Here is a statute, and if it is enacted and if something then happens, what would be the effect of the statute?

Section 9, if the bill is enacted at a time at which he is bombing Cambodia, would mean this bill does not apply to Cambodia. It does apply to reentry into Vietnam. All section 9 includes is hostilities in which the Armed Forces of the United States are involved on the effective date of this act. Suppose on the effective date the President is bombing Cambodia.

Even indeed if he is bombing Paris, the bill does not apply. But assuming he is not in combat in Vietnam at the time the bill is enacted it would prevent him from reentering Vietnam.

MODIFICATION OF BILL TO COVER EXISTING HOSTILITIES

Senator McGovern. Is there any constitutional or legal reason why the bill shouldn't be modified to cover existing hostilities? Maybe this is the best device we have to halt the bombing or the extension of the war.

We don't know what is going to happen in Indochina with regard to reopening hostilities over North Vietnam. We don't know what will happen if the Cambodia Government falls. Is there any reason why this committee shouldn't consider modifying this legislation so that it does apply to hostilities in which we are already involved?

Mr. Bickel. There is no constitutional reason that I can think of, Senator McGovern.

Senator Javits. The reason for the inclusion of section 9 was the unwillingness to make this another effort to end the Vietnam war.

When the War Powers Act was introduced, it was during the Vietnam war and we sought not to embroil this generic reform act in the bitter Vietnam war fund cut-off fight.

I have no doubt that this is something the committee will consider seriously because the conditions which initially dictated this section no longer obtain although there is the ongoing bombing of Cambodia.

Senator McGovern. Yes, I wasn't suggesting changing the 30-day period, but it would seem to me that this itself makes it sharply different from the earlier resolutions that were introduced. I would hope the committee would think about the possibility of modifying section 9 so that after a 30-day period we could review what is going on in Cambodia and what is likely to happen in North Vietnam and elsewhere if the hostilities continue.

Senator Javits. I was simply laying the focal basis to make it clear that I have no unalterable commitment to that section because of the changed condition in Vietnam.

Senator McGovern. I thank the Senator.

Mr. Berger. May I thank you for that. I didn't want to broach it because I am alive to the fact that there may be political implications which I am not aware of, which led you to act as you did with respect to Vietnam, and I wasn't sure whether they obtained with respect to Cambodia. But if you don't have that problem I would urge you, Senator Javits, to make certain that section 9 does not bar the application of this statute to Cambodia. I think this is an economical way of meeting this situation.

Mr. Bickel. You would have to do more than that, you have to write a provision that describes the application of this statute to hos-
tilities ongoing. It won't apply automatically as it stands. You would have to write a provision that brings the other provisions to bear on hostilities that are ongoing at the time of the effective date of this act. It is not enough to simply take——

Senator Jarvis. Professor Bickel has put his finger on it exactly. I am undertaking any commitment as to my own position on what we should do. I am only saying that we must consider this section de novo because the facts to which I intended that should apply are no longer the same facts.

PRESIDENT'S AUTHORITY TO CONDUCT AERIAL BOMBARDMENT OF CAMBODIA

Senator McGovern. Could I ask anyone of the gentlemen to comment on whether or not the President has any authority today, even in the absence of this bill, to conduct aerial bombardment in Cambodia? Presumably the authority that originally justified actions like that is gone. We don't have the Gulf of Tonkin Resolution. We have Cambodia repudiating the SEATO agreement. We don't have any troops to protect in South Vietnam.

On what basis does the President now carry on this Cambodian bombing?

Mr. Berger. On no basis that can be found in the Constitution. What you are going to have is that Assistant Secretary Sullivan's lawyers will come forth with some instant history which was just brewed for the occasion, but it is idle to think that they can really come forth with something that can be solidly based on the Constitution.

I would say what we are doing in Cambodia is utterly without constitutional warrant and ought to be halted.

Mr. Bickel. I think I suggested before that I entirely agree with that. I think all of the old asserted bases, none of which in my judgment were sufficient for the Vietnam war, are gone, and I see no basis for the action in Cambodia. I think the only thing the administration could conceivably come up with in some strained claim that they are protecting some American force somewhere in Southeast Asia which is endangered by the action in Cambodia.

I think this to be disingenuous on its face, at least on the basis of what I know. Maybe he can tell us.

Moreover, aside from that there is no constitutional basis that I can think of at all.

Mr. Katzenbach. I agree with that.

I would only comment that I think the circumstances under which the Tonkin Gulf Resolution was repealed succeeded in obfuscating the situation in Southeast Asia rather than clarifying it. I think that was unfortunate. I think the best argument that can be made for the President's authority is probably that which Secretary Richardson, who is a very able lawyer, made, and I don't think it simply gets that far.

WAS TONKIN GULF RESOLUTION FUNCTIONAL EQUIVALENT OF DECLARATION OF WAR?

Senator McGovern. Do you still hold to the view you once expressed that the Gulf of Tonkin Resolution was the functional equivalent of a declaration of war?
Mr. Katzenbach. Yes, I do, Senator, very much. I think that was quite misunderstood by the press and perhaps even by some Senators. The point which I made was that I thought that the President should under the Constitution and otherwise just as a general proposition go to the Congress for authority. I did not think his authority to conduct a war of that kind depended on its being a declaration of war and so I said when the Congress gave him that extremely broad and, I think, unfortunate delegation in section 3, he was following the processes dictated by the Constitution and in that sense it became a functional equivalent; that is, Congress was enacting a declaration of war.

Senator McGovern. I have always deeply regretted my vote for the Tonkin Gulf Resolution, but I never thought at the time, and I guess I have never thought since then, that it was a functional equivalent of a declaration of war. It seems to me that is the view of the present administration.

The administration told the Congress really they didn’t care whether we repealed it or whether we didn’t. They didn’t have any particular view on it one way or the other, since they didn’t regard it as equivalent of anything that constituted authority for what they were doing in conducting the war.

Mr. Katzenbach. Well, I felt then and I feel now that the delegation given to the President under the Tonkin Gulf Resolution was as broad a delegation to use the Armed Forces as man could conceive of and I don’t believe had Congress declared war it could have given a broader delegation to use the Armed Forces than the President had under the Tonkin Gulf Resolution, and that was the basis for my calling it functional equivalent.

Mr. Bickel. Except perhaps for naming an enemy.

Mr. Katzenbach. They had anybody they wanted in that. It probably was broader than a declaration of war.

The Chairman. I wonder if the Senator would yield?

BREAKDOWN OF CONCEPT OF DEMOCRATIC SYSTEM

There is a very interesting comment in yesterday’s Star on this question of Cambodia. I want to read one paragraph.

It says, “Take, for instance, the matter of bombing in Cambodia. It has been quite obvious ever since the question was brought up that the President hasn’t a legal leg to stand on in continuing to attack Communist forces there since the withdrawal of the last American troops from Vietnam. It is equally obvious that, from a practical point of view, he doesn’t need one. The man says go and the bombers go.”

[The article referred to follows:]

PROBABLY NOT MUCH MORE THAN HOT AIR

(Crosby S. Noyes)

The further we get into this Great, Historical, Constitutional Confrontation between the President and the angry men on Capitol Hill, the less likely it seems that anything more than a great deal of hot air is likely to come out of it.

To be sure, there will be plenty of that. There is nothing on earth more vociferously indignant than a Democratic senator who feels that he has been
affronted by a Republican president. And Richard Nixon at this point is giving them plenty to feel affronted about.

Three major areas of congressional-executive confrontation are now clearly defined.

There is, first, the issue of the President's war-making powers, illustrated most vividly by the continued bombing of Cambodia. There is the issue of executive privilege pointed up by the President's refusal to let his people testify to the Senate select committee investigating the Watergate mess. And there is, finally, the issue of national priorities, centering on Nixon's refusal to spend money appropriated by Congress for projects which he considers to be unnecessary and extravagant.

On each of these issues, it would seem, Congress has a pretty good case. If they could be forced to quick and tidy decisions, it is quite possible that Congress might win on all counts. The trouble is that this is unlikely to happen. Although the President may be on shaky legal ground, he is not going to be easily dislodged from the stand that he has taken or even, one suspects, seriously damaged in a political sense.

Take, for instance, the matter of bombing in Cambodia. It has been quite obvious ever since the question was brought up that the President hasn't a legal leg to stand on in continuing to attack Communist forces there since the withdrawal of the last American troops from Vietnam. It is equally obvious that, from a practical point of view, he doesn't need one. The man says go, and the bombers go. It's exactly as simple as that, not only so far as Cambodia is concerned, but quite possibly, tomorrow or next month, North and South Vietnam as well.

The ultimate right of the Commander-in-Chief, it seems, is the right to give orders to the military that will be obeyed. Congress can rage as much as it likes about its constitutional prerogative to declare war. But if it expects to prevent the President from giving such orders to the armed forces as he feels are necessary, Congress will have to pass a specific law on the subject, which, by almost anybody's guess, will be very hard to do. William Sullivan was not entirely kidding when he said the other day that the President's authority in the final analysis stems from the size of his majority last November.

The issue of executive privilege is another one on which the President is not likely to be successfully challenged any time soon—certainly not soon enough to make much difference in the Watergate investigation. The prospect of Sen. Sam Ervin dispatching the Senate sergeant-at-arms with warrants to arrest recalcitrant White House staffers is more than a little mind-boggling.

The senator probably is quite right in saying that President Nixon has peculiar notions about how far his time-honored "privilege" extends in protecting himself and his administration from embarrassment. He quite certainly is wrong in the dramatic remedies that he proposes.

The critical factor in the Watergate case and the issue of executive privilege which it involves is and always has been far more political than legal. On this issue, the President is vulnerable in terms of a growing public conviction that he may, indeed, have something to hide in this squalid and sorry attempt at political espionage.

For the President, the judgment must be at what point the withholding of executive evidence become politically more damaging than its disclosure. Many people, including this reporter, feel that this point was reached long ago. But it still is up to the President—and not the Congress—to decide.

And finally, when it comes to the "impoundment" of congressionally authorized funds, Nixon has very little to worry about. On the question of holding the budget within what determined to be non-inflationary limits and setting the priorities for federal spending, the President has not only tradition, but also the great majority of American voters on his side. Congress already has demonstrated its inability to override presidential vetoes of budget-busting bills, demonstrating also a degree of fiscal responsibility that few have suspected.

Again, the legalities of the matter are clouded. A recent appellate court decision regarding the withholding of highway funds places the whole question of presidential impounding in a legal limbo. But again, before the matter is likely to be settled once and for all, Richard Nixon will be long gone. And the Great Issues raised between him and the 89th Congress will be left for another president to deal with.

Senator FULBRIGHT. I think he sums up quite well. This is the leading columnist, Mr. Crosby Noyes of the Star. It strikes me that
it brings us to what I detect as indifference to the Constitution or law. I
mean it just doesn’t matter. The President was elected by a majority
and they act illegally not only in this case but on the impoundment.
Hardly anybody in Congress, well maybe some, thinks he doesn’t have
any legal basis to cancel a program. I am not quibbling about a
dollar or 5 dollars. He doesn’t do that.
He says he is not interested in that kind of law which has been
passed over his veto or with his signing it. It seems to me to get
down to what one or two of you, I think Professor Berger in
particular, has said, that the essence of democracy is debate. Someone
else, maybe Mr. Bickel, said that we act together.
The President doesn’t want to act together. He is not interested in
advice from the Congress. It is obvious. The House passed a water
and sewer grant bill, by a majority of, I think, 5 to 1. The President
is not interested in the views of 5 to 1. He vetoed the bill and yesterday
the House could not override the veto. He has the power. When he says
go, they go, whether it be in Cambodia or in the House of
Representatives.
So you are talking here about participation. Well that is true. They
went yesterday, didn’t they, although the House voted 5 to 1 recently
for that bill. So it seems to me you are really faced with a real break-
down of the whole concept of your democratic system. This isn’t un-
usual. This has happened to over three-quarters of the people of the
world. I think it is extremely serious that Mr. Noyes, who professes
to be a constitutionalist, writing with utter neutrality and objectivity,
discusses here the complete breakdown and, in my view, the departure
from respect for law and the Constitution without any reaction at all.
He is just commenting. He accepts it with great equanimity as the
Congress does.
What do you say to that?
Mr. Berger. It is very disheartening to see the people themselves in-
different, for example, to the obscenity of bombing, an obscenity that
repelled the whole world in the case of the bombing of Hanoi.
HAMMERING AWAY AT CAMBODIAN ISSUE SUGGESTED
Nevertheless, I feel that in Cambodia you have a stark issue where
the constitutional underpinnings are going to be very vulnerable. If I
were in the Senate today I would do what some of the great Senators
did before the Civil War. I would come back like a bulldog to the issue
of Cambodia. Day after day I would hammer away that a nation which
can’t learn from its mistakes in the Past is doomed.
If we can’t learn the folly of supporting a corrupt regime hated by
the people, destroying the people—we see it on television—in order to
ram this regime down their throats—I can’t believe it. You haven’t the
same publicity sources as the President has, but I venture to say, Mr.
Senator, Mr. Chairman, you haven’t used them to the utmost.
What is needed is a campaign day after day, burn this issue into the
minds of the people.
The Chairman. Mr. Berger, as an example here are you three dis-
tinguished men and look how much publicity there is. Look at all of
the television cameras. Where are they? You say we should do all of
this. Nobody pays the slightest attention to you.
Mr. BERGER. People listen.

The CHAIRMAN. No, they are not listening now.

Mr. BERGER. People listen in the galleries when you——

The CHAIRMAN. If a newsman reports it, his publisher will likely cut it down and not much will be printed. You can't get attention on this subject any more.

Senator JAVITS. I agree with Professor Berger. I can understand the Chairman's feelings. But I do believe the Senate after all voted for this bill 68 to 16. That is overwhelming support.

The House bill is now much revised and leans much more in our direction than previously. I think he is right about the fact and I feel guilty about it myself.

If the chairman was kind enough to say the main author, I think you are right, I think you should inspire us, including myself with more zeal for the cause then the cameras and the press will listen. They are interested and I think it is our fault we are not giving them enough to chew on. We are not strong enough. We are not vital enough.

George McGovern ran for President on that platform. Well, he didn't do very well in the election, but he was nominated and he had a chance to state his cause and he had millions upon millions of Americans who listened to him and agreed with him. I was against him but I respect enormously what he did and I evaluate it properly in terms of the national purpose.

So I thank you for saying what you have and you give me new resolve and I hope you will inspire others.

The CHAIRMAN. I thank you for it, too. I have the greatest respect for all three of these gentlemen, but they are three gentlemen out of 210 million. I don't have any lack of respect. I agree completely with what you say about the Constitution and illegality.

I am trying to be practical. This isn't just an academic matter. We are trying to talk about passing a law and it probably ought to be passed, but what, Mr. Noyes, who, I am sure, has as much interest in our country as any of us, is saying is "well, so what, the President ordered them to go. It doesn't matter about the Constitution or the Javits bill."

Senator Javits says 68 to 16. That is about 6 to 1. If we judge from what happened in the House, it will be like the bill yesterday. It will go down the drain when it is vetoed. I assume it will be from the President's attitude.

USEFULNESS OF ATTEMPTING TO CUT APPROPRIATIONS

I only raise this to go further and suggest something further. On the attempt to pass an affirmative piece of legislation, subject to a veto, we have had two experiences now in 2 weeks.

My question is not directly relevant and yet it isn't irrelevant. Under our Constitution, assuming it continues to be respected even a little bit, isn't it much more useful if you attempt to cut the appropriations, however distasteful it is, because that doesn't need an affirmative bill?

The President is going to be asking right away. I want $25 billion for new weapons and procurement and I want $60 billion for the upkeep.
So suppose the Senate could gird up sufficiently and we seem to be able to get a majority on the initial go-round, before we get to a veto, before they send the word to go. It has happened several times on these cases.

Supposing we said no and turned down $20 billion of that. Then where do we go? We don’t need any veto. It’s up to him; it is his next move as a practical matter.

Isn’t that a much more realistic way to approach this whole problem; is there anything wrong with it?

Mr. Berger. No, I would embrace every instrument in the armory; I don’t rule out anything.

The Chairman. Isn’t it much more likely to succeed?

Mr. Berger. Perhaps so.

The Chairman. What do you think?

Mr. Berger. I think if you cut down the appropriation there won’t be the gas, bombers and the rest of it.

The Chairman. Assuming we can do that, beyond cutting down the actual physical facilities, wouldn’t this be a critical gesture which would mean a great deal more to a President than passing a bill which he can ignore? Can he ignore a substantial cut in money? Can he go on and spend money that has not been appropriated, do you think?

Mr. Berger. I won’t argue that point but I wouldn’t make it either or, I would want both myself, because I think—I wish I had memorized Professor Bickel’s words—there is a tremendous public good to be accomplished by just exhibiting the congressional will, and what is really a valid construction of the Constitution.

All of the other things are in aid. You’re cutting down on appropriation.

The Chairman. Don’t you think the public will understand a cut in money much more than they will dealing with a rather esoteric constitutional principle familiar to lawyers but not particularly to the public? I don’t think the public has any serious real understanding of what impoundment is, what it really means, or even executive privilege. But when you say you will cut the money, nearly all of them understand that.

Mr. Berger. There is undoubtedly a job of educating to be done, but I have had several experiences that lead me to believe we are underrating the great public. There are people out there that are listening and looking for leadership.

The Chairman. After all you can’t quarrel with the results of the election of November, can you?

Mr. Berger. Well—

The Chairman. You have no better poll, do you?

Mr. Berger. It was a pretty mixed result, like tea leaves, subject to all sorts of readings.

The Chairman. I don’t want to argue. I am just seeking a little support for maybe doing something else.

This bill, I predict, is going to have difficulty not only because the administration is opposed to it but because they don’t want this participation that you are talking about, or debate. And it takes two-thirds to override a veto.

I am trying to find some approach that gives a little greater hope of success and I just thought—
Mr. Bickerl. It seems to me you are engaged in a long-range effort of trying to restore a sense of what the Constitution requires and trying to restore an institutional balance that has been lost.

We have been in a period of—we have all, maybe I haven't, but many of us have sinned in this respect—we have tended to characterize this democracy in totally populist terms. We have tended to tell the people that we govern by plebiscite. That is not the case. It ought not to be. This is a constitutional government and we are engaged in the long-range effort to restore it. That isn't going to happen overnight and it isn't going to be helped, I think, by pitched clashes between the three institutions of government, the Federal Government, which destroy the atmosphere of cooperation in which the government has to work.

Suppose you cut an appropriation. Suppose he comes in for $25 billion for bombers, or whatever, and you cut it in half. He will veto it, Mr. Chairman, and—

The Chairman. He can't veto that.

Mr. Bickerl. He can veto the whole appropriation and go to the country and say Congress is not providing for the national defense.

Suppose you cut his salary. You can't cut it, but suppose you stop appropriating for his staff in the White House. What he will do is veto the entire appropriation bill, including his own salary, and say Congress is acting unconstitutionally and Congress is undermining the Presidency.

I don't think the road to a solution of the problem that now besets us is, if I may so say, by each institution trying to find gimmicks against the other. This is the appalling sense, I thought, of Mr. Kleindienst's testimony yesterday here. If you want to do anything impeach us. I don't think that is the point. I think what we are in the process of trying to do is a long-term project and it is the restoration of constitutional processes which have been undermined not only by President Nixon but undermined by a great deal of ill-advised populism that has been poured on the people of the United States and poured into their ears by the Supreme Court, and God knows who else.

We keep talking about the majority being all that matters, and the people are all that matters. That isn't our system of government. We are reaping some of the fruits of some unwisdom of the past and it will take time to restore us to a position of balance and I advise patience, Mr. Chairman.

The Chairman. You advise patience. Is that equivalent to advising doing nothing and letting nature take its course?

Mr. Bickerl. No; pass the Javits bill.

RESOLUTION OF CENSURE CONCERNING MR. KLEINDEINST

The Chairman. Mr. Kleindienst yesterday—I was there. I must say I was very shocked by his remarking several times: "Why don't you impeach us?" And I wondered. This isn't in the Constitution, but I don't know that it is prohibited.

In the Senate we deal with people who are unruly and we think brings disrepute upon the Senate by resolution of censure. All it does is express exclusively our disapproval of certain actions.
Is there anything unconstitutional about a resolution of censure in the Senate stating that this action of Mr. Kleindienst before the Senate committee, which appeared to challenge or to taunt the Senate to take such an action, seemed to me to be very unseemly and, certainly inconsistent with what you are saying is the right policy and, therefore, we disapprove of it.

Is that constitutional?

Mr. BICKEL. I believe the Senate once censured President Jackson.

The CHAIRMAN. Tell me about it; I never heard of it.

Mr. BICKEL. My memory is very hazy but I believe they did. General Jackson got quite angry about that and said later, I believe, that he regretted not having hanged Calhoun and Clay.

The CHAIRMAN. What?

Mr. BICKEL. Threatened to hang Calhoun and Clay. He didn't carry out the threat. But it became one of the objectives of his career, and he was a man who generally achieved his objectives, to have that resolution expunged and I believe it finally was.

The CHAIRMAN. It was expunged?

Mr. BICKEL. But it was enacted to begin with.

Mr. BERGER. I have an even hazier memory than you have, but I believe you are right.

The CHAIRMAN. I think this might be a good precedent. We need something to bring to the attention of the President and his administration that we are seriously concerned about this abandonment of constitutional and legal action. Maybe this would do it. Impeachment is out, politically. Obviously I would never think of it. But censure of Mr. Kleindienst for his disregard of the Constitution might be possible.

OTHER ACTIONS AT DISPOSAL OF CONGRESS

Mr. BICKEL. There are other actions that are at the disposal of Congress.

The CHAIRMAN. What are they?

Mr. BICKEL. On executive privilege, there is ample precedent when that issue is fully drawn for sending the sergeant of arms out to make at least a constructive arrest and thus getting the issue to court. On impoundment, first of all, Congress ought to reorganize its own budgetary processes, but before that it has the option of taking some appropriation that it really believes has top priority and make it mandatory, so writing the statute that it virtually vests in a recipient, so you have a plaintiff, and you then have constructed a lawsuit which I fully believe you will win, and the President, whatever else he may have said, has never said that he would not obey a decision of the Supreme Court which told him what his proper constitutional function was.

RESOLUTION OF CENSURE

So there are things to be done short of a disruption of the Government, short of a totally hostile and adversary position among the institutions of the Government. A resolution of censure, I think, is probably an excellent idea. There were things said, as I gather, yesterday that were wholly unconscionable.
Mr. BICKEL. I hope I am right on that. I hope I just didn't invent it. I know he threatened to hang Calhoun and Clay. I hope I didn't invent the cause.

The CHAIRMAN. Do you suppose this President might make the same threat against the sponsor of such a resolution?

Mr. BICKEL. He is no General Jackson.

Mr. BERGER. May I add, I can at least think of no constitutional objection to a vote of censure. And thinking quickly, if you have the power, for example, to impeach and power to inquire preliminary to impeachment, you should on notorious fact at least have a lesser power to censure, which is something short of impeachment. It is just like a reprimand from the bench instead of a sentence. I wouldn't have any constitutional doubts on that score.

The CHAIRMAN. It is an interesting thought anyway. It grew out of Mr. Kleindienst's statement.

**QUESTION OF INDIFFERENCE TO FOLLOWING THE CONSTITUTION**

Do you have any comment, Nick, about the general question that there seems to be an acceptance of the idea that, well, he has a majority and we do what we please? Or to put it another way: An indifference to following the Constitution.

Mr. KATZENBACH. Yes, and I share your concern and that of the others, but I would point this out. That is a public unconcern and it is not an unconcern that the President himself has expressed. He has not said there is no constitutional basis for my doing this but I am going to do it anyhow.

He at least has asserted, even though we may differ with him, that he has had a constitutional basis for doing it and that is an important distinction. He at least says, “I do have authority to do it.”

I think there is a public indifference as to whether he has authority to do it or not.

The CHAIRMAN. I think in this impoundment, while there is semantic confusion, that he has certainly gone beyond any possible interpretation when he says I won't carry out a particular law. He isn't cutting back or saving money other than putting it in contingency. He is just abolishing the program. I don't think there is precedent for it and the precedents they cite are so utterly irrelevant. When he cites the Jefferson gunboat business, it absolutely has no relevance. In the cases of Truman's planes, there was a specific understanding that the President could not use this money; otherwise the Senate wouldn't have agreed.

It gives you the impression there is a deliberate deception about it because they just aren't precedents and yet they are presented. They were presented on television by the highest officials, short of the President, as if they were really precedents. It really is very confusing to people because it is repeated. One man says Jefferson and the next one takes it up and nearly all the columnists say Jefferson was the precedent and it is absolutely not a precedent at all. What does one do about it?

You say speak up and they will all pay attention, but who speaks up and gets attention? An ordinary Member of the Senate can't do it.
He can’t compete. Nobody pays any attention to what he says, and rightly so, in the sense that the Senate and the Congress no longer have any particular influence on these matters, so why should people pay attention.

The Executive assumes you are fools and by inaction or inability to do anything about it is one of those self-fulfilling prophecies.

**ISSUE OF EXECUTIVE PRIVILEGE**

Mr. Berger. Let me sound a little more optimistic note.

Take the issue of executive privilege. For years and months you have had a stream of executive propaganda so that you on the Hill yourself use the phrase, which you ought to bar from your halls. I wouldn’t employ the phrase “executive privilege” because it is a figment of the executive imagination. The first time you met the phrase was about 8 years ago, as Schlesinger noted in a piece for the Wall Street Journal. The fact that he criticized the doctrine is encouraging. So too, Averell wrote a critical piece in the Los Angeles Times. George Lardner wrote another in the Washington Post. These are part of a movement to publicize the congressional case which needs to be fostered and encouraged. We are just getting into the battle.

To begin with, if you will permit me to be candid, Congress itself has been shirking it. It has always shirked from a confrontation. Now the thing you have to face up to, you can’t avoid a confrontation, and here again I have to somewhat differ from my esteemed friend.

It is all very fine to talk about cooperation and accommodation, but then along come a Mr. Kleindienst to illustrate what accommodation means on Pennsylvania Avenue. Mr. Nixon is a man who plays tough; he will not understand coming to him in a spirit of accommodation, but he will understand tough measures, such as you had when Senator Ervin stood up to him on Flanigan during the hearings on the Kleindienst appointment. If you want Kleindienst, said Senator Ervin, produce Flanigan. And time after time you have to seize every opportunity.

The Chairman. I am not sure that was a good idea because we got Kleindienst. I don’t know why you cite that.

Mr. Berger. That is democracy.

**LACK OF REPORTING OF SENATORS’ STATEMENTS**

The Chairman. I really don’t know what to do. I guess I feel that they don’t pay any attention partly because I spent all yesterday afternoon testifying, and for all you know or all the world knows, just Senator Muskie and I know about it. There wasn’t a word in the paper about it, and that is the only way you have of getting a——

Mr. Berger. You didn’t say anything appalling yesterday.

The Chairman. No, it was about the same subject before the same committee, but I didn’t agree with Mr. Kleindienst. Anyway, that is a personal matter. It doesn’t matter whether they want to report what I say, but it is an example of the impression that nobody ever says anything.

The truth is there are a lot of Senators, including the three here, who say a good deal, but you never read about it because it isn’t worthy of reporting in the present criteria of the media.
And besides, if they paid too much attention to Mr. McGovern, Mr. Whitehead might criticize them and threaten to remove their license. So they dare not pay much attention to people like that. This is really what is happening. You know it is. They are abolishing public television. I don't need to tell you about this.

S. 440 SUGGESTED AS MORE PROMISING ROUTE

Mr. Javits. I am sorry, Mr. Chairman, I didn't mean to interrupt. I only wish to point out with respect to the Chair's view on appropriations, while the war powers bill commended an enormous majority in the Senate, and the House has already voted for a war powers bill, even though it is not up to snuff, but we have never been able to prevail on the cutoff of funds.

And so what I say, Mr. Chairman, is let us pursue a more promising route. We seem to find this a more promising route.

SIGNIFICANCE OF CUTTING OFF FUNDS

The Chairman. I have the greatest respect for the Senator from New York. He does more work on this type of bill and others than anyone in the Senate, but because he is gifted with inexhaustible energy and unusual intelligence, my comment about that is sure, we don't do it because that is the significant thing. That is the thing that the administration doesn't really want. They don't really care about another Mansfield amendment or resolution or these things that don't really mean a thing to them.

They may say they don't want it, but they don't send up the troops. They don't send up the crowd that occupies the room off the floor and bend our arms. That is why you will never be able to cut off the funds. It is true that the Congress and the Senate has never taken a significant vote against the war.

They have taken a lot of insignificant votes against the war. It doesn't bother the administration. What you really say comes back to what I was saying. The only thing that would bother them really would be a cutoff of funds because then even the public would recognize the blatant disregard of law and order.

They say they believe in law and order, but these other things are esoteric. The semantics are easy to fiddle with. It isn't to say the money was appropriated and then pretend it was. It is a very clear-cut issue and you are exactly right. We have never been able to muster the votes to do it.

It is rather odd we can pass the Mansfield amendment by a big majority, or this bill by a big majority, but never on the thing that matters, which is the money. This is a capitalistic system just looking at the way our elections are run.

Look at what poured into the election committee last spring. You can see what the significance of money is. It is the same thing in the Government. They don't care about these expressions of opinion, not now at least. I think they might care about the cutoff of the money.

And if they did we would get their attention and then I think they would begin to say, "Well, maybe we should get along with the Congress." I think it would bring about some of the cooperation that you are talking about.
What we are trying to find is a way to induce the cooperation. Do you induce it by doing nothing and depending upon their good will or do you do something that makes it worth their while to cooperate. That is really what I am trying to get at and we have tried all of these others.

We passed the Cooper-Church amendment dealing with Cambodia, saying they should not use troops over there and, as you remember, clearly expressing a disapproval on the part of the Congress, the Senate at least, against intervention in Cambodia.

What good did it do or is it doing? That was passed, I don’t remember the majority, but it was passed.

Mr. Javits. It was. But bear in mind the Cambodia provision said no ground troops and we did not prohibit air strikes.

The Chairman. But the interdiction of air was only for supplies going into South Vietnam. That was what it was supposed to be. It wasn’t to protect.

Mr. Javits. As the Chair has said, he was violating a specific law. In fact, I think he is in complete violation of law. He has no authority under the Constitution whatever, no shred of it, but the specific law did deal with ground action.

The Chairman. I didn’t cite that as an example of violation of law, but as a sign he doesn’t want to cooperate. It is quite clearly an expression of the Senate that we didn’t approve of the Cambodian operation. Wouldn’t you agree to that?

Mr. Javits. Yes.

The Chairman. I agree technically there was a——

APPROPRIATIONS CUTS VERSUS JAVITS BILL

Mr. Bickel. If I may, just to clarify a little bit of what I had in mind a moment ago. What shocked me so about the Kleindienst testimony yesterday, he was saying in effect the way that these institutions can check each other is by bringing about a breakdown of the Government.

He said, if you want to check the Presidency, impeach him, vote him out of office.

Now it doesn’t seem to me that it would serve any purpose, and I know you don’t have this in mind, for Congress to go along that road.

The Chairman. I agree completely on that.

Mr. Bickel. Therefore, sure, some appropriations may be cuttable, but you will find yourself in a position——

The Chairman. Wait, I understand.

Mr. Bickel. Facing an appropriation he says is necessary for keeping the Armed Forces in being and you will be helpless there; whereas, if you pass a bill like the Javits bill, you do make an advance toward a restoration of constitutional processes.

The Chairman. I am glad you brought it out. I agree with that. Actually, I believe on the merits we have had these up before.

MILITARY APPROPRIATIONS SHOULD BE CUT ANYWAY

I am so conscious of my own conviction that much in this military appropriation is unnecessary and wasteful, that it ought to be cut anyway, even if none of these other things were around.
Take the Trident, for example, the big battle tank and B-1. I don’t think we need them any more than a hog needs a necktie. They are utterly useless. In the debate we came fairly close to approving it last year, even in the Senate. These are gadgets that are in the bill.

And like the C-5A. How useful is the C-5A? Or the F-111. They are just tremendous boondoggles worth billions of dollars. Or ABM. We lost by a tie vote. We now look upon it and clearly we threw away $10 billion on it that everybody now agrees is foolish and useless.

All I was trying to say was that it should be cut anyway, but this is the sort of thing they pay attention to and they don’t pay attention to our arguments or legalities. They really don’t. I think Mr. Noyes is probably quite right.

As a matter of fact his whole approach to governmental matters is close to the administration and he is a great admirer of the administration. In effect, he says, that it really doesn’t matter what Congress does. The President will do as he pleases. When he says go, they go.

And I am impressed with the fact that I don’t think it would disrupt the Government or expose us to anything. It ought to be cut anyway, but it is an area where we ought to concentrate and do something that would produce a reaction in the Executive. That is really all I was suggesting:

I don’t think the Government will come to any breakdown if we cut the military. We have tried it several times and lacked just a few votes on these issues, as the Trident last year.

Dissenting Opinions of Justice Brandeis

Mr. Bickel. I am reminded of a story, perhaps I heard it from Mr. Acheson, for whom I share Mr. Javits’ admiration and affection.

Justice Brandeis and his law clerk would go to enormous length to prepare a 75-page dissent with 126 footnotes down to the last decimal point. And yet the decision went the other way, 7 to 2, as it had the week before and would the week after, and the clerk would say to the Justice, “What is the use, they won’t listen,” and the Justice would reply, “They will in time.” And, of course, in time they did. It is now difficult to remember the names of Justices who wrote the majority opinions in many a case in which Brandeis dissented.

The Chairman. Anyone else?

Mr. Javits. A good note on which to close.

The Chairman. We need something to give a little bit of encouragement or hope. I think that is a fine finale.

[Whereupon, at 12:45 p.m., the hearing was recessed, to reconvene at 10:30 a.m. Thursday, April 12, 1973.]
The committee met, pursuant to recess, at 10:40 a.m., in room 4221, Dirksen Senate Office Building, Senator J. W. Fulbright (chairman) presiding.

Present: Senators Fulbright, Aiken, and Javits.

The CHAIRMAN. The committee will come to order.

OPENING STATEMENT

The committee resumes hearings today on the proposed war powers legislation of which Senator Javits is the principal sponsor.

Our witnesses today are Mr. Charles N. Brower, Acting Legal Adviser, Department of State, and Mr. David F. Maxwell, former president of the American Bar Association and member of the Advisory Committee to the Secretary of State on International Law.

Mr. Brower, we are very pleased to have you. You have a prepared statement, I believe.

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

Mr. Brower. Yes, sir, I do, Mr. Chairman.

The CHAIRMAN. Do you wish to read it or summarize it, whichever you like.

Mr. Brower. Thank you very much. With your permission I think it would be appropriate to read it.

The CHAIRMAN. All right.

Mr. Brower. Before beginning I might suggest, if I may, that the record of these hearings perhaps include the testimony of the Secretary of State given approximately 2 years ago on more or less the same legislation which gave a rather thorough treatment of war powers legislation, which I think would be of benefit in the record of these hearings as well.

I appreciate the opportunity to appear before you this morning, Mr. Chairman, and to participate in the committee's study of war powers legislation, particularly S. 440, which is known as the Javits-Stennis bill. The profound impact such proposed legislation could have on our constitutional system requires that we accord it nothing less than our most careful and thorough attention. I know that is a course which this committee has been following; Fundamental constitutional ques-
tions are not easily answered, and therefore must be seriously approached.

BACKGROUND AGAINST WHICH ISSUES ARE CONSIDERED

We consider these issues against a background which should give us particularly great pause in contemplating a revision of those arrangements which for nearly 200 years have enabled us successfully to provide for the common defense. The American President has journeyed to Peking and Moscow and in doing so has effected historic changes in the international political environment. More recently an agreement has been concluded bringing to an end the longest war in which this country has ever participated. It is worth noting that those successes have been made possible by the judicious exercise of both executive and legislative authority within their historically prescribed bounds.

STATE DEPARTMENT POSITION ON WAR POWERS LEGISLATION

The Department of State has closely studied the subject of war powers legislation offered in recent years. Secretary Rogers, as I mentioned, testified before your committee on May 14, 1971, and presented a thorough historical, legal, and political analysis of the legislation then under consideration.

Briefly, it has been our position that the description and allocation of war powers in the Constitution intentionally and wisely left the great questions of war and peace in specific cases to be resolved through fundamental political processes in which both the President and Congress participate.

We have, therefore, opposed war powers legislation such as S. 440 which would alter this fundamental constitutional scheme. We have also opposed it because it would either expand or encroach on the underlying constitutional powers sought to be elaborated, a revision which in any event cannot be properly accomplished absent a constitutional amendment. On the other hand, I emphasize we have not opposed war powers legislation which preserves the essential constitutional scheme such as that which was passed by the House of Representatives at each of its last two sessions.

I might note in passing that legislation was passed the first time by a vote of 344 votes to 13, and the second time it was passed simply on a voice vote.

Rather than rehearsing the details of past positions or duplicating already definitive analyses, I should like today to touch upon a few very basic considerations.

INVITATION TO SECRETARY ROGERS AND OTHERS OPPOSED TO LEGISLATION

The Chairman. If I may interrupt, let the record show Secretary Rogers was, of course, invited to come to these hearings and declined to do so. You are appearing here, I assume, in his place? Is that correct?

Mr. Brower. Well, I certainly am appearing here on behalf of the Department of State.
The CHAIRMAN. I wanted the record to show Secretary Rogers was invited to come to represent the State Department at these hearings.

Senator JAVITS. Would the Senator yield?

I think the record should be complete as to those whom we invited to testify who had showed opposition to the legislation. We invited the following: Secretary Rogers, Deputy Secretary Rush; Prof. Eugene Rostow; Prof. Arthur Schlesinger, Jr.; former Secretary of State Dean Rusk; Mr. Eberhard Deutsch; Mr. Charles Rhyne; Prof. Francis Wormuth; Senator Goldwater and Senator Dominick.

The CHAIRMAN. That is correct. I merely picked out Secretary Rogers because the witness referred to him as having testified before. I didn’t wish the record to fail to show that he was invited this time and it was his decision not to appear.

SECRETARY ROGERS’ PREVIOUS TESTIMONY

Mr. BRower. The reason that I asked at the outset that the testimony previously given before this committee by the Secretary of State be included in the record is that I think on review it constitutes such a comprehensive and thorough statement of the Secretary’s position and that of the Department of State on this legislation that it represents a milestone and I think it is useful for this record.

Of course, I do testify here this morning on behalf of the Secretary of State.

The CHAIRMAN. I don’t believe the Secretary dealt with the situation in Cambodia in his former testimony.

Mr. BRower. The situation in Cambodia in May of that year.

The CHAIRMAN. As it is now proceeding. He obviously did not. I was very sorry that the Secretary didn’t come so that we could discuss the application of this bill to the situation now existing in Cambodia.

So I wouldn’t say his statement is completely thorough and all embracing.

Mr. BRower. I think insofar as the fundamental aspects of the legislation concerned, that it was rather thorough. Of course, it could not address itself in 1971 to a specific event of 1973.

SUBMITTED STATEMENTS

Senator AIKEN. I would like to ask whether any of those in opposition to the bill who were invited to appear and didn’t appear have submitted statements?

Senator JAVITS. Yes, and they were also asked if they would like to submit a statement if they couldn’t appear personally.

Senator AIKEN. I think they should be permitted to send in a statement. They may be somewhere out of the country or have other reasons for not wanting to appear at this time.

Senator JAVITS. Mr. Chairman, I submit for the record the statement of Senator Barry Goldwater on this issue together with attached exhibits and ask unanimous consent that it may be made part of the record, (See p. 116.)

The CHAIRMAN. Without objection, it is so ordered.

Senator JAVITS. Mr. Chairman, I make the same request on behalf of Senator Tom Eagleton of Missouri, one of the important sponsors
and authors of this bill, with Senator Stennis and myself. (See p. 110.) I also ask unanimous consent at an appropriate place at the end of our record, to include Senator Eagleton's article in the Missouri Law Review and the following annexes I submit for the record: Raoul Berger's Pennsylvania Law Review article, "War-Making by the President," Merle Pusey's three articles from the Washington Post of April 9, 10, and 11, on this subject, the text of my article for the New England Law Review and my statement before the House Foreign Affairs Committee. (See appendix.)

The CHAIRMAN. Without objection, so ordered.

Proceed.

Mr. Brower, Thank you.

BELIEFS CONCERNING WAR POWERS

Current proposals for war powers legislation are without doubt a direct product of our experience in Vietnam. Some people believe that the constitutional prerogative of Congress to declare war was circumvented in the case of Vietnam, and, by implication, that the war should not have been waged without such a declaration. There is a belief that the Founding Fathers meant us to engage in significant hostilities only when Congress takes the initiative to declare war and that war conducted on any other basis is unconstitutional and in any event unwise. This assumption is fundamental to many of the proposals for war powers legislation, and obviously S. 440.

GENERAL NATURE OF DECLARATION OF WAR

The very first operative sentence of S. 440, for example, commences: "In the absence of a declaration of war by Congress * * *". I think it imperative that there be full understanding regarding the general nature of the declaration of war. Such a declaration essentially amounts to an official statement by one country that a state of war exists between it and another country. It gives rise to well-defined rights and consequences under international law, and automatically invokes a wide array of emergency authorities under our domestic legislation. This is a step which has been taken by the Congress only five times in nearly 200 years. I have reviewed these declarations of war and I recommend it to all concerned with a question of war powers.

All but one declaration of war by the United States has provided that "all the resources of the country are * * * pledged by the Congress of the United States" to "carry on war against the foreign government involved." In the 20th century declarations of war have taken on an implication of dedication to the destruction of the enemy. This implication would, in many cases, be incompatible with the limitations on use of force contained in the United Nations Charter and in fact declarations of war have been extremely rare in the world in recent decades. Surely Congress does not desire to promote maximum retaliation in every case where a less extreme form of military action by the United States would be appropriate. In truth, a curious footnote to history exists in the fact that exactly 1 year ago yesterday the U.S. Senate by a tally of 78 to 7 (with 15 not voting) voted to table
a declaration of war against the Democratic Republic of Vietnam
which had been proposed as an amendment to the predecessor of S. 440,
the Javits-Stennis bill.

So I believe Congress recognizes that there are available to Con­
gress constitutional means of asserting a role in military and foreign
affairs which are far more effective than the power to declare war.
From the legal perspective a declaration of war is just like any other
act or resolution of Congress. The power to declare war is one of
the legislative powers enumerated in article I, section 8 of the Con­
stitution.

Declarations of war, like all other acts of Congress, are subject to
the provisions of article I, section 7 of the Constitution, stating that
every bill, order, resolution, or vote to which the concurrence of both
Houses of Congress may be necessary shall be approved either by the
President or by a two-thirds vote of both Houses of Congress over­
riding a veto. Thus, once war is declared, it cannot constitutionally
be undeclared by a vote of less than two-thirds of both Houses unless
the President concurs. Congress has greater flexibility under the gen­
eral powers of authorization and appropriation, which ordinarily are
exercised on an annual basis and, insofar as support of military forces
is concerned, constitutionally cannot be exercised less frequently than
every 2 years. Under these powers recurrent positive action by Con­
gress is necessary if the President is to have at his disposal the neces­
sary military instruments for application of his policy.

IMPLEMENTATION OF CONGESSIONAL AND PRESIDENTIAL WAR POWERS

I understand the thrust of S. 440 to be an attempt to refine imple­
mentation of the constitutional war powers of Congress and the Presi­
dent. It seems to implement power of both branches. Certainly it
would be within the authority of Congress to attempt to do so under
the "necessary and proper" clause, and it is on precisely this clause
that S. 440 expressly places fundamental reliance. I believe, however,
that the proponents of S. 440, in attempting to implement the re­
spective war powers of Congress and the President, actually have
exceeded the bounds of implementation and have transgressed directly
on the underlying constitutional powers.

Then I should like to cite one example which I think illustrates this
quite startlingly. For example, S. 440 purports to restrict the Presi­
dent's power to defend even the continental United States by limiting
to 30 days the period in which he may engage in hostilities unless Con­
gress specifically authorizes an extension or is physically unable to
meet because of an attack on the United States. After 30 days the
President must stop unless either of those two circumstances lies.
Under the Constitution even the States have authority to provide for
their own defense when they are actually invaded or are in imminent
danger of invasion (article I, section 10). Surely the President can
have no less authority than the constituent States of the Union. Indeed,
the Federal Government has an unlimited constitutional obligation
and authority to defend the States (art. IV, sec. 4), and the President
as Chief Executive and Commander in Chief is the officer bearing
the responsibility and possessing the authority to insure that defense.
The CHAIRMAN. Do you identify the Federal Government with the President? Are those terms interchangeable?

Mr. Brower. Mr. Chairman, you precisely anticipate my next statement, which is that the President as the Chief Executive and the Commander in Chief must be the officer of the Federal Government bearing the responsibility and possessing the authority to insure that defense.

Obviously Congress must provide him with the weapons, but the defense is to be invoked by him.

The CHAIRMAN. Then you do use the word Federal Government to be equivalent of the President?

Mr. Brower. In the sense, Mr. Chairman, that under the constitutional scheme it would seem that the Federal Government in providing the constitutionally required defense must act through the President as Commander-in-Chief and Chief Executive so long as he has the instruments at his command provided by the Congress.

LIMITATION ON CONTINENTAL DEFENSE

I think there can hardly be serious doubt but that the limitation on continental defense envisaged by S. 440 cannot properly be imposed other than by means of a constitutional amendment. At least one member of the Senate, Senator Inouye, in a speech before the Convention of the National Order of Women Legislators on November 13, 1972, suggested that it would be necessary to convocate a constitutional convention to consider a revision of the constitutional scheme of war powers.

NECESSARY AND PROPER CLAUSE

A lot of attention has been focused on the necessary and proper clause of the advocates of S. 440 and the publicity which it has enjoyed.

The "necessary and proper" clause does not constitute an independent grant of constitutional authority enabling Congress to redefine or reallocate the various constitutionally prescribed war powers. It is an instrument of implementation and not of modification. Hamilton made quite clear in the Federalist that the "necessary and proper" clause was not intended to limit the principle of the separation of powers, but rather to preclude too narrow a construction of the authority of the Union vis-a-vis that of the individual States.

The Supreme Court in Myers v. United States, 272 U.S. 52 (1926) substantiated this fundamental precept in ruling that Congress could not constitutionally condition the President's removal power on the concurrence of the Senate, despite the necessary and proper clause. The "necessary and proper" clause does not itself support any legislation which cannot properly be rooted in another provision of the Constitution.

CONSTITUTIONAL AMENDMENT ALONG LINES OF S. 440 QUESTIONED

Some would support a constitutional amendment along the lines of S. 440, but I think this would be to reject nearly 200 years of proven...
constitutional tradition. I believe the Founding Fathers showed great vision in describing and allocating the war powers in general terms. It is impossible accurately to foresee and forecast the precise remedy for every conceivable crisis of future ages. The proposal to change our Constitution in this fundamental way reflects the mistaken belief that detailed rules of procedure will necessarily produce correct foreign policy decisions. This is the illusion that legal formalism will insure wisdom. Flaws in foreign policy are not, I suggest, compelled by our constitutional structure; nor would they be avoided by its remodeling. They lie instead in the unavoidable imperfection of our human decision-making, which, in turn, arises from the fact that none of us is omniscient.

The CHAIRMAN. That is a great admission coming from the executive branch. That is real progress.

BASIC GOAL OF CONGRESS AND EXECUTIVE BRANCH

Mr. BROWER. I believe all of us, both in Congress and in the executive branch, have the same basic goal in mind. I think there is no doubt of that. It is the enhancement of our national ability to make wise decisions in the field of defense and foreign policy.

An important means of fulfilling this objective is better to insure that the legislative branch has sufficient and timely information relevant to its responsibilities, and that it is involved in a thorough exchange of views with the executive branch. We have been working much more closely with this committee in recent months to maintain this exchange. We will continue to work with you to improve our coordination and communication so that together we may attain our common goal.

Thank you, Mr. Chairman, for permitting me to place this statement on the record. I will be happy to answer such questions as you may have.

The CHAIRMAN. Since we have another important witness who also is opposed to the legislation, I think it might be well if we hear him.

Is that all right with you?

Senator Aiken. Go ahead.

The CHAIRMAN. I wonder if Mr. Maxwell is here. Would you give your statement. Then I think it is more interesting if we can ask you both questions at the same time.

We are very pleased to have you, Mr. Maxwell. Mr. Maxwell as I stated, is a former-president of the American Bar Association.

STATEMENT OF DAVID F. MAXWELL, ESQ.

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

I am most appreciative of the privilege of appearing before this committee although I do so with some temerity. After having looked at the record of the preceding hearings and seeing that constitutional authorities that have heretofore appeared before the committee, I feel rather inadequate.
Before referring to my prepared statement, I should like to comment on one question which seemed to concern the committee greatly—it ran all through the testimony like a thread—and that is whether or not a treaty is self-executing.

It is easy to see that what bothered the committee in this respect is the words of the Constitution itself where it provides that the laws of the Congress adopted pursuant to the Constitution and treaties adopted under the authority of the United States, shall be the supreme law of the land.

And I dare say that the troublesome question is the distinction between the necessity for having acts of Congress adopted pursuant to the Constitution vis-a-vis the requirement that treaties are only adopted under the authority of the United States.

Now, as the pundits who have appeared before you heretofore have stated, this is a very difficult and complex problem and by no means clear in international law or constitutional law of this country.

Certainly no pronouncement of the Supreme Court of the United States has served to clarify it. It is possible that certain types of treaties may be self-executing and others may not be. It depends largely on the language. Certainly Congress in giving its advice and consent can make reservations in their approval of the treaties, and this has been widely resorted to by other countries, as this committee well knows.

I have but to cite the Genocide Convention where, for example, the ratification of the Genocide Convention by most of the countries which have adhered to it has been with very specific reservations which practically nullifies their liability under it.

But, barring such a reservation, a treaty could very well be self-executing.

For example, let us take the NATO Treaty. In the NATO Treaty there are words which would indicate that this country is under a duty immediately to come to the rescue of any other country if it is attacked.

And in that connection I refer you to Secretary Dulles’ testimony before this committee on March 20, 1954, when he said that the “all for one and one for all” pledges exchanged among the United States and its European allies in the North Atlantic Treaty would require the President to counterattack without waiting for action by Congress in the event one of our allies was invaded by a common enemy.

He added, however, if time permits, Congress, of course, should share the responsibility.

I refer to that assertion by Secretary Dulles in this connection because in my prepared statement I make certain references which indicate the pertinency of the principles.

My approach to the subject will be a little different from that of most of the witnesses who have been heard heretofore. The academicians and Government witnesses who have heretofore testified at congressional hearings have expounded on the intent of the Founding Fathers in making of the Constitution as a takeoff point for justifying their conclusions. In so doing they have touched on every facet of the constitutional issue involved in the war powers debate, thus making anything I might say in this area wholly repetitive.
Furthermore, as an active practicing lawyer, I see the problem from a different standpoint—perhaps from a more pragmatic one—and I should like to argue by analogy that irrespective of the intent of the Founding Fathers, the changing conditions and the vastly different mores make it no longer acceptable to limit the President in exercising war powers.

**CHANGES WROUGHT IN LAW BY SUPREME COURT’S CONSTITUTIONAL INTERPRETATION**

I need hardly call the attention of the erudite members of this committee to the changes wrought in our law by constitutional interpretation of the Supreme Court. For more than 50 years, separate but equal, was the constitutional test for the education of our children, black and white; yet with a stroke of the pen the Supreme Court of the United States reversed Plessy v. Ferguson and required integration by the Brown v. Board of Education decision. Who would have thought 50 years ago that the cruel and unusual punishment clause of the Constitution would be applied to the abolishment of the death penalty or who would have thought that persons accused of crimes were entitled to such elaborate safeguards under the Constitution as were prescribed by the Supreme Court in the Miranda case. I could cite many other cases including the recent decision on the law of abortion to illustrate the point but these should suffice.

I subscribe to the Holmes’ theory that the law cannot remain static, that it must conform to the changing needs of society, and I submit the decisions to which I have referred and many others as simply representing efforts on the part of the Supreme Court to meet the needs of present social conditions. In like manner the concept of power vested in Congress to make war has undergone radical changes.

**CHANGES TO WAR POWERS VESTED IN CONGRESS**

It could hardly have been envisioned by the Founding Fathers that the Atlantic and Pacific Oceans would not provide an effective defense barrier against invasion by a foreign power; nor could they have foreseen that Europe would be but 6 hours away and Japan 12 and that an atomic warhead could be launched as far away as the Soviet Republic and reach the United States in a matter of minutes. What I am trying to say is that it is wholly impractical for as large a body as the Congress to act with sufficient speed to meet the emergency situations which might arise or for that matter even to anticipate what will arise 5, 10, or 25 years from now.

Furthermore, declarations of war have become obsolete. The modern method is to attack first and worry about declarations later. Therefore, I submit that when the Founding Fathers gave the Congress the right to declare war, they were doing so in the context of a civilization which is entirely different from that in which we live today. Certainly no one would couch “war power” today in those terms and the conclusion is inescapable that such power is wholly inadequate to meet the exigencies caused by present day technology.

The collegians who have appeared, before the congressional committees inquiring into the subject have argued that usage is not to be considered as a precedent in interpreting the war powers of the Presi-
dent. They contend that although there are innumerable instances where the President has used the Armed Forces of the United States without congressional sanction, such usage does not sanction continuance if unconstitutional citing Justice Jackson's concurring opinion in the Youngstown Sheet & Tube Co. v. Sawyer case in which he held that if there is a constitutional inhibition it is not cured by repeated violation. But I submit the principle initiated in that case is not applicable. Usage and practice are not urged as precedents in this statement. On the contrary usage and practice are offered to evidence the changing mores which make it inevitable that the President exercise powers which may never have been envisioned by the Founding Fathers but which, if subjected to constitutional interpretation in accordance with parallel decisions of the Supreme Court in other fields, would be completely justifiable today.

It is hardly necessary to point out that circumstances may arise in which immediate action is imperative in order to prevent irretrievable damage not only to our country but to the whole world.

Suppose, for example, that an atomic attack should be launched against a member of NATO where we have tight treaty obligations and where none of our troops may be stationed at the moment and where we maintain no bases. Will the President then be authorized under these proposed bills to take action or must he stand supinely by until the Congress can have met and granted him authority? Is there a single person who would not say that the objective of the attack would be accomplished before we could come to the rescue? Should we stand idly by in a situation of that kind and let one of our allies be wiped out by an aggressive foe?

We are dealing in this world with totalitarian governments, governed for the most part by a single person or at the very best by a small coterie of powerful leaders. It is true that we, of course, are a democracy and we do not subscribe to the manner in which such countries conduct their foreign affairs, but at the same time, we must be practical and we must keep ourselves in a position to counter any tactical move on their part intended to destroy us. To restrict the President would be an invitation for such a country to move quickly and effectively, safe in the knowledge that retaliation would, in all probability, be delayed.

**IMPRACTICALITY OF 30-DAY CLAUSE**

I should next like to comment on the 30-day clause provided by the Javits bill. It seems to me that this is equally impractical. If such a situation should arise which, in the opinion of the President, comes within section 3 of the act, he may deploy our Armed Forces as he believes to be most expedient to meet the threat. In all probability, the 30 days will have expired before the President has had an opportunity to fully implement his objective. That applies if it is a limited war.

Can it be said then that any action of the Congress would bring the whole operation to a screeching halt? I doubt it. Take, for instance, the Vietnam war. It was said that the Tonkin Gulf resolution (1964) authorized the President to step up the war in Indochina and that without that resolution, he would have been exceeding his powers in dispatching additional troops to Vietnam.
In these very Halls, prominent Members of the Congress have deplored the Tonkin Gulf resolution and so it was expunged from the book (1971). And then what happened? Did the President's authority cease? Did the Vietnam war come to a stop? As the chairman just pointed out, we are still active in Cambodia. It seems to me that the ineffectiveness of the repeal of the Tonkin Gulf resolution points up the impracticality of Congress attempting to reverse the direction taken by the President. Furthermore, while it might be possible for Congress to wind down a war which it believed had been injudiciously launched by the President through its control of the purse strings, I sincerely doubt whether in a real war even the exercise of this power could precipitously end the conflict.

CREATION OF WAR POWERS COMMITTEE OF CONGRESS SUGGESTED

I am inclined to believe that the real problem results from the lack of adequate communications between the President and the Congress. Certainly the Congress is entitled to know and to know promptly the intent of the President in the exercise of his war powers.

The solution might be found in creating a war powers committee of the Congress composed of the majority and minority leaders of the Senate and the majority and minority leaders of the House plus one additional member chosen at large from either the membership of the Senate or the House to whom the President would be obliged to report before resorting to any warlike act. Provision could be made for alternative members of the committee so that in the event of the unavailability of any one of them, five representatives of the Congress would be subject to instant call by the President for the purpose of consulting with him. Certainly if such a group would recognize the necessity for immediate action, it is reasonable to expect that the Congress would ratify its acts. Thus, a full measure of protection could be accorded the President against public abuse and criticism by the Congress and yet the country would still have the benefit of speedy procedures which would insure its adequate defense under all circumstances.

I conclude as I began with reference to the treatymaking power.

It is interesting to note that the treatymaking power is vested in the President with the advice and consent of the Senate. To me the significant word is “advice” which I think has been too long neglected. Advice should come before the fact. Consent may come before or after. So under the system that I have suggested here, the communication medium would be available to the Congress and the President to make sure that no overt acts are taken which will be irretrievable by congressional action.

I very much again appreciate the opportunity to have been here on this occasion.

Thank you, sir.

[Mr. Maxwell's prepared statement follows:]

PREPARED STATEMENT ON WAR POWER BILLS BY DAVID F. MAXWELL, Esq. *

May I first thank the Committee for the privilege of appearing before you on this occasion. My approach to the subject will be radically different from that

*President of the American Bar Association, 1969-70; Member of the Advisory Committee to the Secretary of State, 1967-; Member of Council of the International Law Section, American Bar Association, 1968-68; Member International Academy of Astronautics; Member of International Institute of Space Law (Director 1964-66).
of most of the witnesses who have been heard heretofore. The academicians and
government witnesses who have heretofore testified at Congressional hearings
have expounded on the intent of the founding fathers in the making of the Con-
stitution as a takeoff point for justifying their conclusions. In so doing they have
touched on every facet of the constitutional issue involved in the war powers debate,
thus making anything I might say in this area wholly repetitive.

Furthermore as an active practicing lawyer, I see the problem from a different
standpoint and I should like to argue by analogy that irrespective of the intent
of the founding fathers, the changing conditions and the vastly different mores
make it no longer acceptable to shackle the President in exercising war powers.

I need hardly call the attention of the erudite members of this Committee to
the changes wrought in our law by constitutional interpretation of the Supreme
Court. For more than 50 years, separate but equal was the constitutional test
for the education of our children, black and white; yet with a stroke of the pen
the Supreme Court of the United States reversed Plessy v. Ferguson and
required integration by the Brown vs. Board of Education decision. Who would
have thought fifty years ago that the cruel and unusual punishment clause of
the Constitution would be applied to the abolishment of the death penalty or
who would have thought that persons accused of crime were entitled to such elab­
orate safeguards under the Constitution as were prescribed by the Supreme
Court in the Miranda case; I could cite many other cases including the recent
decision on the law of abortion to illustrate the point but these should suffice.

I subscribe to the Holmes' theory that the law cannot remain static, that it
must conform to the changing needs of society, and I submit the decisions to
which I have referred and many others as simply representing efforts on the part
of the Supreme Court to meet the needs of present social conditions.

Furthermore, declarations of war have become passe. The modern method
is to attack first and worry about declarations later. Therefore I submit that
when the founding fathers gave the Congress the right to declare war, they
were doing so in the context of a civilization which is entirely different from
that in which we live today. Certainly no one would couch "war power" to­
day in those terms and the conclusion is inescapable that such power is wholly
inadequate to meet the exigencies caused by present day technology.

The collegians who have appeared before the congressional committees in­
quiring into the subject have argued that usage is not to be considered as a
precedent in interpreting the war powers of the President. They argue that
although there are innumerable instances where the President has used the
Armed Forces of the United States without Congressional sanction, such usage
does not sanction continuance if unconstitutional citing Justice Jackson's con­
curring opinion in the Youngstown Sheet & Tube Co. vs. Sawyer case in which
he held that if there is a constitutional inhibition it is not cured by repeated
violation. But I submit these scholars miss the point. Usage and practice are
not urged as precedents in this argument. On the contrary usage and practice
is offered to evidence the changing mores which makes it inevitable that the
President exercise powers which may never have been envisioned by the found­ing
father but which, if subjected to constitutional interpretation in accordance
with parallel decisions of the Supreme Court in other fields, would be com­
pletely justifiable today.

It is hardly necessary to point out that circumstances may arise in which
immediate action is imperative in order to prevent irretrievable damage not
only to our country but to the whole world. Suppose, for example, that an
atomic attack should be launched against a member of NATO where we have

\[1\] Plessy vs. Ferguson, 163 U.S. 537, 16 S. Ct. 1158, 41 L. Ed. 258 (1896).
\[3\] Miranda vs. Arizona, 384 F.2d 489, 86 S. Ct. 1602, 10 L. Ed. 2d 994 (1966).
\[5\] Youngstown Sheet & Tube Co. vs. Sawyer, 343 U.S. 579, 72 S. Ct. 865, 96 L. Ed. 1158 (1952).
tight treaty obligations and where none of our troops may be stationed at the moment and where we maintain no bases. Will the President be authorized under these proposed bills to take action or must he stand supinely by until the Congress can have met and granted him authority? Is there a single person who would not say that the objective of the attack would be accomplished before we could come to the rescue. Should we stand idly by in a situation of that kind and let one of our allies be wiped out by an aggressive foe?

We are dealing in this world with totalitarian governments, governed for the most part by a single person or at the very best by a small coterie of powerful leaders. It is true that we, of course, are a democracy and we do not subscribe to the manner in which such countries conduct their foreign affairs but at the same time, we must be practical and we must keep ourselves in a position to counter any tactical move on their part intended to destroy us. To shackle the President would be an invitation for such a country to move quickly and effectively, safe in the knowledge that retaliation would, in all probability, be delayed.

I should next like to comment on the thirty day clause provided by the Javits Bill. It seems to me that this is equally impractical. If such a situation should arise which, in the opinion of the President, comes within Section 3 of the Act, he may deploy our Armed Forces as he believes to be most expedient to meet the threat. In all probability, the thirty days will have expired before the President has had an opportunity to fully implement his objective. Can it be said then that any action of the Congress would bring the whole operation to a screeching halt? I doubt it. Take, for instance, the Vietnam War. It was said that the Tonkin Gulf Resolution (1964)8 authorized the President to step up the war in Indochina and that without that resolution, he would have been exceeding his powers in dispatching additional troops to Vietnam. In these very halls, prominent members of the Congress have deplored the Tonkin Gulf Resolution and that without that resolution, he would have been exceeding his powers in dispatching additional troops to Vietnam. In these very halls, prominent members of the Congress have deplored the Tonkin Gulf Resolution and so it was expunged from the books (1971). And then what happened? Did the President’s authority cease? Did the Vietnam War come to a stop? It seems to me that the ineffectiveness of the repeal of the Tonkin Gulf Resolution points up the impracticality of Congress attempting to reverse the direction taken by the President. Furthermore while it might be possible for Congress to wind down a war which it believed had been injudiciously launched by the President through its control of the purse-strings, I sincerely doubt whether in a real war even the exercise of this power could precipitously end the conflict.

I am inclined to believe that the real problem results from the lack of adequate communications between the President and the Congress. Certainly the Congress is entitled to know and to know promptly the intent of the President in the exercise of his war powers. The solution might be found in creating a War Powers Committee of the Congress composed of the Majority and Minority Leaders of the Senate and the Majority and Minority Leaders of the House plus one additional member chosen at large from either the membership of the Senate or the House to whom the President would be obliged to report before restoring to any warlike act. Provision could be made for alternative members of the Committee so that in the event of the unavailability of any one of them, five representatives of the Congress would be subject to instant call by the President for the purpose of consulting with him. Certainly if such a group would recognize the necessity for immediate action, it is reasonable to expect that the Congress would ratify its acts. Thus a full measure of protection could be accorded the President against public abuse and vitriolic criticism by the Congress and yet the country would still have the benefit of speedy procedures which would insure its adequate defense under all circumstances.

The CHAIRMAN. Thank you very much, Mr. Maxwell. That is a very interesting and also a different approach from some of the other witnesses.

IMPORTANT OF CONGRESSIONAL CONSULTATION BECAUSE OF CHANGED CIRCUMSTANCES

When you are talking about modern warfare and nuclear war, it seems to me that one might well reason that it is all the more impor-
tant that caution be exercised and that the Congress be consulted because of the nature of the war. They are so much more potentially destructive than they were in the past. It wasn’t such a big thing to let a few ships go look at the Barbary Pirates. It didn’t endanger the country.

But it seems to me the restraint of abiding by the Constitution, which means to have a collective judgment, may be even more important because of the change of circumstances.

Your argument that because it is really serious these days we turn it over to one man doesn’t appeal to me. I come back to the statement of Mr. Brower where he confesses that none of us is omniscient. I rather assumed they followed the opposite idea downtown.

If you admit no one is omniscient, I would assume that a collective judgment on the part of the President and the Congress would be more in the public interest and that it is such a serious matter now to get into war that we ought to be very careful about it. Therefore, the Congress ought to be consulted.

That is the conclusion I would draw from your assumption, not that we turn it over to the President because it is very serious.

Mr. Maxwell. I agree with you that it should be a collective judgment of the Congress and the President, but I think that it should be exercised in a different form than what is proposed by S. 440.

My own feeling is that it should be by consultation and communication so that the Congress would have a right to object at all stages of any possible use of the Armed Forces.

The Chairman. Mr. Maxwell, I do, too. I personally have had great reservations about any legislation in this field because I think the Constitution is adequate and I am a strict constructionist. I don’t waiver because of an election which goes strongly one way.

I don’t think that changes the Constitution. I think it is the same now as it was before last November, which means that the Congress itself is to declare war, on which to me means that when you have a war as opposed to some little incidental fracas such as sending a battalion into Mexico—all of these precedents about sending a few troops around to discipline some unruly band it have nothing to do with what I think we are talking about, which is a declaration of war.

Mr. Brower says there are only five declarations, which to me says there have been only five really serious occasions, until recently when we have ignored the Constitution, in which there was a real war.

I don’t think these skirmishes are contemplated by the Constitution, but I think that basically what we are talking about are these decisions involving the security of the country of such magnitude that the Congress ought to be consulted.

Now they haven’t been consulted.

PURPOSE OF LEGISLATION

The only reason this legislation is here is because, and I don’t wish to speak for the Senator from New York, but many of us feel the previous administrations, departed from the Constitution. This one didn’t initiate it. This is an effort to kind of remind the country and the people that the Constitution still stands; it is a way of implementing it.
I have had, as I say, reservations. I agree with what you are saying. All we need to do is abide by the Constitution.

How do we get the Executive to abide by the Constitution? That is what this legislation is about, I think. It has the same purpose as executive privilege and impoundment. I don't think our efforts concerning impoundment ought to be necessary, but since we have an Executive that so abuses his power as Executive, we have to do something to try to bring the Constitution back into fashion.

All three of these efforts have a basic similarity, which is the effort to come back to the Constitution. I think the Constitution is adequate, but, nevertheless, I am inclined to go along with this as a warning or an inducement, I suppose, to this and future administrations to abide by the Constitution.

That is my point of view. So in a sense I agree with you and I regret that circumstances have arisen where it seems to be necessary to a great many people that we have to try to bring the Executive back into the constitutional system.

That is the way I feel about it.

SITUATION DEMANDING IMMEDIATE ACTION

Mr. Maxwell. What troubles me, Mr. Chairman, is that a situation may arise which seems to demand immediate attention. We have an explosive situation continuously in the Near East and so in the exercise of his foreign relations power, the President sends our Mediterranean fleet to the scene.

Well, certainly that doesn't at that point require a declaration of war, but we may be in a war the next minute if somebody doesn't like what we have done, and that is the point that troubles me.

Therefore, I would provide a medium of communication so that before the fleet is deployed to the Mediterranean the congressional committee would have notice of it and then if there were any dire consequences the Congress would be prepared to act in conjunction with the Executive.

That is the point I am trying to make.

The Chairman. Mr. Maxwell, we are always confronted with hypotheticals. Can you think of a single instance in modern times in which all this urgency has been of any significance? Was there any action, for example, in the Tonkin period or in even World War II?

I don't think this has any serious application. They are purely hypotheticals that I agree are sometimes legitimate in argument. Nobody is saying that if without any question we are attacked that the President can't respond. That has been accepted by all, even all of these academics you are talking about.

None of them questioned the right of the President to respond to an attack upon our country. I don't think any of them do. That isn't the question. There is no case that I can think of in which the President was inhibited by the inability of the Congress to act quickly.

The real problem here has not been that at all. Our own experience is that the Executive has ignored and/or deceived the Congress. You can say, well, this legislation won't make any Executive tell the truth. If they are liars, they are liars. That is that, and this won't help it. I agree with that.
And I said I have doubts about its effectiveness concerning what happened in Tonkin Gulf. Yet we are trying to persuade not just this President but future Presidents to come back to what we believe to be the constitutional provisions, that he consult with and get the agreement of the majority at least of the 535 men who represent the 200 million people, that this is such a situation in which this country in its wisdom should go to war.

It is a very serious decision not to be left to one man. That is about the way I look at it.

METHODS ADVANCED TO ACCOMPLISH GOAL QUESTIONED

Mr. MAXWELL. Well, I agree with everything the Senator says. I think, Mr. Chairman, that we do have a common objective here. The Congress, the President, and the people are all anxious to accomplish the same goal, but I am a little troubled about the method that is advanced to accomplish this objective.

I am a little troubled, with all due deference to Senator Javits, about that provision of S. 440, which in effect says that no treaty shall be construed as giving the right to the President to use the Armed Forces as follows:

4B, "No treaty in force at the time of the enactment of this act shall be construed as specific statutory authorization for, or a specific exemption permitting the introduction of the Armed Forces of the United States in hostilities or in any such situation within the meaning of this clause."

Now it seems to me that certain treaties already in existence and binding upon the United States do require us to use the Armed Forces under certain circumstances. Since such treaties were adopted according to the law of the United States the Supreme Court would in all probability have to declare this portion of S. 440 unconstitutional.

That is what troubles me.

WITNESSES' FEELING THAT LEAVING U.S. PRESIDENT IS BETTER

The CHAIRMAN. I want to turn it over to the Senator from New York because he is the expert on the methodology, as he says. I would only observed that you said you were in agreement with me. It seems to me your description of the change in circumstances and the mores and your allusion to the fact that other countries are ruled by dictatorships leaves me the impression that you feel that is the only effective way for us to move. This is what bothers me.

Both of you seem to feel in this very delicate area that it is better to leave it to the President than to the Congress. That is what I gathered from it. Maybe I am wrong in my interpretation. But if you wish to comment on that.

Mr. MAXWELL. I didn't mean to go that far. It seems to me that the President does have an obligation to keep the Congress informed.

Now I read the learned chairman's testimony yesterday on this matter of information and I subscribe to that. I think that the President has a duty to communicate with the Congress. Therefore, I would favor one of the House bills to S. 440, which would require the President to keep the Congress completely informed and I think that the
objective of the Congress would be accomplished in this manner rather than going to the length of S. 440.

The CHAIRMAN. Senator Javits.
Senator JAVITS. Thank you, Mr. Chairman.
Mr. Brower, I am very interested to understand the particular thrust of your testimony.

STATE DEPARTMENT'S ATTITUDE CONCERNING CONGRESS' POWERS IN WARMAKING AREA

First, I assume you are here speaking for the Department of State; is that correct?
Mr. Brower. That is correct, Senator.
Senator JAvITTS. And am I correct also in the assumption that what you are advising us to the attitude of the Department is contained in the following two excerpts from your statement?
"Congress has greater flexibility under general powers of authorization and appropriation."
"The proposal to change our Constitution in this fundamental way, to wit, to establish the methodology of S. 440. Incidentally, the chairman is entirely correct, that all I claim for S. 440, is a methodology for the exercise of the war powers of Congress under contemporary circumstances and as they mesh with the President's powers.
"The proposal to change our Constitution in this fundamental way reflects the mistaken belief that detailed rules of procedure will necessarily produce the correct foreign policy decisions."
I ask you whether the State Department says to us we confirm to you your powers of appropriations and authorization and that is all we believe the Constitution allows you in dealing with the making of a war?
Mr. Brower. Senator, I believe the Constitution provides Congress with a number of powers in the war-making area as it does to the executive branch. The appropriation and authorization powers is cited more as an example.
I think it was not intended to be exclusive.
Of course, the Constitution gives to Congress also the authority to raise and support armies, to organize and maintain navies, to provide rules for the operation of the Army, and the Navy. It has various provisions within the enumerated general legislative powers which may have some application to the war powers area.
Inasmuch as the thrust of my testimony, I believe, is reaffirmation of what we believe the Constitution to be, I would not presume to attempt an alteration of it and I certainly do not intend in my testimony to indicate that Congress was restricted to anything less than what the Constitution permits.

RIGHT TO DETERMINE DEPLOYMENT OF TROOPS

Senator JAVITS. Does the State Department say that we have the right to pass laws about where you shall put troops? In other words, do we have the right to determine the deployment of troops under the very provision of the Constitution that you mentioned, to wit, we can make rules respecting the Armed Forces?
Mr. Brower. Senator, even the word deployment, I think, is to some extent a term of art and I think it is very difficult to deal in hypothesis. Certainly the ability of the President to deploy forces, which my understanding of the word deploy is to a large extent within his authority as Commander in Chief, depends upon whether or not he has an Army and Navy to deploy.

It depends upon what kind of equipment the Army and Navy has. It depends upon a whole series of actions which Congress in the exercise of its general legislative powers may have undertaken.

I would say in the most direct sense the President has the principal authority over the deployment of our foreign forces, of our forces overseas, as I understand that word, but I think that the whole area of war powers is obviously subterfuged by a fundamental political process whereby the President, Congress and the people of this Nation operate toward the making of a decision.

It has been said that the decisions, great decisions of war and peace may be made by one man. That really is not true in the sense that no President of this country operates in a vacuum; no President operates in ignorance of or is influenced by the desires and wishes and the mood of the people who have elected him to that high office, and the desires and moods and wishes of those who represent the people in Congress.

Senator Javits. We are not talking about the desires or the wishes and the moods. We are talking about how you manifest them in action and in law.

By what method does the Congress declare to the President that it doesn't want troops deployed, let us say, in some island in the Indian Ocean? How do we declare that—by our appropriation and authorization power—or do we have any other power, in your judgment?

I want to know what the State Department contends here.

Mr. Brower. I must say I am constrained to tread lightly in the area of giving Congress advice on how to handle its legislative program in this area.

Senator Javits. But you are here giving us advice and you are against S. 440. You are giving us advice as to how we would get set up to deal with these issues of control and exercise of the war powers. What are you testifying for?

Mr. Brower. I am testifying because the committee has requested testimony on behalf of the Department of State with respect to a bill which is known as S. 440.

CONSTITUTIONAL JUSTIFICATION FOR PRESIDENT’S ORDERING BOMBARDMENT OF CAMBODIA

Senator Javits. Mr. Brower, let us take a practical case, Cambodia. What is the position of the Department of State as to the constitutional justification of the President ordering aerial bombardment in Cambodia?

Mr. Brower. I rather thought that question might arise this morning.

I think that several statements on this subject have been forthcoming from administration officials, particularly the Secretary of Defense, within the last couple of weeks.

I have noticed that a study by the Library of Congress which was requested by this committee and received some publicity within the
last week sustains the legal authority of the President even to reintroduce forces and hostilities by U.S. forces into South Vietnam, North Vietnam, and Laos, to say nothing of Cambodia.

I am really not aware at the present time that there is or should be substantial doubt as to the President's authority. The President clearly does have authority in the area that you have cited. He had authority prior to the conclusion of the agreement on peace in South Vietnam and throughout Indochina on January 27 of this year and the constitutional situation has not fundamentally changed.

When President Nixon came into office there was a war going on, had been going on for some time. He has exercised his constitutional authority to wind it up. As other spokesmen for the administration have indicated, it is the last little corner of the windup of the operation which is in Cambodia, and that is what is being taken care of at the present time.

Senator Javits. As I understand it, you stand on, you are not making any new or other declaration as to constitutional authority other than the one made by the Secretary of Defense in this matter; is that correct?

I am trying to get the official position of the Department of State which you are here to give us.

Mr. Brower. Well, I said what I have said. I think it speaks for itself.

The Chairman. Could I inquire whether the letter from this committee asking for the Secretary's position has come to your attention?

Are you dealing with that?

Mr. Brower. Is has come to my attention, Mr. Chairman. I am aware of the letter. It is in the process of being answered, Mr. Chairman.

You enclosed with it, I believe, a statement which asked a number of questions and we always feel that an inquiry from this committee deserves a careful and deliberate response and I believe that will be forthcoming quite soon.

The Chairman. Thank you.

LIBRARY OF CONGRESS REPORT

Senator Javits. Mr. Chairman, in view of the fact that this report of the Library of Congress has been raised and that I and others believe that what the witness has said about it is the result of a newspaper headline rather than the Library of Congress report itself, I ask unanimous consent that the report be made part of this record.

Mr. Brower. If I may, Senator, I tended to understand your remarks just now as indicating I might not have read this report?

Senator Javits. No, not at all.

Mr. Brower. I am sorry, because I have read the report.

Senator Javits. We understand that this was a public question, the matter of what was advertised to the public in a press headline. No, I am sure you have read it.

Mr. Brower. I just wanted the record to show that.

Senator Javits. You have given us what you considered to be your honest opinion. The best evidence is the document itself. That is why I am putting it in the record because I don't think it supports your contention and, of course, is not authoritative in any event.

[The report referred to follows:]
CONGRESS AND THE TERMINATION OF
THE VIETNAM WAR

PREPARED FOR THE USE OF THE
COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE
BY THE
FOREIGN AFFAIRS DIVISION
CONGRESSIONAL RESEARCH SERVICE
LIBRARY OF CONGRESS

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FOREWORD BY SENATOR J. W. FULBRIGHT, CHAIRMAN, COMMITTEE ON FOREIGN RELATIONS

Some weeks ago the Committee on Foreign Relations asked the Library of Congress to undertake a study of the role of the Congress in the termination of wars. This inquiry was prompted by the realization that while much attention has been devoted to the question of the respective powers of the Executive and Legislative Branches in the making of war, relatively little thought has been devoted to the legal processes involved in the termination of wars.

This question now has taken on an added meaning as a result of the nature of the Vietnam cease-fire agreement and the subsequent Paris agreement and the manner in which they have been handled by the Executive Branch. It is not entirely clear whether, either as a practical or a legal matter, these agreements will mark the end of the Vietnam war any more than the Korean Armistice marked the end of that conflict. Although some twenty years have passed since the fighting stopped in Korea, confusion persists as to whether, in a legal sense, that war has ended. In the absence of some affirmative action by the Congress, the Executive Branch or both, a similar confusion may arise with regard to the Vietnam war.

As the study which the Library of Congress has prepared for the Committee on Foreign Relations points out, the Korean war "represented a break in the tradition of joint legislative-executive cooperation in the beginning and ending of war." The Korean war was, as the study notes, "the first major war in U.S. history initiated without the explicit formal approval of Congress, and the first to be concluded without some kind of action by Congress." In considering the War Powers bill the Congress has already begun to address the problem of its proper role in the initiation of future wars. The apparent end of U.S. involvement in the fighting in Vietnam makes it timely to consider how the present war can be formally terminated.

Among the questions which the Committee asked the Library of Congress to examine in its study were the domestic and international legal problems involved in allowing wars to "fade away," and whether Congressional action "to terminate" the Vietnam war is feasible and appropriate. The study which appears on the following pages responds to those questions. It suggests the desirability of action by the Congress both "to terminate" the Vietnam war in a legal sense, and to re-examine the status of outstanding grants of authority to the President attending to the existence of wartime emergencies. In the latter connection, it should be noted that the Senate has already created a special committee to study the question of the termination of the national emergency. I hope that the publication of this thoughtful study which was prepared by William C. Gibbons, Allan W. Farlow and Leneice N. Wu of the Library of Congress will stimulate and inform public and Congressional discussion of these neglected subjects.

On March 14, 1973, the Committee approved publication of this study.
LETTER OF TRANSMITTAL

FOREIGN AFFAIRS DIVISION,
CONGRESSIONAL RESEARCH SERVICE,
March 9, 1979.

Hon. J. William Fulbright,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

Dear Chairman Fulbright: I am pleased to submit this study of the question of formal termination of the Vietnam War by Congress.

The study, prepared at your request by the Foreign Affairs Division of the Congressional Research Service, examines the power of Congress to terminate a war, and surveys the history of U.S. experience in the termination of involvement in both declared and undeclared wars. In addition, it describes legal aspects of the Korean and Vietnam wars, the issues raised with respect to the international legal consequences of the Vietnam armistice agreements, possible congressional action to terminate the Vietnam war, and the implications of such action for domestic law in the United States.

The study does not discuss the impact or lack of impact of any such action upon the position or role of the United States in Southeast Asia.

This study was prepared by William C. Gibbons, Specialist in U.S. Foreign Policy, and Allan W. Farlow, Analyst in National Defense, with the assistance of Leneice N. Wu, Analyst in International Relations, under the general direction of Charles R. Gellner, chief of the Foreign Affairs Division.

Sincerely,

Lester S. Jayson,
Director.