compromise which the United States put forward, notably that con-
tained in President Johnson's Baltimore speech of April 7, 1965. But
these men knew too that of all human enterprises, recourse to military
power is the least susceptible to easy prediction or control. It is always
replete with nasty surprises, disappointments, and setbacks, campaigns
that could not possibly have been anticipated when the initial decision
to use force was undertaken. They knew too that solemn and public
declarations of this order are addressed not only to the American people,
but to those of the world at large, friendly and unfriendly governments
alike, who are required to rely on what Congress does, not on the pri-
ivate fears and reservations of some of the men who voted for a text
which said what it said.

Nor can the argument of deception be given any weight in evaluat-
ing the legal effect of legislation. Astute and worldly men who spoke
and voted for SEATO, the Tonkin Gulf Resolution, and other legis-
llative steps into the Vietnam War now claim that they were brain-
ashed, and that we should therefore treat public acts of the United
States as if they never happened. Washington is a living society, not a
series of closed enclaves labelled "legislative" and "executive." The
atmosphere of that society consists of far more than formal messages
and texts, testimony and votes. Congressmen and Senators live in a
maze of information, rumor, speculation, and gossip, the product of
continuous processes of consultation, leakage, and seepage between the
executive and the legislative branches at all levels, as well as the table
talk of journalists, ambassadors, and other regular and occasional mem-
ers of the community—consultants, members of advisory committees,
and so on. The key Congressmen and Senators responsible for the pass-
age of the Tonkin Gulf and other Vietnam Resolutions knew what
the executive branch knew when they voted. For some of these men
to claim now that they were brainwashed is not only unseemly, but
incredible.

As the basis for an argument that would justify the courts or any-
one else in ignoring these Resolutions, the claim ranks with the historic
efforts to treat, the fourteenth amendment as a nullity because it was
ratified by a number of state legislatures which met in the coercive
presence of an army of occupation, and in some instances were elected
by dubious and indeed fraudulent procedures. Many of these conten-
tions are true, but a public act of the United States stands on its own

foundations, officially and legally, and cannot be collaterally attacked on such grounds.

B. Undue Delegation of Legislative Authority

Professors Velvel, Wormuth, and Bickel advance another contention in their effort to exorcise the Tonkin Gulf Resolution and other legislation supporting the war in Vietnam. To them, the cycle of Presidential, Senatorial, and Congressional decisions with regard to Vietnam, regularly renewed over a period of more than sixteen years, is insufficient to satisfy what they regard as the unambiguous requirements of constitutional orthodoxy. Through a process of reasoning worthy of Justice Black in his most fundamentalist moments, they argue that, save for minor exceptions, hostilities can be authorized only by Congressional action at the time they begin, and then by delegations narrowly limited in scope. In their opinion, neither a treaty nor a congressional resolution can authorize a President to use force in advance of the event. Such provisions, they argue, unconstitutionally delegate legislative power to the President, because they are not suitably limited to the circumstances of the event which gave rise to the resolution—in the case of the Tonkin Gulf Resolution, the attack on American naval vessels in the Gulf of Tonkin.88

The Javits Bill does not accept this theory. Indeed, to Professors Velvel, Wormuth and Bickel, the Javits Bill is as unconstitutional as the Tonkin Gulf Resolution itself.84 For the Javits Bill concedes that an explicit and advance Congressional authorization of the President’s use of force is constitutionally proper, provided it is voted after the passage of the Javits Bill and explicitly exempts the authorization from its restrictions or, if voted before the passage of the Javits Bill, is sufficiently “specific.” As a practical matter, the sponsors of the Javits Bill could hardly embrace the Velvel-Wormuth-Bickel theory of delegation. If congressional resolutions or other acts, like those for Formosa, United Nations participation, the Middle East, Berlin, and the expansion of Castro’s power, were nullities whose operative provisions had to be repeated every time a President wanted to put them into action, it would be impossible for Congress and the President to cooperate at all

88 Velvel, supra note 90, at 478, in 2 FAULK, supra note 28, at 631, 680; Wormuth, supra note 28, at 780-89; 1971 Hearings, supra note 1, at 549, 554-55, 566-68 (testimony of Alexander M. Bickel): “The real answer to the Tonkin Gulf resolution is that if it authorized anything, beyond an immediate reaction, beyond its own factual context, it was an unconstitutionally broad delegation.” Id. at 569.
84 See testimony cited in note 93 supra.
in planning and formulating foreign policy in a way that would be credible.

Velvel, Wormuth, and Bickel discover the source of their rule in what they regard as the original intent of the men who gave Congress the power "to declare war," despite 182 years of opinion and practice to the contrary. The principle of full legislative control of the military power, they argue, precludes much Presidential discretion, and requires Congressional action only at the ritual moment, and then only in terms addressed to defined circumstances. Advance approval for the use of force they regard as a transfer to the President of a power Congress cannot yield even for a moment, even though it retains full authority to change the course of the nation thereafter by repealing, modifying, or reversing its policy, and the President's.

These scholars do not of course claim that Congressional support for the use of force by the President can be given only through a document labelled a "Declaration of War." Nor do they quite deny that the President has some inherent and independent power to use the force of the nation in aid of his conduct of foreign relations, as commander-in-chief of the armed forces, and as chief executive, charged with ensuring that the laws and treaties of the United States be faithfully executed. Without clarifying their views on these questions, however, and above all without considering the constitutional propriety of the Korean War, Wormuth and Bickel in particular conclude that the Tonkin Gulf Resolution, explicitly passed to reinforce and reiterate the policies of the SEATO Treaty, should be regarded as violating the principle they propose.

Actually, the Tonkin Gulf Resolution would appear to be beyond censure even under Bickel's extraordinary rule, since there had been some use of force by the United States in Vietnam, and Congress knew more was being considered at the time the Resolution was passed. Furthermore, the Tonkin Gulf Resolution would seem to contain suitably practical and defined standards to channel and confine the President's authority; it was addressed to what Congress and the President had found to be an "armed attack" by North Vietnam on South Vietnam within the meaning of the SEATO Treaty; and it could be terminated by Congress through a concurrent resolution, that is, without risk of veto. It is hard to conceive of a more precise or controlled "delegation" than one to help defeat a particular attack by one named state against another, pursuant to a policy already embodied in a Treaty.

More broadly, however, the Velvel-Wormuth-Bickel delegation
argument falls before a series of Supreme Court decisions going back at least to Martin v. Mott, upholding standing delegations of discretion to the President in areas close to those of his independent constitutional responsibilities, and in areas of purely Congressional concern as well.

In advancing the argument that the Tonkin Gulf Resolution constitutes an unconstitutional delegation of Congress' power to declare war—which is assumed to include an equally unique power to authorize undeclared war—the commentators, especially Professor Bickel, place some reliance on Kent v. Dulles. That important case considered the legality of denying a passport to Rockwell Kent on the ground that he was a member of the Communist Party. The basic statute on the subject goes back to 1856, and provides that "the Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify such passports." In modern times the passport has become an important facility of international travel, and indeed a 1952 statute purports to make it unlawful for a citizen to depart from or enter the United States without a valid passport.

The Supreme Court upheld Kent's right to a passport, in an opinion which did not reach the question of constitutionality. Starting with the premise that the right to travel was an aspect of liberty protected by the Fifth Amendment, the court hesitated to infer from a pattern of longstanding administrative practice, which it found ambiguous at best, a Congressional purpose to authorize so drastic a curtailment of the liberty of the citizen. Interpreting the statute to avoid constitutional doubts, the court concluded that it should not construe Congressional silence to permit the Secretary to deny passports to individuals on the basis of their political opinions or associations. "If we were dealing with political questions entrusted to the Chief Executive by the Constitution," the Court said, "we would have a different case."

If that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress. . . . And if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. . . . Where activities or enjoyment, natural and often necessary to the well-being of an American citizen,
such as travel, are involved, we will construe narrowly all dele-
gated powers that curtail or dilute them. . . . We hesitate to
find in this broad generalized power an authority to trench so
heavily on the rights of the citizen. . . . We only conclude that
§ 1185 and § 211a do not delegate to the Secretary the kind of
authority exercised here.98

The limits of *Kent v. Dulles* were explored in *Zemel v. Rusk*,99
considering the same statute, in the context of the same argument that
Congress had acquiesced through silence in a long-standing pattern of
administrative practice in construing and applying the passport act.
*Zemel* dealt with the Secretary of State's refusal to validate a citizen's
passport for travel to Cuba during 1962, a tense period in Cuban-Ameri-
can relations culminating in the Cuban Missile Crisis. In 1961 the De-
partment of State had issued regulations requiring passports for travel
to Cuba, and the specific endorsement of such passports by the Depart-
ment before a citizen could travel to Cuba. Mr. Zemel said the purpose
of his trip was "to satisfy my curiosity about the state of affairs in Cuba
and to make me a better informed citizen."100

Reviewing the history of periodic restraints of travel to areas of
war, pestilence, famine, or disorder since 1915—that is, both before and
since the reenactment of the statute of 1856 in 1926—the Court upheld
the Department's position. The issue of statutory construction in *Kent*,
the court said, was "whether a citizen could be denied a passport be-
cause of his beliefs or associations."101 In *Zemel*, however, the issue be-
fore the court, as a question of both statutory interpretation and
constitutional law, was whether the Secretary could refuse to validate
a citizen's passport for travel to Cuba "because of foreign policy con-
siderations affecting all citizens."102

The Court concluded that the history of the problem justified the
inference that the statute did delegate to the President an unreviewable
discretion to restrict travel to areas where for reasons of foreign pol-
cy,103 and indeed for weighty considerations of national security,104 un-
limited travel by citizens could "directly and materially interfere with
the safety and welfare of the area or the Nation as a whole."105

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98 Id.
100 Id. at 4.
101 Id. at 15.
102 Id.
103 Id. at 15.
104 Id. at 16.
105 Id. at 15-16.
In *Zemel*, unlike *Kent*, the Court was therefore required to pass on the constitutional validity of such a delegation of legislative authority. It said:

Finally, appellant challenges the 1926 Act on the ground that it does not contain sufficiently definite standards for the formulation of travel controls by the Executive. It is important to bear in mind, in appraising this argument, that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.

"Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 324.

This does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice. However, the 1926 Act contains no such grant. We have held, *Kent v. Dulles*, supra, and reaffirm today, that the 1926 Act must take its content from history: it authorizes only those passport refusals and restrictions "which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Kent v. Dulles*, supra, at 128. So limited, the Act does not constitute an invalid delegation.\(^{106}\)

Thus, *Kent* and *Zemel* together would seem to confirm, not to challenge, the constitutional validity of the Tonkin Gulf Resolution.

The Courts have upheld other broad delegations of discretion to the President, including many in areas which are purely legislative in character and have no roots in one or another of the inherent powers of the Presidency: in the field of tariffs and of responsibility for banking, to take only two examples.\(^{107}\) The distinction in *Zemel* between delega-

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\(^{106}\) *Id.* at 17-18.

tions in the field of domestic and of foreign affairs is frequently made, and certainly the conduct of foreign affairs requires the flexibility of broad discretion. Still, it is hard to imagine a "delegation" more complete than that of Martin v. Mott, for example, involving the President's power to call out the militia whenever he deems it desirable to do so. Generally speaking, the reasonableness of a delegation should be considered in relation to the nature of the problem Congress was trying to resolve, and its freedom within broad limits to select means which might conceivably contribute to the end it sought to achieve.

No standard even reasonably close to the precedents and their reasoning provides support for the argument that the Tonkin Gulf Resolution can be treated as a nullity because it constitutes an unconstitutional delegation of legislative power. This cannot be the basis for Senator Fulbright's position that the war in Vietnam is "unconstitutional," since the Javits Bill, which he supports, contemplates the possibility that Congress and the President might well decide to use advance statutory authorizations for the use of armed force by the President.

The argument of undue delegation fails for a deeper reason. It is at war with the "nature of things," those stubborn exigencies of the external world that Montesquieu rightly saw as the true source of law, the nature of things in the late eighteenth century and the nature of things now. The necessities of circumstance in dealing with the hurly-burly of the real world have produced a quite different pattern of practice since 1789, not less democratic than the model in the minds of Professors Bickel, Wormuth, and Velvel, but far more flexible, resourceful, and effective. To treat Resolutions like the Tonkin Gulf Resolutions as nullities would make it nearly impossible to associate Congress with the President in the articulation of an effective deterrent diplomacy. Such a rule would make foreign affairs even more exclusively the province of the President than is the case today.

In Marshall's classic words, echoing those of Hamilton in No. 23

See also Comment, Federal Taxation and Economic Stability, 57 Yale L.J. 1229, 1248-55 (1948).


109 War Powers, supra note 1, at 27; Fulbright, Congress, the President and the War Power, 25 Ark. L. Rev. 71, 72 (1971). See also testimony of Alexander Bickel in 1971 Hearings, supra note 1, at 698-77, 879.

110 S. 2956, 92d Cong., 2d Sess. § 3(4) (1972).
The first rule in interpreting "those great powers on which the welfare of a nation essentially depends" is that it must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can best be provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances...

Marshall had noted previously that

[the power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.]

What Marshall wrote about the power of Congress to charter a bank in *McCulloch v. Maryland* applies even more emphatically to the respective roles of the President and Congress in exercising the great powers of the nation abroad, powers whose constitutional contours derive as much from international law and international life as from the deliberately few words of the document of 1787.

The American nation which entered the family of nations in 1776 was endowed in its external relations with all the attributes of sovereignty. The written constitution which went into effect in 1789 must be read, Justice Frankfurter has said, to recognize in the national gov-

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112 *Id.*, at 408.
ernment "the powers indispensable to its functioning effectively in the company of sovereign nations."\textsuperscript{118}

The delegation theory of Professors Velvel, Wormuth, and Bickel would deny the President and the Congress the most ordinary and elementary tools for protecting the nation in a time of international turbulence. Under their rule, we should be the only nation on earth incapable of making a credible military treaty. Their rule would make it impossible firmly to delineate American interests in advance, and thus to deter and contain processes of expansion which Congress and the President deem threatening to national security. It would emasculate both Congress and the Presidency, and deprive even treaties like NATO of their weight and credibility.

The Constitution, Justice Goldberg once said, is not "a suicide pact."\textsuperscript{114} The war power, the Supreme Court has remarked, is the power to wage war successfully. So too, the power of the President and of the Congress over foreign relations is the power to wage peace successfully. There is nothing in the history of the war power and the foreign relations power, since President Washington's first term, to suggest that the United States may not seek to avert the danger of war by giving potential enemies of the nation a credible and effective warning in advance. \textit{McCulloch v. Maryland} teaches that those who oppose the presumptive constitutional validity of the means Congress and the President together select as appropriate to protect the security of the nation face a nearly insuperable burden of proof.\textsuperscript{110}

\section{C. The Political Question Doctrine}

It is sometimes claimed that the "political question" doctrine makes it impossible to reach final decisions—that is, "final" decisions by courts—on the constitutionality of procedures like those used by Presidents and Congress in Korea and Vietnam. This contention misconceives the political question doctrine. It is not, as some contend, a flexible and amorphous idea used by the Courts to avoid questions they do not wish to decide; although judges sometimes use it for this purpose. As Marshall made clear in \textit{Marbury v. Madison},\textsuperscript{110} the doctrine is something quite different: that courts cannot and should not pass on the

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\textsuperscript{114} Aptercher v. Secretary of State, 378 U.S. 500, 509 (1964).
\textsuperscript{110} 17 U.S. (4 Wheat.) 316, 409-11 (1818).
\textsuperscript{110} 5 U.S. (1 Cranch) 137 (1809).
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propriety of decisions entrusted by the Constitution or the laws to the discretion of another branch of government.\textsuperscript{117}

In Marbury's case, no court could have questioned the propriety of the President's decision to nominate Marbury rather than John Doe or Richard Roe; the Senate's vote in its absolute discretion to advise his appointment, and consent to it; or the President's final decision, having received a favorable vote from the Senate, to sign Marbury's commission, and have it sealed. The question became justiciable, the Court said, only because the political discretion of the President and the Senate was exhausted when the seal was affixed. At that moment, and not before, Marbury acquired a vested legal right, a property interest, in the office.

The question whether Marbury's right to the judgeship should be protected in court, the Court said, "far from being an intrusion into the secrets of the cabinet, ... respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents."\textsuperscript{118}

Like nearly all the intervening cases, Powell v. McCormack\textsuperscript{110} rests upon the same simple principle. The Court did not attempt to control the political decision of Congress to exclude Adam Clayton Powell, duly elected to membership in Congress. It carefully ruled, however, that while under the Constitution each House was indeed "the Judge of the Elections, Returns and Qualifications of its own members," the discretion of Congress over the admission of members could rest only on the grounds specified in the constitution—age, citizenship, residence, and election. Since it was conceded in this case that Powell met these

\textsuperscript{117} The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly insome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermediate with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and the laws, submitted to the executive, can never be made in this court.

\textit{Id. at 169-70.}

\textsuperscript{118} Id. at 170.

\textsuperscript{110} 395 U.S. 486 (1969).
constitutional qualifications, which were unalterable by the legislature, it followed that the vote excluding him was invalid. The Court took exactly the same position in *Roudebush v. Hartke:* "Which candidate is entitled to be seated in the Senate is, to be sure, a nonjusticiable political question."

By now many lower courts, faced with the complaint of young men about to be drafted into the armed forces, have passed upon the constitutionality of the war in Vietnam. Such plaintiffs surely have standing to raise the question, in the sense of a direct personal interest in the outcome of the litigation; the possibility that they may be killed or maimed in the course of military operations represents the most direct and most personal of all interests. I can imagine no civil right more profound, and more to be respected, than the right of a conscript to be assured that the war he is required to fight has been constitutionally authorized. All the courts which have passed upon the question have given these plaintiffs the answer Justice Story gave to the militiamen in *Martin v. Mott:* that whether the United States acts or does not act under a treaty; whether it decides to help or not to help a friendly government in measures of self-defense against a rebellion aided or instigated and organized from abroad; whether the President and Congress "declare" war, or choose the course of limited war—all are matters peculiarly within the discretion entrusted to the President, or to Congress, or to both, under our constitution and laws and, therefore "political" questions within the meaning of *Marbury v. Madison.* When Courts decide that the way in which the political arms of the government exercise such discretion is a "political question," they are not abstaining from a decision on its legality; on the contrary, they are deciding that the choices made were within the zone of discretion entrusted to the political branches of the government, and are therefore legal.

I should be the last to urge, as some have done, that the courts should refrain from decisions of this kind on the ground that it may be

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120 Id. at 518-22, 548-49.
impractical and undesirable to have the courts pass on such difficult and sensitive problems. On the contrary, I believe that many exercises of the military power do produce justiciable controversies, and that in such cases the courts should review the exercise of the war power by political authority to make sure it is kept within constitutional limits. I believe our national debate about Vietnam might well have been less confused and less poisonous if the Supreme Court, in a great opinion, had said what the lower courts have all said—and what I think any judge under the pressure of responsibility would necessarily conclude—that there is no constitutional basis for challenging the legality of the war in Vietnam. Men can reasonably debate whether the United States should have made the commitment of the SEATO Treaty, or honored its commitment when the Treaty was breached. They can argue about the strategy and tactics of the combat and diplomacy of the war in Indo-China. Equally, with Senator Cooper they can question whether a vote of Congress was necessary, in addition to a Treaty, to authorize the President to use the national force on a large scale in Vietnam. But when President and Congress pool all the war powers they possess, jointly and separately, what is there left to debate? It is difficult, at least for me, to discover any plausible basis for contending that the Vietnam War is unconstitutional, or even constitutionally doubtful.

D. "Necessary and Proper"

In the tense and cautious diplomacy of our present relations with the Soviet Union, as they have developed over the last twenty-five years, the authority of the President to set clear and silent limits in advance is perhaps the most important of all the powers in our constitutional armory to prevent confrontations that could carry nuclear implications. No shots have been fired between the armed forces of the United States and those of the Soviet Union; and the inhibition against firing the first shot has been an immensely powerful factor of restraint in the conduct of the cold war. The basic rule of cold war diplomacy, thus far, has been that the Soviet Union does not use force to challenge our presence, or what we clearly and privately inform them are our state interests, and

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that we likewise do not use force to oppose hers. We did not intervene in East Germany, Hungary, or Czechoslovakia. They did not use their own force to oppose our actions in Berlin, in Yugoslavia, in Greece, in Korea, and in Vietnam. In resisting the Berlin Blockade, President Truman carefully chose the air lift, a method of action that would have required the Soviets to fire the first shot. President Kennedy sought to accomplish the same end in his handling of the Cuban Missile Crisis, cautiously choosing a limited naval blockade rather than air strike or invasion, the latter strongly urged upon him by Senator Fulbright and others.124

The nature of the problem requires promptness of action, great flexibility in the choice of means, and freedom to shift, from hour to hour, in response to the exigencies of the diplomatic situation. It puts a decisive premium on establishing a deterrent presence, or a credible deterrent threat, before irrevocable steps have been taken, or decisions made.

The Javits Bill purports to abolish this power—essential to diplomacy, and to the process of avoiding war. It is a power which nearly every President has used, at least since 1794, when President Washington sent troops to drive Indians—perhaps supported by the British—from Western territories in dispute. And it is the diplomatic power the President needs most under the circumstances of modern life—the power to make a credible threat to use force in order to prevent a confrontation which might escalate.

I believe that an attempt by Congress to deprive the President of power so crucial to his duties as organ of the nation in the conduct of foreign relations is unconstitutional. It is as unconstitutional as a Presidential assumption of power deemed legislative, or as Congressional invasions of the President's much mooted power to remove subordinate officials of the Executive branch, or his pardoning power, or of the authority of the courts under Article III.125

The Senate Foreign Relations Committee claims to have discovered new potentialities in the necessary and proper clause authorizing Congress to control the way in which "any Department or officer thereof"

124 R. KENNEDY, supra note 12, at 89, 119.
125 See, e.g., Wiener v. United States, 357 U.S. 349 (1958); Reid v. Covert, 354 U.S. 1 (1957); Myers v. United States, 272 U.S. 52 (1926); Muskrat v. United States, 219 U.S. 346 (1911); United States v. Klein, 80 U.S. (13 Wall) 128, 147-48 (1871); Ex Parte Yerger, 75 U.S. (3 Wall) 85 (1869); Ex Parte Garland, 71 U.S. (4 Wall) 333, 380 (1867); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); E. CORWIN, THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION (1927). This argument was the heart of the impeachment proceedings against President Andrew Johnson. See B. CURTIS, supra note 128, at 548.
exercises its functions. But the necessary and proper clause, impressive as it is, cannot be the source of a bootstrap doctrine, empowering Congress to abolish the principle of the separation of powers. Every piece of legislation has as its tacit predicate a Congressional finding that the statute or resolution is, in the view of Congress, “necessary and proper for carrying into Execution” one or another of the powers allocated to it in Article I, Section 8. Congress has been talking the prose (or poetry) of the necessary and proper clause since 1789.

IV. CONCLUSION

The Javits Bill and similar proposals represent the passionate conviction that the campaigns in Korea and Vietnam were a mistake. Many proponents of the Bill also contend that Korea and Vietnam were “Presidential” wars, and could have been avoided if only Congress had not been stripped of its rightful powers by the usurpations of overweening modern Presidents. We are therefore in the midst of a constitutional crisis, they tell us, a crisis which can be cured, and equilibrium in the constitutional order restored, only by the passage of a statute like the Javits Bill. Men like Senator Cooper and Senator Stennis, of course, do not accept this step in the argument. They know that Korea and Vietnam did not come about because the Presidency had arrogated Congress’ powers over foreign policy; Congress fully supported those efforts when they were undertaken. But Senators Cooper and Stennis support the Javits Bill for another reason: they are trying to take advantage of the present state of opinion about Korea and Vietnam to establish certain Congressional prerogatives they have long urged in the perpetual conflict between Congress and the Presidency over their respective roles in making foreign policy. Their effort is addressed to the constitutional practice of Korea, not Vietnam. It represents Bricker’s thesis that treaties are not self-executing, but require Congressional action before they become law.

The nation is in the midst of an important foreign policy crisis. It is not a constitutional crisis requiring a redefinition of the relationship between the President and the Congress, but an intellectual and moral crisis caused by a growing tension between what we do and what we think. The ideas that for twenty-five years have shaped American foreign policy, and the foreign policy of our Allies—the visions which dominated the minds of the delegates who met at San Francisco in 1945 to write the Charter of the United Nations—have suddenly lost their power to command. When the delegates met at San Francisco in 1945,
they saw Haile Selassie standing sadly before them, as he had stood in the Palace of the League of Nations ten years before, asking in vain for help against Mussolini’s aggression. With equal shame they remembered China, which had also met silence when it besought the League to stop Japan. If the world had acted promptly, and in concert, would Japan have conquered Manchuria, and gone on to wage general war against China, and then against others? Would Italy have attacked harmless Ethiopia? Would Germany and Italy have made war against Spain, by sending arms and men to support Franco’s revolution? Would the Rhineland have been occupied, Austria and Czechoslovakia invaded? In short, could the drive towards war have been stopped earlier, before its momentum became irresistible?

To the men of 1945, the answer to these questions was self-evident. World War II could have been prevented, they believed, if Britain, France, and the United States had acted against aggression, firmly, boldly, and above all in good time.

Today there is an outcry against these ideas. Something is wrong with the notion of small wars to prevent big ones, men say, if it produces consequences as ghastly as the campaigns in Korea and Vietnam. There must be a “new” foreign policy that could liberate us from the burdens we have had to bear since 1945.

This demand is the most conspicuous theme of a bellicose literature about how to achieve peace. It is conventional to describe that literature as a “Great Debate.” Like many features of the conventional wisdom, the phrase is misleading. There is disagreement to spare in these books and articles, but little or no debate. Few of the protagonists read what their opponents write, or listen to what they say. Generally speaking, arguments are answered by epithets. The devotees of geopolitics, brooding about nuclear deterrence, dismiss their critics as amateurs, demagogues, journalists, dupes, or worse. Their critics return the compliment. Why should they waste time considering the ideas of fascists, war criminals, revisionists (or other lackeys of monopoly capitalism), or burnt-out cases whose minds were paralyzed in cold war postures twenty years ago?

In contemplating our national priorities, I can think of nothing we need more urgently than a genuine debate about what foreign policy is for. Until we come much closer to agreement on this central question, we shall have little opportunity to deal with the others.

Since 1945, there has been acute dissonance in the nation between what we thought and what we did in the name of foreign policy. While
neither the United States nor any other nation has ever dared con-
template the full-throated enforcement of the United Nations Charter
—in Eastern Europe, for example—American policy has nonetheless
been strongly influenced by the experience of the thirties, and by the
ideas of the Charter. President Truman regarded the Korean War as
atonement for the League’s failure in Ethiopia. His point was under-
scored by the presence of Ethiopian troops in Korea. And the memory
of Munich, and of President Wilson, is a living part of American con-
sciousness.

Truman’s view has not, of course, been universally accepted. The
United States has offered many explanations for its foreign policy since
the Truman Doctrine was announced in 1947: as the “containment” of
“Communism,” or of the Soviet Union, China, and Cuba; as the pro-
tection of “free nations” or of “the free world”; as the manifest destiny
of a Great Power; or as the application of the oldest and most nearly
instinctive policy in all politics—that of the balance of power.

Public opinion has not yet crystallized around any one of these
competing principles as the proper compass for our foreign policy.
Since 1945, the American government under five Presidents has felt
compelled to act in a certain pattern, from Iran, Greece, and Turkey,
to Berlin, Korea, the Middle East and Vietnam. But there is no har-
mony between this pattern of action, and widespread, and now perhaps
prevailing views as to what American and Allied foreign policy ought
to be.

The tension between public opinion and the behavior of govern-
ment is much too great for safety. That tension has already destroyed
the careers of two Presidents, Truman and Johnson; divided the nation;
split the Democratic Party; and perhaps weakened the Presidency as
well. It could have even more serious consequences, for it has given
rise to uncertainty all over the world as to what the United States will
do to protect its own security, and the security of nations it has under-
taken to defend. Uncertainty of this order invites miscalculation, the
kind of miscalculation which had led to so many catastrophes already
during this brutal and tragic century. It is hardly hyperbole to conclude
that the nation must reexamine its foreign policy before its foreign
policy destroys the nation.

The real crisis of our foreign policy can be resolved only through
a disciplined and scrupulous examination of what the nation must do,
given the condition of world politics, to preserve the possibility of
surviving as a democracy at home. That process will be difficult at best.
The relevant Congressional Committees, and Congress as a whole, should be leading the nation in a courteous and sustained debate, through which we could hope to achieve a new consensus about foreign policy, as vital, and creative, as that which sustained the line of policy which started with the Truman Doctrine, the Marshall Plan, NATO and its progeny, and the Point Four Program.

Instead, the Senate Foreign Relations Committee has chosen to escape from the demanding but manageable task of reality by retreating into the insoluble and dangerous realm of constitutional myth. No one could possibly write the statute the Javits Bill purports to be—a codification of what the Founding Fathers prudently left uncodified, the respective powers of Congress and the President in relation to the use of the national force. As George Ball pointed out in his persuasive testimony opposing the Javits Bill, the Bill represents an attempt to do what the Founding Fathers felt they were not wise enough to do: to give precision and automatic operation to the kind of legislative-executive collaboration which they deemed essential to prevent the unrestricted use of American forces by the Executive acting in the pattern of monarch, while at the same time assuring him sufficient flexibility to defend the country against any threats that might suddenly appear.126

In this time of trouble, almost as threatening to the nation as the Great European Wars of 1789-1815, we should not be diverted from the compelling task of rethinking foreign policy into a ritual purge of evil spirits, and an emasculation of the Presidency we have never needed more. The Javits Bill would turn the clock back to the Articles of Confederation, and destroy the Presidency which it was one of the chief aims of the men of Annapolis and Philadelphia to create.

126 1971 Hearings, supra note 1, at 621.
Memorandum of

LAWYERS COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM
on

War-Powers Legislation

The LAWYERS COMMITTEE ON AMERICAN POLICY TOWARDS VIETNAM is seriously concerned that the war-powers legislation (the Javits-Stennis-Beegleton bill) contains many loopholes which should be remedied in the final version issuing from the Senate Foreign Relations Committee. Our concern centers upon five key provisions.

1. The bill fails to provide for automatically calling Congress into session once an "undeclared" war is commenced by the President. The bill declares that such "undeclared" wars shall not continue for more than thirty days without specific authorization by Congress. But thirty days are then far too short and unrestricted bombing by B-52s wreak enormous devastation and might destroy a small nation which may have incurred the President's wrath. The Christmas bombing of North Vietnam -- in the midst of negotiations -- should be sufficient warning of the potential hazards of Presidential war-making. Moreover, as Arthur Schlesinger observed before the House Foreign Affairs Committee only recently, "All wars are popular the first thirty days." It must be recognized that the biggest obstacle to Congressional restraint on the President is the instinctive reaction to rally behind a war -- once begun -- however disastrous or wrong.

Nor is it an answer to point to the bill's provision authorizing Congress to terminate hostilities sooner than 30 days by bill or joint resolution (not subject to Presidential veto); for such Congressional action could be nullified by the President certifying that "military safety for prompt disengagement made continued fighting necessary. President Nixon's disengagement from Indochina remains incomplete after more than four years.

The LAWYERS COMMITTEE favors the approach Senator John Sherman Cooper advanced via-a-vis the earlier war powers legislation (see "Individual Views of John Sherman Cooper", pp. 28-33 of Senate Report No. 92-505, 92nd Cong., 2d Sess., Feb. 9, 1972). In lieu of the 30-day procedure, Senator Cooper advocated a simple joint resolution requiring the President to notify Congress whenever he used the armed forces abroad in an "undeclared" war or "believes" that such use is "imminent". Congress (if not already in session) would convene itself within 24 hours and proceed immediately to decide whether to authorize the hostilities or imminent hostilities. Senator Cooper emphasized the need for a prompt meeting and consideration by the Congress of any involvement in hostilities is the power and duty of the Congress."

We are distressed to note that Senator Cooper's salutary recommendations have not been incorporated in the revised Senate bill. We call your attention to the fact that the newly revised version of H.J.Res.2, introduced on January 3, 1973 in the House by Representative Zablocki along with 11 other Representatives, does adopt basically Senator Cooper's wise recommendations.

Senator Cooper had also proposed to change the rules of both houses to provide, in substance, that legally both houses would be deemed always in session. Senator Cooper's proposal would have the President pro tempore of the Senate and the Speaker of the House reconvene Congress if it were not in session. President Nixon's defiance of the Congress and his claim of inherent authority to wage
war should be ample warning that a President who launched an undeclared war might decline to reconvene Congress. In light of Attorney General Kleindlist's opinion of Presidential omnipotence, it requires little imagination to foresee that he might opine that the requirement for reconvening Congress was unconstitutional. And, indeed, the acting Legal Adviser to the State Department, Charles M. Brower, has already placed on the record the Administration's objection to any legislation that would require the President to reconvene Congress in the event of an undeclared Presidential war. In his testimony before the House Foreign Affairs Committee on March 13, Mr. Brower stated: "A decision to convene Congress constitutionally lies within the discretion of the President, and should depend on the circumstances prevailing at the time." What would the Founding Fathers have thought of the proposition so advanced that the President has a constitutional right not to reconvene the Congress at a time when he arrogates to himself the power to initiate war on his sole authority in negation of the constitutional mandate vested in Congress to determine war. Such a claim to arbitrary power offends the prevailing principle of our whole constitutional system.

Senator Fulbright has already pointed out that a provision authorizing the President "to forestall the direct and imminent threat" of an attack should be eliminated. Instead of curbing Presidential war-making, this provision would, in effect, confer advance Congressional authority upon Presidential usurpations, however unwarranted, as well as upon Presidential actions of dubious constitutional validity.

Senator Fulbright has warned that under such provisions a President might cite secret or classified data "to justify almost any conceivable military initiative", and that such legislative authority could be construed "as sanctioning a pre-emptive, or first, attack solely on the President's own judgment." Inasmuch as such a first strike might be nuclear, Senator Fulbright had proposed that an amendment be adopted to prohibit a nuclear first strike under any circumstances "without the prior explicit authorization of Congress." This proposal, it should be noted, had been advocated by the Federation of American Scientists. It is deplorable that this amendment vis-a-vis a nuclear first strike was not accepted by the Senate. The events of the last year -- particularly the horrendous B-52 carpet bombing of Hanoi and Haiphong approaching in tonnage the Hiroshima and Nagasaki atom bombs -- should dictate the necessity of expressly incorporating in the war-powers legislation an explicit prohibition against a nuclear first strike.

We commend to the Foreign Relations Committee H.J.Res.267, introduced by Representative Delious, which would forbid first use of nuclear weapons anywhere in the world in any type of war without prior authorization by Congress, though it would not limit the President's power to respond in-kind to a nuclear attack.

There may arise circumstances -- and lamentably the Indochina war was one such instance -- in which the commander-in-chief judges that the peace and safety of the United States require him to initiate hostilities without Congressional authorization. But our legal order does not commit the question of the measures appropriate to protect the peace and safety of the United States to the judgment of the commander-in-chief; it commits it to Congress. Until Congress takes action
the United States cannot legally initiate hostilities.

Those who desire a government which would vest the power to initiate war in a single man are free to seek an amendment to the Constitution which transfers the war power to the President. But why should the Congress, seeking to curb undeclared Presidential war, confer upon the President just such power, however much unintended.

3. The Senate bill is deficient in that it applies only to the commitment of troops to actual hostilities but does not apply to their deployment abroad. This is a serious deficiency; the Indochina experience indicates the due necessity of halting the deployment of troops abroad -- before the march of events catapults the nation into combat.

In this respect the revised Zablocki bill (H.J.Res.2), building on the Indochina experience, requires the President to report to Congress and require its approval not only when the President commits armed forces to combat but when he "commits military forces equipped for combat to the territory, airspace or waters of a foreign nation", or "substantially enlarges military forces already located in a foreign nation."

We strongly urge that the deployment contingencies covered in the Zablocki bill be incorporated in the Senate bill.

4. Although the Senate bill would, in effect, recall the many blank checks (the "constitutional processes" requirement) outstanding in existing mutual security treaties by requiring specific congressional authorization for the use of troops under them, the bill does not, however, cover the special provisions embodied in the Middle East, Formosa and Cuba resolutions, adopted during the Kennedy and Eisenhower administrations. Failure to deal explicitly with these resolutions leaves the door open for undeclared Presidential wars.

5. The exemptive clause making the war powers bills inapplicable "to hostilities in which the armed forces of the United States are involved on the effective date of this Act" should be eliminated. It is imperative that Congress reassert its constitutional responsibilities and powers without reservation. It is imperative that the resumption of the Indochina war be prevented. In the light of the unprecedented B-52 bombings of the densely populated cities of Hanoi and Haiphong last December -- which outraged all of mankind -- how can Congress temporize?

We are aware of the interpretation advanced by Senators Stennis and Eagleton that if on March 28, 1973 "all other provisions of the cease-fire agreement are upheld by the signatory nations, American participation in hostilities within North and South Vietnam will terminate", and at such time the war powers bill would "apply in full to any reintroduction of American forces to North and South Vietnam", and that it would apply to Cambodia and Laos once cease-fire agreements had come into force in those countries.

In light of President Nixon's defiance of Congress -- witness the impoundment of funds authorized in legislation passed over his veto -- it would be optimistic indeed to rely on such provisions or interpretations. What reason is there to believe that President Nixon would not veto the war powers legislation? What reason is there to believe that Mr. Nixon would agree to the Eagleton interpretation? The Administration has already indicated that it would consider resumption of hostilities if a violation of the cease-fire accord occurred. President Nixon has previously stated that he did not consider the Mansfield Amendment to the Military Procurement Authorization Act as binding upon him -- even though he
himself signed the bill. What reason is there to believe he would do otherwise vis-a-vis the war-powers bill. He might, in the present posture of the bill, resume bombing for 29 days -- and point to the war powers bill as a grant of authority.

How should Congress react to a President who persists in bombing Cambodia even when the specious ground previously relied upon -- the safety of American troops in Vietnam -- has evaporated into thin air. How can Congress tolerate the unbridled arrogance of power contemptuously displayed by the President? Will Congress leave unchallenged Deputy Assistant Secretary of State William Sullivan's response when asked what was the President's legal authority for bombing Cambodia: "For now I'd just say the justification is the re-election of President Nixon."

It is imperative that the Senate proceed to secure the enactment of the Church-Case legislation forbidding the use of any funds whatsoever "to finance the reinvolvement of U. S. Military forces in hostilities in or over" Vietnam, Laos or Cambodia "without prior, specific authorization by Congress." It is a sad commentary that so vigilant a committee as the Senate Foreign Relations Committee failed to press the Church-Case rider to the Foreign Assistance bill for fiscal 1973.

Important as is the problem of preventing future undeclared Presidential wars, the immediate, pressing and urgent task is to prevent the resumption of war in Indochina.

It is not enough to proclaim that Presidential war-making is unconstitutional and illegal. The grim fact is that executive war-making is practiced and ultimately 'practice makes law.' The events of recent years show that the transfer of the war power to the President draws other powers with it -- witness the untrammeled impoundment practiced by the executive and the blunderbuss extension of "executive privilege" -- a myth lacking constitutional basis.

If we continue to follow the easy downward path of executive aggrandizement, our republican institutions will become as evanescent as those of imperial Rome. Perhaps this was our destiny. When the United States embarked upon a course of imperialism with the Spanish-American War, the distinguished political scientist John W. Burgess warned that this meant the end of constitutional government. In his classic, The Reconciliation of Government with Liberty, (p.373) Burgess observed:

"There is nothing now to prevent the Government of the United States from entering upon a course of conquest and empire... We are by no means a peaceably inclined people... In fact, besides being belligerent and boastful, we are restless, nervous, and at times hysterical. We have just the qualities to answer the call of a Napoleon in the Presidency."

Respectfully,

By: Joseph H. Crowly, Co-Chairman

Hoch Reid, Director of Research
Hon. J. W. Fulbright,
Chairman, The Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

Dear Senator Fulbright: I understand that the Committee on Foreign Relations of the United States Senate is currently holding hearings on war powers legislation. I happen to be the author of a House bill in this very important field, H.R. 3046, and as such I raised the question of whether it might be appropriate for me to appear at this time before your distinguished Committee. I understand that the decision has been made not to hear from Members of the House at this particular time, but that it might be appropriate to submit a statement and documentation for the record. I therefore enclose the following:

1. a copy of my bill, H.R. 3046;
2. a summary of its provisions;
3. a copy of a short statement with a summary of the bill from page H510 of the Congressional Record of January 29, 1973, and
4. a copy of the statement I made before the House Committee on Foreign Affairs in support of this measure.

I would appreciate it very much if you would be good enough to insert these documents together with this letter in the record of your hearings and I would be happy, of course, to appear at any appropriate time in further support of the measure.

You will note that the approach I have taken is, first, to recognize the principle that where there has been no declaration of war nor any attack upon the United States, there should normally be prior Congressional authorization to commit troops to combat abroad. Recognizing, however, that emergency situations may arise and believing that it is impossible to foresee exactly what these emergency situations may be, my measure would permit the President, in such situations—to be determined at his discretion—to nevertheless commit troops to combat abroad without prior Congressional approval. Whenever he did this, however, the President would be required to make an immediate report to the Congress and the Congress would be required to debate that report and either approve or disapprove the action taken. In the event the action was not disapproved, the President would be required to make periodic reports at intervals of not to exceed six months, at which time the Congress would again be required to vote approval or disapproval. If and whenever the Congress might affirmatively disapprove the action taken, then the President would be required to terminate that action. The measure would not apply to hostilities in programs, existing treaty obligations, whatever they may be; and I do not attempt to determine what these obligations are.

I may say that in my respectful judgment, Senator Javits' bill (and, of course, he deserves great credit for his pioneering efforts) suffers from two basic defects. First, it attempts to foresee and to limit and classify the types of occasions in which the President can commit troops to combat abroad without prior Congressional authority. I do not think that it is possible to foresee all of the emergency situations which may arise. Second, his bill provides that even in these situations, such action without prior Congressional authorization can continue for only 30 days. I do not think that this limitation is a practical one, and moreover it is my belief that in some of the situations listed by Senator Javits—and notably in the case where he is defending this country from an attack—the President is acting under an inherent constitutional authority, and if this is correct I do not see how Congress can limit action of this type to a period of 30 days. This point, you will recall, was made by Senator Cooper in his separate views to the report of the Committee on Foreign Relations in the 92nd Congress. My bill, on the other hand, would have no application when there was an attack on the United States; its territories or possessions, and thus this constitutional problem is avoided.

I respectfully submit that the provisions of my bill, which I have discussed with a good number of knowledgeable people, meet many of the objections urged against other war powers legislation; and I hope that the approach embodied
therein may have some serious attention from your distinguished Committee when you come to consider the reporting of legislation.

With many thanks for your attention and for your courtesy, I am

Sincerely,

DAVID W. DENNIS,

Member of Congress.

[A BILL To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress of the United States or of a military attack upon the United States]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. In the absence of a declaration of war by the Congress or of a military attack upon the United States, its territories or possessions, the Armed Forces of the United States shall not be committed to combat or introduced into a situation where combat is imminent or likely at any place outside of the United States, its territories and possessions, without prior notice to and specific prior authorization by the Congress, except in case of emergency or necessity, the existence of which emergency or necessity is to be determined by the President of the United States.

SEC. 2. Whenever, in the absence of a declaration of war by the Congress or of a military attack upon the United States, its territories or possessions, the President of the United States nevertheless determines that an emergency or necessity exists which justifies such action, and shall, by consequence, commit the Armed Forces of the United States to combat or shall introduce them into a situation where combat is imminent or likely at any place outside of the United States, its territories or possessions, without prior notice to and authorization by the Congress, as is provided and authorized in such cases under and pursuant to the provisions of section 1 of this Act, the President shall report such action to the Congress in writing, as expeditiously as possible and, in all events, within twenty-four hours from and after the taking of such action. Such report shall contain a full account of the circumstances under which such action was taken and shall set forth the facts and circumstances relied upon by the President as authorizing and justifying the same. In the event the Congress is not in session the President shall forthwith convene the Congress in an extraordinary session and shall make such report to the Congress as expeditiously as possible and, in all events, within forty-eight hours from and after the taking of such action.

SEC. 3. Not later than ninety days after the receipt of the report of the President provided for in section 2 of this Act, the Congress, by the enactment within such period of a bill or resolution appropriate to the purpose, shall either approve, ratify, confirm, and authorize the continuation of the action taken by the President and reported to the Congress, or shall disapprove and require the discontinuance of the same.

SEC. 4. If the Congress, acting pursuant to and under the provisions of section 3, shall approve, ratify, and confirm and shall authorize the continuation of the action taken by the President and so reported to the Congress, the President shall thereafter report periodically in writing to the Congress at intervals of not more than six months as to the progress of any hostilities involved and as to the status of the situation, and the Congress shall, within a period of thirty days from and after the receipt of each such six-month report, again take action by the enactment of an appropriate bill or resolution, to either ratify, approve, confirm, and authorize the continuation of the action of the President, including any hostilities which may be involved, or to disapprove and require the discontinuance of the same.

SEC. 5. If the Congress shall at any time, acting under the provisions of section 3 or section 4, disapprove the action of the President and require the discontinuance of the same, then the President shall discontinue the action so taken by him and so reported to the Congress, and shall terminate any hostilities which may be in progress and shall withdraw, disengage, and redeploy the Armed Forces of the United States which may be involved; just as expeditiously as may be possible having regard to, and consistent with, the safety of the Armed Forces of the United States, the necessary defense and protection of the United States, its territories and possessions, the safety of citizens and nationals of the United
States who may be involved, and the reasonable safety and necessities, after
due and reasonable notice, of allied or friendly nationals and troops.

SEC. 6. In the event that the Congress, despite the provisions of sections 3, 4,
and 5 of this Act, shall, nevertheless, in any instance, fail to adopt legislation
either approving or disapproving the action of the President, as provided and re­
quired by sections 3, 4, and 5, such failure to act on the part of the Congress
shall be taken and deemed to be an approval, ratification, and confirmation of
the action of the President, and an authorization of the continuation thereof;
and disapproval of the President’s action, with the consequences attendant there­
upon as provided in section 5, shall result only from action by the Congress affirmatively
disapproving and requiring the discontinuance thereof, as in section 5 pro­
vided. Any such failure to act on the part of the Congress shall in no wise relieve
the President of the duty to make periodic reports to the Congress as provided
in section 4 of this Act.

SEC. 7. For the purposes of this Act the Panama Canal Zone shall be taken
and deemed to be a territory or possession of the United States.

SEC. 8. Nothing contained in this Act shall alter or abrogate any obligation
imposed on the United States by the provisions of any treaty to which the United
States is presently a party.

SEC. 9. If any provision of this Act or the application thereof to any particular
circumstance or situation is held invalid, the remainder of this Act, or the applica­
tion of such provision to any other circumstance or situation, shall not be affected
thereby.

SEC. 10. 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.

SUMMARY OF H.R. 8046

One of the great unresolved constitutional questions in our country is the
question of the distribution of the war powers, under the Constitution, between
the executive and the legislative branch.

The question is highly important, it is in no sense a partisan one, and it has
been with us throughout our history.

Drafting of legislation which attempts to limit or define the war power, which
will be effective and yet sufficiently flexible, and which will meet adequately
situations which can not altogether be foreseen, is very difficult. Nevertheless
I believe the problem is sufficiently important to justify the effort.

I have drafted a bill for this purpose, and briefly and in outline my bill provides
as follows:

1. When there has been no declaration of war by the Congress, nor any attack
on American territory, the President shall not commit the armed forces of the
United States to combat or to situations abroad where combat is imminent or
likely without prior congressional approval; except in cases of emergency or
necessity—the existence of which emergency or necessity shall, however, be
determined by the President.

2. If the President determines that an emergency exists in such situations
which justifies and requires the commitment of our armed forces to combat or
to combat situations abroad without prior congressional approval, he shall
immediately make a report in writing to the Congress respecting his action.

3. The Congress, shall within 90 days thereafter take legislative action to
approve or to disapprove the action of the executive.

4. If the Congress approves the action taken, the President shall thereafter
make reports on the situation to the Congress at intervals of not more than
six months, and the Congress shall thereupon (and within 60 days from the
receipt of such report) again approve or disapprove the action of the executive.

5. If, on receipt of the first Presidential report or at the time of any sub­
sequent report—as above provided—the Congress acts to affirmatively dis­
approve the action of the executive, the President shall thereupon terminate the
action taken and disengage the troops involved as expeditiously as it may be
possible to do so “having regard to, and consistent with, the safety of the armed
forces of the United States, the necessary defense and protection of the United
States, its territories and possessions, the safety of citizens and nationals of the
United States who may be involved, and the reasonable safety and necessities,
after due and reasonable notice, of allied or friendly nationals and troops.”

6. The bill does not apply to any hostilities which are in progress at the time of
the passage of the bill.
7. The bill does not alter or abrogate any presently existing treaty obligations of the United States.

I have not attempted to define and detail in advance the situations in which the President can act without prior congressional approval. I do not think that all such situations can be foreseen, and I have intentionally left the President flexibility. Neither do I attempt to put any automatic termination point on action taken. If the President acts to commit our armed forces to combat abroad without prior congressional approval, however, (except where Congress has declared war or the Nation has been attacked) he must thereafter promptly report his action to Congress and obtain its approval—or disapproval—and if the action is approved he must periodically report on the situation and thereafter Congress must again pass upon it. Only affirmative disapproval by the Congress will require the action undertaken by the executive to be discontinued.

I am trying to draw permanent legislation for the long run situation—legislation which will leave the executive room to act and which will yet make certain that the Congress, as representatives of the people, is assured an active part and participation in the fateful decisions of peace and war.

PROPOSED ARMED FORCES LEGISLATION

Mr. DENNIS. Mr. Speaker, last Friday I introduced—with some of my distinguished colleagues—a bill entitled:

A bill to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war—or of a military attack upon the United States.

Briefly the bill provides that in such cases prior approval by the Congress is necessary in order to commit our Armed Forces to combat abroad: but it permits such action by the President without prior congressional approval in cases of emergency or necessity, followed by prompt report to the Congress with provision for congressional approval or disapproval of the action. This bill is a serious effort to provide long-range legislation which will leave the Executive necessary flexibility while assuring congressional participation.

I have asked for hearings, and I am today placing in the Record a copy of the bill and a digest of its provisions.

OUTLINE OF THE BILL

1. When there has been no declaration of war by the Congress, nor any attack on American territory, the President shall not commit armed forces of the United States to combat or to situations abroad where combat is imminent or likely without prior congressional approval; except in cases of emergency or necessity—the existence of which emergency or necessity shall, however, be determined by the President.

2. If the President determines that an emergency exists in such situations which justifies and requires the commitment of our armed forces to combat or to combat situations abroad without prior congressional approval, he shall immediately make a report in writing to the Congress respecting his action.

3. The Congress shall within 90 days thereafter take legislative action to approve or to disapprove the action of the executive.

4. If the Congress approves the action taken, the President shall thereafter make reports on the situation to the Congress at intervals of not more than six months, and the Congress shall thereupon (and, within 30 days from the receipt of such report) again approve or disapprove the action of the executive.

5. If, on receipt of the first Presidential report or at the time of any subsequent report—as above provided—the Congress acts to affirmatively disapprove the action of the executive, the President shall thereupon terminate the action taken and disengage the troops involved as expeditiously as it may be possible to do so "having regard to, and consistent with, the safety of the armed forces of the United States, the necessary defense and protection of the United States, its territories and possessions, the safety of citizens and nationals of the United States who may be involved, and the reasonable safety and necessities, after due and reasonable notice, of allied or friendly nationals and troops."

6. The bill does not apply to any hostilities which are in progress at the time of the passage of the bill.

7. The bill does not abrogate or alter existing treaty obligations of the United States.
Mr. Chairman and members of the committee:

I appear here today before your distinguished Committee in behalf of H.R. 3046, of which I am the author and of which Mr. Rhodes of Arizona, Mr. Smith of New York, Mr. Erlenborn of Illinois, Mr. McClory of Illinois, and Mr. Buchanan of Alabama are co-sponsors.

This is a measure entitled "A Bill to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress of the United States or of a military attack upon the United States."

Briefly, and in outline, its provisions are as follows:

(1) When there has been no declaration of war by the Congress, nor any attack on American territory, the President shall not commit the armed forces of the United States to combat or to situations abroad where combat is imminent or likely without prior Congressional approval; except in cases of emergency or necessity—the existence of which emergency or necessity shall, however, be determined by the President.

(2) If the President determines that an emergency exists in such situations which justifies and requires the commitment of our armed forces to combat or to combat situations abroad without prior Congressional approval, he shall immediately make a report in writing to the Congress respecting his action.

(3) The Congress shall within 90 days thereafter take legislative action to approve or to disapprove the action of the executive.

(4) If the Congress approves the action taken, the President shall thereafter make reports on the situation to the Congress at intervals of not more than six months, and the Congress shall thereupon (and within 30 days from the receipt of such report) again approve or disapprove the action of the executive.

(5) If, on receipt of the first Presidential report or at the time of any subsequent report—as above provided—the Congress acts to affirmatively disapprove the action of the executive, the President shall thereupon terminate the action taken and disengage the troops involved as expeditiously as it may be possible to do so "having regard to, and consistent with, the safety of the armed forces of the United States, its territories and possessions, the safety of citizens and nationals of the United States who may be involved, and the reasonable safety and necessities, after due and reasonable notice, of allied or friendly nationals and troops."

(6) The bill does not apply to any hostilities which are in progress at the time of the passage of the bill.

(7) The bill does not abrogate or alter existing treaty obligations of the United States.

I am pleased to be afforded the opportunity to appear before this distinguished Committee on the exceedingly important topic of the war powers of the President and the Congress—or the distribution as between Congress and the President of the war power of the United States, for I know of no topic, Mr. Chairman, which could be more vital to our nation or more worthy of our most painstaking consideration. The problem before us is not a new one—it has been with us since the early days of our Republic.

It is a problem fraught with controversy because neither the presumed intentions of the framers, the language of the Constitution itself, nor the gloss given to the Constitution by years of interpretation by means of actual practice, has served to bring about a crystal-clear and indisputable resolution to conflicting points of view.

I am prepared, however, after some study and consideration of the subject, to accept and to defend the point of view that the intention of the framers was, basically and in general, to lodge with Congress the power and authority to commit the Nation to war (subject to a right in the executive to act in emergency situations to—In Madison's words—"repel sudden attacks") while placing in the President as Commander-in-Chief the conduct and direction of the war once the commitment to war has been made.

I base this view on the rather specific language of Article I, Sec. 8 of the Constitution, plus such early and authoritative interpretations as that of Thomas Jefferson, writing to James Madison in 1789, when he said:
"We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."

and that of Alexander Hamilton who, in Federalist 69, wrote as follows:

"The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy, while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature."

The Supreme Court in The Prize Cases, 2 Black (67 U.S.) 635 (1862), moreover, while upholding the executive declaration of a blockade, remarked that "Congress alone has the power to declare a national or foreign war", and that "He [the President] has no power to initiate or declare a war". Chief Justice Marshall in Talbot v. Seeman, 1 Oranch (5 U.S.) 28 (1801) spoke of "The whole powers of war being, by the constitution of the United States, vested in congress . . . ". and Congressman Abraham Lincoln showed his understanding of the matter when he wrote to his law partner, Bill Herndon, and said:

"The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention undertook to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us."

Proponents of the executive power argue that the rationale of the concept that the President might act "to repel sudden attacks" (which Madison stated as the reason for changing the proposed words giving Congress the power "to make war" to the words "to declare war") was, and is, broad enough to justify independent action by the President to use the armed forces to protect the nation's security in a variety of emergency situations; and they can and do point to a long list of actual occasions on which such executive action has, in fact, been taken.

See, in this connection, the testimony of the Honorable William P. Rogers, the Secretary of State, before the Committee on Foreign Relations of the United States Senate on May 14, 1971. Secretary Rogers cited the cases of Mr. Jefferson and the Barbary pirates, President Polk and Mexico, President McKinley and the Boxer Rebellion, Theodore Roosevelt and Panama; actions by Presidents Theodore Roosevelt, Taft, Wilson and Coolidge in Mexico, other parts of Latin America, and the Caribbean; President Franklin D. Roosevelt's destroyers-for-bases agreements, with dispatch of troops to Greenland and Iceland; President Truman's action in Korea, President Eisenhower's lauding of Marines in Lebanon, President Kennedy's quarantine of Cuba, and President Johnson's landing of Marines in the Dominican Republic, all as executive actions using and committing our armed forces without a declaration of war and often without prior Congressional authorization and in that connection he said:

"I cite these historical precedents not because I believe they are dispositive of the constitutional issues your Committee is considering—far from it—but to illustrate how the constitutional system adapts itself to historical circumstances. Whatever the reasons for presidential initiatives during this period, they seem to have been responsive to the times and to have reflected the mood of the nation."

Some argue, and it is a legitimate argument worthy of serious consideration, that whatever ambiguity there may be in this field of the respective war powers of the executive and legislative branches, it is better left alone; that the task of legislative definition is an impossible one, requiring a rigidity not adapted to the varying and unforeseeable forms in which the problem may arise; and that while legislative and executive cooperation in the field are important this is best left to the good will and the good judgment of both branches, without any legislative attempt to define areas in this field of Constitutional powers.
Thus Secretary Rogers, in his testimony already referred to, while recognizing that:

"... the framers of the Constitution intended decisions regarding the initiation of hostilities to be made jointly by the Congress and the President, except in emergency situations."

and while stating that:

"The recognition of the necessity for cooperation between the President and Congress in this area and for the participation of both in decision-making could not be clearer than it is today."

nevertheless held that:

"What is required is the judicious and constructive exercise by each branch of its constitutional powers rather than seeking to draw arbitrary lines between them."

I concede that this is a difficult field in which to legislate, and I am of the opinion—for example—for reasons which I will state in a few moments, that the proposed bill of the distinguished Senator from New York, Mr. Javits, which passed the Senate in the 92nd Congress, falls fatally afool of these very arguments and, for that reason, ought not to be adopted.

The difficulty with the No Congressional Action thesis, however, lies in the fact that the executive (which earlier in our history was rather careful of the Congressional prerogative) increasingly in recent years—due in part to Congressional acquiescence and in part, no doubt, impelled by the necessities of modern conditions—has taken more and more power to itself in this field, and has engaged in military operations of increasing magnitude without prior Congressional authority, with the result that we are in danger of losing that degree of Congressional participation and cooperation which all concede is necessary to the satisfactory conduct of military operations by the United States.

For this reason I have become convinced that a legislative effort to preserve and to further this Congressional participation is in order and is important, constructive and worthwhile, provided that this can be successfully accomplished while still preserving to the executive the flexibility to act promptly in the national interest which the realities of the modern world may require.

H.R. 3046 is presented as a serious effort to accomplish this important task.

If you will permit me to briefly analyze H.R. 3046 you will note the following:

First.—The bill recognizes the principle that when there has been no Congressional declaration of war, nor any attack on the United States, the President shall not ordinarily commit our armed forces to combat abroad without prior Congressional authorization.

Second.—It recognizes that situations of emergency or necessity may nevertheless occur which warrant such executive action without prior Congressional authorization.

Third.—It does not attempt to define, to list, or to categorize what these cases of emergency or necessity may be, and it leaves to the President the determination of whether such an emergency or necessity exists.

This is important; and it is an important point of difference from, and, in my respectful judgment, of superiority over, Senator Javits' bill, to which I have already referred.

The distinguished Senator from New York does attempt to list four cases, and four cases only, where the executive can act to commit troops to combat without a Congressional declaration of war.

In my judgment this is unrealistic and unduly restrictive—for the simple reason that it is impossible to foresee all the different and varying situations which may arise, and which may perhaps imperatively require such executive action.

Fourth.—Whenever such executive action without prior Congressional authority is taken, prompt report must be made by the executive to the Congress. This will keep the Congress informed, and this legal necessity for reporting and for justifying the action taken will, I think, have a salutary effect in discouraging ill-considered executive action.

Fifth.—Congress is thereafter required to take prompt action to approve or to disapprove the action of the executive. This assures Congressional consideration of what has been done and of participation in the decision.

Sixth.—If Congress approves (or, alternatively, fails to disapprove) the action taken, the President is required to make subsequent and continuing reports to Congress, at not to exceed six-month intervals.
Seventh.—Congress, on receipt of such subsequent reports, must again consider them and must again act thereon. These provisions—6th and 7th—are designed to assure continuing Congressional participation, and I believe and submit that for this reason they are highly important, and are probably the heart of the bill.

Eighth.—If Congress ever affirmatively disapproves the action taken, the President must terminate it as expeditiously as possible.

Finally.—The bill is prospective in character and in operation and does not apply to any hostilities in progress when it is adopted; nor does it alter or abrogate pre-existing treaty obligations, whatever these may be.

I believe and submit that H.R. 3046 meets most of the objections which have been urged—and I believe urged with some force—against other war power bills. I have already noted what I believe to be the fallacy of the effort to confine independent executive action in this field to four specified categories on a “use” basis. Senator Javits’ bill, moreover, seeks to limit action even in these categories to only 30 days’ duration, which, I submit, is certainly unrealistic and, since the categories so limited include even the case of an armed attack on the United States, is also probably unconstitutional—because surely the executive has the Constitutional right and duty to defend the country against an armed attack, and this Constitutional right and duty can hardly be limited by Congressional enactment to an exercise of only 30 days. H.R. 3046, on the other hand, does not apply or become operative at all in the case of an attack upon the United States, its territories or possessions.

The bill H.R. 3046 is thus submitted to your consideration as a bill designed as a long-range measure, which will not rigidly or unrealistically circumscribe necessary action by the Chief Executive, but which will assure, in the future, that cooperation and co-participation between the executive and the legislative branch, in the vital matter of peace and war, which was contemplated and intended by our fathers the framers of the Constitution, and which, in my judgment, is absolutely necessary to our continued functioning as a representative Republic.
IN THE SENATE OF THE UNITED STATES

JANUARY 18, 1973

Mr. JAVITS (for himself, Mr. STENNIS, Mr. EAGLETON, Mr. BENTSEN, Mr. TAFT, Mr. ABOUNED, Mr. BAKER, Mr. BAYH, Mr. BIBLE, Mr. BROW, Mr. BROOKE, Mr. BURDICK, Mr. HARRY F. BYRD, JR., Mr. ROBERT C. BYRD, Mr. CASE, Mr. CHILES, Mr. CLARK, Mr. COOK, Mr. CRANSTON, Mr. FONG, Mr. HART, Mr. HARKELL, Mr. HAYFIEL, Mr. HATHAWAY, Mr. HUNDESTON, Mr. HUGHES, Mr. HUMPHREY, Mr. INOUYE, Mr. KENNEDY, Mr. MAGNUSON, Mr. MANSFIELD, Mr. MATHIAS, Mr. MOGOWERN, Mr. MECALF, Mr. MONDALE, Mr. MOSS, Mr. MUSKIE, Mr. NELSON, Mr. NUNN, Mr. PACKWOOD, Mr. PELL, Mr. PERCY, Mr. PROXMIRE, Mr. RANDOLPH, Mr. RUSCOFF, Mr. ROTH, Mr. SCHWEIZER, Mr. SCOTT of Pennsylvania, Mr. STAFFORD, Mr. STEVENS, Mr. STEVENSON, Mr. SYMINGTON, Mr. TALMADGE, Mr. TUNNEY, Mr. WEICKER, Mr. WILLIAMS, and Mr. YOUNG) introduced the following bill; which was read twice and referred to the Committee on Foreign Relations.

A BILL
To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress.

1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the “War Powers Act”.

PURPOSE AND POLICY

SEC. 2. It is the purpose of this Act to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the Armed Forces.
Forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations after they have been introduced in hostilities or in such situations. Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof. At the same time, this Act is not intended to encroach upon the recognized powers of the President, as Commander in Chief and Chief Executive, to conduct hostilities authorized by the Congress, to respond to attacks or the imminent threat of attacks upon the United States, including its territories and possessions, to repel attacks or forestall the imminent threat of attacks against the Armed Forces of the United States, and, under proper circumstances, to rescue endangered citizens and nationals of the United States located in foreign countries.

EMERGENCY USE OF THE ARMED FORCES

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 circum-
stances, only—

(1) 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;

(2) 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;

(3) to protect while evacuating citizens and nation-
als of the United States, as rapidly as possible, from (A)
any situation on the high seas involving a direct and im-
minent 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 gov-
ernment of such country and are being subjected to a
direct and imminent threat to their lives, either spon-
sored 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; or

(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 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 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.

REPORTS

SEC. 4. The introduction of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act shall be reported promptly in writing by the President to the Speaker of the House of Representatives and the President of the Senate, together with a full account of the circumstances under which such Armed Forces were introduced in such hostilities or in such situation, the estimated scope of such hostilities or situation, and the consistency of the introduction of such forces in such hostilities or situation with the provisions of section 3 of this Act. Whenever Armed Forces of the United States are engaged in hostilities or in any such situation outside of the United States, its territories
and possessions, the President shall, so long as such Armed
Forces continue to be engaged in such hostilities or in such
situation, report to the Congress periodically on the status of
such hostilities or situation as well as the scope and expected
duration of such hostilities or situation, but in no event shall
he report to the Congress less often than every six months.

THIRTY-DAY AUTHORIZATION PERIOD

SEC. 5. The use of the Armed Forces of the United
States in hostilities, or in any situation where imminent in-
volve ment in hostilities is clearly indicated by the circum-
stances, under any of the conditions described in section 3 of
this Act 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 mil-
tary 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.
TERMINATION WITHIN THIRTY-DAY PERIOD

SEC. 6. The use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act may be terminated prior to the thirty-day period specified in section 5 of this Act by an Act or joint resolution of Congress, except in a case where the President has determined and certified 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.

CONGRESSIONAL PRIORITY PROVISIONS

SEC. 7. (a) Any bill or joint resolution authorizing a continuation of the use of the Armed Forces of the United States in hostilities, or in any situation where imminent involvement in hostilities is clearly indicated by the circumstances, under any of the conditions described in section 3 of this Act, or any bill or joint resolution terminating the use of Armed Forces of the United States in hostilities, as provided in section 6 of this Act, shall, if sponsored or cosponsored by one-third of the Members of the House of Congress in which it is introduced, be considered reported
to the floor of such House no later than one day following
its introduction unless the Members of such House otherwise
determine by yeas and nays. Any such bill or joint resolution,
after having been passed by the House of Congress in which
it originated, shall be considered reported to the floor of
the other House of Congress within one day after it has
been passed by the House in which it originated and sent
to the other House, unless the Members of the other House
shall otherwise determine by yeas and nays.

(b) Any bill or joint resolution reported to the floor pur-
suant to subsection (a) or when placed directly on the calen-
dar shall immediately become the pending business of the
House in which such bill or joint resolution is reported or
placed directly on the calendar, and shall be voted upon
within three days after it has been reported or placed directly
on the calendar, as the case may be, unless such House shall
otherwise determine by yeas and nays.

SEPARABILITY CLAUSE

Sec. 8. If any provision of this Act or the application
ter to any person or circumstance is held invalid, the
removal of the Act and the application of such provision
to any other person or circumstance shall not be affected
thereby.
EFFECTIVE DATE AND APPLICABILITY

Sec. 9. 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. 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.