informed promptly by the President that he has begun a use of force involving "war" in the constitutional sense, whatever his reason for doing so; and, second, the right to limit or terminate that use of force, at any time following the President's report, by majority vote of both Houses. Under such an allocation of control, we would expect as a matter of practical politics, though not of constitutional obligation, that the President would obtain prior congressional approval before initiating force, except when he felt that the need for speed or secrecy compelled his unilateral action.

B. The Role of War-Powers Legislation

Is there a role for war-powers legislation in implementing these allocational rules? It is unlikely that a larger congressional voice, such as that described above, can ultimately rest on war-powers legislation, rather it will depend upon the extent of congressional determination to become involved in these decisions, as shown by (a) internal reform to strengthen congressional capacity to deal with use-of-force questions rationally and, when necessary, swiftly or secretly; (b) congressional willingness to vote yea or nay on use-of-force policies during their formative periods; and (c) the use of existing means (for example, the appropriations and legislative processes) to coerce or cajole the Executive Branch into meaningful collaboration with Congress, primarily through its pertinent committees, on use-of-force policies from their birth to death. If these steps are not taken, war-powers legislation by itself will mean little. In fact, it may be counterproductive, representing one last ineffective but very public lunge at congressional use-of-force relevance. Better no law than one that proves meaningless.

Against this background, however, war-powers legislation does have merit on two scores. First, it may provide initial thrust necessary to break both the President and Congress out of the gravitational pull of present executive hegemony.

Without action-forcing, or encouraging, legislation and with the dimming of Vietnam passions, it is easy to envisage continued presidential control over American use of force, rocked only slightly by occasional bursts of congressional rhetoric.

Second, war-powers legislation may effectively spark the development of consensus about the allocation of control. If there are basic elements of the allocation on which the President and Congress can agree, and if those elements can be captured in a war-powers act, signed by the Executive, that concrete, visible agreement could provide a constitutional starting point for the evolution of general accord. In other words, war-powers legislation need not, indeed cannot, deal with all of the allocational dilemmas posed by control over American use-of-force policy. But it can provide a simple, effective point of departure for resolution of those dilemmas.

C. A Basic War-Powers Act

War-powers legislation with clearly positive effect, in my view, would have terms such as these:

1. Text

Section 1. Whenever the President without prior congressional approval initiates the use of armed force by the United States, he shall submit promptly to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(a) the objectives of the use of force;
(b) the human and economic resources committed;
(c) the geographical areas affected and the length of time that given resources have been committed to given areas;
(d) projections of future developments as to each of the above;
(e) domestic and international legal bases for his use of force, including why no prior congressional approval of it was obtained;
(f) such other information as the President may deem useful to Congress in the fulfillment of its constitutional responsibilities with respect to the initiation of the use of armed force by the United States.

Section 2. Whenever the Speaker of the House and the President pro tempore of the Senate receive such a report and Congress is not in session, the President shall convene Congress in order that it may consider the report, unless the use of force has already been terminated.
Section 3. Whenever a report is submitted by the President pursuant to this act, both Houses of Congress shall proceed immediately to the consideration of the use of force cited in the report, unless the use of force has already been terminated.

2. Comment

Section 1 of the act above avoids the problem of what constitutes "war" in the constitutional sense by requiring the President to report all uses of force to Congress. He would have an opportunity under section 1(e) to indicate those uses that he believes do not constitute "war" and thus fall within his absolute control. Congress in turn would have an opportunity to disagree with him when it considers his report. Reasonable men may differ in close cases over whether a use of force has significant human or economic cost for this country and whether it impairs the sovereignty of another country, but they are not likely to disagree in the important instances—those in which the use of force is either patently significant or insignificant. Presidents and Congresses through a process of claims and concession over time should be able to reach basic agreement on what is and is not a use of force wholly within executive prerogative.

To minimize confusion over what is and is not "war" for constitutional purposes, however, Congress could legislatively define the dividing line. Any such definition would be arbitrary to a degree, but so long as it embodied the constitutional distinction between significant and insignificant uses of force, the definition should fall within congressional authority to implement the Constitution (see section 2 of "A More Detailed War Powers Act" below).

Section 1 above also indicates by its use of the phrase "prior congressional approval" rather than "prior congressional declaration of war" that the form of authorization by Congress has nothing whatsoever to do with the constitutional allocation of control.

Definition in section 1 of the minimum content of the executive report is necessary to prevent meaningless presidential compliance. With information of that sort in hand, Congress should be equipped to weigh the costs and benefits of the use of force. Two other problems with the reporting process exist: one that the President may not act quickly enough, if guided only by the adverb "promptly," and two that the President may believe that portions of the required report should be transmitted and kept in secret. Both problems could be specifically dealt with in the legislation, or left, as in the act above, to resolution through presidential-congressional claim and concession. "Promptly," in particular, would be difficult to define rigidly, since there may be occasions when the President needs to delay his report to guard the impact of American action yet unsuspected by the enemy.

Section 2 ensures that Congress will have a timely opportunity to review the executive initiation of force. The "unless the use of force has already been terminated" proviso exists to prevent needless special sessions. If the force has already been terminated, it very likely did not constitute "war" in the constitutional sense. Should the Speaker and the President pro tempore nonetheless wish a special session, they may urge one on the President. Should Congress upon later considering the matter wish to take a position, it would be free to do so.

Section 3 again assumes that in most cases there will be no need for immediate congressional action once the use of force has ended. It further assumes that Congress will not act on all uses reported to it; those within the President's absolute control are immune from congressional limitation or termination, and Congress may choose to remain silent for a time, or forever, even on uses that constitute "war".

Arguably, section 3 should prescribe procedures to force rapid congressional consideration of use-of-force reports. Assuming that statement of such procedures is technically feasible, it could well do more harm than good. There is no merit in having Congress rush to ill-considered decision, whether for or against presidential action. So long as Congress proceeds "immediately" to consider the question, and refuses to allow its processes to be thwarted by minority will, it should take the time for meaningful consideration by its appropriate committees and on the floor of both Houses.

The legislation described above is deliberately simple. It does not deal with any aspect of control over the war-powers except the actual initiation of force. And it presents only a few crucial elements of that allocation of authority, leaving the rest to articulation by the President and Congress in specific cases. It does provide Congress with what it presently lacks: the guarantee that it will
have the facts and an opportunity to act at the outset of any significant American use of force, except for those few, if any, that end before the President has time to report and Congress to be called into session. As suggested earlier, a Congress determined to be involved in American use-of-force policy can move from that opportunity to more general collaboration with the Executive via existing mechanisms.

D. A More Detailed War-Powers Act

If a fuller statement of the allocation of control than appears in the act proposed above is thought essential, my recommendation would be as follows:

Section 1. The Constitution allocates control between the President and Congress over American involvement in war. It is the purpose of this act to define procedures for the exercise by the President and Congress of their joint responsibility for American involvement in war.

Section 2. The United States is involved in war when 1,000 or more American ground troops, or equivalent air or naval units, are (a) committed to an area of combat, whether or not all of the committed units actually engage in hostilities, or (b) committed to the territory of another state whose government opposes their presence.

Section 3. The President may initiate on his own authority any use of armed force by the United States not amounting to war as defined in section 2 of this act.

Section 4. If the President seeks congressional approval before engaging in war as defined in section 2 of this act, American involvement may be authorized by any instrument approved by a majority of both Houses of Congress and signed by the President. That instrument may limit the objectives, geographical areas, human and economic resources committed, and the duration of American involvement, or leave all or any of these matters to the President’s discretion.

Section 5. If the President engages in war as defined in section 2 of this act without obtaining prior congressional approval, he must submit promptly to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(a) the objectives of the use of force;
(b) the human and economic resources committed;
(c) the geographical areas affected and the length of time that given resources have been committed to given areas;
(d) projection of future developments as to each of the above;
(e) domestic and international legal bases for his use of force, including why no prior congressional approval of it was obtained;
(f) such other information as the President may deem useful to Congress in the fulfillment of its constitutional responsibilities with respect to the involvement of the United States in war.

Section 6. Whenever the Speaker of the House and the President pro tempore of the Senate receive such a report and Congress is not in session, the President shall convene Congress in order that it may consider the report.

Section 7. Whenever a report is submitted by the President pursuant to this act, both Houses of Congress shall proceed immediately to the consideration of the use of force cited in the report. By majority vote of both Houses, Congress may at any time ratify, limit, or terminate American involvement.

Section 8. So long as Congress fails to limit or terminate the use of force, the President may control American involvement as he thinks necessary in the national interest.

The act above elaborates the simpler version stated earlier, changed to take account of the definition of “war” included in the more lengthy version. Though the allocation of control stated in the second act are those which should be followed, in my judgment, the simpler act is preferable as actual war-powers legislation. The less complex the legislation, the more likely it is to be understood and respected. Both understanding and respect are vital if a war-powers act is to provide the thrust necessary to escape the pull of existing practice.

Mr. Zablocki, thank you, Mr. Reveley.
You have not addressed yourself to S. 440, legislation with broad sponsorship in the other body. It will undoubtedly be considered in the Senate as the principal measure.
Mr. Reveley. Your proposal comes closer to the sort of legislation I think appropriate, than does S. 440. S. 440 in my judgment is not tenable.

Mr. Zablocki. Would you address yourself particularly to sections 3 and 5 on which some witnesses have raised questions of constitutionality.

Mr. Reveley. I have a great deal of difficulty—as mentioned in a section of my written statement that I have not discussed this afternoon—in being dogmatic about what is and what is not constitutional. It seems to me that the country is in a period of extreme disagreement about what is and what is not constitutional, so far as the allocation of war powers between the President and Congress is concerned.

I think that sections 3 and 5 of S. 440 generally reflect the intent of the Framers and 19th-century practice. They do not reflect Presidential practice in this century—practice strongly supported by most Members of Congress during the heyday of the cold war. Thus I have no certain answer as to the constitutionality of those two sections.

In my opinion, however, they do not reflect the best contemporary allocation of control between the President and Congress, in terms of the purposes that the country is seeking to achieve by that allocation. These are the purposes laid out in the written part of my statement that I did not cover.

Presidents Commit Forces Without Congressional Approval

Mr. Zablocki. Professor Berger, as you noted on page 7 of your statement, throughout American history Presidents have sent the Armed Forces into conflict situations without prior congressional approval. In most cases these have been minor incidents, as you stated. But some have not been.

Mr. Berger. Not in the 19th century.

Mr. Zablocki. Is it your contention that a President has no power to deploy troops abroad even when the situation clearly would not involve combat, unless consent has been given by Congress?

Mr. Berger. I suggest a deployment statute that would limit the circumstances in which troops could be deployed to situations which would not invite hostilities. I would not attempt either here or in writing to draft a deployment statute but plainly I think the Congress ought to be consulted and its authority should be sought before you deploy 300,000 troops in Germany. It happens as a matter of policy that I would be for it, but I think the Congress ought to be heard. I want to put this to the forefront of your thinking. It is not merely that I have any special love for the Congress and a distaste for the Presidency, but I think the Congress is the great debating forum. It is the representative forum. It is constantly being changed. It represents a diversity of opinion. That means to me that on any given issue debate will bring forth all sorts of imperfections and counterarguments that should be considered. No matter how heated you are, time after time there have been strong men who have had a strong impact on your thinking because you do listen to reason. Not always, but generally. It is for that reason I would like to have discussion here.
But to go back to deployments, I would find no difficulty with a comprehensive statute that would lay down the sort of situations in which no further authorization for deployment need be sought. But what I submit to you is that as a constitutional matter, deployment is the prerogative of the Congress and the thing has been turned topsy-turvy. You are never consulted. One of the consequences is the Executive deploys the destroyer Maddox to invite a shot. He deploys troops where somebody is going to go at them.

I read of a meeting not long before Pearl Harbor where Secretary Stimson, then Secretary of War, conferred with various admirals on "How can we cause the Japanese to strike the first blow without too much risk?" That sort of judgment just should not be left to generals, or to Secretaries. To put your troops in troubled spots is like a little boy putting a chip on his shoulder. It is going to get knocked off and then you are in a fracas.

Mr. Zablocki. Certainly you have an understanding, Professor Berger, that the committee at least considers setting some clear demarcation as to what would constitute invitation to hostilities as determined, for example, by the number of troops involved. Mr. Reveley in his more detailed war powers proposal on page 31 seeks to draw the line between what is and what is not a war, by setting a number of 1,000 or more ground troops or equivalent air or naval units. This raises several questions.

LIMITATION DETERMINED BY NUMBERS

In a nuclear age when a hydrogen bomb dropped by a fighter bomber with a crew of two could utterly devastate a small country, how can any number such as 1,000 be set? That clearly would be a full-scale war even though only two human beings were involved. I find some problems if we try to include in legislation a demarcation or a limitation determined by the number of personnel.

Mr. BERGER. It so happens, by coincidence, Mr. Reveley and I arrived at a suggested 1,000 independently, but I have no special affinity to 1,000. Problems like that, Mr. Chairman, in my judgment—and I may say something of which you are not aware—I spent 8 years in the Government and I was later chairman of the Administrative Law Section of the American Bar Association. We were trying to reform the Administrative Procedure Act, so I know something about the problems of legislation. I would not pretend to make suggestions to you for the details of deployment statutes. I tackled a broader problem. Acheson said categorically Congress has no right to interfere with deployment, and I laid the constitutional basis that refutes that claim, makes it untenable.

Now what the details are, I think like the details of all legislation, some of your splendid aides have to hammer away at it. You have to talk about it back and forth. They are not insoluble problems. You might want to give more elbow room to the President in a deployment statute in certain situations. But certainly you can start with this, it seems to me, given a situation which plainly invites hostilities, deployment must have the authorization of Congress. Wouldn't you agree?
Mr. REVELEY. As a matter of customary practice perhaps, not as a legislative requirement. Remember, I firmly believe that formal war powers legislation ought to be kept simple to increase the likelihood that it will be obeyed.

Mr. Chairman, let me comment on your well-taken point about nuclear weapons. My limit of 1,000 ground troops, or their naval or air equivalent, assumes the use of conventional weapons. Since one nuclear weapon, even if carried in a suitcase by a little old lady, could start a war in the most fundamental sense, I would condition my 1,000-troop proposal on the use of conventional weapons.

Mr. ZABLOCKI. How would you define an equivalent air or naval unit? Would that definition be left to the President or would legislative history by Congress make it clear?

Mr. REVELEY. I think Congress would provide the definition, though I haven't as yet done so. The 1,000-troop limit, however, is my alternative proposal. I believe the better arrangement is one in which the President is allowed to do as he will, subject to a meaningful reporting requirement, which promptly gives Congress an opportunity to take whatever action it thinks is appropriate. If Congress gets into definitional problems in war powers legislation and tries to cover too much ground, it risks producing a statute that will not be obeyed either by the President or by Congress in enough instances to give it credibility.

DEFINING "WAR" IN CONSTITUTIONAL SENSE

But if Congress wants to define "war" in the constitutional sense, I think it can be done, taking into account the nuclear versus conventional weapons distinction, and taking into account the need for a clear definition of what naval and air forces are equivalent to 1,000 ground troops.

Mr. ZABLOCKI. I certainly appreciate your comments on H.J. Res. 2. I find your proposal intriguing because it is so simple. I agree with you that perhaps S. 440 is too definitive and I thought H.J. Res. 2 would be a compromise version. I believe your suggestion about H.J. Res. 2, regarding the reference to declaration of war warrants serious consideration.

Mr. BERGER. I would add that authorization is a more flexible term today than declaration. Your authorization can take several forms, although I would remind you of Professor Bickel's insistence don't spell authorization out of appropriations or something like that. It must be an express authorization, but "authorization" is a broader term.

Mr. ZABLOCKI. Governor Thomson?

Mr. THOMSON. I wonder, gentlemen, if we had had a proposal such as Senate 440 or H.R. 2 at the time President Kennedy was sending 15,000 American troops into Vietnam, would there have been any benefit from it at all except the involvement of Congress in a decision?

Mr. BERGER. If I may address myself to that. I think that is a tremendous benefit, I want to remind you, sir, of the Tonkin Gulf resolution which is a little later, when you had one lone voice. Sen. Wayne
Morse when Fulbright was taken into camp by Lyndon Johnson, something he never ceased to regret.
Mr. THOMSON. Hindsight is helpful.

NONE OF US HAVE FORESIGHT

Mr. BERGER. But those who don’t learn from hindsight can’t learn, because we, none of us, have foresight. At that time there was one lone voice, a maverick Senator who said, “Let’s have hearings. Let this thing be aired” and I think, for example, had that been aired—I will go further, had some of the intelligence estimates you can find if you read the Pentagon Papers been disclosed, there would have been a debate. I think if we are going to go into danger we should go open-eyed, we should know what is happening and the place to find out is in Congress.

Mr. Congressman, I have great admiration for many Congressmen, not for all. I don’t think they are the ultimate responsible of wisdom; but I simply cannot grasp what it is that takes a man who is just another Congressman up here on the Hill and transforms him into a miracle man when he moves down a mile or two to Pennsylvania Avenue. There is something miraculous about that that has always eluded my grasp.

You see there is a much better exchange of opinions right here than you get among the White House circle. When you read the inside stories, by people like George Reed—if you have a strong man like Lyndon Johnson, he does not want anybody but yes men around him. He made up his mind so he gets trapped in his own frailties, but here you have fellows as willful and strong-minded as you are. You are a marketplace of ideas, arguing the whole thing out.

You may come out on the wrong end, but I am a Democrat and I accept that—even that they elected Nixon. That is the democratic process.

CONSTITUTIONAL ALLOCATION OF WAR POWERS RESPONSIBILITY

Mr. BEVELEY. Let me answer in terms of several of the underlying purposes that we are trying to achieve by the constitutional allocation of war-powers responsibility, as noted on pages 8 through 11 of my written statement. One objective is to encourage democratic control over the use of force. Democratic control is encouraged if the Executive must promptly report to Congress the facts of what he has done and his rationale for doing it.

Another objective is to create and maintain national consensus behind American use-of-force policies. Absent that consensus, we know policies can come to a bad end, along with other things tainted by them. If Congress is involved from the outset, the building of consensus is more likely to occur.

We always want rational use-of-force decisions, and an element in rational decisionmaking is criticism of Executive policy. I don’t think we are likely to get such criticism consistently from any source but Congress. The sooner Congress gets the facts and becomes involved, the sooner meaningful criticism can begin.

Finally, congressional involvement should ease the review and change of use-of-force policies when they become outmoded.