In short there is real benefit in having congressional involvement from the outset. It may not lead to specific authorizing, limiting or terminating action by Congress. But it should lead to focused, informed congressional consideration of American involvement in conflict at its very beginning.

THE FACTS DRIBBLE IN

As things now stand, I don't think Congress gets the opportunity for that consideration. The facts dribble in. Many Congressmen feel like they never have a clear point in time, at which, if they want to, they can take a stand.

Mr. Thomson. Congress knew in 1963 that 15,000 troops had been committed to Vietnam and the next year they got the Gulf of Tonkin resolution from the President and they passed it. Now we did not have any statutory requirements for the President to report to the Congress, but he did report to the Congress and he did ask Congress to pass the Gulf of Tonkin resolution and Congress passed it.

Mr. Reveley. I am not of the school that thinks Congress was uninvolved in the decision to commit this country in Vietnam. I do think, though, the congressional involvement was haphazard, never clearly focused, and generally clouded by the cold war notion that it is more important to support the President than to examine the costs and benefits of his policies. What I am suggesting is that war-powers legislation can be useful in an action-forcing sense, by providing procedural imperatives to get Congress to do what it already has the power to do if it wants to, and to get the Executive also to do what he has the power to do but often chooses not to do.

Mr. Thomson. Do you gentlemen both think we were engaged in a de facto war in Vietnam or in a de jure war in Vietnam?

Mr. Reveley. I think de jure in light of the Tonkin Gulf resolution.

Mr. Berger. I never stopped to think about it. It was war.

Mr. Thomson. If it was either de facto or de jure, did the Commander in Chief under those conditions have the right to deploy troops into Cambodia?

Mr. Reveley. That is a more difficult question. Under the terms of the Tonkin Gulf Resolution, which were broad, he may well have. But the Cambodian incursion can be viewed as a new war just about as easily as it can be understood as an emanation of the war in Vietnam.

Mr. Thomson. When President Roosevelt ordered troops into Africa, was that extra-constitutional or extra-legal? He is the Commander in Chief and during the war he has the right to deploy those troops.

Mr. Berger. I had great difficulty with that as I listened yesterday. Let me just change the facts a little.

Mr. Thomson. We can't now.

Mr. Berger. Not those facts. You know we test our assumptions by looking at the possible application to other facts. As a lawyer you know a very slight change of facts can produce a quite startling difference of result.
THE THEORY OF HOT PURSUIT

Consider, for example, MacArthur was raring to go into North Korea. Truman stopped him because that would have involved China. It was relatively simple to go into Cambodia; but suppose on the theory of hot pursuit that the “first General” decides to go into China, protect his troops. How far does this go?

My own feeling is that we have to stop and ask the policymaker how far does it want to go at any point? The final voice in measuring the cost to the Nation as against the benefits that accrue is for the Congress.

Now I would like to make another point. I was an ardent Rooseveltian. I worked for the New Deal at the time and admired vastly what he did, and was consumed with a passion against Hitlerism. As I have gotten older—and I am getting along in years—and reflected upon it all, I have been very worried. Today there are two schools of thought about it. There is a school of thought that feels, thank God, that we had a leader that was capable of disregarding the will of the people and the will of Congress. You were told yesterday he got his draft law by one vote. Others think—and I have come to that conclusion—that a democracy has a right to go to hell in its own way.

I don’t glory in what Roosevelt did to defy Congress. I think Congress is elected to have a voice in all these decisions. It might have been a frightful thing looked at in hindsight. But I think ultimately our Constitution—we have rocked along for 175 years because we have lived under it and respected it—must prevail. A nation, Mr. Congressman, the salvation of which depends on the wisdom of one man, is in one hell of a box.

CONGRESS AUTHORIZING TOTAL WAR

Mr. Reveal, I’d like to speak to the analogy between North Africa and Cambodia. My understanding of the Second World War is that Congress authorized total war, anything the President wanted to do to crush the enemy he might do. If Congress had been clear in Vietnam, however, and authorized only a ground struggle in South Vietnam, which in my judgment it constitutionally might have done, then the Cambodian incursion would have been beyond the authorization given the President.

Even granting the breadth of the Tonkin Gulf resolution, if the President had wished to attack the Soviet Union in his conduct of the Vietnam War, I think that would have been beyond the authorization given him by that resolution. Thus, what the President may do depends on the nature of the authorization.

A different but related question is the Commander in Chief’s control over tactics and strategy, and how this control bears on the length to which Congress can go in limiting the theater of war.

Mr. Breslin, Would you permit me to address myself to an important matter that was raised yesterday? That is, as an experienced seasoned legislator, you looked down the road, anticipated the practical results, and foreseeing the possibility of a veto you asked “Is this an exercise in futility?” It is to that I wish to address a few remarks. I do not think it is an exercise in futility.
Mr. Reveley has told us he agrees that as far as the original intention of the Framers, and in the 19th Century practice, there is no question about the warmaking power of Congress. Presidential warmaking is a 20th Century practice, and by this we must mean from Korea and Vietnam only.

We have a President that says, “I can create my powers;” they are needed for our safety and I can make them. There is a school, in part including Mr. Reveley, who says these practices have become embedded in the Constitution. He has very sophisticated ideas, but still leaves open the question, who is going to redistribute the powers defined in the Constitution. Others, believe that what the Constitution says, it means. If you are going to change it, you have to amend it. That, according to Mr. Reveley, is what most of the people think; and I agree, I am one of them.

Mr. Thomson. The Constitution says that Congress has the power to raise and maintain an Army and a Navy. Congress has for many years raised and equipped an Air Force. Now, how does that—

Mr. Berger. I would have some difficulty being literal-minded about that because by that token we would have to say we could not have nuclear forces because all we knew back in the days of old was musketry. The joke, Mr. Congressman, is you used the word “Air Force.” Suppose you had infantry, artillery, and Air Force in the Army—

Mr. Thomson. We have an Army Air Force.

LITERAL READING OF THE CONSTITUTION

Mr. Berger. The point I am making is that even on a literal reading you cannot read “Army” in this respect as not to include technical apparatus which becomes a part of the Army.

Some would now weigh Presidential practice against the clear intention of the founders. This is not an area of textual doubt. We know what the Framers meant by their division of powers and what they said is crystal clear. The State Department expressly, and Acheson tacitly, admitted, that the only power the President was given was to repel attack on the United States.

It is time for a construction by the Congress of its own powers. It is accused of acquiescence. Therefore it has to say, “There are our powers.” Now suppose; that you are vetoed. What then?

Mr. Bickel said yesterday you should then have a concurrent resolution. Let’s say you are vetoed and adopt a concurrent resolution embodying your idea of what the original powers are. Now you have a concurrent resolution which gives the sense of Congress of the meaning of the Constitution, which it is entitled to do: And suppose you have a headstrong President who now sends 13,000 troops to Vietnam or tomorrow decides to resume the war in Vietnam, bomb North Vietnam back into the stone age. At that point you are entitled to go into court and say that the President is acting contrary to the Constitution. I want to say to you bluntly it does no good merely to huff and puff.
ANTICIPATING WHAT CONGRESS WILL DO

It is because the President knows and anticipates that is what Congress will do that he is becoming increasingly arrogant and willful. Witness what he has done about John Dean and Dwight Chapin in his latest effusion about executive privilege. He is so daring because he knows that Senator Eastland won't subpoena Dean. Were I sitting where Senator Eastland sits, I would issue a subpoena; I would hold Dean in contempt; then I would send the Sergeant-at-Arms to arrest him, and I would take a corps of press photographers with me. If the President met the Sergeant-at-Arms with a file of Marines, the sergeant should say, "Mr. President, I am only trying to get into court." Because 20 minutes after Dean is in the guardroom he can send his lawyers into the District Court and obtain a writ of habeus corpus. Instead of being like a pair of washer women, we will have this decided in a respectable way.

Get your concurrent resolution on the books, and if the President sends 15,000 troops into Vietnam, Congress should appeal to the courts. Just bear in mind the court stopped Truman in the midst of the Korean War from a seizure of the steel mills. Bear that in mind. There are precious few decisions by the Supreme Court that intimate that the Commander in Chief enjoys supreme powers. The reason I spent time here, Mr. Chairman, being tedious perhaps and boring you with details of constitutional history, I want to be sure that you have a firm grasp of the historical facts. The first step is to know the truth, and the truth shall make you strong. Know the constitutional facts, and that there is no disagreement as to what the original intention was.

THE WISDOM OF ANY PARTICULAR LEGISLATIVE PROPOSAL

Mr. Zablocki. Mr. Findley of Illinois.

Mr. Findley. Mr. Berger. I am sorry I have to phrase it this way, but I believe you do recommend enactment of S. 440, is that correct?

Mr. Berger. Without commenting on the wisdom of the statute. I have not addressed myself, Mr. Congressman, to the wisdom of any particular act. I think the most important thing about the proposed bill is that they mark a first step toward resumption of your powers. That is what is needed.

Now we can talk endlessly about details and I submit this thought to you. There never was a perfect statute.

Mr. Findley. I saw that remark and I agree with you, but we do have to deal with details here. We have before us House Joint Resolution 2.

Mr. Berger. I am the wrong man for you. I don't want to waste your time.

Mr. Findley. You would rather not respond?

Mr. Berger. That's right. I speak with confidence—about what I have studied; when I studied the war powers I went back to all the original sources for myself. I combed everything, so when I talk to you about it—I am not diluent. I learned to sift out everything, and then when I make up my mind to have confidence in my judgment. But I don't want to advise you or give you off the top of my head suggestions or criticism without study.
GIVING MORE POWER TO PRESIDENT

Mr. Zablocki. But, Mr. Berger, you set your own precedent because you did comment on section 3 in House Joint Resolution 2 as giving more power to the President than he has now.

Mr. Berger. One aspect, I said first, Mr. Chairman, that in the main what the statute does is restore the original distribution of powers which gave Congress the power to authorize, to wage war and gave the President the right to repel attack on the United States and to conduct war. Then I said—maybe I exposed myself—I said it went beyond that when it authorized him to protect troops located outside the United States, which Congress could do.

But remember the reason I mentioned that was to make the point that you have to exercise control over deployment. Now another thing, I have been down three times in the last month. I have been asked to talk about Executive privilege and I have tried to study that very carefully. It is as great an issue as you have here in war powers because the flow of information is power. He who controls that controls our lives. Vietnam teaches that with all its concealment. I have not had time to study the details of your statutes and I would be foolhardy to talk about them.

TRYING TO DEFINE THE WAR POWERS

Mr. Findley. Thank you for your candor on that. I would like to ask Mr. Reveley a few questions. First of all, the language that appears at the bottom of page 26—the basic war-powers act—I find especially appealing because it is so close to the precise language I first drafted about, I think, thirty-five years ago.

I did not attempt to define the war powers. I dealt only with reporting requirements. And I still feel myself that this could be a very useful step forward for the Congress to take, even if we do not try to define the war powers vis-a-vis the Legislature and executive branch.

I would like to ask you a few questions about your use or words. You have in section 1 the word "initiates." What does that mean?

Mr. Reveley. I am trying to distinguish the situation in which the President sends American troops into actual combat from the situation in which he simply sends them to a place where hostilities are imminent, but not in progress. By initiate I mean the commitment of Armed Forces to actual hostilities.

Mr. Findley. You have reason to prefer initiates over the word commits?

Mr. Reveley. No.

Mr. Findley. In your view do they mean the same thing?

PRECISE MEANING OF WORDS

Mr. Reveley, Yes, the distinction is between imminent hostilities and actual hostilities and the verb used to describe involvement in the latter could be either initiates or commits.

Mr. Findley. Continuing that phrase you say, "Approve and initiate the use of Armed Forces * * *"? Do the words "use of," mean deployment?
Mr. Reveley. No, it does not. It means only commitment of American Armed Forces—ground, air, or naval—to actual hostilities.

Mr. Findley. Do you have any reason to oppose the expansion of that section then to require a report when the use occurs as well as when the deployment occurs?

Mr. Reveley. My principal reason is this: A reporting requirement for deployment raises enforcement and definitional problems. It seems likely that there will be some deployments so de minimis in their potential consequences that the President will feel no need to report them and Congress will be reluctant to make an issue out of his failure to report—even though, for example, the deployment in question doesn't fall within the exemptions of House Joint Resolution 2 section 5(2). To remedy this problem, Congress would be driven to complicated, difficult to understand statutory definitions of reportable and nonreportable deployments.

**Elemental War-Powers Legislation**

I feel strongly that if Congress does enact war-powers legislation, it ought to be elemental, so simple that any reasonable man can understand and obey its requirements. If after that sort of basic legislation proves viable, Congress wants to go on and pass something more complex, fine.

I also feel that war-powers legislation can do little more now than provide the initial thrust necessary to escape the gravitational pull of present practice—to push Congress and the President out of their present ways of doing use-of-force business. Beyond that, collaboration between the two branches will come, if at all, through existing mechanisms, for example, committee proceedings, informal contacts, legislation and appropriations, on a day-in, day-out basis from the beginning of the formation of any use-of-force policy to the end.

Thus I favor legislation that deals only with the commitment of American Armed Forces to actual hostilities, that requires the President to report promptly and Congress to consider his report immediately.

Mr. Findley. My next question relates to the word "promptly" which is the same word we wound up with in both of our proposals. Yet we never defined this to my satisfaction in the legislative history. I think we use some words like "from 2 to 5 days" or something like that. Is that precise enough in your judgment?

**Setting specific deadlines**

Mr. Reveley. In my early drafts of a war-powers act, I set specific deadlines for the filing of the report, for example, 24 hours after the beginning of the use of force if Congress is in session. In later drafts, I dropped the precise times because there may be occasions when it is not in the national interest to reveal that an American initiative is underway before it can be sprung full-blown on the opposition.

Mr. Findley. You mean the hostile government?

Mr. Reveley. Yes, sir. If you start trying to specify precise times, you run head-on into the problem that they may conflict with the need for secrecy. Also, there may be occasions when it is reasonable for the
President to take 48 hours rather than 24, because he is absolutely swamped.

Mr. FINDLEY. Doesn't that argue even more strongly for the preparation of that report in that moment of crisis when he is adding up pros and cons of a given course of action? Should not he take into account the necessity to report?

Mr. Reveley. I didn't mean to suggest that the President shouldn't report as a rule within 24 hours. But it should be up to Congress through its action in specific cases, rather than through potentially unrealistic statutory deadlines, to make clear to the President that he may not wait 48 hours to report when he could have reasonably done so in 24, and that there is no politically acceptable possibility of his waiting a week under such circumstances, or of his not having thought through the costs and benefits of American involvement before he acted.

Mr. FINDLEY. A further safeguard from the standpoint of the Executive is that the report under our bill is to go to the Speaker of the House and the President pro tem of the Senate.

Mr. Reveley. Which is what I propose also.

SPECIFYING THE REPORTING TIME PERIOD

Mr. FINDLEY. If it were deemed advisable, there could be a time period of the highest classification and still meet the reporting requirements. What I am getting at is perhaps we ought to be specific and say within 24 hours.

Mr. Reveley. If you couple that with the understanding that then the Speaker and the President pro tem would not disclose the report.

Mr. FINDLEY. Publicly.

Mr. Reveley. Publicly. But if the report is given to Congress, especially if Congress must be called into special session to receive it, the secrecy dilemma remains acute; and if the report isn't given promptly to Congress, has much been accomplished by giving it to the Speaker and President pro tem? Perhaps so. It would at least make clear to the President that he has to have the report written and handed over promptly even if it is not immediately disclosed to Congress as a whole.

Mr. FINDLEY. The report could be transmitted to the Chairman of the Foreign Affairs and Foreign Relations Committees. They could be brought into consultation. They could decide whether to pass it on to the Members of their committee.

KEEPING REPORT IN CONFIDENCE

Mr. Reveley. What about a time certain for transmission of the report to the Speaker and President pro tem, coupled with an understanding in the legislative history, or an explicit statutory proviso, that if, in the President's judgment, disclosure of the report, all or any part of it, would impair national security, then it would be kept in confidence by them.

Mr. FINDLEY. I think that was in our language.

Mr. ZABLOCKI. It was developed in legislative history when we debated the question of the floor.
Mr. Findley. My next question relates to page 27 under (E). I don't know if you were here yesterday when the witnesses challenged a portion of the reporting requirement and they made a good point against the present reference to present treaty provisions. They took the position that there is no treaty that really conveys to the President automatic authority to use military force.

And I am inclined to think they are right and if it is listed as a source to which the President could look for legal justification, then we are inviting trouble.

Mr. Reveley. I agree there are no treaties in existence at the moment that automatically authorize the President to use force on his own authority, but that is not what I meant.

Mr. Findley. What do mean by "international legal basis"? Is there such a basis?

VIOLATING INTERNATIONAL LAW

Mr. Reveley. In weighing the costs and benefits of American involvement in war, one thing Congress needs to know is whether our involvement in that particular conflict violates international law. For example, Article 2(4) of the U.N. Charter; any violation of international law in American conduct of war has legal, political, and moral consequences that may be quite costly to the country.

The President couldn't make a convincing case under section 5(e) of my proposed act that international law is in accord with American use of force if the force were used aggressively.

Mr. Findley. You are not suggesting he use any international legal basis as his authority for using force?

Mr. Reveley. No, I don't think that is possible.

Mr. Findley. We ought to figure out a better expression.

Mr. Reveley. It seems to me that there are two sorts of war costs: first, the human and economic costs to this country, and the diminished legal rights of its citizens stemming from a draft, restrictions on freedom of speech and so forth; second, the costs that come from damage to our international political and legal situation. The latter is what I am getting at under "international legal bases."

I am not suggesting that the President can ever get from international law a prerogative to use force on his own authority. That authority must be found, if at all, in domestic constitutional law.

Mr. Findley. But it is important that this statute not leave such an impression.

LANGUAGE IS CONFUSING

Mr. Reveley. Right. Your point is well taken that my language is confusing. That is not what I meant.

Mr. Findley. My other question relates to section 3 in which you require that both Houses proceed immediately to the consideration of the use of force. By "consideration" do you mean consideration by a committee or by the entire Chamber or both?

Mr. Reveley. Again I chose not to attempt to state procedural mechanisms for consideration. The kind of consideration desired will vary from case to case. If a matter is presented that Congress as a
whole wants to consider quickly, then Congress always has the power to adopt the necessary procedural rules to speed action on that case. There are many instances in which I think the action-forcing procedures now in S. 440, however, could be counter-productive. Congress may not want to act that quickly. It may need a couple of months to weigh the costs and benefits. That is fine, so long as the appropriate committees immediately begin to consider the use of force.

Mr. Zablocki. On that point you are aware that House Joint Resolution 317 provides that a report or action on the part of the Congress be taken immediately so the report would be part of the congressional action the very next day.

Mr. Reveley. I think that is much too quick.

Mr. Zablocki. And only one House—

Mr. Reveley. One House can't do it.

Protecting U.S. Citizens and Nationals

Mr. Findley. One question. Is it wise for the Congress to include in a statute a statement showing clearly that the President has a reserve power to use military force to protect citizens or nationals of the United States?

Mr. Reveley. My feeling is that it is no wiser to include that provision than other similar provisions, for example, that the President may repel attacks on American territory. I would prefer to leave to Congress and the President, through a process of claim and concession in actual cases, the definition of those situations in which the President ought as a rule to act unilaterally and those situations in which he ought as a rule to consult Congress before acting.

Mr. Zablocki. I gather Mr. Reveley you have a preference for the 92d Congress version to House Joint Resolution 1, which did not contain section 3 and section 6.

Mr. Reveley. Yes. I do.

I think that in an attempt to accommodate the Senate and to deal more specifically with the allocation of control your measure has lost some of the classic simplicity and workability that it had in the past.

Mr. Zablocki. Would you amplify on your reason for suggesting that section 4 in House Joint Resolution 2, the consultation provision, should not be included? I am interested in your position because my own view is that we should obtain that by congressional insistence.

Executive's Consultation Meager in Past

Now, given the meager performance of the executive branch in recent decades do you think the White House would conduct such consultation on its own? Wouldn't such Executive-congressional consultation be more likely if we had it spelled out in legislation?

Mr. Reveley. That might be the result. But if you spell it out, and consultation does not occur, then you have a dead letter in your act, which undermines the force of the whole measure.

I feel that change in existing practice, which is essentially executive dominance, is likely to come only when the President decides that consultation with Congress is both inescapable and useful. To this end,
Congress needs to engage in internal reform that will enable it to have a more meaningful voice in use-of-force decisions, and Congress needs to develop the will to take the political heat involved in acting on these questions when they are still young.

Mr. Zablocki. Would you clarify what you mean by internal reform of Congress?

Mr. Reveley. For example, improvement in the process by which Congress gets information essential to use-of-force decisionmaking.

Mr. Zablocki. That is what we are trying to do.

Mr. Reveley. I know that. Reporting provisions in war-powers legislation have merit on that score, but I think Congress needs to start getting information long before the time at which these provisions would come into play.

**INFORMATION NEEDED IN EARLY STAGES**

In other words, information is needed during the early stages leading toward the moment at which a decision to commit or withhold troops is actually made.

I am talking about basic foreign affairs information. The kind of information that the Executive has in vast quantities today, but that Congress struggles to grasp.

In part, Congress struggles because the Executive won't help. In part it struggles because Congress itself does not have strong information gathering and distributing machinery.

Mr. Zablocki. In the area of advising Congress on executive agreements, we did not get such information voluntarily.

Indeed, other agencies within the Government and the executive branch did not receive such information and only after we passed legislation did Congress and the other agencies get that information.

For example, the State Department benefited by our legislative action.

Mr. Reveley. That is right.

Mr. Zablocki. So I feel strongly about the consultation provision. I think unless we insist by legislation we will never get it.

Mr. Reveley. Why couldn't Congress set up a mechanism independent of the executive branch to get basic foreign affairs information?

**A PRIORITY-GOVERNED PROCESS FOR DECISIONMAKING**

If Congress were to structure its committees to produce a coordinated, priority-governed process for reaching decisions; if it developed better procedures for dealing with classified information; if it had better procedures for acting swiftly; and if Congress were to start taking positions on use-of-force issues from their outset, it seems to me that you would be able to cajole or coerce the Executive into consultation that he is not going to agree to otherwise.

This sort of internal reform and development of willpower by Congress is going to make the difference, rather than language in war powers legislation. Though it's possible a statutory requirement on consultation could be helpful also.

Mr. Zablocki. Mr. Reveley, we in Congress attempted to get information in the past and the reply from the executive branch was the inevitable executive plea of executive privilege.
Mr. BERGER. They reply "It is not in the national interest to tell you."

Mr. REVELEY. Could you set up a mechanism that is run by Congress, that gets the information itself?

I grant that there is some information that can come only from the Executive, but it seems to me that much of the basic data important to judging foreign affairs could be gathered by congressional operatives, just as executive operatives gather that information for the executive branch.

OBTAINING THE PRESIDENT’S VIEWS AND PLANS

Mr. ZABLOCKI. I do not see how any machinery in Congress could obtain the views and plans of the President, what he is intending to do.

Mr. REVELEY. Could they get information on what is going on in Vietnam? Not on Presidential thinking, but on what’s going on in the world?

Mr. ZABLOCKI. Congress would be getting the information after the fact?

Mr. REVELEY. Couldn’t you get it before the fact?

Mr. ZABLOCKI. I doubt it.

Mr. FINDLEY. A bill that Senator Cooper sponsored in the last Congress and I believe passed the Senate but which unhappily had no consideration on this side of the Capitol would have required the CIA to make detailed reports to the Congress of its factual findings. Not its techniques but its findings worldwide. This I think would be a very significant advance.

Mr. ZABLOCKI. For years, Mr. Findley, I have sponsored legislation calling for a Joint Committee on Intelligence but we never got anywhere because the executive branch and the leadership in Congress did not support the proposal.

LEADERSHIP BEHIND CONGRESSIONAL COMMITTEES

Mr. REVELEY. The leadership has to be behind the congressional committees directly responsible for foreign affairs, and that support has often been lacking in the past. This is another element of congressional reform that seems necessary to make Congress a more potent participant in war powers decisionmaking.

Barring such reform, all the war-powers legislation on earth won’t go but so far in restoring a congressional voice in use-of-force decisions.

Mr. ZABLOCKI. It was proposed in hearings in the past that a joint committee on information be created. Do you think this might resolve the problem?

Mr. REVELEY. One problem with joint committees is that they tread upon other committees’ jurisdiction and thus often do not end up very effective.

Mr. ZABLOCKI. One effective role that a Joint Committee on Information could play would be when Congress is not in session. It could receive the reports without calling the Congress into session.

Mr. REVELEY. If we were starting from scratch, it would be useful to have a Joint Committee on Foreign Affairs, like the Joint Committee on Atomic Energy, with legislative teeth, without significant competition from other committees. That would be the most rational way of going about it, but since we are not starting from scratch, I don’t think that sort of solution is realistic.
COORDINATION BETWEEN CONGRESSIONAL COMMITTEES

But how do the Foreign Affairs Committees in both Houses coordinate their work with that of the Armed Services Committees, and the Appropriations Committees? How are foreign affairs priorities set and followed in Congress? These sorts of problems of internal organization I think, have to be confronted if Congress is to effectively re-establish itself on foreign affairs.

Mr. Zablocki. If I may go to another troubling issue, and either one of you may respond if you wish.

Professor Bickel testified yesterday that he does not believe the 30-day provision contained in S. 440 is essential to the operation of the bill. But that section 3 of S. 440 is essential.

Would you care to comment?

Mr. Reveley. As far as the 30-day provision goes, it is most unfortunate, because it would enable Congress to pocket veto Executive action, to terminate a use of force without a decision on the merits. I think that if the S. 440 approach is taken, yes, section 3 is needed to make it effective, because, unlike the 30-day proviso, that section spells out when the President can act by himself and when he cannot.

Mr. Zablocki. The second congressional prerogative to which you refer on page 24 of your statement, Mr. Reveley, is the right to limit or terminate the use of force at any time following the President’s report by a majority vote of both Houses.

What exactly do you mean by saying “to terminate and limit”?

DEFINITION OF “TERMINATION”

Mr. Reveley. By termination, I mean a congressional resolution saying the country is not to be involved in that particular conflict.

Should such a resolution pass, then I think the President must terminate American involvement. He may do so in a manner consistent with the safety of American forces during the withdrawal process.

Mr. Zablocki. In your opinion a concurrent resolution would be of sufficient statutory force?

Mr. Reveley. Yes, I don’t think the President has to sign the resolution. A different situation exists before the President has committed troops. Then it is up to him to sign or veto, because at that point he has not yet exercised his half of the joint responsibility that he shares with Congress over the involvement of this country in hostilities.

But once he has already committed troops, then Congress by a concurrent resolution may terminate American involvement.

By congressional authority to “limit” American involvement, I mean limits on such matters as the geographical areas where force may be used, ceilings on the number of American troops to be committed, restrictions on the use of nuclear weapons.

Mr. Berger. May I furnish a legal basis for Mr. Reveley’s proposition?

CONGRESS ALONE CAN WAGE WAR

Do you remember I read to you the statement by Madison that Congress alone can wage, continue or terminate war. You remember that?

Mr. Zablocki. Yes, sir.
Mr. Berger. Now if Congress is to do that, if Congress seeks to terminate a war, and if the attempt is subject to the veto of the President, Congress has been deprived of the power that Madison says it has.

The President is the “first general.” He cannot compel Congress to continue a war against its will so the only medium that is left to it is a concurrent resolution. In short, the power of Congress to terminate a war is plenary.

Mr. Reveley. I ought to qualify what I said.

I don't think Congress constitutionally could terminate a use of force by the President that is directly essential to the physical protection of American territory. Let’s remember that the President was named Commander in Chief by the Constitution and that among the powers expressly given him by the Framers was authority to repel invasion.

Mr. Berger. He was not repelling it as President; but as Commander in Chief, as Rogers explains, I would agree only partially that you cannot stop his use of force in defending the United States. There could conceivably come a time when the people of the United States would say, “let’s call a halt no matter what it costs.” For example, what led the Japanese at Hiroshima to say “enough.” You do not have to permit the President to have the United States bombed back to the stone age.

GENERATING CONSTITUTIONAL CRISIS

Mr. Reveley. I think you would have a constitutional crisis of the first water in that case, because a plenary Presidential obligation under the Constitution to defend the country would oppose a plenary congressional right under the Constitution to judge whether the benefits of American involvement in war are worth the costs.

I don’t think the constitutional dilemma would be susceptible to any sort of simple answer.

Mr. Berger. You create a dilemma by using a joker, the word “plenary.” I never thought of the power of the Commander in Chief as plenary.

Mr. Reveley. You read it much too narrowly.

Mr. Findley. Our troops are nearly out of Vietnam, our POW’s are nearly home and within a few days perhaps both projects will be completed.

If after that date bombing continues in Cambodia by U.S. military planes, could the Congress by a concurrent resolution effectively stop the President from continuing such attacks?

END BOMBING THROUGH CONCURRENT RESOLUTION

Mr. Reveley. Not just by arguing that Congress may constitutionally end the bombing by passing a concurrent resolution. The President would very likely regard such a resolution as advisory only, in light of the present disagreement and confusion in the country over war-powers constitutional law. If, however, Congress were willing to back up the resolution by cutting appropriations necessary to the bombing or by sanctioning the President in other areas, he might heed the resolution, without conceding that he is constitutionally required to do so.
To establish the constitutional point, if it can be established, will require a change in executive thinking and habits—a change that could be begun by passage of war-powers legislation that requires Presidential reporting and that guarantees Congress a meaningful, early opportunity to express its will on American involvement in hostilities.

Mr. BERGER. The source of Mr. Reveley's doubt about constitutional certainty arises from the practices of the President. Presidential usurpations do not impeach the clear delineation of powers in the Constitution; I cannot buy this "constitutional uncertainty" argument.

No. 2, I would differ about this question of the effect of a concurrent resolution very vigorously. I want to remind you that, in one of the soldier's cases brought to stop the Vietnam war, one of the circuit court judges of the First Circuit said the case would be different if Congress were here asking us to stop the war. I cannot put my finger on it but I remember it.

USURPATION OF CONGRESSIONAL POWER

I cannot conceive that a court that would stop Truman in the middle of the Korean war from seizing a steel plant when he said a strike would disrupt all our steel production necessary for armament, that that court refuse to decide a claim by Congress that "there is a usurpation of congressional power and we want a halt to this."

Gentlemen, I say you have to decide what your rights are; if you don't do that, you're always going to be stepped upon.

Mr. ZARDOCKI. Mr. Reveley.

Mr. REVELEY. Let me lay one ghost, or what I think is a ghost, to rest. That is Professor Berger's assumption that only the President has claimed for himself a broad constitutional prerogative to use force.

Some of the most eloquent statements regarding Presidential prerogative were made in the Senate during the debate over the constitutionality of Truman's action in Korea, and thereafter until the souring of the Vietnam war.

Mr. BERGER. That is a count of noses, and Congressmen can be as wrong as the President. A plague, a pox on going back to these pseudo authorities.

THE "HOLY WRIT" OF CONSTITUTION

I want to go back to what Mr. Reveley calls "holy writ." He admits that for 100 years, "holy writ" prevailed. He admits the people believed in "holy writ," that is the Constitution. What right do we have to frustrate that belief in the intention of the Framers?

Mr. REVELEY. It started with George Washington.

Mr. BERGER. I would like to debate George Washington with you. I think I am familiar with what George Washington did do. I can read you something for the record, what George Washington said. George Washington said in his farewell address, "Don't usurp a power even when you think you are doing something good because the example you thereby set is worse than the good you accomplish and will destroy the Nation." Those were George Washington's last words.
In any event I started out by saying I did not want you to accept a bunch of opinions merely because they concurred with mine. That is a count of noses. I remind you what Professor Bickel said, "I believe in the Constitution." And that is what Professor Schlesinger said.

If we don’t like the Constitution let’s submit the issue to the people without any Madison Avenue euphemisms. Tell them the President thinks he has to be able to run this country alone and Congress be damned; and maybe Congress will be in such disrepute that the people will give it to him.

ELITIST GROUP MAKING DECISION

I will accept that, but I don’t want a little elitist group making that decision.

Myres McDougal, a well-meaning man and fine gentleman, was afraid in the midst of World War II that we would have a band of willful men such as were led by Senator Lodge that would defeat the new League of Nations. He cried “Damnation on what Lodge did in the World War”; therefore we have to deprive this minority of the power to do that. The way to do that, he proclaimed, is to recognize that the Constitution has been changed: adaptation by usage. He made an elaborate argument for executive agreements.

What did he emerge with? Instead of a little undemocratic “minority”—one-third of elected Senators from all over the country—he has the President making executive agreements by himself.

Secret agreements the Senate cannot find out about. That is the kind of thing philosophers can emerge with. They do not look around the corner to see what may ensue. I would rather live with the wisdom of Madison and Jefferson and not McDougal. He argued for presidential agreements. I have chapter and verse on that. He went so far as to argue that there are certain agreements made under the independent power of the Commander in Chief that cannot be touched by Congress. Think of it, Congress by a statute can repeal a treaty, but it cannot repeal an executive agreement which is not mentioned in the Constitution.

NO PROPRIETARY INTEREST IN INFORMATION

I want to add one thing. Set up your own information gathering, says Mr. Reveley. The President does not have a proprietary interest in information which costs us millions to collect. Congress has set up the most elaborate information collecting machinery in the world and has made the mistake of depositing it in executive agencies. Now Mr. Reveley tells us “Let’s duplicate that.”

Deputy Comptroller General Robert Keller testified that when GAO tried to duplicate one little segment in Southeast Asia it cost us $170,000. Multiply it. I am a taxpayer. Why should we duplicate it. History shows that there is a plenary congressional right to require information from the Executive.

The Supreme Court said Congress has attributes of the legislative power that were enjoyed by Parliament: Parliament enjoyed untrammeled power to inquire. You have a right to information and I
would agree with you Mr. Chairman. Information is at the root of good government.

Now, on confidentiality. The other day John Stevenson, former legal adviser to the State Department, came down to a conference in which I participated, speaking as gently as a sucking dove, telling Congressmen: "We will work this out; let us cooperate."

They always talk like that when they are under the gun.

CONGRESSIONAL PARTICIPATION IN TREATY MAKING

In the treaty field I would say to the Senate, you are entitled to participate in treaty making from the word go, from the beginning, not just to serve as a rubber stamp. May I remind you that when you are playing with a fellow that plays tough, you have to respond in kind or you are just going to be beaten down to the ground.

Mr. Zablocki. If I may pursue the provision of congressional right to limit or terminate use of force. Would you argue that it would be advisable to spell out in the resolution the procedure for congressional action in this area? Or do you prefer ambiguous language?

Mr. Reveley. My preference is not to spell it out, though I believe that I did so in my alternative, more detailed war-powers proposal. Section 7 of that proposal, on page 32 of my written statement, says:

"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 or limit or terminate American involvement."

By that, I mean congressional action through a concurrent resolution. In other words, Congress would not need to get Presidential signature or override Presidential veto in order to limit or terminate a use of force begun by the President without prior congressional approval.

Mr. Zablocki. Do you prefer your more detailed war-powers act proposal or the simpler one?

THE EVOLUTION OF CONSENSUS

Mr. Reveley. I prefer the simpler one for two reasons. First, because it covers less ground, it would be easier to understand and more likely to be followed to the letter. War-powers legislation must be understood and obeyed if it is to provide the starting point for the evolution of consensus about the pertinent constitutional rules, and if it is to push Congress and the President out of their present acceptance of executive dominance.

Second—I realize I keep saying this—a reassertion of congressional authority over the war powers depends much less on war-powers legislation than on the further development of congressional capacity and will to participate in use-of-force decisions, and on the exercise of that capacity and will through processes already in existence.

Mr. Zablocki. Gentlemen, you have been most generous with your time, however, I have one further question of Mr. Berger.

As you recall, in his testimony yesterday, Professor Schlesinger noted the Davis' bill must be submitted to the test of practical historical applicability in order to test the wisdom of the proposal. In your statement today you note it is not your purpose to defend the wisdom
of the proposal but rather its constitutionality which has come under attack.

I would appreciate your comment on the wisdom of S. 440 and how it might have affected past situations.

For example, is it your contention that if S. 440 had been law in 1960 the United States would likely not have become embroiled in the Vietnam war.

INITIAL ACTION ON VIETNAM CONCEALED

Mr. Berger. I think a President would have had very serious thoughts about embarking on the measures he did embark on. Of course our problem there is that a great deal of what was done was concealed initially. If you go through the Pentagon papers—some of it is summarized in Halberstan’s book “The Best and the Brightest”—a lot of this was covert. For example, we were never told that we were waging clandestine war. We were never told that prior to the Maddox there was a scheme for sending forth Vietnamese raiders. We did not man them, but it was planned that they would conduct raids, and we were right in that area where we could get shot at. Legislation without a curb on deployment might not have it done. But I would say this: had you known that 15,000 men were being sent into combat, some Congressman could raise it on the floor and say, “This is prohibited by statute; and let’s go on from there.”

I might say I am not enamored of suits by individual Congressmen even for causes that I like. I like Congress to act as a body. That is what it is supposed to do. I am prepared to accept defeat at the hands of Congress as a body. I have trust in its collective judgment. When I stop having that I have to stop being a democrat.

The wisdom of this for me springs from a deeper well. Mr. Chairman, than testing any given commitment, whether it be the commitment of 15,000 troops or later 200,000 troops. It springs from the crying need for an assertion by the Congress of its constitutional rights. It needs to say, “Stop this constant erosion and invasion of our prerogatives.” We have a function to perform in interest of the democratic process.

RESTORING CONSTITUTIONAL BALANCE

The first step is a construction by yourself of your own powers. The reason I like section 3 is not for what it can do. I did not stop to weigh on pharmaceutical scales what it can do. The reason I like section 3 is because it seeks to restore what is the original constitutional balance, equilibrium. Mr. Reveley would not deny that it was the intention of the Founders that Congress would have the vast bulk of the war powers and the only Presidential initiative would be on the invasion of the United States. That was admitted by the legal advisor of the State Department in 1966 and that it what section 3 says. If it does nothing else it will have one great virtue if we pass it. I think the President can then be halted in his tracks as a lawbreaker, and he should be.

I think it is an affront to our legal system to stomach violation of the law by the President. You cannot ask a highwayman on the street to obey a law if you cannot ask your President to obey a law. If I were in Congress I would stop at nothing to see that the President obeys the law. No doublespeak about it.
EXPRESSES APPRECIATION TO WITNESSES

Mr. Findley. I would like to express my appreciation to both of
these men for testifying today.

I would like also to assure Mr. Berger that at least one Republican
shares his convictions that he has just expressed so eloquently—it
is not just Democrats that feel that way—and also to ask unanimous
consent to include in the record the text of a letter from the Director
of the CIA dated September 28, 1972, which sets forth very clearly
the problem the Congress confronts in trying to make itself better
informed and have access to information in the executive branch.

[The letter referred to follows:]

CENTRAL INTELLIGENCE AGENCY,
OFFICE OF THE DIRECTOR,

Hon. F. Edward Hebert,
Chairman, Committee on Armed Services, House of Representatives, Washing­
ton, D.C.

Mr. Chairman: This is in response to your request for recommenda­
tions concerning H.R. 10204 and an identical bill, H.R. 16334, "To amend the
National Security Act of 1947, as amended, to keep the Congress better informed
on matters relating to foreign policy and national security by providing it with
intelligence information obtained by the Central Intelligence Agency and with
analysis of such information by such agency."

Generally, H.R. 10204 and H.R. 16334 require the transmittal of certain
Agency information and analysis and the performance of certain activities for
the Senate Armed Services and Foreign Relations Committees and the House
Armed Services and Foreign Affairs Committees. Specifically, the bills:
(a) require full and current Agency reporting and analysis to the com­
mittees of all intelligence information collected by the Agency concerning
relations of the United States to foreign countries and matters of national
security;
(b) authorize any one of the four committees to impose special reporting,
analysis, and, implicitly, related collection requirements upon this Agency;
(c) provide access to this information and analysis to all Members and
all congressional employees designated by a Member and determined by the
committee concerned to have necessary security clearances.

As you know, we have consistently made ourselves available to a number of
congressional committees to provide substantive intelligence briefings and to
answer questions which fall within their jurisdiction. The principal recipients
of these briefings are: the Aeronautical and Space Sciences, Appropriations,
Armed Services, and Foreign Relations Committees of the Senate; the Ap­
propriations, Armed Services, Foreign Affairs, and Science and Astronautics
Committees of the House; and the Joint Committee on Atomic Energy and the Joint
Economic Committee. This current arrangement appears to have been satisfac­
tory from the standpoint of the committees and has not been inconsistent with
the responsibilities Congress has imposed by law upon the Director of Central
Intelligence to protect intelligence sources and methods.

H.R. 10204 and H.R. 16334, on the other hand, pose a number of serious
problems:
(a) The authority of congressional committees to impose special reporting,
analysis and related collection requirements upon the Agency appears
not to be in conflict with the constitutional separation of powers by subjecting
the Agency to executive direction from two separate branches of Government;
(b) The five-fold increase in the number of statutory clients for the
Agency from one (the President as Chairman of the National Security
Council) to five (the President and four separate committees of the Con­
gress) would diminish the Agency's resources and capability to serve any
one of its clients and inevitably lead to irreconcilable conflicts of priority
and interest;
(c) Widespread access throughout the principal political branch of our Government to all Agency information and analysis made available to the four committees would tend to politicize that which must remain apolitical to retain its value:

(d) It is impossible to divorce completely all of the intelligence information subject to the bills from the sources and methods used in its collection. Any derogation in our ability to protect such information increases the possibility that vital sources of information will be irrevocably lost.

In view of the above considerations, I believe that enactment of either H.R. 10204 or H.R. 16334 would jeopardize the performance of the functions imposed upon this Agency by the National Security Act of 1947 and recommend against their favorable consideration by your Committee.

The Office of Management and Budget advises that there is no objection to the submission of this report and that enactment of either H.R. 10204 or H.R. 16334 in their present form would not be consistent with the Administration's objectives.

Respectfully,

RICHARD HELMS, Director.

Mr. Berger. I want to thank you, Mr. Chairman, for the privilege of testifying for I do count it a great privilege.

Mr. Beverley. And I also, Mr. Chairman.

Mr. Zablocki. Thank you, gentlemen. We appreciate your testimony. It has been most enlightening and some of your suggestions will receive full consideration.

The subcommittee stands adjourned until 10 a.m., Tuesday, March 20, when we will hear two respected members of the bar, both of whom are distinguished, former Government officials but currently engaged in private practice.

They are: The Honorable Herbert Brownell, former Attorney General, and the Honorable John Stevenson, former Legal Adviser to the Department of State.

Thank you, gentlemen.

[Whereupon, at 5 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Tuesday, March 20, 1973.]
The subcommittee met at 9:30 a.m., pursuant to call 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 convene this morning what is scheduled, as of now at least, to be the last session in our hearings on war-powers legislation. Earlier testimony from a variety of witnesses has amply demonstrated the complexity of this issue. Rather than shy from that complexity, however, the subcommittee is more determined than ever to face its challenge responsibly and hopefully report meaningful legislation.

Here to assist us this morning in that effort is Mr. John Stevenson. Formerly legal adviser to the Department of State, Mr. Stevenson is now engaged in private practice as a member of the bar in New York City.

Mr. Herbert Brownell, former Attorney General, was also scheduled to testify this morning. However, because of an emergency he has been prevented from doing so.

Mr. Stevenson, if you will proceed please.

Mr. Stevenson has appeared before this subcommittee in the past and has given excellent testimony. We look forward to your words of wisdom this morning.

STATEMENT OF JOHN R. STEVENSON, NEW YORK BAR

Mr. Stevenson. Thank you very much, Mr. Chairman. I appreciate very much the opportunity to appear again before this subcommittee. I have a strong personal interest in the subject matter of these hearings which I have had the opportunity to discuss with you previously in my then capacity as the legal adviser of the Department of State. I appear today as a private citizen and member of the bar with no official standing. My statement expresses solely my own personal views and is in no sense intended as a statement of past or present administration policy.

You have asked me to comment on three presently pending bills—House Joint Resolution 2, H.R. 317, and S. 440. In the first instance, however, I would like to make a somewhat more general statement
directed at what I consider to be the central constitutional and policy question involved in these bills, namely, the attempt to define by statute the extent of the President's power to use the Armed Forces.

OF DOUBTFUL CONSTITUTIONALITY

In brief summary, it is my opinion that to the extent the various war powers bills attempt to define the President's powers to use the Armed Forces they are of doubtful constitutionality; that such definition by way of a constitutional amendment, while legally valid, would not be desirable since it would both unduly restrict the President in certain circumstances and appear to give him a blank check in others; and, finally, that such bills do not meet the basic problem which is, in my view, not one of legislative or constitutional definition, but rather of effective cooperation and consultation between the Congress and the President in discharging their respective independent and shared constitutional responsibilities.

A. In the first place, defining the President's powers would be of doubtful constitutionality. The reasoning underlying my views is as follows:

Both Congress and the President have constitutional powers with respect to the Armed Forces of the United States and in this area of shared constitutional powers it seems to me particularly inappropriate for one branch of the Government to attempt to define the reach of the other's constitutional powers. The fundamental constitutional principle of the separation of powers clearly contemplates that in this important area of shared responsibilities the two branches of the Government will cooperate in the exercise of their shared and independent responsibilities with differences to be resolved not by legislation or judicial interpretation, but by mutual accommodation springing from political interaction between the two branches and with the electorate.

The courts, for their part, have been most reluctant to interfere with the political processes in this area. The District of Columbia Court of Appeals has stated the judiciary's views very succinctly as follows:

"NECESSARY AND PROPER" CLAUSE NOT SUFFICIENT BASIS FOR CONGRESS

I am not impressed with the argument that Congress' power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States * * *" is a sufficient constitutional basis for defining the President's constitutional powers. While admittedly this clause gives Congress the authority to execute and implement powers of the other branches of the Government, as well as of those of Congress, it should not be read as giving Congress the authority to overturn the constitutional balance between the Congress and the President. That would not be to execute but rather to extirpate.
There is no judicial authority for the proposition that the "necessary and proper" clause was intended to limit the principle on the separation of powers. Alexander Hamilton indicated in The Federalist papers that it was intended principally to guard against an excessively narrow construction of the authority of the National Government versus that of the States.

Second, definition of the President's war powers by constitutional amendment would not be in the national interest:

While, of course, the definition of the President's powers to use the Armed Forces would be constitutionally valid if effected through a constitutional amendment, such an amendment would in my view not be in the national interest.

UNDERCUTTING PRESIDENT'S FOREIGN POLICY ACTION

Such definition would seriously undercut the President's power to conduct an effective foreign policy, on the one hand, while on the other hand would in many cases not effectively prevent, and might even exaggerate, the involvement in hostilities which the sponsors of war powers legislation seek to prevent.

I will not give you an extensive list of specific horrors that might result from the enactment of such a definition since I believe a number of other witnesses in this and prior hearings have already done so. Let me state the relevant consideration in a more general way:

(1) We are not wise enough at this time to foresee in advance all possible cases in which it may be necessary for the President to have emergency power to employ the Armed Forces. As Alexander Hamilton so correctly states in the Federalist No. 23 "the circumstances that endanger the safety of the Nation are infinite."

(2) On the other hand, in other cases the proposed definition could be regarded as clearly authorizing action with respect to which a more cautious approach would be taken by the President in the absence of such definition. Where a particular action clearly falls within the definition's permissive authority for Presidential action (without congressional authorization until some later date), it might well be that future Presidents in these circumstances would in effect feel that Congress had affirmatively authorized such action and not address the question of appropriate congressional consultation in the light of the particular facts of the particular situation.

PREVENTING FUTURE VIETNAMS

(3) Definition of the President's powers would be of little utility as a means of preventing future Vietnams. In view of the historical fact of general congressional support for the administration's Vietnam policy at the time of the original commitment of U.S. combat forces, as evidenced by the passage of the Tonkin Gulf resolution and other congressional actions supportive of such commitment, it would seem entirely probable that, had the proposed definition of the President's authority been in force, the President would have obtained the requisite congressional authorization required under the proposal. He thus, in effect, would have had even clearer authorization than was actually the case in the absence of such definition.
Finally, in my view, the constitutional definition obscures the basic problem. By concentrating on the necessity for formal authorization by Congress, the constitutional definition approach to the exercise by the President of his powers to use the Armed Forces obscures and neglects what in my view is the basic problem—that of achieving more effective cooperation and consultation between the executive and legislative branches.

What should be done?

First, let me state that I am not for one moment maintaining that the present situation is a desirable one or that no steps are necessary to provide for more effective cooperation between the executive and legislative branches in meeting the critical questions involving the use of our Armed Forces which this and subsequent governments must meet at the present time and in the years ahead.

I would urge, however, that a solution be looked for and worked out within the existing constitutional framework which recognizes that this is an area of shared powers with the problem of coordination to be resolved through the political processes and not by constitutional, legislative or judicial definition. With cooperation such definition would be unnecessary; without cooperation, it will be ineffective and will only raise false hopes that through legal formulas we can solve what are basically political problems under our separation of powers system.

**IMPROVING COOPERATION ON INFORMATION**

Second, I would hope the Congress will accept the offer by the Secretary of State and other administration spokesmen to cooperate in improving the process of informing and consulting with the Congress. In this respect I have two specific suggestions and a caveat.

First, I suggest that there be regular briefings and consultations, not merely in times of crisis but also on a regular basis, as Secretary Rogers proposed to the Senate Foreign Relations Committee.

With a background of regular consultation in respect of the problems of a specific area and appreciation of the various considerations involved in foreign policy decisions in which use of the Armed Forces might conceivably be involved, it will be much more feasible to act speedily in a crisis and, where the occasion demands, without publicity, yet with the benefit of advance consultation with Congress. Moreover, with this sort of history of regular consultation, I would hope that there would be much greater confidence on the part of the executive branch in the benefits of consultation in advance of the action.

Second, it seems desirable that consideration be given to means of institutionalizing consultation with Congress in respect of the use of the Armed Forces.

This could be achieved, as a number of Congressmen have suggested, by the establishment of a special joint committee of the Congress. Institutionalization would have the advantage of providing the President with a definite group—recognized by Congress to speak for it in this area—with which the executive branch could develop the habit of working with confidence and mutual trust.
ACHIEVING APPROPRIATE SECURITY PROTECTION

Moreover, such a joint committee would facilitate the problem of working out an appropriate solution to the difficult question of achieving appropriate security protection for the highly confidential information which will inevitably form the basis for effective consultation in many of these crises.

So much for my two specific suggestions. Now for the caveat. While this may in part reflect my past 4 years' participation in the executive branch of the Government, I do not think it inappropriate to point out that consultation to be effective must be a two-way street. Congress must be willing to organize itself in such a way that consultation will be a continuing process in times of relative calm as well as crisis. Moreover, Congress must in effect be willing to assume the responsibilities inherent in advance consultation and forego the luxury of holding the executive branch solely responsible—on the basis of 20-20 hindsight—for action taken in crises.

Whether or not these specific suggestions commend themselves to the subcommittee, I would also like to urge what might well be considered as procedural suggestions in dealing with this issue of the use of the Armed Forces. I believe that the various war power bills represent the most significant and far-reaching proposals relating to the President’s authority in the foreign affairs field that Congress has ever made. In view of their importance and the fact that we now have the opportunity as a result of the termination of the U.S. military role in the Vietnam conflict to consider these issues on their merits as they relate to this country's future and without the distraction and distortions imposed by our domestic differences over Vietnam, I would urge the fullest in-depth consideration of these proposals before Congress acts.

CONGRESS, PUBLIC, UNAWARE OF ISSUES

I am quite aware of the extensive hearings which this subcommittee and the Foreign Relations Committee of the Senate have held in this area, but the fact remains that, until the debate in Congress last spring, not only the public at large, but most of the informed leaders of the country were not aware of many of the important issues raised by these proposals. In point of fact, no representative of any organized bar association has appeared before this subcommittee or the Senate Foreign Relations Committee and it is my understanding that the study which the American Bar Association is conducting in this area has not yet been completed.

I recognize the concern of many with respect to the existing situation as well as the suspicion that a request such as this may be a delaying technique—although I assure you it is not. I do urge, however, that this subcommittee continue its considered study of alternative approaches to the very real problem with which you have been concerned. In this connection I respectfully urge that you indicate your interest in receiving the views of representatives of bar associations and other informed citizens’ groups throughout the country.

Against this background of my general views, let me speak very briefly on the three pending bills on which you have asked my comments.
1. S. 440. This Senate bill, which is in effect the same bill which was passed by the Senate last year, represents the definitional approach to the war powers question in its most comprehensive form. For the reasons indicated above, I strongly oppose the attempt to define in advance, whether by statute or constitutional amendment, the circumstances in which the President may make emergency use of the Armed Forces without congressional authorization and to require the termination of such use of the Armed Forces within 30 days if Congress has not acted. Moreover, predetermining this authority on the necessary and proper clause tends to undermine our separation of powers principle.

WELCOMES REPORTING PROVISIONS

I have no objection to the reporting provisions of this legislation; in fact, I welcome them, but I note with regret that there is no reference whatsoever to what I consider the basic problem in this area—consultation between the President and the Congress.

2. H.J. Res. 317. I see no objection to Congressman Bingham's proposal for prompt reporting, although I would prefer a provision for the President to convene a special joint committee rather than the entire Congress, when Congress is not in session.

I strongly oppose his provision purporting to terminate the President's authority to use the Armed Forces—in the absence of express congressional authorization—by a resolution adopted by either House of Congress. Such a proposal seems to me to purport to deprive the President of his constitutional authority by the action of one House of Congress alone. Moreover, it seems to raise an additional constitutional question. For even if Congress did have the power to terminate the President's authority in all circumstances, that power would surely be vested in the Congress as a whole and not in one of its Chambers acting alone.

HOUSE JOINT RESOLUTION 2 SENSIBLE, REALISTIC

3. House Joint Resolution 2. This new House bill, which you, Chairman Zablocki, and other Members of this subcommittee are sponsoring, continues in some respects the sensible and realistic approach to this problem reflected in House Joint Resolution 1 passed by the House of Representatives in the 91st Congress. It does so by its emphasis on consultation and prompt reporting of the use of the Armed Forces. However, regrettably it was moved to adopt in part the constitutional definition approach by attempting to limit in advance, albeit by much more general language than S. 440, the President's use of the Armed Forces. It is preferable to S. 440 because of its generality and because it does not provide for termination of the President's authority within 30 days in the absence of congressional action. However, like all definitional approaches it raises a constitutional issue and may not cover all necessary uses of the President's emergency powers, and may, on the other hand, suggest that the President need not take as cautious an approach in some situations as he would in the absence of this definition.

My own strong personal preference is for House Joint Resolution 1 in the form reported by this subcommittee and passed by the House.
of Representatives last year. If the Members of the subcommittee consider that some strengthening of that bill is necessary, I would recommend that, rather than crossing into the quagmire of constitutional definition, the subcommittee give further consideration to means of strengthening and institutionalizing the consultation process between the executive branch and the Congress.

Thank you very much.

JOINT COMMISSION ON INFORMATION

Mr. Zablocki. Thank you, Mr. Stevenson.

I presume your recommendation in your final sentence refers to a joint commission on information which would receive the consultation and reports from the executive branch, particularly when Congress is not in session. Is that your intention?

Mr. Stevenson. That seems to be the specific suggestion that has attracted the most support. I think there may be other supplementary ways of improving the consultation process by also having regional subcommittees to confer with State Department officials on particular areas as a way of keeping the Congress as a whole informed. But with respect, though, to this particular problem of the use of the Armed Forces, I think the special joint committee is probably the most effective institutional suggestion.

Mr. Zablocki. As you well know, however, this subcommittee would be transgressing its authority if it attempted to provide a joint commission on information in this legislation. Under House rules this would have to be provided by the Rules Committee. Nevertheless, I would hope that the Foreign Affairs Committee would strongly recommend such a joint commission on information in the report accompanying the resolution which we will report for action to the Congress.

You raise a constitutional question regarding section 3 of House Joint Resolution 2. It was merely added to clarify section 2 of House Joint Resolution 1 in the 92d Congress which is still contained in House Joint Resolution 2, where the Congress recognizes that the President in certain extraordinary and emergency circumstances has the authority to defend the United States and its citizens without specific prior authorization by the Congress. Therefore, I cannot really see why this would raise a constitutional question not where it departs from a responsible position.

OPENING DOOR TO CONSTITUTIONAL DEFINITION

Mr. Stevenson. Mr. Chairman, as I indicated this is a very general statement and as a practical matter, I would not at this point anticipate great difficulties with it. However, I think once the door to constitutional definition is opened, that it is very difficult to then in the future argue that a definition going somewhat further is objectionable on constitutional grounds, and I think we do have a dual question here, the constitutional question as well as the question of practicality. It has also seemed to me that while both the Congress and the Executive are entitled to their own views of how the Constitution should be interpreted; that once you go beyond the stage of interpretation in a sense the Congress resolution, which you are certainly entitled to do (as to
how you view the application of particular provisions) to an attempt to say what the President's constitutional powers are, I then have trouble, under our constitutional framework.

Moreover, I also am concerned about overturning what seems to me the wisdom of the founding fathers in not attempting to be too specific about what the situation might be in the future and so, therefore, while this section really is very general and in that sense, much preferable from a practical standpoint to the Senate proposal. I still would much prefer to not see you turn toward the definitional route, or if you do, I would hope it would be in the form of a sense of the Congress resolution rather than an attempt to legislatively state what the President's powers are.

Mr. Zablocki. Our intention is merely to restate these powers.

Section 6 is another addition to House Joint Resolution 1 which has been passed by the last two Congresses. It provides for congressional action. You have not addressed yourself to this section. Would you care to share your views with the subcommittee on the validity and desirability of section 6?

Mr. Stevenson. Certainly. If in fact, you do wish to provide for the Congress assembling and considering these reports, I see no constitutional problem in providing for this action. However, I would question whether it is desirable in all cases to create the more or less crisis atmosphere convoking the two houses of Congress if they are not in session, might cause. I think in this area there is an overlay with the suggestion with respect to having some sort of a joint committee because it seems to me in some circumstances a report of this nature would be more appropriately dealt with by a joint committee than by the Congress as a whole. I think this is particularly true when you look at some of the specific reporting requirements.

Your legislation, Mr. Chairman, not only deals with situations involving hostilities but even where there has been an enlargement of our military forces at overseas stations. So it would seem to me that it might be much more appropriate to at least in the first instance or at least in some of the circumstances, provide for joint committee action rather than action by the Congress as a whole. This could also have the advantage of enabling more effective consultation and speedier action and, in some cases where it is necessary, action without publicity.

Mr. Zablocki. Such a joint commission could then recommend whether any congressional action would be warranted.

Mr. Stevenson. Exactly. I am not saying that I might not want to go on to the next step, if it were serious.

Mr. Zablocki. In previous testimony the recommendation has been made repeatedly that Congress should pass the strongest legislation possible, probably S. 440. Even if the President vetoes it, and even if Congress in either body could not override the next action of the Congress should be a concurrent resolution. In view of your statement on page 2 that rather than bills attempting to define or codify by legislative action, constitutional war powers, it would be preferable to promote effective cooperation and consultation between the Congress and
the President in discharging their respective independent and shared constitutional responsibilities, what actions of Congress would, in your opinion, enhance greater cooperation and consultation?

DEFINING PRESIDENT’S CONSTITUTIONAL POWERS

Mr. Stevenson. Mr. Chairman, it is my view that the attempt to provide by the strongest legislation—if by strongest you mean this attempt to define the President’s constitutional powers—is the least productive way to produce the consultation and cooperation which I think are so necessary. I think this tends to lead to fairly sterile constitutional confrontations, in an area in which the Judiciary, at least, indicates that you are not going to get final constitutional solutions. And I think it tends to impede the effective cooperation and functioning of the political processes which otherwise might enable us, at this particular time in our history, to make a fresh start. I think, as I said in my testimony, I think the fact that our military involvement in Vietnam has ended makes this a time where it could be possible to have effective and imaginative and constructive approaches to this problem of consultation and cooperation.

Mr. Zablocki. On page 5 you state that you are not “for one moment maintaining that the present situation is a desirable one or that no steps are necessary.” That would indicate that, contrary to what some people maintain, Congress should enact legislation. It would also indicate that there had not been effective cooperation and consultation between the executive branch and Congress in the past.

Mr. Stevenson. Mr. Chairman, I did state that and I also supplemented it by stating that I did not feel that effective consultation was solely the responsibility of the executive branch. I think if in fact we do establish institutional means of consultation and if Congress accepts the offers to work along these lines that the Secretary of State and others have made, I think we will have a vastly improved situation. I do not think that the cooperation and consultation has been as good as it might have been.

CONGRESSIONAL INITIATIVE ON CONSULTATION

Mr. Zablocki. To what degree, Mr. Stevenson, do you believe that congressional initiative in the area of consultation was thwarted by the executive privilege positions repeatedly taken by the Executive?

Mr. Stevenson. Mr. Chairman, I think we have been dealing with perhaps the most difficult situation you can have in terms of cooperation, namely, an ongoing conflict on which the President was doing his best to disengage the United States under honorable conditions. I think that that is the most difficult and trying situation in which to act and I think it is a situation involving his functions as Commander in Chief where he has responsibility to protect our Armed Forces which makes indepth consultation and secure use of classified information the most difficult of problems. My own feeling is—and I made this point in my statement—that with some sort of joint committee and with a growing mutual trust through the use of this joint committee, that a number of these problems would be much more manage-
able and you would not be forced to the executive privilege confrontation in the future. I think that in fact executive privilege has not actually been invoked as many times as has been suggested and I think while there can always be differences as to the necessity of invoking executive privilege in a particular situation, I think the principle itself is essential, particularly in the area of advice on matters of vast importance to our foreign policy.

Mr. Zablocki. Would you not agree nevertheless that in the recent years the Congress has shown a willingness to assume its responsibility, but the executive branch, under pretense of executive privilege, did not cooperate?

Mr. Stevenson. I could not accept that general statement because—

EXECUTIVE WILLINGNESS TO SHARE INFORMATION

Mr. Zablocki. Would you say there was willingness on the part of the Executive to share with Congress the information they have?

Mr. Stevenson. Well, Mr. Chairman, I can only say that I know for a fact that the Secretary of State on many occasions did offer to set up briefings and provide for regular briefings by Assistant Secretaries and I don’t think these opportunities were always taken up. Now, there have been other situations where Congress felt that they were not being as fully informed as they might have been. After all, we are all human and no one is perfect in this area. I have stated that I think that there could be improvement in this area and I am trying to look for the ways to achieve that improvement.

Mr. Zablocki. Let me share with you the frustration Congress has felt when we’ve accepted the invitation of the executive branch to be informed. We would meet in closed secret sessions. The same information and more appeared in the evening paper than we were told in secret in the morning. My point, of course, is that Congress has not really been leveled with in the past. I don’t think there was any effort or willingness on the part of the Executive to share with Congress. Let me ask you another question. Do you think the Executive would be more willing to share such information if we had a joint commission on information? Would the composition of such a commission make any difference?

IMPROVING CONSULTATION PROCESS

Mr. Stevenson. It is my personal opinion that it would improve the consultation process. I feel by the regular use of this committee, by the mutual habit of working together that would build up over the years, that there would be a common sense of confidence and willingness to consult much more fully. I think the experience of the Joint Atomic Energy Committee, which also deals with a highly sensitive area, is illustrative of an effective solution when you are dealing with areas where admittedly there is sensitivity if the information is not dealt with in a proper fashion.

Mr. Zablocki. Do you believe the executive branch would welcome such a joint commission on information? I ask this question because
in the past the executive branch was adamantly opposed to the suggestion of a joint committee on central intelligence, which would, in a sense, be a joint commission on information. What is the administration's position now?

Mr. Stevenson. As I stated at the outset, I am no longer a member of the administration. I am a private lawyer but I can refer you to Secretary Rogers' statement before the Foreign Relations Committee where he said he was quite prepared to work with Congress in this area. He did not go into any details and I think quite properly. The question of the organization of Congress is a matter for Congress in the first instance. But I would certainly hope that some proposal along these lines would be looked into and considered by the administration. I know there is considerable support among many serious students of this whole problem for this proposal. I think Dean Wilcox of the Johns Hopkins school who has had both executive branch experience and also was chief of staff of Foreign Relations Committee has made a very specific proposal along these lines. He certainly is one of the most constructive and impartial persons who has been considering this whole problem.

SUPPORT FOR JOINT COMMISSION ON INTELLIGENCE

Mr. Zablocki. I am fully acquainted with Dean Wilcox position. I believe when he was with the legislative branch he supported the Joint Commission on Intelligence.

I want to apologize to my colleagues for taking so much time.

Governor Thomson?

Mr. Tromsoe. Do you really believe that we have already passed the distractions and distortions, as you call them, imposed by the war in Vietnam, and we are now in a period of calm in which we can appraise these constitutional questions impartially and without regard to our recent unhappy experience?

Mr. Stevenson. As I said to the chairman, I am no longer a member of the administration so I can only express my hope as a private citizen that we are in fact past that involvement and that the very constructive agreements that have been negotiated are in the process of being effectively carried out. I think clearly the termination of this Vietnam experience, if my hopes and expectations are correct, certainly gives us an opportunity to deal with this problem in terms of the future, in terms of long-range general interests. I mean I am not suggesting—in fact, I was not saying we should act right now. I still think that some careful consideration should be given to this problem.

Despite my own efforts, both officially in the last year and since leaving the Government, I have not yet seen the serious attention to this issue by organized bar associations and other interested groups that I think the importance of the issue warrants. In the case of the Bricker amendment, you had a 3- or 4- or 5-year period of very intensive consideration, numerous bar association reports, and so forth, and I think that there is no necessity for too much speed in this area right now. But I think this period is much more propitious than when the Vietnam conflict was still in process.
WOULD LEGISLATION HAVE PREVENTED VIETNAM?

Mr. Thomson. If you review the testimony before the committee, there was hardly a witness that was not asked would a resolution of this kind have prevented Vietnam or if the President have authority to send troops into Cambodia or did he have certain powers to continue bombing and some of the testimony has gone to the questions of the extent of the Presidential powers to deploy troops outside of this country. Now do you believe that the President does have constitutional powers to station troops outside of this country?

Mr. Stevenson. Yes, I do. I feel that obviously Congress has a very definite role in this area. I mean there are numerous relevant congressional powers, but, of course, the most conspicuous is the congressional power of the purse. If you are going to have bases outside this country and are going to have troops in them, you need appropriations, so Congress very definitely has a role in that area. In fact, most of the agreements in this area do provide, if they are not previously authorized, that they are subject to congressional action with respect to the financial implications. There are other areas where Congress role is also reflected. So it seems to me that neither the President nor Congress can really act effectively in this area without cooperation between them. I think the best way to have cooperation is to have effective consultation.

Mr. Thomson. You think then the President was fully empowered to deploy our Navy off the coast of Israel during the 6-day war so that they would be in a position if needed or if he thought it in the interest of this country to use the power that we had there.

Mr. Stevenson. I think that each of these instances has to be looked at very clearly in terms of the then factual situation as to what the overall U.S. interest is in a particular situation and with, in my view, at least, the disability of having, where feasible, maximum amount of congressional participation. But I do feel that the President as Commander in Chief and as the Chief Executive of this country, clearly has and has traditionally had the right to deploy our Armed Forces, particularly our Navy in the best interest of the United States, at least as seen by him.

Mr. Thomson. You would agree with Professor Schlesinger then that if we had on the books S. 440, it would not have prevented Vietnam, but it might have prevented President Roosevelt engaging in a naval war with Germany prior to World War II because of the problems he was having with the Congress at this time.

Mr. Stevenson. I clearly indicated in my statement that this legislation would in my view not have prevented the commitment of our troops to Vietnam. You certainly had, at the time the commitment was made, evidence of congressional support. When you read the Tonkin Gulf resolution, that was adopted, it appears very similar to some of the sort of action that is contemplated under this statute. So I think in one respect the effect of this statute would have been to in a sense strengthen the decision that was taken rather than to in any sense have prevented it.
Mr. Thomson. What you are telling us is really that it is very difficult to define the constitutional powers of the President and if they can be defined, it would be inadvisable to write the definition into the statute or into the Constitution.

Mr. Stevenson. Those are exactly my sentiments.

Mr. Thomson. Thank you very much.

Mr. Zablocki. Mr. Biester, my colleague from Pennsylvania.

PRESIDENTIAL CAUTION IN COMMITMENT OF FORCES

Mr. Biester. I apologize for not having been here during all of your testimony.

I wonder if you agree that a President should be extremely cautious before placing the forces of the United States in such a position that hostilities are likely to result?

Mr. Stevenson. Certainly, as a matter of policy, I think any situation in which hostilities may result is one to be viewed with great concern.

Mr. Biester. I did not say concern. I said caution.

Mr. Stevenson. I also say with caution. In fact, you will note in my statement that one of my concerns is that under some of these proposals, the President might feel that if something came within the four letters of one of these definitions that that in effect exhausted his obligation to consult with Congress or be cautious. I do not feel that this legislation is going to result in the President’s being more cautious. I think perhaps the most troublesome part of it all is the Senate bill, where you have the 30-day proposal which might almost lead a President to take action during that 30 days that he might not otherwise take because of his concern about what would happen at the end of the period. So my own feeling is, if it is caution that we want, the best way to get caution is by improving the cooperation and consultation procedures and I think also your reporting provision is helpful in this regard. So that as I said to the chairman earlier, I was fully sympathetic to the earlier House bill and I am very sympathetic to attempts to institutionalize the cooperation and consultation procedure.

APPROPRIATENESS OF 30-DAY CLAUSE

Mr. Biester. Let me be sure I understand you. Are you saying the 30-day clause is inappropriate because it might induce a President to engage in conduct in which he thinks Congress might approve within that 30 days?

Mr. Stevenson. What I am saying is that with a 30-day proposal you face the Chief Executive with a time limit. By that time limit he is going to have to seek congressional approval or maybe a congressional debate. And I think that is the sort of pressure that may not be the most conducive to the sort of overall approach that I would like to have the President take. That is not my principal objection to that proposal, but you were talking about the question of caution.

Mr. Biester. I want to say to the matter of caution—and it seems to me every time we institutionalize caution in this area, we may be engaging in a beneficial act—it seems to me the provisions of practi-
all of these bills involves institutionalizing to a certain degree of caution on the part of any Executive in carrying out his powers as Commander in Chief. And I wonder what is wrong with that?

**Specific Conditions Contained in § 440**

Mr. Stevenson. In the first place, I do not accept your premise, because it seems to me where you have a bill like the Senate bill which does not even talk about consultation, the first thing you do is you see whether a particular action comes within the four specific cases that are being dealt with. And if it does, I would suggest that maybe there would be less Presidential caution in that situation than where it is not all that pressing. Now, you say well, isn’t the fact that the President is going to have to go to Congress in 30 days going to also induce him to be cautious. Well, certainly in some situations where the involvement is such that it is perfectly clear that he is taking the necessary action to exercise his constitutional powers in their narrowest sense, namely, to defend the United States against a sudden attack, there probably will be no problem in getting congressional approval. But in some of the other situations, where it is not all that clear what the situation is, I am somewhat concerned about the effect of a 30-day deadline and a public discussion at the end of that time. I am not saying that Congress should not participate, but I think there are many ways that it could participate without having that one fixed formula and that one deadline.

Mr. Biester. Again, I guess I am going to have to come back to a word you use and this time it is “clear.” If it is not all that clear he may even feel inhibited in his action. Do you think he should commit forces of the United States in circumstances which may directly result in hostility unless it is clear to him that it is in the best interest of the United States and if he cannot convince the Congress of the wisdom of the clarity of his position, do you think he should go ahead?

**Acting in Responsible, Cautionous Way**

Mr. Stevenson. To answer your last question, I agree with you completely. I think he should not. I think obviously, at least in my view, the President should be acting in the responsible, cautious way but there are situations that are very complex and where the time when you take certain action may be just as important in terms of the national interest as the specific action that you take and there may also be other circumstances in which consultation with a committee of Congress that could be conducted privately might be more in the national interest than a general debate. So I am not disputing your point, but I think it is too much of a straitjacket. I would like more flexibility.

Mr. Biester. Would you clarify for me—and I should like to clear this up—I apologize for asking you—the concept of “letters of marque and reprisal.” I have a recollection that those are authorizations to privateers in a nonwar situation. Am I correct about that?

Mr. Stevenson. My history is a little rusty on this, but I think this goes back to an earlier day when it was customary without declaring war, without, in fact being engaged generally in hostilities,
for governments to authorize privateers to carry on certain actions and
I think these provisions of our Constitution reflect really the practice
of earlier day rather than the present day situation.

Mr. Bieker. I would be correct, would I not, that the Constitution
gave that power to the Congress in article I, section 8?

Mr. Stevenson. That is correct.

Mr. Bieker. Thank you very much.

CALL FOR BAR ASSOCIATION TESTIMONY

Mr. Zablocki. Mr. Stevenson, in your prepared statement as well as
in your colloquy with my colleague, Governor Thomson, you suggest
holding off any action by the subcommittee until representatives of the
bar association and other informed citizens groups can be heard.
Of course, you do say in the statement that you are aware that the
House Foreign Affairs Committee and the Committee on Foreign
Relations in the other body did indeed hold hearings. This subcom­
mittee held 11 days of hearings on war powers in 1970 and another
2 days in 1971 and 5 days this year. We have heard dozens of wit­
tesses. In addition, the issue has been debated at length on the floor
of the Senate and the House. So I must ask you, do you honestly be­
lieve that Congress has failed to give this issue due consideration?

Mr. Stevenson. As I indicated, I do not blame Congress but I am, as
a private citizen, very much concerned when this important public
issue has not received the attention of some of the organized groups
which I think should be considering it. There have been many wit­
tesses but they have all been appearing in their individual capacity
and I regret that the bar associations have not moved more quickly.
There is an American Bar Association study underway. I think I
would also say this, Mr. Chairman, that it is particularly the pro­
posals for constitutional definition that arouse my concern. I mean
clearly some of the other proposals, particularly along the lines that
you have been addressing yourself to, do not raise such serious ques­
tions. So that it is particularly the area of constitutional definition
that I would be very concerned in having Congress move on without
hearing more on this subject.

Now, of course, your committee has dealt with this subject, but it is
only recently and only in a very limited way that this subcommittee
has moved to that approach.

ABA STUDY ON WAR POWERS

Mr. Zablocki. The study to which you referred was authorized by
the American Bar Association at its summer 1971 meeting—almost a
full year after the Congress had passed the first war powers resolu­
tion. As I understand it, it is being carried out by the ABA’s interna­
tional law section, by a special steering committee on war powers study
chaired by a New York lawyer, Mr. Lyman M. Tondee, Jr. In a tele­
phone conversation with Mr. Bordes of our staff on March 19 Mr.
Tondee described the study as one predicated on the ABA’s belief that
there should be a thorough and scholarly study of the war powers
issue, its constitutional meaning as interpreted from the Constitu­
tional Convention to the present day, and not in relation to any
specific incidents, wars for example. While the great stress is to be on
tits intended scholarliness, the study is planned in two phases. Phase
I will be a scholarly historical review of constitutional meaning as
supported by history, et cetera. This phase has been contracted to the
Columbia University Law School. We have no idea when a report will
be forthcoming on phase I. As I understand it phase II will involve an
analysis and review of the scholarly phase I effort.

This will reportedly be done by a group of experienced international
lawyers and will supposedly result in a final report which together
with the phase I effort will constitute the final study. This is expected
to be completed by the fall of 1974, which, I submit, is much too late
for the 93d Congress to act upon their recommendations. Because you
have recommended that Congress withhold action until this report
from the American Bar Association will be available, I must ask
this question: What new ideas relative to war powers do you antici­
patel be forthcoming from the American Bar Association or other
organizations—ideas which have not already been discussed be­
fore this committee?

DEFINITIONAL APPROACH TO PROBLEM

Mr. Stevenson, Mr. Chairman, as I indicated earlier, it is primarily
with respect to the serious constitutional issues that the definitional
approach to this problem raises that I feel the report of the ABA
group and other reports by the organized bar would be helpful. I am
in no sense suggesting that there should be a delay in trying to improve
the consultation process, if this can be done either by getting a rule
which will permit consideration of a joint committee or through work­
mg out reporting procedures. I would not have been concerned with the
passage of the bill passed by the House last year. So that perhaps I
should have narrowed my statement with respect to the necessity for
awaiting reports by bar associations and put it more in terms of not
acting in terms of constitutional definition without having the benefit
of their views.

Mr. Zablocki. Indeed, your word of caution would be more appropri­
to the Members of the other body where they appear to be gung ho in
support of S. 440.

Mr. Stevenson. That is absolutely correct.

Mr. Zablocki. I did not want the record to show that you had such
apprehensions about the House of Representatives.

Mr. Stevenson. I appreciate your point. It is well taken.

Mr. Zablocki. On page 4, Mr. Stevenson, you argue that effort
to resolve the dilemma over the war-making powers through a con­
stitutional amendment would be—and I quote—"not in the national
interest." However, in the very next sentence you seem to equate the
national interest with the President's power. That is on page 4,
* * * the President's power to conduct an effective foreign policy
* * *. Do you believe that the Congress has any role whatsoever in the
formulation and execution of U.S. foreign policy?
CONSULTATION AND COOPERATION

Mr. Stevenson. I certainly do. That I think is implicit in my whole statement, that consultation and cooperation are the ways that our system of separation of powers works most effectively. Clearly, any President to be most effective requires both congressional and public support for his policies and it is only through achieving this support that policy can be maximally effected and furthermore Congress does have so many powers in this area. We talked a little earlier about the power of the purse. There is no question that foreign policy depends very greatly on congressional cooperation with respect to all sorts of financial implications of our foreign programs. Indeed, even the organization of the State Department itself is dependent upon cooperation with Congress.

Mr. Zablocki. The power of the purse seems in recent years to be exercised to a greater degree by the Executive through the impoundment of domestic funding of certain projects. I will not go into the constitutionality of that particular action on the part of the executive branch. But I do think and I do agree that Congress does have this power of the purse. At times, however, situations make it very difficult for Congress to withhold moneys or funding when a decision has already been made. I am referring, for example, to the safety of U.S. Armed Forces sent to foreign lands where there is combat or imminent hostility. It would be foolhardy not to provide the necessary funds which would allow those troops to efficiently and safely conduct the mandate that was placed on them by the executive branch.

Mr. Thomson. No questions.

Mr. Zablocki. Let me ask one final question. In earlier testimony Prof. Alexander Bickel stated, and I quote, “A vast ambiguity now shrouds the allocation of the w0rmaking power.” Would you agree with him in his statement?

Mr. Stevenson. I would not put it quite that way. But I think it has been clear that I have felt that the question of the w0rmaking powers is something that the founders purposely attempted to deal with in a general way relying on the political interaction between the two branches of government rather than by specifying detailed rules. And I think I prefer the general approach rather than the detailed rulemaking approach in this area.

Mr. Zablocki. I understand that, Mr. Stevenson, but if indeed there is ambiguity, there must be serious effort to correct it.

Mr. Stevenson. Again, I guess my only quarrel would be with the word “ambiguity.” I don’t think that the Founding Fathers intended to be ambiguous. They intended to be general realizing that given diverse circumstances with which this country would have to deal over the years, that any attempts at a greater definition would soon be outdated in a not effective way of dealing with the problem. I prefer not to characterize that as ambiguity. I think they knew what they were doing and they provided for a general framework which could adapt itself to changing circumstances.
Mr. Zablocki. When your successor, Mr. Brower, acting legal adviser to the Department of State, was before the committee, I suggested that this area of war-making powers could perhaps be clarified by a resolution which would only restate those references to war-making powers found in the Constitution of the United States—article I, section 8, which lists the powers of the Congress, and article II, section 2, the one sentence, which states, "The President shall be Commander in Chief of the Army and Navy of the United States and of the militia of the general States when called into the actual service of the United States." Although I asked the question somewhat facetiously it appears that he thought even this type of legislation would be subject to constitutionality. All I was suggesting was a mere restatement of the Constitution.

DEALING WITH QUESTION COMPLETELY

Mr. Stevenson. Well, Mr. Chairman, it is a very interesting suggestion. My problem as a lawyer I guess, would be in knowing what significance to attribute to which provisions you selected and which you had left out because I think there would be other relevant provisions certainly if you were attempting to deal with the question completely. So that I would think that perhaps Mr. Brower's apprehensions were that you were not repeating the Constitution as a whole and if you repeated it as a whole, I am not sure that that would serve any purpose.

Mr. Zablocki. Only those sections in the Constitution that deal with war powers would be repeated in legislation.

Mr. Stevenson. Well, certainly, Mr. Chairman, the Constitution is the Constitution and it would not be altered by the fact that you in a resolution referred to these provisions. If in fact you were attempting to legislate these provisions into law, I cannot see precisely what the legal effect would be, because they are already the supreme law of the land.

Mr. Zablocki. We would hope that would be the case but by restatement attention would be brought to those specific portions of the Constitution. Hopefully that would satisfy those who say the executive powers were increased by historical acceptance and development. We would bring it back to what the Founding Fathers had intended.

Mr. Stevenson. It is an interesting suggestion. I would wish to urge you to include all the relevant provisions if you will.

Mr. Zablocki. It would not be my intention to omit anything relevant. But I don't think you would suggest the committee should clutter the resolution with irrelevant portions of the Constitution.

AN ORIGINAL SUGGESTION

Mr. Stevenson. I must say, Mr. Chairman, it is a very original suggestion. I am not sure what the executive branch or the public at large would make of that sort of legislation. I think you certainly have the tradition of referring to constitutional provisions in your bills but to in fact attempt to relegislate something that is in the Constitution, I am not sure that it might not confuse people.
Mr. ZABLOCKI. I would hope not. The only purpose would be that both branches, the executive and the legislative, would live up to the provisions of the Constitution.

Mr. STEVENSON. I think I have about exhausted my comments on that proposal, sir.

Mr. ZABLOCKI. Governor Thomson?

Mr. THOMSON. No questions.

Mr. ZABLOCKI. At this point, I am reluctant to say we have to close this session. I want to thank you again, Mr. Stevenson, for your enlightened views. If you have any influence with the ABA, it would be appreciated if you can hurry the report so that we can have the benefit of their views, not in 1974 but as early as possible. We are very anxious to have the advice of constitutional lawyers and that of such prestigious organizations as the ABA. Though we may not always agree with their suggestions, nevertheless, I am sure the subcommittee would welcome them. I submit if we are going to wait until the fall of 1974, legislation will fall by the wayside. My own view is that we will go to conference in the 93d Congress. Something will be enacted which will be presented for the President’s consideration. Hopefully we will have legislation which will be in keeping with our national interests and at the same time restate the intent of Congress to meet its obligations in this very troubled area of war powers.

Thank you again, Mr. Stevenson.

The subcommittee will stand adjourned to the call of the chairman.

[Whereupon, at 10:55 a.m., the subcommittee adjourned to reconvene subject to the call of the Chair.]
Ms. ABZUG. Mr. Chairman, it is strange that we have reached the point of extended debate over "war powers." It is strange, that is, if we are still a constitutional democracy; for the Constitution states without qualification that "the Congress shall have the power * * * to declare war." There is nothing anywhere in the Constitution that authorizes Presidential wars. Yet that is what we have had and are still enduring in Indochina. After the signing of a cease-fire agreement in Vietnam, the President continues to bomb Cambodia daily. He threatens to resume American bombing in North and South Vietnam also, despite the repeated demand of an overwhelming majority of Americans, that we get out of Southeast Asia and stay out.

It is strange that one man has such power. The Founding Fathers would never have believed it. They envisioned a system in which a vote meant something and was not just a parody of participation in making decisions. This President makes all the decisions, alone, often against the advice even of his own advisers—who then have to scurry around to find legal justification for what he has done. They can't find such justifications, but that doesn't stop Mr. Nixon from continuing to do as he pleases.

It is strange that the Congress seems powerless to stop him. We have the power: that, too, was provided in the Constitution. Congress has the ultimate power, the "power of the purse"—if we had the will, we could put a stop to this madness at once by cutting off all funds for present and future ventures in Indochina.

We could have the backing and the enthusiastic support of a vast majority of our constituents. No war in America's history has ever been so unpopular. The repeal of the Tonkin Gulf resolution repealed every vestige of authorization by Congress for Presidential wars—and essentially admitted error in having been tricked into passing the resolution in the first place. There is every evidence that prolonging or renewing this war will meet with tremendous resistance, not just from peace groups, but from moderates and conservatives as well.

Before the cease-fire agreement, the Senate twice passed measures to cut off funds, but the House, fearing that such action would endanger our troops and impede the President's peace efforts, refused to pass similar legislation. By this time, it is surely clear to all that, whether or not the President's peace efforts were sincere, they did not work. There is no peace in Southeast Asia; there is not even a cease-fire in Vietnam. Both sides go on shooting, each blaming the other. Undoubtedly, both sides do violate the cease-fire; but that is not a problem that can or should be settled by American bombs.

If we are to avoid continued involvement, the Congress must take firm control of American intervention in the affairs of other nations.
I have introduced two bills that would have this effect in the Asian situation. H.R. 3578 would terminate all military and paramilitary assistance to the nations of Indochina. This specifically includes funding for military activities of such agencies as the CIA and AID, whose activities have often served as a covert substitute for a declaration of war. Political subversion and assassination in other lands should not be paid for by American taxpayers. Yet we have seen it happen, not only in Southeast Asia, but in South America and the Dominican Republic.

My second bill, H.R. 5821, would require congressional authorization for the reinvolvement of American forces in Indochina.

The problem I find with the other bills that have been introduced to cope with this situation is that congressional sanction would be applied for any armed intervention longer than 30 days. This last provision invalidates the whole concept. Within 30 days, as we have seen all over the globe, a well-supplied army can overthrow practically any government and substitute a more friendly one. This is precisely what the ITT and the U.S. Government planned in such countries as Chile. What point is there in allowing this to happen and then asking Congress to rubberstamp it? Is it conceivable that at such a point, Congress will cut off funds for our troops backing the new, “friendly” government? We have been caught in that trap for the last decade. We should have learned something from it.

The Congress should demand that unless the United States is attacked on our own soil the President must receive specific authorization prior to intervention in the affairs of other nations. We are now discovering that a great deal of intervention has been going on, without public accountability, in a number of countries. One might call it prewar intervention. U.S. dollars and military aid continue to prop up shaky regimes around the world. When they fall—as Cambodia’s seems about to do—we find ourselves committed by Presidential decisions to war, by whatever name. This is clearly an unconstitutional exercise of war powers which the Congress can act to prevent before, not after, conflagrations occur.

Apart from pragmatic results, there is the basic necessity for establishing the principle of congressional authority. This country is traveling down a dangerous road in allowing more and more power to be concentrated in one man’s hands. Can we name any country where this trend has not ended in dictatorship? What reason have we to believe that it will be different here? Before we leap to cite the safeguards of democracy, we should look to see just what is happening to those safeguards. Opponents of the present administration are not yet in jail in any great numbers, but they have certainly been silenced. Under threat of losing licenses, broadcast media have imposed an uneasy “self-censorship.” News reporters who will not disclose their sources are being jailed—which means that sources are drying up. “Executive privilege” is being used to cover—we know not what, for those close to the President are being protected from disclosing their role in the Watergate bugling and break-in. Impoundment of funds already appropriated for social services, is being used as a way to keep the poor from getting too knowledgeable in organizing. Mr.
Nixon's proposed budget cuts would finish off all hope that moderate- and low-income people can make it in this inflated economy. Only the rich will make it—and that too is characteristic of dictatorships.

The course of least resistance is to allow ourselves to continue on this downhill slide. It is not easy, having relinquished our power, to regain it. But it is the one significant act that can change the course of history for decades to come. And the time to act is now, before it is too late.
Mr. Chairman, my purpose in presenting this testimony is to urge the adoption by the Congress of legislation which will clarify the relationship between the powers of the Congress and of the President as they relate to making war. The legislation which I propose, which is embodied in House Joint Resolution 21, would make unmistakably clear and carry out the intentions of the framers of the Constitution.

It is elementary that the framers of the Constitution intended that power should be shared between the various branches of Government. They established an elaborate, and effective, system of checks and balances for the purpose of preventing the exercise of governmental powers being concentrated in any one department of Government. That philosophy was clearly stated by Thomas Jefferson, who said, "It is not by the consolidation, or the concentration of powers, but by their distribution, that good government is affected."

This has presented no problem during those times in our history when the Congress and the President have been of one mind and purpose in carrying out national policies. In times of conflict between the Congress and the President, however, each branch tends to interpret the Constitution in the manner which supports its own point of view. Who is "right" sometimes seems to depend upon the opinion of the public. But this must not be, for the proper exercise of constitutional powers is a matter of law, not popular referendum.

Since we are a government of laws, and not of men, it is imperative for us now to clarify for all time the relationship between the Congress and the President as to the warmaking powers.

Certainly there is no respect in which the need to clarify the sharing of Government powers is more important than in that of the warmaking powers. War being the most extreme of all national endeavors, should not be entered into except under unquestionable constitutional authority, based upon full compliance with the great decision-making process that the Constitution established.

The legislation I propose, to clarify the powers of the Congress and the Executive, is entirely appropriate under the Constitution. Article 1, section 8, of the Constitution gives Congress the power to "* * * make all laws which shall be necessary and proper for carrying into execution" the enumerated powers of the legislative branch. This clause not only gives the Congress the power to implement its own powers through legislation; it gives Congress the power to make all laws which shall be necessary and proper for carrying into execution "* * all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The conflict in the matter of warmaking powers seems to arise out of the difference between the power of the President in his capacity as Commander in Chief, as opposed to the power of the Congress to declare war.
Since the Constitution expressly provides that it is the Congress that shall have power "* * * to provide for the common defense, * * * to raise and support armies, * * *" and "* * * to provide and maintain a navy * * *" it is clear that the President would be Commander in Chief in name only if Congress did not provide him with armed forces to command. Thus, while the Constitution establishes that the President is Commander in Chief of our Armed Forces, the power is granted to the Congress to make all laws which shall be necessary and proper for carrying the Commander in Chief's powers into execution.

Most importantly, the one and only power to declare war is granted and imposed by the Constitution on the Congress.

It is certain that the framers of the Constitution intended that this be more than an idle exercise. It very clearly means that, if a state of war is to exist between the United States of America and another nation, it is Congress that must decide that issue. As in other Government decisions, Congress establishes the policy which the President is to carry out.

In an early draft, the proposed Constitution gave the Congress the power to make war, but that language was changed to the power to declare war, thus preserving and continuing the constitutional pattern of giving the Congress the power and duty of creating national policy, by legislation, and giving the executive the power and duty to take care that those national policies and laws be faithfully executed.

Thus, the Constitution makes a clear distinction between the legislative and executive functions—between policymaking and its execution and the national policy decision as to whether this Nation is to go to war is clearly a congressional power and duty.

Congress also has the power "to raise and support armies, but no appropriation of money to that use shall be for a longer term than 2 years." No department of Government other than Congress can raise or support an army. This entails the power of the purse, as well as the national policy decision as to whether we shall have armies and the size and extent of our armies.

The problem here, which the framers foresaw, was that, while Congress might raise an army, an open ended appropriation to support an army would be self-perpetuating and would place too much power in one department of government. They did not want the purse and the sword under the control of one department of government. Accordingly, they prohibited such an open ended commitment of funds. They required that war appropriations be renewed every 2 years. This provides for debate, discussion, and the airing of all points of view, which is typically part of the legislative process. It assumes that one decision will reflect the will of the American people. If pursuit of a military goal was no longer deemed justified, or if the need for an army has disappeared, Congress would be in a position to consider these things in deciding whether to renew a war appropriation.

This power, taken together with Congress' power to declare war, gives a clear picture of the framers' intention that Congress should determine whether the forces of the United States should be committed to war.
The legislation I am proposing would provide a statutory clarification of the scheme of checks and balances the framers foresaw in the area of making war and yet provide reasonable flexibility to enable the President to meet the contingencies inherent in the world of today. This legislation is pursuant to Congress' power to make all laws necessary and proper to carry into execution its enumerated powers.

Very simply, it acknowledges the Commander in Chief's power to meet emergency situations with armed force, but requires him to report his reasons for his action to the Congress within 72 hours. This commitment of U.S. troops cannot exceed 30 days without the approval of Congress in the form of a concurrent resolution.

The legislation is necessary. We must never again go to war unless we have the undivided support of the Nation. We must never again ask our people to spill their blood in a cause which does not have their support. If we decide to call upon our citizens to make great sacrifices in a military cause, they must have a voice in that decision. And the voice of the people of the United States is heard through their representatives in the House of Representatives and the Senate. As a matter of constitutional law, and as a matter of democracy, the decision can be made in no other way.
STATEMENT OF HON. JOHN DELLENBACK OF OREGON

Mr. Chairman, I commend you and the other members of the subcommittee for acting so promptly in this session to hold hearings once again on the war powers issue. I’m pleased to have the opportunity to submit a statement in behalf of H.R. 454, which I introduced, and to urge your serious consideration of this measure and other proposed legislation dealing with this issue.

There is a good deal of discussion in this country today about the division of authority between the Congress and the executive. I don’t wish to open for debate here the question of whether the executive branch has assumed a disproportionate share of power in the affairs of Government, on either side of which issue there is a good argument to be made. In the realm of warmaking, however, the fact of the matter is that during the terms of three consecutive Presidents American forces were involved in conflict in Vietnam for some 10 years largely on the basis of simple Presidential authority. By no means do I intend to equate the actions of those three Presidents—indeed their actions were quite different—but the fact remains of what occurred, and there are important lessons there to be learned.

Such a situation as that through which we have all so recently suffered results, in my opinion, from a subversion of the original intent of those who framed the Constitution. I am convinced that, with the exception of repelling sudden attacks on the United States or its citizens or acting in other emergency situations, our forefathers intended to vest full war powers in the Congress. Clearly the President’s power is to serve as Commander in Chief of the Nation’s armed forces once those forces are committed to war, but he does not bear the responsibility of committing them to war. This responsibility falls squarely on the Congress.

Congress has exercised its power to declare war on only five different occasions: the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II. U.S. forces have been involved in hostilities without an official declaration of war on more than 150 occasions in our country’s history. Prior to this century, however, such incursions were of brief duration and relatively uncostly. What is most alarming is the fact that with no congressional declaration of war, we’ve spent some 80,000 lives and $180 billion dollars on two very real and prolonged wars in the 20th century. It is unthinkable to me that in our country and under our system of government the decision to sacrifice so much should fall upon any one man alone, however able and whoever he may be.

H.R. 454, which is virtually the same as the bill which overwhelmingly passed the Senate during the last session of Congress, represents a deliberate proposal that the Congress speak clearly on the critical issue of the powers vested respectively by the Constitution in the legislative branch and in the executive branch so far as the commitment of and the control over the Armed Forces of the Nation are concerned.
The bill begins by defining those circumstances under which the President, without prior congressional approval, may introduce forces into hostilities or situations where imminent involvement in hostilities is clearly indicated. The four specific conditions outlined are what may be termed emergency situations calling for defensive action and fall in line with the intention of the Constitution's authors to allow the President to deal with emergency situations. They are:

1. To repel an armed attack upon the United States and its possessions;
2. To repel an armed attack against U.S. forces located outside of the United States;
3. To protect American citizens who are being evacuated from a situation of danger; and
4. In compliance with specific statutory authorizations for the conduct of military operations.

Should the President determine that any of the above situations exists and decide to employ U.S. forces, he would then be required promptly to report to Congress the extent of such involvement and the circumstances under which it was initiated. Moreover, he would be required periodically to apprise Congress of the status of such military activities.

Section 5 prohibits the President from continuing military hostilities under the bill's permitted conditions beyond 30 days unless Congress passes specific enabling legislation. Provision is made, of course, to expedite the passage of such legislation.

What the 30-day limit does is place the burden of proof on the President who must convince Congress that military action by U.S. forces is both justified and essential to the country's welfare. Should a President be contemplating the introduction of forces into hostilities, he would have to stop and consider whether he would be able to accomplish his objectives within 30 days or whether he would be able to persuade Congress that a more sustained involvement is warranted. In other words, the bill will make it as difficult as possible for the Executive to place us in a position where we are too far into war to get out and will prevent the President from finding himself in the lonely position of conducting a war without the support of the people's representatives in the Congress.

Opponents of this legislation may argue that Congress is going too far by attempting to impose restrictions on the Executive in this matter. They may argue that today's fast pace and instant communications may require immediate and unhindered action by the Commander in Chief to protect our interests. Let me point out that this bill in no way prohibits the President from acting quickly to protect the country or its citizens, but rather provides him a good deal of flexibility in emergency situations and the means to obtain congressional support when necessary.

A prime concern of the Congress should be to make certain that it is not easy to go to war, and if that takes imposing restrictions, then I am all for it. Vietnam has made it all too painfully clear that once we have substantially committed American men, money, and equipment to the defense of another nation, extrication from the conflict becomes extremely difficult. Congress cannot effectively act after the fact, nor should it be expected to. The time for Congress to act is when the original decision is made and in joint participation with the President.

I thank the subcommittee for your attention to this matter.
STATEMENT OF HON. WM. L. DICKINSON OF ALABAMA

Mr. Chairman, it is a privilege to appear before the Subcommittee on National Security Policy and Scientific Developments to speak in behalf of legislation to define the authority of the President to intervene abroad or to make war without the express consent of Congress.

I know there will be many constitutional experts who will testify before you on the technical aspects of this legislation, and I will not pretend to have their knowledge of the issue. Nevertheless, as a Representative of a segment of the American people who have a stake in the outcome of these hearings, I would like to go on record here today in favor of legislation which I introduced on this subject.

My bill, House Joint Resolution 250, would assure that any action taken by the President to commit any armed force of the United States to armed conflict with hostile forces outside the United States would be reported in detail to the Congress, which would then have 30 days to concur or dissent. Should the Congress dissent, the President would have 30 days in which to disengage all forces so committed.

Certainly, the President must be left with the power to repel sudden attacks upon the United States without congressional authorization for obvious reasons, and my bill would leave the President with that power. However, the Congress would then be able to review the President's action and determine the propriety of the action.

Many of my constituents have written me during the last 8 years both praising and condemning our actions in Vietnam. However, in most cases, the opening line of the correspondence went something like this: "I do not think we should have gotten involved in the first place..." I have said the same thing many times, and I am sure many, if not all, of you have heard or said it on numerous occasions too. The lesson has been a long and bitter one, but hopefully we have learned from it. The American people have a right to be protected from another involvement of this nature, and it is up to the Congress, and specifically the gentlemen on this committee, to come up with legislation which will give us that protection.

We, as Members of Congress, have accepted the responsibility to speak for our constituents and see that their views are taken into account when decisions of national impact are made. Therefore, let's stop shirking our duty in this area of vast importance to our people and pass legislation to assert our responsibility in making war policy.

Thank you, Mr. Chairman.
STATEMENT OF HON. DON FUQUA OF FLORIDA

Mr. Chairman, members of the subcommittee, I welcome this opportunity to testify in support of measures which would define the authority of the President to intervene abroad or to make war without the express consent of Congress. I have been a cosponsor of this legislation in the past two Congresses and I feel that it is most important if we are to responsibly carry out the constitutional powers we are given over matters of war and peace.

Essentially, the legislation recognizes that war is too momentous and too awesome an undertaking to be decided by one individual or one individual and his closet personal advisers. Certainly, the framers of the American Constitution were nearly unanimous in insisting that their own people, through the Congress, assume such an awesome right. We are confronted with, many assert, a constitutional crisis. I wonder, however, if we are not witnessing the interplay of the legislative and executive branches under a living and dynamic Constitution. I applaud the efforts of this subcommittee and other of my colleagues in asserting the constitutional powers over war and peace which are rightly those of the Congress. We have been cited a list of nearly 200 U.S. military hostilities abroad without a declaration of war. Accordingly, the Congress has in too many instances stood idly by while the executive, with dubious constitutional grounds, has taken this country to and retained it in war. The introduction of the various war powers bills reaches to the very core of the division of powers between the legislative and the executive and I am pleased that the issue has finally been joined.

Senator John Stennis, a great American and strong supporter of this Nation's efforts in meeting our commitments to foreign nations, is a primary sponsor of this legislation and addressed the need for its enactment:

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

I feel strongly that the original constitutional distribution of powers must be restored by statute in order to insure congressional participation in warmaking policy. In a superb article by Prof. Raoul Berger of the Harvard University Law School, it was demonstrated that the power to declare war was lodged in Congress as a guard against being "hurried" into war, so that no single man can involve us in such distress. The recent extrication of this country from the tragic conflict in Vietnam illustrates that it is indeed easier to go to war than it is to get out of one. Certainly, one purpose of the legislation we are now considering would be to make war more difficult to attain than is peace.

There is little question but that the Founding Fathers invested the President with the power to defend against sudden attack upon the United States. Certainly, I recognize and support the President's authority to react to such emergencies as it is essential to the defense of
our people. The various legislative proposals provide for such exigencies and in no way inhibit the President from asserting his powers as Commander in Chief.

The legislation that I have introduced enumerates the war powers of the Congress contained in section 8 of article I of the Constitution which states that Congress shall have the power to declare war; to raise and support armies; to provide and maintain a navy; to make rules for the Government and regulation of the Armed Forces; to provide for calling forth the militia for organizing, arming, and disciplining the militia; and to make all laws necessary and proper for executing the foregoing powers. The Framers of the Constitution were most explicit in assuring the Congress of a concurring role in any measure that would commit the Nation to war. My bill specifically limits the power of the President to commit the Armed Forces of the United States to action in any armed conflict with hostile forces outside the United States to the period of war declared by Congress or the period of a national emergency declared by Congress if such commitment should last over 30 days. The President would have full authority to take whatever action he felt was necessary to repel sudden attack or to respond to a threat to national security. The President would, however, be required to report to Congress within 72 hours and explain in detail his reasons for, and his evaluation with respect to the effect and duration of, such commitment. If the Congress, within 30 calendar days after receiving such report, shall not by concurrent resolution approve or otherwise act on said report, such commitment shall immediately terminate, and the President, as soon as practicable but not later than 30 calendar days after such termination, shall disengage all forces so committed.

Since the introduction of my bill during the 92d Congress, I have had the opportunity to review the very thoughtful remarks of my colleague and friend, Dante Fascell, which appeared in the pages of Foreign Policy, a well respected journal. Congressman Fascell has raised the question of whether the 30-day period in which the Congress must consider the President's request for congressional authorization of his commitment of U.S. Armed Forces, would result in the Congress proceeding in a hasty and rubberstamp fashion. Certainly, if such a time period would result in a rubberstamp approval of the President's actions, I would prefer a different approach. The Congress must have adequate opportunity to carefully scrutinize the President's evaluation of the situation and be able to independently analyze the threat or lack thereof. Accordingly, there is indeed a great need to provide a structure for influencing the President before he acts to commit American troops overseas in hostile combat. The debate on the exact mechanism for this consultation is exhaustive. It serves, however, to highlight the seriousness of the constitutional question confronting us.

The most important consideration, however, is to insure that the exercise of the war powers is a matter for collective judgment, wisdom and responsibility. Certainly, no altering of the Constitution is necessary. It is simply incumbent upon the Congress to enact such legislation as is necessary and proper to the discharge of its war declaring power and the President's Commander in Chief responsibilities. Again, I thank the subcommittee for this opportunity to present my testimony and I respectfully encourage you to report out an effective war power bill so that the Congress can resume its rightful place as coequals in the determinations over matters of war and peace.
STATEMENT OF HON. BARRY GOLDBERGER OF ARIZONA

Forgetful of the post-World War I period of the 1920's and the 1930's when this country was being called an isolated country and a fortress America, some in Congress seek to revive legislation which they, as their philosophical kin of the past, believe might prevent this country from ever again being drawn into another major conflict. In my opinion, this legislation, known as the war powers bills, is unrealistic, unwise, and unconstitutional. It makes no sense from the standpoint of safe or intelligent military planning. It is disruptive of our entire mutual security system which now safeguards world order. It is totally without any statutory precedent in American history. And, in my opinion, it invalidly prohibits the President in the exercise of his constitutional powers of national defense.

The specific legislation which has been introduced is so rigidly drafted it would leave the United States standing by helplessly in the face of an all-out attack against important friendly nations, such as Israel, with which we have no defense treaty, and would even block humanitarian assistance such as the 1964 Congo rescue mission in which the U.S. military saved almost 2,000 non-Americans from rebel atrocities.

There are two major approaches taken by legislation introduced in the House of Representatives. H.R. 2053 is typical of one of these schemes. It sets out only four narrow situations in which U.S. forces can be used. If an emergency does not fit one of the four situations which the draftsmen of the bill have foreseen, the President is prohibited from acting until Congress authorizes him, no matter how untenable the situation may become as a result of our failure to act. Even when the President may act, the bill places a limit of 30 days on his conduct. Another provision of the bill allows Congress to stop whatever action the President has started before the 30 days are up. Thus, what the bill gives with one hand it takes away with the other.

The other major approach is represented by House Joint Resolution 2. Although it utilizes broader, and therefore more flexible language, it too sets statutory limitations on the situations when the Armed Forces may be introduced in hostilities.

In essence, this raises many basic objections against any form of war powers legislation. First, I believe it is simply impossible to prophesy in any law all of the unexpected and unlimited variations of events when a President may need to take defensive action without advance congressional approval.

Second, these bills attempt to define the boundaries of the constitutional allotment of the war powers between Congress and the President, something the Founding Fathers never attempted to do. For the declaration of war clause does not confer upon Congress the sole power whereby the country can become engaged in war. In fact, the Constitutional Convention purposefully narrowed the authority of