CONGRESS AND THE TERMINATION OF THE VIETNAM WAR

The Power of Congress to Terminate a War After a Cessation of Hostilities

There are three standard ways in United States and international law in which wars, both declared and undeclared, can be definitely ended: by treaty, by legislation, or by presidential proclamation.\(^2\) The choice of the method or combination of methods to be used depends on various factors. (See below for an account of the steps taken to end World Wars I and II.) Wars can also be ended by the suspension of hostilities or by a cease-fire or armistice—whether or not there is an armistice agreement—which can, after a reasonable period of time and the establishment of the necessary facts to support such a conclusion, be interpreted by the courts as representing the end of the war. Under U.S. law, however, a cessation of hostilities or armistice cannot terminate a declared war. In order for a declared war to be ended, and for statutes made operative by reason of the existence of an official state of war to be repealed or to revert to their peacetime status, appropriate action would have to be taken by the political branches of Government.

In the case of an undeclared de facto war, an armistice and related facts could be interpreted by the courts as representing a de facto termination of the war, even if, as in the case of the Korean war, there were no treaty or other international instrument, legislation, or presidential proclamation officially pronouncing the war to be at an end.

There can be no question about the power of Congress to terminate any war with respect to war-related grants of power to the President and the regulation of legal consequences within the legislative jurisdiction of Congress. But Congress cannot legislate for other countries, and although it can specify U.S. conditions for a political settlement of a war, Congress cannot negotiate or make international arrangements under which those terms would be carried out. When confronted with the problem, the delegates to the Constitutional Convention, a number of whom were inclined to give Congress the power to declare peace as a check against the possibility that an ambitious executive might attempt to continue a war without public approval, decided to rely upon the treaty power because of the importance of having joint legislative-executive action.

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1 This paper does not discuss the impact or lack of impact on the position or role of the United States in Southeast Asia which might or might not result from congressional action with respect to termination of the war.
It is clear, however, that action by Congress to terminate a war can directly affect the international legal situation, and can become the instrument by which the war is officially ended by the United States from the standpoint of its own position with respect to a state of war—a unilateral formal declaration. After the failure of the Treaty of Versailles it was Congress which brought the war officially to an end, both domestically and in terms of the status of U.S. belligerency in international law, by first enacting a joint resolution terminating the war from the domestic legal standpoint, and then enacting a second joint resolution terminating it from the standpoint of U.S. belligerency. (For the texts of both laws see appendixes A and B.) To obviate all uncertainty, the President, after Congress acted, negotiated treaties which, in substance, gave effect to what Congress had done. He then proclaimed the war at an end as of the date—July 2, 1921—the second joint resolution became effective, thus making it clear that for purposes of international law the war ended for the United States when Congress with the concurrence of the President said it was ended. As will be noted below, however, some authorities took the position that for some international purposes the war might not be officially terminated until the President, after congressional action on the treaties, proclaimed the war to be over. Action by the courts was not uniform. In most cases the courts accepted the date of the joint resolutions as the end of the war, but in some cases the President’s proclamation was considered the terminal point, and a few courts took the position that the war had not even ended at that juncture because a treaty of peace as such had not been signed. (The treaties signed with Germany, and Austria-Hungary were not treaties of peace.)

Similarly, the legal state of war with Germany as well as with other associated European countries was ended by joint resolution after World War II, and although action by the courts again was not uniform the effective dates of these resolutions generally have been considered the terminal dates of the war with those countries. (For the text of the law ending the war with Germany see appendix C.)

Termination of an undeclared, de facto war by Congressional action, on the other hand, does not present an easy question in terms of predictable legal consequences. Authorities do not agree even today as to whether the Korean “war” has ended. Efforts are now underway in Congress and the executive branch to determine the consequences of a termination of the national emergency proclaimed during the Korean war by President Truman in 1950.

Since, by definition, a de facto war is dependent on the existence of certain facts, a determination of both its existence and its termination is one of fact, not laws. Consequently, legislation designed to terminate a de facto war, is, at best, an accurate appraisal and declaration of recent events. This being the case, legislation declaring an end to a de facto war without provision for intended legal consequences would not necessarily be dispositive of issues dependent on that determination, and, while such a declaration would undoubtedly be given great weight, other branches and the states could attack collateral the accuracy of the declaration.

Prior to the Korean war there were five declared general foreign wars in U.S. history; the War of 1812, the Mexican War, the Spanish-American War, and the two World Wars. There has been one undeclared limited war which Congress authorized in advance, and which the courts recognized as war from the political standpoint (i.e., authorized by Congress). This was the “war” with France, 1798-1801.

All of these were concluded by joint action of the Congress and the President. The war with France, the War of 1812, the war with Mexico and the Spanish-American War were terminated by treaty with Germany and Austria-Hungary. The Second World War was terminated by an act of Congress followed by treaties with Germany and Austria-Hungary. The Second World War was terminated by an act of Congress in the case of Germany, and a treaty in the case of Japan.

There have been several other conflicts which some authorities refer to as “public wars” and which are generally considered to have constituted “states” of or “conditions” of war as a result of the existence of armed hostilities between the United States and other nations. These were the First Barbary War, 1801-05, and the Second Barbary War, 1815, both of which Congress authorized in advance, and which were concluded by treaties; U.S. action in the Boxer Rebellion of 1900, which was not submitted to Congress for approval or authorized by Congress, and which was concluded by an international executive agreement which was not submitted to Congress for approval; the war against the Filipino “insurgents” after the Spanish-American War, which was conducted by the President with support from Congress but without explicit approval or authorization, and was ended by surrender; and, finally, the hostilities with Mexico, 1914-17, which were authorized by Congress the day after President Wilson moved U.S. troops into Mexican territory and were terminated, when, following mediation of Argentina, Brazil, and Chile, U.S. troops were withdrawn from Mexico.

From the legal standpoint, domestic as well as international, the United States was in a general and officially designated state of war, that is, engaged in hostilities which were declared by Congress to be a “war,” and in which U.S. participation was authorized by law, in each of the five declared wars. It is not as clear that the undeclared hostilities cited above constituted authorized, de jure states of war, although various aspects of each of these conflicts would appear to justify their classification as “public wars” in which there was a partial or limited state of war from a political and legal standpoint, both domestically and internationally. This conclusion is further supported by the fact that in both Barbary Wars and in the Boxer Rebellion the
opposing country declared war against the United States. (In the Barbary Wars Tripoli declared war; Algiers did not.)

The situation at the end of the First World War presented a new and unique situation from the standpoint of termination. Whereas all previous declared wars were ended by treaty, the impasse over the Treaty of Versailles left the United States in a state of war with Germany and Austria-Hungary. With the courts holding that the state of war continued in effect for judicial purposes, it was apparent that new steps had to be taken to bring the war legally to an end, both domestically and internationally. In 1920, Congress, which was then controlled by the Republicans, passed a joint resolution declaring the state of war terminated.6

There was a sharp and prolonged partisan debate in which the Republicans contended that Congress had the power to declare an end to the war and the Democrats, faced with the prospect of losing all hope of approval of the Treaty of Versailles, argued that Congress did not have the power to terminate the state of war except with respect to domestic law. Wilson vetoed the measure, saying that it would “place an ineffaceable stain upon the gallantry and honor of the United States” because it would establish peace “without exacting from the German Government any action by way of setting right the infinite wrongs.” He did not object on constitutional grounds, and it would appear that he did not think Congress was acting unconstitutionally in attempting to end the state of war by joint resolution. The House did not override the veto.

In 1921, however, Harding, requested congressional action and Congress, after intense partisan debate, passed two joint resolutions ending the war. The first, which became law on March 3, 1921, provided that in the interpretation of provisions in acts of Congress and in certain presidential proclamations the date the resolution became effective would be regarded as the end of the war.7 The Attorney General ruled that “What Congress has done is to declare a state or rather a condition of peace to exist as to the laws of and governing the United States.”

The second, which became law on July 2, 1921, terminated the state of war for the United States, and prescribed conditions for U.S. relations with Germany and the other enemy states.8 Following this action the President negotiated treaties with Germany and Austria-Hungary embodying the terms which Congress had prescribed, which were quickly approved by the Senate, and on October 21, 1921, the President

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8 41 Stat. 1339 (1921).
issued a proclamation declaring that the war was over. The results of this complicated series of events has been summarized as follows:

It would seem not improper to set July 14, 1919, as the date of the end of the war for purposes of trading between nationals of the two countries; to set March 3, 1921, as the date of the end of the war for the purpose of applying much of America's wartime legislation; and to set July 2, 1921, as the date of the end of the war for purposes of American municipal law and claims before the Mixed Claims Commission. But there may also be some international situations in which it would be improper to say that the war ended before November 11, 1921.

The termination of World War II was also a complicated matter. Beginning in 1945 efforts were made in Congress to pass legislation dealing with termination. Truman, however, urged Congress not to take precipitous action on legal termination of the war, the hostilities, or the states of national emergency which had been declared by the President in 1939 and 1941. Hearings were held in the House and in 1946 a joint resolution was reported from committee providing for repealing only those statutes which the executive branch had testified should be repealed at that time. The House passed the bill, but Congress adjourned before any action by the Senate.

Truman then proclaimed a "cessation of hostilities" as of December 31, 1946, which had the effect of rescinding 53 of some 500 laws pertaining to war or national emergency. He noted, however, that his proclamation did not terminate the state of war or the national emergencies which had been declared. It ended only the "period of hostilities."

In 1947, Congress took up the matter again and passed a joint resolution terminating the state of war and the national emergencies of 1939 and 1941 with respect to certain statutes of the type which would have been covered by the legislation from the previous Congress. In a great number of cases, however, the effect of this action was to terminate the effectiveness of the particular statutory authority but not to repeal it, thus leaving extant a large number of war-related or emergency statutes in the category of "permanent legislation." Some of these dated from the First World War, others from the 1920's and 1930's, and the largest number from the Second World War.
The state of war with Germany finally was concluded in 1951 by joint resolution, and the state of war with Japan in 1952 by a peace treaty. The national emergencies of 1939 and 1941 were rescinded by Truman on April 28, 1952, after his 1950 proclamation of a state of national emergency in connection with the Korean war. For a period of almost 2 years there were three coexistent national emergencies.

EXPERIENCE WITH THE KOREAN AND VIETNAM WARS

The political branches of government have not taken authoritative steps to cause either the Korean or the Vietnam wars to be considered a “state of war.” Congress did not, in either war, see fit to make the judgment that the hostilities constituted states of war, and Presidents Truman, Kennedy, Johnson, and Nixon did not request such action. However, when we queried the Judge Advocate General’s Office of the Air Force, which is responsible for these aspects of the legal work of the armed services, concerning whether any of the laws which become operative “in time of war” or during a “state of war” had been used during the Vietnam war, the answer was carefully phrased. It was that, so far as that office knew, there had been no use made of such statutes. We must assume, therefore, that there is a possibility some of the statutes have been used, or would be cited if the particular authority for various activities were required to be given. If such were the case it would, of course, raise the question as to whether, despite the absence of congressional action determining that a “state of war” existed, the executive branch acted in such a manner as to indicate a strong presumption in favor of the existence of a de jure war.

From the standpoint of the courts, both wars have been considered as being war, and as having been authorized or at least supported by Congress. (See below.) The executive branch also has taken the position that Congress has authorized the war by passing the Gulf of Tonkin resolution. Under Secretary of State and former Attorney General Katzenbach took the position that this was the “functional equivalent of . . . declaring war.” This, incidentally, raises interesting questions about the status of the war. He appears to have been suggesting that, from the standpoint of the executive branch, it was a de jure rather than merely a de facto war.

A principal reason for the absence of congressional action activating wartime statutes in the case of Korea and Vietnam was the existence of authority for a presidential declaration of a national emergency giving the President some of the power and legal authority needed to prosecute both wars, aided, of course, by congressional action on the necessary appropriations and use of selective service.

Thus, it can be seen that Congress has played a principal role in the legal termination of wars, both general and limited, and that until the Korean war all major foreign wars had been ended by treaty or by a combination of legislation and treaties. The Korean war was significant because it represented a break in the tradition of joint legislative-executive cooperation in the beginning and ending of war. It was the
first major war in U.S. history to be initiated without the explicit formal approval of Congress, and the first to be concluded without some kind of action by Congress.

The problem of permitting a war to fade away rather than being finally ended through a political act of termination is illustrated by the complications resulting from the Korean war, in which the armistice agreement was not implemented domestically or internationally by conclusive political action. Twenty years have passed since the armistice was signed. The state of emergency is still in existence, and the grants of power extended by Congress are still residing in the executive branch. Soldiers who serve in the DMZ continue to receive combat pay. Hostilities, though infrequent, occasionally erupt.

Lack of a definitive political act ending the Korean war also created uncertainty with respect to the legal definition of the situation in the several years after hostilities ended, and conceivably could still create legal uncertainty. (Suppose, for example, that a U.S. soldier receiving combat pay were killed in a skirmish in the DMZ. Would this be considered a "state of war" for insurance purposes?)

An armistice is not regarded as an action which terminates a "state of war." If a war is declared, it can be officially terminated only by a treaty, congressional joint resolution, presidential proclamation, or a combination of these. In a principal case on the subject, involving a determination by the Supreme Court as to whether certain of the President's war powers, authorized by Congress had terminated after the cessation of hostilities with Germany at the end of World War II after the President had proclaimed the end of the war, but before implementing legislation and treaties, Justice Frankfurter stated: "War does not cease with a cease-fire order, and the war powers of the President are not exhausted when the shooting stops. ... The powers of a President which depend on the existence of a state of war ... terminate when the appropriate political agency makes a determination that the war has concluded."

For undeclared, limited wars, there are few legal precedents with respect to the question of termination. Unlike the termination of a declared war, for which action by Congress is required in order to restore a state of peace, Congress would not necessarily need to declare an undeclared war at an end if there were no statutes made operative during the war which required such action. A war which has been declared or otherwise determined by Congress to be a "state of war" triggers certain statutes which are operative only during periods described as "in time of war," in a "state of war," or by similar phrases. In order for these to be restored to a peacetime status, Congress would have to declare the war or "state of war" at an end. But, in an undeclared war, unless Congress, during the war, were to enact legislation for the purpose of the war without establishing criteria or a date for automatic termination, no transfer of authority from Congress to the President would occur, and no termination of the legislation by Congress would be required. In international law, moreover, it has long been established that wars do and can end merely by a cessation of hostilities or a cease-fire or armistice.

22 Lederer v. Watkins, op. cit.
23 Note 8 U.S.C. 1140 and 1140-2, which state that the President can terminate the period of entitlement by which aliens who serve in the armed forces during hostilities can gain citizenship. Presumably, Congress can repeal this provision and set its own terminal date.
Although an undeclared war can be terminated by virtue of a cessation of hostilities or a cease-fire or armistice agreement, the problem of legal uncertainty which this creates, and the delay resulting from the passage of time before the war can be said to be terminated, would seem to constitute reason for a political action officially terminating the Vietnam war. In addition, a political act of this nature would give authoritative sanction to the position of the United States that, for its part, the war has ended.

THE LEGAL STATUS OF THE VIETNAM WAR

In making a judicial determination of whether or not a "state of war" exists, courts have distinguished between a de facto war (sometimes referred to as war in the material or general sense) and de jure war (i.e. war in the technical or strictly legal sense). The issue of whether the Korean hostilities constituted war has been litigated repeatedly. In nearly all cases, the existence of a war was found even though there was no express congressional declaration. The courts reasoned that war, in fact, existed even though some of the requirements for "war" in the constitutional or legal sense were missing. This same issue has arisen in state and federal courts on numerous occasions since the outbreak of overt hostilities in Vietnam. Without significant exception, it has been determined that a "state of war" existed. In most of these cases, it was unnecessary to determine whether the war was de facto or de jure.

Authorities do not agree, however, whether a "state of war" has existed in the constitutional sense (de jure). While it is generally agreed that legislative sanction is necessary to the technical existence of a war, the law is not settled as to what particular legislative acts are required to give this sanction. In the famous Prize cases, Justice Grier observed that "If it were necessary to the technical existence of war that it should have legislative sanction, we find it in almost every act passed at the extraordinary session of the legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency." That decision held that the Civil War was, in fact and law, a "war" for the purpose of determining ownership of a confiscated blockade runner. Other decisions of the courts have distinguished between "perfect" and "imperfect" or "general" and "partial" or "limited" wars, and have found that Congress authorized a "state of war" in certain cases, notably the "war" with France in 1798-1801, even though it did not declare war. Some of the court cases dealing with the Vietnam war point out the similarity between these earlier situations and congressional approval of U.S. action in Vietnam.
Court decisions since the commencement of the Vietnam conflict which require a determination of the status or nature of that war are, however, neither clear nor controlling. The Supreme Court has not considered this issue on its merits and is not likely to do so in the foreseeable future. Lower federal courts which have addressed the question—always peripherally—have generally found enough congressional action, participation, acquiescence, knowledge and support, or collaboration, depending on the semantic preference of the court, to meet the constitutional requirement of congressional sanction. In no case in which executive authority was challenged did the courts base a decision on the proposition that the Executive had the constitutional authority to carry on extended combat operations in Vietnam without the participation of Congress in some degree. While no court has expressly held that the congressional actions necessary to give sanction to the war constituted an implied declaration of war in the constitutional sense, it is difficult to avoid that inference. For example, the Second Circuit Court of Appeals in deciding *Orlando v. Laird*, conceded that the Constitution, by vesting in Congress the power to declare war, required the exercise of congressional authority to legitimize U.S. war efforts in Vietnam. It also found that Congress exercised that authority. It did not say, however, that a declaration of war could be implied from that exercise.

**LEGAL EFFECTS OF THE VIETNAM ARMISTICE AND THE ACT OF THE PARIS CONFERENCE**

On January 27, 1973, a four-power Vietnam cease-fire agreement, officially called "The Agreement on Ending the War and Restoring Peace in Vietnam," was signed in Paris. It provides (Article 2) for a "complete cessation of hostilities . . . [which] shall be durable and without limit of time." It is not a treaty or agreement of peace. Nor does it "end" the war. According to its preamble, the signatories entered into the agreement "with a view to ending the war and restoring peace in Vietnam. . . ." (Emphasis added.)

On March 2, 1973, pursuant to the agreement of January 27, twelve nations signed an "Act of the International Conference on Vietnam," approving and supporting the Vietnam armistice agreement. This, too, is not a treaty or agreement of peace, nor does it "end" the war. It is a statement of intention of the parties, a binding international agreement, under which the parties accept certain international obligations.

In both the Vietnam cease-fire agreement and the 12-power Act the United States recognized and agreed to respect the neutrality and sovereignty of Laos and Cambodia, and agreed to end all military activities in both countries.

All of these actions on the part of the United States Government have been taken by the President alone, presumably under his powers.

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32 A clear expression of the doctrine that a de jure war can exist without a formal declaration of war is contained in the dissenting opinion contained in *Eckey v. Pa. Mut. Life Ins. Co.*, 96 A.2d 202 (1953): "Many courts throughout the land have held that war can exist between the United States and the armed forces of another nation de facto or de jure, without any formal declaration of war. . . ." The court cited a line of supporting cases going back to the Civil War.

33 78 F.2d 1039 (C.A. 2, 1932).

34 TIAS 7242.

35 TIAS 7298.

36 A cease-fire agreement in Laos was signed by the two opposing Laotian forces in February.
as Commander-in-Chief, or as Chief Executive, or both. There has been no explanation of the source of power in each instance.

The Department of State considers the Vietnam armistice agreement and the Act of the twelve powers to have been international agreements other than treaties, and therefore to constitute executive agreement under U.S. practice. Accordingly, both actions are governed by the provisions of P.L. 92-403, requiring international agreements other than treaties to be reported to Congress within 60 days, and both have now been transmitted to Congress.

It is interesting by comparison to note the situation in 1954, when French involvement in the war in Indochina ended with the international conference in Geneva. Even though there was no clear obligation to do so, the French Government submitted the Geneva conference declaration to the National Assembly for its consideration. The Assembly passed a resolution commending the Government and approving the declaration.

It is also interesting to note that in his speech to the National Assembly, Prime Minister Mendes-France, while making it clear that all French forces were going to be removed from Indochina under the terms of the Geneva Accords, stated that if a violation of the Accords required the renewed use of force, he would consult in advance with the Assembly before sending French military units into combat again.

Although the United States is formally committed to maintaining the cease-fire in Vietnam, and to respecting the cease-fire in Laos, there is no bar to resumption by the President of hostilities in either country, or against the Democratic Republic of Vietnam (North Vietnam). When asked about this possibility Administration spokesmen have stated that it would be "legally correct" under the Vietnam cease-fire agreement to use U.S. air power. Such use would depend, "on the extent of the challenge, on the nature of the threat, on the circumstances in which it arises." They have not stated that the United States would or would not resume hostilities. Nor have they stated whether or not Congress would be asked to approve such a resumption, of whatever scale.

In both domestic and international law the Vietnam cease-fire agreement and the Act of the twelve powers in and of themselves do not constitute an end to the war or represent the termination of hostilities. In the absence of actions to this effect, such as a treaty or agreement of peace, the war cannot be said to be terminated until the necessary conditions exist for this to be considered to be a reasonable presumption. As was indicated earlier, this is a determination which could be made if, after a reasonable period of time, it could be established that hostilities have not only ceased but terminated, and that effective steps have been taken fully to implement the agreements.

**The Question of Termination by Congress of the Vietnam War**

Although there is no precedent for termination of an undeclared war by a legislative act initiated by the legislature, there is also no apparent legal bar to the use of such a method for this purpose. The
fact that the war was not declared would not appear to be preclusive. Several previous undeclared wars have been terminated by treaty approved by the Senate. Moreover, Congress has clearly recognized the "state of war" in Vietnam without expressly declaring its existence, and what it has approved and supported by legislative sanction it can terminate by a legislative act or actions which withdraw any or all of those sanctions.

There are some difficulties with this approach, however. As was indicated earlier, the declaration that a de facto war has terminated would constitute an interpretation of the facts which might not be considered conclusive. This particular problem would be obviated if the law were to be based on the assumption that the war was a de jure or legally authorized war. (This could be done on the basis of the Gulf of Tonkin resolution and other actions of Congress which supported the war.) There are clear precedents for termination of a de jure war by Congress. Moreover, congressional termination of a war which Congress has found to be de jure would have predictable legal consequences based on precedent. Even if congressional termination of the Vietnam War could be considered conclusive from the standpoint of the legal consequences within the legislative jurisdiction of Congress, however, it would not necessarily have any effect on the actions of the United States with respect to the war. Congress could declare the war to be over, but this in and of itself would not prevent a determined President from resuming hostilities.

In view of the fact that the executive branch has generally taken the position that the President did not need congressional authorization to become involved in the Vietnam war, action by Congress terminating the war might be rejected by the President, who, if he were to continue to get appropriations, could resume the war. (The existence of a volunteer Army might facilitate such action by obviating the necessity for congressional approval of the use of selective service.) In this event, one recourse for Congress could be a prohibition on the use of appropriations as a necessary means for implementing termination.

One possible approach to the question of termination would be a joint resolution terminating the war with respect to domestic law. The second would be a joint resolution terminating the U.S. "state of war," and stating the conditions for termination from the standpoint of U.S. international responsibilities and rights. Even if this latter action were to stand alone as an expression of the position of one or both of the political branches of government with respect to the status of U.S. belligerency, it could, as a unilateral formal declaration, constitute the instrument for international recognition of the existence, for the United States, of a state of peace, especially if it were promulgated internationally by a presidential proclamation.

The Domestic Legal Consequences of Termination of the Vietnam War by Congress

If Congress were to enact a statute terminating the Vietnam war, with respect to domestic law, certain legal consequences conceivably could flow from that action pertaining to various statutes and presidential proclamations, and in the area of individual rights.

Concerning war-related delegated presidential power, there may be a few relatively minor activities and programs which would be ter-
minated by such an action unless specifically exempted or extended for stated periods of time. This matter presently is being examined by the American Law Division from a computer printout of relevant sections of the U.S. Code provided by the Justice Department.

Congressional action to terminate the war would not, of course, diminish the extraordinary powers residing in the executive branch which depend on the existence of the Korean emergency. In order to restore those powers to the Congress, it would be necessary to terminate the Korean emergency, either by presidential proclamation or by legislation.

With respect to rights of individuals, there are innumerable potential controversies involving private entities and governmental subdivisions which, in some degree, depend for their resolution on political determination of the end of the war. These controversies may be generally divided into three major categories:

1. Prosecution of "wartime" criminal offenses under the Uniform Code of Military Justice.
2. Resolution of criminal and civil cases arising under wartime legislation governing the rights of private individuals and entities (e.g., rent control, State tax laws exempting certain wartime income).
3. The construction of contracts which provide for performance conditioned on the existence of war (e.g., insurance contracts with so-called "war clauses").

These cases do not ordinarily involve constitutional separation of power issues; instead, the legislative intent of the enacting body or the intention of the contracting parties is controlling. In an overwhelming majority of these cases distinction between a war de facto and a war de jure is not relevant. Nevertheless, a political determination as to when the Vietnam war terminates would help to clarify the issues and might result in the avoidance altogether of some controversies. Such a determination containing a clear expression of congressional intent would erase many ambiguities which might otherwise be encountered in applying the wartime provisions of the Uniform Code of Military Justice and other federal laws.

With regard to the construction of contracts and the application of wartime legislation enacted by the states, the official declaratory effect of such an act would constitute an authoritative guide in resolving such controversies. Of course, since the intention of the parties and the enacting bodies is controlling, the congressional declaration would not be conclusive in this general category.

CONCLUSION

The preceding comments can be summarized as follows: Congress has the power to terminate the war in Vietnam with respect to war-related statutory grants of power to the President and the regulation of legal consequences within the legislative jurisdiction of Congress. It also has the power to act in such a manner as to affect directly the international legal situation, and action by Congress can become the instrument by which a war is officially ended by the United States from the standpoint of terminating its own state of war. Moreover, action by Congress officially terminating the Vietnam war would help to obviate domestic and international legal ambiguities and uncertainties resulting from the lack of an agreement or treaty of peace.

APPENDIX A


CHAP. 136.—Joint Resolution Declaring that certain Acts of Congress, joint resolutions, and proclamations shall be construed as if the war had ended and the present or existing emergency expired.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That in the interpretation of any provision relating to the duration or date of the termination of the present war or of the present or existing emergency, meaning thereby the war between the Imperial German Government and the Imperial and Royal Austro-Hungarian Government and the Government and people of the United States, in any Acts of Congress, joint resolutions, or proclamations of the President containing provisions contingent upon the duration or the date of the termination of such war or of such present or existing emergency, the date when this resolution becomes effective shall be construed and treated as the date of the termination of the war or of the present or existing emergency, notwithstanding any provision in any Act of Congress or joint resolution providing any other mode of determining the date of such termination. And any Act of Congress, or any provision of any such Act, that by its terms is in force only during the existence of a state of war, or during such state of war and a limited period of time thereafter, shall be construed and administered as if such war between the Governments and people aforesaid terminated on the date when this resolution becomes effective, any provision of such law to the contrary notwithstanding, excepting, however, from the operation and effect of this resolution the following Acts and proclamations, to wit: Title 2 of the Act entitled "The Food Control and District of Columbia Rents Act," approved October 22, 1919 (Forty-first Statutes, page 297), the Act known as the Trading with the Enemy Act, approved October 6, 1917 (Fortieth Statutes, page 411), and all amendments thereto, and the First, Second, Third, and Fourth Liberty Bond Acts, the Supplement to the Second Liberty Bond Act, and the Victory Liberty Loan Act; titles 1 and 3 of the War Finance Corporation Act (Fortieth Statutes, page 506) as amended by the Act approved March 3, 1919 (Fortieth Statutes, page 1313), and Public Resolution Numbered 55, Sixty-sixth Congress, entitled "Joint resolution directing the War Finance Corporation to take certain action for the relief of the present depression in the agricultural sections of the country, and for other purposes," passed January 4, 1921; also the proclamations issued under the authority conferred by the Acts herein excepted from the effect and operation of this resolution: Provided, however, That nothing herein contained shall be construed as effective to terminate the military status of any person now in desertion from the military or naval service of the United
States, nor to terminate the liability to prosecution and punishment under the selective service law, approved May 18, 1917 (Fortieth Statutes, page 76), of any person who failed to comply with the provisions of said Act, or of Acts amendatory thereof: Provided, further, That the Act entitled "An Act to amend section 3, title 1, of the Act entitled 'An Act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917 (Fortieth Statutes, page 217), and for other purposes," approved May 16, 1918 (Fortieth Statutes, page 553), be, and the same is hereby, repealed, and that said section 3 of said Act approved June 15, 1917, is hereby revived and restored with the same force and effect as originally enacted.

Nothing herein contained shall be held to exempt from prosecution or to relieve from punishment any offense heretofore committed in violation of any Act hereby repealed or which may be committed while it remains in force as herein provided.

Approved, March 3, 1921.
APPENDIX B

42 Stat. 105 (1921) July 2, 1921 [S.J. Res. 16]

CHAP. 40.—Joint Resolution Terminating the state of war between the Imperial German Government and the United States of America and between the Imperial and Royal Austro-Hungarian Government and the United States of America.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

Sec. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

Sec. 3. That the state of war declared to exist between the Imperial and Royal Austro-Hungarian Government and the United States of America by the joint resolution of Congress approved December 7, 1917, is hereby declared at an end.

Sec. 4. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 3, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Saint Germain-en-Laye or the treaty of Trianon, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

Sec. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the
Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America.

Sec. 6. Nothing herein contained shall be construed to repeal, modify or amend the provisions of the joint resolution “declaring that certain Acts of Congress, joint resolutions and proclamations shall be construed as if the war had ended and the present or existing emergency expired,” approved March 3, 1921; or the passport control provisions of an Act entitled “An act making appropriations for the diplomatic and consular service for the fiscal year ending June 30, 1922,” approved March 2, 1921, nor to be effective to terminate the military status of any person now in desertion from the military or naval service of the United States, nor to terminate the liability to prosecution and punishment under the Selective Service law, approved May 18, 1917, of any person who failed to comply with the provisions of said Act, or of Acts amendatory thereof.

Approved, July 2, 1921.
APPENDIX C


(Public Law 181 Chapter 519)

JOINT RESOLUTION To terminate the state of war between the United States and the Government of Germany

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: Provided, however, That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest.

Approved October 19, 1951.

(17)
WITNESS’ TESTIMONY BEFORE HOUSE FOREIGN AFFAIRS SUBCOMMITTEE

Senator JAVRITS. Mr. Brower, I noticed also in your testimony before the other body, before the House Foreign Affairs Subcommittee, a rather interesting statement I would like to ask you about.

Do you have your testimony there?

Mr. Brower. Yes, sir, I do have a copy of that statement, Senator.

Senator JAVRITS. It is not your original statement, it came in the cross-examination, and I will hand it to you.

Mr. Brower. Thank you.

Senator JAVRITS. If you have difficulty in following it.

You say as follows:

I have spent some time this afternoon saying that no one can precisely define what the limits are—

Speaking of the limits of the President’s authority—

to take us into hostilities. That is to Congressman Bingham’s question.

As I mentioned before, the Constitution is a pretty old document; it never said the U.S. Congress should provide an air force. Well, in those days there was not an air force, there were no airplanes. But we have an air force and nobody doubts the authority of Congress to provide an air force. It is construed, it inferred from the authority to raise armies and provide navies.

Now that is a very simplistic example of the growth and the flexibility, adaptability of the Constitution. I wish I had more ability to see into the future, but I do not have and I do not claim the ability to see all of the kinds of predicaments which might confront a President some 5, 10 or 20 years from now.

If I were trying to enumerate—

And please mark this sentence and I will be glad to hand it to you—

If I were trying to enumerate them I would only be proving the wisdom of a proposition that I have been presenting this afternoon; namely, that it cannot be done.

May I read that again.

If I were trying to enumerate them I would only be proving the wisdom of the proposition that I have been presenting this afternoon; namely, that it cannot be done.

Now my question is this, Mr. Brower: Are you giving us the same testimony—in other words, that we cannot put limits on the President’s authority to take us into hostilities?

Will you please read this.

Mr. Brower. Senator, I am with you right up to the point where you said, “In other words, are you saying,” because I think that is not an accurate characterization of my testimony.

Obviously I stand by the testimony I gave before Chairman Zablocki’s subcommittee on the other side of Capitol Hill.

I think the Senator may have misunderstood the thrust of it, however.

The point that I was making there and that I would make here is that the Constitution is a document designed to have some degree of flexibility. If it did not it would not have lasted these nearly 200 years. It was designed so that the fundamental decisions for this country are taken by means of a complex political process, give and take of the political arena.

It was a fundamental admission by the Founding Fathers that it is impossible to prescribe detailed rules to govern everything that might happen in the future.
We have witnessed many ways in which the Constitution has adapted to changing circumstances consistent with the overwhelming will of the people of this country who, for example at the time of the writing of the Constitution could not possibly have suspected the importance of the interstate commerce clause and the wide range of alterations in the practical scheme of the way things are done in this country which have resulted as technology advanced and the Federal Government's authority increased.

All I am saying is that if you accept that the Constitution is a fundamentally flexible document which through fundamental political processes adapts to the changing times of history, we must accept the proposition that you would be changing the Constitution and altering this scheme by trying to outline very detailed rules where the Founding Fathers left flexibility.

IMPLEMENTATION OF CONSTITUTION

Senator Javits. If one should follow logically the result of what you say, as a lawyer, it seems to me that you would have no laws at all, that the only law would be the Constitution, which, as you say, doesn't go into details.

Why do we pass laws about the interstate commerce power? Why do we implement the 14th amendment? Why does the Supreme Court hold some constitutional and some unconstitutional? What is the purpose of laws if it is not to specify in detail the general outlines of the Constitution? And, aren't we doing exactly that in S. 440? Whether that is a good bill or bad bill, it is a law to implement the provisions of the Constitution dealing with the war powers.

Mr. Brower. I think Congress has been very active in the field of foreign affairs and military defense. There are whole volumes of the United States Code devoted to subjects in this area. I am not saying and I am sure I am not understood as saying that the Congress has no authority to legislate whatsoever in the field of war powers.

I think I made myself quite clear on this subject. To the extent that Congress takes action to implement the powers which exist in the Constitution, it acts properly. To the extent that it proposes to legislate in a way which would either expand or encroach upon the underlying constitutional powers, it acts inconsistent with and indeed in conflict with the Constitution.

Senator Javits. That's why I referred you to your testimony before the House. It seems to me you were saying there that we simply cannot legislate to implement, that the President has the absolute power to commit us to hostilities and there is nothing we can do about it except cut off the money or not raise and maintain the Armed Forces.

Is that the thrust of the State Department's position?

Mr. Brower. I don't think the President of the United States has the power in the fundamental meaning of that word to do anything all by himself in isolation from the will of the people and the expressed desires of the elected representatives of the people.

It simply does not operate that way, has not operated in that way so far as I know at any time during the early 200 years of existence of the Constitution.

I do believe that the President has very strong powers, historically and constitutionally, with respect to the deployment of troops.
I think Congress has very wide powers, historically and constitutionally, in a variety of areas which can affect the President's practical ability and the practical reach of his authority.

Senator Javits. Well, I think that the State Department has exposed its position on this and I have expressed mine. We will just get a reiteration of the same point of view.

HOW CONGRESS COULD STOP PRESIDENT

I would like to turn to Mr. Maxwell and ask him this.

I noticed that you end the last page of your statement which you have read, "Certainly if such a group—that is the joint congressional committee—would recognize the necessity for immediate action, it is reasonable to expect that the Congress would ratify its acts."

Well, suppose, Mr. Maxwell, the Congress wanted to turn him down, what would it do then, under your theory?

Mr. Maxwell. Under my theory it would then report back to the Congress and take appropriate action.

Senator Javits. What would be appropriate action?

Mr. Maxwell. Well, I think appropriate action would be a resolution deploring the proposed action of the President or some equally effective action.

Senator Javits. You say "deploring" is effective action?

Mr. Maxwell. It seems to me that no President who is about to embark upon the use of the Armed Forces of the United States would take lightly censure from the Congress.

Senator Javits. The only remedy you think we have is to censure him, not to stop him?

Mr. Maxwell. I think you might even go further by use of your power to finance the operation; stop that.

Senator Javits. So we have to rescind the appropriation, in your judgment; we have no other way to stop him?

Mr. Maxwell. In my judgment there is no other way provided for in the Constitution.

CONGRESS' POWER TO MAKE LAW

Senator Javits. To stop him. Yet you agree that the Congress has some lawmaking power.

Mr. Maxwell. Yes.

Senator Javits. And do you say, therefore, that it has only the power to declare war by a formal declaration and nothing else?

Mr. Maxwell. No; I would go much further I think than Mr. Brower would in that respect.

I believe that the Congress does have the power to act effectively in this area and I think that the action that I suggest, and there may be other actions that would occur to the Congress at that time, but I think the action should come before.

It just seems to me that the President has a duty to advise, to seek advice from the Senate and from the Congress, and certainly after seeking advice, should act on that advice, and I would say that the power of the Congress flows from the power to "advise and consent."

Senator Javits. Well now, Mr. Maxwell, you like your law and I like mine. But do you concede that we have the power and the right
to make a law. In other words, to establish a methodology, whether it is yours or mine, which will result in giving the Congress a coequal war power?

Mr. Maxwell. The Senator has asked me about a law?

Senator Javits. Your law. Let us take yours.

Mr. Maxwell. Yes.

Senator Javits. You say that under your law they could stop him, too. Now all I say is that if we have the power to pass a law, we don’t have to pass yours; we can pass mine.

Mr. Maxwell. The question is whether my law or your law is going to be upheld as being constitutional.

Senator Javits. I understand that. But you do concede our power to make a law which will establish a method by which we can stop a President from making war?

Mr. Maxwell. Yes.

WHY ISN’T S. 440 AS GOOD AS WITNESS’ LAW?

Senator Javits. If you concede that, why isn’t my law as good as yours if the methodology stands up?

Mr. Maxwell. Well, I think I pointed out, Senator Javits, in my earlier remarks that I am troubled by the intent of this law to override treaty obligations.

ISSUE OF AUTOMATICITY IN NATO TREATY

Senator Javits. On the treaty obligation question, Mr. Maxwell, I would like to cite the State Department itself, which testified that the NATO Treaty is not automatic but must be implemented according to constitutional processes. Indeed when the Senate Foreign Relations Committee reported the NATO Treaty to the full Senate for ratification, it said in its report the following—I am citing Senate Executive No. 8, 81st Congress, 1st session, page 18.

“...The committee wishes to emphasize the fact that the protective clause ‘in accordance with their respective constitutional processes’ was placed in article 11 in order to leave no doubt that it applies not only to article 5,” which is the article you are talking about, for example, “but to provision in the treaty. The safeguard is thus all inclusive.”

So certainly the Senate and the State Department weren’t conceding the issue of automaticity in the NATO Treaty. You may think that, but the Congress didn’t.

What John Foster Dulles may have later said is no more than what one Secretary of State said. There are a lot of things said by Secretaries of State that we don’t agree with. In the final analysis what we do in ratifying that treaty is what counts, and I have read what we said. So, I cannot accept your construction of automaticity in the NATO Treaty. I don’t think the Congress is deprived of any power there at all. And the State Department has supported that in a memorandum of law, that ratification of the NATO Treaty did not denude the Congress of its power.

The CHAIRMAN. Would you yield to me on that point for an excerpt.

The executive hearing we had in this committee on June 2, 1949, discussed this very matter. I thought it might add to at least the historical interest of this exchange.
In discussing the NATO Treaty, Senator George, who was the ranking Democrat on that committee and a very distinguished constitutional lawyer, was commenting upon this matter. It is in the executive hearings. He says:

If you will excuse me, I am not going to talk about Article V. I agree it is the heart of this treaty and it is all right. I do not want to go into it. I do not know that I raise any particular objection to anything until you get to page 23, when you talk about the President and the Congress. Now there I am in fundamental disagreement with the implications that are here made. "During the hearings substantially these questions were repeatedly asked:"—

I read from the report—

In view of the provisions of article 5 that an attack against one shall be considered an attack against all, would the United States be obligated to react to an attack on Paris or Copenhagen in the same way it would react to attack on New York City?

To my mind, if you are going to put that question in there, there should be a positive and unequivocal no; absolute. We would react to an attack by a local invading force on any part of the United States, whether we were right or whether we were wrong. It is an altogether different proposal.

Now the next question is one that raises a question:

In such an event would the President have the same authority to take action without specific congressional approval as he has under the Constitution to act in order to repel an invasion against the United States?

Again the answer would be a positive and unequivocal no. That is mainly what I want to talk about on this.

In other words, in that same context Dulles took one view and the Senator took exactly the opposite.

Mr. Maxwell. May I just say, Senator Javits, in reply to that, that I do not think that the answer to this question is so cut and dried as you seem to believe. It seems to me that constitutional scholars have disagreed very seriously on whether or not a treaty like NATO is self-executing, whether or not the United States is bound by its terms and whether it would require the President to take action.

It is certainly conceivable that under certain circumstances the President may presume that an attack against one of the allies of NATO is, in effect, a challenge to the sovereignty of the United States as well, and I just don't believe that the President's power should be limited in this respect.

S. 440 does not limit President's powers under NATO treaty

Senator Javits. It is not so limited by S. 440. If your hypothetical situation were to occur, then it is authorized by S. 440 in section 3 and he can proceed on an emergency basis.

In other words, S. 440 in that respect takes care of the crisis you have hypothesized.

Mr. Maxwell. Wouldn't the right of the President to proceed for 30 days be dependent upon whether we had bases in the country that was attacked?

Senator Javits. No, no. You must read sections 3 (1) and (2).

Mr. Maxwell. Or whether there were citizens there who needed the protection?

Senator Javits. Not at all.

We believe NATO is not automatically self-executing.
SOURCE OF POWER FOR PRESIDENT'S ACTIONS

I would like to also, Mr. Chairman, if I may, to just put one thing in the record out of this Library of Congress study which Mr. Brower referred relative to Vietnam. The staff has called my attention to the following statement on page 9.

In both the Vietnam cease-fire agreement and the 12-power Act—

That is the act of Paris, act confirming it—the United States recognized and agreed to respect the neutrality and sovereignty of Laos and Cambodia, and agreed to end all military activities in both countries. All of these actions on the part of the United States government have been taken by the President alone, presumably under his powers as Commander in Chief, or as Chief Executive, or both. There has been no explanation of the source of power in each instance.

STATEMENT OF SENATOR STENNIS CONCERNING ONGOING HOSTILITIES

Also, Mr. Chairman, I think it might be very illuminating to the committee to have in the record the statement of Senator Stennis who is coauthor of this legislation and one of its major sponsors, and I ask unanimous consent that it be included. (See p. 109.)

The CHAIRMAN. Without objection.

Senator JAVITS. And I would like to point out also, Mr. Chairman, that the news release of the chairman of the Armed Services Committee who is also one of the principal sponsors of this bill is rather important on this issue we are discussing.

He says as follows, and I quote:

In my opinion we are not currently "involved" in hostilities in South Vietnam, North Vietnam or Laos within the meaning of the bill. Referring to S. 440.

The Chair will recall the section of the bill which relates to ongoing hostilities and I continue to read:

Thus, if enacted into law in the current circumstances the terms of the bill will apply to the use of American Armed Forces in those countries. I want to stress, however, that this bill excludes hostilities in which the United States is engaged on the date when it becomes law.

Chairman Stennis feels that certainly the termination of hostilities in South Vietnam, North Vietnam, and Laos remove them as "ongoing hostilities." The question of Cambodia obviously remains open. But I thought that might be illuminating to the committee.

The CHAIRMAN. Could I ask Mr. Brower a question?

Senator JAVITS. Of course.

WITNESS' AUTHORIZATION TO STATE GOVERNMENT'S POSITION ON CAMBODIA

The CHAIRMAN. A moment ago the Senator from New York asked you about Cambodia. I had anticipated that you might be authorized to state officially the position of the State Department, the Government this morning. Were you not? Did the Secretary state that you were authorized to state the position with regard to Cambodia?

Mr. BROWER. Mr. Chairman, I am here on behalf of the Department of State as you indicated in place of the Secretary of State. As far as I know I have answered all questions that have been put to me this morning.
The CHAIRMAN. I didn’t know whether this was complete or not. You answered the Senator from New York primarily, if I understood it, by saying well the Secretary of Defense stated the Government’s position; is that the answer?

Mr. Brower. I believe I gave an answer to the question.

I did indicate in the course of it that over the past 2 weeks or so there have been statements by high administration spokesmen on this subject which have illuminated the issue also.

The CHAIRMAN. I didn’t think they had illuminated it very much. That is why I addressed the letter to you to get a more formal statement of the Government’s authority to conduct apparently unlimited operations in support of the Government of Cambodia.

This morning’s paper says they are preparing to run a convoy, I think, 142 trucks from old Sihanoukville. It is becoming a major operation. Maybe I wasn’t as alert as I should have been, but I thought that when you replied to the Senator from New York that you primarily said well, the Secretary of Defense stated the position and that the reply to the letter of the chairman of this committee seeking a more detailed explanation of what your position is with regard to your authority was not yet prepared.

All I am trying to do is just clarify the record a bit.

GOVERNMENT POSITION ON CAMBODIA

Would you restate it for my benefit? Maybe I didn’t pay attention and I wouldn’t try to put words in your mouth. Would you simply restate the position of the Government.

Mr. Brower. I did say both of those things, Mr. Chairman.

I did say a little bit more. Lest I put words in my own mouth the reporter can read back that portion of the record that would clarify it most accurately.

The CHAIRMAN. You don’t care to restate it from the beginning or do you wish the reporter—

Mr. Brower. I simply understood, Mr. Chairman, that you were unclear to precisely what I had said. I think the clearest indication of that is what is recorded in the record.

[At the request of the chairman the following colloquy was read by the reporter.]

"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."

The CHAIRMAN. That is all.

Is that your complete statement about Cambodia?

Mr. Brower. Well, that was my answer to the question. If you have additional questions I would be pleased to answer them.

**PRESIDENT'S AUTHORITY IN VIEW OF PAST CAMBODIAN NEUTRALITY**

The CHAIRMAN. For example, you say when he came into office the war was going on and all he is doing is winding it up.

If I recall, when he came into office we weren't at war with Cambodia in any respect. Cambodia was a neutral country, wasn't it?

Senator JAVITs. Sihanouk was in command.

The CHAIRMAN. Yes, and they were a peaceful country with which we were not at war. How do you stretch it to cover Cambodia?

Mr. Brower. I don't think it requires any stretching at all. When the President came into office there was a war in Indochina, if I may use that term, which developed so that it had aspects involving Cambodia prior to the time American forces went into Cambodia in the spring of 1970.

I think it is clear that the President has had authority since entering office to pursue his three aims as expressed in his speech of May 8 of last year in that area, which were, first, to insure the ability of South Vietnam to determine its own future and not to have a Communist Government imposed on it; secondly, to achieve a safe withdrawal of our forces; and, thirdly, to successfully recover our prisoners of war.

And he has had full constitutional authority to achieve all three objectives.

Now, the agreement, if I may finish the answer, Mr. Chairman, the agreement as I think it hangs together, the agreement on peace in Vietnam concluded on January 27 provides for the achievement we believe of all three goals.

Now, it has been implemented as of today to the extent of achieving the latter two goals, withdrawal of our forces and recovery of prisoners to the fullest extent. It has not been completely implemented in the first objectives inasmuch as at the present time there is not a cease-fire in Cambodia.

The parties, which include North Vietnam, parties to the agreement, are required under article XX as part of this settlement, as part of this agreement, to withdraw all of their forces from Cambodia.

At the present time that has not occurred.

In the context of this historical and present situation which I have outlined it seems clear to me beyond a doubt that the President has full constitutional authority to conduct air strikes, to order air strikes in Cambodia.

**PRESIDENT'S CONSTITUTIONAL AUTHORITY TO ORDER AIR STRIKE IN CAMBODIA**

Senator JAVITs. What words in the Constitution give him that authority?
Mr. Brower. Primarily his authority as Commander in Chief of the Armed Forces and Chief Executive of the United States, responsible for the conduct of our foreign relations.

Senator Javits. If that doesn't give him the authority then he has none. Is that right?

Mr. Brower. Do you stand or fall on that proposition?

Senator Javits. If that doesn't give him the authority then he has none. Is that right?

In other words, he can't make his authority by declaring three principles or eight principles.

Mr. Brower. If I learned one thing in law school and subsequently, that is to be careful about standing or falling on a single proposition.

I think the Constitution is a little broader than that. I think that is his primary authority and I will rest with that statement.

Senator Javits. Can you cite any provision in the Constitution that is secondary or tertiary authority? Anything you wish to cite that is secondary or tertiary to that primarily?

Mr. Brower. I am not sure I understand your question at this point.

Senator Javits. Well, you say something else in the Constitution that he can rely on. What is it?

Mr. Brower. Article II in general, I think, is the basis of Presidential authority.

Senator Javits. Do you find anything in article II that you can add to Commander in Chief and Chief Executive?

Mr. Brower. Yes, sir; the President is specifically sworn faithfully to execute the laws of the United States and I think it is fair to say acting with respect to Cambodia is faithfully executing the law of the United States.

I don't think that the Constitution is quite the same as a section, chapter and verse of the United States Code. You can't as you would have in an individual lawsuit point to what word, what comma, what semicolon, what phrase is the authority for this action.

The Constitution is a fundamental flexible document which gives certain general areas of authority to the President and certain general areas of authority to the Congress and they have shared powers in these areas.

I would say that the President's authority with regard to the case we are discussing rests on his general authority under article II of the Constitution.

I think it is difficult for anyone to be more precise than that. The Constitution is not such a precise document.

PRESIDENT'S OBLIGATION TO EXECUTE LAWS

Senator Javits. You mentioned that he has the obligation to execute the laws. Do you have any law that you wish to cite with respect to Cambodia?

Mr. Brower. I believe the record will show that I said he is pledged or sworn to faithfully execute the laws. I was simply indicating, as others have indicated, and I think the Library of Congress study supports, the President is acting in accordance, certainly not in conflict with any laws of the United States.

Senator Javits. Well, certainly “not in conflict” is a far cry from “acting in accordance,” as a lawyer.

Mr. Brower. Well, I think if you are acting in accordance with or consistent with the statute that is the same as saying you are not acting in conflict.
Senator Javits. Is there any statute that you refer to in the answer to that question, any law or statute that you wish to refer to?

Mr. Brower. In what respect?

Senator Javits. In respect to what you say, that the President derives some measure of authority from faithfully executing the laws.

What laws?

Mr. Brower. Senator Javits, what I said was in answer to your question about the constitutional sources of the President's conduct, in this situation, that his powers, his authorities, his limits, if you will, pursuant to article II, include a constitutional pledge faithfully to execute the laws, and I simply asserted the proposition that the President is acting in full compliance with all of the legislation which has been passed by the U.S. Congress which in any way pertains to Cambodia.

ADMINISTRATION'S RELIANCE ON OWN ASSERTIONS ABOUT ITS POWER SUGGESTED

Senator Javits. With all respect, I think that the administration is relying upon its own assertions about its power and I don't think that is a constitutional basis for power.

Mr. Brower. I did not wish to interrupt the distinguished Senator from New York. I cannot in good conscience permit such an assertion to stand unchallenged.

The Chairman. What do you challenge about it?

Mr. Brower. Pardon?

The Chairman. Where was it wrong?

Mr. Brower. I think it does not rest solely on the President's assertion that he has the power, it rests on the Constitution of the United States and the study authorized and requested of the Library of Congress by this committee, says nothing to the contrary and fairly clearly indicates that conclusion is correct.

Senator Javits. The study, Mr. Brower, says the following: I would like to read it to you again. It says all of these actions:

In both the Vietnam cease-fire agreement and the 12-power act the United States recognized and agreed to respect the neutrality and sovereignty of Laos and Cambodia, and agreed to end all military activities in both countries. All of these actions on the part of the U.S. Government have been taken by the President alone, presumably under his powers as Commander in Chief, or as Chief Executive, or both.

There has been no explanation of the source of power in each instance. So they apparently don't know what he has asserted.

Mr. Brower. I would say the three gentlemen who wrote the study, judging from their other conclusions, did not feel such was necessary.

The Chairman. All it says, there has been no explanation of the source of his power.

Mr. Brower. It does not say that. It says, and I quote:

Although the United States is formally committed to maintaining the cease-fire in Vietnam, and to respecting the cease-fire in Laos and Cambodia, and agreed to end all military activities in both countries. All of these actions on the part of the U.S. Government have been taken by the President alone, presumably under his powers as Commander in Chief, or as Chief Executive, or both.

This is a pretty strong statement.

Senator Javits. They are talking about the Paris agreement. Let us read the whole sentence. Not that this study is the last word, but you seem to be relying on that very heavily.
It says:

Although the United States is formally committed to maintaining the cease-fire in Vietnam and to respecting the cease-fire in Laos, there is no bar to resumption by the President of hostilities in either country or against the Democratic Republic of Vietnam.

As I read it, that relates to the formal commitment, that doesn't make it lawful or unlawful.

Mr. Brower. What I am saying, Senator Javits, is that if you conclude, as this study requested by the committee does, that the President has the authority to recommit American forces to hostilities against North or South Vietnam or Laos, where a cease-fire presently is in force, then he clearly must have constitutional authority to carry out certain air strikes over Cambodia where at the present time there is no cease-fire despite the fact that the Cambodian Government offered a unilateral cease-fire in article XX of the agreement, including peace in Vietnam.

It specifically calls upon the parties and especially the North Vietnamese in this case to get out of Cambodia.

Can President move in on any country he chooses?

Senator Javits. Mr. Brower, if you are right, there is no cease-fire over Taiwan, the Philippines, Singapore, Burma, India, Pakistan, lots of other countries. Does that mean he can move in on any country he chooses?

Mr. Brower. I am not aware we have been previously involved in a war in any of those countries.

Senator Javits. We were previously involved with a war with Germany and Japan. Does that give us any license to bomb them without some concurrent action by Congress? It may sound ridiculous, but it seems to me that is what you are arguing.

Mr. Brower. I agree with the first part of your statement, it does sound somewhat ridiculous in historical context.

Senator Javits. Obviously, Mr. Brower, you and I are not going to agree on this matter—that is clear.

Mr. Brower. Well, I think, if I may say so, Senator Javits, one of the aspects of our fundamental and political process is Congress and the executive branch do not always entirely agree.

Protecting President against public abuse and congressional criticism

Senator Javits. There is no question about that. Therefore, I was rather interested in Mr. Maxwell's statement, about the thrust of congressional legislation. He says, "Thus a full measure of protection could be accorded the President against public abuse and vitriolic criticism by the Congress."

That is a brand new one to me. I didn't know we were supposed to protect the President or any of us as Senators, and I doubt the President would agree with you. I don't think our President, and I know him very well, is a bit dismayed by what you describe as public abuse and vitriolic criticism. Certainly we are not going to pass laws to protect him against that, I hope.
Wouldn’t you agree with that as an American that is going a little far?

CHANGE THE WORDING FROM “SHACKLE” TO “LIMIT” AND “RESTRICT”

Senator JAVITS. One other thing, Mr. Maxwell. I noticed that you changed the word in your statement and I wondered whether it was advised or it just kind of happened.

I noticed in your written statement, you used the word “shackle.” You said, “The changing conditions and the vastly different mores make it no longer acceptable to shackles the President in existing war powers.”

Mr. MAXWELL. I think that word was too strong. I changed it to “limited.”

Senator JAVITS. I don’t know, but I think the word “limited” is much stronger. And I noticed you did the same thing later in your statement where you again had the word “shackle.”

Mr. MAXWELL. That is correct.

Senator JAVITS. And you changed it to “restrict,” to restrict the President. It seems to me that that really is straining the Constitution to say that we can neither limit nor restrict the President in the exercise of the war making power. I think that that is going a lot further than shackling and I wonder if you would be kind enough to precisely define your terms before we let the record stand.

Mr. MAXWELL. In my view when you shackles a person you pretty well tie him up but if you limit him you might let him go some distance but not all the way. That was basically the reason I changed the word.

Senator JAVITS. Okay.

NOTHING PERSONAL IN QUESTIONING

Mr. Brower, one other question. I hope you understand we are differing as public men and lawyers.

Mr. BROWER. Of course.

Senator JAVITS. Nothing personal about it, and I don’t in any way denigrate your authority or dignity or the respect we hold for you and the State Department. I am sure you understand.

Mr. BROWER. I appreciate that.

SECRETARY RICHARDSON’S STATEMENTS ON “MEET THE PRESS”

Senator JAVITS. I wish you would call to the Secretary’s attention the fact that there is an amendment in the law, saying there is nothing with respect to Cambodia that we do that should represent a commitment to the defense of the Government of Cambodia, and so I was very dismayed to read that, in answering the questions on “Meet the Press,” Secretary Richardson, in giving the justification, said one of our justifications is to support a government with which we have been fighting in a continuing effort to bring the fighting to an end.

Indeed, Mr. Chairman, I think it may be desirable, as the witness referred to Secretary Richardson’s explanation, to read that into the record.
If I may, I would like to do so. The two questions are as follows. These are from the text of the broadcast.

Mr. Brower. I was going to suggest, I am familiar with the transcript, perhaps to have those inserted in the record in full context might be more appropriate.

Senator Javits. I was going to insert the questions and the answers. Mr. Brower, I would simply suggest perhaps the transcript of the entire interview.

Senator Javits. Fine. I ask unanimous consent the whole transcript go in.

The Chairman. I have no objection, I hope it is all relevant.

Senator Javits. It probably isn’t.

The Chairman. Would you mind picking out the relevant parts.

There is a lot of it probably that has nothing to do—

Senator Javits. Mr. Brower would disagree with me perhaps so I would like to read into the record the question and the answer to which I refer and ask unanimous consent that Mr. Brower may add anything that he wishes from the transcript.

The Chairman. My only point is that the record gets so voluminous it destroys its effectiveness for your purpose.

Senator Javits. Right. I withdraw my previous unanimous consent request and will read into the record the two questions and answers and I do ask unanimous consent that anything Mr. Brower wishes to add may also be included.

The Chairman. Without objection.

Senator Javits. This is “Meet the Press,” April 1, 1973, Hon. Elliot L. Richardson, Secretary of Defense.

Mr. Beecher. Mr. Secretary, there has been increasing criticism of late, particularly in the Congress, about American air activity in Cambodia. Now that the last American troops have left South Vietnam, what is the legal and moral basis for our continued bombing in Cambodia?

Secretary Richardson. The moral basis, to take that first, Mr. Beecher, is, of course, simply that, although cease fire agreements have been entered into in the other areas of fighting in Indochina and although the Lon Nol Government of Cambodia did propose a cease fire to take effect, together with the cease fire in South Vietnam, there has been no response yet by the other side. So there is fighting continuing there, and what the United States is doing—this brings it to the legal part of it—is to support a government with which we have been fighting in a continuing effort to bring the fighting to an end.

Mr. Beecher. In your judgment, absent the cease fire, could the Lon Nol Government survive without active American air support?

Secretary Richardson. I think it would be very difficult in present circumstances. They are facing a massive threat by well-armed, well-organized guerrilla forces, which include forces from North Vietnam itself. This is a situation which could be brought to an end if Hanoi observed in full the cease fire agreements as they apply to the whole of Indochina.

They could help bring this about simply by shutting off supplies and withdrawing their own forces from North Vietnam.

Then the next question and answer I wish to insert is on page 4 of the transcript.

Mr. Lisagor. Mr. Secretary, I would like to ask you what I think is a very simple question, and that is, why is it so difficult for the Administration to state its constitutional authority for bombing in Cambodia?

Secretary of State Rusk used to use the Southeast Asian Treaty as the authority. President Johnson used the Gulf of Tonkin Resolution. President Nixon has used the protection of American troops in his obligations as Commander-in-Chief. None of those hold now, so why is it difficult for you to state what legal authority you have?
Secretary Richardson. I don’t think it is difficult, Mr. Lisagor, unless you are looking for some line in the Constitution that deals specifically with this kind of situation. Of course, the Constitution is a much broader and more general document than that.

Basically I believe that our Constitutional authority rests on the circumstance that we are coming out of a ten-year period of conflict. This is the wind-up. The fighting in Cambodia is a kind of residue; it is the area where least of all there is now being observed the provisions of the agreements entered into in Paris.

So I think one way of putting it is that what we are doing in effect is to try to encourage the observance of those agreements by engaging in air action at the request of the government, which is the principal victim of the non-observance of those agreements.

Mr. Brower, you can put in anything you wish or read it or whatever you like.

STATEMENTS OF SECRETARY RICHARDSON ON “MEET THE PRESS”

Mr. Brower. I would simply suggest, Mr. Chairman, that the record might be more complete in the sense that there would be full context if we enter into the record this interview, which is not very long.

The Chairman. The whole interview? Yes, if it is relevant to this question, but we are not interested in the entire discussion.

Mr. Brower. Mr. Chairman—

The Chairman. You are bringing in this study from the Library of Congress. That was a study for the purpose of determining possibilities of terminating the war by congressional action. The use to which you put it, I think, is a very strained one, and its authority for that use, but anyway it is in the record.

My only objection is if we get the record so cumbersome it isn’t useful to people interested in the question of the war powers. Anything relevant to that is perfectly all right.

Mr. Brower. Lest I be accused of running up the congressional printing bills at the taxpayers’ expense, let me just add two portions of the record which have been inserted by Senator Javits.

Mr. Nessen asks the following question:

Mr. Nessen. Does this commitment to Cambodia require congressional approval?

Secretary Richardson. It seems to me, Mr. Nessen, that in the light of what the United States has been doing over many years, including recent years in Cambodia, that we can rest on the proposition that this is in effect a followup in a small and limited way of what we were doing before the cease fire agreements went into effect. Had they not been signed, we certainly would have been continuing to do this.

Then there is a further exchange where the same reporter, Mr. Nessen, asked:

Of course, that is the same justification that was used in the early days of the American involvement in Vietnam, that we were only there to make the other side stop what it was doing, as Secretary Rusk used to put it. How is the present commitment to Cambodia any different from the original American commitment which led to the long Vietnam war?

Secretary Richardson. The principal difference, Mr. Nessen, is that in this instance we have negotiated agreements with North Vietnam. Those agreements include provision for a cease fire extending to all of Indochina, of which, of course, Cambodia is a part. So the situation is different to the extent that our objective now is the fulfillment of the terms of those agreements. The other side.
has only to carry out its obligations and U.S. support, because it is only air sup­port, of Cambodia can cease.

I think that is all that is required in that regard, Mr. Chairman.

SITUATIONS OF IMMEDIATE THREAT OF HOSTILITIES

With your leave, I would like to make one point with respect to an exchange between Senator Javits and Mr. Maxwell.

I know the distinguished Senator from New York has traditionally been a very great friend of the North Atlantic Treaty Organization and has participated very actively in many affairs connected with it.

I think the impression was left on the record, however, if I under­stood the Senator correctly, that somehow the North Atlantic Treaty under this war powers bill, S. 440, might be regarded as a necessary congressional authorization for the U.S. forces to come to the defense of a NATO country where they were not stationed and not them­selves attacked.

I simply point out that towards the end of section 3 of S. 440 is the following language:

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 Armed Forces of the United States in hostilities or in any such situation.

The situation referred to is the situation of imminent threat of hos­tilities and I think Mr. Maxwell’s concern about NATO represents a concern which the administration shares.

It is very difficult to set forth a list, as I believe this bill does at­tempt to set forth, of all of the future circumstances which might require military response on the part of the United States.

I think this feeling, this sensation is the difficulty that perhaps underlie your proposed amendment, Mr. Chairman, which was offered during the debates last year, which would have had a much more sim­plified version of section 3, of this bill.

Now, Senator Javits has indicated that this is not really a problem because all the situations that really might arise are presently covered by resolutions and has referred, I believe, specifically to the Middle East resolution.

The Middle East resolution is more than 15 years old. I believe it dates back to 1957. This administration made quite clear on previous occasions, specifically in a letter of March 12, 1970, addressed to you, Mr. Chairman, by the then Acting Assistant Secretary for Congres­sional Relations, indicating that, and I quote—“On the other hand, if the resolution is not repealed”—you will recall there was a proposal to repeal that.

The CHAIRMAN. That is right.

Mr. Brower. “If the resolution is not repealed, the administration would not construe it,” the resolution, “as a source of authority for any decisions which might involve the United States in a conflict in that area.”

I think it is worth recalling that the resolution and its operating provisions to the extent it has not been overtaken by the intervening 15 years addressing itself to a threat, I believe the specific language is “any country dominated by international communism.”
Now the Secretary of State in his testimony before this committee of May 14, 1971, stressed, and I quote, "For example, such a restriction," that is, the restrictions of article III, "could seriously limit the ability of the President to make a demonstration of force to back up the exercise of our rights and responsibilities in Berlin or to deploy elements of the Sixth Fleet in the Mediterranean in connection with the Middle East situation."

What this adds up to, I think, is an underlining of the fact that one simply cannot say that article II, section 3 of this bill, and the limitations it imposes, has no practical effect because all the cases that we are particularly concerned about are taken care of by Senate antiquated resolutions. I think that proposition bears further examination and I would just like this point for the record.

I know the Senator is particularly concerned about NATO and other situations to which I have alluded and I think this is a difficult—

**HANDLING OF SERIOUS FUTURE CRISIS**

Senator Javits. May I ask this question.

Do you construe S. 440 as preventing the Congress from adopting any legislation resolution which the President might propose or not propose, which would then be adequate authority under S. 440?

Mr. Brower. No.

Senator Javits. To do anything in any area of the world including using our forces instantly?

Mr. Brower. Senator Javits, of course this bill would not preclude Congress from adopting a resolution but let us look at the Middle East resolution that has been on the books 15 years and you have, if I understand you correctly, suggested reliance on that resolution.

From the text of it, as I have just stated, it is merely overtaken by events so you run into one of two problems. Either Congress is going to be constantly engaged very heavily in the business of reviewing and revising and repealing resolutions, which I think is, at best, a considerable burden on the legislative program, or it is going to be left to react at the time a crisis arises.

The last war in the Middle East took 6 days from beginning to end. This bill, under the provisions of this bill, even with the hurry-up treatment in Congress, it could take 7 days for a resolution to be processed through both Houses of Congress.

I am simply pointing out that there is, I believe, not a simple answer to the question of how do you really handle a serious crisis in the future on the basis of this bill, particularly section 3.

Senator Javits. Well, Mr. Brower, I think you misunderstand our position respecting these resolutions. We don't say that these resolutions are adequate or inadequate. We just say they survive under the wording of S. 440 as statutory authorizations. We say if the administration considers them inadequate it can come to us to make them adequate.

I think that is a pretty small price for Congress to pay in terms of at long last having a handle on these warmaking powers. So I am sorry but, in other words, we are not considering this as part of the implementing machinery of S. 440. They are there and they persist for whatever they are worth. We pass no value judgment on them; we
only say that legally they would survive under the bill as statutory authorizations.

If the administration considers they are inadequate it can come to us and ask for new ones or repeal these or whatever it likes.

The Tonkin Gulf it chose to repeal because it said it wasn’t depending on it anyhow, so we don’t have to deal with it. I really don’t think that we are relying upon the fact that the advance authority on the part of the United States is complete.

If the administration doesn’t think it complete it will come and ask us for additional authority. That is provided for by S. 440.

CONSTITUTIONAL AUTHORITY FOR ADMINISTRATION’S ACTIVITIES IN CAMBODIA

For myself, I would tell you flatly I believe the administration under the Constitution has to get authority on Cambodia, where I think it is proceeding without authority. I think this is a very grave question for our country because I cannot see the constitutional authority, or any legal authority, for what is being done.

You don’t agree with me and I gather Secretary Richardson doesn’t, but many do and we feel very strongly about that.

1790’s LAW IN WHICH 30-DAY CLAUSE WAS EMPLOYED

We have found a rather interesting law from the 1790’s in which the 30-day clause was employed. It was later supported in a Supreme Court case.

I would like, Mr. Chairman, to write that up, not in any great length, to submit it to the State Department for comment.

The CHAIRMAN. Without objection.

Mr. Maxwell and Mr. Brower, we are very much in your debt for coming here today and giving us your views about this difficult matter.

EFFORT TO BRING US BACK TO CONSTITUTION

I want to say myself I have reservations about this kind of legislation because I have great respect for the Constitution. I regret very much that the abuse by the Executive of his powers, or presumed or alleged powers as Commander in Chief, makes it appear necessary to do something to try to bring us back to the Constitution.

That is all this legislation is intended to do. It is to implement it, as the Senator says. He is interested in the methodology, the way you would enforce the Constitution.

Regarding Mr. Maxwell's comment that the President didn't cease when we repealed the Tonkin resolution, that doesn't mean that he had any authority. His authority was removed. It means the President was proceeding without any authority, and Presidents do that.

As long as the Army obeys its command, as Mr. Noyes said the other day, when the President says go they go. That is that, even though it is utterly contrary to the Constitution.

So I think there is a very simple area when we talk on one hand about power and on the other hand about authority and constitutional
authority. In any case it is a very complicated issue and we appreciate very much your contribution, both of you. Thank you very much.

Mr. Brower. We appreciate the opportunity, Mr. Chairman.

[Statements of Senator Stennis, Senator Eagleton, and Senator Goldwater follow:]

STATEMENT SUBMITTED BY SENATOR JOHN C. STENNIS (D-MISS.) TO SENATE FOREIGN RELATIONS COMMITTEE, APRIL 12, 1973

Mr. Chairman and members of the committee, I am sorry that I cannot be present in person to talk about the War Powers Act which is before you. I do want to take this method of expressing my strong support for this measure which was, as you know, reported by this committee and passed by the Senate last year.

We are all supposed to be able to learn from our own errors. Without trying to focus, now, on all that has been error in recent years, I think we have surely learned that the nation must never again be committed to war, and to war's painful sacrifices, without the full moral sanction of the American people.

It is the role of Congress to speak for the people, as their elected representatives, in matters of this kind. This bill before you is designed to let Congress fulfill that role before any future commitments are made, except in a few special emergency instances.

I introduced a similar bill in 1971 and worked closely in 1971 and 1972 with the distinguished Senator from New York, Mr. Javits; the distinguished Senator from Missouri, Mr. Eagleton; the distinguished former Senator from Virginia, Mr. Spong; and others on the bill that passed the Senate. But, as I have stated before, I believe that the bill now before you—which represents the fine work of the Foreign Relations Committee, based upon the bills originally introduced by Senator Javits, Senator Eagleton, and myself—is the best version which we have considered.

The bill is quite simple in concept. Contrary to the assertions of some, it does not attempt to set out in detail all those circumstances in which the President could, and could not use, the Armed Forces of the United States on his own authority. Instead, it simply outlines three general emergency circumstances in which the President would be permitted to use the Armed Forces for a limited period of time—30 days—prior to obtaining Congressional authority. These circumstances are: to repel an armed attack upon the United States; to repel an armed attack against the Armed Forces of the United States; and to protect citizens and nationals of the United States while evacuating them from danger. In all other circumstances, prior statutory authorization would be required. Such authorization would also be needed to extend the use of force beyond 30 days in the three emergency circumstances. Moreover, Congress may terminate hostilities within the thirty day period by an Act or a joint resolution.

The current version of the bill also includes three important floor amendments which were introduced by Senator Javits on behalf of the co-sponsors during the debate on the floor of the Senate last April. I call particular attention to that portion of last year's debate on April 5, 1972, pages S. 5460-5466, and I commend it highly, particularly to those members who are concerned that there may, be too little flexibility for the President in the procedures which are established.

The bill also contains detailed language to ensure that treaties and appropriations bills will not be interpreted as being the required go-to-war authorization. Further, the bill requires full reports from the Executive branch when the Armed Forces are used in hostilities, and it contains detailed provisions to prevent a bill authorizing a continuation of the use of the Armed Forces from being significantly delayed either in committee or on the floor of either body of the Congress.

I know that there has been considerable discussion, in the light of recent events, as to whether the pending bill, if enacted, could prevent a presidential reinv olvement in the Indochina war. In discussions just before I was hospitalized, I hoped for a comprehensive cease-fire throughout Indochina, and felt that following such a cease-fire the terms of the bill would then apply, and would prohibit re-introduction of U.S. forces without Congressional consent.

Now it is clear that there has been no real cease-fire for much of the war zone, and no end to the U.S. involvement in a part of it. Moreover, the present

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uncertain circumstances are certain to undergo further change before the bill is finally enacted.

We can hope that, by the time this bill reaches its final legislative stages, the situation in Cambodia will have stabilized and the war will finally be ended there. In that event, the provisions of this bill could apply to Cambodia as to other parts of the world. In my opinion, we are not currently "involved" in hostilities in South Vietnam, North Vietnam, or Laos, within the meaning of the bill; thus, if enacted into law under current circumstances, the terms of the bill would apply to the use of American Armed Forces in those countries. I want to stress, however, that this bill excludes hostilities in which the United States is engaged on the date when it becomes law.

I believe this provision should remain in the bill. I think the chances for this bill are seriously jeopardized if it can be viewed as just another anti-administration end-the-war resolution. I hope we can avoid that tangle and keep debate focused on the future and the point of principle involved.

The point of principle, it seems to me, is quite clear. A decision to go to war is the most important decision a government can make—especially in the nuclear era. It requires sacrifice in material terms, and for a heroic few, it requires the ultimate sacrifice. The fabric of our Republic—indeed the fabric of any nation—cannot long withstand the strain of asking citizens for the ultimate sacrifice without permitting them to participate in the decision of whether to make that sacrifice. It is tempting, I know, particularly to men who have had close association with a President in hours of crisis, to take a shorter range view of the problem. It is tempting to believe that the most desirable arrangements are those which leave the President the maximum amount of flexibility. I do not believe that this is the theory upon which our Constitution is based. In the long run the only stable basis for continued confidence in our government is to have the people participate in the major decision of whether we are to have war or peace. The only practical way for the people to participate is through their elected representatives—the Congress.

Under this bill, Congress and the Chief Executive would decide, together, whether the United States should use force of arms—except in a few emergency cases. I am sure this is the process envisioned in the Constitution.

I do not blame President Nixon, or any other President, for the fact that this careful constitutional process has not always been employed. In retrospect, it appears that a series of presidential decisions, all made in good faith, have eroded the constitutional intent. Now, I believe, we should legislate to set clear guidelines for the future.

These are the practical reasons why I support this bill. I do not believe it sets up a perfect system, but it builds a practical framework for Congress to use in assuming its share in the responsibility for the decision of whether or not the nation is to go to war. I do not believe that a weaker bill—for example, one which requires only that the President report to the Congress if he initiates hostilities—would accomplish this important objective.

I pointed out last year, Mr. Chairman, that I respect the views of those who oppose this bill. Their arguments often center on the premise that there may be circumstances in which the President would be constrained under the bill's provisions. As I said earlier, we have worked hard to make these constraints flexible in emergencies, but, it is true, constraints are there. Thus, before involving the nation in war, a President would have to take into consideration the Congress and the people it represents, and this will make it more difficult for him to take some types of military action than would be the case if the bill were not law. This close second look by the President, whoever he might be, is highly important of course. That is one purpose of the bill.

I believe that by enacting this bill into law, we will be making a significant contribution, not only to the constitutional balance of the Federal Government, but to the long range stability and safety of our whole country.

STATEMENT SUBMITTED BY SENATOR THOMAS F. EAGLETON, (DEMOCRAT, MISSOURI), WAR POWER HEARINGS, SENATE FOREIGN RELATIONS COMMITTEE

Mr. Chairman, I appreciate the opportunity to participate again in the important discussion of war powers legislation. I was privileged to testify on this subject on two occasions during the 92nd Congress in defense of my own war powers bill. Those hearings were instrumental in helping Senators Javits, Stennis
and me to resolve differences of approach and to draft the War Powers Act, a composite, in my opinion, of the best of our three proposals.

The legislation before this committee is one of the most complex and one of the most sensitive issues Congress has had to address in the history of the Republic. In the face of this complexity many are reluctant to legislate at all. And still more prefer the generalized, simplistic approach which offends few and resolves nothing.

If we timidly approach the war powers issue by simply enacting resolutions of high intent while failing to delineate the legal limits of power, Congress will have forfeited its role within our system, and Presidents will continue to distort the Constitution with exaggerated claims of power. The Founders gave Congress the right to "make all laws necessary and proper" expressly to deal with such distortions of constitutional intent. If we are to overcome Congressional apathy and Presidential adventurism, we cannot be reluctant to express our position in an unequivocal manner.

In the past year—since the Senate passed the War Powers Act by an overwhelming vote on April 13, 1972—the American people have become more aware than ever of the dangers of permitting a single man to commit the nation to war.

In December 1972, the United States launched the most awesome bombing attack since the London blitz on the cities of Hanoi and Haiphong. During this period the President went into seclusion. He failed to communicate his intentions to Congress and he refused to explain his actions to the American people. He ordered a halt to the attacks just before the confusion and dismay of Americans reached the intolerable level. But he left an indelible—perhaps subconscious—concern in the minds of people everywhere. After that experience many decided that perhaps he did have too much power.

Then, after two false alarms, we were told that a peace agreement would be signed. And we all joined in commending the President and his chief negotiator, Dr. Kissinger, for their outstanding accomplishment. We hung on every word as Kissinger gave us the details of the "peace with honor" proclamation. And with each detail we admired even more the men who had negotiated our extrication from a seemingly interminable war.

And now, with hardly time to enjoy our peace, we are reminded again that the deterioration of our institutions of government has left us at the mercy of the 'White House. We continue to bomb Cambodia and we hear threats that violations of the cease-fire will be punished by the United States. We are reminded that, in short, "The Lord giveth, and the Lord taketh away."

The variety of emotions we have experienced since December—first horror, then elation and now trepidation—are good indicators of the degree to which our welfare as a nation is dependent upon decisions made by the President of the United States. It is clearly an unhealthy situation and to correct it we will have to assure that the decision to go to war is a collective one by reactivating the Congress as a decision-making body.

The time has come for Congress to reassert its role within our system. The public is now keenly aware that it is wrong to wage war without the full consent of Congress and the people. We cannot risk the possibility that memories will fade before we have corrected the deficiencies that contributed to involving us in the most unpopular war in our history.

The issue before this committee today is not a partisan one. And, in the contemporary sense, it is not built on ideological bias. Those who have been active in seeking to correct the imbalance within our system represent a wide spectrum of political thought. Certainly the distinguished Chairman of the Senate Armed Services Committee, Senator Stennis, and I have differed greatly on the efficacy of our involvement in Indochina. We both believe, however, that the decision to wage war must be made by Congress. As Senator Stennis has said, "The last decade has taught us . . . that this country must never again go to war without the full moral sanction of the American people. The only practical way for all parts of the nation to participate in such a decision is through the Congress."

THE CONSTITUTIONAL QUESTION

Before we can begin to correct the institutional deficiencies that were so dramatically exposed during the Vietnam years, we must first understand the nature of the constitutional crisis that now confronts us.

Congress's role in the war-making area had seriously deteriorated long before we became involved in Vietnam. In the post-World War II period Congress seemed, in large part, unconcerned with Presidential encroachments. Sympto-
matic of this lack of concern was Congress's quiet acquiescence in the early 1960s as Presidents gradually involved us more deeply in hostilities in Vietnam.

When, in a time of apparent crisis, both Houses routinely approved a vaguely worded and ill-defined White House draft which became known as the Gulf of Tonkin Resolution, there were few in Congress who understood that the awesome responsibility to decide whether, when, and to what extent America would engage in hostilities was being delegated to the President.

Whether or not the members of this body understood the full consequence of their vote is now a moot point. Faulty vision and political pressures cannot be permitted to minimize the legal significance of the Gulf of Tonkin Resolution.

The constitutional crisis we experience today has not come about because the Gulf of Tonkin Resolution was passed, but rather because it was repealed—on January 12, 1971. Since that date, President Nixon has relied almost exclusively on alleged Commander-in-Chief powers as authority for American involvement in Indochina. The war is now—we hope—coming to an end, but the constitutional question remains unresolved.

If the President's claim of power is allowed to stand without challenge, Congress will have lost its own powers by attrition. Instead of making the decision whether or not to authorize hostilities before they begin, we will be left in the position of either ratifying or attempting to reject Presidential fait accompli.

The President cannot be allowed to initiate hostilities at will and then force Congress to muster a two-thirds majority of both Houses to stop him. That is precisely the problem we must address if Congress is going to regain its proper role.

I would like to present today a defense of the bill that was passed in the Senate during the last session of Congress by an overwhelming 68-16 majority. This bill, which was jointly authored by Senator Javits, Senator Stennis, and me, represents more than three years of concerted effort and careful deliberation. This Committee participated in its development and deserves great credit.

CONSTITUTIONAL RESPONSIBILITIES OF CONGRESS AND THE PRESIDENT

I would like initially to establish two basic points which I believe must be reflected in any responsible attempt to legislate in this area.

First, Congress alone was given the responsibility to decide on the crucial questions of war and peace. The record is clear that those in attendance at the constitutional convention were surprised and dismayed at the suggestion that the President be given power to make decisions which might result in offensive military action. As one delegate commented, he “never expected to hear in a republic a motion to empower the executive alone to declare war.”

The two Founders who are considered to be ideological adversaries on the questions of congressional versus executive power, James Madison and Alexander Hamilton, were in accord on the war powers issue. In the Federalist Papers Madison stated:

"The power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not the cause of declaring war."

Alexander Hamilton was equally emphatic when he declared that it was the “exclusive province of Congress, when the nation is at peace, to change that state into a state of war; it belongs to Congress only, to go to war.”

Second, the Commander in Chief was given the authority to “repel sudden attacks.” The initial draft of the Constitution provided that the legislature should “make war.” But this phrase was changed because of a concern that that wording did not, in the words of Madison and Gerry, “leave to the executive the power to repel sudden attacks.” The expression “make war” was then changed to “declare war.”

As we now seek the legislative formula that will best help us to fulfill the intent of the Founders, we do so with the perspective of almost 200 years of experience in working with the Constitution. This is to our advantage.

But the exigencies of modern warfare are far beyond the imagination of those who drafted our fundamental law. Today, the Commander in Chief can move whole divisions half-way across the globe in a matter of hours... complex military alliances seem to commit us far beyond our own borders... and, perhaps most importantly, we can destroy ourselves and the rest of the world at the press of a button. To clarify the respective roles of Congress and the President in this environment is no easy task.