given the language in section 2(c) where the President can exercise powers as Commander in Chief only under those three situations, none of which applied in either Cambodia or Vietnam.

STATE UPHOLDS AUTHORITY AS "COMMANDER IN CHIEF"

Mr. Leigh. Well, from a legal point of view I think the shortest answer is that the Congress cannot by statute circumscribe a power which is derived from the Constitution.

Mr. Solarz. So if I understand what you are saying—

Mr. Leigh. You have then the obligation, if you are trying to construe the statute, to try to construe it in such a way as to maintain its constitutionality. So if you take that very literal interpretation which you gave to it, I think you run smack up against the constitutional question and I think lawyers could try to resolve that either by saying it is inconsistent with the President's independent power as Commander in Chief or else they could say we prefer to construe it as not intended to be exhaustive—and I admit that the word "only" flies in the face of that, but lawyers are always dealing with inconsistencies between one piece of legislation and another or between a constitutional principle and a statute.

Mr. Solarz. Can you cite any judicial decisions which would lend substance to your interpretation of section 2(c) with respect to the inherent authority of the President to use American forces in combat situations not encompassed under the situations in that subsection?

Mr. Leigh. Well, we are going to supply, as has been requested, a memorandum to the committee for inclusion in the record. Among the things that we would cite would be the statement of Chief Justice Taft in 1916, the Slaughterhouse cases which were decided by the Supreme Court in 1872 and the case of—

JUDICIAL DECISIONS CITED

Mr. Solarz. What did the Slaughterhouse cases have to do with an evacuation?

Mr. Leigh. A portion of that opinion reads:

Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. There can be no doubt that the right depends on his character as a citizen of the United States.

Perhaps rather than try to multiply citations, of which there are very many, I assure you, it would make more sense for us to write a memorandum.

Mr. Solarz. You can do that.

[The memorandum follows:]

THE PRESIDENT'S AUTHORITY TO USE THE ARMED FORCES TO EVACUATE U.S. CITIZENS AND FOREIGN NATIONALS FROM AREAS OF HOSTILITY

1. THE CONSTITUTIONAL AUTHORITY OF THE PRESIDENT

From the time of Jefferson to the present, American Presidents have exercised their authority under the Constitution to use military force to protect
U.S. citizens abroad. Instances where this authority has been exercised in the absence of any legislative action include the Boxer Rebellion in China in 1900, and the landing of Marines in Nicaragua in 1926.

During the Congo crisis of 1964 and the Dominican Intervention of 1965, large numbers of foreign nationals together with U.S. citizens were evacuated in military actions ordered by the President. A sample listing of occasions when Presidents have exercised authority to direct evacuations of Americans and of foreign nationals is attached to this memorandum.

The first explicit judicial recognition of this authority appears to be the U.S. Circuit Court decision in Durand v. Hollins, 8 Fed. Cas. 111, 112 (1860). This was a suit against a navy commander for damages caused by his forces during an action to protect U.S. citizens in Greytown, Nicaragua in 1854. The court found that since the military action was pursuant to a valid exercise of Presidential authority, the navy commander was not liable.

Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action.

The question whether it was the duty of the President to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there, was a public political question, in which the government, as well as the citizens whose interests were involved, was concerned, and which belonged to the executive to determine; and his decision is final and conclusive, and justified the defendant in the execution of his orders given through the secretary of the navy. (Emphasis added.)

The Supreme Court in In Re Neagle, 135 U.S. 63-64 (1889), noted that the President had certain exclusive "rights, duties and obligations growing out of the Constitution itself" which included an implied obligation to protect U.S. citizens abroad. The Court then referred to a military action to protect one Martin Koszta, a foreign national who had merely indicated his intention to become a naturalized U.S. citizen:

While in Smyrna he [Koszta] was seized by command of the Austrian consul general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hulsemann, the Austrian minister at Washington, ... resulted in the release and restoration to liberty of Koszta. ... Upon what act of Congress then existing can one lay his finger in support of the action of our government in this matter?

See also the Slaughterhouse Cases, 89 U.S. 79 (1872) where the Supreme Court said that one of the privileges and immunities of a U.S. citizen "is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government."

The nature and basis of the President's authority was succinctly stated by President Taft in 1916, following the termination of his term in office:

He [the President] has done this [used military force to protect Americans] under his general power as Commander in Chief. It grows not out of any specific act of Congress, but out of that obligation, inferable from the Constitution, of the Government to protect the rights of an American citizen against foreign aggression. ..." (William Howard Taft, The President and His Power, (1967) p. 94-95 (originally published in 1916).)

This remains the position of the executive branch.

2. EFFECT OF STATUTES RESTRICTING USE OF FUNDS IN INDOCHINA

We do not believe that any conflict exists between the President's constitutional authority to take military action for the limited purpose of protecting
American lives, and the various statutes which have been enacted since June of 1973 prohibiting the use of appropriated funds for the introduction of U.S. forces into hostilities in Indochina.

The legislative history to these statutes indicate that they were not intended to circumscribe the President's constitutional authority to protect the lives of U.S. citizens abroad.

During the floor debate on the Addabbo Amendment to the Continuing Appropriations Resolution for Fiscal Year 1974—one of the earliest fund limitation provisions—the House Minority Leader inquired whether the amendment would affect the President's ability to protect "the lives of American civilians" in Indochina. Congressman Addabbo responded as follows:

"The gentleman from Michigan is speaking of protective action. I am speaking of direct combat action by our forces. We are not amending the Constitution here this afternoon; we are taking a congressional prerogative. The President still has, as Commander-in-Chief, certain war powers and if any place in this world our forces are threatened or attacked he can move for the moment. . . ."

Representative Ford then asked if it was correct "that the President as Commander in Chief has certain constitutional military responsibilities" which were beyond the scope of the funds limitation provision. Congressman Addabbo responded. "His rights under the Constitution as Commander in Chief, yes".

On August 3, 1973—after the first of these statutes was enacted but before their effective date—Admiral Moorer, then Chairman of the Joint Chiefs of Staff, said in executive session testimony before the Senate Foreign Relations Committee:

"[T]he only time that I think I said we might . . . use retaliatory fire was in the event we were trying to rescue Americans. I think you accept that as being—I do—a world wide authority when we get into that type of crisis."

Chairman Fulbright then said that he recognized the President had such authority to rescue Americans, though he also suggested that the U.S. should not create a situation making such action necessary. Testimony of Admiral Moorer before the Senate Foreign Relations Committee, August 3, 1973, page 40.

One might ask, if Presidential authority for evacuating U.S. citizens is so clear, why was the Congress asked to enact legislation clarifying that authority for the recent Indochina evacuations? A major consideration involved the national concern and controversy over the United States' overall role in Indochina, and the desire that any evacuation be supported by Congress as well as by the constitutional authority of the President. The protection of American citizens, the executive branch believed, should not be subject to potential disputes over interpretations of the Constitution or of the various statutes relating to Indochina.

A second reason involved the intimate relationship between evacuating Vietnamese nationals and evacuating U.S. citizens. It was determined that if substantial numbers of Vietnamese were not evacuated as part of a plan to evacuate Americans, the rescue of Americans would have been immediately and seriously jeopardized. Moreover, the United States had some responsibility to many Vietnamese who had long been associated with the United States.

It was clear that the various statutes restricting U.S. involvement in hostilities in Indochina did not apply to the evacuation of foreigners in situations where involvement by U.S. armed forces in hostilities was not imminent. Also, the President's constitutional authority to rescue foreign nationals as an incident to the evacuation of Americans had significant historical support. But since the evacuation of Vietnamese might have raised questions beyond those applicable to an operation limited to Americans, the support and clarification of Congress was sought in the President's address to Congress on April 10, 1975.

APPENDIX A

INSTANCES WHERE U.S. ARMED FORCES HAVE BEEN DIRECTED TO PROTECT U.S. CITIZENS WITHOUT CONGRESSIONAL AUTHORIZATION

1. Following the burning of the American and British legations in Japan in 1863, the U.S. minister in Japan was instructed to direct the Commander of the USS Wyoming to use "all necessary force" to insure the safety of Americans residing in Japan.
2. In 1868 a detachment of Japanese troops assaulted foreign residents including some Americans in the city of Hilo. Naval forces of the United States and other Western powers made a joint landing to protect the foreign settlement.

3. In 1889, U.S. naval forces in the Pacific were ordered to extend full protection and defense to American citizens and foreigners in Samoa who were threatened by civil war in that island.

4. In 1900, approximately 2,500 U.S. troops were sent to join an international military force organized to protect foreign citizens and legations in Peking during the “Boxer Rebellion” in China. At the request of Norway and Sweden, the U.S. minister in China was instructed to extend “all possible proper protection” to Swedish and Norwegian missionaries attached to American missions in China.

5. In 1927, Nationalist soldiers in Nanking, China attacked Americans and other foreigners. On March 22 of that year, eleven men from the USS Noa were landed to protect the American Consulate. Additional forces were sent from the USS Preston to protect Americans and their property. The next month, 24 marines were landed at Hankow to protect an American business firm and in December, during a rebellion in Canton, marines were sent ashore to assist in the evacuation of Americans. By the end of 1927, the United States had 44 naval vessels in Chinese waters and 5,670 men ashore.

6. When local disturbances broke out in Nicaragua in 1928, the government of that country requested that American forces undertake to protect the lives and property of Americans and other foreigners in Nicaragua. A U.S. naval commander was then instructed to establish neutral zones in Nicaragua to protect “lives and property of Americans and foreigners.” In May of that year, a force of marines was landed for the purpose of establishing a neutral zone. Additional neutral zones were established later in the year. The American military presence in Nicaragua continued until 1933.

7. In 1964, more than 1,000 civilians of 18 nationalities, including Americans were held as hostages by Congolese rebels near Stanleyville. With the authorization of the Government of the Congo, U.S. military transport planes landed Belgian paratroops in Stanleyville who effected a rescue during a four day joint operation. Some of the foreign hostages had been killed by the rebels, including three Americans.

8. In 1965, President Johnson ordered U.S. armed forces to land in the Dominican Republic to evacuate Americans and foreign nationals. The U.S. Embassy in Santo Domingo had reported that the Dominican Government was unable to guarantee the safety of Americans and other foreigners during the insurrection then taking place. Between April 28 and May 9, 1973, 2,711 Americans and 1,726 other foreign nationals were evacuated.

For additional examples, see “Authority of the President to Repel the Attack in Korea”, 22 Department of State Bulletin, 173 (1950); Memorandum of the Solicitor for the Department of State, October 5, 1912, “Right to Protect Citizens in Foreign Countries by Landing Forces” (2d ed., 1929); “Power of the President to Send the Armed Forces Outside the United States”, Committee print prepared for the Joint Committee made up of the Committee on Foreign Relations and the Committee on Armed Services of the Senate, February 28, 1951, 82 Congress, 1st session.

Mr. ZABLOCKI. Before you leave this question, I will again try to be helpful since I was the principal sponsor in the House of the War Powers Resolution. I clearly recall the effort exerted on this point in the War Powers Conference. Let me refer you to page 14 of the committee print on “The War Powers Resolution.” The House version did not attempt to codify the various situations under which the President had the authority to commit U.S. Armed Forces. The Senate version did. In order to satisfy the Senate conferees, we agreed to section 2(c) but it was intended as a statement of purpose and policy, a sort of sense of Congress.

On page 14 of the committee print, the last sentence says:
Subsequent sections of the joint resolution are not dependent upon the language of this subsection as was the case with the similar provision of the Senate bill.

Mr. Solarz. I appreciate the chairman's explanation and say—his lack of legal credentials notwithstanding—if he should ever leave the Congress, I am sure there will be ample opportunity for him to employ his talents in the service of the State Department which I think are—

Mr. Zablocki. I don't mean to carry a brief for the State Department [laughter] but having long been concerned with war powers I wanted to share my experiences with my colleague from New York.

Mr. Solarz. I appreciate that.

ANCESTRY OF CONFERENCE LANGUAGE

Mr. Findley. Could I add to that.

I recall vividly the ancestry of that 2(c) and the language took various forms at various stages of the consideration in the House-Senate Conference and one form had the words "can be" instead of "are." It now reads "are exercised." One version said "can be exercised" which would have appeared to be much more delimiting on the President's authority than what finally emerged. This was compromise language, frankly.

Mr. Solarz. As you know, I was not here when this language was written.

Mr. Zablocki. You make an excellent inquiry into the details—we wish you had been a conferee. My purpose was not to shoot down your argument or anything but just to provide background.

Mr. Solarz. I sincerely appreciate that, Mr. Chairman. Let me say I apologize if I am asking questions the answers to which are clear to those engaged in the formulation of this legislation but I suspect many of the members are in the same quandry I am in trying to understand its precise application which is why I am pursuing this line of inquiry.

SPECIFICATION OF AIRCRAFT USED IN EVACUATION EXECUTION

Let me move to a slightly different question. On the evacuation itself I understand that approximately 113,000 Vietnamese were evacuated of which about 60,000 came out by sea which implies that they arrived by the sea essentially through their own efforts and then were picked up by American ships out at sea. That means about 53,000 were taken out through either fixed plane or rotary fixed wing or rotary wing efforts.

Now prior to that final airlift for which notification was submitted to the congressional leadership pursuant to the War Powers Resolution, how were these other people brought out? In the period of time prior to the final evacuation, they were brought out on American planes I gather. Were these civilian planes or were these Air Force planes?

Mr. Hoffmann. They were a combination of charters, regularly scheduled airlines and "backhaul" on military supply aircraft that were flying in and out of Saigon.
Mr. SOLARZ. Who was flying the charters and the charter flights? Were these civilians?

Mr. HOFFMANN. They were civilians. I would have to get you the airlines that were flying that. Bird was flying some, I believe World Airways was flying some. I would have to get you the names if there were any others. Pan American, of course, had regularly scheduled airline service into Saigon which continued up until the time I think approximately 4 days prior to the execution of the rotary wing plane.

FUNDING FOR EVACUATION FLIGHTS

Mr. SOLARZ. Who was paying for these evacuations during that period of time and where were the funds coming from?

Mr. HOFFMANN. The resupply efforts and the supply planes which were both charters and U.S. indigenous Air Force planes were paid out of appropriations for that purpose, the so-called Pentagon, and I believe there were some AID programs and money expended pursuant thereto. With respect to the commercial airlines, it is my information that the people that went out on commercial airlines paid their way.

Mr. SOLARZ. So that the bulk of the Vietnamese who were evacuated prior to the final airlift on fixed wing airplanes were evacuated through a process that was in effect incidental to the supply effort which was funded under prior authorizations?

Mr. HOFFMANN. I believe there may have come a time toward the end at which there were aircraft being flown exclusively for the purpose of evacuation.

Mr. SOLARZ. I have one last question which I would like to ask Mr. Leigh.

As I understand your interpretation of the President's constitutional authority to use troops for evacuation, it would appear that if the legislation which was reported from the conference had been adopted by both the House and the Senate prior to the final evacuation that the limitations in that legislation on the manner in which the President could deploy the troops for this purpose were, if I understand you correctly, inherently constituted as a violation of the President's inherent constitutional authority.

VIOLATION OF PRESIDENT'S INHERENT CONSTITUTIONAL AUTHORITY

That is to say, the legislation, by limiting the number of troops that could be used to the number necessary to evacuate Americans and their dependents and the limitation on the amount of time during which the troops could be deployed to the amount of time necessary to evacuate the Americans—if your interpretation of the President's constitutional authority is correct—in and of themselves were unconstitutional; and if the President had determined that he wanted to keep the troops in longer than the amount of time necessary to evacuate Americans, he would have been constitutionally justified in doing so, the restrictions in the bill notwithstanding, and if the President decided that he needed only, say, 5,000 troops to evacuate the Americans but for whatever the reasons he wanted to send in 10,000 or 15,000 for the purposes of an evacuation, that he would have been within his constitutional authority as Commander in Chief to do so with restrictions in this bill notwithstanding. Is that your position?
Mr. Leigh. When you say this bill you mean the one—
Mr. Solarz. Right, the bill that came out of the conference.
Mr. Leigh. Yes; that is my position as a constitutional matter. I want you to understand that the President has not taken that position; this is my opinion.
Mr. Lagomarsino. Would the gentleman yield?
Mr. Solarz. Yes.

STATE CONTENDS PRESIDENT ACTED WITHIN CONFINES OF LEGISLATION

Mr. Lagomarsino. Could you not make a pretty good factual argument because of the restrictions, because of the things that Mr. Hoffmann mentioned earlier about the entwinement, if you will, of Americans and Vietnamese and what it would take to get those Americans out—that you make a good factual argument that it was within the confines of the legislation?
Mr. Leigh. Yes; I did say that in answer to your earlier question but Mr. Solarz changed the facts and went up to 15,000 or something like—I have forgotten the amount that we could use according to the conference bill. I do believe personally that such matters involve the inherent constitutional power of the President and I don't think that every limitation that Congress might enact on an appropriation or otherwise is necessarily a constitutional one. I think there are some that would be plainly unconstitutional.
Mr. Lagomarsino. I think that is a very fair statement.
Mr. Zablocki. Would the gentleman yield?
Mr. Solarz. Yes.
Mr. Zablocki. Mr. Leigh, would you agree that it would be preferable if the conference report would have been adopted in both Houses even though—

PRECEDENT OF IMPOSING LIMITATIONS UNDESIRABLE

Mr. Leigh. Preferable. Now I said earlier that I thought that—this again is my personal view, not the administration's, which asked for the enactment—from a strictly constitutional point of view and forgetting about the question of funding and the other things that were in the bill it would have been preferable not to have set a precedent that the Congress could impose limitations of that sort on what the President may do in an emergency to evacuate Americans or even—
Mr. Zablocki. You are referring now to the seven statutes that limited the President?
Mr. Leigh. No; I am referring now to section 4(c) of the Senate bill which was the one that was carried over into the conference version—I am sorry. I am not sure it was section 4(c). It was the section that referred to section 4(c) of the war powers and required the President to make certain certifications before he could use the authority.
Mr. Zablocki. Section 4(c) in the conference report on H.R. 6096, the Vietnam Humanitarian Assistance and Evacuation Act.
Mr. Solarz. Lastly, Mr. Leigh, what is your interpretation of the President's inherent constitutional authority in this regard, notwithstanding that it is a somewhat murky constitutional area, that there are no cases precisely on that point and that one could argue with some legitimacy or a contrary position. I have the feeling, having partici-
pated actively in this debate over the last few weeks and hearing people with great eloquence and force argue both sides, that the President does or does not have the constitutional authority to engage in such an evacuation without prior congressional authorization, that in point of fact it is unclear from a legal point of view whether or not he does and that perhaps this is something which the Congress ought to try to clarify further.

CONSTITUTIONAL SYSTEM PROVIDES FLEXIBILITY

Mr. LEIGH. Well, you have several propositions in that statement. I agree that it is inherent in a system such as ours based on separation of powers that there will be areas of uncertainty where the exclusive authority of one branch leaves off and the other begins. I think it is better to say that there is an area in there where it moves back and forth. I do not agree with your suggestion that because it is uncertain that it would therefore be desirable to try to pin it down exactly. I think the genius of the system that we have is one which allows some flexibility, some area for movement under our constitutional system.

Mr. SOLARZ. I want to thank the chairman for indulging my rather lengthy questioning.

Mr. ZABLOCKI. Two questions; and if you prefer to answer them for the record, you may.

Did I understand you, Mr. Leigh, to say that the fund limitations as provided in the appropriation bill were the sections that were asked to be waived in the original request of the President and were in themselves an invasion of the constitutional right of the President?

Mr. LEIGH. I didn't express an opinion about that and I don't want to say that they were an invasion of the President's authority. If they were interpreted as precluding him from rescuing Americans clearly, I think that would have been an invasion but I didn't hear anyone in Congress really make that argument. In fact, nearly everyone said it was clear that the President had the authority to rescue the Americans.

DEFINITION OF "HOSTILITIES"

Mr. ZABLOCKI. As you know, the key word in section 4(a)(1) is "hostilities." Can you tell us what your working definition of that word is and then apply that definition to each of the three reports which have been filed? For the Foreign Affairs Committee's intended understanding of the word I refer you to the committee report as reprinted on page 23 of the committee print of "The War Powers Resolution" which reads as follows:

The word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "Imminent hostilities" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

Could you supply to us what is your definition of that word?

Mr. LEIGH. Yes, we will undertake to supply that. I want to be perfectly candid with the chairman that Mr. Hoffmann and I have not worked out prior to now any agreed interpretation of it. I think
there were a lot of considerations that went into it, and as Mr. Hoffmann has emphasized it is a very difficult thing to apply these statutes or this resolution apart from the factual situation in which you become involved.

Take a simple question like aggression which in a way is some ways easier. The League of Nations started trying to define aggression back in the 1920's and it never completed the task. The United Nations went on with this and I believe it has been only in the last couple of years that they worked out an interpretation of aggression.

Mr. ZABLOCKI. Let me clarify my request for your definition of "hostilities." Keep in mind the definition on page 23 of the committee print. Lastly, please advise how you took into account that particular section of the section-by-section analysis as it is reprinted on page 23; how you interpret it and how you define it?

Mr. LEIGH. Yes.

Mr. ZABLOCKI. If there is no objection by the other members of the subcommittee, there are several other questions we would like to present to you for response for the record because of the limitation of time.

Mr. LEIGH. Certainly.

Mr. ZABLOCKI. We would appreciate it.

[The questions and answers follow:]

COMMITTEE ON FOREIGN AFFAIRS,
HOUSE OF REPRESENTATIVES,
Washington, D.C., May 9, 1975.

HON. MONROE LEIGH,
Legal Adviser, Department of State,
Washington, D.C.

DEAR MR. LEIGH: Your testimony before the Subcommittee on International Security and Scientific Affairs Wednesday was most enlightening and helpful to the Subcommittee's purposes. Please accept my thanks for your cooperation.

As indicated at the close of the hearing, I would appreciate your answers to the following additional questions for inclusion in the hearing record:

(1) As you know, only those reports filed pursuant to Section 4(a)(1) trigger the balance of the Act, involving Congressional action. The obvious key word in section 4(a)(1) is "HOSTILITIES." Can you tell us what your working definition of that word is as it related to each of the 3 reports which have been filed? Also, can you tell us what your working definition of "imminent" hostilities is?

[Note.—See p. 23 of Committee print regarding House Foreign Affairs Committee report definition of "hostilities"]

(2) Again in terms of relating the report of April 30 to your working definition of "hostilities," how precisely did the four U.S. casualties noted in that report figure in to make it a Section 4—and only a Section 4—report?

REGARDING PRESIDENT'S AUTHORITY TO evacuATE AMERICANS AND NON-AMERICANS:

(3) The three War Powers reports use essentially the same language in describing the President's authority for the action he took in committing troops. Basically, they all say the operations were ordered "pursuant to the President's Constitutional executive power and authority as Commander-in-Chief of United States Armed Forces." There is a great deal of dispute over what that term "Commander-in-Chief" means—especially within the context of the War Powers Resolution.

Would you give us briefly your legal interpretation of what precisely the President's authority is as Commander-in-Chief?

* Same letter sent to Hon. Martin R. Hoffmann.
REGARDING REPORT OF APRIL 12—EVACUATION OF PHNOM PENH:

(4) The President's report of April 12 said that "the last elements of the force to leave received hostile recoilless rifle fire." Was that "hostilities" and if not, why not?

REGARDING REPORT OF APRIL 30—EVACUATION OF SAIGON:

(5) The report of April 30 also indicates that U.S. fighter aircraft "suppressed North Vietnamese anti-aircraft artillery firing on evacuation helicopters." It also notes that ground security forces "returned fire during the course of the evacuation operation." Did not those two incidents clearly constitute hostilities thereby necessitating a Section 4(a) (1) report?

(6) Did you or did you not consider the two Marines who were killed at Tan Son Nhut airport a part of the evacuation force? Were they not actually assisting directly in the evacuation operation?

(7) What were the detailed circumstances surrounding the loss of a Navy helicopter in which two crew members lost their lives? Were they directly assisting or participating in the evacuation operation?

(8) Does the phrase "taking note of..." appearing in each of the 3 reports suggest anything other than a full binding legal responsibility upon the President?

Sincerely,

CLEMENT J. ZABLOCKI,
Chairman, Subcommittee on International Security and Scientific Affairs.

DEPARTMENT OF STATE,
Washington, D.C., June 3 1975.

Dear Mr. Chairman: We are writing in response to your letters to us of May 9, 1975, requesting amplification of our testimony before your Subcommittee on May 7.

Enclosed is a memorandum which responds to questions asked by members of the Subcommittee during our testimony. Although this memorandum may also answer a few of the questions raised in your recent letter, we shall also address each of your questions individually.

1. Your first question inquires as to our working definition of the word "hostilities" in section 4(a) (1) of the War Powers Resolution. We are, of course aware of the comments made by the Committee on page 7 of H. Report 93-287, wherein the Committee attempted a general definition of that word, which had its origin in the Senate version of the Resolution. Even as so defined, however, there is of necessity a large measure of judgement which is required. We note in this connection that even when measured against certain past events, differing views as to when hostilities commence were expressed during the Hearings before the Committee in 1973. See for example the colloquies between Representatives Bingham and Du Pont and Senator Javits on pages 16-17 and 21-22 of the Hearings. You will also recall Professor Bickel's response to Mr. Du Pont with respect to the definition of "hostilities" that:

"There is no way in which one can define that term other than a good faith understanding of it and the assumption that in the future Presidents will act in good faith to discharge their duty to execute the law." (Hearings, at 185)

Whether "imminent involvement in hostilities" is clearly indicated by the circumstances is similarly, in our view, definable in a meaningful way only in the context of an actual set of facts. To speculate about hypothetical situations is possible but would not seem desirable. Reasonable men might well differ as to the implications to be drawn from any such hypothetical situation. In this connection, you will no doubt recall the uncertainty of some members of the Congress as to whether the military alert of October 24, 1973 triggered the reporting provisions of the War Powers Resolution, and the conclusion expressed by you on the Floor on April 9, 1974 (Congressional Record, at H. 2726) that hostilities had not been imminent and that a report had not been required.

Subject to the foregoing caveats, we turn to our working definitions of these terms. As applied in the first three war powers reports, "hostilities" was used to

8 Memorandum appears on p. 29.
mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and "imminent hostilities" was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.

You also ask which of the first three war powers reports referred to situations involving hostilities. In our view, the April 30, 1975 report refers to a situation where at least one incident of hostilities existed (see point 5 below); and in the Cambodia evacuation referred to in the April 12, 1975 report, an imminent involvement in hostilities may have existed (as to the factors that would enable one to reach a conclusion on whether hostilities did in fact exist see point 4 below). The April 4, 1975 report concerning the Danang evacuation, however, does not refer to a situation where hostilities existed.

You also use the term, "a Section 4 report." As we read the War Powers Resolution, section 4 does not call for different types of reports depending on whether U.S. armed forces are introduced under subparagraphs (1), (2) or (3) of section 4(a). Instead, section 4 seems to require only that "a report" be filed in any of the subparagraphs (1), (2) or (3) situations, and that such report merely contain the information specified in subparagraphs (A), (B) and (C).

It seems that the real thrust of the question is why the President in his April 30, 1975 report referred to section 4 in general, and not to any particular subparagraphs in that section. We presume that the President did so because the events giving rise to that report did not seem to be limited to just one of the three subparagraphs in section 4(a).

Furthermore, since the operation had terminated by the time the report was prepared, the question of possible congressional action under section 5 of the Resolution was moot; thus, a specific reference to 4(a)(1) was not needed to call attention to possible action under section 5.

3. Your letter refers to the President's authority as Commander-in-Chief. The three war powers reports you referred to all cite two sources of authority: Article II, Section 1 of the Constitution which provides that the "executive Power shall be vested" in the President, and the Commander-in-Chief clause (Article II, Section 2).

With respect to the Commander-in-Chief clause, we do not believe that any single definitional sentence could clearly encompass every aspect of the Commander-in-Chief authority. This authority would include such diverse things as the power to make armistices, to negotiate and conclude cease-fires, to effect deployments of the armed forces, to order the occupation of surrendered territory in time of war, to protect U.S. embassies and legations, to defend the United States against attack, to suppress civil insurrection, and the like.

With respect to the specific question of protecting and rescuing U.S. citizens, the enclosed memorandum contains a discussion of both court opinions and historical precedents on this subject.

4. You refer to a portion of the April 12, 1975 report on the Cambodia evacuation which notes that the "last elements of the force to leave received hostile recoilless rifle fire." Whether or not this rifle fire constituted hostilities would seem to us to depend upon the nature of the source of this rifle fire—i.e., whether it came from a single individual or from a battalion of troops, the intensity of the fire, the proximity of hostile weapons and troops to the helicopter landing zone, and other evidence that might indicate an intent and ability to confront U.S. forces in armed combat. Our information concerning the source of this rifle fire is not sufficiently detailed to enable one to draw a conclusion as to whether this clearly amounted to "hostilities."

5. Your letter notes that the April 30, 1975 report relating to the Saigon evacuation indicates (a) that U.S. fighter aircraft "suppressed North Vietnamese anti-aircraft artillery firing on evacuation helicopters," and (b) that U.S. ground forces returned fire during the course of the evacuation. The first situation on its face constituted "hostilities." The evidence concerning the second situation is inconclusive as to whether the fire was of sufficient intensity so as to be part of a purposeful confrontation by opposing military forces; but in view of the actions of the U.S. fighter aircraft, a characterization of the second situation
may be academic. In any event, as discussed under point number 2 above, there were other circumstances present in the evacuation operation which precluded a conclusion that section 4(a)(1) alone, and no other provision of section 4, pertained to the operation.

6. The two marines who were killed at Tan Son Nhut airport the day before U.S. forces entered South Vietnamese airspace were not a part of the evacuation force. They were members of the marine guard at the American Embassy and were, at the time of their death, on regular duty in the compound of the Defense Attaché Office which was located at the airport. As you know, an evacuation effort not involving our combat troops had been conducted for some time prior to the introduction of the evacuation forces. The fact that these marines, rather than civilian members of the Embassy, were killed was fortuitous and not a consequence of the introduction of the evacuation force.

7. The loss of the Navy helicopter was not directly related to the evacuation operation. Our understanding is that the helicopter was at the time, in accordance with standard operating procedures, involved in an ordinary search and rescue holding pattern near its home aircraft carrier. The purpose of its mission was to provide assistance to aircraft and helicopters that were participating in the evacuation operation, should such assistance become necessary. The helicopter crashed in the immediate vicinity of the carrier. The cause of the crash is not known, and the bodies of the crew were not recovered.

8. Your letter notes that the first three war powers reports contain the phrase "taking note of ..." You inquire whether this suggests anything other than a full binding legal responsibility upon the President. This phrase connotes an acknowledgement that the report is being filed in accordance with section 4 of the War Powers Resolution. No constitutional challenge to the appropriateness of the report called for by section 4 was intended. As you are aware, President Nixon in his veto message of October 24, 1973 indicated that portions of the War Powers Resolution, including sections 5(b) and 5(c), are unconstitutional. No such position was expressed as to section 4.

We hope we have covered each of the points raised not only in your letter, but also during our testimony before the Subcommittee on May 7. Please accept again our appreciation for the Subcommittee's careful inquiry into these very complex legal and constitutional questions.

Sincerely,

MONROE LEIGH,
Legal Adviser, Department of State.

MARTIN R. HOFFMANN,
General Counsel, Department of Defense.

Mr. ZABLOCKI. As I said at the beginning of the session, Mr. Leigh and Mr. Hoffmann, particularly in evaluating or assessing your abilities—Mr. Leigh, what I said earlier I still maintain, that you have certainly given insight and help to the members of this subcommittee; we understand your views as representing those of the executive branch.

We thank you gentlemen for appearing before the subcommittee.

Mr. LEIGH. We are grateful for the opportunity, Mr. Chairman.

Mr. ZABLOCKI. The subcommittee is adjourned.

[Whereupon, at 4:07 p.m., the subcommittee adjourned.]
WAR POWERS: A TEST OF COMPLIANCE

WEDNESDAY, JUNE 4, 1975

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERNATIONAL RELATIONS,
SUBCOMMITTEE ON INTERNATIONAL SECURITY
AND SCIENTIFIC AFFAIRS,
Washington, D.C.

The subcommittee met at 2:15 p.m. in room H-236, the Capitol, Hon. Clement J. Zablocki (chairman of the subcommittee) presiding. 

Mr. ZABLOCKI. The subcommittee resumes this afternoon the hearings it started on May 7 regarding the adequacy of compliance with the War Powers Resolution. The hearing of May 7 was specifically related to the reports of April 4, April 12, and April 30.

This afternoon we are directing our specific attention to the President's report of May 15 relative to the Mayaguez incident. Even more specifically, we are especially interested in the nature and extent of the consultation effort which surrounded that incident as provided for in section 3 of the act.

That issue of consultation—and the relative adequacy or inadequacy of it—has been the subject of considerable discussion and some controversy within and outside of Congress. In short, there is a good deal of honest difference of opinion on what precisely the consultation provision calls for and what Congress intended when the act was adopted.

Without prejudging the situation, I would only note that as chief House sponsor of the War Powers Resolution I can say clearly that consultation was contemplated in all cases in which U.S. Armed Forces are committed into areas of hostilities abroad. This understanding is obviously contrary to what appears to be the administration's view that such consultation is required or desirable only in instances in which actual hostilities can be anticipated with some degree of certainty.

Our intent today is to clarify this and related questions by a thorough, impartial, and dispassionate discussion. To help us in that effort we have invited three witnesses to share with us their views. They are:

The Honorable Jacob Javits, Senator from the State of New York and chief Senate sponsor of war powers legislation. He should be here within 10 minutes; there are roll calls in the Senate that require his presence at the moment.

However, we do have the Honorable John F. Seiberling, Representative from the State of Ohio, who has some rather strong views on what consultation should be.

Of course we have the Honorable Monroe Leigh, Legal Adviser to the Department of State, who has appeared before this subcommittee on
prior occasions. Mr. Leigh is a very able and distinguished lawyer who will, I am sure, further speak to the question and the proposition that troubles us.

Gentlemen, we are honored to have you here with us and we look forward to your remarks.

Congressman Seiberling, if you will proceed, sir.

STATEMENT OF HON. JOHN F. SEIBERLING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

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

I very much appreciate the opportunity to testify this afternoon and I certainly want to commend you for holding these hearings to examine the Mayaguez incident in light of the requirements of the War Powers Resolution.

I believe you all have copies of my prepared statement.

Although questions have been raised as to the wisdom of particular decisions that the President made, I think now that the incident is over, these questions had best be left to the historians. What concerns me now, and should concern Congress and the people, is the effect of the President's decision on our laws—particularly the War Powers Resolution—and our democratic institutions.

When the War Powers Resolution was passed in 1973 it was hailed as historic legislation. I think most of us believed then that it would help to usher in a new era of cooperation between the President and the Congress in matters involving the commitment of U.S. Armed Forces to hostilities.

LEGISLATION REASSERTS CONSTITUTIONAL WAR POWERS OF CONGRESS

You, Mr. Chairman, and members of your subcommittee worked for three Congresses to get a War Powers Resolution passed so you know better than most that this was not a frivolous exercise but a serious attempt by Congress to recapture its constitutional warmaking authority. Having assisted in the chairman's efforts to secure passage of the resolution, I am personally aware of how hard he and others worked to pass the resolution and to override President Nixon's veto of it.

This legislation was born out of the blood and tears of a decade of tragedy in a war that was never declared by Congress and after unilateral actions and deceptions by the Executive had shocked and divided Congress and the country. It became law only after the most strenuous effort and against the most desperate opposition. It is a truly masterful legislative attempt not only to reassert the constitutional war powers of Congress but to reassume its full responsibilities in this field. I cannot believe that the Congress, less than 3 years later, is prepared to abandon any part of this legislation or to allow it to fall into disuse or be weakened by nonobservance.

MERE PASSAGE OF A LAW IS NOT ENOUGH

Unfortunately, the mere passage of a law does not automatically change ingrained patterns of behavior. American Presidents have
become accustomed over many years to ordering the commitment of American troops to action without either first consulting with or gaining the approval of Congress. The Mayaguez incident shows that such behavior will continue, despite the law, unless Congress demands a change. That is why I think these hearings today are so important. Just writing a law is not enough in this case. Congress must take action to see that the law works. The best way to do that is to evaluate each instance in which the resolution comes into play to determine if its provisions are being complied with and, if not, what should be done to correct the situation.

With respect to the Mayaguez incident, it is clear that the President did comply with the reporting section of the law—section 4. Within the stated period of time the President reported to Congress under section 4(a)(1) on the actions he had taken to regain the ship and the crew.

However, it is also clear that the President did not comply with the consultation provision of the law—section 3. I do not think there is any disagreement about whether, in this particular instance, the President was required to comply with section 3. In previous testimony before this subcommittee, the Honorable Monroe Leigh, Legal Adviser to the State Department, stated that in the Department's view "prior consultation is contemplated only in cases which would fall within section 4(a)(1)." The Mayaguez clearly fell within 4(a)(1), as the President has acknowledged.

PROBLEM LIES IN INTERPRETATION

The problem lies not in any disagreement about the President's responsibility to comply with the law but rather with his interpretation of the law. I think it would be helpful, therefore, briefly to review the legislative history of the consultation provision to establish for the record once again precisely what the law says and what Congress intended that provision to mean.

I am mindful of your time limitations, Mr. Chairman, so I would like to submit for the record a detailed legislative history of the consultation provision and a number of newspaper articles about the Mayaguez incident. I will summarize the substance of these documents. I would like to summarize along with some newspaper articles that give the chronology of the Mayaguez incident and the President's proceedings.

The consultation provision in the original House bill (H.J. Res. 542) stated that "The President in every possible instance shall consult with the leadership and appropriate committees of the Congress before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent***. In the accompanying report (H. Rept. 93-287) it was made clear that consultation was not "synonymous with merely being informed. Rather," the report said, "consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions, and in appropriate circumstances their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available." In addi-
tion, the report said, "the use of the word 'every' reflects the committee's belief that such consultation prior to the commitment of armed forces should be inclusive."

HISTORY OF CONSULTATION PROVISION

There was no debate on this consultation provision during House consideration of House Joint Resolution 542; it was not a matter of contention. However, it appears to have been understood by all. The distinguished majority leader, Mr. O'Neill, summed up the purpose of the resolution when he said:

All this resolution asks is that Congress, the voice of the American people, be consulted prior to the commitment of U.S. Armed Forces to hostilities abroad.

The Senate bill, S. 440, did not contain a consultation provision and there was no discussion of the issue in the Senate debate, but when the conferees reported the bill it contained a consultation provision almost identical to the House version, the only substantive difference being the naming of "Congress" rather than the "leadership and appropriate committees of Congress" as the ones with whom the President must consult. Now it was specifically mentioned twice in the Senate debate on the conference report.

Senator Fulbright, who was managing the conference report, called the consultation provision of the compromise "the most fundamentally important of all" in the bill even though the original Senate bill had not contained any such provision.

Senator Jacob Javits, one of the principal authors of the War Powers Resolution in the Senate, elaborated on the conference report language as to what the consultation provision meant. Javits said the provision "is to be read as maximal rather than minimal. The President is obliged by law to consult before the introduction of forces into hostilities." He went on to note that the provision made allowances for instances "of such great suddenness in which it is not possible to consult in advance."

CONSULTATION PROVISION SEEN AS CONSTRUCTIVE

Again there was no debate on the consultation provision when the conference report came before the House nor was there any debate on this provision during consideration of the President's veto.

As a final note, Mr. Chairman, it is interesting to note that in his veto message President Nixon singled out the consultation provision as being one of the few constructive provisions in the bill, to use his words.

Mr. Chairman, I don't think the language could be any clearer, but if there is any ambiguity in the wording of the resolution, the legislative history certainly clears it up. The only instance in which Congress sanctions action without prior consultation is in what Senator Javits called an instance "of such great suddenness * * * it is not possible to consult in advance."

With this background I would now like briefly to review the President's actions during the Mayaguez crisis as they relate to this provision. Two facts stand out.
MAYAGUEZ INCIDENT AND PRESIDENT'S ACTIONS

First, 2½ days elapsed between the time our Government was notified of the seizure of the Mayaguez—5:30 a.m. on Monday, May 12—and the moment when President Ford ordered the final military action on Wednesday, May 14—1:45 p.m.—to rescue the ship and crew. During that period the President met four separate times with the National Security Council: Once on Monday, twice on Tuesday and once on Wednesday. The final decision on a course of action was not made until late in the afternoon of Wednesday—nearly 60 hours after the first notification of the ship’s seizure.

I appreciate that this was a swiftly moving crisis but since the President had time to consult with the NSC four separate times, surely he could have found time to seek the advice and counsel of the Congress on this matter, had he so desired. Certainly the test which Senator Javits spelled out of great suddenness did not apply in this instance.

The second, and more relevant fact, is that from all published accounts it is apparent that the President believes he did meet the consultation provision of the law by merely informing Members of Congress of decisions already reached.

PRESIDENT’S FAILURE TO CONSULT

Mr. Roderick Hills, a counsel to President Ford, in a New York Times article of May 15 is reported to have told a questioner that “the President believed that informing Congress of his actions satisfied the requirement of the War Powers Resolution that he consult with Congress before beginning military operations.”

Later Ron Nessen, the President’s press secretary, asserted that the President had consulted with Members of Congress through his congressional relations staff. However, many of those Members of Congress within the leadership—and specifically Speaker Albert, Senator Mansfield, Congressman O’Neill, Senator Eastland, and Senator Case—said that they had only been informed, not consulted.

Whether or not Mr. Hills’ and Mr. Nessen’s reported statements accurately reflect the President’s view of this law, the President’s failure to consult is consistent with such a view. Congress must not let stand without challenge a precedent which would practically nullify this section of the resolution.

In the absence of a formal admission by the President that he incorrectly interpreted the law, it should be revised so that there can be no question about what is intended. The consultation provision is meaningless if it is only going to involve informing Members of Congress, after the fact, as to a decision the President has already made. Consultation, particularly when it involves matters as serious as those covered by the War Powers Resolution, should involve face to face contact, in a give-and-take situation, between the President and Members of Congress. Nor does it have to be a meeting solely between members and the President. In certain instances it might be appropriate for members to sit in on a National Security Council meeting where options are being discussed.
AMENDMENT TO WAR POWERS RESOLUTION INTRODUCED

Because of the apparent confusion about the meaning of the consultation provision, I have introduced a bill today in the House to amend that portion of the law. I would like to submit a copy for the record, Mr. Chairman. I believe I have already given you copies.

A similar bill was introduced in the Senate by Senator Thomas Eagleton, one of the Senate's leading experts on the War Powers Resolution. The bill does two things:

1. It would replace the words "consult with Congress" with the words "seek the advice and counsel of Congress," which were taken from your committee report, Mr. Chairman, and

2. It would add a definitional sentence to the consultation section spelling out in precise language what "seek the advice and counsel of Congress" means.

The bill is wholly consistent with the original intent of Congress in passing the War Powers Resolution. It does not change the thrust of the law; it simply clarifies the meaning of existing language. I hope, Mr. Chairman, that your subcommittee will have an opportunity to consider this legislation in the near future.

I thank you very much. If you have questions, I would be glad to try to answer them.

Mr. ZABLOCHKI. Thank you, Mr. Seiberling.

Before asking any questions, without objection the newspaper articles and the other memoranda that Mr. Seiberling has, as well as the copy of the bill, I understand you do want made part of the record at this point.

Mr. SEIBERLING. I would appreciate that.

Mr. ZABLOCHKI. Without objection, so ordered.

[The documents follow:]

LEGISLATIVE HISTORY OF THE CONSULTATION PROVISION OF THE WAR POWERS RESOLUTION

H.J. Res. 542 (93rd Congress) as Passed by the House, July 18, 1973

Consultation

SEC. 2. The President in every possible instance shall consult with the leadership and appropriate committees of the Congress before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent, and after every such commitment shall consult regularly with such Members and committees until such United States Armed Forces are no longer engaged in hostilities or have been removed from areas where hostilities may be imminent.

Explanation of Consultation Provision in H.J. Res. 542 from House Report 93-287

Section 2. Consultation

This section directs that the President "in every possible instance shall consult with the leadership and appropriate committees of the Congress before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent. * * *"

The use of the word "every" reflects the committee's belief that such consultation prior to the commitment of armed forces should be inclusive. In other words, it should apply in extraordinary and emergency circumstances—even when it is not possible to get formal congressional approval in the form of a declaration of war or other specific authorization.

At the same time, through use of the word "possible" it recognizes that a situation may be so dire, e.g. hostile missile attack underway, and require such
instantaneous action that no prior consultation will be possible. It is therefore simultaneously firm in its expression of Congressional authority yet flexible in recognizing the possible need for swift action by the President which would not allow him time to consult first with Congress.

The second element of section 2 relates to situations after a commitment of forces has been made (with or without prior consultation). In that instance, it imposes upon the President, through use of the word "shall", the obligation to "consult regularly with such Members and committees until such United States Armed Forces are no longer engaged in hostilities or have been removed from areas where hostilities may be imminent."

A considerable amount of attention was given to the definition of consultation. Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.

In the context of this and following sections of the resolution, a commitment of armed forces commences when the President makes the final decision to act and issues orders putting that decision into effect.

The word "hostilities" was substituted for the phrase "armed conflict" during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "Imminent hostilities" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.

Public Law 93-148

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Conference Report 93-547

The House joint resolution provided for presidential consultation with the leadership and appropriate committees of Congress before and after the President introduces United States Armed Forces into hostilities or situations of imminent hostilities. The conferees modified the House provision, to provide for consultation with the Congress. Section 3 of the conference report is not a limitation upon or substitute for other provisions contained in the report. It is intended that consultation take place during hostilities even when advance consultation is not possible.

EXPLANATION BY SENATOR JACOB JAVITS OF THE CONFERENCE REPORT

Congressional Record, October 10, 1973, p. S. 18986

Section 3, the provisions establishing a statutory requirement of advance consultation as well as continuing consultation with the Congress, to be read as maximal rather than minimal. The consultation requirement is not discretionary for the President; he is obliged by law to consult before the introduction of forces into hostilities and to continue consultations so long as the troops are engaged. This section does take account of the contingency that there may be instances of such great suddenness in which it is not possible to consult in advance. In such situations the actions of the President would still be governed by the declaration of authority in section 2(c).
It is important to note that, while consultation is a statutorily established requirement in this legislation, the President does not acquire or derive any authority respecting the use of the Armed Forces through the consultation process per se—although "consultation" may lead to a declaration of war or the enactment of specific statutory authorization. In other words, consultation is not a substitute for specific statutory authorization.

Section 3 is rather intended to reestablish the historic, consultative tradition between the executive and the Congress respecting foreign affairs and international security matters, which has generally prevailed throughout our Nation's history. The breakdown in recent years of this consultative tradition has contributed heavily to strains between the executive and the Congress, and in my judgment is an important contributory element in the constitutional crisis now confronting our Nation with respect to the war powers.

EXCERPT FROM PRESIDENT RICHARD NIXON'S VETO MESSAGE, OCTOBER 24, 1973

"The responsible and effective exercise of the war powers requires the fullest cooperation between the Congress and the Executive and the prudent fulfillment by each branch of its constitutional responsibilities. House Joint Resolution 542 includes certain constructive measures which would further this process by enhancing the flow of information from the executive branch to the Congress. Section 3, for example, calls for consultations with the Congress before and during the involvement of the United States forces in hostilities abroad. This provision is consistent with the desire of this Administration for regularized consultations with the Congress in an even wider range of circumstances."

[From the New York Times, May 23, 1975]

THE MAYAGUEZ INCIDENT AND THE CONSTITUTION

(By Raoul Berger)

Raoul Berger is Charles Warren senior fellow in American legal history at Harvard Law School and author of "Executive Privilege: A Constitutional Myth."

CAMBRIDGE, MASS.—Once more Congress has abdicated its constitutional responsibility, carried away by a wave of "rally round the flag" fever. The Senate Foreign Relations Committee hastened to set its seal on the President's "exercise of his constitutional powers" in sinking Cambodian patrol boats in order to regain the captured merchant vessel Mayaguez.

What powers? President Ford invoked his "constitutional executive power and his authority as Commander in Chief." His counsel, Roderick Hills, explained that Mr. Ford "acted under his constitutional war powers to protect the lives and property of Americans."

We are not, of course, at war with Cambodia, so that resort to the "war powers" is farfetched; and those powers were by design very limited.

As to "protection" of Americans abroad, President James Buchanan recognized in 1859 that the power to afford such protection resided in Congress. He advised Congress, "I deem it my duty to recommend the passage of a law authorizing the President to employ the naval forces for the purpose of protecting the lives and property of American citizens passing in transit across the Panama routes."

The Act of July 27, 1868, directs the President, when a citizen is unjustly deprived of his liberty by a foreign country, "to use such means, not amounting to acts of war, to obtain the release, and promptly to report to Congress."

Suppose that the patrol boats that the United States sunk, instead of belonging to pygmy Cambodia, had been those of the Soviet Union. Is it for the President alone to make the fateful judgment that may plunge us into war? Such situations call for the "collective judgment" of President and Congress, as the War Powers Resolution of 1973 requires.

That requirement is not satisfied by merely "informing" selected members of Congress of the forthcoming hostilities, but by genuine "consultation" before a decision is made, as is stated in the conference committee report on the resolution.
By his invocation of the "constitutional executive power" and that of "Commander in Chief," Mr. Ford apparently signals that he does not consider his "constitutional" powers to be limited by the resolution, a view that seems to be shared by the Senate committee. Of course, if the President possesses the "constitutional powers" to which he lays claim, they cannot be limited by Congress, and the President is free to sink us into yet another Vietnam quagmire.

It is idle to look to the words "executive power" for war-making authority, for the powers comprehended therein were painstakingly enumerated by the Framers of the Constitution. In that enumeration the sole grant of "war power" is contained in the words "Commander in Chief," a limited grant.

Because opponents of the Constitution raised the specter of "detested" monarchical power, Alexander Hamilton downgraded the grant, explaining that the words "Commander in Chief" merely made the President "first General."

Louis Henkin, professor of constitutional law at Columbia University, has justly observed that generals "even when they are 'first' do not determine the political purposes for which troops are to be used; they command them in the execution of policy made by others"—by the Congress, as the Founders made abundantly clear.

The power to "declare war," meaning, as Justice Joseph Story stated, the "power to make and carry on war," was lodged in Congress exclusively. The purpose, James Wilson explained to the Pennsylvania ratification convention, was to guard against being "hurried" into war, so that no "single man [can] ... involve us in such distress." It was designed, said James Madison, to hobble the "executive propensity to war." In addition to "commanding" troops in a war so "declared," the President is authorized to repel an invasion, and by the terms of the War Powers Resolution an attack upon the armed forces. Manifestly, the bombing of the Cambodian patrol boats falls in none of these categories.

Does the President have an "inherent right," as his counsel Mr. Hills postulates, to undertake hostilities for the "protection" of American citizens and property? President Buchanan did not think so. The constitutional records disclose that the Founders jealously insisted on a Federal Government of enumerated, strictly limited powers.

Defending the Constitution in the Virginia ratification convention, Gov. Edmund Randolph said that the powers of the Government "are enumerated," that it "has no power but what is expressly given it." In the same convention, it was stated that the "legality of any power" is to be tested by the question, "Is it enumerated in the Constitution." Such citations can be multiplied, and they are reinforced by the pervasive Colonial distrust of executive power. To conjure up an "inherent" executive power in the teeth of the Framers' studied efforts to limit it is to charge them with leaving the barn door wide open.

When the claim to "inherent power" was made in support of President Harry S. Truman's seizure of the steel mills to prevent a strike during the Korean war, it was emphatically rejected by Justice Robert H. Jackson.

In what is considered his finest opinion, Mr. Jackson stated that the Framers "made no provision for exercise of extraordinary authority because of a crisis." Emergency powers, he said, "are consistent with free government only when their control is lodged elsewhere than in the executive who exercises them"—that is, in Congress. Claims of "inherent power" are a euphemism for stepping out of bounds, for exercise of a power that was not conferred. Such claims, particularly when they assert power exclusively lodged in Congress, endanger our democratic system.

The paramount harm that flows from this fresh Cambodian adventure is the disruption of the constitutional allocation of powers, the invasion of powers conferred exclusively to Congress. Approval by individual members cannot make such invasion constitutional. The Supreme Court has declared: "One branch of government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on strict observance of this salutary rule."

Richard M. Nixon has taught us anew that power grows by what it feeds on, and that to condone unauthorized expansion is to undermine the foundations of our democratic society.

It is apropos to Congress that, having just shaken us loose from a disastrous war, sustained in no small part by Congressional acquiescence—it is once more ready to approve a Presidential exercise of its own power. Thereby it gives its sanction to yet another dismal "precedent" that future Presidents will not be slow to invoke against Congress.
WASHINGTON, May 14.—The White House said today that President Ford had consulted with Congressional leaders before ordering an attack on Cambodian patrol boats. At least some of those leaders insisted later, however, that they had not been consulted but merely informed of a Presidential decision already made.

However, members of Congress generally expressed approval of the President's action and the Senate Foreign Relations Committee adopted a strong resolution of support this evening acknowledging the President's constitutional right to order military operations.

Yesterday the White House press secretary, Ron Nessen, told reporters that President Ford would “consult” with Congress before ordering any military action to rescue the seized American freighter Mayaguez, or its crew.

He quoted the Congressional War Powers Resolution of 1973, which states, in part, that “the President in every possible instance shall consult with Congress before introducing United States armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated.”

Roderick Hills, a counsel to the President, told a questioner that Mr. Ford had acted under his Constitutional war powers to protect the lives and property of Americans. When asked to cite the specific authority within the Constitution, Mr. Hills said that he did not have the exact article in front of him.

But he insisted that the inherent right of the President to use war powers to protect lives and property had not been challenged. The only open question, he said, was the appropriate level of military response.

Mr. Hills, an assistant to Philip Buchen, the head of the White House legal department indicated that the President believed that informing Congress of his actions satisfied the requirement of the War Powers Resolution that he consult with Congress before beginning military operations.

The resolution does not require prior approval of military action by Congress, he asserted.

At today's news briefing, Mr. Nessen said that the President, through his Congressional relations staff, “did consult” with Democratic and Republican leaders of the House of Representatives and Senate between 5:30 and 6 P.M. yesterday, “three hours before the fact.” A statement issued by the Defense Department today indicated that the attack began shortly after 8:30 P.M., Eastern Daylight Time.

However, Senator Mike Mansfield, Democratic leader of the Senate and one of those listed by Mr. Nessen as having been consulted, said in a telephone interview today:

"I was not consulted. I was notified after the fact about what the Administration had already decided to do."

In a statement released later, Senator Mansfield said: "I did not give my approval or disapproval because the decision had already been made. My reaction at this point is that there are a lot of questions to which I want answers."

Senator James O. Eastland, Democrat of Mississippi and President Pro Tempore of the Senate and Senator Clifford P. Case, Republican of New Jersey, the ranking Republican on the Senate Foreign Relations Committee, also said that they had not been consulted but had been informed. Mr. Eastland said he had been told after the attack.

Both, however, indicated that they strongly supported President Ford’s action against the Cambodian boats.

The majority leader of the House of Representatives, Thomas P. O'Neil of Massachusetts, also said he had not been consulted but only informed.

The House minority leader, John J. Rhodes of Arizona, was quoted by The Associated Press as having said that he had not been notified until after the Cambodian vessels were sunk. But a spokesman for Mr. Rhodes told a questioner: "He was notified beforehand. We are calling it a consultation. Mr. Rhodes has no complaint."

A member of the White House Congressional liaison staff told a questioner
that leaders of the Senate had been called about the President's planned action, starting with Senator Mansfield at 5:55 P.M. yesterday and concluding with Senator Eastland at 8:20 P.M., or shortly before the attack on the Cambodian vessels began. Memorandums of each call were sent to Max Friedersdorf, head of the Congressional relations staff, who had presumably passed the response along to the President, the staff member added.

This staff member said that about half the Senators had voiced approval of the President's action while the others simply "acknowledged" the information. Earlier today, Mr. Nessen said that the response of the Congressional leaders to the "consultation" was "a strong consensus of support and no objections."

The Members of Congress were not given any legal basis for the President's order for military intervention when they were contacted by the White House staff. At today's briefings at the White House, Mr. Nessen said that "the President has authority to protect the lives of Americans and the property of Americans under the Constitution."

Although several members of Congress charged that the President had violated the War Powers Resolution by failure to consult Congress, there was little criticism of the military action itself.

The resolution adopted by the Senate Foreign Relations Committee, while it will not be voted on by the full Senate, was intended as a vote of Senatorial confidence. It was approved unanimously and said:

"Committee condemns an act of armed aggression on an unarmed U.S. merchant vessel in the course of innocent passage on an established trade route."

"The President has engaged in diplomatic means to secure its release and we support that."

"Third, we support the President in the exercise of his constitutional powers within the framework of the War Powers Resolution to secure the release of the ship and its men."

"We urge the Cambodian Government to release the ship and the men forthwith."

[From the Washington Post, May 17, 1975]

THE MAYAGUEZ DECISION

(By Jules Witcover)

THREE DAYS OF CRISIS FOR PRESIDENT FORD

It was 22 minutes past midnight on Thursday morning and President Ford, weary but gratified at the outcome of what one White House aide called "the biggest decision he's ever had to make in his life," came out of the Oval Office and headed for bed.

"Boy," he said, turning to the aide and smiling, "this is where I could really use a swimming pool."

But because the new White House swimming pool won't be finished before July 1, Mr. Ford trudged over to the residential quarters. There, he signed letters explaining to Congress his decision to take military action to recover the American merchant ship Mayaguez and its crew of 40, turned in—and proceeded to oversleep that morning.

The specific decision on what to do and when, the first made in an atmosphere of genuine crisis in the 9-month-old Ford administration, came at 4:45 p.m. on Wednesday, about halfway through a one-hour-and-50-minute meeting of the National Security Council in the Cabinet Room.

The acting chairman of the Joint Chiefs of Staff, Air Force Gen. David C. Jones, standing at the far end of the long conference table with pointer in hand, laid out to the NSC and key White House staff aides a series of military options, describing each on maps and charts.

The options dealt with three areas: what to do about the ship itself; what to do about Tang Island, where it was suspected the crew might be held; what to do about Cambodian military installations and forces on the mainland that might take retaliatory action.

More than two days earlier, at NSC's first Mayaguez crisis meeting at noon Monday, the President had taken the first steps necessary to reach the point of selecting among the options.
He ordered that full information be put together on the location of ship and crew, what military units were on or near the scene, and what others were needed and how soon they could be moved to the site in the Gulf of Siam.

On Tuesday morning, at a second NSC meeting stating at 10:30, Mr. Ford, acting on concern that the crew might be moved out of the area—an action that would severely complicate the recovery task—issued orders for U.S. forces to interdict any boats coming from or going to Tang Island, off which the seized U.S. freighter was anchored.

Meanwhile, the airlifting of Marines into the area went forward, and on Tuesday night, at a third NSC meeting, the President issued orders putting Navy, Marine Corps and Air Force units on a one-hour alert.

Beginning Tuesday night and continuing into early Wednesday morning (Washington time), after reports that Cambodian boats were attempting to move the crew from the island to the mainland, the attacks on the gunboats were carried out. Three were sunk.

The situation was now at a critical point, and in this climate, with reports flowing in all morning to the Pentagon and the White House, the NSC held its fourth and most significant meeting at mid-afternoon on Wednesday.

As Gen. Jones reviewed the various options at that meeting, according to one who was present, the President repeatedly interrupted to ask questions and to express his desire for caution and determination that the safety of the crew be preserved.

"He was very calm and deliberate," this observer recalled. "For some reason, he gave me the impression of being general himself. The impression I got was of a man who had been in the military, and the members of the NSC were obviously impressed with his knowledge of the military."

"He was the one who pressed all the questions. He wasn't going to be rushed into something."

In the discussion of the various options, according to another administration source, different approaches were studied, but there was essential agreement about the use of military force once those at the table were convinced diplomatic overtures were getting nowhere.

"We're criticized for examining options and for not examining options," this source said. "Well, they were examined."

When the President had determined the option he favored in each of the three areas—the ship, the island and the mainland—he issued specific verbal orders to Adm. James L. Holloway III, chief of naval operations, who immediately left the Cabinet Room to implement the President's wishes.

It was a serious, even somber meeting, with the only levity provided—briefly—by Donald H. Rumsfeld, the President's chief White House staff assistant. Rumsfeld, a former Navy pilot, offered jokingly that the Navy could do a better job than the Air Force on the ordered air strikes against the mainland.

"Everybody laughed," one of those present recalled, "and that was about the only laugh in the whole meeting."

Several sources said there was no political talk at the meeting; that is, what the political impact of the action decided upon would be. But one individual said there was some discussion of how the action would be perceived by the public.

The President sat at the center on one side of the long conference table.

To Mr. Ford's immediate left were Secretary of Defense James R. Schlesinger and Deputy Secretary of Defense William P. Clements Jr. To Mr. Ford's immediate right was Deputy Secretary of State Robert S. Ingersoll.

Across the table sat Secretary of State Henry A. Kissinger, Vice President Rockefeller and CIA director William E. Colby.

White House staff aides involved in the consideration of options and implementation of the selected plan included Rumsfeld; Philip W. Buchen, counsel to the President; Robert T. Hartmann and John O. Marsh, counselors; White House press secretary Ronald Nessen; Max L. Friedersdorf, White House legislative chief; and Maj. Robert C. (Bud) McFarlane, military assistant to Kissinger.

After that fourth NSC meeting broke up, the President conferred with Rumsfeld and Kissinger and then attended the bipartisan congressional leadership meeting at which the leaders were informed of the decision—about 90 minutes after the first U.S. assault forces had taken off from their stations, according to the chronology of military operations released by the White House.

As the military operation went forward, the President put on a tuxedo and attended a state dinner for Premier Johannes den Uyl of the Netherlands, stepping out to take status reports from Kissinger and others.

During the dinner, he was told that the ship had been retaken, and at 11 p.m.
he returned to the Oval Office where, 18 minutes later, he was told the entire crew had been recovered as well.

According to an observer, he immediately broke into a grin and conveyed the news to Kissinger, Rumsfeld and other aides sitting around his desk.

He changed from his tuxedo into a blue suit and, at 12:30 a.m. Thursday, walked into the White House press room and announced that “the vessel has been recovered intact and that the entire crew has been rescued.”

The crisis was over, but ahead were the ramifications, both domestic and foreign. Though the participants said domestic politics never were a consideration, one knowledgeable Republican politician, Sen. Barry Goldwater of Arizona, made clear yesterday what he thought the political impact would be.

“This one act of Ford could be the act that elects him,” Goldwater said. “You know, I haven't always been solidly with him, solidly in his corner, but I am now.

“I've opposed him as much as I've backed him, and I have had serious doubts about his leadership, and they were dispelled. It was the kind of decision it takes a strong man to make.

“You know, he likes to talk about Harry Truman, and I guess one of the things that makes Truman maybe the greatest President in this century was that you never had to wake up and say, ‘I wonder where the President is.’”

Staff writers Murrey Marder and Spencer Rich contributed to this story.

[H. R. 7594, 94th Cong., 1st Sess.]

IN THE HOUSE OF REPRESENTATIVES

JUNE 4, 1975

Mr. SIEBERLING introduced the following bill; which was referred to the Committee on International Relations

A BILL To amend and improve the War Powers Resolution

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

Section 1. Section 3 of the War Powers Resolution is amended by—

(1) striking out “consult with Congress” and inserting in lieu thereof “seek the advice and counsel of the Congress”;

(2) striking out “consult regularly with the Congress” and inserting in lieu thereof “regularly seek the advice and counsel of the Congress”;

(3) adding at the end thereof the following new sentence: “For purposes of this section, the words ‘seek’ the advice and counsel of mean that the President before making a final decision to introduce United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, shall in every possible instance provide the relevant information to and discuss the proposed decision for using such Armed Forces with Members of Congress, including but not limited to the Speaker of the House of Representatives, the majority and minority leaders of the Senate and the House of Representatives, the chairmen and ranking minority members of the Armed Services and Foreign Relations Committees of the Senate, and the chairmen and ranking minority members of the Armed Services and International Relations Committees of the House of Representatives, and shall ask for their advice and counsel before ordering such introduction of the United States Armed Forces.”

Mr. ZABLOCHI. Mr. Seiberling, I note with interest your definition of consultation in the proposed bill. Do I understand correctly that in certain instances you intend that consultation require Members of Congress to sit in on the National Security Council? In your opinion would this be in violation of the separation of powers doctrine?

EFFECTIVE MEANS OF CONSULTATION THROUGH THE NSC

Mr. Seiberling. I think, Mr. Chairman, in answering that question if the Congress attempted to require that they sit in, that could be con-
considered a violation of the separation of powers but all I am meaning to suggest—and the bill does now so require—is that the President in appropriate cases have this way of consulting and could invite the Members of Congress to sit in on that meeting. I would not consider that to be a violation of the separation of powers which does not, as I understand it, require that the President build a wall between himself and his deliberations and the Congress. If he chooses to invite the members to sit in, it seems to me that would be appropriate and I don't think the members would compromise the Congress separate status by so doing.

Mr. Zablocki. I recall briefings where Members of Congress were invited to the White House. These meetings were prefaced by the statement that they were informal meetings and not to be interpreted as a presentation by representatives in the White House or in the capacity of the executive branch.

Mr. Seiberling. Well, I am not an expert in that phase of constitutional law, Mr. Chairman. I can only say that my bill would not impose any such requirement or even deal with that question, it would leave the form of consultation up to the President and the members.

Past Experience Generates Concern

Mr. Zablocki. My concern stems from past experience. A further example that comes to mind involves Dr. Kissinger before he became Secretary of State. At that time he was the Chief National Security Adviser to the President and Chairman of the National Security Council, and he briefed Members of Congress on neutral ground, not on the hill nor at the White House but near the White House, thus getting around the problem.

Mr. Seiberling. I don't think the Founding Fathers intended that the President and the Congress deal with each other as though they were separate sovereign powers; they are all part of the same government. By creating separate, coequal branches of the Government, they, in the words of Alexander Hamilton, provided that each would be a check on the other.

Quite clearly if a Member of Congress were consulted—if the House majority leader and the Senate majority leader, for example, were consulted by the President as envisioned by the War Powers Resolution and as clarified by amendment—that does not mean that they are in effect making the decision for the President or for the Congress. It would simply mean that before he made the decision he was seeking their advice and he could ignore it if he wanted to and go ahead and do something different from what they advised and they could decline to give him advise in the appropriate circumstances.

So it seems to me that neither side is trenching upon the constitutional prerogatives of the other by merely consulting but they are supposed to have an exchange of views, and I understood that that was what section 3 of the War Powers Resolution as elucidated in your committee report indicated should be done.

Specification on "Consultation" Needed in Legislation

Mr. Zablocki. Clearly, the intent of section 3 was that, to the extent possible, the President consult with Congress. As author of the House
bill I can say that it was not the intention of section 3 to expect the
President to consult with all 535 members.

Mr. Seiberling. It would be impractical.

Mr. Zablocki. It would be most impractical. If he sought the advice
of a fraction of the total number of the Members in the House, he would
never be able to make a decision.

Mr. Seiberling. I think that that is really the core of the difficulty
in this case and when the bill was changed in conference before it was
adopted, so that in place of the leadership and of the Houses and the
appropriate committees the words "consult with Congress" were sub­
stituted, it was not spelled out as to just what that meant. It seems to
me that my amendment as incorporated in my bill would solve that
problem or at least address itself to it by specifically saying that con­
sulting with Congress means discussing it with Members of Congress.

Then I include "but not limited to" and then I spell out at least those
people that he ought to consult with, which gets us a little way back to
your committee's original concept of the leadership and the chair­
men of the committees but it does not limit it to those people.

ADVANTAGES OF AMENDMENT

Mr. Zablocki. But it might be difficult for the executive branch to
determine who to include in the consultation other than the leadership.
For example, if they select one certain Republican, a Democrat might
claim the right to equal status on the basis of similar seniority. I under­
stand that even to the extent consultation was carried out in the May­
aguez incident, some Members of Congress who were not included took
affront and complained.

Mr. Seiberling. Of course that problem arises every time he con­
sults, but I assume that, since he did call some people and inform them
after the Security Council meeting on the Mayaguez incident, he must
have made some choices. My amendment makes it a little easier for
him, at least ultimately, to include these particular people, and that
way it would avoid ruffled feelings if other people not named in the
amended resolution were not included.

I think there is another aspect to this, too. It leaves it up to these
particular people to decide to what extent they then, in turn must
inform other Members of Congress, and that way the consulting with
Congress takes place through a specified channel of leadership which I
think is an orderly way to go about it.

TIMING OF CONSULTATION QUESTIONED

Mr. Zablocki. I would like to ask one further and final question on
this point as it relates to your proposed bill. In subparagraph 3 the
words "seek the advice and counsel of" mean that the President will
consult before making a final decision. Then in elaborating on what
you interpret as the consultation and advice and counsel, in the last
line of the proposal you say, "shall ask for their advice and counsel
before ordering such introduction of the U.S. Armed Forces." This
leads me to the question, precisely when would the consultation take
place: Before he makes the final decision or before he orders the troops
into combat?
Mr. SEIBERLING. Well, I think that some work by drafting experts might be appropriate.

Mr. ZABLOCKI. If you retain your last reference, "the introduction of the U.S. Armed Forces," he did then indeed consult in almost every instance.

Mr. SEIBERLING. Let me say that in the Mayaguez incident, as I understand the chronology, he had his fourth meeting with the Security Council at the end of which he gave the orders for the marines to land on the island and for the planes to carry out their operations. In other words, he had already given the order and after that he went to another room where Members of Congress were already assembled and he informed them of his decision. So there are some subtle differences here between making a final decision and giving an order.

CONGRESSIONAL INVOLVEMENT IS THRUST OF PROPOSAL

The thrust of this proposed language is that he might make a tentative decision as to what he was going to do, but before he finally gave the orders he ought to consult with the members and ask for their advice as to whether they think this is a good course of action. There is an enormous difference between doing that and waiting until after he has made his decision and then saying to the Members of Congress, "Well, I have made my decision, gentlemen; does anybody have any objection?"

Well, it is going to be a bold person that objects to a decision that the President announces he has already made because he might turn out to be right in which case the objection would look foolish and most people do not want to try to override a President when he has made a decision. So I submit that this is an extremely important distinction because the time to ask the Members of Congress for their opinions is before he has given the orders to take particular action. Once he has given the order, the die is cast and their opinions are almost irrelevant.

Mr. ZABLOCKI. My time has run out but I would like to counsel with the committee as to which would be preferable, to continue the questioning of each witness separately or to hear the three witnesses first and then question as a group.

Mr. FINDLEY. I am sure Senator Javits is interested in this very point we are pursuing now, so if the Senator is agreeable I would like to ask Mr. Seiberling a couple of questions on this point.

Senator JAVITS. I have a time limitation.

Mr. ZABLOCKI. The author of this particular section is Mr. Findley, of Illinois; therefore, I call upon him.

Mr. SEIBERLING. I take my hat off to him, I think it is an admirable job.

Mr. FINDLEY. You are now speaking of the consultation. You have given me too much credit, Mr. Chairman.

Mr. ZABLOCKI. It was your idea.

Mr. FINDLEY. I will gladly claim authorship to the reporting part and the concurrent resolution part but not the resolution although I am glad it is in there.

Mr. ZABLOCKI. Well, if you didn't author it, you protected it.

LEGISLATION IN NEED OF PRECISE LANGUAGE

Mr. FINDLEY. Mr. Chairman, if I could ask a question or two of our good friend, Mr. Seiberling.
First of all I want to thank you for this very thoughtful statement and the proposed amendment to the War Powers Resolution. I think it brings into focus a very important part of the resolution. I have always felt that the consultation part is the least precise and therefore the least effective part of the War Powers Resolution, and I didn’t see really any way to make it much more effective.

I feel myself that any President facing a grave military crisis is going to find the best possible avenue that he sees to bring the leadership of the Congress into the decisionmaking process if time permits. In any event, we cannot legislate too precisely on just what will be possible in every instance.

I notice in your statement you have the phrase “in every possible instance” as the loophole.

Mr. SEIBERLING. That is committee language.

Mr. FINDLEY. We recognized that that was important as we drafted this resolution.

The President, of course, has to act with dispatch and secrecy. These are elements of military response that have to be recognized. Your proposed amendment would bring into the consultation and advice process 13 persons as I count them and that is quite a lot to be involved in any intimate review on a continuing basis of a military crisis.

Mr. SEIBERLING. I think that is fewer than there are on the National Security Council if you throw in the staff and all that.

REFLECTIONS ON ADVICE AND COUNSEL PROCEDURE

Mr. FINDLEY. The staff undoubtedly, but the membership of it does not exceed four.

In your statement your men60ned the President himself met four different times with the NSC and no doubt the NSC itself met on other occasions. To have a really meaningful advise and counsel procedure involving legislative action, I would think that it would be almost essential that they drop everything else they are doing and stay with the NSC during this 2½-day period in this instance or any other unfolding crisis to be there to consider and evaluate the facts as they are perceived and as they may change during this period of time.

Otherwise, if they are brought in for advise and consultation at the time of the first meeting of the NSC with the President, all of that might be totally outdated by what happens a few hours later. It might really be well for the President in the future to do his best to insist that the Speaker of the House and the minority leader as well as the majority and minority leaders in the Senate come and stay there with him and consider this crisis as it unfolds.

Mr. SEIBERLING. I would see no objection to that.

Mr. FINDLEY. I don’t think it is prudent for us to write that into the War Powers Resolution.

Mr. SEIBERLING. I agree.

Mr. FINDLEY. Personality problems or partisan considerations might be so great as to make that imprudent.

PROMPT WRITTEN REPORTING SEEN AS IMPORTANT ELEMENT

As long as you keep that phrase “in every possible instance” I don’t see that there is great harm done by your language, but I doubt if it really would cause much of a change in the relationship between
the President and the legislative branch here. It seems to me the most important elements in the War Powers Resolution are the requirements of prompt reporting in writing to the Congress and second the deadlines that are written in.

Mr. SEIBERLING. I would agree with you that those are the most important parts of the resolution even though Senator Fulbright said he thought the heart of it was the consultation provision. I think that we have certain examples before us.

The Cambodian incursion, which as I understand is was undertaken without consultation with a single person in the Congress—President Nixon simply did it and the tragic consequences ensued even within our country. Four people were killed at Kent State University, in my district, as a result of the incursion. Similarly the bombing of Cambodia—which was kept secret from the Congress except apparently in a hallway or somewhere they mentioned it to one or two people in passing—could have been handled by this prior consultation. In both cases it is entirely possible that the Congress might have given the President a different point of view which might have caused a different result. We don't know.

AMENDMENT REQUIRES ADVICE BEFORE FINAL DECISION

That is about all we can expect. There is no way you can require a President to follow the advice of Congress and there is no way you can really require him to consult before his mind is already made up, but you can certainly require that in every possible instance he ask them for their advice before he has formally announced a decision. That is all my amendment addresses itself to and really that is what your committee report says.

Mr. FINDLEY. The main suggestion I would have is that in defining which Members of Congress are to be consulted you would make it much more restrictive.

Mr. SEIBERLING. I would not object to making it more restrictive, provided we say "including but not limited to" so that he at least has to include those people.

Mr. FINDLEY. Thank you.

Mr. ZABLOCKI. Mr. Lagomarsino.

Mr. LAGOMARSINO. Mr. Chairman, I have just one question about the timing here.

From the chronology it is obvious that the President ordered the movement of troops and of aircraft carriers and so on rather soon in the game and no doubt that was required because of the distance that the aircraft carrier particularly had to travel to reach the area.

Mr. SEIBERLING. Yes.

KEY WORDS: "IN EVERY POSSIBLE INSTANCE"

Mr. LAGOMARSINO. I don't know what else the President could have done to meet the deadlines that eventually occurred and there probably was not time to consult all of these people before that. Now do you contemplate that even preliminary steps that would be necessary for introduction of troops into combat would be covered by the consultation requirement?
Mr. SEIBERLING. Again the key words are “in every possible in­
stance” and that of course would not be practical in every case. Senator
Javits in his description of the conference report to the Senate used
some language which I quoted which I think is very appropriate
where he said that the provision made allowances for instances “of
such great suddenness in which it is not possible to consult in
advance.”

However, in this case, and I am now reading from the Washington
Post article recapping the Mayaguez decision by the President, it
was not until the fourth Security Council meeting 2½ days after the
Mayaguez seizure incident was reported that the President made the
decision—and I am looking now at the article—at the fourth meet­ing.
It said when the President had determined the option he favored in
each of the three areas—the ship, the island and the mainland—he
issued specific orders to Adm. James Callaway, Chief of Naval Oper­
ations, who immediately left the Cabinet room to implement the Pres­
ident’s wishes.

FOURTH NSC MEETING

Then it goes on to say after that fourth NSC meeting broke up the
President conferred with Rumsfeld and Kissinger and then attended
the bipartisan congressional leadership meeting at which the leaders
were informed of the decisions about 90 minutes after the first U.S.
assault forces had taken off from their station, according to the chro­
nology of military operations released by the White House.

Mr. LAGOMARSINO. Let’s go back before that to the chronology which
is in our packet.1 I am not sure who prepared this. It shows that
there was one National Security Council meeting at noon on Monday,
May 12, and that afternoon—it does not give the time. It says,
The aircraft carrier Coral Sea and other ships from the 7th Fleet were ordered
to set course for the Gulf of Siam.

Mr. SEIBERLING. But that does not involve the language of the act
which says that he only has to consult with Congress before introduc­
ing U.S. Armed Forces into hostilities or into situations where im­
minent involvement in hostilities is clearly indicated.

Mr. LAGOMARSINO. I wanted to make clear you were not expanding
it.

DECISION MADE AT FOURTH MEETING

Mr. SEIBERLING. There is a line, when they get to the point, where
they reach a geographical area and it is going to involve imminent hos­
tilities. At that point you have to make a decision. Are you going to
cross that line or not? That decision, as I understand it, was not made
until the fourth meeting of the Security Council. They simply started
the machinery before then.

Mr. LAGOMARSINO. Some kind of decision was made that we better
have somebody there if you want to proceed with that effort.

Mr. SEIBERLING. That is a very useful question, it brings out, in
my view, the point at which consultation is required under the act. I
would say that it certainly was not required for the preliminary
action, but was before the final decision was taken.

1 Chronology appears on p. 105 of appendix.
Mr. Lagomarsino. Thank you.
Mr. Seiberling. Thank you.
Mr. Zablocki. Mr. Solarz.
Mr. Solarz. Thank you, Mr. Chairman.

I have just one brief question for our distinguished colleague. I found your analysis of the legislative history of the consultation provision in the War Powers Resolution both interesting and informative. I note that in your effort to deal with some of the problems that have emerged with respect to that provision since the time it was first enacted, you spell out a list of those specific Members of Congress in the leadership who ought to be consulted prior to the time action is ordered. I wonder whether you think it would make sense to go back to the original language of the House bill which provided for consultation not only with the leadership but with the appropriate committees of Congress because in your suggested bill while you spell out those specific members of the leadership who ought to be consulted you make no reference at all to consultation with the appropriate committees themselves.

CONSULTATIONS WITH APPROPRIATE COMMITTEES

As a member of one of the appropriate committees who is not a part of the leadership, it seems to me at least from my perspective that it might make sense for the President to consult with the Foreign Relations Committee in the Senate or the International Relations Committee in the House.

Mr. Seiberling. Well, I think that it would make sense if it were practical. Mr. Findley pointed out, however, that even 13 members is a lot if you are going to have to get them together and act fast. I was not in on the drafting of the conference report. Senator Javits was one of the Senate conferees and I guess it was at their urging that the language was changed so maybe he could enlighten us as to why.

I understood the thinking was that if we didn't make it the whole Congress that there might be a tendency to just pick and choose people who were going to be sympathetic to whatever action the President took. My bill would avoid that problem by spelling out people who should be included.

Mr. Solarz. I understand what you are trying to do here. What I am trying to get at is whether or not you think it would or would not make sense to also add specifically the appropriate committees to the list of those with whom the President would be legally obligated to consult.

CONSULTATION WITH COMMITTEES POSES PROBLEMS

Mr. Seiberling. I think that gets back to the same problem of consulting with the Congress. He obviously cannot consult with 535 people in an emergency. I doubt if he can counsel with the full International Relations Committee or Foreign Relations Committee in an emergency. It seems to me that the genius of the resolution's language was that he could pick the way he consulted with Congress and it would be up to the chairmen and the majority leader and so forth to then go on and pass that information on to other Members of Congress. I think
that is the orderly way to do it, but I guess we ought to let the Senator state his view.

Mr. Zablocki. We are very deeply honored and privileged that the Senator has taken time from his busy schedule to come before this subcommittee and testify. The Honorable Jacob Javits, Senator from the State of New York, is chief Senate sponsor of the War Powers Resolution. We certainly welcome his views on the question of whether consultation was carried out under the provisions of the War Powers Resolution in the most recent incidents involving the commitment of our Armed Forces to areas of hostilities.

Senator.

STATEMENT OF HON. JACOB K. JAVITS, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator Javits. I thank the Chairman.

Mr. Chairman and members, may I ask unanimous consent that my statement may be made part of the record.

Mr. Zablocki. Without objection, so ordered.

Senator Javits. The consultation of the Congress prior to the Mayaguez incident resembled to me the old and discredited practice of informing selected Members of the Congress a few hours in advance of the implementation of the decision already taken within the executive branch. I cannot say whether this was from force of habit or whether it was calculated to test the mettle and resoluteness of the Congress, or both. I would hope that it was the former, just force of habit. It seems to me that these hearings are critically important so that we may make our position known to the Executive and to the country.

DISTINCTION BETWEEN “BRIEFING” AND “CONSULTATION”

There is a crucial distinction between the old line briefing where you call people in and tell them what you are going to do, and the consultation called for by the act which I think Congressman Seiberling has very well described. It is only where the suddenness of the action is such as to make prior consultation impossible that we feel consultation can come after the event. But there would be few such situations. After all, we get advance intelligence on almost everything from our satellites and other sources.

Consultation really means that when the Executive wishes to come to a decision about a given matter he shall consult with the Congress as to what the decision should be, and take into account what the Congress believes should be the decision before it is made. Otherwise you are not consulting, you are just reporting a fact or a decision which has already been taken.

MEANING OF PRIOR CONSULTATION

Now what do I mean by prior consultation? I mean such means as under the circumstances are appropriate. An optimum way is Presidential speech to a joint session of Congress. That would be the full meaning of consulting the Congress if it also includes a “feed-back”
mechanism to get the advice of Congress. But, that is usually impractical because of security or time reasons. Therefore in most instances the proper course would be to consult with those committees which have legislative jurisdiction. The President can designate his representatives to present his views to the committees and get the views and comments of the committees.

For example, in respect of the Mayaguez, it would have been appropriate to consult the Foreign Relations Committee in the Senate and the International Relations Committee in the House. If time permitted and it was adequate to the situation and it involved any question of the availability of armed forces, et cetera, the President would be justified in extending that to the Armed Services Committees of each House on the matters in their jurisdiction. But, declarations of war fall in the jurisdiction of the Foreign Relations Committees, as they are the main forums.

Now as to the leadership, I think the leadership in this context is to be viewed as a creature of each House for particular purposes, mainly political and administrative. That is the group that the President talks to because it leads the members of his party in the Congress. When he talks to the joint leadership, he speaks to those who determine the calendar, the order of priority in the House or at least the House follows their actions and has recommendations. But really the leadership is not a unit for decision or a unit from which a President can bounce off what he wants to do, his ideas and get back an opinion that speaks for the Congress. That is really not the function of the leadership.

**FUNCTION OF THE LEADERSHIP**

The function of the leadership is to tell the President what the House thinks, but if they don't know yet what the subject is about, then it is no consultation. Now, if he said he wants to consult the leadership, he brings them in, he tells them what he wants to do and he says: “Go back home, fellows; hold a caucus of your party and tell us what they said,” I can understand. But even that would not match the expertise of the members of the committee that are pertinent to the issue.

If you call in the leadership, they don't know what they are being called in for—some general subject dealing with the war in Southeast Asia or the seizure of the Mayaguez. Then you consult with them and then they have to go back and find out what their particular constituent body thinks, whereas if he consults the substantive legislative standing committees he is getting the view of that body which is charged with making recommendations on that subject to its own House.

So I respectfully submit first and foremost that that should be the established method of consultation that is with the Senate Foreign Relations Committee and the House International Relations Committee. If the President would also like to consult with the leadership—that is fine and that is icing on the cake.

**KEY TO WAR POWERS RESOLUTION**

The important point of our consultation, is this. It does not involve any legal power or grant of authority. The legal power in the War
Powers Resolution is that we can decide when the stop loss provisions of the War Powers Resolution should be applied. Now in an operative sense that is the key to the War Powers Resolution.

Congressman Zablocki has very kindly referred to me as the Senate author. That is what I intended it to be, the power to stop loss, and coupled with that, the power to anticipate the 60 or even 90 days by concurrent resolution which shortens the length of the emergency period in which the President can act. So when the President is required to give us notice under 4(a)(1), suppose he does not? Suppose he does what Nixon did, he says it is all unconstitutional, forget it.

We can nonetheless pass a resolution saying, “Look, Mr. President, from this moment on”—he does not have to sign it—“you lose any authority to put those Armed Forces in where you are going to put them.” That is our volition and our initiative, locked in by drafting provisions against filibuster, or committees pigeon-holing the resolution. That is the genius of this law, and as we learn to live with it and have experience with it, we will latch on to that and we will understand that this is a real power.

METHODOLOGY SEEN AS PERFORMANCE TEST

Now it is perfectly true, that our bill which contained an authority test as well as a performance test was not the bill adopted in the sense that the House approach was adopted without the authority test. We did adopt the House approach, the methodology being that it is a performance test, it is not an authority test. That is, did he or didn’t he have constitutional authority?

The minute he puts troops into hostilities or imminent danger of hostilities, the act begins to operate. And he does not have to tell us he is doing it, because the 60-day clock starts to tick if a report is required, and even if he fails to do a report, it still begins to operate and it is up to us to press the button so he loses all authority if we do not agree with his actions. Now this is the key to this whole legislation. If the President takes emergency action, his action is only good until Congress acts dispositionally because we have the declaration of war authority.

In view of the fact that I was a party to the compromise, I knew what I was compromising, so I must tell those that think like Senator Eagleton, “Look, fellows, I sympathize with you.” I was all for the Senate bill, I was its author, but it didn’t go, that was not the way it went. We had a different approach in defining the President’s emergency authority. The approach adopted omitted such a definition and relied solely on a performance test, which was the second leg of the Senate bill. Ultimately, the House only took that part of my original scheme.

CONSTITUTIONAL POWER OF CONGRESS

I read with the greatest interest the letter that the lawyers for the Department of State and the Department of Defense have sent to Congressman Zablocki. They are still arguing what their version is of constitutional power and on the grounds of which President Nixon vetoed the bill. Well, we know all about that. It just didn’t fly.

The bill which is law is based on a performance test. In other words, they are perfectly right about the fact he is Commander in Chief, he