342. Hearings, supra note 187, at 462, "Congressional inquiry, discussion and debate ought to serve a second function; facilitating a rational decision by the electorate outside the Congress." R. Dahl, supra note 341, at 125.

343. Hearings, supra note 187, at 455, 459. The philosopher Charles Francis, who served as an Assistant Secretary of State, shed his outsider's respect for governmental expertise: "often the government does know something that people on the outside don't, but its something that isn't so. ... After a while I came to suspect that I might be dealing with hard facts but rather with a world created out of hunch, hope, and collective illusion." Id. 460. Military reports of constant progress in Vietnam illustrate the point. As Professor Dahl said, "The more closely debate moves toward broad and basic policy, the more competent is the legislative decision likely to be, and correspondingly less competent is the expert." R. Dahl, supra note 341, at 244.

In the executive branch there is also an ill-concealed contempt for Congress. "People like Mr. Acheson," stated Senator Fulbright, who had occasion as a member of the Foreign Relations Committee to know at first hand, "make no bones about it. They just say they [Senators] are boobs and ought to have nothing to do with foreign policy. . . ." Hearings, supra note 187, at 403. Acheson himself referred to the "anguishing hours" he spent in the Senate to "suffer fools gladly." D. Acheson, supra note 183, at 101. When we reflect that Truman, Kennedy, Johnson, and Nixon came to the Presidency from the Senate, we may ask by what miracle "boobs" became demi-gods.

W. W. Rostow states, "In the period 1961-69 I had the privilege of observing the process of Congressional consultation with the President [Kennedy and Johnson] on many occasions. ... I emerged with great respect for members of Congress and have heard them make wise and helpful observations, both critical of the President's course and supportive." Hearings, supra note 187, at 535.

344. Hearings, supra note 187, at 405-06. Reedy states of some meetings of the Cabinet and of the National Security Council that "everyone [was] trying desperately to determine just what it is that the President wants to do." Id. 406. Former Attorney General Ramsey Clark stated that "he had been wrong not to speak out against the Vietnam war when he was ... Attorney General in President Johnson's cabinet while the war was expanding," and is quoted as saying, "There is too much tendency in the executive branch not to argue with policy," N.Y. Times, Aug. 16, 1972, at 7, col. 1. Of course, there is the occasional maverick, like Under Secretary of State George Ball, who persisted in opposition to Vietnam escalation in the face of an inner-circle consensus.

345. Senator Charles Mathias said, "The more a President sits surrounded only by his own views and those of his personal advisers, the more he lives in a house of mirrors, in which all views and ideas tend to reflect and reinforce his own." Hearings, supra note 187, at 17.

Even worse is a situation such as that of President Eisenhower. Ambassador Douglas Dillon, according to C. Sulzberger, supra note 241, at 1018, said that "Eisenhower never reads the newspapers and therefore doesn't know what goes on, and the apparatus around him sees that he doesn't know what goes on. The President's information nowadays is limited to what he is allowed to see by his entourage." J. Jennings, supra note 342.


347. Hearings, supra note 187, at 445-56. "In the conduct of foreign relations, unity is one of the most important assets leadership can possess, disagreement one of the greatest liabilities." R. Dahl, supra note 341, at 221, 232. In addition to the examples cited by Dahl, there is the current divisiveness over Vietnam, which toppled one President, and has strewn 'boulders in the path of another, in no little part because the people were not really consulted.

348. Senator Fulbright stated, "The Congressman or Senator has to respond to the wishes ... of his electorate. This anchor in reality is the elected Representative's one indispensable credential for participation in the policymaking process." Hearings, supra note 187, at 23.


350. Monaghan, supra note 172 at 19.


353. Justice Black stated in Reid v. Covert, 354 U.S. 1, 40 (1957), "Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny."


THE WAR POWERS CRISIS

Mr. JAVITS. Mr. President, at the request of the New England Law Review, I have prepared an article entitled "The War Powers Crisis" which embodies a full exposition of my view on this crucial constitutional issue which has now reached crisis proportions. As the war powers issue is of such importance to the Senate and the Nation, I felt it would be useful to have the text of my article appear in the Record. Mr. President, I accordingly ask unanimous consent that it be printed in the Record.

There being no objection, the article was ordered to be printed in the Record, as follows:

THE WAR POWERS CRISIS

(By Senator Jacob K. Javits)

There is no longer any serious argument as to the existence of a constitutional crisis over the exercise crisis over the exercise of the Nation's war powers. The pertinent question is: What will the Congress—and the President—do about this crisis? The de facto concentration of plenipotentiary war powers in the hands of the President has subverted the letter and the spirit of the Constitution and has placed an almost intolerable strain on our national life as the deep wounds of the Vietnam experience so inescapably remind us.

In the decisive field of national security the awesome strength and vigor of the Presidency, in contrast to the comparative weakness and lack of cohesiveness of the Congress, is a cause for deep concern and even chagrin. For, the now almost unlimited power of the Presidency with respect to matters of war is a unilateral power not only to defend our nation wisely but also a unilateral power to involve us in the quagmire of a Vietnam or in a thermonuclear holocaust.

The severe imbalance which has developed between the power of the President and that of Congress has evoked many charges of "usurpation." While "usurpation" is a heavy word which may help to assuage our feelings, a review of the record of the past thirty years leading up to our present predicament does not, in my judgment, allow us the solace of attributing the result to Presidential usurpation. The Congress has given away its authority—not only by default and acts of omission—but even more importantly in an endless series of loosely-worded and broadly drawn delegations of authority to the President. To cite only one example, but they are numerous, how many of us—including myself—who voted for the Tonkin Gulf Resolution in 1965 do not feel uncomfortable today in rereading its extraordinary language: "the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force . . ."

No legislation can guarantee national wisdom, but the fundamental premise of the Constitution, with its deliberate system of checks and balances and separation of powers, is that important decisions must be national decisions, shared in by the people's representatives in Congress as well as the President. By enumerating the war powers of Congress so explicitly and extensively in article I, section 8, the framers of the Constitution took special care to assure the Congress of a concurring role in any measures that would commit the Nation to war. Modern practice, culminating in the Vietnam war and the result of a long history of executive action employing the warmaking power which weaves in and out of our national history, has upset the balance of the Constitution in this respect.

The War Powers Act, of which I am the principal author, is a bill to end the practice of Presidential war and thus to prevent future Vietnams. It is an effort to learn from the lessons of the last tragic decade of war which has cost our Nation so heavily in blood, treasure, and morale. The War Powers Act would assure that any future decision to commit the United States to any war-making must be shared in the Congress to be lawful.

Our experience of the last five years or more has demonstrated how much harder it is to get out of an undeclared war than it is to get into one. In dealing with this situation, Congress has been forced back into relying solely on its
"power of the purse" over appropriations. We have seen how difficult and unsatisfactory it is for Congress to try to get a meaningful hold on the Vietnam war through the funds cutoff route.

Yet there is a group of pundits, historians, and commentators who would have us fly directly in the face of this tortuous experience and confine ourselves to the funds-cutoff route. Those who would so advise us are either too timid or too conservative to try institutional reform. They would have us face the Presidential war power so often used as a fine tuned, subtle, and decisive instrument with a clumsy, blunt, and obsolescent tool. The fund-cutoff remedy is there now and will be there when the war powers bill becomes law. It can then be an excellent sanction, but it is not a substitute.

The obvious course for Congress is to devise ways to bring to bear its extensive, policy making powers respecting war at the outset, so that it is not left to fumble later in an after-the-fact attempt to use its appropriations power. This is what the War Powers Act seeks to do.

If James Madison had pressed his point on September 7, 1787, during the debate in the Constitutional Convention, we might not be faced with our current agonizing dilemma, Madison proposed then that two-thirds of the Senate be authorized to make treaties of peace without the concurrence of the President. "The President," he said, "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace." However, Madison withdrew his proposal without putting it to a vote.

It is not clear whether Madison was speaking seriously or facetiously. It is clear, however, that Presidents have tended to see their role, as Commander in Chief conducting a war, as the decisive power of the Presidency. President Nixon articulated this view very precisely, when he said last April:

"Each of us in his way tries to leave [the Presidency] with as much respect and with as much strength in the world as he possibly can—that is his responsibility—and to do it the best way that he possibly can... But if the United States at this time leaves Vietnam and allows a Communist takeover, the office of President of the United States will lose respect and I am not going to let that happen."

The effort embodied in the War Powers Act is the fulcrum, in my judgment, of the broader attempt of the Congress to reassert the dangerous constitutional imbalance which has developed in the relationship between the President and the Congress. Unless Congress succeeds in reasserting its war powers, I do not think it can succeed in reasserting its powers of the purse which have grown so weak in comparison with the Executive branch.

The publicists and the lawyers of Presidents have been busy for years now in advancing a new constitutional doctrine. According to this novel doctrine the President has inherent powers, in his role as Commander in Chief, to over-ride any other powers conferred anywhere else in the Constitution.

We have reached a point where proponents of the Presidency seem to be claiming that the power of the Commander in Chief is what he himself defines it to be in any given circumstance. This is the challenge that must be met by the Congress. If this challenge is not met successfully by the Congress, I do not see how it can prevent the further erosion of its powers and jeopardize freedom itself.

I wish to emphasize my view that the Congress itself is on trial in the eyes of the people. The issue addressed by the War Powers Act is a fundamental constitutional issue.

It rejects the premise that the issue of "Presidential war" can be handled by making distinctions between "good" Presidents and "bad" Presidents. We could never arrive at an agreed criteria for making such judgments and there is no way such distinctions could be applied to Presidential wars on an ad hoc basis.

The need is for legislation which will assure Congressional involvement and the exercise by Congress of its equal share of the responsibility at the outset of all wars. Our constitutional system requires confidence that the Congress will act as responsibly as any President in the national interest. Even more significantly, it assumes that the national interest can best be defined and acted upon when both the President and the Congress are required to come to an understanding as to what is that national interest.

THE WAR POWERS ACT (S. 440)

Thus, in my judgment, the War Powers Act (S. 440) is one of the most important pieces of legislation in the national security field that has come before
the Senate in this century. The bill's various sections are carefully interrelated and interdependent. I will concentrate on an explanation of the bill and how it is intended to work, and I shall try to dispel the allegations which have been made against it by the State Department and other critics.

I shall begin by dealing with the constitutionality of S. 440, as well as its historical background and then proceed to a detailed explanation of the bill.

In this connection we should begin with the words of the Constitution itself because from what many critics have said, it almost seems as if they have neglected to read what the Constitution in fact does say about the war powers.

WAR POWERS OF CONGRESS

Article I, section 8 of the Constitution enumerates the war powers of Congress. The list of these powers is both detailed and comprehensive:

"provide for the common defense."
"to define and punish ... offenses against the law of nations."
"to declare war."
"to raise and support armies."
"to make rules for the government and regulation of the land and naval forces."
"to provide for calling forth the militia to execute the laws ... and repel invasions."
"to provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States."

The powers of Congress which I have just listed are extensive and specific, but the Founding Fathers went even further to buttress the power of Congress in this field. They did this by concluding article I, section 8 with an all-inclusive power—the "necessary and proper" clause, which empowers Congress: "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof" (italics added.)

THE PRESIDENT AS COMMANDER IN CHIEF

And, compared with the war powers of Congress so specifically enumerated in the Constitution, let us examine the war powers actually granted to the President in the Constitution. These powers at best can be described as sparse and cryptic. Article II, section 1 states: "The executive power shall be vested in a president of the United States of America."

Article II, section 2, states, without further elaboration:

"The President shall be Commander in Chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States."

It would be useful at this point to take a look at the "legislative history" of the Commander in Chief concept as it is used in the Constitution. There was no doubt in the minds of the drafters of the Constitution about who would be the first President of the United States. George Washington was elected unanimously to the office less than two years after completion of the Constitutional Convention. Twelve years earlier, in June 1775, the Continental Congress had appointed George Washington to be "Commander in Chief" of the colonial forces. Washington held this post as Commander in Chief until his formal resignation and return of his commission in December 1783. He was the only Commander in Chief the United States had ever had when in 1787 the Constitution was drafted and the phrase "Commander in Chief" was written into it.

Clearly, the drafters of the Constitution had the experience of the Continental Congress with George Washington in mind when they designated the President as "Commander in Chief" in article II, section 2. Thus, the "legislative history" of the constitutional concept of a Commander in Chief was the relationship of George Washington as colonial Commander in Chief to the Continental Congress.

That relationship is clearly defined in the Commission as Commander in Chief which was given to Washington on June 19, 1775, and which was formally returned by him to the Continental Congress on December 23, 1783.

I would like to quote the final clause of this Commander in Chief's Commission, because it establishes the relationship of the Congress to the Commander in Chief in unmistakable terms:

"And you are to regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a fu-
ture Congress of the said United Colonies or a committee of Congress for that purpose appointed."

THE PRESIDENT'S EXPANDING POWERS

I have dwelt at some length on this question of the Congress' war powers, and the relationship of those powers to the President's function as Commander in Chief, because critics of the War Powers Act so often choose to ignore what the Constitution says. Moreover, out of the sparse and cryptic language of article II, section 2 of the Constitution there has grown up an extraordinarily overblown doctrine of so-called Commander in Chief powers. The outer limits of this doctrine as cited as a barrier against even the exercise by Congress of its own clearly enumerated war powers. For instance, in his testimony before the Senate Foreign Relations Committee, Secretary of State Rogers approvingly quoted the following assertion of the Truman Administration: "... the President, as Commander in Chief of the Armed Forces of the United States, has full control over the use thereof."

To this ever expanding doctrine of exclusive Commander in Chief powers, Secretary Rogers added a new dimension of his own, in telling the Foreign Relations Committee:

"I would think that his powers as Commander in Chief would authorize him to take whatever action he felt necessary to try to protect the safety and the lives of our prisoners of war."

Presumably this could include authority on his own to invade North Vietnam, Laos, Cambodia and perhaps even the People's Republic of China. I doubt that there are many Americans who would go this far even to agree with Secretary Rogers.

HISTORICAL AND CONSTITUTIONAL PERSPECTIVES OF THE WAR POWERS ACT

The constitutional aspects of the War Powers Act were investigated in a most authoritative way in the hearings conducted by the Foreign Relations Committee. The record of those hearings is already coming to be recognized as the most comprehensive and authoritative examination in existence of the constitutional war powers issue. I command the hearings to all interested in this subject.

The question has been asked, quite rightly, why—after all these years—do we need a war powers bill now? It is clear that the Administration opposes any legislation in the war powers field and is apparently quite happy with the present situation. Secretary Rogers said that the War Powers Act: "... reflects an approach not consistent with our constitutional tradition." The Secretary further felt that the "respective roles and capabilities" of the Executive and the Congress should be "left to the political process."

It is the future of this approach which necessitates a war powers bill. The golden days of Senator Vandenburg have been obliterated by the Vietnam war.

The constitutional imbalance, which has reached such dangerous proportions and which is the prime factor behind this bill, is a recent development growing out of the last few decades. The United States emerged from World War II as the dominant world power—a role alien to all our previous national experience. The unique challenges arising from this new role were such that we slipped into a practice which ran counter to the genius of our Constitution and the underlying structure of our political system. This practice has concentrated the essential war power in the Institution of the Presidency and left Congress little more than an appropriative and confirmatory role. It has proved to be a most costly failure which has dangerously strained the fabric of our whole society.

Throughout our history it has been recognized that the essential conduct of foreign policy was a prerogative of the President. But until the United States emerged from World War II as the dominant power of the world, the President's foreign policy portfolio was a relatively modest one, evolving only slowly in our history from the traditions established by President George Washington's admonition to beware of "foreign entanglements."

The Founding Fathers were deeply distrustful of "standing armies." At the times of the ratification of the Constitution, the United States Army consisted of a total of 718 officers and men. On the eve of the Civil War it was only 28,000 and in 1890 it was only 38,000. Even in 1915, the Army numbered less than 175,000. However, since 1951 the size of our "standing" armed forces rarely has dipped below 8,000,000 men. These forces under the President's command are equipped with nuclear weapons and submarines, intercontinental missiles, supersonic jets and
they are deployed all over the world. A budget of more than $87 billion has been requested to support these forces in FY 1974.

It is the convergence of the President's role of conducting the foreign policy with his role as Commander in Chief of the most potent "standing army" the world has ever see that has tilted the relationship between the President and Congress so far out of balance in the war powers field. It is this convergence which has created the new situation requiring countervailing action by Congress to restore the Constitutional balance.

EXPLANATION OF THE BILL

It is important to note that the provisions of this bill govern the use of the armed forces: "In the absence of a declaration of war by the Congress." In this bill we are dealing with undeclared wars—wars which have come to be called Presidential wars because the constitutional process of obtaining Congressional authorization has been short-circuited.

Undeclared wars are not a new phenomenon in our history. Our armed forces have been introduced in hostilities many more times in the absence of a declaration of war than have been pursuant to a declaration of war. The key problem for the Congress and our Nation, particularly in contemporary circumstances, is undeclared war, or Presidential war, as epitomized by Vietnam. It is to this urgent, contemporary problem that S. 440 addresses itself.

Section 1 of the bill contains its short title—the "War Powers Act."

Section 2 is a self-explanatory short statement of "Purposes and Policy," stressing its intention to "... insure that the collective judgment of both the Congress and the President will apply to the introduction of the Armed Forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances ... ."

Section 3 (along with section 5) is the core of the bill. Section 3 consists of four clauses which define the conditions or circumstances under which, in the absence of a Congressional declaration of war, the Armed Forces of the United States "may be introduced in hostilities or in situations where imminent involvement in hostilities is clearly indicated by the circumstances."

The first three categories are codifications of the emergency powers of the President, as intended by the Founding Fathers and as confirmed by subsequent historical practice and judicial precedent. Thus, subsections (1), (2), and (3) of section 3 delineate by statute the implied power of the President in his concurrent role as Commander in Chief.

The authority of Congress to make this statutory delineation is contained in the enumerated war powers of Congress in article I, section 8 of the Constitution, which I cited above. Most importantly, the authority of Congress to make this statutory delineation is contained in the final clause of article I, section 8, granting to Congress the authority:

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

REPELling ARMED ATTACK ON THE UNITED STATES

Subsection (1) of section 3 confirms the emergency authority of the Commander in Chief to: "repel an armed attack upon the United States, its territories and possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack:"

It should be noted that this subsection authorizes the President not only to repel an attack upon the United States and to retaliate but also "to forestall the direct and imminent threat of such an attack." The inclusion of these words grants a crucial element of judgment and discretion to the President. While, it was thought by some that the power to "forestall" was inherent in the power to "repel," it was decided to expressly include the forestalling power to avoid any ambiguity domestically or in the eyes of any potential aggressor. Its inclusion belies the allegation of critics that the bill is "indecisive."

Nonetheless, while the President clearly must apply his discretion and judgment to the implementation of this authority, it is by no means a "blank check."

For the President to take forestalling action, the threat of attack must be "direct and imminent." Moreover, he must justify his judgment on this point under the mandatory reporting provisions contained in section 4. But, and this is the point to be emphasized, the judgment is his.
REPELLING ATTACK ON U.S. ARMED FORCES

Subsection (2) further defines the emergency power of the President: "to repel an armed attack against the Armed Forces of the United States located outside of the United States, its territories and possessions, and to forestall the direct and imminent threat of such an attack;"

The authority contained in this subsection recognizes the right, and duty, of the Commander in Chief to protect his troops. Like subsection (1) it includes the authority to forestall a direct and imminent threat of attack, as well as to repel an attack. Clearly, just as the President would not have to wait until the bombs actually started landing on our soil to act against an attack upon the United States, similarly our forces would not have to wait until enemy bullets and mortars hit before they could react.

Nonetheless, it will be noted that the power to repel attacks upon the armed forces located outside the United States is less comprehensive in one respect than the power to repel attacks upon the United States itself. While the subsection contains the authority to repel and forestall, it does not include the separate and broader power to retaliate.

There are good reasons for this. First, it should be emphasized that the President could of course take retaliatory action if an attack upon our armed forces abroad was integral to an attack upon the United States. And he could do this respecting our NATO forces as part of his forestalling powers relating to an attack upon the United States. Nonetheless, the wording of this provision is meant to retain safeguards against wider embroilment resulting from incidental attacks upon U.S. forces, or attacks resulting from provocative actions by local U.S. commanders. Thus, for instance, an attack upon a Marine Guard at our Embassy in Nepal would not trigger an authority to retaliate by seizing the country. Likewise, for instance, a sneak attack on security guards at one of our airbases in Thailand would not trigger an authority to retaliate by launching search and destroy missions.

PROTECTING U.S. CITIZENS ABROAD

Subsection (3) codifies that the authority of the President to rescue United States citizens and nationals abroad and on the high seas. By defining the circumstances and procedures to be followed, this subsection is a conscious movement away from some of the excesses of nineteenth century gunboat diplomacy. The language of this subsection is as follows: "to protect while evacuating citizens and nationals of the United States, as rapidly as possible, from (A) any situation on the high seas involving a direct and imminent threat to the lives of such citizens and nationals, or (B) any country in which such citizens and nationals are present, with the express or tacit consent of the government of such country and are being subjected to a direct and imminent threat to their lives, either sponsored by such government or beyond the power of such government to control; but the President shall make every effort to terminate such a threat without using the Armed Forces of the United States, and shall, where possible, obtain the consent of the government of such country before using the Armed Forces of the United States to protect citizens and nationals of the United States being evacuated from such country;"

NATIONAL COMMITMENTS

Subsection (4) is perhaps the most significant part of the bill. For, while subsections (1), (2), and (3) codify emergency powers which are inherent in the independent constitutional authority of the President as Commander in Chief, section 3(4) deals with the delegation by the Congress of additional authorities which would accrue to the President as a result of statutory action by the Congress and which he does not, or would not, possess in the absence of such statutory action.

The language of section 3(4) reads as follows: "pursuant to specific statutory authorization, but authority to introduce the Armed Forces of the United States in hostilities or in any such situation shall not be inferred (A) from any provision of law hereafter enacted, including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in such situation and specifically exempts the introduction of such Armed Forces from compliance with the provisions of this Act, or (B) from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the
provisions of this Act. Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such Armed Forces are engaged, or these exist, an imminent threat that such forces will become engaged, in hostilities. No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities or in any such situation, within the meaning of this clause (4); and no provision of law in force at the time of the enactment of this Act shall be so construed unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in any such situation.

The key phrase in this subsection is contained in its initial five words: "pursuant to specific statutory authorization." The rest of the subsection is an explanation, elaboration and definition of the meaning (for the purposes of the bill) of the words pursuant to specific statutory authorization." In an important sense, this subsection gives legislative effect to S. Res. 85, the National Commitments Resolution adopted by the Senate on June 25, 1969 by a vote of 70 to 18 which states: "that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment."

The significance of subsection (4) is multiple. First, it establishes a mechanism by which the President and the Congress together can act to meet any contingency which the Nation might face.

There is no way to legislate national wisdom but subsection (4) does provide important protection to the American people by requiring that the Congress as well as the President must participate in the critical decision to authorize the use of the Armed Forces of the United States in hostilities, other than hostilities arising from such "defensive" emergencies as an attack upon the United States, our armed forces abroad, or upon U.S. citizens abroad in defined circumstances. It provides as much flexibility in the national security field as the wit and ingenuity of the President and Congress may be jointly capable of constructing.

Subsection (4) places a big responsibility upon the President as well as the Congress. The Initiative in generating specific statutory authorization to meet contingencies and developing crises may in most instances come from the President. As the conductor of foreign policy, with all the information and intelligence resources at his command, it will be incumbent upon him to present the case to the Congress and the Nation.

There is a clear precedent for the action anticipated in subsection (4)—the "area resolution." Over the past two decades, the Congress and the President have had considerable experience with area resolutions—some of it good and some quite unsatisfactory. In its mark-up of the War Powers Act, the Foreign Relations Committee considered this experience carefully in approving the language of subsection (4). The Intent of the final clause of subsection (4) is to uphold the validity of three area resolutions currently on the statute books. These are: the "Formosa Resolution" (H.J. Res. 159 of January 29, 1955); the "Middle East Resolution" (H.J. Res. 117 of March 9, 1957, as amended); and the "Cuban Resolution" (S.J. Res. 280 of October 3, 1962).

The best known—and most controversial—of the area resolutions, the Tonkin Gulf Resolution (H.J. Res. 1145 of August 10, 1964), was repealed as of January 12, 1971.

The question may be asked: What is to guard against the passage of another resolution of the Tonkin Gulf type?

The answer is that any future area resolutions, to qualify under this bill as a grant of authority to introduce the armed forces in hostilities or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, must meet certain carefully drawn criteria—as spelled out in the language of subsection (4). The pertinent language is 

"... unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in such situation and specifically exempts the introduction of such Armed Forces from compliance with the provisions of this Act ...

In other words, any future area resolution must be a specific grant of authority which would contain a direct reference to the bill now under discussion. The
phrase "exempts ... from compliance with the provisions of this Act" is included to insure that the precise intention of the grant of authority is clearly established with reference to the War Powers Act. The exemption could of course establish other procedures—or it could reaffirm all, or part, of the provisions of S. 440. The bill thus allows for as much flexibility with respect to handling of any developing crisis or sudden emergency as the Congress and the President may jointly deem prudent.

Clearly, both the President and the Congress will have much to do, following the passage of this bill. First, Congress will have to review closely the three area resolutions which are left standing by the provision of subsection (4).

As a first step in the mental attitude of partnership which will be brought about by this bill, the Administration should review the world situation carefully and take the initiative in coming to the Congress with recommendations respecting the existing area resolutions—as well as recommendations for any new ones which the President may feel are needed for our national security.

As regards the three existing area resolutions which continue to qualify under subsection (4), the Nixon Administration, in another context, has said it did not rely on the resolutions and has taken the following position: "... as a functional matter, [the area] Resolutions have no continuing significance in the foreign policy formulation process, and it is for Congress to determine whether they should be terminated or simply allowed to fade away."

With the new situation that would allow the adoption of the War Powers Act, a new approach would be required of the Executive.

At this point, I should draw attention to the fact that requests for new authority, pursuant to subsection (4), do not qualify for the “Congressional Priority Provisions” contained in section 7. However, it is contemplated that Congressional consideration of new subsection (4) grants of authority can generally be undertaken in the absence of an imminent threat or emergency in a deliberative way, including Committee hearings. The point here is to obviate a repetition of the unfortunate experience of the Congress with the Tonkin Gulf Resolution, which it was later realized went through the Congress without enough inquiry in the respective Committees and in the related floor debate, for it was confirmatory not plenary; and more a gesture of solidarity with the President than a decision on war by the Congress.

RENEWING CLOSE CONSULTATION

Not only must the Congress be prepared to play its role in the war powers area with wisdom and foresight—but with great responsibility.

And, an important new responsibility is also placed on the Executive branch. Last minute "crunches" can be avoided by a renewal of the earlier practice of continuing close consultation between the Executive branch and the relevant committees of Congress. The Executive will be obliged to make the Congress, again, its partner in shaping the broad, basic national security and foreign policy of the Nation well in advance of the exercise of the warpower.

CONGRESSIONAL AUTHORITY AND PRESIDENTIAL FLEXIBILITY

Some have argued that seeking Congressional authority to use the armed forces with respect to developing crisis situations would deprive the President of flexibility—or introduce ambiguity—in the conduct of foreign policy during crisis situations. It is said that the President would have to "telegraph his punches" and thus remove surprise from his diplomatic arsenal.

This charge does not stand up under scrutiny: First, the President would not be compelled or obliged to use the armed forces just because the Congress granted him the authority to do so. This could be made clear to the entire world through the public media facilities at the President’s command, as well as through the diplomatic channels at his command.

Moreover, it is just not true, as some critics of the bill have alleged, that the passage of this legislation would inhibit the President’s capacity to move elements of the fleet anywhere on the high seas. To give a specific example, there is nothing in the bill which would have affected the President’s decision to move elements of the Sixth Fleet into the eastern Mediterranean during the 1971 Jordanian crisis. The right of United States naval forces to operate freely anywhere in international waters would not be abridged by this bill. Moreover, the capacity of our armed forces to rescue U.S. citizens stranded or threatened on the high seas would not be restricted by the bill.
An important provision of subsection (4) is contained in its first qualifying clause (A). As stated in the Committee Report, the purpose of this clause is to overrule the Orlando vs. Laird decision of the Second Circuit Court, which held that passage of defense appropriations bills, and extension of the Selective Service Act, constituted implied Congressional authorization for the Vietnam War.

**TREATIES**

One of the most far-reaching aspects of subsection (4) is its provisions respecting treaties. Throughout the past two decades there has been continuing confusion, debate and controversy respecting a crucial phrase that is standard in our Nation's collective and bilateral security treaties; that phrase is that implementation of such treaties, as to involvement of U.S. forces in hostilities, will be in accordance with the "constitutional processes" of the signatories.

In an important sense, subsection (4) defines "constitutional processes" for the first time, as it relates to treaty implementation by the United States. The definition of "constitutional processes" respecting treaty implementation is both negative and positive.

Subsection (4) makes a finding in law that no U.S. security treaties can be considered self-executing in their own terms. With respect to existing treaties the bill states:

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

Additionally, the subsection states that authorization for introducing the armed forces in hostilities shall not be inferred: "... from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the provisions of this Act."

It is important to bear in mind that these negative findings with respect to treaties must be considered in conjunction with the authority of the President in subsections (1), (2), and (3). The authority contained in those subsections is in no way abridged or diminished by the negative finding on treaties per se.

Moreover, as the language of the subsection makes clear, the bill envisages the adoption of treaty implementation legislation, as deemed appropriate and desirably by the Congress and the President. Such implementing legislation would constitute the authority "pursuant to specific statutory authorization" called for by subsection (4).

There are two principal reasons for including these provisions with respect to our collective and bilateral security treaties. First, is to ensure that both Houses of Congress must be affirmatively involved in any decision of the United States to engage in hostilities pursuant to a treaty. Treaties are ratified by and with the consent of the Senate. But the war powers of Congress in article I, section 8 of the Constitution are vested in both Houses of Congress and not in the Senate (and President) alone. A decision to make war must be a national decision. Consequently, to be truly a national decision, and, most importantly, to be consonant with the Constitution, it must be a decision involving the President and both Houses of Congress.

Second, the negative findings with respect to treaties is important so as to remove the possibility of a future issue of bitter contention such as arose with respect to the SEATO Treaty and the Vietnam war.

Treaties are not self-executing. They do not contain authority within the meaning of section 3 (4) to go to war. Thus, by requiring statutory action, in the form of implementing legislation or an area resolution of the familiar type, the War Powers Act performs the important function of defining that elusive and controversial phrase—"constitutional processes"—which is contained in our security treaties.

Subsection (4) contains one additional important provision. It states:

"Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."

As explained in the Committee report, the purpose of this provision is "to prevent secret, unauthorized military support activities." Senators conversant
with the major debates of the past five years will recognize that this provision is designed to prevent a repetition of many of the most controversial and regrettable actions of the past two administrations in Indochina. For, we know that the ever deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. “advisors” to accompany South Vietnamese units on combat patrols. Soon, such U.S. advisors were authorized to shoot, first in self-defense, and later, without restriction. And, in Laos, secretly and without Congressional authorization, U.S. “advisors”—frequently members of the Armed Forces on “loan” to the CIA—were deeply engaged in the war in northern Laos.

CONGRESSIONAL AUTHORITY FOR PRESIDENTIAL WARS

The approach taken in the War Powers Act places the burden on the Executive to come to Congress for specific authority. The sponsors of the bill believe that this provision will provide an important national safeguard against creeping involvement in future Vietnam-style wars. The danger of U.S. involvement in wars over the next decade at least would appear to be greater as regards small, “limited” brushfire, undeclared wars of obscure beginnings—such as the ones which have wracked Southeast Asia for the past several decades—than the danger of a big conventional war.

The State Department has raised the charge that S. 440 would require the disbandment of NATO’s unified command. This is a faulty and distorted reading of the legislation. It is certainly a reading which is in direct contradiction of the legislative purpose of the authors and sponsors of the bill, and in normal operation it contradicts the plain text for the bill, as stated in section 9 which reads as follows:

“Nothing in section 3(4) of this Act shall be construed to require any further specific statutory authorization to permit members of the Armed Forces of the United States to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this Act and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.”

Section 4 of S. 440 requires the President to report “promptly” in writing to both Houses of Congress any use of the Armed Forces covered by section 3 of the bill. The provisions of this section are clear and simple. In his report to Congress, the President is required to include “a full account of the circumstances under which . . . [he has acted] . . . the estimated scope of such hostilities or situation, and the consistency of the introductions of such forces in such hostilities or situation with the provisions of section 3 of this Act.”

In addition, the President is required to make periodic, additional reports so long as the Armed Forces are engaged in circumstances governed by section 3. Such additional reports shall be submitted at least every six months.

It will be noted that the President is required to report “promptly.” This word has been used in preference to “immediately” or a possible specific time limit such as 24 hours. The important thing is that the report must be prompt but it must also be comprehensive. It might take a few days for the Executive branch to assemble all the facts and reports from the field, as well as to assemble the various intelligence reports and, most importantly, to prepare an informed judgment on the “estimated scope of such hostilities.”

What we are looking for here is a full and accurate report of events, combined with an authoritative statement by the President of his judgment about the direction in which the situation is likely to develop. The Congress can act intelligently and responsibly only when it has the necessary information at hand. We cannot allow a repetition of the experience we had with respect to the Tonkin Gulf Resolution, where we later learned that we were provided with incomplete, even misleading and inaccurate, reports of what had actually occurred.

It is important to bear in mind that the reporting requirements of the bill apply independently of the provisions of sections 5, 6, and 7. There are several reasons for this, despite the fact that there inevitably will be a close de facto operational connection between the President’s report under Section 4 and the subsequent actions of Congress under sections 5, 6, and 7.

First, it should be clear that the President’s mandatory report is not to be considered a request for an extension of authority as might be granted subsequently under section 5. Such a request can only be introduced by a member of Congress.
Second, it is entirely possible that even a majority of the actions taken under the President's direction pursuant to section 3 will be shortlived, one-shot actions completed well within the thirty-day time period, and thus requiring no extension in time of the authority spelled out in section 3.

80-DAY AUTHORIZATION PERIOD

The Committee Report characterizes section 5 as "the heart and core of the bill." Taken in conjunction with section 3, it is just that. It is the crucial embodiment of Congressional authority in the war powers field, based on the mandate of Congress enumerated so comprehensively in article I, section 8 of the Constitution. Section 5 rests squarely and securely on the words, meaning and intent of section 8, article I and thus represents, in an historic sense, a restoration of the constitutional balance which has been distorted by the practice of recent decades.

Section 5 provides that actions taken under the provisions of section 3: "shall not be sustained beyond thirty days from the date of the introduction of such Armed Forces in hostilities or in any such situation unless (1) the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of Armed Forces of the United States engaged pursuant to section 3(1) or 3(2) of this Act requires the continued use of such Armed Forces in the course of bringing about a prompt disengagement from such hostilities; or (2) Congress is physically unable to meet as a result of an armed attack upon the United States; or (3) the continued use of such Armed Forces in such hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof."

Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the President in this age of instantaneous communications and of intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate and duty with respect to the great questions of war and peace.

The choice of thirty days, in a sense, is arbitrary. However, it clearly appears to be an optimal length of time with respect to balancing two vital considerations. First, it is an important objective of this bill to bring the Congress, in the exercise of its constitutional war powers, into any situation involving U.S. forces in hostilities at an early enough moment so that its (Congress') actions can be meaningful and decisive in terms of a national decision respecting the carrying on of war. Second, recognizing the need for emergency action, and the crucial need of Congress to act with sufficient deliberation and to act on the basis of full information, thirty days is a time period which strikes a balance enabling Congress to act meaningfully as well as independently.

It should be noted further, that the thirty-day provision can be extended as Congress sees fit—or it can be foreshortened under section 6. The way the bill is constructed, however, the burden for obtaining an extension under section 5 rests on the President. He must obtain specific, affirmative, statutory action by the Congress in this respect. On the other hand, the burden for any effort to foreshorten the thirty-day period rests with the Congress, which would have to pass an act or joint resolution to do so. Any such measures to foreshorten the thirty-day period would have to reckon with the possibility of a Presidential veto, as his signature is required, unless there is sufficient Congressional support to override a veto with a two-thirds majority.

The issue has been raised, quite properly, as to what would happen if our forces were still engaged in hot combat at the end of the thirtieth day—and there had been no Congressional extension of the thirty-day time limit.

The answer is that, as specified by clause (1), the President, in his capacity as Commander in Chief and in accordance with his duty as Commander in Chief to protect his troops, would not be required or expected to order the troops to lay down their arms.

The President would, however, he under statutory compulsion to begin to disengage in full good faith to meet the thirty-day time limit. He would be under the injunction placed upon him by the Constitution, which requires of the President that: "he shall take care that the laws be faithfully executed."

The thirty-day provision contained in section 5 thus assumes that the President will act according to law. No other assumption is possible unless we are to discard our whole constitutional system. So long as the President is acting in good faith, in acting to disengage, there would be no constitutional confrontation over light-
ing by our forces after the thirty-day period (or any other period established by statute.)

Section 6 of the bill establishes that Congress may, through statutory action, foreshorten the thirty-day provisions of section 5. Clearly, such action could only happen in most extraordinary circumstances wherein a President might act in blatant opposition to the national will or the national interest.

**ANTIFILIBUSTER SAFEGUARD**

Section 7 is an important provision of the bill which establishes strict procedures to assure priority Congressional action to extend, or foreshorten, the thirty-day time period as provided in sections 5 and 6. The provisions of section 7 are included to remove the possibility that action in this regard could be prevented or delayed through filibuster or committee pigeon-holing.

It is important to note again that requests for authority under procedures established in section 7. In other words, a Presidential request for an area resolution of the type contemplated in section 3, subsection (4) would not trigger the provisions of section 7. Such requests would be considered by Congress under normal procedures. Section 7 would apply only with respect to measures which would extend, (or foreshorten) measures already previously made statutory under section 3.

To give an example, the Tonkin Gulf Resolution could not have been shoved through the Congress under the priority consideration procedures of section 7. On the other hand, hypothetically, if United States Armed Forces were fighting in Mexico, pursuant to specific statutory authorization under section 3, to resist an invasion by the Soviet Union or Cuba, a resolution to extend the thirty-day authorization period would qualify for the priority consideration procedures, if sponsored or cosponsored by one-third of the membership of the House in which it was introduced.

Finally, it should be noted that an important measure of flexibility has nonetheless been retained in section 7. Its strict, almost instant, provisions can be modified in any particular instance by a majority vote of the members of the House in which it is being considered. This is the meaning of the phrase "unless such House shall otherwise determine by yeas or nays." The significance of this "escape clause" is that in situations which clearly do not constitute a national emergency, the Congress can proceed as it may decide to, upon majority vote.

Section 8 contains a standard separability clause which simply provides that if any provision of the bill should be held invalid, this would not affect the validity of the rest of the bill.

Section 9 provides, in part, that:

"This Act shall take effect on the date of its enactment but shall not apply to hostilities in which the Armed Forces of the United States are involved on the effective date of this Act."

The bill, at the time of introduction, was not intended to apply retroactively to the Vietnam War. However, after the total withdrawal of U.S. Armed Forces from Vietnam on March 28, as provided by the Agreement on Ending the War and Restoring the Peace in Vietnam, signed in Paris on January 27, U.S. forces will be no longer be involved in any hostilities in North or South Vietnam, and the provisions of the War Powers Act will be applicable to any possible resurgence of that tragic conflict. We also now have a cease-fire in Laos, and, when the initial cease-fire period of 60 days is complete and American involvement is terminated, the provisions of the War Powers Act shall apply to that country also. A Cambodian cease-fire is also expected shortly. Hopefully, there will be an effective cease-fire throughout Indochina by the time the War Powers Act is enacted and the War Powers Act would apply to the reintroduction of forces throughout Indochina. The principal sponsors of S. 440, including myself, Senator Eagleton and Senator Stennis are united in this interpretation.

**CONCLUSION**

The real question—and the State Department has posed it—is, independently of Congress, "to what extent the President has the power to use the armed forces by virtue of his role as Chief Executive, as Commander in Chief, and in the conduct of foreign relations." In practice, the question has been answered over the past several decades, in effect, by no limits being placed on this alleged power of the Commander in Chief so that the President has been able to commit the people to extended war. In effect all he has asked from Congress is
that it provide the money and the men. But this was almost an imperial doctrine, not that any American President so intends it, but he is driven to it by some awful logic if this claim of power by the Executive is acquiesced in by Congress and the Nation as valid under the Constitution. It is not valid if the Congress chooses to exercise its power under the "necessary and proper" clause to define by law the President's and its own role in making war. And when the President's authority is so defined, as it will be if the War Powers Act becomes law, then the issue of authority is determined in an authoritative way, and, I have little doubt, will be carried out to be the best of his ability in good faith by any American President.

STATEMENT BY SENATOR JACOB K. JAVITS

THE WAR POWER CRISIS

There is no longer any serious argument as to the existence of a constitutional crisis over the exercise of the nation's war powers. The pertinent question is: What will the Congress—and the President—do about this crisis? The de facto concentration of plenipotentary war powers in the hands of the President has subverted the letter and the spirit of the Constitution and has placed an almost intolerable strain on our national life as the deep wounds of the Vietnam experience so inescapably remind us.

In the decisive field of national security the awesome strength and vigor of the Presidency, in contrast to the comparative weakness and lack of cohesiveness of the Congress, is a cause for deep concern and even chagrin. For, the now almost unlimited power of the Presidency with respect to matters of war is a unilateral power not only to defend our nation wisely but also a unilateral power to involve us as in the quagmire of a Vietnam or in a thermonuclear holocaust.

The severe imbalance which has developed between the power of the President and that of Congress has evoked many charges of "usurpation". While "usurpation" is a hasty word which may help to assuage our feelings, a review of the record of the past thirty years leading up to our present predicament does not, in my judgment, allow us the solace of attributing the result to Presidential usurpation. The Congress has given away its authority—not only by default and acts of omission—but even more importantly in an endless series of loosely-worded and broadly drawn delegations of authority to the President. To cite only one example, but they are numerous, how many of us—including myself—who voted for the Tonkin Gulf Resolution in 1965 do not feel uncomfortable today in rereading its extraordinary language: "the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force . . .".

The powers of Congress are enumerated in some detail in Article I of the Constitution. Under the Constitution the Senate is given a special position in foreign affairs, while the House is given precedence in appropriations. The war powers, spelled out so purposefully in section 8 of Article I, are given jointly to the House and the Senate. All those three powers—foreign affairs, appropriations and war powers—tend to converge and mingle inextricably in the exercise of our nation's contemporary role as a world superpower. Unfortunately during the Vietnam period this convergence of foreign affairs, appropriations and war powers saw the House and the Senate divided on policy, leaving the President an opportunity to neutralize Congress as an institution and to consolidate effective authority within his own office. The House and the Senate never did get together on Vietnam, with the result that Congress failed to play a commensurate role in the painful and protracted disengagement from that ill-starred misadventure.

The conclusion of the Vietnam peace agreement removes the principal issue of policy difference between the Senate and the House, and thereby ought to facilitate the process of joint Congressional action on the underlying constitutional challenge which confronts the House and the Senate together.

This Committee, to a large extent under the leadership of Congressman Zablocki, has been wrestling with the war powers question for almost three years and conducted the first congressional hearings on the issue in June, July and August of 1970. I had the honor of testifying myself in those hearings on August 5, 1970. In the Senate, together with Senators Stennis and Eagleton in particular, I have taken the lead in forging war powers legislation. After much hard work, in S. 2656 we were able to draft legislation which commanded an
extraordinarily broad spectrum of support and was passed 68–16. On the Democratic side of the aisle, Senator Stennis, Chairman of the Armed Services Committee, was a principal architect of the bill, which also commanded the support of Senator McGovern. On the Republican side, I was a principal architect of a bill which commanded the support of all four members of the Senate Republican ‘leadership’. To achieve such results there must be a lot that is right about the Senate bill.

At this time I would like to pay tribute to Chairman Zablocki for his far-sighted and statesmanly persistence with respect to war powers legislation. It was his initiative which broke a procedural log-jam and made possible last year a House-Senate Conference on war powers. Unfortunately, the conferees, who were all sorely pressed by other end-of-session and electoral responsibilities, were only able to meet once. At that meeting, it was understandably not possible to bridge the legislative differences between the House and Senate measures. But, personally, I was very heartened by the optimism and determination expressed by both House and Senate conferees that an agreement could and should be reached on this pressing constitutional challenge to the Congress as an institution. In my judgment, Congressman Zablocki’s new bill introduced in this Congress already shows evidence of this determination to get together with the Senate on a war powers bill.

I have read carefully the Report issued by this Committee on August 3, 1972, to accompany S. 2956 (House Report 92–1302). My attention was drawn particularly to pp. 4–6 of the Report which contains the subsection entitled ‘Objective Powers’ and ‘Provisions of the Legislation’. I find that the provisions of the Senate bill are entirely consistent with the principles stated by this Committee in that Report. For instance: a) Reaffirmation of Congress’s power to declare war (which stated as a declarative sentence in the House bill) in Section 5 of the Senate bill is given concrete and explicitly legislative expression; b) Emergency authority of the President (also expressed as a declarative sentence in the House bill) is delineated legislatively in Section 3 of the Senate bill; Prior Consultation with the Congress before involving the Armed Forces in Hostilities (which in the House bill of last year expressed the ‘sense of Congress’) is given specific legislative expression in Section 3(4) of the Senate bill.

The Senate War Powers Act (S. 440) is a bill to end the practices of Presidential war. It is an effort to learn from the lessons of the last tragic decade of war which has cost our Nation so heavily in blood, treasure, and morale. The War Powers Act would assure that any future decision to commit the United States to any warmaking must be shared in by the Congress to be lawful.

No legislation can guarantee national wisdom, but the fundamental premise of the Constitution, with its deliberate system of checks and balances and separation of powers, is that important decisions must be national decisions, shared in by the people’s representatives in Congress as well as the President. By enumerating the war powers of Congress so explicitly and extensively in article I, section 8, the framers of the Constitution took special care to assure the Congress of a concurring role in any measures that would commit the Nation to war. Modern practice, culminating in the Vietnam war and the result of a long history of Executive action employing the warmaking power which weaves in and out of our national history, has upset the balance of the Constitution in this respect.

The central core of the War Powers Act is contained in sections 3 and 5 of the bill. Section 3 consists of four clauses which define the conditions of circumstances under which, in the absence of a congressional declaration of war, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances.”

The first three categories are codifications of the emergency powers of the President, as intended by the Founding Fathers and as confirmed by subsequent historical practice and judicial precedent. Thus, subsections (1), (2), and (3) of section 3 delineate by statute the implied power of the President in his concurrent role as Commander in Chief.

Subsection (4) of section 3 is perhaps the most significant; while subsections (1), (2), and (3) codify emergency powers which are inherent in the independent constitutional authority of the President as Commander in Chief, subsection (4) deals with the delegation by the Congress of additional authorities which would accrue to the President as a result of statutory action by the Congress, and which he does not, or would not, possess in the absence of such statutory action.
Thus, subsection (4) regulates and defines the undertaking of a "national commitment."

Section 5 provides that actions taken under the provisions of section 3 "shall not be sustained beyond 30 days from the date of the introduction of" such Armed Forces in hostilities or in any such situation unless—"the continued use of such Armed Forces in hostilities or in such situation has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof."

Section 5 resolves the modern dilemma of reconciling the need of speedy and emergency action by the the President in this age of instantaneous communications and of intercontinental ballistic missiles with the urgent necessity for Congress to exercise its constitutional mandate and duty with respect to the great questions of war and peace.

A detailed, section-by-section explanation of the entire bill is contained in my speech of March 29, 1972, which initiated the Senate debate on the War Powers Act. I ask unanimous consent that the text of that speech be printed in the Record at the conclusion of my remarks.

Our experience of the last 5 years or more has demonstrated how much harder it is to get out of an undeclared war than it is to get into one. In dealing with this situation, Congress has been forced back onto relying solely on its "power of the purse" over appropriations. We have seen how difficult and unsatisfactory it is for Congress to try to get a meaningful hold on the Vietnam war through the funds-cutoff route.

Yet there is a group of pundits, historians, and commentators who would have us fly directly in the face of this tortuous experience and confine ourselves to the funds-cutoff route. Those who would so advise us are either too timid or too conservative to try institutional reform. They would have us face the Presidential war power so often used as a fine tuned, subtle, and decisive instrument with a clumsy, blunt, and obsolescent tool. The fund-cutoff remedy is there now and will be there when the war powers bill becomes law. It can then be an excellent sanction, but it is not a substitute.

The obvious course for Congress is to devise ways to bring to bear its extensive, policy making powers respecting war at the outset, so that it is not left to fumble later in an after-the-fact attempt to use its appropriations power. This is what the War Powers Act seeks to do.

If James Madison had pressed his point on September 7, 1787, during the debate in the Constitutional Convention, we might not be faced with our current agonizing dilemma. Madison proposed then that two-thirds of the Senate be authorized to make treaties of peace without the concurrence of the President. "The President," he said, "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace."

However, Madison withdrew his proposal without putting it to a vote. It is not clear whether Madison was speaking seriously or facetiously. It is clear, however, that Presidents have tended to see their role, as Commander in Chief conducting a war, as the decisive power of the Presidency. President Nixon articulated this view very precisely, when he said last April:

"Each of us in his way tries to leave (the President) with as much respect and with as much strength in the world as he possibly can — that is his responsibility — and to do it the best way that he possibly can. . . . But if the United States at this time leaves Vietnam and allows a Communist takeover, the office of President of the United States will lose respect and I am not going to let that happen."

The effort embodied in the War Powers Act is the fulcrum, in my judgment, of the broader attempt of the Congress to redress the dangerous constitutional imbalance which has developed in the relationship between the President and the Congress. Unless Congress succeeds in reasserting its war powers I do not think it can succeed in reasserting its powers of the purse which have grown so weak in comparison with the Executive branch.

The publicists and the lawyers of Presidents have been busy for years now in advancing a new constitutional doctrine. According to this novel doctrine the President has inherent powers, in his role as Commander in Chief, to override any other powers conferred anywhere else in the Constitution.

We have reached a point where proponents of the Presidency seem to be claiming that the power of the Commander in Chief is what he himself defines it to be in any given circumstance. This is the challenge that must be met by the Con-
gress. If this challenge is not met successfully by the Congress, I do not see how it can prevent the further erosion of its powers and jeopardize freedom itself.

Mr. Chairman, I have studied carefully H.J. Res 2 which you introduced on January 3, 1973, with a number of your colleagues as cosponsors. This new version of H.J. Res 2 shows that your thinking is not frozen on the war powers question. I want to assure you that my thinking, and I believe the thinking in the Senate is also not frozen. We have worked very hard and we are convinced that we have a good piece of legislation. We are strongly convinced of the principles underlying our bill but we are not doctrinaire about the wording. I mentioned earlier that I thought the principles which your Committee had set forth in last year's Report were entirely consistent with the bill which the Senate has passed. In the new version of H.J. Res 2 I detect some further evolution in your thinking about legislative expression of those principles. I think we are on a converging path here: history is pushing us closer together. We are both seeking to serve the nation and to fulfill our oath of office and our constitutional responsibilities as members of Congress. When we meet in conference, we ought to meet as allies and as co-equals as well.

If you will bear with me, Mr. Chairman, I would like to offer a few observations about H.J. Res 2 which is before you. First, I am gratified to note that Section 3 and Section 6 which have been added to your bill, bring it much closer in structure to the Senate bill that was the case last year. Section 3 of your bill closely resembles the language of a substitute for Section 3 of the Senate bill which was offered as an amendment on the floor by Senator Fulbright during the Senate debate last year. The Senate rejected the Fulbright amendment 28-56 because we thought that it gave away practically the whole ball game to the President—sort of a generalized, Tonkin Gulf blank check. I would hope that your Committee would give further consideration to this language from that perspective.

The new Section 6 of H.J. Res 2 parallels in some respects Sections 5, 6 and 7 of the Senate bill. I am attracted to the second paragraph of your Section 6 (which found on lines 11-16 of p. 4 of H.J. Res 2). This paragraph provides for the special convening of Congress when it is not in session, to receive reports from the President in the event of his emergency use of the Armed Forces in hostilities. This provision, is not contained in the Senate bill but, in my judgment, it ought to be incorporated in the final legislation enacted by the Congress.

As I read the first paragraph of your Section 6, it is a substitute for Sections 5, 6 and 7 of our bill. While the language of those Sections of the Senate bill is doubtlessly susceptible to negotiation in conference, I think there is wisdom in going the route of much greater specificity, as we have done in the Senate. Finally, in connection with your Section 6, I find a troublesome ambiguity on a vital matter. The Senate bill, in Section 5 particularly, is very deliberately constructed so as to throw the burden of proof on the President to convince the Congress, with respect to the question of authorizing an extension of his "emergency" involvement of the Armed Forces in hostilities. I think it is essential, when the President has acted in the absence of a declaration of war, that the burden be on him to convince the Congress that he has acted in response to a bona fide emergency. If the situation is reversed, and the burden is placed on the Congress affirmatively to overrule the President's action, the Congress is likely to be faced with grave psychological obstacles as well as the threat of a veto requiring two-thirds of both Houses to override. I would like to suggest that you look again at the language of your Section 6 in this light.

In closing, Mr. Chairman, I wish to emphasize my view that the Congress itself is on trial in the eyes of the people. The issue addressed by the War Powers Act is a fundamental constitutional issue.

It rejects the premise that the issue of "presidential war" can be handled by making distinctions between "good" Presidents and "bad" Presidents. We could never arrive at an agreed criteria for making such judgments and there is no way such distinctions could be applied to presidential wars on an ad hoc basis.

The need is for legislation which will assure the exercise by Congress of its equal share of the responsibility at the onset of all wars. Our constitutional system requires confidence that the Congress will act as responsibly as any President in the national interest. Even more significantly, it assumes that the national interest can best be defined and acted upon when both the President and the Congress are required to come to an understanding as to what is that national interest.
The biggest question remaining about the United States' withdrawal from Vietnam is whether it will bring an end of presidential wars. At the moment, the country feels a profound sense of relief that both our troops and our prisoners of war are home at last. The rejoicing over this successful liquidation of our traumatic venture is dampened, however, by the absence of any safeguards against a recurrence.

The tidal wave of public opinion which finally brought the war to a close had two basic objectives: (1) to end the useless blood-letting in Vietnam; (2) to close the gaping loophole in our government system which has allowed the President to commit the nation to war without the approval of Congress. The second objective is still far from being accomplished.

The disappointments that are now coming to the surface are largely a result of the President's unwillingness to let go of one-man war-making power. Not only has the administration continued the bombing in Cambodia, after the last vestige of pretense that it was related to the safety of our troops in Vietnam had been removed; in his speech recently the President also seemed to threaten a resumption of bombing in North Vietnam if Hanoi fails to carry out the terms of the cease-fire. Despite the official explanation that the military is merely trying to clean up a "lingering corner of the war," we have here the possibility of new wars for which the Nixon administration would be wholly responsible.

The distinction is not an arbitrary one. So long as the President was liquidating the war which had been unconstitutionally started by his predecessors, he had a powerful argument to justify continued military operations. As Commander-in-Chief he has a solemn obligation to protect American troops in the field. Even in the case of a war started by the President without congressional authorization, this obligation remains, as the corrective legislation passed by the Senate last year recognizes. But when the war in Vietnam is over, the President has no shadow of authority, as Senators Javits, Mathias and Hatfield have pointed out, to drop bombs in Indochina.

It must be obvious to any objective mind that the request of the Lon Nol government in Cambodia for continued American bombing until a cease-fire is reached in that country has no bearing whatsoever on the President's authority. To say that the President is free to engage in military activities in another country merely on the request of its leader is to argue that he is free to make war at his own discretion regardless of how remote our interests in the outcome may be. This gross disregard of constitutional limitations is stiffening the demand on Capitol Hill for enactment of a comprehensive war-powers bill at the present session.

There are some who argue that Vietnam itself is the cure for presidential war-making. The country has learned its lesson, it is said, and will not again venture upon a costly military project that does not have the support of Congress or the country. But that flimsy hopefulness flies into the face of recent history.

Even our participation in World War II began without congressional authorization, and war was declared only after Pearl Harbor. The conflict in Korea was solely a presidential war even though President Truman succeeded in covering it with the sanction of the United Nations. In the case of Vietnam, President Johnson induced Congress to delegate its war-making power to him in the now infamous Tonkin Gulf resolution. Congress was so ashamed of that performance that it ultimately repealed the resolution.

If Congress had succeeded in stopping the war, the clamor for a new war-powers law would not now be so loud. That experience might serve to guide the future. Congress did limit the use of American ground forces in Laos and Cambodia, but all its efforts to halt the war through legislative action came to naught. Congressional control of the purse, which is often cited as a potential weapon against presidential wars, proved to be useless for the simple reason that Congress would never risk potential disaster by defying our forces the weapons and supplies essential to protect their lives.

Vietnam has demonstrated, therefore, that Congress cannot, or will not stop presidential wars once they have begun, with the crude means now at hand. This aspect of the Vietnam experience will even shape future Presidents to embark upon reckless military ventures on the assumption that, however disillusioned it might become, Congress could do nothing about a presidential war.

[From the Washington Post, Apr. 9, 1973]

WHO HAS THE POWER TO MAKE WAR?

(By Merlo J. Pusey)
The appalling fact is that ever since World War I and its aftermath Congress has left a power vacuum in regard to the use of American military forces. By the very nature of his office, the President has filled that vacuum and will continue to do so until Congress finds a way of reasserting its unquestioned constitutional right to determine whether or not the country should participate in any war.

Supreme Court Justice Robert H. Jackson summarized the problem acutely in his conccurring opinion in the steel seizure case. "In matters of war and peace," he wrote, "a succession of Presidents—well-intentioned and patriotic to be sure—have indeed come close to cancelling the effectiveness of Congress. The result is a dangerous contradiction of the principles of democratic government, which I believe ought to be set right."

The Supreme Court slapped down the attempt of the Truman administration to extend controls over the domestic economy to support a presidential war. But most constitutional authorities agree that the court is no likely to intervene in the controversy between the President and Congress over the war power.

As matters stand, therefore, most of the currents are running in the direction of further presidential wars unless Congress finds a way of reasserting its authority. It is one of the most ironic facts of our age. Nearly two centuries ago the founding fathers wrote into the Constitution powerful and explicit provisions that the war powers should be lodged in Congress (except that the Commander-in-Chief might respond to sudden attacks) with firm determination to break away from the British practice, which had permitted the king to decide the issues of war and peace. In recent years, American Presidents have come to exercise most of those kingly powers.

In explaining his vote against allowing the President to make war, George Mason of Virginia told the Constitutional Convention of 1787 that he was "for clogging rather than facilitating war; but for facilitating peace." Professor Alexander M. Bickel of Yale picked up this remark in the hearings before the Senate Foreign Relations Committee on the war-power bills and remarked that, by our practice of recent years, "we have managed to clog peace and facilitate war. I think it is time," he added, "we got back on course."

One other comment by Professor Bickel is worthy of serious thought as the country settles down to think about the second great lesson from Vietnam. Continued relinquishment of the war power in the hands of the President, for want of congressional action to restore the constitutional balance; the Professor said, would take us "as near to a long-term catastrophe as this country can contemplate."

[From the Washington Post, Apr. 10; 1973]

**Presidential War Powers**

(By Merlo J. Pusey)

Is the effort of Congress to pass a war-powers bill a threat to strong executive leadership in this age of superpowers and nuclear weapons? Some sincere citizens undoubtedly think so. The cult of the strong President has taken firm root in American soil. For several decades historians, politicians and journalists have been lauding Presidents who have outrun their constitutional authority, while consigning Presidents who have refused to make war, without the consent of Congress to a lesser category as "weak executives."

Conscions of his place in history, every President tends therefore to broaden the powers of the office—to associate his name with glamorous events that history will remember. President Nixon is certainly no exception to this rule. "Each of us," he has said, "in his own way tries to leave [the Presidency] with as much respect and with as much strength in the world as he possibly can—that is his responsibility—and to do it the best way that he possibly can."

To support this view of their role, recent Presidents and their spokesmen have developed the doctrine of inherent powers, usually associated with the President's role as commander-in-chief. In his defense of the presidential war in Korea in the 1950s, Secretary of State Dean Acheson went so far as to say:

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

Before President Johnson stepped up the fighting in Vietnam to the level of large-scale warfare, he did make a gesture of getting a blank check from Congress. But he stoutly contended that the Tonkin Gulf resolution was not necessary to what he was doing in Southeast Asia. The Nixon administration has been
more guarded in its verbiage. Secretary of State William P. Rogers has repeatedly acknowledged before congressional committees that the President should seek legislative authority before initiating a new war, except in cases of meeting an emergency, although he insisted that the invasions of Cambodia and Laos be regarded as exceptions on the ground that they were part of an ongoing war. His reasoning seems to leave no excuse, however, for the current bombing of Cambodia after the war in Vietnam has been terminated. In any event, the claim of inherent power in the presidency to make war is being as flagrantly asserted in practice as ever before.

The basic issue that the country must now face is whether acceptance of this claim is essential to our national security and our position as a great power. Actually, the risks that are involved in a broader role for Congress in this area of policy-making are grossly exaggerated. No one is proposing to cripple the President in his direction of international policy or to tie his hands in meeting an emergency. Most of the people who are now demanding corrective war-powers legislation want the President to continue exercising powerful leadership. It is a matter of fitting his leadership into the constitutional mold so as to curb the dangers of one-man decisions and to arrest the evolution toward tyranny.

Undoubtedly war-powers legislation would cause the White House some inconvenience. One-man decisions are always easier than democratic debate and justification of every step taken before the Congress and the people. But this is true of popular government in all of its aspects. It is far more complex than dictatorship and requires a much greater skill for the shaping and application of national policies. Human experience has left no doubt among free peoples, however, as to which process produces the best results.

The present posture of the administration favors a sharing of the war power in theory while denying it in practice. Secretary Rogers told the Senate Foreign Relations Committee: "There are few significant matters which can be accomplished by presidential order alone . . . the fact that even a minor skirmish could lead to a confrontation of the major powers and raise the specter of nuclear war, serves to emphasize the desirability of appropriate congressional participation in decisions which risk involving the United States in hostilities . . . we must be sure that such decisions [involving war or the risk of war] reflect the effective exercise by the Congress and the President of their respective constitutional responsibilities."

Mr. Rogers went so far as to tell the sponsors of the war-powers bill that their objectives "are the same as the objectives of this administration." He offered to explore with Congress the possibility of improving its information in regard to issues of war and peace and to talk about a joint congressional committee that could serve as a consultative body with the President. These suggestions have more recently been reiterated by the State Department's acting legal adviser, Charles N. Brower, but they are a lame response to the national demand for a check-rein on the President's power to make war.

The administration's negative view of the problem has been coupled with active opposition to the Javits bill passed by the Senate last year. The President likes the flexibility resulting from the absence of any meaningful legislation in this sphere and is loath to face any curtailment of his freedom of action. His strategy is obviously designed to thwart congressional action if possible or to keep the legislation innocuous if Congress insists on some action. In the background is an unquestioned threat of a veto if any meaningful war-powers bill is passed.

While the reluctance of all Presidents to be restrained can be readily understood, this attitude involves a fundamental inconsistency for the Nixon administration. The President's strongest bid for a place in history is as a man of peace. It is the subject that he loves most of all to talk about, and he has made enormous contributions to a peaceful world by his withdrawal from Vietnam and his rapprochements with China and the Soviet Union. Why, then, should he continue to chip away at the image he is trying to build for history by refusing to cooperate in the restoration of the war-making power to its constitutional dimensions and by continuing to function under the discredited inherent-powers theory?

It is no answer to say that the President is trying to keep all the power to make war in his own hands in order to safeguard the national security. Regard for the national security and the public welfare is precisely what led the Founding Fathers to fear one-man rule in this sphere. They knew that a democracy could not be secure with its power concentrated in a few hands.

Perhaps it would be too much to expect the President to take the lead in righting the imbalance that has crept into our system. But he could at least cooperate
with the constructive effort that Congress is making. There is much work yet to be done, especially in the House of Representatives.

It would be helpful if the administration would merely drop the pretense that the status quo is satisfactory. Secretary Rogers shocked the Senate by arguing for continued reliance on the present arrangement "that has worked so well for the most part, for 200 years." He could have intended to exempt Vietnam, but he did not do so, and in any event it is a rather frightening description of a system that involved the country in useless war for 12 years, at a cost of nearly 46,000 combat deaths and 808,000 wounded, without the sanction of our national policy-making body.

However benevolent the intentions of any administration in power, mere drifting along with a legal vacuum which produces such results is a dismal outlook for a dynamic democracy. Fortunately there is an alternative, which will be the subject of another article in this space.

[From the Washington Post, Apr. 11, 1973]

LEGISLATING WAR POWERS

(By Merlo J. Pusey)

Is it possible to draft legislation that will restore to Congress a meaningful role in war-making without crippling the United States in its international relations? Foes of the war-powers bill say it is not. Their strongest argument is that our responsibilities as a superpower in a chaotic world are so complex that the President must have a free hand in using our military forces without the restraint of legal formalities. A few years ago that view was widely held. It commands less support today, not only because the perils of presidential wars have been so graphically demonstrated, but also because patient and understanding legislators have devised a bill that gives promise of restoring the constitutional balance without excessive rigidity. Chief credit for the bill goes to Senator Jacob Javits, but it now has 60 sponsors in the Senate. In its present form S. 440 is a composite worked out largely by Senators Javits, John Stennis and Thomas Eagleton and their staffs. Senators Robert Taft and Lloyd Bentsen, who had introduced war-powers bills of their own, joined the trio for the sake of consolidating support behind a single measure. The Foreign Relations Committee held extensive hearings, and the Senate passed the bill in April, 1972, by a vote of 68 to 16.

The measure failed to become law last year because the House passed the much weaker Zablocki bill and there was time for only one meeting of the conference committee before Congress adjourned. New hearings have already been held on the House side this year, however, and new Senate hearings are scheduled for today and tomorrow. Representative Clement J. Zablocki has substantially strengthened his bill, and the prospect that a useful measure will be sent to the White House has notably improved.

It is worthy of note that these are not partisan bills designed to embarrass the President. The Republican and Democratic sponsors have worked closely together with the commendable objective of reasserting the constitutional authority of Congress and of preventing presidential wars. Both the majority and minority leaders of the Senate are co-sponsors of the Javits-Stennis-Eagleton bill. It likewise has wide support among both liberals and conservatives. Care has been taken to avoid any encroachment on the President's constitutional powers. By way of codifying the law, which Congress has a right and duty to do under the "necessary and proper" clause of the Constitution, the bill spells out the circumstances under which the armed forces could be used without a declaration of war. The President could repel an attack on the United States territory or its armed forces stationed outside of the country. He could retaliate against such attacks, and he could act to "forestall the direct and imminent threat of such an attack." He could use military force to protect the evacuation of American citizens abroad if their lives were in imminent danger, and of course he could act under any specific congressional authorization such as the Middle East resolution.

The later proviso does not, of course, imply that Congress might again give the President blank checks in regard to using military force, as it did in passing
the Tonkin Gulf resolution. The bill specifically provides that the right to use the armed forces in hostilities shall not be inferred from any resolution unless such action is specifically authorized. Specific congressional authorization is also required for the assignment of any part of our military to the armed forces of another country that is at war or in imminent danger of being involved in hostilities.

To minimize controversy, the bill leaves undisturbed the three so-called area resolutions now on the books—authorizing the use of armed forces in Formosa, the Mideast and Cuba, if the President finds it necessary. It is anticipated, however, that one of the first actions of the President under the bill would be to review these situations and go to Congress with fresh recommendations.

One of the most delicate problems sponsors of the bill had to deal with was its effect on NATO. The NATO treaty provides that an attack upon one of its members shall be regarded as an attack upon all of them. If it is to remain effective, the unified NATO commands must be able to respond to attacks in Europe at the discretion of the President (and other NATO executive authorities) without waiting for legislative action. The Foreign Relations Committee report interprets the bill, however, as meaning that "no treaty, existing or future, may be construed as authorizing use of the armed forces without implementing legislation." This seems to say that any military action by American forces in defense of an ally under NATO would have to be approved by Congress.

The debate in the Senate makes clear that no such crippling of NATO is intended. The President could respond to an attack upon a NATO country if American forces stationed there were involved or if he deemed the attack to be also aimed at the United States. Such action would not necessarily mean full-scale war any more than a presidential response to an attack upon the United States would. In either case follow-up action by Congress would be necessary if a war had to be fought.

Congress has a legitimate interest in preventing use of the NATO treaty as a substitute for a declaration of war. A treaty ratified only by the Senate cannot nullify the war power which belongs to both houses. In reasserting its war power, however, Congress should be careful to avoid casting any doubt upon the right of the President to speak for the United States in authorizing immediate NATO action in case of an emergency. The language of the report on this point needs to be clarified.

The heart and core of the bill are Sections 4 and 5. Section 4 would require the President to report promptly to Congress whenever he might take emergency military action under the terms of the bill. Section 5 would forbid him to continue the hostilities thus begun for more than 30 days without congressional approval, unless Congress had been put out of operation by an armed attack. In any circumstances, however, the military could continue to fight while disengaging from the unauthorized hostilities.

In case of an outrageous abuse of presidential power to make war Congress could, by a two-thirds vote (overriding a veto), tell the President to stop in less than 30 days. And of course Congress could always extend the 30-day period by legislative action. Accelerated procedures are laid down to make certain that Congress would not be hamstrung by filibustering or other dilatory tactics. While the 30-day cut-off is necessarily arbitrary, it would allow time for reports and deliberation; and it would force Congress to act before a military build-up like that in Vietnam could take place.

The effect of the bill would be to put the President on notice that he could not undertake a military venture without explaining to Congress his action and his aims and his claim of authority. That alone would be a powerful restraint upon dubious hostilities that would not bear scrutiny or win popular support. Even more important, the bill would almost compel Congress to face the issue and to assume responsibility for the course to be taken.

Congress itself has been shamefully negligent in relinquishing into the hands of the President all but absolute control over the fate of the nation. Now it is attempting by cool and rational legislation to redress the balance and to assume its rightful place as the national policy-making body. Every American has a vested interest in the success of this undertaking, even though the details of the bills under consideration are still open to debate, clarification and improvement.
Mr. Chairman, in October of 1971 I appeared before this Committee offering testimony in general support of legislation to establish guidelines over the use of our Armed Forces in the absence of a declaration of war. Later in the 92nd Congress the Senate passed a War Powers Bill. But since no action on this measure was taken in the House we are again making the effort in the Senate to get a War Powers Bill approved.

I was deeply interested during the last Congress in setting ground rules to reiterate and elaborate upon our Constitution's command that the nation's forces be committed to war only by decision of Congress. I felt that the abdication of these constitutional responsibilities greatly contributed to the power shift from the Congress to the Presidency. Congress, it seems, has consistently given up many of its lawful powers in recent years—and the power has gravitated to the branch that has used it, namely the Executive. We can see this clearly in the area of budget control as well as in the area of war powers. The President has not so much usurped power as the Congress has given it up. And by giving up its Constitutional responsibilities the Congress has helped create the belief that the demands of the nuclear age are such that the Constitution is obsolete and problems of foreign affairs and warmaking must necessarily be left to the President. I do not believe that to be true.

Those that oppose this legislation say that our national security can best be safeguarded by keeping the power to make war in the President's own hands. And yet it was this same regard for the national security and public welfare that led our Founding Fathers to fear one-man rule and thus to give Congress the specific right in the Constitution to declare war.

Our involvement in Southeast Asia makes at least one thing clear—we made a serious mistake when we allowed one Branch, the Executive, to bear the burden for policymaking and control. Our inaction in Congress resulted in a situation where responsibility for military commitment was not shared between the Congress and the Executive; where virtually no opportunity for national debate or public forum existed; and where four individual men and their administrations decided foreign involvement policy instead of the President WITH the deliberative will of the people expressed through the Congress. Our lesson from the Vietnam conflict was a painful one. And we can prove we learned it well by defining the President's warmaking powers. We must take action now, while the memory of the Vietnam War is still fresh in our minds, so that we can be sure to avoid a similar tragedy in the future.

I don't believe anyone is proposing, and certainly this is not the intention of S. 440, that we cripple the President in his direction of international policy or tie his hands so that he will be unable to meet an emergency. What S. 440 provides is simply corrective action which will hopefully result in once again fitting Presidential leadership into its proper constitutional mold in order to limit the dangers of one-man decisions. The current battle between the President and Congress demands a reaffirmation of faith in the Doctrine of Separation of Powers and checks and balances, and entails at the same time a reaffirmation of faith in the people themselves—and in our Constitution.

Conditions in the modern world do not, in my opinion, render obsolete the devices built into our Constitution to avoid tyranny. What these conditions do encourage and, in fact, demand is rather a reassertion of Congressional responsibility.

S. 440 is an effort to fulfill—not alter, amend or adjust—the intent of the Constitution's Framers. It will insure that the collective judgment of both the Congress AND the Presidency will be brought to bear in decisions involving the introduction of the Armed Forces of the United States in hostilities or situations where imminent involvement in hostilities is indicated by circumstances. Mr. Justice Jackson in his concurring opinion in the steel seizure case said:

"In matters of war and peace, a succession of Presidents—well-intentioned and patriotic to be sure—have indeed come close to canceling the effectiveness of Congress. The result is a dangerous contradiction of the principles of democratic government, which I believe ought to be set right."

Mr. Chairman, I support S. 440 and am a co-sponsor of the bill, because I believe it is an attempt to begin "setting things right again." No one man can possibly be expected to bear the burden of committing this nation to war with only the tacit authorization of the national legislature—the branch of government closest to the people. And Congress should not allow one man to exercise war powers alone—powers expressly given to the Congress in the Constitution.
STATEMENT OF SENATOR PETER H. DOMINICK

Mr. Chairman. Thank you for the opportunity of communicating my concerns with regard to S. 440, the War Powers bill, to the Foreign Relations Committee.

Because of the rather extensive debate on this bill in its various forms, my remarks will be brief. To save time, I would like to submit for the Committee's review a law review article authored by my good friend at Yale, Professor Eugene Rostow, regarding the constitutional implications of this legislation.

It is my firm belief that this legislation, if enacted, will have as great an impact on the future of this country, if not the entire free world, as any other bill to be considered by Congress at least since my election in 1961. Your responsibility is indeed great. A foundation for such history should be something much firmer than this ill-conceived proposal. In addition to internal inconsistencies, the bill is the product of emotion rather than constitutional logic.

Section 2 of the bill, for example, provides that "... this Act is not intended to encroach upon the recognized powers of the President as Commander in Chief and Chief Executive. . . ." At loggerheads with this declaration is Section 5, which provides that Congress can, in thirty days (or less under Section 6) legislate an end to the President's action. I can think of no more direct way of encroaching upon the powers of the President who has committed troops under the conceded executive powers under Section 2. This bill commissions 535 Commanders in Chief.

Last year during consideration of this measure, which fortuitously expired with the 92nd Congress, I offered several amendments which to my mind were decided improvements in the bill. I urge you to give consideration to these measures in your deliberations on the bill.

Mr. Chairman, a far wiser course of action is to recognize the constitutional powers of the President, but at the same time, assure an opportunity for judgmental import from Congress. The distinction between collective judgment and collective decision-making is crucial. The bill could be tempered by requiring the President to consult with Congress, if possible, prior to committing troops. Should the President act without such authorization, he must promptly report to the Congress on his action and the authority justifying that action.

Is there any difference in an end result through the appropriations power of Congress or the strategy as embodied in the War Powers bill? Section 9 of this bill permits, without further legislative efforts, command-level participation by American officers in such treaty commitments as NATO and the UN. Specific congressional authorization would be required, however, for other troop participation. I fail to understand how such an arrangement does not effectively vitiate mutual defense and security commitments. We could not, then, go to the aid of Germany, France, Greece, Italy or any of the other NATO countries without legislation—which is no small feat in terms of time and effort. Should this bill become law, our participation in an emergency in Korea would be limited to command activities, and we could not use any American forces that have been established there as a defense force as a part of the UN participation group, unless Congress specifically consented through legislation.

Under the North Atlantic Defense Command, we have agreed with Canada to a joint mutual defense of the continental US and Canada. We could under this bill participate in the command structure, but not commit our soldiers should Canada be attacked, in the absence of legislation. Can there be any doubt about the eroding effect this would have on the credibility of our mutual defense agreement? Does anyone seriously think we can live alone—without allies—with fractional orbiting bombs overhead and the threat of a nuclear attack by submarine? I believe that this legislation, in its present form, would hamstring America and jeopardize the freedom of our citizens. At a minimum, this legislation should be amended to clarify that the authority of the President which he was authorized to exercise in the implementation of the UN charter or any treaty ratified prior to enactment is not limited by the bill.

In addition, a provision should be added exempting intelligence activities by the President from the operation of this bill. I do not know whether a mission, such as was undertaken by the "Pueblo", would require prior congressional approval is in fact necessary, we will need some other name than "intelligence" to describe those missions.

Should this type of activity be threatened by any enemy, I can conceive of the ridiculous situation of requiring the President to return to Congress every thirty days for authorization for individual missions to be continued. This is:
neither advisable nor realistic and in fact could be counterproductive to the purpose of the bill.

Finally, Mr. Chairman, let me address myself to the distinction being drawn by Section 3 between Americans at home or in foreign countries. Section 3 provides for retaliatory strikes if America is attacked. By design, this option is closed to our countrymen in the service who happen to be serving outside the U.S. For example, American ships under attack in the Mediterranean would be allowed to defend themselves while under attack, yet could not strike at the home bases of the aircraft to prevent another attack. If those same planes attacked the US, that option would be open. Are the lives of Americans outside this country any less important?

NATO contingency plans, which specify what our troops can do in the event of an attack, would in large measure be rendered useless. This legislation literally makes sitting targets of our servicemen in foreign countries. I urge you to allow the option of retaliation to Americans serving outside the US.

Mr. Chairman, this legislation involves difficult constitutional questions and frightening implications for the ability of America to pursue a comprehensive and integrated foreign policy. May emotion lose out to wisdom and logic.
GREAT CASES MAKE BAD LAW: THE WAR POWERS ACT

EUGENE V. ROSTOW*

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

HOLMES, J., dissenting in Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904).

The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

Alexander Hamilton, The Federalist No. 23

The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex ... it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

James Madison, The Federalist No. 48

I. INTRODUCTION

Responding to the bitterness and tragedy of Vietnam, a group of Senators led by Jacob K. Javits of New York proposes fundamentally to

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* Sterling Professor of Law and Public Affairs at Yale University. This article is based on the author's Leon Green Address, delivered at the Fiftieth Anniversary Dinner of the Texas Law Review, March 11, 1972. It is a pleasure to note my admiration for Dean Green, and my enthusiasm for his distinguished service to the law, and to our law schools.
change the constitutional relationship between President and Congress in the field of foreign affairs. They assert that the underlying cause of the Vietnam tragedy is a modern and most unconstitutional excess of presidential power—a shift in the rightful balance of authority between the two branches caused by presidential “usurpations” at least since the time of McKinley, and especially those they claim Lyndon B. Johnson made with regard to Vietnam.

Ignoring their own repeated votes for Vietnam, these Senators say, “We live in an age of undeclared war, which has meant Presidential war. Prolonged engagement in undeclared, Presidential war has created a most dangerous imbalance in our Constitutional system of checks and balances.” Although Senator John Sherman Cooper has rightly criticized their theory as a rewriting of history, without factual foundation, these men have offered a Bill which in their view would correct nearly two hundred years of error, strip the Presidency of many of its most essential powers, and restore what they fondly imagine was the constitutional model of 1789.

This contention, which is the major premise of the Senate Foreign Relations Committee Report on the Javits Bill, confuses two concepts, one of international law, the second of American constitutional law. “Undeclared” (or “limited” or “imperfect”) war is a category of public international law, used to denote hostilities on a considerable scale conducted in time of “peace” rather than of “war,” so far as international


2. WAR POWERS, supra note 1, at 8.

3. In a statement of individual views, Senator Cooper remarks:

I do not concur in one underlying theme of the Committee’s report—which was never discussed in Committee and never voted on—that the Executive has taken from the Congress its powers. The record, if studied, discloses that the Congress, particularly since World War II, has not only acceded to but has supported Executive resolutions requesting Congressional authority to use the armed forces of the United States, if necessary, in hostilities.

These are settled facts of history. We can change our course but we cannot revise and rewrite history.

Id. at 32.
law is concerned. "Presidential" war, as the Committee uses the phrase, obviously refers to hostilities undertaken by the United States, and authorized by the President alone. The United States, like most other nations during the last two and a half centuries, has rarely chosen to invoke the international law of war by solemnly "declaring" that a state of war exists, signalling maximum hostility, and implying the invasion or even the destruction of an enemy state. But a considerable number of our many "limited" or "undeclared" wars, like Vietnam itself, have been authorized by Congress as well as the President through procedures which have been approved in usage and in Supreme Court opinions since the first years of the nation under the Constitution of 1789. Such hostilities cannot therefore be described as "Presidential."

The Javits Bill rests on heady new perspectives the Senate Foreign Relations Committee has discovered in the necessary and proper clause. Its doctrine would permit a plenipotentiary Congress to dominate the Presidency (and the courts as well) more completely than the House of Commons governs England; that is, it would permit Congress to amend the Constitution without the inconvenience of consulting the people.

The battle cry of "constitutional usurpation" quickens the blood of every Congressman, and indeed of every American. Accustomed as we are to treat nearly all questions of policy as questions of constitutional law, we find it easy to conclude that whatever we dislike intensely must also, and therefore, be unconstitutional as well. It is as natural for us to preach a return to the true orthodoxy of the Founding Fathers as it is for devout Moslems to make a pilgrimage to Mecca.

Holmes once remarked that great cases, like hard cases, make bad law. The Javits Bill confirms Holmes' quip more vividly than any proposal since that of the Bricker Amendment, which was in part a response to the Korean War. We should find safer outlets than the Javits Bill for the hydraulic pressure of our present discontents about Vietnam.

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4 Members of Congress have themselves perhaps underestimated the authority vested in them by the "necessary and proper" clause of Article I, Section 8, of the Constitution. That clause entrusts the Congress to make all laws "necessary and proper for carrying into execution" not only its own powers but "all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof." Strictly interpreted, the "necessary and proper" clause entrusts the Congress not only to "carry into execution" its own constitutional war power, but also, should it be thought necessary, to define and codify the powers of the government as a whole, including those of the President as its principal officer.

Id. at 16. See discussion pp. 896-97 infra.

5 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952), (Frankfurter, J., concurring).
We wisely refrained from curbing the powers of the Supreme Court even after the catastrophic error of Dred Scott. The same calm prudence should guide our course now, with respect to the Presidency.

The Javits Bill rests on a premise of constitutional law and constitutional history which is in error. Its passage would be a constitutional disaster, depriving the government of the powers it needs most to safeguard the nation in a dangerous and unstable world. Even if a President were to ignore such a statute, assuming that it passed over his veto, on the ground that it is unconstitutional, the passage of the Bill would create uncertainties, and envenom politics, in ways which would themselves be dangerous, both at home and abroad. It would tend to convert every crisis of foreign policy into a crisis of will, of pride, and of precedence between Congress and the President, making the policy process even more athletic than it is today.

The Javits Bill is a more serious attack on the Constitution and the security of the nation than one or another of the Bricker Amendments, which were nearly recommended by the Congress in the middle fifties. Those Amendments dealt only with the legal effect of treaties as internal law. They would have required affirmative action by Congress before treaties become operative as the supreme law of the land. The Javits Bill is more ambitious. It would allow the President, as the constitutional head of state, commander-in-chief, and representative of the nation in the conduct of foreign affairs, to use the armed forces of the United States in five and only five classes of cases: pursuant (1) to a declaration of war, or (2) to a specific statutory authorization of undeclared war passed after the passage of the Javits Bill itself, and specifically exempting a proposed use of force from its provisions, or like legislation in force at the time of the enactment of the Javits Bill, if it is sufficiently "specific"; absent such Congressional mandates, the

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7 S. 2956, 92d Cong., 2d Sess. § 3 (1972).

In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, only . . . (4) pursuant to specific statutory authorization, but authority to introduce the Armed Forces of the United States in hostilities or in any such situation shall not be inferred (A) from any provision of law hereafter enacted, including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in such situation and specifically exempts the introduction of such Armed Forces from compl-
Bill would permit the use of the armed forces of the United States by the President only (3) to *repel* an armed attack on the United States, or (4) on the armed forces of the United States located outside of the United States; to *forestall* the direct and imminent threat of such an armed attack; to *retaliate* against armed attacks on the United States (not, however, against armed attacks on the armed forces of the United States located outside of the United States); or (5) to protect American citizens abroad being evacuated from a situation of direct and imminent threat to their lives. And in all hostilities except those authorized by a declaration of war—that is—those of “specific” advance statutory authorization of undeclared war; the evacuation of citizens in danger; and of armed attack on the United States or on its forces—the President could not use force for more than thirty days unless Congress ratified his course within that period or had exempted the particular use of force from the Javits Act in advance. The Bill would also require the President to report in writing to both Houses of Congress regarding the introduction of the armed forces “in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances,” and provides that within thirty days Congress could overrule even a President’s decision to use force in conformity with the Bill by an act or joint resolution.

The Javits Bill would annul the military provisions of all outstanding treaties, and probably of other legislative commitments dealing with the use of force as well, including the authority specified in the Middle Eastern Resolution and other Resolutions of similar import. We should

ance with the provisions of this Act, or (3) from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the provisions of this Act. Specific statutory authorization is required for the assignment of members of the Armed Forces of the United States to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such Armed Forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities. No treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States in hostilities or in any such situation, within the meaning of this clause (4); and no provision of law in force at the time of the enactment of this Act shall be so construed unless such provision specifically authorizes the introduction of such Armed Forces in hostilities or in any such situation.

How one Congress could constitutionally bind its successors in this way passes my understanding. The problem is hardly comparable to the provisions of § 12 of the Administrative Procedure Act, providing guidelines to the courts in interpreting subsequent statutes as repeals by implication, 60 Stat. 244, (1946), 5 U.S.C. § 559 (1970); Rusk v. Corr, 369 U.S. 867 (1962).


become the only nation in the world unable to make credible treaties or other security commitments. If the Javits Bill should become law, there would be a difficult and dangerous hiatus, maximizing uncertainty, until new treaties could be negotiated, and new legislation confirming them be considered and passed. With respect to the use of the armed forces by the President acting without prior authorization from Congress, the Bill would abolish at least half the categories in a pattern of practice which extends in an unbroken line of more than 150 instances to the Presidency of George Washington; equally, it would put the Presidency in the straitjacket of a rigid code, and prevent new categories of action from emerging, in response to the necessities of a tense and unstable world. Under the Javits Bill, no President could make a credible threat to use force as an instrument of deterrent diplomacy, even to head off explosive confrontations. And, on those occasions when the Bill would authorize the President to move quickly, the reporting requirements could well of themselves blow every secret diplomatic brush into a major crisis.

The Javits Bill is full of paradox. While its nominal motivation is to assure the nation that a pacific Congress will staunchly keep jingo Presidents from engaging in limited wars like that in Vietnam, the Bill would not have prevented the campaign in Vietnam if it had been enacted thirty years ago. Our participation in Vietnam was specifically authorized by President Eisenhower's SEATO Treaty, and by several


The last clause of § 3(4) of the Javits Bill, quoted in note 7 supra, is ambiguous on this point. Nor is it clarified in the Senate Report on the Bill, War Powers, supra note 1. The important question remains whether the language of outstanding statutes and Joint and Concurrent Resolutions should be regarded as "specific" enough to survive the passage of the Bill, in view of the first sentence of § 3(4), and the flat statement that "no treaty in force at the time of the enactment of this Act shall be construed as 'specific statutory authorization for, or a specific exemption permitting, the introduction' of the armed forces in hostilities.

The Middle East Resolution, for example, provides that the United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East. To this end, if the President determines the necessity thereof, the United States is prepared to use armed forces to assist any such nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism: Provided, That such employment shall be consonant with the treaty obligations of the United States and with the Constitution of the United States.


In view of the policies of strict construction and Congressional control embodied in the Javits Bill, would this language be construed to authorize Presidential action to assist Jordan, for example, against an attack from (or by) Syria?
other laws, including the Tonkin Gulf Resolution, which authorized the use of armed force by the President to carry out that Treaty.\textsuperscript{10} The procedures used to bring Congress and the Presidency together behind the campaign in Vietnam fully comply with the substantive standards of the Javits Bill. In the case of Korea, the Bill would have required President Truman to obtain a Congressional Resolution within 30 days supporting the action he took under the United Nations Charter, which has the status of a treaty in our legal system. That Resolution could surely have been obtained at the time, although the President and the Congressional leaders thought it unwise and unnecessary to do so.\textsuperscript{11}

If the Javits Bill had been on the books, it would have prevented President Kennedy from resolving the Cuban Missile Crisis as he did, by the skillful and minimal deployment of our armed forces as an instrument of diplomatic deterrence and persuasion, in the interest of protecting vital national interests without precipitating nuclear war, or any other kind of war. In its Report, the Senate Foreign Relations Committee, relying on testimony by Professor Bickel, asserts that the Cuban Missile Crisis could have been treated under Section 3(1) of the Javits Bill as a case of forestalling “the direct and imminent threat” of armed attack on the United States. The United States government, however, has made no such claim, even under the “inherent” right of self-defense provision of Article 51 of the United Nations Charter, far broader than the Javits Bill in its reach. Indeed, the notion that the Soviet Union in 1962 was about to launch nuclear missiles against the United States from Cuba, knowing that it would have received a nuclear attack in response, is incredible. The Cuban Missile Crisis, real as it was, must be seen as part of the push and pull of Soviet-American diplomacy, in the context of the Berlin and Laos crises of the period, President Kennedy’s Vienna meeting with Khrushchev, the Bay of Pigs fiasco, and other factors.\textsuperscript{12}

\begin{itemize}
\item \textsuperscript{10} See discussion pp. 872-885 infra.
\item \textsuperscript{11} See discussion pp. 869-870 infra.
\end{itemize}
Under the Javits Bill, President Johnson could not have employed the implicit threat of force to keep the Soviets out of the Six Day War in 1967, and President Nixon could not have used the same method to avert a general war in the Middle East in September, 1970, or to confine and contain the India-Pakistan War of 1972. Nor could earlier Presidents have used or threatened to use the nation’s armed forces to persuade France to leave Mexico in 1865-66, to avoid war with Spain or Britain over Florida, or to send Commodore Perry on his fateful voyage to Japan.

As Senator Javits has said with admirable candor, the purpose of his Bill is to reduce the elective Presidency, which the Founding Fathers were at pains to establish as a third autonomous and coequal branch of the government, to the humble posture of George Washington during the Revolution, when he functioned as commander-in-chief, appointed by the Continental Congress, and its creature, or the creature of its committees, in every respect. I should have supposed that if anything is clear about the intent of the Founding Fathers, it is that one of the major goals of the Philadelphia Convention was to remedy what was

Marxist-Leninist regime in Cuba from extending its activities by force or the threat of force to any part of the hemisphere. The Resolution also announced our determination to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States. That clause of the Resolution, unlike clause (a), did not mention the use of arms. See Cuban Resolution, note 9 supra. Mr. Chayes believes, however, that the Resolution was “one of the bases” of the President's authority to do what he did. 1970 Hearings, supra note 1, at 138. It would seem a better reading of the Cuban Resolution, in light of the restrictive policy of the Javits Bill, to interpret it as contemplating what President Johnson did in the Dominican Republic, but not what President Kennedy did before and during the Missile Crisis.


Because this important speech is not yet readily available in libraries, it may be convenient to quote its extraordinary conclusion in full:

Clearly, the drafters of the Constitution had in mind the experience of the Continental Congress with George Washington when they designated the President as “Commander-in-Chief” in Article II Section 2. Thus, the “legislative history” of the Constitutional concept of a Commander-in-Chief was the relationship of George Washington as colonial Commander-in-Chief to the Continental Congress. That relationship is clearly defined in the Commission as Commander-in-Chief which was given to Washington on June 19, 1776.

I would like to quote the final clause of this Commander-In-Chief’s Commission, because it establishes the relationship of the Congress to the Commander-in-Chief in unmistakable terms:

“AND you are to regulate your conduct in every respect by the rules and discipline of war (as herewith given you) and punctually to observe and follow such orders and directions from time to time as you shall receive from this or a future Congress of the said United Colonies or a committee of Congress for that purpose appointed.”

This historical background clarifies, and gives added meaning to, those phrases in the Constitution concerning the war powers which are the subject of such contemporary controversy.
perceived as a critical weakness of the Articles of Confederation, namely, the absence of a strong and independent executive. The British monarch was much more in their minds as a point of departure than the revolutionary commander.

A wistful and nostalgic chord runs through the testimony and the speeches which favor the Javits Bill. The Founding Fathers, the distinguished and appealing proponents of the Bill say, wanted to make it hard to go to war, and easy to make peace. They wanted America to remain aloof from the quarrels of a naughty world, to eschew the pride and arrogance of power, and to use force only when openly attacked. Let us return to the wisdom of the patriarchs and prophets, these leaders tell us, and require Congress itself—or perhaps even the people through a referendum—to authorize every use of the sword. Thus they would wrap a foreign policy of nearly pacifist isolationism in the priestly mantle of constitutional command.15

The Bill’s supporters dismiss the fact that the men who made the Constitution had quite another view of its imperatives when they became Presidents, Senators, Congressmen, and Secretaries of State. The words and conduct of the Founding Fathers in office hardly support the simplified and unworldly models we are asked to accept as embodiments of the only True Faith. Nor did the policies the Founding Fathers adopted when they became officials always shine with the innocence of Professor Commager’s spirit. Above all, the essence of the Constitution was to build a framework which could last for ages. To suppose that the Constitution binds the nation forever to a particular foreign policy, or even a particular theory for foreign policy, is a fantasy, entirely alien to the chilly realism of No. 23 of The Federalist, and of McCulloch v. Maryland. The makers of the Constitution built in anticipation of changes in world politics that could not be anticipated in 1787. They wished to endow their successors with the full freedom of democratic responsibility to choose the foreign policy they found best suited to the politics and military technology of the period in which they lived. If the Constitution does not enact the Social Statics of Herbert Spencer, it surely does not enact the foreign policy of William E. Borah or J. William Fulbright. Constitutionally, the United States is as free to follow McKinley’s example in making its foreign policy as that of Cleveland.

The constitution of the United States is a process—a process of

15 1971 Hearings, supra note 1; at 8-74 (testimony of Professor H. S. Commager), 75-85 (testimony of Professor R. B. Morris).
tension, conducted in a matrix of custom, and guided by certain standards, habits, and rules. Justice Brandeis once said that

[the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.]

The same theme runs through the Federalist papers.

In the contest for preeminence between President and Congress which constitutes one phase of Justice Brandeis’ vision, the Javits Bill is nearly alone. Congress has made no bid for supremacy so bold, and so foreign to the American Constitution, since the impeachment of Andrew Johnson. The Bill would not restore the constitutional balance of 1787; it would profoundly alter that balance with regard to the conduct of foreign relations, as it has evolved in nearly two hundred years of testing experience.

I reach this conclusion not as an advocate of increased presidential power, but as a defender of the constitutional pattern of enforced cooperation between President and Congress we have inherited, for all the friction it inevitably generates. I disagree with the arguments for enlarged presidential power put forth in recent years by McGeorge Bundy, James McGregor Burns, and Senator Fulbright. No President, and no Congress, can develop or carry out a foreign policy unless in fact they work together. Of course Congress should participate, and participate as early as possible, in decisions involving major and sustained hostilities, through processes of continuous consultation, and, where desirable and feasible, through formal legislative actions approving declared or undeclared war. That is now the pattern of our politics and of our constitutional usage. The respective powers of each branch are indispensable if the making and execution of foreign policy are to remain under effective democratic control. Our practice is strenuous, and hardly conducive to a quiet, easy life, either for Presidents or for members of Congress. A quiet life for public officials is not, however, the most important goal of our constitutional arrangements and practices. There is no safe way to codify those arrangements and practices,

17 M. BUNDY; THE STRENGTH OF GOVERNMENT (1968); J. BURNS, PRESIDENTIAL GOVERNMENT (1968); R. NEUSTADT, PRESIDENTIAL POWER; THE POLITICS OF LEADERSHIP (1968); 1970 Hearings: supra note 1, at 81 (testimony of Dr. Burns); Fulbright, American Foreign Policy in the 20th Century Under an 18th-Century Constitution, 47 CORNELL L.Q. 1 (1961).
especially with regard to the use of nuclear weapons, in ways which could meet all the contingencies likely to arise. It is striking that Senator Fulbright was alone on the Senate Foreign Relations Committee in urging a congressional vote before the President could legally use the nuclear weapon.\(^{18}\)

Gouverneur Morris remarked that "no constitution is the same on paper and in life."\(^{19}\) Justice Frankfurter carried the thought further, writing about the relation between President and Congress in regard to the war power:

> The content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed. The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on executive Power vested in the President by § 1 of Art. II.\(^{20}\)

The Javits Bill repudiates that history root and branch, and seeks to substitute parliamentary government for the tripartite constitution we have so painfully forged.

II. THE BACKGROUND OF CONSTITUTIONAL USAGE

The most serious illusion of legal positivism is the notion that "the original intention" of those who drafted and voted for a law is thereafter knowable, save as a guideline of broad purpose or principle. The debates of judges and scholars about the legitimacy of Marbury v.

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\(^{20}\) *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 616-11 (1952) (Frankfurter, J., concurring).
Madison, the scope of the commerce power, or the true import of the Fourteenth Amendment are evidence enough of the limited value of such inquests as a guide to later decisions. It is psychologically impossible for a man of the twentieth century, however learned and sensitive, to perceive the world as the men of 1787 did. There is no way for him to reproduce the structure and climate of their universe—to understand as they did the relation of the several parts to each other and the weight which various fears, concerns and ambitions had in their minds. The most important words John Marshall ever wrote were that we should never forget it is a constitution we are expounding—a constitution intended to endure for ages to come, and capable of adaptation to the various crises of human affairs—but a constitution nonetheless, assuring continuity as well as flexibility, boundaries of power, coupled with a wide freedom of democratic choice.

How did the Founding Fathers intend to allocate the power to use the armed forces between the President and the Congress? I do not start here because I believe that we can conjure up from their few spare words on the subject a sacred norm of Arcadian purity to which at all costs we must "return," a tight model, capable, like a magical computer or coin machine, of providing clear solutions for every contingency likely to arise. The astute men who drafted the Constitution and started it on its way had a much deeper and more realistic sense of the relationship between law and life than that. Nonetheless, it is right as well as customary to start with the document, viewed against the background of their words and their experience, because the animating principles of their project—democratic responsibility, the theory of checks and balances in the exercise of shared powers, and civilian control of the military—have retained their vitality, and must continue to do so if we hope to survive as a free and democratic society.

In the perspective of political theory, the Presidency is one of the two great inventions of the Constitution, the other being judicial review. The weakness of the Executive under the Articles of Confederation was one of the major reasons for convening the Constitutional Convention of

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21 In 1857, W. H. Trescott, in his DIPLOMATIC HISTORY OF THE ADMINISTRATION OF WASHINGTON AND ADAMS, 1789-1801, at 7-8, remarked that [i]t would be almost as easy for a man in the vigorous and varied activity of his matured life to realize faithfully to himself the uncertainty and weakness of his infancy, as for a citizen of the United States at the present day to reproduce the condition of his country at the date of that treaty which secured its independence—the weakness of its institutions, its economic life, and its internal and external situation.

See also id. at 97.

1787. Problems of security and of diplomacy were among the dominant preoccupations of the men who met at Philadelphia, and first among their arguments for Union. The nation was surrounded by British, French and Spanish territories, to say nothing of hostile Indian tribes. The Founding Fathers were mortally afraid the United States might be dismembered as a pawn in the Great Game of European power politics. Their Revolution had succeeded because they had the help of France. They knew that France had not assisted the American revolutionaries because the Bourbon King was a secret republican at heart, or a believer in the right of revolution. They feared a turn of the wheel of European politics which might undo all that had been achieved, despite their military alliance with France. Hence their concern with the Presidency and with the establishment of clearly national authority over defense and foreign relations in the new constitution. Of the 85 Federalist papers, 26 are devoted to one or another aspect of the problem.

23 The basic idea which governed the drafting of the provisions of the Constitution dealing with the safety of the nation was classically stated by Hamilton in No. 23 of The Federalist:

The principal purposes to be answered by union are these—the common defence of the members; the preservation of the public peace, as well against internal convulsions as external attacks; the regulation of commerce with other nations and between the States; the superintendence of our intercourse, political and commercial, with foreign countries.

The authorities essential to the common defence are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations, are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defence.

This is one of those truths which, to a correct and unprejudiced mind, carries its own evidence along with it; and may be obscured, but cannot be made plainer by argument or reasoning. It rests upon axioms as simple as they are universal; the means ought to be proportioned to the end; the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.

Whether there ought to be a federal government intrusted with the care of the common defence, is a question in the first instance, open for discussion; but the moment it is decided in the affirmative, it will follow, that that government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the National Forces.

The Federalist 142-49 (Modern Library ed. 1937). Hamilton's views on the President's independent role in assuring the security of the nation were developed later in a number of papers. See, e.g., those collected by Professor R. B. Morris in Alexander Hamilton and...