WAR POWERS LEGISLATION, 1973

HEARINGS
BEFORE THE
COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE
NINETY-THIRD CONGRESS
FIRST SESSION
ON
S. 440
TO MAKE RULES GOVERNING THE USE OF THE ARMED
FORCES OF THE UNITED STATES IN THE ABSENCE OF A
DECLARATION OF WAR BY THE CONGRESS

APRIL 11 AND 12, 1973

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(III)
WAR POWERS LEGISLATION, 1973

WEDNESDAY, APRIL 11, 1973

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 4221, Dirksen Senate Office Building, Senator J. W. Fulbright (the chairman) presiding.

Present: Senators Fulbright, Pell, McGovern, Aiken, and Javits.

The CHAIRMAN. The committee will come to order.

OPENING STATEMENT

The Senate has been engaged this year in a wide-ranging inquiry into the constitutional thinking of the Nixon administration, particularly with reference to the separation of powers as between Congress and the Executive. Yesterday morning I had the privilege of hearing an exposition on "executive privilege" by Attorney General Klein, in which he expressed the Nixon administration's view that, although the Executive's claim of an unqualified right to withhold information from Congress is "not expressed in a constitutional clause," and is not even a "settled field of law," it is nonetheless "squarely founded in the separation of powers doctrine," implanted by historical precedents which "yield Burkeian rules of constitutional prescription of the highest vitality."

I myself am not quite certain of what it takes to make a "Burkeian rule of constitutional prescription of the highest vitality." The meaning of so splendid a phrase does not exactly leap to mind, but somehow it does not quite strike me as the "strict constructionism" to which this administration has paid such eloquent tribute. In both foreign and domestic affairs the constitutional thought of the Nixon administration seems, in each instance that arises, to resolve itself down to a general deduction along the following lines: the Constitution is vague; the framers left it to the wisdom of future generations to decide the meaning of this clause or that; we, the Executive, and winners of the last election, are such a "future generation;" it is, accordingly, up to us to interpret the Constitution as we see fit; we can therefore do as we please, confident in the knowledge that such was the intent of the Founding Fathers.

NIXON DOCTRINE OF WAR POWERS.

In the matter of war powers, as in that of impoundment and executive privilege, the Nixon administration holds that the framers "painted with a broad brush. * * *" So at least said Mr. Justice Rehn-
quist back in his days as Assistant Attorney General. As we have come to recognize, executive references to the alleged imprecision of the Cambodia. It consists essentially of a deep and abiding faith that, workings of the “political process,” the need of Presidential flexibility, and to broadly brushed paintings, invariably turn out to be euphemisms for the same thing; the President should be allowed to do exactly as he pleases and Congress ought not to interfere.

The “Nixon doctrine” of war powers is currently in evidence in Cambodia. It consists essentially of a deep and abiding faith that, when one spurious legal case collapses, another can be instantaneously cooked up. Thus, when Congress repealed the Gulf of Tonkin resolution, the administration took the position that it never had relied on that enactment anyway. It based its Indochina war policy—so Mr. Nixon said—on the need to protect American troops in Vietnam—rather a sophistc argument since it did not explain on what legal ground the troops were being kept in Vietnam. Now, in any case, they are out and the administration is hoisted on its own constitutional petard in attempting to justify its continued bombing of Cambodia, or perhaps I should say ought to be if it had any concern about its credibility with the Congress or the public.

Assistant Secretary Sullivan recently assured congressional aides that “two lawyers” at the State Department were working on an attempt to come up with some new constitutional justification for the bombing of Cambodia. Mr. Sullivan was not apparently in much doubt that his lawyers would succeed. “For now,” he added with a smile, “I’d just say the justification is the reelection of President Nixon.”

Confronted with this rather interesting new constitutional precept, both the White House and the State Department have remained prudently evasive. Well they might, recalling that when President Nixon sent American troops into Cambodia on April 30, 1970, he specified that their mission was “to protect our men who are in Vietnam and to guarantee the continued success of our withdrawal and Vietnamization programs.”

And when American forces were withdrawn from Cambodia, the President said, on June 3, 1970:

The only remaining American activity in Cambodia after July 1 will be air missions to interdict the movement of enemy troops and materiel where I find that this is necessary to protect the lives and security of our forces in South Vietnam.

Secretary of Defense Richardson has attempted to improve upon Mr. Sullivan’s levity. The President, he now tells us, has clear constitutional authority to continue the bombing in Cambodia, even though our troops are now out of Vietnam, because the President is merely trying to clean up a “lingering corner of the war”—and besides, the Cambodian Government has asked us to bomb.

How exactly the President derives his constitutional war powers from the request of a foreign government—a government at that which has explicitly removed itself from protection under the SEATO pact—Mr. Richardson did not say.

He—or someone, I am sure—will say, in due course. For my own part, I retain total confidence in the ability of this administration to come up with some specious legal justification for doing exactly
what it wishes to do. Like Humpty Dumpty, who would not be mastered by a mere word, the Nixon administration has shown that it will not be gotten the better of by anything so trivial as a law.

To paraphrase Lewis Carroll, when this administration interprets the Constitution, it means just what the President chooses it to mean—"neither more nor less." The question is: as Humpty Dumpty pointed out, "which is to be master—that's all."

PURPOSE OF HEARING

So far the executive has been "master"—without serious opposition from the Congress. We meet here today to consider the possibility that Congress may yet muster the capacity to reclaim the mastery of one of its own domains—the domain of deciding whether and when our country is to be committed to war. Perhaps the way to do that is through the enactment of the war powers bill on which testimony will be given today.

Perhaps some modification of the bill will commend itself to the committee and to Congress, or perhaps as the committee observed in 1969, no legislative enactment is required to enable Congress to reassert its constitutional authority over the use of armed forces. "* * * all that is required," the committee judged at that time, "is the restoration of constitutional procedures which have been permitted to atrophy." 1

These are matters on which we now seek enlightenment from three distinguished witnesses, Prof. Raoul Berger, Charles Warren senior fellow in American Legal History, Harvard Law School; Prof. Alexander M. Bickel, Yale University Law School; and Mr. Nicholas B. Katzenbach, vice president and general counsel, IBM Corp.

Senator Javits, would you like to make a statement?

Senator Javits. Thank you, Mr. Chairman.

Mr. Chairman, first, let me compliment the Chair on a very gifted and distinguished statement. It is my view that, if Congress is to assert its constitutional authority, it will have to be through a methodology such as is set forth in this bill.

My other views, Mr. Chairman, are the following:

HEARINGS COME AT CRITICALLY IMPORTANT TIME

I think that these war power hearings, the second time the matter has been heard before the committee in reasonable detail, come at a critically important time. Since I first introduced the bill in June 1970, there has been a Vietnam cease-fire and the termination of U.S. military operations in Vietnam. But the termination of these operations has been marked by resumption of or continued U.S. participation in the air war over Cambodia. The President has also claimed authority to reintroduce U.S. forces into Vietnam in order to enforce the cease-fire.

Mr. Chairman, whatever may have been the arguments of the administration to sustain the constitutionality of the prior actions designed to liquidate U.S. military operations in Vietnam and free our prisoners of war and to bring about a cease-fire, claims of constitutional authority to engage in bombing in Cambodia or military reentry into Vietnam seem to me to lack any substance whatever.

1 "National Commitments," Apr. 16, 1969, p. 32.
If ever we had to face up to what has become the twilight zone of the Constitution in terms of the warmaking power, it is now. Our country, in the interest of stability, domestic tranquillity, international peace and security, most urgently needs this issue to be settled.

The war-powers bill under consideration today has survived 3 years of most searching scrutiny and debate by and among the best and most experienced minds in our country. This is the year to settle the problem by enacting into law a methodology to carry out the power to take the nation into war and to determine how under the Constitution it shall be shared and under what conditions and methods this judgment shall be made.

Mr. Chairman, if ever I heard an indictment of the sheer failure to decide by the Congress itself it is in the statement read by the Chair and in my own thinking and indeed in the testimony of the witnesses who will appear this morning.

HEARING PROCEDURE

Mr. Chairman, I suggest that it would be desirable to hear the witnesses en banc so that when question time comes the witnesses may have an opportunity for a discussion.

The CHAIRMAN. I understand that is agreeable to them, but they will give their statements separately.

Mr. Berger, will you start, please.

STATEMENT OF RAOUl BERGER, CHARLES WARREN SENIOR FELLOw IN AMERICAN LEGAL HISTORY, HARVARD LAW SCHOOL

Mr. BERGER. Mr. Chairman, I know in times like these, after you have carried on a long struggle, it is not easy to resist discouragement. Permit me, therefore, as one who is on the sidelines and who has been watching this, to say, I feel you have made progress. I feel that this committee, going back to its earliest reports, which was 1967-68, has had a profound impact on the minds of the American public; and I have to testify it helped to turn me around, so I beseech you, stay with it.

The vaporings of a Kleindienst are just headlines of the moment. They won't stand up. The work you are doing will survive.

Now, it is more than carrying coals to Newcastle to rehearse some of the matters, which I shall do this morning, because you are even more familiar with most of these things than I am.

Nevertheless, I hope you will indulge me because our task is the task of educating public opinion, of bringing home to them that we are not dealing with something that is mysterious and murky, that the murkiness is really a creation of the President, and it is with that in mind I go forward.

May I say I am from time to time astonished to find misunderstanding in high quarters; very able journalists that repeat tired cliches without thinking about them at all; and that again is an object I hope to comment on this morning.

The CHAIRMAN. If I may interrupt, that has been especially true on impoundment. Nearly every article I have seen ignores what the Congress is really saying. We are not saying he can't withhold some money,
but reference to abolition or cancellation of programs is rarely made in the best journals.

Mr. BERGER. I have followed it closely in impoundment, in executive privilege, and in connection with the war powers and foreign relations and I am convinced that what has happened is that even people on the most respected journals have simply not taken the pains to find out for themselves.

Now I may say your work spurred me to go back and find out for myself because I am a cranky old fellow who just doesn’t want opinions, I don’t care whose opinion. What I say to you comes out of my own independent study of the sources. I have tried to go over everything that is available personally and it is that study that lies at the basis of the convictions I am going to utter forthrightly to you today.

CHARGES THAT BILL IS UNCONSTITUTIONAL

My chief concern is to defend the Javits bill against charges by Secretary of State William P. Rogers and former Under Secretary of State Eugene V. Rostow that it is unconstitutional. It is not my purpose to defend the wisdom of the particular provisions, for as John Marshall stated, “The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional.” Whether or not the Javits bill represents the wisest possible solution of the problem—the legislature is yet to be born that can draft a perfect bill—is not nearly so important as the fact that you are taking a great step toward resumption of your constitutional powers.

Here I would join Senator Javits.

The bill would represent a constitutional construction by Congress of its powers, which should go far to repel the “muckiness” created by a long series of self-serving Presidential assertions of power. Congress, the Supreme Court has often held, cannot abdicate its powers. The corollary of the axiom is that Congress is under a duty to exercise those powers itself.

Opponents of the bill summon remote hypothetical contingencies which might demand instant, unfettered Presidential response. Against such a parade of horribles I would pose the actual horror of ever-deepening involvement in the Vietnam quagmire. Most Presidential adventures, as Prof. Henry Steele Commager pointed out, lacked the element of urgency; in almost every case there was time to consult Congress.

I cannot improve on his statement that “great principles of government are not to be decided on the basis of the argument ad horren-dum—by conjuring up hypothetical dangers and insisting that the structure and operations of government must be based on the chance of these rather than on experience.” I may say one could almost call it a maxim of constitutional construction by the Supreme Court itself: remote hypothesis is not to sway judgment. Practicalities based on experience and evidence have to be our foundation.

Let me then focus on the issue of constitutionality. Roughly speaking, the bill seeks to limit Presidential warmaking in the absence of congressional authorization, leaving the President free to defend the United States and its Armed Forces against sudden attack. The power
to wage war, it may be categorically asserted, was vested by the Constitution in Congress, not the President. If this be so, your bill merely seeks to restore the original design. It cannot be unconstitutional to go back to the Constitution. Here I can only sketch the materials which demonstrate the purpose of the Founders, referring for full documentation to my article, "War-Making by the President."

I may say I hope you will bear with me because I do think I have gleaned a few additional grains in the history which are worth noting.

**POWERS OF COMMANDER IN CHIEF**

The best index of constitutionality is the specific provisions of the Constitution respecting the war powers, plus the explanation of the Founders as to what they intended to accomplish thereby. The war powers of the President are expressed in three little words—"commander in chief," which Hamilton explained to a people in dread of creating another George III, merely meant that the President was to be the "first general."

As Professor Louis Henkin recently remarked, generals, "even when they are 'first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others." The "Commander-in-Chief" was to lead the Armed Forces once war was "commenced" by Congress or by a "sudden attack" on the United States. This is the entire historical content of those three little words.

**BULK OF WARMAKING POWER LODGED IN CONGRESS**

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

It is a noteworthy thing that Wilson, one of the Framers, summarizing it all, could think of only one military function of the President, and that was to lead the Army like the old Saxon general; whereas the tremendous bulk, the overtowering bulk of the powers summarized by him appertained to the Congress.

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

**CHANGE IN WORDING FROM "MAKE" TO "DECLARE"**

You may think that I too easily glide from a power to "declare" war to a power to "make" it. Originally it was proposed that Congress
be empowered to "make" war; this was changed to "declare," for reasons well summarized by Secretary of State Rogers. In his testimony before your committee in 1971, he confirmed that the "change in wording" from "make" to "declare" "was not intended to detract from Congress' role in decisions to engage the country in war. Rather it was recognition of the need to preserve in the President an emergency power—as Madison explained it—to repel sudden attacks' and also to avoid the confusion of 'making' war with 'conducting' war, which is the prerogative of the President" as Commander in Chief, once war is initiated.

But for the decisions involved in conducting war as "first general," all the rest of the war powers remained in Congress. In the words of Hamilton's proposal to the Convention, the Executive would "have the direction of war when authorized or begun," implying it was not for him to begin a war. Though Hamilton was the great proponent of expanded Presidential powers, he later stated that "it belongs to Congress only, to go to war."

**WHY POWER TO DECLARE WAR WAS VESTED IN CONGRESS**

Why had they done this? We have a wonderful explanation from James Wilson. The power to "declare," i.e., to wage, war was vested in Congress, James Wilson explained to the Pennsylvania Ratification Convention, as a guard against being "hurried" into war, so that no "single man (can) * * * involve us in such distress." The severely limited role of the President was a studied response to what Madison called "an axiom, that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence."

"Those who are to conduct the war," said Madison, "cannot in the nature of things be proper or safe judges, whether a war ought to be commenced, continued or concluded." Note, parenthetically, the relevance of Madison's remark to President Nixon's continued bombing in Cambodia; it is Congress, not the President, that is to determine whether a war, once commenced, is to be "continued or concluded." George Mason was also "against giving the power of war to the President, because not (safely) to be trusted with it." So the President was left with the power "to repel and not to commence war," as Roger Sherman advised. But for the power to "repel sudden attacks" on the United States or to direct a war once begun by Congress, the entire warmaking power was vested in Congress. On this eminent scholars are agreed, as the hearings before your committee in 1971 on the predecessor bill amply testify, and as was conceded in 1966 by the State Department's legal adviser, to which I will return.

**DEPENDENCE OF APOLOGISTS ON EXTRA-CONSTITUTIONAL STATEMENTS OR ACTIONS**

In a fairly extensive reading I have come across no apologist who would twist out of the original intention of the Founders a plenary warmaking power, singlehanded warmaking power of the President.
The apologists depend on extra-constitutional, post-1787 self-serving statements or actions by the President not on the Constitution, not on anything that was said by a Framer. I wish we could get that home to the American public through journals of public opinion. Let me address myself to a remark made before you by John Norton Moore.

Prof. John Norton Moore finds uncertainty as to “which branch would have authority to commit the Nation to force short of war, or indeed what ‘war’ meant.” Such semantic questionings overlook the Founders’ anxiety to limit the power of a “single man” to “hurry” us into war. Those who feared a blazing forest fire were little disposed to authorize the President to start brush fires. “Brinkmanship” is an invention of our era. A Convention which carefully authorized the President to “repel sudden attacks” on the United States hardly left him free to engage in foreign adventures “short of war.” Congress, said the Supreme Court in 1800, may “declare a general war” or “wage a limited war,” thereby comprehending all “war” and dissipating the “uncertainty.”

Madison’s summary of the matter deserves to be blazoned on your walls in letters of gold:

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

May I remind you that when Madison spoke of “declaring” war, as Secretary of State Roger explained, he was really talking about the power to wage war, to initiate it and to do everything connected with warmaking except to conduct it once it was declared or brought about by invasion.

**POWER TO REPEL SUDDEN ATTACKS**

In 1966 the legal adviser of the State Department had little quarrel with the view of the “original intention” here expressed, and said of the President’s power to “repel sudden attacks” that, “In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States.”

I want to hammer that home. As late as 1966 the theoretician of the State Department’s position was that “repel sudden attack” probably meant attacks on the United States. I would say assuredly the framers did not conceive that the President might repel attacks on Kamchatka. But, the adviser added, “In the 20th century the world has grown much smaller, an attack on a country far from our shores can impinge directly on the Nation’s security. . . . The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress.”
No member of the Executive has ever pointed to a constitutional provision, or to a statement of the Founders, that supports this extraordinary claim. Recall Madison’s words: “the Executive has no right, in any case, to decide the question, whether there is, or is not cause for declaring war.”

EXECUTIVE BRANCH’S APPEAL TO EMERGENCY POWER

Whether the national security is threatened, whether an attack on a foreign state represents a threat to the “national security,” is a political matter not left to the decision of the “first General.” The “power of judging the causes of war,” said Madison, “is fully and exclusively vested in the Legislature.” In essence, the executive branch appeals to the emergency power; and on this we need to bear in mind what Justice Jackson stated when President Truman seized the steel mills in the midst of the Korean War so that production would not be interrupted by labor strife:

“Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.” I would say this too ought to be burned in letters of fire over your doors. Think a thousand times before you give a blank check of emergency powers because you have had the experience, you know what happens with blank checks.

PRECEDENTS FOR SENDING TROOPS INTO BATTLE QUESTIONED

The real bedrock of the Presidential position resides in a statement made by then Secretary of State Acheson when he advised President Truman in 1950 that he had constitutional authority as Commander in Chief to commit troops to meet the invasion of South Korea. He relied on a State Department memorandum which listed “eighty-seven instances in the past century” in which prior Presidents had exercised “Presidential power to send our forces into battle.”

I may say that statement reminds me of the way Attorney General Kleindienst was talking, the petty little incidents out of which Acheson could conjure a power to commit the forces to battles are nothing short of amazing.

Later Under Secretary of State Nicholas Katzenbach stated that “most of these [incidents] were relatively minor uses of force.” The “vast majority” of such cases, said Edward Corwin, “involved fights with pirates, landing of small naval contingents on barbarous or semibarbarous coasts [to protect American citizens], the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border.” Generally they were not against sovereign States; certainly they were not against States that could challenge our power, States like France, Russia, England, or Germany.

No possibility of “war” was presented by these incidents; and one can only marvel at the fantasy that can conjure from such incidents “precedents” for sending our troops “into battle.” Were these incidents to be regarded as equivalent to Executive waging of war, the last precedent would stand no better than the first. Illegality is not legitimated by repetition. So the Supreme Court has held. In Powell against McCormick, when the House of Representatives pressed on the Court,
"we have done this time and time again," the Court said it was wrong when you first did it and it wasn't improved by repetition.

DOCTRINE OF ADAPTATION BY USAGE

A singular thing I may say to you is that while the Supreme Court hasn't bought this line, a very respectable body of academic opinion has, under the doctrine of adaptation by usage. It is a glossy euphemism for usurpation of power, and it rests in part also on the "gloss of life" statement by Justice Frankfurter, which in turn rests on a statement by Marshall made in the Halls of Congress. Marshall later said that he had no intention of claiming that Congress could enlarge its power by construction. The argument is that it is too cumbersome to amend the Constitution. This is one of the supreme examples of effrontery.

The servants of the people say, of course, the Constitution provides a mechanism for alteration, but it is too tedious, it is too hard; you might even refuse us, so we will just "adapt" it by our practices, we will encroach a little here and step a little further there, and that becomes the "gloss of life." To my mind, that is in complete violation of the separation of powers. If Congress cannot delegate powers, if it cannot abdicate its powers, so the Supreme Court has said, how can the President take what Congress can't give?

One of Professor Rostow's points in arguing that the Javits bill is unconstitutional, is that it would permit Congress to "amend the Constitution without the inconvenience of consulting the people." If Congress cannot by statute thus "amend" the Constitution, how can the President amend the Constitution by his own practices? As well lift himself by his bootstraps. Hamilton, the daring pioneer of broadly-read Presidential powers, regarded it as "a fundamental maxim that an agent cannot new-model his own commission. A treaty, for example, cannot transfer the legislative power to the executive department."

Now the President claims that what the Senate and President combined cannot do the President can do all alone: he can "new model his commission" and transfer the legislative power to the executive.

SECRETARY ROGERS' ARGUMENT CONCERNING UNCONSTITUTIONALITY QUESTIONED

A word about Secretary of State Rogers. It is a mark of intellectual confusion that at the very same time he was saying of the Javits bill, which merely seeks to insure congressional participation in decisions for hostilities: "I don't think you can change the Constitution, amend the Constitution, by legislation," he could also state, "Mindful of the hardships which war can impose on the citizens of a country and fearful of vesting too much power in any individual, the framers intended that decisions regarding the institution of hostilities be made not by the President alone . . . but by the entire Congress and the President together." And he agreed that "the Constitution mandates a role for Congress in the making of decisions to use force."

How can a bill which seeks to secure that role be in violation of the Constitution?

I think he has undercut his own argument; he has blown it out of the water.
NECESSITY OF STATUTE CONCERNING WARMAKING ROLE

Now, I come to a facet of a question raised by Senator Javits. If the Constitution already vests this war-making role in Congress, it may be asked, why is it necessary so to provide by statute? The reason is that proponents of Presidential war-making, relying on Acheson's "87 incidents," maintain that "a practice so deeply embedded in our constitutional structure should be treated as decisive on the constitutional issue."

Congress, too, can construe its power under the Constitution, and go far to dispel the "murkiness" created by Presidential assertions of power. Then, too, on the view most favorable to the President, that war-making is a shared power, the Presidential power, the Supreme Court has held, would be subject to the countervailing statute. Moreover, disobedience of a statute by the President would place him in the position of a law-breaker. No man is above the law; and a violation of law opens the courts to enforcement of the statute. It is certainly crystal clear if you embody it in a statute that is enacted.

This issue, let me emphasize, will not be settled by exhortations, even in statutory form. President Eisenhower unhesitatingly ordered the Secretary of the Treasury to disobey a statutory cutoff of funds on the grounds that it was an unconstitutional encroachment on his power to withhold information from Congress. Ultimately the Supreme Court must decide whether the President may act in defiance of a statute. Given a dispute about constitutional boundaries the Court is the inescapable arbiter. I cannot believe that the Supreme Court would prefer to have the Congress sit in judgment on its own cause, and to impeach the President for acting in defiance of its enactment. I think the court would vastly prefer that the issue be decided in an impartial atmosphere.

I, therefore, look at impeachment—even if you had the votes—as a last resort. If the Court should do what I don't anticipate, label the issue a "political question" and say fight it out, then Congress would have no recourse but to defend its position. You would be acting under the rule of necessity; when there is no other judge, Congress has to be the judge. When the Reconstruction Congress impeached Andrew Johnson for violating the Tenure of Office Act, Chief Justice Chase wrote that the issue ought to have been submitted to the courts.

NECESSITY OF STATUTORY CONTROL OVER TROOP DEPLOYMENT

Without control over deployment, your delegation of powers to the President to repel attacks on troops stationed abroad won't really be effective. Unless Congress establishes control over deployment by statute requiring congressional authorization, the President will in the future as in the past station the Armed Forces in "hot" spots that invite attack, for example, the destroyer Maddox in the Tonkin Gulf.

Once such an attack occurs, retaliation becomes almost impossible to resist. Although I agree with Prof. Alexander Bickel that "Congress can govern absolutely, absolutely, the deployment of our forces outside our borders," I venture to think that Secretary of State Acheson's categorical statement to the contrary calls for analytical refutation. At least my search of the literature disclosed no attempt to deal with
it. So short as my statement will be on this, it will pull together a few threads of constitutional sources and history.

I was an admirer of Acheson but have become disenchanted by the man's intellectual arrogance, his readiness to speak ex cathedra. This is a characteristic statement:

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

Acheson furnished no citations nor reasoning for this untenable assertion.

It is Congress that is to "provide for the common defense," which implies the right to decide what is requisite thereto. Congress also is "to raise and support armies," and by necessary implication it can withhold or withdraw that support. In determining the size of the army it will "support" it is entitled to weigh priorities: Shall troops be stationed in Germany or deployed in Cambodia? Indeed the constitutional mandate that "no appropriation" for support of the armies "shall be for a longer term than 2 years" implies that it is for Congress to decide at any point whether further appropriations should be made and in what amounts. The duty of Congress, in Hamilton's words, "to deliberate upon the propriety of keeping a military force on foot," surely comprehends the right to insist that a portion of the military forces should not be kept "on foot" in Vietnam or Europe.

RIGHT TO SPECIFY HOW APPROPRIATED MONEYS SHALL BE SPENT

With the power of appropriation goes the right to specify how appropriated moneys shall be spent. This is immediately relevant to the issue of impoundment. And it is not a mere matter of logic but of established parliamentary principle.

After 1665, stated the great historian Henry Hallam, it became "an undisputed principle" that moneys "granted by Parliament, are only to be expended for particular objects specified by itself." I may add, if my memory serves me, Sir Edward Seymour, who was an officer of the Ministry, was impeached for applying money specified for one public purpose to another public purpose. So the power to specify and control disbursements of funds was regarded with great seriousness by the Parliament. That practice was embodied in an early congressional enactment.

I hardly need to emphasize that all of the colonial assemblies laid claim to the power of the Parliament in the slightest detail.

In discussing the congressional power to investigate, the Supreme Court found that the British Parliament had exercised it, and therefore it was one of the powers conferred upon Congress by the Constitution. Consequently, if there was this parliamentary power to specify how appropriations were to be expended in every detail, it was lodged in the Congress.

In a very early statute, I think an 1809 citation contained in my article, the Congress specified the funds were to be used for this purpose and no other purpose whatsoever. If, therefore, Congress specifies that its appropriations are to be spent only for troops stationed in the United States, that specification is binding on the executive.
Finally, there is the power to make rules "for the Government and regulation of the Armed Forces," withheld from the Commander-in-Chief and given to Congress. These words connote a power to govern and control the Armed Forces, and they manifestly embrace congressional restraint upon their deployment.

I would, therefore, urge that you consider a bill or provision requiring congressional authorization for the deployment of the Armed Forces abroad, except in tightly limited circumstances which would hold no prospect of involvement in hostilities.

CONSTITUTIONALITY OF JAVITS BILL UNASSAILABLE

The constitutionality of the Javits bill, in my judgment, limiting the President's power single-handed to embroil the Nation in war is unassailable.

POWER TO FORESTALL IMMINENT DANGER OF ATTACK

One last word: It is very seldom that I dare differ with my esteemed friend and colleague, Professor Bickel, but on one point I wish to spread some facts before you, and this is the suggestion that the power to forestall imminent danger of attack, or to forestall attack on troops outside of the United States, was embodied in the Constitution.

In going back over the original documents I found this. As far back as the Continental Congress, the Articles of Confederation show, the States were very jealous of their sovereignty; they didn't rely on the army of the Congress to defend them, so they insisted on a provision which would enable them to repel an attack upon the individual State, mind you, not on the contiguous States. Virginia couldn't defend against an attack on Maryland, but on Virginia, or against imminent danger of invasion. For example, if Virginia had received news that Indian tribes were about to invade it, Virginia was then permitted to act. This cropped up and was recommended to the Convention and embodied in the Constitution.

So you have an express provision authorizing a State (1) to repel an attack upon itself or (2) imminent danger of attack upon itself. There is an ICC case passing on the Transportation Act where the motor carriers claimed a power conferred by Congress on the railroads. The Supreme Court held that the fact the power was conferred on the railroads and not granted to the motor carriers meant that it was withheld. I suggest not to be too hasty about concluding that there is a constitutional power in the President to repel the "imminent danger of invasion," let alone imminent danger of attack on troops stationed abroad.

This doesn't mean that you can't handle the situation by a delegation from Congress, but I would caution against claims to constitutional powers that can be made by the Executive without your sanction.

You had a sample yesterday from the lips of Attorney General Kleindienst. You should not be too ready to put your blessings on a power which really is hard to find in the Constitution. You can dele-
gate the power, and you have done so. My suggestion—perhaps Professor Bickel would regard it as formal—is that your legislative history point to this constitutional history and make clear the fact of delegation. Anything beyond repelling attacks on the United States is a matter of delegation. If there is a constitutional power that goes beyond this, you have something that is likely to be virtually unlimited; whereas if it is delegated it can be restricted.

I thank you.

[Professor Berger's prepared statement follows:]

**PREPARED STATEMENT OF PROFESSOR RAOUl BERGER**

First let me express my gratitude to this Committee for its leadership in the Congressional struggle to resume its powers. History, I am confident, will mark your efforts as a turning point in the course of democratic government.

It is astonishing that despite all of the testimony of the noted historians and constitutional lawyers who have appeared before you, there remain respected journalists and publicists who still regard the issue as a "murky constitutional division of war powers between Congress and the President." To my mind, such statements indicate that the writers have not taken the pains to study closely the history of the war powers. What is "murky" to them has become quite clear to me; and if I speak with undue conviction, it is because I took the word of no one on the issue, but instead went back to the historical sources and studied them for myself.

My chief concern is to defend the Javits Bill against charges by Secretary of State William P. Rogers and former Under Secretary of State Eugene V. Rostow that it is unconstitutional. It is not my purpose to defend the wisdom of the particular provision, for as John Marshall stated, "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Whether or not the Javits bill represents the wisest possible solution of the problem—the legislature is yet to be born that can draft a perfect bill—is not nearly so important as the fact that you are taking a great step towards resumption of your constitutional powers. The Bill would represent a constitutional construction by Congress of its powers, which should go far to repel the "murkiness" created by a long series of self-serving presidential assertions of power. Congress, the Supreme Court has often held, cannot abdicate its powers. The corollary of that axiom is that Congress is under a duty to exercise those powers itself.

Opponents of the Bill summon remote hypothetical contingencies which might demand instant, unfettered presidential response. Against such a parade of horrors I would pose the actual horror of our ever-deepening involvement in the Vietnam quagmire. Most presidential adventures, as Professor Henry Steele Commager pointed out, lacked the element of urgency; in almost every case there was time to consult Congress. I cannot improve on his statement that "great principles of government are not to be decided on the basis of the argument ad horribendum—by conjuring up hypothetical dangers and insisting that the structure and operations of government must be based on the chance of these rather than on experience." (Fulbright Hearings 16).

Let me then focus on the issue of constitutionality. Roughly speaking, the Bill seeks to limit presidential war-making in the absence of Congressional authorization, leaving the President free to defend the United States and its armed forces against sudden attack. The power to wage war, it may be categorically asserted, was vested by the Constitution in Congress, not the President. If this be so, your Bill merely seeks to restore the original design. It cannot be unconstitutional to go back to the Constitution. Here I can only sketch the materials which demonstrate the purpose of the Founders, referring for full documentation to my article, "War-Making by the President."

The best index of constitutionality is the specific provisions of the Constitution respecting the war powers, plus the explanation of the Founders as to what they intended to accomplish thereby. The war powers of the President are expressed in three little words—"Commander-in-Chief," which Hamilton explained to a

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people in dread of creating another George the Third, merely meant that the President was to be the "first General." (RB 85). As Professor Louis Henkin recently remarked, generals, "even when they are 'first,' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others." (Henkin, Foreign Affairs 50-51, 1972). The "Commander-in-Chief" was to lead the armed forces once war was "commenced" by Congress or by a "sudden attack" on the United States. This was the entire historical content of those three little words.

In contrast, the over-towering bulk of the war-making power was lodged in Congress. James Wilson, with Madison, the leading architect of the Constitution, explained:

"The power of declaring war, and the other powers naturally connected with it, are vested in Congress. To provide and maintain a navy—to make rules for its government—to grant letters of marque and reprisal—to make rules concerning captures—to raise and support armies—to establish rules for their regulation—to provide for organizing . . . the militia, and for calling them forth in the service of the Union [there was no standing army] all these are powers naturally connected with the power of declaring war. All these powers, therefore, are vested in Congress." (RB 38).

To this may be added that Congress is also empowered to "provide for the common defense" and to make appropriations for the foregoing purposes. Since all of the powers "naturally connected" with war-making are vested in Congress, it follows, as several Founders expressly stated, that they are not to be exercised by the President. (RB 41 n. 98).

You may think that I too easily glide from a power to "declare" war to a power to "make" it. Originally it was proposed that Congress be empowered to "make" war; this was changed to "declare" (RB 39-41), for reasons well summarized by Secretary of State Rogers. In his testimony before your Committee in 1971, he confirmed that the "change in wording" from "make" to "declare" "was not intended to detract from Congress' role in decisions to engage the country in war. Rather it was a recognition of the need to preserve in the President an emergency power—as Madison explained it—"to repel sudden attacks' and also to avoid the confusion of 'making' war with 'conducting' war, which is the prerogative of the President" as Commander-in-Chief. (Fulbright Hearings 488). But for the decisions involved in conducting war as "first General," all the rest of the war-powers remained in Congress. In the words of Hamilton's proposal to the Convention, the Executive would "have the direction of war when authorized or begun" (RB 37), implying it was not for him to begin a war. Though Hamilton was the great proponent of expanded presidential powers, he later stated that "it belongs to Congress only, to go to war." (RB 42 n. 99).

The power to "declare," i.e., to wage, war, was vested in Congress, James Wilson explained to the Pennsylvania Ratification Convention, as a guard against being "hurried" into war, so that no "single man [can] . . . involve us in such distress." (RB 36). The severely limited role of the President was a studied response to what Madison called "an axiom, that the executive is the department of power most distinguished by its propensity to war: hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence." (RB 38).

"Those who are to conduct the war," said Madison, "cannot in the nature of things be proper or safe judges, whether a war ought to be commenced, continued or concluded." Note, parenthetically, the relevance of Madison's remark to President Nixon's continued bombing in Cambodia; it is Congress, not the President, that is to determine whether a war, once commenced, is to be "continued or concluded." George Mason also "was against giving the power of war to the President, because not (safely) to be trusted with it." (RB 40). So the President was left with the power "to repel and not to commence war," as Roger Sherman advised. (RB 39). But for the power to "repel sudden attacks" on the United States or to direct a war once begun by Congress, the entire war-making power was vested in Congress. On this eminent scholars are agreed, as the Hearings before your Committee in 1971 on the predecessor Bill amply testify, and as was conceded in 1966 by the State Department's Legal Adviser.

Professor John Norton Moore finds uncertainty as to "which branch would have authority to commit the nation to force short of war, or indeed what war meant." (Fulbright Hearings 462). Such semantic questionings overlook the Founders' anxiety to limit the power of a "single man" to "hurry" us into war. Those who feared a blazing forest fire were little disposed to authorize the Presi-
dent to start brush fires. "Brinkmanship" is an invention of our era. A Convention which carefully authorized the President to "repel sudden attacks" on the United States hardly left him free to engage in foreign adventures "short of war." Congress, said the Supreme Court in 1800, may "declare a general war" or "wage a limited war," thereby comprehending all "war" and dissipating the "uncertainty." Bas v. Tingey, 4 Dallas 87.

Madison's summary of the matter deserves to be blazoned on your walls in letters of gold:

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

In 1966 the Legal Adviser of the State Department had little quarrel with the view of the "original intention" herein expressed, and said of the President's power to "repel sudden attacks" that "In 1787 the world was a far larger place, and the framers probably had in mind attacks upon the United States." (RB 47). Assuredly the Framers did not conceive that the President might repel attacks on Kamchatka. But, the Adviser added, "In the 20th century the world has grown much smaller, an attack on a country far from our shores can impinge directly on the nation's security. . . . The Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress."

(RB 50). No member of the Executive has ever pointed to a constitutional provision, or to a statement of the Founders, that supports this extraordinary claim. Recall Madison's words: "the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war." Whether an attack on a foreign state represents a threat to the "national security" is a political matter not left to the decision of the "first General." The "power of judging the causes of war," said Madison, "is fully and exclusively vested in the legislature."

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

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

When Secretary of State Acheson advised President Truman in 1950 that he had constitutional authority as Commander-in-Chief to commit troops to meet the invasion of South Korea, he relied on a State Department memorandum which listed "eighty-seven instances in the past century" in which prior Presidents had exercised presidential power to "send our forces into battle." (RB 59). Later Under Secretary of State Nicholas Katzenbach stated that "most of these [incidents] were relatively minor uses of force." (RB 59-60). The "vast majority" of such cases, said Edward Corwin, "involved fights with pirates, landing of small naval contingents on barbarous or semi-barbarous coasts [to protect American citizens], the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border." (RB 60).

No possibility of "war" was presented by these incidents; and one can only marvel at the fantasy that can conjure from such incidents "precedents" for sending our troops "into battle." Were these incidents to be regarded as equivalent to executive waging of war, the last precedent would stand no better than the first. "Illegality is not legitimated by repetition. So the Supreme Court has held. (RB 60 n. 200)."

Some academicians consider that presidential practices constitute a "gloss of life" on the Constitution, that the Constitution is a living document which must expand to meet new needs. But the way to such expansion is by amendment, not by self-appointed revisionists. Given a presidential takeover of powers plainly conferred upon Congress alone, and accompanied by an unmistakable intention to withhold them from the President, his appeal to his own "precedents" seeks to alter the constitutional distribution; it violates the separation of powers. Professor Rostow inveighs against the Javits Bill because "it would permit Congress to amend the Constitution without the inconvenience of consulting the
people,” (RB 31), this about a return to the Constitution. If Congress cannot by statute this “amend” the Constitution, how can the President amend the Constitution by his own practices? As well lift himself by his bootstraps. Hamilton, the daring pioneer of broadly-read presidential powers, regarded it as a fundamental maxim that:

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

Now the President claims that what the Senate and President combined cannot do the President can do all alone; he can “new-model his commission” and “transfer the legislative power to the executive.”

A word about Secretary of State Rogers. It is a mark of intellectual confusion that at the very same time he was saying of the Javits Bill, which merely seeks to insure congressional participation in decisions for hostilities: “I don’t think you can change the Constitution, amend the Constitution, by legislation,” (Fulbright Hearings 525), he could also state, “Mindful of the hardships which war can impose on the citizens of a country and fearful of vesting too much power in any individual, the framers intended that decisions regarding the institution of hostilities be made not by the president alone... but by the entire Congress and the President together.” (Fulbright Hearings 488).

And he agreed that “the Constitution mandates a role for Congress in the making of decisions to use force.” Id. at 528. How can a Bill which seeks to secure that role be in violation of the Constitution?

If the Constitution already vests this war-making role in Congress, it may be asked, why is it necessary so to provide by statute? The reason is that proponents of presidential war-making, relying on Acheson’s “87 incidents,” maintain that “a practice so deeply embedded in our constitutional structure should be treated as decisive of the constitutional issue.” (RB 81). Congress too can construe its power under the Constitution; and a statute would serve as such a construction, and go far to dispel the “murkiness” created by presidential assertions of power. Then too, on the view most favorable to the President, that war-making is a shared power, the presidential power, the Supreme Court has held, would be subject to a countervailing statute. (RB 76). Moreover, disobedience of a statute by the President would place him in the position of a law-breaker. No man is above the law; and a violation of law opens the courts to enforcement of the statute.

This issue, let me emphasize, will not be settled by exhortations, even in statutory form. President Eisenhower unhesitatingly ordered the Secretary of the Treasury to disobey a statutory cut-off of funds on the grounds that it was an unconstitutional encroachment on his power to withhold information from Congress.8 Ultimately the Supreme Court must decide whether the President may act in defiance of a statute. Given a dispute about constitutional boundaries the Court is the inescapable arbiter. I cannot believe that the Supreme Court would prefer to have the Congress sit in judgement on its own cause, and to impeach the President for acting in defiance of its enactment. When the Reconstruction Congress impeached Andrew Johnson for violating the Tenure of Office Act, Chief Justice Chase wrote that the issue ought to have been submitted to the courts.4

DEPLOYMENT

Section 8(2) of the Bill authorizes the President to “repel an armed attack against the Armed Forces... located outside the United States.” Unless Congress establishes control over deployment by statute requiring Congressional authorization, the President will in the future as in the past station the Armed Forces in “hot” spots that invite attack, for example, the destroyer “Maddox” in the Tonkin Gulf. Once such an attack occurs, retaliation becomes almost impossible to resist. Although I agree with Professor Alexander Bickel that “Congress can govern absolutely, absolutely, the deployment of our forces outside our borders” (RB 78 n. 318) I venture to think that Secretary of State Acheson’s categorical statement to the contrary calls for analytical refutation. Acheson stated, “Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by Congress in the exercise of powers which it has under the Constitution.” (RB 77).

Acheson furnished no citations nor reasoning for this untenable assertion. It is Congress that is to "provide for the common Defense," 5 which implies the right to decide what is requisite thereto. Congress also is "to raise and support armies," and by necessary implication it can withhold or withdraw that support. In determining the size of the army it will "support" it is entitled to weigh priorities shall troops be stationed in Germany or deployed in Cambodia? Indeed the constitutional mandate that "no appropriation" for support of the armies "shall be for a longer term than two years" implies that it is for Congress to decide at any point whether further appropriations should be made and in what amounts. The duty of Congress, in Hamilton's words, "to deliberate upon the propriety of keeping a military force on foot," surely comprehends the right to insist that a portion of the military forces should not be kept "on foot" in Vietnam or Europe.

With the power of appropriation goes the right to specify how appropriated moneys shall be spent. This is not a mere matter of logic but of established parliamentary principle.

After 1665, stated the great historian Henry Hallam, it became "an undisputed principle" that moneys "granted by Parliament, are only to be expended for particular objects specified by itself." That practice was embodied in an early Congressional enactment. If, therefore, Congress specifies that its appropriations are to be spent only for troops stationed in the United States, that specification is binding on the Executive. Finally, there is the power to make rules "for the government and regulation of the armed forces, "withheld from the Commander-in-Chief and given to Congress. These words connote a power to govern and control the armed forces, and they manifestly embrace congressional restraint upon their deployment. I would therefore urge that you consider a bill or provision requiring Congressional authorization for the deployment of the Armed Forces abroad, except in tightly limited circumstances which would hold no prospect of involvement in hostilities.

The constitutionality of the Javits Bill, in my judgment, limiting the President's power single-handed to embroil the nation in war is unassailable.

The CHAIRMAN. Thank you, Professor Berger. That is a very thorough and interesting discussion.

Professor Bickel, would you like to take up from there. Then before we go into questions we will go to Mr. Katzenbach.

STATEMENT OF PROF. ALEXANDER M. BICKEL, YALE UNIVERSITY LAW SCHOOL

Mr. BICKEL. I am very glad to be here today in response to the committee's invitation. It is a great privilege to have the opportunity to assist the committee, in whatever small measure, in its historic endeavor to restore the balance of warmaking power under our Constitution.

I spoke to the same subject here before, in July 1971, and I will try not to rehash my earlier testimony. Hence, I will not now discuss, except as the committee may later wish to inquire, the question of the constitutionality of one or another past presidential action; nor will I enter upon extended argument in support of my position that Congress has full power to prescribe in greater detail than does the Constitution itself the allocation of warmaking power between the President and the Congress.

(When I speak of the power of Congress I mean, of course, the legislative process, which includes the President's veto power, and then the congressional power to override.)

5 Citations for this portion will be found in RB 78-80.
"NECESSARY-AND-PROPER" CLAUSE OF CONSTITUTION

I will pause a moment only to deal with a novel argument—an astonishing one. I find it—concerning the power of Congress.

In arguing that Congress has the power to enact such a statute as S. 440, I have relied, in part, as others have done, on the "necessary-and-proper" clause of article I, section 8 of the Constitution. This clause begins by authorizing Congress to make "all laws which shall be necessary and proper for carrying into execution the foregoing powers * * *"). So far, the reference is to the previously enumerated powers of Congress itself.

But the clause notably goes on to charge Congress also 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." I understand that the State Department now takes the position that the necessary and proper clause provides no support for war powers legislation such as S. 440, or even for more attenuated legislation such as House Joint Resolution 2, because it does not authorize Congress to expand its own powers under the Constitution, or in any other way to change the Constitution.

This contention is a classic question-beggar. Of course, the necessary and proper clause does not authorize Congress to enact unconstitutional legislation, and of course, therefore, if it were true that the President has exclusive power under the Constitution to do anything that S. 440 would require him to seek congressional approval for, then it would be true also that Congress cannot take away his power, and that the necessary and proper clause is no help. But the extent of exclusive Presidential power is not a given: it is not the premise, it is the question. There is a substantial area of exclusive Presidential power, which Congress cannot disturb, and which S. 440 touches upon only to affirm it.

Beyond that is a larger area, a "zone of twilight," as Justice Jackson said in *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952), in which the President and Congress "may have concurrent authority, or in which its distribution is uncertain." And still beyond is power that properly belongs to Congress, which Presidents, though acting always in good faith and from a sense of duty as they saw it, have in recent years usurped to themselves.

The issue is the authority of Congress, in exercise of the legislative function, to recapture power that under the Constitution properly belongs to Congress, although Presidents have of late exercised it independently of Congress, and to render certain a distribution of powers within the "zone of twilight" which has in the past been uncertain. This authority of Congress may be viewed as existing in any case, because in general Congress has the residual power, what John Marshall long ago characterized as the implied power, to do anything that perfects or clarifies or declares the structure and operation of the Government or aids its function. But the necessary and proper clause confirms the existence of this authority and frees it from any possible doubt.
Nothing in the Constitution does or can empower Congress to do something unconstitutional, but much in the Constitution needs to be clarified or implemented, and except in the limited number of instances where exclusive power is specifically vested elsewhere, the necessary and proper clause authorizes Congress to do so, with respect to its own functions as well as those of the other branches of the Federal Government.

S. 440

Coming to the specific legislative proposal that is before the committee, S. 440, I may say, as came out when I was here in July 1971 in a colloquy with Senator Spong, whom I greatly regret no longer seeing here, that I originally, when the idea of this bill was first broached, looked upon attempts at codification with some skepticism. I harbored the doubts natural to a common law trained lawyer about such efforts, and feared that any comprehensive declarative statute would run the risk of being either too restrictive in its definition of Presidential power, or else of becoming, like the lamentable Tonkin Gulf resolution, a blank check. But successive drafts of the Javits bill, to which, as this committee’s report of February 9, 1972 pointed out, Senators Stennis, Eagleton and Spong among others contributed, culminating in the bill that was passed by the Senate last year and that is now S. 440, have convinced me that safe, sound and effective general declarative legislation is possible in the war powers area.

Moreover, I am entirely convinced that Congress will not likely—I had nearly said, cannot ever—be brought to resume exercise of its share of the war power through specific actions until it has in declarative fashion reallocated a share of the responsibility to itself. The people tend not to hold Congress responsible, and its own Members tend to avoid the responsibility. When a Tonkin Gulf resolution or a Formosa resolution is put before the Congress, it goes through quickly because a substantial part of the membership is under the misapprehension that Congress is merely being asked to stand patriotically by the President, who is acting within the constitutional sphere of his own independent, if not indeed exclusive, authority.

Thus, the late Senator Richard Russell, we are told advised against intervention in Vietnam, but told President Johnson that he would stand by him loyally if the President should act. The President, for his part, does not feel obliged to put his whole case before Congress, to bare his mind and reveal his intentions and thus defend his proposal and persuade Congress and the country to accept it. For, after all, he is not proposing, he is merely asking Congress to stand with him in united ranks behind something that he has authority to do anyway. There is no need for Congress to know everything since it is not Congress that is assuming the responsibility, and there are always plausible reasons for maximum secrecy.

And so a vast ambiguity now shrouds the allocation of the warmaking power—more ambiguity than can be attributed to the language of the Constitution, however cryptic, but an ambiguity bred by years of Presidential assertiveness and congressional inertia. The upshot is that Congress does not know its place, so to speak; it has lost its bearings in this area. If Congress is ever again to take meaningful specific measures in matters of war and peace, it is apparent to me that it must
first perform some quasi-constitutive act, an act of standing forth before the people as responsible, of declaring its responsibilities to itself and to the country with some clarity.

**QUESTION OF OVERSTATEMENT OF PRESIDENT'S POWER**

I am aware of questions raised by Senator Fulbright and others about those provisions of section 3 of S. 440 which define and declare, not the powers and responsibilities of Congress, but the power and function of the President as Commander in Chief. One question is whether the bill does not somewhat overstate the extent of exclusive, independent power that the Constitution vests in the Commander in Chief. In my judgment it does not, with the single possible exception of section 3 (3) (A) and (B), which speaks of protecting American nationals on the high seas or in a country in which they are subjected to a direct and imminent threat to their lives. But in the situations referred to, action if any is so clearly of an emergency nature and must so clearly be undertaken with the utmost speed, that I should think it almost impossible to expect that the President will be able first to seek and obtain legislative approval.

**QUESTION OF WHETHER PRESIDENTIAL POWERS BETTER LEFT UNSTATED**

A second question that is raised about the declaration of Presidential power in section 3 is whether it would not be better in any case to leave independent, exclusive Presidential powers unstated, so that in any instance of their exercise the responsibility will clearly be the President's alone, and so that no words have been put on paper, however carefully and precisely, which under any circumstances might be given a latitudinarian construction. The answer to this question that I find persuasive is that the actual draft of section 3 of S. 440 is precise and is, on any fair reading, not only a full implementation of the constitutional grant to the President, but also more restrictive than many a claim of power that has in past years been made by Presidents, and indeed acted upon.

Moreover, as a matter of effective drafting, it seems to me impossible to state with any clarity what is reserved to Congress without stating first what belongs to the President. The task is one of line-drawing, of separating one thing from another, and in doing so one must state what is on both sides of the line. Now, I use words such as "must" and "impossible." Of course, I do not mean them literally. I think one must do it this way in order to be fully effective, and it is impossible to do it with full effectiveness any other way. It can be done without saying anything about Presidential powers, but it is my strong conviction that it could not be done nearly as well.

**RISK OF TYING FUTURE PRESIDENT'S HANDS IN UNFORESEEABLE CRISIS**

Another worry that has been expressed is that any attempt to circumscribe the President's warmaking power runs the risk of tying the hands of some future President in some unforeseeable future crisis in which action by him would be beneficial, if not essential. The Founding Fathers, it is added, were wise enough to make no such attempt at circumscribing executive power. The fact, however, is that the Founding-
ing Fathers did intend to limit the President's warmaking power. That power has appeared virtually unrestricted in the practice of recent years, but the intention to make it so cannot be imputed to the framers. Be that as it may, the failure of the framers to write more than they did and more specifically than they did is no argument that we should equally refrain from doing so. They knew less than we do. And they knew that we would know more. That was their wisdom. Writing a Constitution, they drew broad outlines and left much to be filled in from time to time by statute and court decision.

We know enough to know now that what the Javits bill states as independent Presidential power is in all reason, consistently with the intention of the framers of our Constitution, and in light of the experience of nearly two centuries, including a quarter century of the nuclear age, all that is needed, indeed all that is possible. The Javits bill describes the sort of emergencies in which a purpose to use force automatically and take the consequences can be imputed to our people without testing that purpose in the Congress. I think we should have learned by now, not only calls into question the nature of our representative democracy, but is useless; it is in the end an act of self-flagellation that helps nobody, including the ally we are supposed to be rescuing. The country will not effectively fight a war that it got into without knowing that it wanted to or without having been persuaded that it should—as a nation, through the two institutions, the Presidency and the Congress, that together are fit to evoke the national will and give it effect.

ALTERNATIVES TO S. 440 PROVISIONS BECOME BLANK CHECKS

Alternatives to the provisions of S. 440, drafted in the effort to be less restrictive and more cautious about the future, become blank checks. That is true for example of section 3 of House Joint Resolution 2. The operative phrase of this section is “endangers the United States”—not directly or immediately, but in any sense.

The phrase suggests, not a question of fact, but of judgment, and not a judgment tied to present circumstances, but a prophecy. I don’t suppose for a moment that any President, including President Johnson in 1965, ever acted except in the good faith belief that he was responding to a situation that in a large sense, and looking to the future, endangered the United States, or ever thought, to continue quoting the language of section 3 of House Joint Resolution 2, that he was in anything but such “extraordinary and emergency circumstances as do not permit advance congressional authorization,” if for no other reason than that he thought it wise to keep his decision private and his options open to the last minute.

Looking beyond emergencies in which it sanctions independent Presidential action, section 3 of S. 440 makes provision for specific prospective authorization of the use of force. The emphasis is on the word “specific.” There are to be no more Tonkin Gulf resolutions authorizing everything and nothing, and no other ratifications, prospective or post facto, without the assumption of responsibility, as by appropriating money. The argument has been made by people whose opinion must give pause that Congress ratified Presidential action by appropriating money to support the war in Vietnam, for example. I
confess I don't understand the position. The Constitution does not say
that the President shall declare war subject to congressional veto by
failure to appropriate. It says that Congress shall declare war, and that
must mean that Congress, whether by formal declaration or other
legislation, must expressly authorize the initiation of hostilities save
only in the limited conditions in which the President may act on his
own independent authority, and in which, indeed, his authority may
be exclusive.

To appropriate money in support of a war the President is already
waging, it seems to me, is no more to ratify his action in responsible
fashion than to appropriate for the payment of his salary.

Under section 3 of S. 440, the United States will be able to under-
take credible international commitments through specific legislation
implementing treaties or other agreements. I do not think we have
credible commitments of that sort now. Commitments we have made
are ambivalent in their own terms, and exist, moreover, in the miasma
of ambiguity and misapprehension that has surrounded our domestic
allocation of the warmaking power.

ONLY ASSURANCE LIES IN PROCESS OF ACTING BY CONSENT

There is no assurance that restoring a proper share of responsibil-
ity to Congress will result in its wise exercise. Congress, it has been
said, would not have allowed President Roosevelt to shoot at German
submarines and raiders in the Atlantic in 1941, which may be true.
Congress might also have plunged into Vietnam, all gung-ho, in 1965,
which may also be true, although it is not a conclusion that can be
drawn from passage of the Tonkin Gulf resolution. Congress and the
President are indeed capable of acting unwisely, singly or together,
but hopefully less likely together than singly. At any rate, together
they are all we have got. The only assurance there is lies in process;
in the duty to explain, justify, and persuade; to define the national
interest by evoking it; and thus to act by consent. S. 440 will conduce
to this end.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Professor Bickel, I thought that last comment about acting together
is especially appropriate. That is what we are not doing now.

Mr. BICKEL. No; you are not.

The CHAIRMAN. Mr. Katzenbach, will you proceed sir.

STATEMENT OF NICHOLAS de B. KATZENBACH, VICE PRESIDENT
AND GENERAL COUNSEL, IBM CORP.

Mr. KATZENBACH. I appreciate your invitation to testify on S. 440,
the "War Powers Act."

LEGISLATION IS CONSTITUTIONAL AND BINDING UPON PRESIDENT

I have no question about the constitutional power of Congress to
enact this legislation. This committee for the past several years has
heard much testimony on the respect of the powers of the President
and Congress with respect to the use of the Armed Forces, and there
is little that I can add to your knowledge. My own view is very similar
to that expressed by Justice Jackson in the steel seizure case. I believe that Congress has very broad powers under the Constitution to legislate with respect to both foreign and domestic policy; that, in the absence of legislation or conflicting congressional view, the President has considerable freedom of action acquired as much by custom and historical precedent as by constitutional principle; and that the President has relatively little power under the Constitution and stemming from his own authority to act in ways which conflict with congressional mandates.

Therefore, I conclude that this legislation is constitutional and, if enacted, binding upon the President.

RESERVATIONS ABOUT WISDOM OF S. 440

I do have serious reservations about the wisdom of S. 440. On balance, I would endorse it, but reluctantly. Let me explain the reasons for my reluctance.

First, this legislation is a reasonable restatement of what I conceive to be the meaning and intent of constitutional provisions. No President should engage the United States in major or prolonged hostilities without formal congressional authorization. He may claim the right to engage in hostilities "short of war"—but even as to these I believe Congress may make reasonable provisions to prevent their escalation by events, intended or unintended, to larger hostilities. Surely, any President must recognize the need for broad public and congressional support in circumstances involving the use of armed force. And given that fact, I cannot conceive the situation where Congress will, within a 30-day period, deny the President whatever further authority he seeks. Therefore, as a practical matter, I doubt this legislation would or should have any major impact on the questions it addresses.

Furthermore, I have two additional concerns. I think there are many who tend to view this legislation as an effective check on Presidential power—and most importantly, as a way of avoiding future Vietnams. I do not believe it can or will have this effect.

One hopes and prays that we can avoid future Vietnams; but I doubt that this legislation would be an important part of that process. Of necessity, the language is broad and the President who wishes to exploit its ambiguities has plenty of scope to do so. And he could, in my view, almost always create the public support which would give him the political license to do so.

This problem is aggravated by the fact that to the extent the President claims authority greater than that given in this legislation he may simply ignore its strictures. In that way it could inadvertently become the vehicle for expanding rather than restating Presidential power. And certainly there are Presidential statements today, and in the past, which suggest that in the President's view he has power somewhat greater than that provided for in this legislation. And, I think the Congress must also consider the precedential effect of a veto of this legislation and a failure of the Congress to override the veto.

LEGISLATION SUPPORTED

Despite these reasons for having serious reservations about the practical effect of this legislation, I support it because it seems to me
that the failure of Congress, in the face of the Presidential statements, I have already referred to, to assert its constitutional role would be unfortunate. I think that Congress has in recent years lost much of its power and prestige in foreign affairs to the President, and it has done so largely by default. While I continue to believe that the President should and will play a major role in formulating our foreign policy, some restoration of balance is clearly desirable. As President Johnson used to say, "If you want Congress in on the landing you ought to have them in on the takeoff as well."

Furthermore, S. 440 implies a willingness on the part of Congress to share responsibility with the President for extremely difficult decisions. While there is little political advantage for individual Senators and Congressmen in doing so, there is an advantage to the Nation and to our political institutions. The democratic decision-making process is not an easy one to make work. But the fact that it is a difficult one is no excuse for its abandonment.

Thank you.

The CHAIRMAN. Thank you, Mr. Katzenbach.

You all made a very fine contribution to our thoughts. It has not resolved all of our questions, of course. I don’t know that anyone ever will unless the experience may do that.

### REASON FOR EXECUTIVE BRANCH RESISTANCE

I think you all agree the bill is constitutional. I don’t believe there is any dissent at all on the committee’s part, but speaking for myself, there does remain some lingering doubt, to which all of you have referred, and Mr. Katzenbach in particular, about its utility and necessity and what effect it will have on the Presidency.

I wondered if this would make any contribution. How do you explain the position taken by the executive branch on this bill? If it is not restrictive of their power in any substantial way, why don’t they relax and let it be passed?

Would you comment on this, Mr. Katzenbach? You have been in the executive branch. Why don’t they just say, “Yes, this is all right; it states the constitutional provision.”? What do you think is in their minds that inspires them to resist it?

Mr. Katzenbach. Well, I think that the President is claiming today a far broader power than that expressed in this bill and I think that he opposes it because it casts doubt on the fact that he has that broader power that he has claimed.

### RISK OF PRESIDENT’S IGNORING BILL

The CHAIRMAN. If that is true, is it your argument that even though we pass it then all he does is say I will ignore it? We do run the risk of it being vetoed and then not passed.

That, I think, is an argument of substance. Supposing it is passed, do you think he would ignore it like he ignores the clean water bill? We passed it over his veto and he still says, “Well, I am sorry, I don’t agree with the policy of the Congress; therefore I won’t execute that law.”

Is this what you are saying? It is an act of futility?

Mr. Katzenbach. I would hope it would not be an act of futility, but I confess that I am not an expert on this President or his administra-
tion, Mr. Chairman, and he has made statements that would be inconsistent with this and I would guess that he would state that this could not limit his authority, that he regarded it as an encroachment on his constitutional prerogatives and that as a political matter he would probably comply with it.

The CHAIRMAN. Did you say he would comply with it?
Mr. KATZENBACH. I think as a political matter if this were passed over his veto.

The CHAIRMAN. He might comply with it?
Mr. KATZENBACH. He would comply with it.

The CHAIRMAN. That is quite a concession.

**EFFECT OF BILL ON FUTURE PRESIDENTS**

Mr. BICKEL. If I may intervene here, you are not dealing only with this President, we are not legislating, you are not legislating just for the next 3 years. There will be other Presidents. If a bill like this gets on the statute books, indeed even if it gets vetoed but Congress passed it, and that is the view of Congress, you will have made a difference to something that exists even though Professor Berger denies its existence, and that is the constitution of practice which accretes precisely by this sort of expression of opinion by the institutions of Government and of their view of the Constitution.

Mr. Nixon may make all sorts of statements about it when it is first enacted, but there will be other Presidents after Mr. Nixon and the passage of a bill like this will make a difference to their views and to the view that their advisers take of the constitutional position.

**SUPPOSING BILL DOESN'T PASS OVER VETO?**

The CHAIRMAN. What do you say to his argument—supposing it doesn't pass over a veto? In view of the last 2 weeks, there is not much assurance you can pass anything over veto. Are we worse off?

Mr. BICKEL. No, I wouldn't think so. Then you are in a position of having an expression of constitutional opinion by two Houses of Congress, not by two-thirds vote perhaps, but there it is. When we discuss the constitutional practice, when Mr. Berger discusses these matters, he cites you to speeches, to expressions of opinion.

Hamilton may be authoritative, but the Congress of the United States is also an authoritative voice in the creation, in the accreting of the coral reef that is this Constitution.

Senator JAVITS. Will the Chair yield to that point?

Mr. BICKEL. Yes.

Senator JAVITS. There are 61 cosponsors in the Senate of this legislation. I have rather a suspicion, Mr. Chairman, that the next President or two may be found in that list.

[Laughter.]

Mr. BICKEL. Or at least the next presidential candidate or two.

The CHAIRMAN. They seem to go through a particular metamorphosis when they move from here down there; they assume a completely different character. The last three of them did.
Mr. Berger. I make no claims to any political wisdom, certainly not. I wouldn't pit my judgment against that of Mr. Katzenbach. Nevertheless, it wouldn't at all surprise me—assuming passage over a veto—it wouldn't at all surprise me that Mr. Nixon, who is a very head-strong man, should persist in bombing Cambodia. I know your bill doesn't apply to Cambodia. But let us assume it does apply; let us hypothesize. Or if the President wanted to recur to bombing of Vietnam it would apply to that, wouldn't it?

Mr. Bickel. Yes.

Mr. Berger. Let us assume that he would want to recur to bombing of Vietnam. We know that when Congress cut off funding for foreign aid because information was refused to Congress, President Eisenhower, on the opinion of Attorney General Rogers, said this is an invasion of his prerogative, and directed Treasury to disburse the funds in spite of the cutoff statute on the ground that it was unconstitutional.

Now you could very likely confront a similar situation. And if you confront it and do nothing, you are going to be in a lamentable position. I for one refuse to believe that the Supreme Court, when the chips are down in a real confrontation by the Congress, when Congress says our prerogatives are being eroded and encroached upon, that the Court will refuse to listen to you. Remember that on the issue of executive privilege, President Nixon said—I hope he meant it—that he will welcome the submission of this controversy to the courts.

The Chairman. You don't think they will say it is a political question?

Mr. Berger. A political question, in the broadest sense, is a question which is confined to some other branch for determination. Here you have two branches, neither of which can conclusively determine a boundary dispute between them. Madison and Jackson and Frankfurter said that given a dispute between the branches, there must be an impartial arbiter. The arbiter must be the courts; anything else is unthinkable.

We are dealing with a dispute about boundaries of power, and I want to remind you that tucked away in Luther against Borden, which was a landmark political question case, there is an exclusion of questions about the boundaries of the Federal branches from the “political question” doctrine. The court has decided a number of private litigations, the Lovett case, for example, (where the House tried to encroach on the power of the executive over employees) and the Meyers case (a removal of a postmaster) which were in reality contests between Congress and the President. Will the court decide the issue because it is presented by a private person, but not decide it when the Congress protests that it is really its powers that are being impaired.

Any administrative agency has standing to protest against that. And I am not going to transform this in an issue of standing.
I would fully agree with Professor Bickel, who stated the argument for the bill in terms of public benefits that were only in the back of my mind, stated it far better than I can; that is a great value. But beyond that, if you are to go beyond pious exhortations you must begin to think about the next step, you must mean business; either bill or joint resolution must be enforced.

You have a right when the President encroaches on your prerogative and against your will as expressed either in statute or joint resolution, you have a right to turn to the courts.

SUPPLEMENTARY LEGISLATION REGARDING DEPLOYMENT

The CHAIRMAN. Did you have reference there to the next step, aside from courts, being legislation with regard to deployment as supplementary to this?

Mr. BERGER. Yes.

The CHAIRMAN. Did you both suggest that?

Mr. BICKEL. I certainly would. I have long believed that that ought to be reviewed.

The CHAIRMAN. I thought it was interesting and I wanted to be sure I interpreted you correctly. You both think that might be useful as the next step legislatively speaking?

Mr. Bickel. I used to think of it as a prior step, but now maybe it has to be a next.

The CHAIRMAN. I would like to reserve my time. I would like to yield to the chief sponsor of the bill so he can proceed, if that is agreeable. He is our expert. He is our in-house lawyer.

Senator JAVITS. At the customary fee.

The CHAIRMAN. It is very high.

COMMENDATION OF WITNESSES

Senator JAVITS. I want first to thank Professor Berger, Professor Bickel and Mr. Katzenbach for coming here today. It is a singular expression of their dedication to the interests of the country. It takes time and it takes energy and it exposes you to the slings and arrows of criticism. Your gratification will come if we do something in the interest of the Nation which is consistent with your advice. I know I express the gratitude of millions of Americans for your testimony. Thank you for bringing your skill, your wisdom, and your prestige to bear upon this issue.

I was very much edified by your previous testimony, in the case of Professor Berger by his very fine article in the Pennsylvania Law Review, which has been made a part of the Congressional Record, and I make the reference accordingly here in this record, and if our Chairman should feel that we should include it in this record I will ask him to do so, but it is in the Congressional Record as of February 20, 1973. (See appendix).

I find that the testimony in each case has a particular portance to the issues which have been raised respecting this legislation and demonstrates the validity of what I said myself in opening the hearings this morning, that this legislation has now really been through the mill. It has had 3 years of the most careful scrutiny by friends and
foes alike, and I think it has stood up fantastically well. I think the testimony this morning bears that out.

Now I would just like to go over with each witness what I glean from his testimony as of vital importance to the bill and to elicit any comment or suggestion both individually and in reflection by one upon the other.

I find particularly compelling in Professor Berger's testimony the concept of the Commander-in-Chief conducting a war, having the direction of war.

I find also extremely illuminating the quoted statement from Madison at page 7 in which Madison says that the power of judging the causes of war is fully and exclusively vested in the legislature. It seems to me that these are the very essence of what we are talking about. I find the rebuttal by Professor Berger of the concept of adaptation by usage of the Constitution to be an especially compelling one and, finally, I would like to call to your attention, Professor Berger, the very broad question of policy involved in the views not of one but of two Secretaries of State.

You quoted Dean Acheson, I think to great effect, and you spoke of Secretary Acheson whom I knew personally and had a great affection for, but who did have a certain arrogance of mind.

And I would like to put in the same context a quote from Secretary Rogers on this legislation, in his testimony before us. He said, "The President as Commander-in-Chief of the Armed Forces of the United States has full control over the use thereof."

This is his testimony before the Senate Foreign Relations Committee and he approved in that respect an earlier, similar assertion made during the Truman administration.

CONGRESS DARE NOT KEEP SILENT NOW

It seems to me that in the tradeoff that Professor Bickel spoke of, that is, the danger of veto, and Mr. Katzenbach, that we perhaps are giving the President more power by defining his power than perhaps he has, in drawing the line, it seems to me that you three gentlemen concur upon one thing: We do not dare to keep silent now; we cannot keep silent now, if this is not to be the final act of surrender. I would greatly appreciate it if you would give me your comment upon that.

Mr. BICKEL. Well, I entirely agree with that. For a period of years in escalating fashion we have had claims of presidential power in this area which are reaching the ultimate limit. In the past presidential power has grown because Congress has not been assertive of its own power; because there has been a vacuum.

I think, if now, Congress is again silent, the presidential adviser, indeed the constitutional scholar of 10, 20 years from now will say, here is what Presidents have claimed.

President Nixon claimed this, Secretary Rogers said that, and all Congress did was have some hearings with a bunch of ineffectual academics and nothing else happened, and academics do not count in history, Mr. Senator, as you well know.

What does count—well, in their role as academics they don't count; Mr. Katzenbach mentioned Dr. Kissinger—in their proper person as
academics they do not count. It does count that Congress stood up. In fact, as you suggest, it would count negatively if Congress were to fail to stand up and say anything. I think we are having an example before us right now and that is the bombing of Cambodia.

There is nothing left of all, of any of the old arguments, as the Chairman said in his opening statement, as you suggested, there is nothing left of the old arguments. The bombing now proceeds on the basis of the sort of assertion of Presidential power that you have quoted from Secretary Rogers.

Unless some voice, some authoritative constitutional voice is heard from elsewhere than the White House and the State Department, that will become or that is in danger of becoming the practice under the American Constitution and you must not allow it to happen.

Mr. Berger. I would join in Professor Bickel's statement and I would borrow your words; I consider it a very dangerous thing for Congress to refrain from action because it is just like preemption of land; after a while Presidential claims tend to become irreversible. This is truly a great moment in history. I can't think of a more critical moment than the present moment. The essence of our democracy doesn't lie in the superior wisdom of Congress, but it lies in what Professor Bickel noticed, the opportunity for debate. For example, the Tonkin resolution might not have gone through if it had been thoroughly debated; if Wayne Morse had succeeded in rallying a few forces and exploring some of these issues. Even if he had failed, the great thing is the chance to debate. That is really the essence of democracy; and the silence of Congress now is apt to strangle that chance just as effectively as the strangle hold on information exercised by the President.

So I would adjure the Congress to pass your bill.

Senator Javits. Thank you.

Mr. Katzenbach. I agree with that and that is the reason that I support it. I merely said I did do so with reluctance because I have some concern about the failure to pass the legislation and I have some concern about a failure to pass beyond the veto. I have some concern about amendments that may be made in the legislative process which would broaden it and what the historical precedential effect of that, but I came down in support of the bill because I don't see any alternative today but for the Congress to make that effort to assert its authority and to make that full legislative effort that you are engaged in.

BASIC METHODOLOGY OF THE BILL

Senator Javits. Mr. Katzenbach, you are a highly able lawyer, have had worlds of experience. Is it fair to say that you really look at this from the point of view of seeing what else could be done based upon your very considerable skill and expertise?

We are not talking about modest changes of language or so on, but do you now feel that the basic methodology of the bill is about the best that one can do?

Mr. Katzenbach. Yes; I think I do and I really endorse fully what Professor Bickel said on that score as to how to do it and I don't believe you can state what the Congress is going to do without stating what the President is going to do.
I think that there are respects in which it may be giving the President more authority than perhaps the Constitution presently gives him, but it certainly isn't giving him more authority than I suspect any President would claim.

So in that respect I think it is probably a satisfactory compromise.

Senator JAVITS. Professor Berger, it may interest you to know, if I may, Mr. Chairman—may I have another 5 minutes?

The CHAIRMAN. Yes.

ADDITION OF ISSUE OF DEPLOYMENT BY SENATOR STENNIS

Senator JAVITS. It may interest you to know on the issue of deployment, which you have very properly pinpointed, because, international affairs being what they are, when you put forces in a given place, they themselves can invite trouble. I am in no sense a person who believes that the world is going to be free of struggle.

But it would interest you to know the man who added that whole concept to this bill is the chairman of the Armed Services Committee, certainly no dove or pacifist, Senator Stennis. It was he who felt that the issue of deployment was so central to the power of Congress to have anything to say about whether we would or would not go to war that it had to be added.

I thought that might interest you as an historical point.

CONGRESS AND THE PRESIDENT TOGETHER ARE ALL WE HAVE

Professor Bickel, two points that you made that are tremendously impressive, it seems to me: One is that the Congress and the President may both be unwise, panic as you say, but you emphasize the proper point for the country when you say at any rate together they are all we have got. That is the only machinery we have that can do what needs to be done and, therefore, let us charge them with the maximum responsibility. Let the blood be on all our hands, to be very rude about it, and then we will see how much responsibility we show, we and the President.

CONGRESS’ CHANGED FEELINGS CONCERNING TONKIN, FORMOSA, AND MIDDLE EAST RESOLUTION

And I thoroughly agree with you that today the Congress doesn’t feel the same way about the Gulf of Tonkin resolution or the many other resolutions we have passed. As you say, we were going along under the old system with the decision the man on high has already made. This is the very system which we are seeking to reform. The fault for that system belongs to Congress as well as the President.

INCREASED CREDIBILITY OF U.S. COMMITMENTS

I would like to ask you about your assertion that our commitments will be more credible because we would spell out the power of the Congress and the President as they were not before, and were not with respect to Vietnam.

Now this is critical for this reason. Even the State Department, and all of our top authorities, now agree NATO has no automaticity. It is
the most central of our security alliances. Under those circumstances it has always seemed to me rather than prevailing the other way, the argument that you make is in favor of the bill, and that is that it will strengthen rather than weaken the hand of the United States.

Would you care to make any further comment?

Mr. Bickel. It seems to me that any foreign statesman with his head screwed on right looking at the recent experience that we have been through, looking at the 10 years or so of Vietnam, looking at what is going on in our domestic politics, looking at what Congress is saying, taking account to be sure of inflated claims that President Nixon may make for himself, but looking to a more distant future, must, if he has a care for the safety of his own country, tell himself, well, you just can't say about these people.

The treaties when they were enacted were not meant to be automatic, Presidents claim a certain amount of power, Congress says they don't have it, it is very hard to say what a commitment by the United States may now mean.

That, it seems to me, has to be the attitude of any intelligent foreign statesman. I think it corresponds to the reality. I think it is very difficult to say now what the constitutional position is, who can act when.

Now under this bill, Congress will be enabled, the bill won't do it automatically, but Congress will be enabled to look around the world and to make binding American commitments, to make them specifically by describing some detail future circumstances, not all, to be sure, but some future circumstances that might call for action and we will be enabled to do what we are not now able to do, what in the past when Presidential claims to power were less inflated we were not able to do, what the Senate of the United States didn't think we were able to do when it ratified SEATO and NATO, namely make a firm credible commitment to act in limited circumstances.

This is not now the situation. I think the bill will enable us to do that, if we wish.

Mr. Berger. May I interpolate.

Am I mistaken in thinking that most post-1900 commitments had this constitutional processes phrase which put every foreign power on notice that in order to go to war, for example, to put teeth into a commitment you had to have the action of Congress.

Senator Javits. If I may answer that question, Professor Berger, the uncertainty left in the NATO Treaty was attributable to Article V, which states that an attack upon one shall be regarded as an attack upon all. That raised the question which the State Department ab initio, when it first testified on the treaty, laid at rest and which no NATO country has since challenged. Article XI states that implementation of the treaty will be in accordance with constitutional processes and it was made clear when the Senate ratified the NATO treaty that constitutional processes refers to all provisions, including Article V.

As I think you said, Professor Berger, many even who write for the press have spoken loosely about automaticity in the NATO Treaty. No witnesses here have because it is not true and it has been expressly rebutted by the whole posture of our government.
And that gives additional reason for the positive codification which is contained in this bill.

Mr. Berger. Permit me to mention for your record what emerged with great clarity in a fragment from the 1954 hearings that was introduced by Senator John Sherman Cooper; a colloquy between Watson and Chairman Wiley, where Wiley time after time went to great lengths to repeat that this means that there can be no action without the concurrence of a full Congress.

So it seems to me in this Korean debate you have a very good history as to the meaning of constitutional processes.

Senator Javits. Thank you very much.

I have one question of Professor Bickel; then I have one question of you, Mr. Katzenbach.

VETO BY EITHER HOUSE OF PRESIDENT’S USE OF ARMED FORCES

One of the bills which is in the House says that either House by resolution can veto the President’s utilization of the Armed Forces and he thereupon must desist.

Aside from that I noticed you have apparently examined the other bills. I just wondered whether you examined that one.

Mr. Bickel. That is the Bingham bill.

Senator Javits. I was especially attracted by your statement on page 8, “The Constitution does not say that the President shall declare war subject to congressional veto by failure to appropriate.”

Mr. Bickel. I feel that very strongly and I have this additional remark that bears on this. I have always felt very uncomfortable with lying-on-the-table provisions. They are an extra-constitutional device which I have never felt has been or can be domesticated to our system.

I don’t think there is anything under the Constitution except managing its own washrooms and committees and rules that a single House of Congress can do that has the effect of law. I think the constitutional position couldn’t be clearer for anything that has effect of law.

The Constitution says any resolution, act, or vote, any vote, that needs the concurrence of both Houses has to be submitted to the President for his signature. I think the whole lying-on-the-table device and I know it is used for court rules, for reorganization of the government, what have you, is very dubious and it is more than dubious when the power to veto in this fashion is sought to be reposed in a single House of Congress.

So I have an objection to it on constitutional grounds. On grounds of policy, I think it is simply ineffective and I think it is meaningless. It fails to do what seems to me essential, namely tell Congress what its responsibility is.

To sum up, to expect that one House of Congress is going to summon the guts to tell the President to stop on its own is to expect the politically unlikely.

Senator Javits. So it is the negative fact that this would be a negative action that makes it inadvisable in your judgment?

Mr. Bickel. Yes. Besides, it is a holding forth of a promise of prospective action which Congress can, of course, take without ever passing a bill like that.
If Congress wanted to pass the McGovern-Hatfield amendment it could have passed it years ago; it didn't. What the Bingham bill does is to attempt to tell us that in the future things are going to be different. I won't believe it until you have shown me on paper, as S. 440 shows me, that you have an understanding of the Constitution, an understanding of your responsibility under it, and you have put that on paper as a statute and that then I might believe will govern your future actions.

Senator Javits. Thank you.

President's Power to Obtain Public and Congressional Support

Mr. Katzenbach, just one question.

I am moved to it by your statement, "Surely any President must recognize the need for broad public and congressional support in circumstances involving the use of armed force."

I think that it is a very valid statement, but isn't it a fact, and your unique competence in this is very important, that in weighing whether he does have broad public and congressional support, a President actually today weighs in the back of the President "effect."

In other words, if he just went on the television and he said, in my judgment based upon my sources our country is so imperiled that I have to deploy the Armed Forces in combat against so and so, isn't he 98 percent there already under the prevailing setup?

Mr. Katzenbach. I think he is 98 percent there and he probably has 98 percent of the Congress at this stage of the game. I think the President, any President, has enormous power to bring along the people and the Congress in circumstances where he feels and asserts with conviction the threat to the United States and to its values and to its security and the need to stand together.

All of these are very potent arguments that a President has and on which much of his power has been historically based.

Reasons for Witness' Support of Bill

Senator Javits. Aren't you brought to the support of this bill, albeit reluctantly, as you said with such candor, by the fact that this at least has a chance for somewhat improving the situation respecting the unleashing of the dogs of war?

Mr. Katzenbach. Yes; that is true, Senator. It is also my feeling, although there has been some reluctance in the past to do so, the Congress ought to take responsibility for important national decisions of this kind.

I don't know that there is any political advantage to individual Senators and Congressmen in doing so, but I think that is what the Founders of the country intended and I think it is what is right and in the long run I think it is important to the President to have that support particularly if things didn't go well.

Senator Javits. Thank you very much for appearing here today.

The Chairman. Senator McGovern.

Senator McGovern. Mr. Chairman, I think the Committee is very fortunate to have these three very distinguished witnesses before us. I admire each one of them very much. I did want to ask a couple of
questions with regard to what the practical impact of the Javits bill would be in certain situations if it were actually the law of the land.

**EFFECT OF S. 440 ON BOMBING OF CAMBODIA**

One thing that I think concerns all of us a great deal is the bombing of Cambodia. I regard it as an outrageous action on the part of our Government. I don't understand it at all.

If the Javits bill were now the law of the land, Professor Bickel, in your judgment would that provide a vehicle that either would prevent or stop this kind of conduct on the part of the administration?

Mr. BICKEL. I think quite clearly, Senator McGovern, there is no provision of the Javits bill describing presidential power that could remotely even by disingenuous construction justify the support of the present bombing in Cambodia.

I think what the President would have to do, if this bill were on the books, in order to bomb Cambodia, or if he wanted to go back into Vietnam, with any kind of force, in order to enforce the armistice agreements there, as he viewed it, what he would have to do would be to come to Congress and ask Congress to act, which is the proper way. Congress might or might not. I can't tell you that, but there is nothing in the bill as it stands, as now drafted, that would authorize him to bomb Cambodia.

He is not protecting the United States against any attack or threat of attack. There are no troops of the United States to protect, nothing left, and there is nothing that I can read in the bill which would justify him going back into Vietnam because an agreement by which he came out has been breached.

Just think of this. . . .

Suppose when Hitler invaded the Rhineland, I believe it was 1932 or 1933, President Roosevelt who was then in office had said this is really an outrageous action and it is a violation of the Versailles Treaty, which we didn't sign, but it is a violation of the Armistice Agreements that we made with Germany and I suppose he could plausibly have said that, so I will send a few bombers over there and send the Navy and send some troops over.

It is an unthinkable proposition that because you have been in a war in a place once you then have in perpetuity, I suppose, the power to go to war again to enforce the conditions by which you got out of it and indeed the objectives that first brought you into it.

Nothing in the Javits bill suggests any such thing and nothing that I have heard of by way of justification for the bombing in Cambodia is any different, rests on any sounder basis.

**EFFECT OF SECTION 9**

Mr. BERGER. Would you permit me to ask a question, I . . .

What is the effect of section 9? I am troubled by that. "This act shall take effect on the date of its enactment but shall not apply to hostilities in which the Armed Forces of the United States are involved on the effective date of this act."

Mr. BROKEL. Well, I answered the question, Senator McGovern, in the sense in which I thought you asked it.