puts the troops in. But if we act to countermand or stop it, from then on it becomes illegal without a declaration of war, his authority is good only until Congress acts dispositively, but the Constitution gives Congress the power to declare war, or to refuse to declare war. I think it is important, very important, to get the scheme of the law because this is a very historic change from the past and naturally it will take time to work in.

I believe, the President gets mixed marks on this one. The fact is that he did make the reports. Whether he labeled them 4(a)(1) reports or just section 4 reports and said he was using his power as Commander in Chief, in my understanding of our legislation, is ultimately immaterial. The fact is that he did make the reports and what we then do with the reports is up to us, not up to him, regardless of how he labels them.

CONFUSION OVER MEANING OF CONSULTATION

I think that even the Presidency—I would not say Mr. Ford himself, but the Presidency, was confused about what is really meant in terms of consultation. You can understand that. It is a new law, a new kind of approach to our foreign policy, and we are engaged in the common work of learning from what has happened so that it shall not happen the same way again.

Our hearings in the Senate Foreign Relations Committee in a sense will be a response to this letter from the State and Defense lawyers. If they react to our hearings, which I am sure they will in one form or another when we get the Secretary before us and you get him before you, we will find out what their view is at the political level. That is the way a pattern of action which will be solid for the future will develop under the War Powers Resolution.

I would like to conclude because I have covered what I had to say in the statement and in this oral discussion with the committee. I conclude as follows.

CONSULTATION SHOULD INCLUDE ALL CATEGORIES

Mr. ZABLOCKI. Before you conclude, Senator may I pose this question. In my opening statement I gave what I thought was the view of the House or of this member who is a principal sponsor in the House on what we meant by consultation—as to whether consultation was only applicable to 4(a)(1) situations or in every instance. What is your view on that issue?

Senator JAVITS. The law says “wherever possible” he shall consult. You gentlemen added a reporting requirement in where he materially augments our forces abroad in a peacetime deployment. I don’t think there is any question from a policy viewpoint about the fact that consultation should include all the categories embodied in section 4; not only the introduction into hostilities but also the 4(a)(2) and 4(a)(3) deployments.

Mr. ZABLOCKI. It’s on this very point that the executive branch may be confused. As you know, section 3 says “after every such introduction [he] shall consult regularly with the Congress until U.S. Armed Forces are no longer engaged in hostilities or have been re-
moved from such situations." Now, that language does not in any way indicate that we expected him to consult where they would be entering into hostilities.

Senator Jarvis. Certainly not. I think at least the lawyers who wrote you that letter saying, because he pulled out the troops that was moot; I think they are all wet on that one. The Congress always has a right to go back and learn from the history of the situation, even if the President might consider it moot. Besides, I hear there are a couple of marines still somewhere in Saigon, so technically we still have jurisdiction.

REPORTS SUBJECT TO SCRUTINY

But be that as it may, I just wanted to conclude, Mr. Chairman, as follows. The President has now submitted four reports under the War Powers Resolution concerning the Mayaguez. These reports deserve scrutiny because, in my judgment, they contain ambiguities which could prove to be most troublesome in foreseeable future circumstances.

We don't have to rely on the President to label a report 4(a)(1), which starts the 60-day clock ticking. That is what makes the argument in the legal memorandum by the lawyers of Defense and State about what is the definition of hostilities not relevant. That is the role we have to decide and the War Powers Resolution implements our constitutional authority to stop him. It is the equivalent of our refusing to declare war, which we have full power to do.

By precedents and history the Congress has practically surrendered all its power except cutting off the money, which we finally had to do in the case of Vietnam. So we have given ourselves some new levers to exercise our powers. I hope no citizen of the United States thinks that we have any more or less than we have under the constitution. Once the President puts troops in, that is the big act and that is a tough mountain to climb over for any Congress.

EVACUATION OF FOREIGN NATIONALS IS KEY POINT

I do want to call the committee's attention to this matter of bringing out foreign nationals. That is a key constitutional point as the case developed and it seems to me that the position of the State Department and Defense Department lawyers is weakest on that score.

As Barry Goldwater argued in the debate in the Senate, the Presidents have put us into war or what is a war situation 100-odd times—I think 119 or something like that. But, that is why we passed the War Powers Resolution. So what is the use of lecturing us on the fact that he has done it. That doesn't change the Constitution or increase the President's power or decrease the Congress'. Of course the President has done lots of things and that is what we intended to reach with this particular piece of legislation. By the performance standard of the War Powers Resolution it does not make any difference to us what constitutional power he thinks he has invoked. The fact is that when the President puts troops into a hostilities situation or imminent danger thereof, then our law becomes operative. It becomes operative because it is up to Congress to make the controlling, dispositive decision of getting into war, or not getting into war.
If the Senate bill had passed, which included provisions about the rescue of American citizens, there would have been a different argument. But, there the actual language of the law which included only U.S. nationals would have been against the argument which the administration lawyers have made. I believe it equally runs contrary to the bill containing the methodology which we have adopted, just as fully contrary as if the Senate authority and performance standard had passed. The criterion in the House bill is: Where are the troops and what are they doing? The minute that the troops have been introduced into hostilities the Congress has the necessary jurisdiction on which to proceed.

If the President had sought authority for the evacuation of Vietnamese nationals, too. I am confident it would have voted to bring out foreign nationals that could have been brought out with Americans; and the conference report which we passed on the Saigon evacuation said so. We passed it that way in the Senate and the House debate supported it, but because of the “mootness” under the time lapse the whole bill finally was turned down for other reasons.

So I really think we should make it clear that in the future we expect the President, when he is making a decision like that, to get authorization because we should not under those circumstances be put to the pain and anguish of having to stop him. You see, that is really what it comes down to the way the State and Defense lawyers have defined it. They claim if he says he has a constitutional power to take out Americans as well as foreign nationals you don't have the constitutional power to stop me. A President should not proceed on the assumption that he can take out foreign nationals without asking us and having us concur. I really think that that is a very important point that we wish to deliver to the Executive.

As to Americans, there is no question in my mind about the constitutional authority. As to foreign nationals, the President should not make it necessary for us to stop him, he should come to us in advance for authority to bring out foreign nationals. We are most likely to give it to him.

It is my judgment that the War Powers Resolution has worked well in the first rather uncontroversial and elementary trial runs to which it has been subjected. But there are no grounds for congressional, or national, complacency. It will only work as well as we make it work, and we in the Congress need to perfect our own organizational implementation procedures. We must be assertive of our duties and exercise our responsibilities and prerogatives. For example, I think that it is not inappropriate to say to our leadership, “Look, when the President says he is consulting you about a war situation you owe it to us either to come back and find out what we think,” or to tell the President, “Look, Mr. President, we will summon the appropriate
committees; they have the expertise and the subject matter jurisdiction and we will come right here and sit with you.” That is consultation. I think that is only fair and just as far as we are concerned, and it is in no way a denigration of our leadership. On the contrary, it is our leaders' duty to sustain our institutional prerogatives and our law. It is our job in the committees because we have the expertise, to tell them what we believe that law requires.

We learn as we go along and we will tighten things up. Amendments may be necessary but with all respect, I am rather worried about amendments so soon.

Thank you, Mr. Chairman.

[Senator Javits' prepared statement follows:]

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

WAR POWERS RESOLUTION MEETS INITIAL TESTS

Within the past eight weeks, the War Powers Resolution (Public Law 93-148) has been tested under fire three times in rapid succession. I believe that this unique legislation has stood-up well in its initial tests; and that this is an opportune time to examine with some care just what the initial tests reveal about the War Powers Resolution.

First, I think it is important to note that Public Law 93-148 has been accepted by the Executive Branch as the central legislation defining the legal parameters of Presidential initiative in the introduction of the Armed Forces into hostilities, as well as the correlation of such action with the powers and responsibilities of the Congress. President Ford’s compliance with the law is in welcome contrast to his predecessor's unsuccessful effort to veto it.

Second, our initial experiences show that improved procedures are required, both within the Executive Branch and the Congress, to assure smooth and effective implementation of this legislation.

Third, it seems clear that while the Executive Branch has accepted the requirement of compliance with the War Powers Resolution, the Congress must be vigilant, alert and active to assure that the spirit as well as the letter of the law is observed. If Congress sits back passively and merely awaits Executive fulfillment of the reporting requirements of the law, the key policy decisions will continue to be monopolized by the Executive Branch, as they were in the decades leading up to enactment of the War Powers Resolution.

Fourth, the initial test runs have shown that the consultation provisions of the law is the pressure point most vulnerable to circumvention and manipulation. A major portion of my remarks is devoted to this problem.

Section 3 of the War Powers Resolution states that: “The President in every possible instance shall consult with the Congress before introducing United States Armed Forces into hostilities •••” It is clear that, with respect to the Mayaguez incident, advance consultation with the Congress by the President fell far short of the intentions of those who drafted the legislation and those who voted overwhelmingly for it in both Houses of Congress.

To a disturbing extent, consultations with the Congress prior to the Mayaguez incident resembled the old, discredited practice of informing selected members of Congress a few hours in advance of the implementation of decisions already taken within the Executive Branch. It is unclear whether this relapse was from force of habit or was calculated to test the mettle and resoluteness of the Congress.

It seems to me that the time has come to establish a crucial distinction, if the War Powers Resolution is to meet the nation's expectations of it. A distinction must be made between the historic custom of giving advance notice to the Congressional leadership of major Presidential decisions, and the prior consultations requirements of the law. The prior consultations required under the law should be conducted with the committees having legislative jurisdiction—meeting in their formal capacities as committees of the Senate and House of Representatives. If the President wishes to conduct the consultations personally, as he did in one instance with the Senate Foreign Relations Committee, the
committee as a matter of courtesy can meet the President at the White House. Otherwise, I believe that it is incumbent upon the President to send his designated representative or representatives to appear before the Senate Foreign Relations Committee and the House International Affairs Committee, in full and timely manner, to consult in the full sense of that term.

The President would not be bound in any legal sense by the advice he received in the course of consultations with the committees. But, he would be rash to wholly discount it because any actions he may take after consultation are subject to Congressional review, which under the terms of the law can range from disapproval to full endorsement.

It is important to recall at this point that the consultation process is not an authorization process. The War Powers Resolution itself deals only with emergency instances where the President introduces United States Armed Forces into hostilities in the absence of a Declaration of War by Congress. Even if his introduction of troops into hostilities is pursuant to a prior authorizing statute or resolution (not constituting a Declaration of War), such introduction is subject to the review and cut-off provisions of Sections 4-7 of the War Powers Resolution. Moreover, the instances in which the President, as Commander-in-Chief, can introduce U.S. Armed Forces into hostilities without a Declaration of War are set forth in Section 2(c) of the law.

In my judgment, our experience with the Mayaguez incident demonstrates the wisdom of separating the consultation process from the Congressional review or authorization process. Facts which were not revealed to the Congress in the unsatisfactory consultation process concerning the Mayaguez, but which have subsequently come to light, raise profound questions concerning the military actions taken in connection with securing release of the ship and the crew. For instance, we have learned that the amphibious assault by our Marines was conducted against the wrong island, 20 minutes after the crew had been released. The lives of 41 U.S. servicemen were lost in connection with the release of 36 crew members. Bombing missions were conducted against an oil refinery and aircraft on the Cambodian mainland both known to our government to be nonoperational. In addition, it appears that the standard warning being given to all ships of the risk of being stopped in those waters was not given to the Mayaguez.

In circumstances somewhat similar to the Mayaguez incident, the Congress in August 1964 passed the Tonkin Gulf Resolution. The provisions of the War Powers Resolution were drafted with that regrettable experience in mind. Specifically, the decision to give Congress a full 60 days in which carefully to consider the emergency introduction of U.S. Armed Forces into hostilities by the President was designed to avoid hasty and emotional action by the Congress in ratifying Presidential action without sufficient information.

Our initial experiences with the War Powers Resolution indicates that obtaining full and timely information from the Executive Branch is a difficult and complicated procedure even with the statutory sanctions contained in the law. Under the law there are at least three distinct and supplementary mechanisms for the Congress to obtain required information from the Executive Branch. First, there is the prior consultation process. As noted, this was unsatisfactory with respect to the Mayaguez incident, although it was somewhat more satisfactory respecting the Cambodia and Vietnam evacuations—but largely as a result of clear demand and follow-up by the responsible committees of the Senate and House. Second, there is the information required to be submitted in the reports to the Congress by the President under Section 4 of the law. Third, Section 4(b) requires that: "The President shall provide such other information as the Congress may request . . . ."

It is my firm conclusion that the Congress can only obtain the information it requires by acting formally through the committees having legislative jurisdiction with respect to the War Powers Resolution. This applies in the first instance to the prior consultation process.

Our experience in the Senate Foreign Relations Committee shows that the staff has an important role in obtaining and evaluating information necessary for committee members to act in an informed and considered way. Only with the assistance of diligent, disciplined professional staff can the committees of Congress hope to cope on equal terms with the large bureaucracy which supports the President and his Cabinet secretaries in matters of war, peace and diplomacy. Moreover, I believe it would be useful for the Senate Foreign Relations Committee and the House International Relations Committee to consider means
The President has now submitted four reports under the War Powers Resolution. These reports deserve scrutiny because, in my judgment, they contain ambiguities which could prove to be most troublesome in foreseeable future circumstances. By chance, the first three instances bringing the War Powers Resolution into play have concerned the rescue of American citizens. In each instance, the rescue was completed prior even to the 48-hour period within which the President is required formally to report to the Congress. Since the introduction of U.S. Armed Forces into hostilities in each instance was terminated before the receipt of the Presidential report, formal consideration of the reports has in each instance been mooted by the circumstances.

Nonetheless, there are three aspects of these reports on which I wish to comment. First, I note the ambiguous wording of the reports, which seem to follow a pattern established in the first report and not fully appropriate to the circumstances. The initial report, submitted on April 4, was essentially an informational report in compliance with Section 4(a) (2). Such reports, dealing with the deployment of combat-equipped forces short of introduction into hostilities, do not trigger the subsequent provisions of the bill. However, the three subsequent reports, submitted respectively on April 12, April 30 and May 15, concern the introduction of U.S. Armed Forces into hostilities in connection with: (a) the evacuation ofPhnom Penh; (b) the evacuation of Saigon; and (c) the release of the Mayaguez ship and crew.

Each of these three reports is, within the parlance of the War Powers Resolution, a 4(a) (1) report; a 4(a) (1) report triggers the subsequent provisions of the War Powers Resolution by setting in motion the 60-day clock. In my judgment, the Executive Branch should have clearly and properly labeled the three 4(a) (1) reports. I do not wish to impute motives for this deficiency. But I believe it is timely to remind the Executive Branch—as was made clear during the floor debate on the Conference Report—failure properly to label a report required to be submitted under Section 4, or even a failure to submit a required report, will in no way delay or frustrate the triggering of the 60-day clock and the provisions of Sections 4 through 7 of the law.

Second, I believe that the format and mode of delivery of the four initial reports received under the War Powers Resolution to be questionable in law and unsatisfactory. Each of the reports has been cast in the form of a personal letter from the President to the Speaker of the House, as recipient for the House of Representatives, and the President Pro Tempore of the Senate. They are brief to the point of being in minimal compliance with the content requirements set forth in the law. Furthermore, as if to imply that these required reports are informal, personal letters to the Speaker and President Pro Tempore in their individual capacities, the reports have been delivered to the personal places of abode of the Speaker and the President Pro Tempore, rather than to their official offices in the Capitol. (In one instance, the report to the Speaker, as recipient for the House of Representatives, was sent to him in Peking, China where he happened to be visiting.)

Third, as indicated above, the four reports received so far under the War Powers Resolution have been almost worthless from an information point of view. They do not suggest a readiness within the Executive Branch to provide the full and timely disclosure of relevant facts and judgments which the reporting provisions of the law were designed to elicit. And, they do not provide an adequate informational basis for informed Congressional action. I hope and trust that these deficiencies will be corrected in any future occasions.

In conclusion, it is my judgment that the War Powers Resolution has worked in the first, rather elementary and non-controversial trial runs to which it has been subjected. But clearly there are no grounds for Congressional, or national, complacency. The War Powers Resolution will work only as well as the Congress and the Executive Branch make it work. We in Congress must further perfect our own organizational and implementation procedures. We must be assertive of the duty to exercise our responsibilities and prerogatives, while being restrained and responsible in the exercise of our judgments. And the Executive Branch, in my judgment, must be more forthcoming and conscientious both with respect to the prior consultation procedures and the reporting requirements.

As it happens, I wish to take note of the ironic coincidence that each of the first three incidents triggering the War Powers Resolution concerned the protection and rescue of American citizens. I say ironic because this issue, while dealt with explicitly in the original Senate bill, is not clearly dealt with in the final
legislation which emerged from the conference. Section 2(c) of the legislation as enacted, in declaring the instances in which the President has authority to introduce U.S. Armed Forces into hostilities in the absence of a Declaration of War, makes no mention of the rescue of American citizens as the Senate bill had it. I think this was a regrettable omission and in my judgment the legislative history of the War Powers Resolution, as well as previous constitutional practice and doctrine, support the view that the emergency powers of the President include, as a sole addition to the categories set out in Section 2(c) of P.L. 93-148, the authority to employ the Armed Forces in the rescue of American citizens if legitimately required by the circumstances.

This is not just an academic point. In April, the State Department submitted a legal memorandum to the Senate Foreign Relations Committee asserting that the President has the authority on his own to evacuate foreign nationals, in limited numbers, while evacuating Americans if this can be done “without materially changing the nature of such an effort”.

This view was decisively rejected by the Senate and, according to my understanding, also by the House. The rejection of this assertion was contained in the adoption by each House of the separate versions of the Vietnam Contingency Act of 1975. The conference report was also passed overwhelmingly in the Senate but for reasons which I do not fully comprehend the conference report ultimately was rejected by the House. Nonetheless, it is my understanding that the debate in the House on the conference report prior to its rejection clearly demonstrates that the House did not agree with the Executive Branch assertion of a Presidential authority to evacuate foreign nationals. Unfortunately, through a legislative anomaly, the legal and constitutional need for a Congressional authorization for the evacuation of large numbers of Vietnamese, has not been completed. I think it is unfortunate that this loose end has been left hanging. The deficiency lies with the Congress in this instance and I trust that we will avoid such regrettable anomalies in the future. I also trust that the Executive Branch will not seek to establish this anomaly as precedent for the expansion of Presidential authority.

Mr. ZABLOCKI. Thank you, Senator, for your excellent statement. I have been asked at times to describe the difference between the Senate and the House versions of war powers. The precision with which you have articulated those differences is admirable.

Senator JAVITS. There is nothing like somebody whose ox is gored.

[Laughter.]

Mr. ZABLOCKI. Well, I noted on page 3 in your statement you referred to that section of your bill that was omitted and you think should have stayed. You are still defining the powers.

CONTROL OBTAINED THROUGH METHODOLOGY

Senator JAVITS Right. Well, that is water over the dam. Fundamentally, the way for Congress to get control over the war powers by the Congress to the extent that it is entitled to, is by a methodology. I used that word quite a lot in the debate, and I still feel that way. The important thing was to assert our control that way, so I am perfectly content and fully gratified.

Mr. ZABLOCKI. Senator, the primary purpose of this meeting is to clarify the intent was unconstitutional. Much has been said by the executive branch, and if they ever read the transcript of these hearings, I hope they will benefit by this. Let’s consider a specific instance of what might be called consultation—and I am reading from the chronology of the Mayaguez incident prepared by the Library of Congress.

On Tuesday, May 13, at 5:30 p.m., White House aides contacted approximately 17 congressional leaders including Senators Hugh Scott, Mansfield, Byrd, Griffin, Sparkman, Stennis, Thurmond and Eastland.

They unfortunately omitted any House Members. We will have to talk with the Congressional Library; we provide their funds for them.
[Laughter.] They just refer to the Senators. We are second-class citizens so often, and this irks me, Senator. As a former House Member, I know you have certain sentiments on that.

CONSULTING OR INFORMING?

Senator JVrrtis. Yes.

Mr. ZABLOCKI. “These congressional leaders were informed of the plan to use some form of force.”

In your interpretation, would this be a form of consultation, simply informing them of the plan? It should be noted that this is between the second and third National Security Council meetings, not after the fourth nor between the third and the fourth, but it was on Tuesday, May 13, at 5:30 p.m., before the third National Security Council meeting, and the White House aides have informed the leadership of both Houses of a plan to use some form of force. In your opinion, would this constitute some form of consultation?

Senator JVrrtis. From the record which the chairman has read, I cannot say yes or no to that. But from my own knowledge, because we have actually pursued this issue in the Senate Foreign Relations Committee and examined the situation with Senator Mansfield present and Senator Scott present, I believe it was not. On the total record, it is my judgment that the Executive had decided and that in the old way he may have labeled it consultation, but he was notifying the leaders. I think that is the substance of what actually occurred.

COMMITMENT OF TROOPS

Mr. ZABLOCKI. Senator, the purpose for my question is that I understand from your testimony, Mr. Seiberling, that the decision to commit U.S. Armed Forces was made during the fourth National Security Council meeting. According to our Library of Congress chronology, that meeting took place on Wednesday, May 14, between 3:52 and 5:40 p.m. The order for the commitment of troops was issued at 4:45 p.m., and the assault forces began operations at 5:14 p.m. Now, it wasn’t until 6:40 p.m. on May 14—1 hour after the close of the fourth NSC meeting—that President Ford and the National Security Council briefed 17 congressional leaders on the military plans. The point, of course, is that the congressional leaders were told that the troops were committed only after the decision was made.

Mr. SEIBERLING. Yes. As I understand the proceeding, the Security Council meetings dealt with preliminary dispositions and with preparing the military and Defense Department evaluations, or presentation, rather, to the President of the various options that they thought that he had, and it was at the fourth Security Council meeting where those options were discussed and where the President chose the particular option that he followed. At that point he gave the orders to Admiral Holloway to go to implement that particular option, and thereafter he held a meeting with Members of Congress and informed them of his decision.

COMMITTEE REPORT CLARIFIES MEANING

Your question about telling them of the preliminary plan before or after the second meeting raises some interesting distinctions, because
certainly that could be part of a consultation process; but if that is all that was done, I would certainly agree with the Senator that that would not be consultation as envisioned by the bill. I refer again to the committee report which says two things: It says that there must be a full supplying of all the relevant information to the Members of Congress, and second, seeking their advice and opinions. Certainly merely telling them about a plan without giving them all the background information and then asking them, "What do you think?" would not be consultation as envisioned by your committee report.

Senator JAVITS. I think that I will let my answer stand.

Mr. ZABLOCKI. Mr. Findley.

Mr. FINDLEY. Thank you, Mr. Chairman.

Senator JAVITS. It is my feeling that especially in regard to these initial reports under the War Powers Resolution the Congress has a great responsibility to pass judgment on the adequacy of the Presidential response.

Senator JAVITS. Correct, and also on its legal standing. In other words, we have immediately to decide whether we accept the label put on by the Executive. Suppose he says that I am reporting, as he did before, under section 4. We have an immediate responsibility to decide whether it is the 4(a)(1) report, even if he does not say so.

CONGRESSIONAL JUDGMENT ON ADEQUACY OF PRESIDENT'S COMPLIANCE

Mr. FINDLEY. Now, this could be any of several levels. It could be a subcommittee report, it could be the full committee, it could be the House, it could be a congressional concurrent resolution passing judgment. Do you have any recommendation as to the form and level at which the judgment should be expressed?

Senator JAVITS. Well, the statute provides that the judgment must be expressed by each House on a concurrent resolution if it is going to be a substantive decision to reduce the 60-day period. On the other hand, on consultation, it is left wide open as to form.

Mr. FINDLEY. I am not speaking of the consultation process but our responsibility in reviewing after the fact the President's response to the War Powers Resolution.

Senator JAVITS. If you wish to stop it sooner than 60 days, then you have got to do something, and it has to be congressional action.

Mr. FINDLEY. I guess I am still not making my point clear. We now have as a matter of history the Mayaguez incident, the evacuation of personnel from South Vietnam. It is a closed chapter, or at least we think it is. At this stage, should the Congress do anything formal in the way of passing judgment on the adequacy of President Ford's response to the War Powers Resolution?

GROUND RULES FOR IMPLEMENTATION

Senator JAVITS. I cannot say as yet. I would say that as a matter of principle, I would like to see us by sense resolution or committee report at least give our views as to what he did and why he did it and what do we think about it. I think that your hearings should go forward in order to see whether it is a matter of policy. It would be unwise as yet to crystalize our views. Once you crystalize your view,
and state it as a view, let's say, by a sense resolution of the House and Senate, you are bound by it yourself, so I think we want to know a lot more about the situation before we do that. But it is entirely conceivable as a result of this experience we could and perhaps should lay out what we consider to be the proper ground rules for implementing the War Powers Resolution perhaps by a sense resolution, so I definitely put that as one option.

Mr. FINDLEY. I understand your recommendation in regard to consultation in which the Foreign Relations Committee or the House International Relations Committee would be called down to the White House for direct discussion with the President. Now that admittedly could be a ponderous and time-consuming operation, it could be rather swift, but if it proves to be impractical at a given moment—your recommendation would not be that he skip consultation with fewer numbers.

Senator JAVITS. Oh, no; not at all. I said it depends on the situation and the ground rules. The President can send the Secretary of State to the committees on very short notice.

Mr. FINDLEY. Thank you, Mr. Chairman.

Mr. ZABLOCKI. Mr. Lagomarsino.

CONSULTATION AS A MATTER OF POLICY

Mr. LAGOMARSINO. Just one question, Senator. At one point I understood your testimony to be that you felt that even in cases where the President was adding to our troops already existing in an area that he would be compelled to consult with Congress.

Senator JAVITS. Yes; but that does not mean we can stop him. These deployment sections, 4(a)(2) and 4(a)(3), do not trigger the cutoff provisions.

Mr. LAGOMARSINO. Well, I wonder if he is even required to consult because the language on consultation reads, "The President in every possible instance shall consult with Congress before introducing U.S. Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated," and so on.

Senator JAVITS. That is right. I didn't make it clear but the consultation that I referred to in those instances was not statutory consultation because as we are covering it by a statute which requires notice it certainly is a clear intendment that he should consult as a matter of policy.

Mr. LAGOMARSINO. Should?

Senator JAVITS. That is right.

Mr. ZABLOCKI. Senator, there is a vote on the House floor; we will be right back.

Mr. SOLARZ. Could I question while you are gone?

Senator JAVITS. Do you want me to wait?

NO EXIGENT NEED FOR AMENDMENT

Mr. ZABLOCKI. I want to thank you, Senator, for coming here. The situation is exactly as you have outlined. I share your assessment that it would be improper at this point to amend the War Powers Resolution without getting additional background information. That is why
we have held these hearings. It's for that same reason we asked the questions to which this letter of June 3 responds. We are trying to find out the interpretation of the executive branch—and then we will pass judgment.

We will recess for 5 minutes.

Mr. Solarz. Could the Senator stay for 5 minutes?

Senator Javits. Five minutes.

Mr. Zablocki. You are not even a member of the subcommittee. That is how far we go with new members.

Mr. Solarz. I never thought I would have so meteoric a rise, Mr. Chairman, in such a short time.

Thank you, Senator, for giving us the benefit of your wisdom in this situation. There are a few questions I wanted to ask.

As I understand your position, you were contending that the President has the inherent constitutional authority as Commander in Chief to send in the Armed Forces without prior consultation with the Congress in order to rescue American nationals in the kind of situation which they were involved in with the Mayaguez.

PRESIDENT'S INHERENT CONSTITUTIONAL AUTHORITY

Senator Javits. Yes. It is an emergency authority, before Congress has acted on the larger question of war, or no war.

Mr. Solarz. All right. As you know, in section 2(c) of the act three different situations are clearly spelled out which justify the use of troops and that is not one of them. Can you think of any other situations in which the President has an inherent constitutional authority to send in troops that are not specified in section 2(c) of the act?

Senator Javits. I do not because the Senate bill had four contingencies in that regard.

Mr. Solarz. If the President has the constitutional authority to send troops in for such a purpose, would he not have the constitutional authority, if in his judgment the rescue operation required a continued presence of American forces to keep them there in spite of a concurrent resolution by the Congress ordering him to remove them?

Senator Javits. That is a contested twilight area. We realize that it existed and it would depend on the tension between the Congress and the President and the condition of the opinion of the country. You know, you could not sue him and he could not sue us. This bill is exactly developed along that line. The manifestation of our authority would certainly curtail and sharply limit that operation. Perhaps that is all you can do. But I assume the President would obey the law. We can't arrest him if he doesn't.

Mr. Solarz. And that concurrent resolution could be presumed to be passed at any point.

Senator Javits. Yes.

RELUCTANCE EXPRESSED FOR WAR POWERS AMENDMENT

Mr. Solarz. Now do you think it would make sense at this point to amend the War Powers Resolution to provide for the reintroduction of your provision that was eliminated in the conference report?
Senator JAVITS. I am very wary about any amendment at this time. I think we have to have more experience with it, though it would be in my favor to restore more of the Senate bill. I would not be for amendments at this time.

Mr. SOLARZ. That would apply, I presume, equally so to an amendment calling for the President to consult specifically with the appropriate committees.

Senator JAVITS. Again I would like the idea. I think it is fine to have them and to have hearings, and so forth, but I would not wish to commit myself to an amendment under these conditions.

Mr. SEIBERLING. May I give you a copy of my amendment, it is similar but not the same as Senator Eagleton's.

Senator JAVITS. Thank you.

Mr. ZABLOCKI. Your chairmanship was short-lived.

Senator JAVITS. May I be excused!

Mr. ZABLOCKI. Thank you very much, Senator.

Senator JAVITS. Thank you.

OBSERVATION MADE ON CONSULTATION PROVISIONS

Mr. SEIBERLING. Mr. Chairman, before you go on, could I just call the attention of the committee to one other item from the congressional debates on this bill that I thought contained a very cogent observation. During the debate in the House on the original bill, Representative Edith Green of Oregon at page H6277 made a rather lengthy statement and I think it really brings out what I thought was the spirit of this bill, because while Senator Javits quite appropriately pointed out that the real “teeth” of this bill are the powers of Congress to cut off a military action, still, as he also pointed out, once the military action has been initiated it becomes as a practical matter very difficult. That is why I think perhaps the “mouth and ears” of the bill are the consultation provisions, because that kind of communication may be effective in forestalling military action which once started, might be difficult to cut off.

Mrs. Green made this observation:

Some have billed this legislation as an effort to curb Presidential power. I certainly see it that way also but I prefer to give greatest emphasis to the positive, to the view that this legislation demonstrates congressional acceptance of its obligations to participate in crucial choices. If representative government means anything, it means collective decisionmaking on the countless solemn, painful options constantly presented for our review. All this legislation does is reassert the congressional duty to share in those choices for right or for wrong.

REPORT REASSERTS NEED FOR CONGRESSIONAL INVOLVEMENT

The committee report reiterates the similar thought, and if the Congress is to share in those choices then obviously we must be given the opportunity to participate before the choice is made, at least to the extent of giving the President a congressional viewpoint and communicating with the other Members of Congress what the President’s proposed consideration of action is, wherever that is feasible.

Thank you, Mr. Chairman.

Mr. ZABLOCKI. Thank you.
Any further questions of Mr. Seiberling?

We are very pleased to have Mr. Monroe Leigh who has appeared before the committee before.

Before we start perhaps it would be best if we go vote on this question and you will not be interrupted in your presentation.

The subcommittee will recess for 5 minutes because of a record vote.

[A short recess was taken.]

Mr. Zablocki. The subcommittee will resume its hearings.

I apologize, Mr. Leigh, for the interruption but we had that legislation on the floor.

Do proceed.

STATEMENT OF HON. MONROE LEIGH, LEGAL ADVISER,
DEPARTMENT OF STATE

Mr. Leigh. Mr. Chairman, Mr. Lagomarsino, I have a very short statement I would like to go through.

First of all I again express my appreciation for the opportunity to appear before this subcommittee on the subject of war powers. I understand that the focus of today’s hearing will be on steps taken by the executive branch to comply with the "consultation" provisions set forth in section 3 of the War Powers Resolution (Public Law 93-148).

Before turning to the subject of consultation, I wish to make a brief reference to the report regarding the Mayaguez affair which the President sent to the Speaker of the House and to the President pro tempore of the Senate early in the morning of May 15, 1975.

[The report follows:]

REPORT DATED MAY 15, 1975, FROM PRESIDENT GERALD R. FORD TO HON. CARL ALBERT, SPEAKER OF THE HOUSE OF REPRESENTATIVES, IN COMPLIANCE WITH SECTION 4(a) (1) OF THE WAR POWERS RESOLUTION


DEAR MR. SPEAKER: On 12 May 1975, I was advised that the SS Mayaguez, a merchant vessel of United States registry en route from Hong Kong to Thailand with a U.S. citizen crew, was fired upon, stopped, boarded, and seized by Cambodian naval patrol boats of the Armed Forces of Cambodia in international waters in the vicinity of Poulo Wal Island. The seized vessel was then forced to proceed to Koh Tang Island where it was required to anchor. This hostile act was in clear violation of international law.

In view of this illegal and dangerous act, I ordered, as you have been previously advised, United States military forces to conduct the necessary reconnaissance and to be ready to respond if diplomatic efforts to secure the return of the vessel and its personnel were not successful. Two United States reconnaissance aircraft in the course of locating the Mayaguez sustained minimal damage from small firearms. Appropriate demands for the return of the Mayaguez and its crew were made, both publicly and privately, without success.

In accordance with my desire that the Congress be informed on this matter and taking note of Section 4(a) (1) of the War Powers Resolution, I wish to report to you that at about 6:20 A.M., 13 May, pursuant to my instructions to prevent the movement of the Mayaguez into a mainland port, U.S. aircraft fired warning shots across the bow of the ship and gave visual signals to small craft approaching the ship. Subsequently, in order to stabilize the situation and in an attempt to preclude removal of the American crew of the Mayaguez to the main-
land, where their rescue would be more difficult, I directed the United States Armed Forces to isolate the island and interdict any movement between the ship or the island and the mainland, and to prevent movement of the ship itself, while still taking all possible care to prevent loss of life or injury to the U.S. captives. During the evening of 13 May, a Cambodian patrol boat attempting to leave the island disregarded aircraft warnings and was sunk. Thereafter, two other Cambodian patrol craft were destroyed and four others were damaged and immobilized. One boat, suspected of having some U.S. captives aboard, succeeded in reaching Kompong Som after efforts to turn it around without injury to the passengers failed.

Our continued objective in this operation was the rescue of the captured American crew along with the retaking of the ship Mayaguez. For that purpose, I ordered late this afternoon an assault by United States Marines on the island of Koh Tang to search out and rescue such Americans as might still be held there, and I ordered retaking of the Mayaguez by other marines boarding from the destroyer escort Holt. In addition to continued fighter and gunship coverage of the Koh Tang area, these marine activities were supported by tactical aircraft from the Coral Sea, striking the military airfield at Ream and other military targets in the area of Kompong Som in order to prevent reinforcement or support from the mainland of the Cambodian forces detaining the American vessel and crew.

At approximately 9:00 P.M. EDT on 14 May, the Mayaguez was retaken by United States forces. At approximately 11:30 P.M., the entire crew of the Mayaguez was taken aboard the Wilson. U.S. forces have begun the process of disengagement and withdrawal.

This operation was ordered and conducted pursuant to the President's constitutional Executive power and his authority as Commander-in-Chief of the United States Armed Forces.

Sincerely,

GERALD R. FORD.

Mr. LEIGH. The preparation of this report, and of the three preceding reports, in accordance with the War Powers Resolution, are in my opinion indicative of the good faith effort on the part of the administration to comply with the reporting requirements set forth in the War Powers Resolution.

REPORT INDICATIVE OF GOOD FAITH EFFORT

I might add that it has frequently been difficult to comply with the procedural provisions in section 4(a) of the resolution. For example, section 4(a) requires the President to submit a written report containing certain specified information within a 48-hour period to the Speaker of the House and to the President pro tempore of the Senate. To comply with the 48-hour requirement in the last report which concerned the Mayaguez affair, the President had to be awakened at 2 o'clock in the morning in order to read and sign his report so that it could be delivered to the Speaker and the President pro tempore of the Senate. These deliveries were made to the offices of the Speaker and President pro tempore at approximately 2:30 a.m. on May 15 about 4 hours before the expiration of the 48-hour period.

SIGNIFICANT POINTS IN MAYAGUEZ INCIDENT

Returning now to the question of consultation, I think that three points are of significance in connection with the Mayaguez affair: First, the congressional leadership was informed of the principal military operations prior to the actual commencement of those operations; second, the congressional leadership did have an opportunity to express
its views concerning the impending military operations—and in fact some of them did, many of them did express their views—and third, all views which were expressed by the congressional leadership either in the Cabinet room meeting on May 14 or in the two earlier telephone contacts with the White House staff on May 13 and 14 were communicated directly to the President.

With respect to the particulars of the executive branch’s efforts to adhere to the consultation provisions in section 3 of the War Powers Resolution, perhaps I should begin by noting that although the Mayaguez incident was a rapidly unfolding emergency situation, four separate sets of communications took place between the executive branch and the congressional leadership. The first of these was carried out by White House staff officers at the direction of the President on the evening of May 13 between 5:50 p.m. and 7:20 p.m. One contact, however, was not made until 8:20 p.m. and another not until 11 p.m.

MEMBERS CONTACTED BY PRESIDENT

Ten Members from the House side and 11 Senators were contacted regarding the military measures directed by the President to be subsequently taken to prevent the Mayaguez and its crew from being transferred to the Cambodian mainland and to prevent any reinforcement from the mainland of Cambodian forces detaining the Mayaguez vessel and crew. The individual views expressed by each of the members were communicated to the President. Among the members contacted on the House side were the Speaker, the majority and minority leaders, and the chairman and ranking minority member of the House Committee on International Relations.

At approximately 8:30 p.m. that same evening, U.S. aircraft sank a Cambodian vessel seeking to approach the Mayaguez. This was the first fire from U.S. forces that was directed at Cambodian ships and forces during the entire affair.

FURTHER COMMUNICATIONS

The second set of communications took place on the following morning, May 14, 1975, between 11:15 a.m. and noon. At that time 11 Members of the House and 11 Senators were contacted and informed that three Cambodian patrol craft had been sunk and that four others had been immobilized in an effort to prevent removal of the Mayaguez crew to the mainland. They were also informed at that time (1) that one Cambodian vessel had succeeded in reaching the mainland “possibly with some U.S. captives aboard”; and (2) that the first U.S. Navy vessel, the destroyer escort Holt, had arrived in the area.

The House Members and Senators contacted included all of those that had been contacted on the previous evening. Once again, each of the individual views of the House Members and the Senators was communicated to the President.

The third and fourth sets of communications involved State Department briefings and the President’s White House meeting with the congressional leadership, respectively. On May 14, between 3 p.m. and 5 p.m., Department officials briefed members of the House International Relations Committee, the Senate Foreign Relations Committee
and the House Armed Services Committee concerning the status of the Mayaguez operation.

The fourth communication occurred when the President met with the congressional leadership in the Cabinet room at the White House at approximately 6:30 p.m. on that same day. At that meeting the President personally briefed the leadership on the specific orders given by him for the recapture of the ship and the crew. There was an active exchange of views concerning the operations that had already taken place and the operations that were to take place later on the evening of Wednesday, May 14.

COMMUNICATIONS SEEN AS CONSISTENT WITH RESOLUTION

It is my view that these communications—which involve information from the President to the congressional leadership and views expressed by the congressional leadership being communicated to the President—were consistent with the provisions of section 3 of the War Powers Resolution. The President under that resolution is called upon to consult “in every possible instance.” I realize that some have argued that the President could have done more to secure the views of Congress prior to ordering the final military action to recapture the Mayaguez and its crew, but one must consider the other things that the Chief Executive had to do to discharge his obligations under the Constitution.

The period of decision extended at most from 7:30 a.m. Monday, May 12—4 hours after the seizure—to 7:30 p.m. Wednesday, May 14, a period of about 60 hours. During this period the President set in motion the various diplomatic and military actions which resulted in the eventual release of the vessel and the crew. He supervised the mobilization of the naval and air strength which were brought to bear on the situation; he initiated the diplomatic efforts to reach the Cambodian Government and to seek the assistance of the United Nations. He made the critical decisions authorizing the military to take hostile actions to prevent the ship and crew from being taken to the mainland. These were his inescapable constitutional responsibilities as Commander in Chief.

ADMINISTRATION EFFORTS TO COMPLY APPLAUDED

Despite these continuous demands on his time, he saw to it that four sets of consultations were carried out—one of which he personally carried out with the leadership. Even in the light of hindsight, I believe that this was a remarkable effort by the President to cooperate with the Congress during a time of emergency decisionmaking.

Thank you very much, Mr. Chairman.

Mr. ZABLOCKI. Thank you, Mr. Leigh.

I certainly must agree that the administration demonstrated good-faith effort in complying with the reporting requirements of the War Powers Resolution. However, the chronological report of the events in your testimony does not seem to synchronize exactly with that of the Congressional Research Service.

Mr. LEIGH. I haven’t seen theirs.

MR. ZABLOCKI. I would particularly like you to amplify the informa-
tion on page 3 of your statement regarding one of the three points you call significant in connection with the Mayaguez affair—the one that the congressional leadership was informed of the principal military operations prior to the actual commencement of those operations. For example, to what extent were the alternatives or the intentions explained to the leadership? Are we to understand that the President sought their advice on what should be done and to what extent?

**CONGRESSIONAL VIEWS COMMUNICATED TO PRESIDENT**

You say the congressional leadership was informed of the principal military operation but further down you say that the individual views expressed by each of the members were communicated to the President. What views were communicated? Did any of the leadership say, "Well, I don't think you should do this, Mr. President" or, "Mr. President, I think you should"—

Mr. LEIGH. I don't want to go into the individual comments made in response to the notifications, but I can say that all of these comments were very carefully noted by the White House staff and they were immediately brought to the President's attention. As you see, the list of these consultation periods—the one on the afternoon of Tuesday, May 13 was carried out in about an hour except for one or two members who were out of the city or for some reason could not be reached. The same thing was true of the telephone contact of the following morning, Wednesday, May 14.

Mr. ZABLOCKI. You state that the congressional leadership did have an opportunity to express its views concerning the pending military operation. Are you aware that any of the views were implemented or were there any modifications of the President's decisions?

**CONGRESSIONAL SENTIMENT WAS ONE OF SUPPORT**

Mr. LEIGH. I honestly can't answer that but there was basic unanimity. I must say there was in fact no dissent from any person called as to the principal actions taken. There was in one or two cases some apprehension expressed about certain portions of the final action, but on the whole the sentiment was overwhelming in support of what the President proposed to do.

Mr. ZABLOCKI. But what you are saying here is that prior to the final decision of the President the leaders had been advised of a principal military operation being planned and their views were expressed.

Mr. LEIGH. Well, I certainly don't want to mislead the committee in any way as to what I mean by this statement. It seems to me that the first significant military action was the sinking of several Cambodian vessels which were approaching either the ship or the island. The President had been in touch with congressional leaders prior to that action being taken. This is what I meant.

The second major action was the assault to recapture the ship, and the assault on the island. Prior to this second action there were two notifications and expressions of congressional views. The President himself had a meeting with the leadership at the White House at 6:40 p.m. on Wednesday, May 14, and State and Defense Department officials met with three committees of Congress earlier that afternoon.
CONCERN OVER BREACH OF SECURITY

Now let me say a word about this final assault action which involved movements of troops from various parts of the Far East into a position to be effective. The President was extremely apprehensive that there be no breach of security in advance of the time that they actually were landed, so there were strong arguments for not revealing that information—even to a select group of members—very much in advance of the time it was to occur.

Mr. ZABLOCKI. Let me restate my question, and now I am going to try to make it very pointed. On page 3 you state that the congressional leadership was informed of the principal military operations prior to the actual commencement of those operations. I presume that was on May 13 between the hours of 5:50 a.m. and 7:20 p.m. ?

Mr. LEIGH. Well, the first principal military action—

Mr. ZABLOCKI. But an hour later at approximately 8:30 p.m. that same evening, a U.S. aircraft sank a Cambodian vessel seeking to approach the Mayaguez.

Mr. LEIGH. That is right, sir.

Mr. ZABLOCKI. Therefore, the orders must have been given to the area by the President to use military force prior to the actual commencement of—

Mr. LEIGH. Yes. The President told the Members of Congress that in that period he had ordered the U.S. military forces to take action to prevent the seamen and the vessel from being moved to the mainland.

Mr. ZABLOCKI. So in a true sense that really would not be consultation?

WAS CONGRESSIONAL OPPORTUNITY REASONABLE?

Mr. LEIGH. Well, what I claimed in the second portion of my summary is that the congressional leadership under the circumstances of the emergency action had been given an opportunity to express dissent or contrary views before the orders were executed.

Mr. ZABLOCKI. I understand.

Mr. LEIGH. I suppose the point of debate would be whether this was a reasonable opportunity under the circumstances.

Mr. ZABLOCKI. Well, that is a fine point but my question is prior to the actual commencement of those operations. They were told when the operations were already underway.

Mr. LEIGH. Well, you know, the President many times was in almost direct contact with the pilots of the planes who were flying over these Cambodian vessels and they had during the initial phases orders not to expend any ammunition without specific approval from Washington, and this was a very closely supervised arrangement.

CONCERN OVER PROPER INTERPRETATION OF “CONSULTATION”

Mr. ZABLOCKI. Well, I wanted to make it very clear that I am in full accord with what was done. However, what I am now concerned about, and what this meeting is all about, is the consultation question. The issue is whether the executive branch clearly understands what those of us in Congress who sponsored and voted for the War Powers Resolu-
tion meant by consultation and what we hope in the future the executive branch will interpret as consultation. We applaud the extent to which the executive branch has already complied with the law, with the War Powers Resolution; but I do hope that in the future we will have on the part of the Executive a fuller response and that he will abide by all the provisions of the resolution.

Mr. Leigh. I think it is fair to say that nobody in Washington could tell at the time the consultation was being carried out between 5:15 and 7:20 on Tuesday, May 13 in the first phase that the sinking of a vessel was going to occur so soon after the consultation. They had general instructions as to what they were to do and they were told that before they expended any ordnance they had to have specific approval from Washington, and there was direct communication. So the President, assuming the views of Congress had been 100 percent contrary to his own, would still have had it in his power to prevent the military action of Tuesday evening, May 13.

Mr. Zablocki. I understand that but I would again remind you that section 3 calls for consultation by the President “in every possible instance.”

MEANING OF “IN EVERY POSSIBLE INSTANCE”

Mr. Leigh. Is it your interpretation, Mr. Chairman, that the “in every possible instance” language was intended to contemplate only the absence of Congress from Washington during a crisis? I thought it was broader than that by far. And I thought I had seen in the legislative history a reference to the fact that there might be cases where the President might not be able to consult at all even though the Congress was in Washington and in session.

Mr. Chairman, the only other situation that I would interpret as intended by the “in every possible instance” language is a situation of such emergency that the President could not consult, or of such immediacy that he could not fully consult. The language however, was not intended simply to leave it up to the President as to whether he thought the instant case deserved consultation.

I was advised that in the instance of the Danang evacuation when the Congress was not in session, the leadership was not in Washington. For example, the Speaker of the House and the minority leader of the House were in China.

Mr. Zablocki. They were out of the country.

Mr. Leigh. They were notified.

ADEQUACY OR INADEQUACY OF CONSULTATION IS CONCERN

Mr. Zablocki. I am advised they were notified. There was a report, but there was not consultation. I am speaking of consultation. The consultation could not take place because they were out of the country. I applaud the executive branch for the way they abided by the reporting provisions of the resolution. In every instance I think they reported rather fully. But such is not the case regarding consultation; only in the last one, the Mayaguez, do I see any sentiments of consultation? Even in that last instance on May 13 it was not truly consultation but more informing and reporting or advising that the action had already been formulated, finalized, and that as the situation arises military force would be used.
What we are concerned with here is the relative adequacy or inadequacy of consultation.

Nevertheless, I agree with Senator Javits that perhaps we ought to give the resolution a bit more time to be proven rather than start amending it. I hope that these hearings—which we may continue, if necessary—would shed greater light as to what the intent was regarding consultation. Then we would hope that the executive branch would follow the prime example they set by living up to the reporting section, that they would live up to the consultation section and we will all be happy.

PRIOR CONSULTATION IN DANANG EPISODE

Mr. Leigh. Well, if I may just say briefly that it is my understanding that there was prior consultation in the sense of notification even as to the Danang episode which was the occasion for the first war powers report which came a few days after the notification. But during the Danang evacuation there was an intensive attempt to reach the Speaker and Mr. Rhodes as well as a score of additional members of the two Houses; it was carried out wherever they were in the world and that was done at the President's direction.

Mr. Zablocki. Mr. Leigh, you have heard the testimony of the two prior excellent witnesses, Representative Seiberling and Senator Javits, refer to the need for all information relative to the situation to be made available at a consultation. Would you state that in the Mayaguez incident that all relevant information to the situation was made available when the congressional leadership was informed of the principal military operations prior to the actual commencement of those operations?

Mr. Seiberling. Page 23 if you are looking for the language.

Mr. Leigh. I was looking at the statute first.

Well, I think it is very difficult to say all relevant information because there was an immense flow of information coming in to the White House and the State Department during this time. The President personally did the briefing with the congressional leadership at 6:30 on the 14th and covered a great deal of ground and spent I think just over an hour not only giving his preliminary briefing but also responding to questions which came from various Members of the Congress.

Mr. Zablocki. Mr. Leigh, that was almost 24 hours after the first Cambodian vessel was sunk.

LACK OF COMPLETE INFORMATION: REASON FOR NO CONSULTATION

Mr. Leigh. That is true but, you see, for some time we didn’t know how much military power could be brought to bear on the situation in that event our diplomatic efforts were rebuffed. If he had tried to brief the Congress 24 hours earlier, the President would not have had very much to tell them I don’t think. It is just in the nature of this kind of situation that you cannot expect to have complete information and that was one of the agonizing thoughts about the decision, he had to act on the basis of what he had.

Mr. Zablocki. Mr. Leigh, you say the President would not have had very much to tell them 24 hours earlier. You are again referring to
what he would report to the Congress. It is not what he would tell us, it is what he would seek from us which is what I think is the matter of contention here. What is consultation but seeking advice and counsel on a policy that is in a stage of formulation; clearly it is not telling one about an already finalized policy.

Mr. Leigh. Well, I would reiterate that I don't think he would have known on Tuesday, the 13th, what would have been possible to do in the ultimate military sense. He did tell the Congress prior to the time that it actually occurred that he had given general orders to the military to try to isolate the ship's crew and to keep them from being taken to the mainland because it would be difficult to rescue them if that happened. I am sure you agree with that.

I am afraid that on page 3 my sentence is in error in speaking of the principal military actions when I had in mind two such actions; I should have separated that sentence into two parts, and indicated that there were different consultations with respect to each of the two actions.

Mr. Zablocki. Mr. Lagomarsino.
Mr. Lagomarsino. I have some more questions but I will yield to the chairman.

Mr. Zablocki. Go ahead.

APPROPRIATE CHANGE FOR CONSULTATION?

Mr. Lagomarsino. Mr. Leigh, would you care to comment on the suggestions made by Mr. Seiberling and by Senator Javits as to how the consultation might be changed?

Mr. Leigh. I certainly accept that view of consultation in the general sense, as I previously testified before this committee, means a two-way exchange back and forth. Now as for Senator Javits' preferred method of consultation, it would be as I understand it to have the President appear before a joint session of Congress. Well, I don't think that anyone would claim that that would have been possible in a situation like the Mayaguez.

Mr. Lagomarsino. If I might interrupt you, to me that seems like the very opposite of consultation, talking to a joint session of Congress. There is no chance for interchange.

CHANGE FOR INTERCHANGE

Mr. Leigh. I had the same thought when Senator Javits said that, but it was the preferred form of consultation which he suggested when the question was put to him earlier this afternoon.

Mr. Lagomarsino. It might be informing Congress. You can certainly argue that that would be the—

Mr. Leigh. I suppose the President could make his talk and then he could say, "I will wait so many hours and I hope as many of you as care to will communicate with me or my staff." I think of consultation as the sort of thing that happened or occurred on the afternoon of the 14th when the President met in the same room and gave the Members of Congress who were there as much information as he could give them and actually received their views.
Now the complaint has been made that the trouble is he had already given the orders as to what should be done, and that was certainly true. On the other hand, when this question came up the President took the position that he had his constitutional responsibilities and he felt this was the way he had to exercise them but he was certainly intellectually willing to hear any counterargument that anyone cared to make. I think it was possible with the kinds of communication that existed with the commanders on the scene that had the President been convinced otherwise he could have stopped the action before it took place.

PROVISIONS NEED MORE TIME

Mr. LAGOMARSINO. Do you have any comments on Mr. Seiberling’s suggestions for changing the consultation requirements?

Mr. LEIGH. Well, with all respect to Mr. Seiberling, I think that I would tend to side with Senator Javits on that question—in other words, to see how the war powers provisions work out over a period of time, unless, of course, one wanted to correct what seems to me a drafting omission in section 3 on consultation—that consultation be required not just in the 4(a) (1) situation but also in a 4(a) (2) situation or in a 4(a) (3) situation. The President has not made anything of that; he intends to consult irrespective of which of these paragraphs an action may fall under.

Mr. LAGOMARSINO. As I recall, it was your position that the Danang position was a 4(a) (2) situation.

Mr. LEIGH. That is correct, and we so reported it later.

Mr. LAGOMARSINO. I have no further questions.

Mr. ZABLOCKI. On that very point, in the course of your testimony on May 7 you stated your interpretation that consultation was necessary or required only in situations involving section 4(a) (1) reports—in other words, where there would be actual hostilities.

Mr. LEIGH. Or imminent.

Mr. ZABLOCKI. Or imminent—and only in those instances would it be necessary to comply with section 3, that is, consultation. Is that still your interpretation?

Mr. LEIGH. Yes. I think that since the language in section 3 regarding consultation exactly tracks the language in section 4(a) (1) this is the logical and correct interpretation of section 3 as a matter of technical interpretation. But I don’t think it is a point that the Congress ought to have any apprehension about because I have not seen the slightest indication in the executive branch to make a distinction on this basis.

“HOSTILITIES” AND “IMMINENT HOSTILITIES”

Mr. ZABLOCKI. Taking your own definition of hostilities on page 2 of your June 3 letter:

As applied in the first three war powers reports, “hostilities” was used to 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 the U.S. forces.
You go on to say:

In our view, neither term necessarily encompasses regular or infrequent violence which may occur in a particular area.

In the Cambodian situation even if there was one artillery piece fired that is a hostile action. How would you be in a position to presume that there would be an absence of hostile actions and therefore not consult? I think this is a very narrow interpretation of what we meant by consultation. Certainly, consultation was not intended to come after the action or after the commitment of troops to hostile areas. That clearly and emphatically was not the intent of Congress.

I would be the first one to sponsor an amendment to section 3 to make it very clear that we intended to have consultation whenever there would be a chance of or an intention of sending troops abroad.

Mr. LEIGH. Well, it seems to me from the point of view of the executive branch and on the record so far that they are perfectly prepared to do the same thing with the two situations.

Mr. ZABLOCKI. This is not what you said in your paper.

Mr. LEIGH. Now we are addressing two separate questions. One is whether it is technically required to consult and the other is whether there is a situation of hostilities. Now the second question when we raised it at our prior session also involved the question of the funds limitation provision which appear in slightly different forms in quite a number of Department appropriation measures and in two or three of the foreign assistance bills.

PRIOR CONSULTATION NOT APPLICABLE TO SECTION 4(A) (2)

Mr. ZABLOCKI. I may have misunderstood, Mr. Leigh, and I am very pleased if you are now correcting what was my understanding in our meeting of May 7 where you said in effect that prior consultation is contemplated only in cases which would produce a section 4(a) (1) report.  

Mr. LEIGH. I would certainly have to say—and I will be happy to correct the transcript if there is any flaw in it—as a technical matter of legal interpretation I think the section 3 requirement for consultation applies only in a 4(a) (1) situation but it does not apply in the 4(a) (2) situation. On the other hand, in the very first report that we made, which was the Danang report, and which was not a 4(a) (1) situation in the legal sense, we did in fact consult and I believe that that would be the policy of this administration.

Mr. ZABLOCKI. I am somewhat comforted by the fact that this may be the policy. I don’t recall that the report stated that there would be consultation even though it was applicable to 4(a) (2).

Mr. LEIGH. The report does not have to reveal whether you consult.

Mr. ZABLOCKI. I understand. If it does not have to technically reveal to what subsection of section 4 it is responsive, would you agree with the premise that it is the Congress prerogative to then interpret it as to what subsection it applies so that if the Congress determined that

---

*a* See p. 3 for previous statement made by Mr. Leigh.
it was applicable to section 4(a)(1) then it would trigger the provisions of a congressional action?

EXECUTIVE ENTITLED TO INTERPRETATION

Mr. LEIGH. I think it is perfectly within the power of Congress to decide even if we reported under 4(a)(2) that it was really 4(a)(1) and treat that as the beginning of the 60-day or 90-day period trigger. I don't agree that the competency is absolute. I think Senator Javits was saying that the Executive can have an interpretation just as the Congress can have an interpretation and in the last analysis it would arise on some sort of lawsuit which the courts would probably decide.

Mr. ZABLOCKI. Just for the record and to make it unquestionably clear in my mind, from what you had said, it was my understanding that on the basis of past performance the policy would be that to the extent possible the executive branch would consult regardless of whether the commitment of troops would be applicable to the section 4(a)(1) or 4(a)(2) or (3).

Mr. LEIGH. That is clear, sir, and I meant to say that.

Mr. ZABLOCKI. Well, I am going to review the May 7 hearing but it is my understanding that it was contemplated that the prior consultation would be contemplated only in cases where we would produce a section 4(a)(1) report and that is certainly not the intent of Congress. We had hoped for consultation in all instances.

Any further questions, Mr. Lagomarsino?

REPORT CLARIFIES CONSULTATION PROVISION

Mr. L. AGOMARSINO. If the chairman will yield, of course I was not here when this resolution was debated or passed but it would be rather apparent to me from just reading section 3 that it speaks about imminent involvement in hostilities which is the very language of 4(a)(1). It would be a very simple matter to amend it to include 4(a)(2) and 4(a)(3) and then we should, if that is what Congress really had in mind because it is not clear from reading the statute itself that there was any intention to go beyond 4(a)(1).

Mr. ZABLOCKI. If you read on page 14 of the report:

The House joint resolution provided for Presidential consultation with the leadership and appropriate committees of Congress before and after the President introduces U.S. 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 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.

Mr. LEIGH. There again it is the same language.

Mr. L. AGOMARSINO. It still talks about—

CONSULTATION IN EVERY INSTANCE

Mr. ZABLOCKI. Yet it clearly reflects that it was intended, at least in drafting, even then, that we reach debate on the floor. We clearly intended it to indicate that the consultation would be in every instance.
Mr. LAGOMARSINO. It sounds just from reading this report language here that the only difference that was made between the House version and the conference version was instead of consulting with the leadership you consulted with the Congress.

Mr. ZABLOCKI. Well, I don't mean this disrespectfully. Section 3 of the conference report is not a limitation or substitute for other provisions contained in the report. I think, as per requiring interpretation of a legal language, that this would mean sections 4(a)(1), 4(a)(2), and 4(a)(3). It had not related to section 4(a)(1).

Mr. LAGOMARSINO. Of course you argue that consultation would not take the place of reporting or some other requirement, so it is not clear.

Mr. ZABLOCKI. I am not a lawyer so I will not apologize for the language. I will try to explain it.

Mr. SOLARZ. Thank you, Mr. Chairman.

I speak now as a visitor to the committee, my tenure as chairman having been very short-lived. I appreciate the opportunity to ask a few questions.

LEGAL FOUNDATIONS FOR USE OF AMERICAN FORCES

Would it be fair to say in your judgment, from a legal and constitutional point of view, the evacuation of American nationals from Vietnam authorized by the President was essentially the same as his justification for the rescue of the crew of the Mayaguez, that his determination to use American forces in both instances rested on essentially the same legal and constitutional foundations?

Mr. LEIGH. Yes; I agree with that. I think that the legal situation was more complicated in the case of the rescue operation of the refugees and—well, Saigon.

Mr. SOLARZ. Because of the fact that foreign nationals were involved?

Mr. LEIGH. Intermingled.

Mr. SOLARZ. Yes. I understand it is your position that the amendments restricting American paramilitary action in Indochina were not applicable in this instance. Is that essentially because the legislative history behind those amendments to the law clearly indicated that they were not intended to prevent this kind of operation?

Mr. LEIGH. Yes.

Mr. SOLARZ. Or is it because you take the position that the President has an inherent constitutional authority to rescue American nationals that have been captured on the high seas and regardless of the legislative history of those particular provisions the President had the right to do it from a constitutional point of view anyway?

FORECLOSING USE OF ARMED FORCES

Mr. LEIGH. Yes; I would take that as the ultimate position but here they tend to merge because my understanding of the reasons which were given at the time of the enactment of the funds limitation provisions was that they did not go so far as to prevent the President from exercising his constitutional authority to rescue American citizens simply because those citizens happened to be in Indochina. So it was understood, I think fairly clearly, both from the legislative history
and also from the constitutional doctrine which lay back of it, that the Congress did not intend to foreclose the use of Armed Forces to rescue Americans in Indochina.

Mr. Solarz. That was part of it. I was not there at the time although I have read your memo. My understanding is while the President may have authority to send in American troops to rescue American nationals, that the Congress has an inherent authority to refuse to fund such an operation, and that therefore if the Congress enacted legislation prohibiting the use of American tax dollars to support an operation for rescue for, say, American nationals in some area of the world, the President would not be able to pay the troops who he sent in to accomplish that objective.

Mr. Leigh. I think that is correct.

EXECUTIVE POSITION ON INAPPLICABILITY OF EXISTING RESTRICTIONS

Mr. Solarz. So that your position with respect to the inapplicability of the existing restrictions in the law has to do essentially with the legislative history of those provisions which in your judgment would not clearly indicate that they were not designed to prohibit this kind of action.

Mr. Leigh. That is right.

Mr. Solarz. If the legislative history indicated otherwise, then they would be applicable?

Mr. Leigh. They would be applicable subject to possible constitutional difficulties.

Mr. Solarz. Yes, but if I understand your testimony correctly you are saying that Congress does have the constitutional authority to cut off funding for such an operation.

Mr. Leigh. I see what you mean. Well, certainly if Congress is able to cut off the funding, there is no question that the President has no funds to use. It does not always arise as easily as that because Congress usually has appropriated the money. The President has the appropriation, lie is in the process of expending it and he has to face the question whether the particular limitation is constitutional.

FUNDS LIMITATION VERSUS CONSTITUTIONAL AUTHORITY

Now I see that I should have made a distinction in the first instance in answering your question between a limitation which is a condition subsequent and a failure of Congress to provide appropriations when all other appropriations have run out. My testimony when we were previously in a colloquy on this was that I was not sure that the Congress by imposing a condition subsequent or an appropriation which has not yet been fully expended could limit the President's power to carry out certain constitutional duties such as to defend the United States from hostile attack against its mainland territory. There is obviously no judicial decision on this but I would think that there would be a serious doubt as to the constitutionality of such a limitation if it were applied to prevent the President from defending the mainland territory of the United States from attack.

Mr. Solarz. In your judgment, how far does the President's inherent authority to use American troops to rescue American nationals extend
in terms of the uses to which such troops can be put? For instance, does the military action have to clearly be related to the rescue of the individuals involved?

Mr. Leigh. To take your first more general question first, I think it is very difficult to lay down any rule of thumb because one of the fascinating things about our constitutional system is that it is constantly producing different kinds of questions which even the brightest people were not able to foresee in advance, so I would be very reluctant to try to specify.

POWERS AS COMMANDER IN CHIEF DIFFICULT TO DEFINE

I notice that Professor Bickel when he testified in hearings similar to this took the same position. It is almost impossible to give a rigid and precise definition of what the President's constitutional powers are as Commander in Chief, so that would be my general answer to your general question.

Now I believe in theory that the President, if he has the money, as Chief Justice Taft said on one occasion, to support troops could constitutionally send them anywhere. On the other hand, I think this is really in the area of the political accommodation that has to exist between the executive branch and the legislative branch, and I think you ought to count on the President not really doing wildly foolish things with the power that the Constitution gives him as Commander in Chief. I realize this is a controversial discussion in the wake of the Cambodian situation but that is my technical view.

Mr. Solarz. Can you think of any situation in which the President would have an inherent constitutional authority to commit American forces to combat situations that are not listed in section 2(c) of the bill other than a situation in which he is attempting to rescue American nationals from a situation where they are in jeopardy...

Mr. Leigh. I heard you ask that question earlier today.

Mr. Leigh. I thought to myself I am glad I don't have to answer that on the spur of the moment.

[Laughter.]

I think it is difficult, in all seriousness, to answer a question like that. If I could make this sort of a general answer, I think that if we put in Senator Javits' preferred position as a fourth item, then the problem is most likely to arise in interpreting the scope of that fourth item which is a very difficult one to do. Perhaps you will allow me to think about that and attempt to provide you with an answer for the record.

Mr. Solarz. Yes.

[The information follows:]

SITUATIONS IN WHICH THE PRESIDENT HAS THE AUTHORITY TO INTRODUCE ARMED FORCES INTO HOSTILITIES

Besides the three situations listed in subsection 2(c) of the War Powers Resolution, it appears that the President has the constitutional authority to use the Armed Forces to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad, to suppress civil Insurrection, to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States, and to carry out the terms of security commitments contained in treaties. We do not, however, believe that any
such list can be a complete one, just as we do not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised.

Mr. SOLARZ: I have just one or two more questions.

Assuming that the President, pursuant to the provisions of the joint resolution, committed American troops into a situation in which they were involved in hostilities abroad—

Mr. LEIGH. I am sorry. When you say joint resolution—

Mr. SOLARZ. I mean pursuant to the War Powers Resolution.

Mr. LEIGH. I see. I am sorry, but the President would not commit troops pursuant to the War Powers Resolution since the resolution does not give the President any authority.

CONCURRENT RESOLUTION DEMANDING TROOPS WITHDRAWAL

Mr. SOLARZ. All right. But in the exercise of his inherent constitutional authority to commit American troops into the combat situation and the Congress in its wisdom passed a concurrent resolution demanding the involvement of those troops be terminated, is it your position that if the troops were sent in in the first place under the President's inherent constitutional authority that the concurrent resolution ordering them to be withdrawn would itself be unconstitutional or do you believe that the President would be constitutionally obligated to act in accordance with the provisions of the War Powers Resolution and withdraw the troops?

Mr. LEIGH. Well, I remember Senator Javits' answer that this was a gray area. I think I go a little bit further. I think it would be unconstitutional on the simple logic that if the President had the power to put the men there in the first place that power could not be taken away by concurrent resolution because the power is constitutional in nature. There might, however, be all sorts of reasons as to why the political process would force him to wish to comply with that concurrent resolution.

There is a further question as to whether a concurrent resolution in this situation would have the dignity of law under the Constitution. I think a very strong argument can be made that a concurrent resolution in this situation would be insufficient and that the Congress must resort to the usual process for a statute and submit it to the President. If he disapproves it, it must then be passed over his veto by a two-thirds vote in each House.

CONCURRENT RESOLUTION WOULD PLACE UNCONSTITUTIONAL DEMAND ON PRESIDENT

Mr. SOLARZ. Except if your original point is correct, and the President sent the troops in to this situation in the pursuance of his inherent constitutional authority, then even if Congress passed a law requiring him to pull the troops out, and the President vetoed it, and the Congress passed the bill over his veto, I assume your conclusion would be that it would still be an unconstitutional demand on the President?

Mr. LEIGH. Yes.

Mr. SOLARZ. And he would be constitutionally permitted, as it were, to keep the troops there!

Mr. LEIGH. Yes. Now, you could get a test of that in court. I won't
take much of your time but the fact is that there never has been a congressional resolution of that sort as far as I know—certainly not in this area.

Mr. SOLARZ. Hopefully we would not reach that point. You raise some very interesting points here and I just want to pursue it very briefly for a minute, if I may.

Do you believe that in a situation where the President would commit American troops into combat pursuant to what he believed was his inherent constitutional authority that the Congress, if it determined that it did not want the troops there—would the Congress have the authority, in your judgment, to pass a law cutting off funding for the troops and thereby in effect requiring the President to withdraw them?

DISTINCTION MADE BETWEEN APPROPRIATIONS

Mr. LEIGH. Again, I make the distinction as between the condition subsequent in an appropriation not yet completely spent and new appropriations.

Mr. SOLARZ. I have to confess that without a legal background—

Mr. LEIGH. If he has used up all the money appropriated and then Congress refuses to provide any more, I think the Congress has effectively stopped the President from continuing the military action. I don't know how he can go on. If, on the other hand, he still had moneys that were unexpended, he could continue to spend those until such time as there was a court challenge and the court found that he was acting illegally.

Mr. SOLARZ. Your position, I gather, would be the President has the inherent authority to defend an attack against American Armed Forces even if they are stationed overseas?

Mr. LEIGH. I frankly don't favor the use of the term “inherent.” I used it, I admit, but I think this is one of the mistakes which the Government lawyers made in the steel seizure case—that they should have said implied power instead of inherent power.

SCENARIO EXEMPLARYS PRESIDENT'S AUTHORITY

Mr. SOLARZ. Take the Korean situation for instance. Supposing the troops, stationed as they are north of Seoul just south of the 38th parallel, and in the course of an attack by troops were fired on, the President pursuant to what he felt was his implied constitutional power—leaving aside the question of treaty obligations for a minute, assuming they didn't exist—sent in troops to defend the troops that had originally been attacked and the Congress decided it didn't want troops in Korea and passed a concurrent resolution under the terms of the War Powers Resolution, to tell the President to take the troops out. Your position, if I understand it, would be that since he had sent troops in to protect the troops that were originally fired on, and that was done as a result of his implied authority as Commander in Chief, that he could safely disregard this concurrent resolution on the grounds that the Congress cannot take away a power which he has from a constitutional point of view.

Mr. LEIGH. I hope I am not going to be asked to rule on this. I believe that the answer to that is yes. I am not speaking for the administration,
Mr. Solarz. I wonder if I could conclude by asking the chairman, who is responsible for the drafting of this legislation a question and that is to the extent that there may be any merit whatsoever to this argument that the provision in the War Powers Resolution with respect to a concurrent resolution is the mechanism for bringing about a withdrawal of American forces in a combat situation which the Congress does not want them involved in may be constitutionally defective and that it would be preferable from a constitutional point of view to require a law to be passed which the President would have the opportunity to veto—do you think there is any merit to that, and if there is, would it perhaps make sense to amend the War Powers Resolution to provide for that contingency so that we are not confronted with the situation at some point in the future? Do we pass a concurrent resolution and then we are told, ha, ha, that you cannot constitutionally get the troops out with a concurrent resolution, you have to go the legislative route?

EXPLANATION ON MERIT OF CONCURRENT RESOLUTION

Mr. Zablocki. It would require a very lengthy answer. We struggled with this particular gray area not for weeks but months. Our purpose essentially was to provide Congress with a two-barrel approach—as we call it—to ending a commitment of troops ordered by the President. The first of that so-called two-barrel approach involves the 60-day period at the end of which the President would have to end the commitment of troops unless Congress, in effect, exercises its exclusive war-making powers by endorsing or approving the action through a declaration of war or a specific authorization. As you know, the 60-day period can be extended by 30 additional days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of U.S. Armed Forces requires the continued use of such forces as part of affecting their prompt removal.

The second barrel so to speak, or the other approach, involves the concurrent resolution which we regard as a statutorily legal method of ending the commitment of troops. The thought behind the desirability of the concurrent resolution route is obvious: since the Constitution gives Congress—and only Congress—the power to declare war, Congress had to have a nonvetoable method of demonstrating, if it so chose, that it did not wish to declare war, even before the expiration of the 60-day period. We recognized that the Constitution clearly states that the President is Commander in Chief but it also states with even greater clarity that only Congress can declare war.

Granted, Congress may have abdicated that power over the last few decades through inaction; as a result, Presidents began to assume the power. In time, this assumption of power by Presidents led to the erroneous idea that it was an inherent or implied Presidential power.

WAR POWERS: REASSERTION OF CONGRESSIONAL AUTHORITY

The War Powers Resolution was an attempt to deal with that problem. In other words, the basic philosophy underlying war powers is that it is a reassertion of congressional authority in this area. It said, in effect, that this power was not inherent in Presidents—despite the fact that they have assumed it even from the time of George Washington.
The point, of course, is that under the Constitution this was a power of the Congress, not the President.

As for the concurrent resolution, our statutes are replete with cases where Congress has given temporary authority to the President, the Reorganization Acts for example. But what Congress gives in this way it can also take back—by concurrent resolution.

As Senator Javits' testimony today states, the basic difference between the Senate approach and ours was that his was a test of powers. The Senator had attempted to codify the powers of the President. This would have opened up Pandora's Box and questions of constitutional authority.

**IMPORTANCE OF HOUSE APPROACH**

The House approach was not to question or try to define and codify the President's powers, not to deal with the gray areas, and not to deal with the historical precedents. Rather, the House approach was to reiterate the constitutional war-making powers of the Congress. If and when the President committed troops, the House approach provided a method of dealing with the situation. Unless the Congress approves, the President has to cease employing our troops abroad. That is the basic difference.

Mr. SOLARZ. I thank the chairman for his very illuminating analysis.

Mr. ZABLOCKI. May I add this before I forget? As far as the Korean question you asked, it would even be more simple because we have a treaty with Korea and I don't think the Congress could prevent the executive branch from employing the troops in Korea because we have a commitment. I am not sure now whether we had a commitment with a freeze; that is, unless it would be an abrogation of our constitutional authority. Most treaties have it but I have to review that.

Mr. LAGOMARSINO. If the gentleman would yield.

Mr. SOLARZ. Yes.

Mr. LAGOMARSINO. An interesting side light of Mayaguez is drawn into the discussion here, too, because as I understand the Cambodian patrol boats fired on our aircraft prior to any firing by our side on the Cambodian patrol boats. You can maintain that around where we had a right to be there in the first place and the response.

Mr. LEIGH. That is true.

Mr. LAGOMARSINO. Yes.

**REMOVAL OF TROOPS AFTER TIME LIMIT**

Mr. SOLARZ. The chairman made the interesting point that the concurrent resolution only comes into effect if the Congress decides to act prior to the first 60-day period or the extension for another 30 days. In your position if you are consistent, if the American President sends Armed Forces into combat in an area pursuant to his implied constitutional authorities, that this 60-day cutoff or additional 30-day cutoff is inoperable as well because if the President has used his constitutional authority to send troops in, the Congress does not have the right under the War Powers Resolution to require the removal of them after 60 or 90 days or the absence of additional congressional authorizations. So would that be your position?

Mr. LEIGH. Would you state that again? I am not sure I followed you.
Mr. Solarz. According to the War Powers Resolution, if the President sends troops into a combat situation pursuant to his constitutional authority, at the end of 60 days the President can certify in writing that he needs troops for another 30 days. At the end of that period of time, in the absence of specific congressional authorization, the troops have to be withdrawn, and it would seem to me that your position, to be consistent, would have to be that that limitation is itself unconstitutional. If the President has sent the troops in pursuant to his constitutional authority, the War Powers Resolution can’t require him to withdraw the troops after 90 days. Is that your position?

Mr. Leigh. Yes, I agree with that.

Mr. Zablocki. Let me pursue that. Is it your position that the President can declare war?

Mr. Leigh. No.

Mr. Zablocki. But if he sends troops into combat, what do you call it?

Mr. Leigh. Well, it depends on the degree of hostilities. I have not in my discussion tried to make this distinction. You were talking about the Korean situation—what you characterized as a brushfire situation.

Conflict of Judgment

Mr. Solarz. My last question had nothing to do with the Korean situation. When we get down to the crunch of these questions, the position of yourself and the administration is that the very restrictions which are incorporated by this act are themselves unconstitutional. So it seems to me there is a fundamental conflict of judgment here between the Congress and the administration because you are saying that if the President sends in troops, say, to rescue American citizens or American Armed Forces, as I understood the War Powers Resolution he can do that without a declaration of war.

Mr. Leigh. Yes.

Mr. Solarz. And at the end of 60 days if he certifies in writing to the Congress the troops can remain another 30 days, but at the end of those 90 days, if I understand the War Powers Resolution, he has to withdraw those troops unless there has been in the interim specific authorization by the Congress for them to remain.

If I understand you correctly, at the end of the 90 days, even if Congress has enacted this, so long as the President has sent them in the first place pursuant to his implied constitutional authority, he can keep them there, which in effect means that the War Powers Resolution is meaningless if your interpretation is correct.

Mr. Leigh. It seems to me that this is exactly the same question as if Congress had passed the concurrent resolution. You put aside the question of the validity of the resolution.

Congress in Anomalous Position

Mr. Solarz. Well, I suppose one can’t manufacture legal tests, but I think we are in a very anomalous situation here in the Congress, we operate on the assumption that we have written a bill which very thoughtfully deals with these problems, which attempts the establishment of restrictions on the use of American forces abroad without a
congressional declaration of war, and then the spokesman for the administration tells us that the very limitations contained in the War Powers Resolution are themselves an unconstitutional restraint on the authority of the President. They have no trouble complying with the reporting provisions and that is fine, but I must say that the guts of this, much more than the reporting provisions are the limitation provisions.

Mr. Seiberling. That is why President Nixon vetoed the bill, because he said it was unconstitutional on the advice of the State Department.

Mr. Solarz. Is there some way to get a resolution of this constitutional conflict?

Mr. Seiberling. Mr. Chairman, could I make some comments?

Mr. Zahlojki. I do want to point out that in this veto message, if you read it carefully, the lawyers were responding to the Senate version, portions of which one would have to admit were constitutionally questionable in that they tried to codify the powers of the President and the powers of the Congress.

MAKING DETERMINATION WITHIN CONSTITUTIONAL RIGHT OF CONGRESS

Certainly the Congress is within its constitutional right to make the determination, as a matter of fact, it has an obligation to do so if it is going to meet its responsibilities in this area of war powers. After all, only Congress can declare war, and I don't think any President can ignore that.

Mr. Leitch. I agree no President could ignore either that nor a congressional resolution under war powers. Also I was assuming that we are not launching a war of preemption or a war against another country. We are speaking of the President acting solely pursuant to his constitutional authority.

Mr. Solarz. That is correct.

Mr. Leitch. I was thinking of a situation where he needs to do it in order to protect the United States. You gave the example of protecting U.S. citizens abroad.

Mr. Solarz. Or it could be protecting American Armed Forces.

Mr. Leitch. I think the constitutional question is the same as the one that was addressed by Senator Javits and which he termed a "twilight area."

Mr. Solarz. The President is limited to those situations under which, without this legislation, everybody agrees that the President would have had the constitutional authority anyway.

Mr. Leitch. I don't accept that the President gets his authority to send in troops from the War Powers Resolution, and your example was one which didn't treat it as coming from this resolution. I don't believe the War Powers Resolution was intended to give the President authority, I think this is the trouble about the constitutional justification which you mentioned, Mr. Chairman.

RESOLUTION HAS NO DELEGATING POWERS

This resolution does not delegate anything to the President. It is not an act of delegation by the Congress of power to the President. It is, as Senator Javits was saying, a procedural scheme for arranging
an interchange in what is obviously a difficult area between the two branches of the Government, but I don't think there is any delegation here.

Therefore, the argument that this is like some of the earlier examples where Congress created a concurrent resolution procedure to control the exercise of authority delegated to the President—namely, the Legislative Reorganization Acts where Congress did delegate certain legislative powers—is arguable. There is nothing delegated here.

Therefore, to say that Congress would later by concurrent resolution take back what it had previously delegated overlooks the fact that nothing was delegated.

Mr. SOLARZ. I think your interpretation makes this whole act meaningless because the President can only commit American troops into combat in situations where he has the constitutional authority to do so. Now if he does not have the authority to do so, then he doesn't have the right to commit American Armed Forces. If he does have the authority in the first place, then you are saying that the limitations in this bill don't apply because of the fact that if he had the authority to commit them originally, the Congress can't put a limit on the exercise of that constitutional authority.

IS THE LAW MEANINGLESS?

Consequently, your interpretation means that the limitations which Congress has written into this law are meaningless and inapplicable because, since the President obviously—even I am sure the State Department—would not contend that the President on his own initiative can send the troops in to occupy a country simply because he would like to add to the territorial possessions of the United States. That would be a constitutionally unjustifiable use of his power as Commander in Chief.

The only situations that you would justify the use of the Presidential determination to use American Armed Forces in combat is where he already has the implied authority to do so. Consequently you say if he has the implied authority, then Congress can't cut him off at the end of 90 days because that is an unconstitutional infringement on his authority. So if that is the case, what is the purpose for the War Powers Resolution?

Mr. SEIBERLING. He is saying if Congress refuses to declare war, the President can carry it on anyway as long as the money has already been appropriated.

Mr. LAGOMARSIANO. Would the gentleman yield?

I don't think that is what he is saying exactly. I don't think he is saying the President can declare war.

Mr. SEIBERLING. But he can carry it out.

Mr. LEIGH. As Commander in Chief.

Mr. LAGOMARSIANO. And that is a matter of degree.

Mr. LEIGH. Yes.

Mr. LAGOMARSIANO. Korea and Vietnam were wars undeclared.

Mr. LEIGH. We had undeclared wars with France in the 18th century; it is not new under our Constitution.

Mr. LAGOMARSIANO. So you could get to that situation depending on
the facts of the particular case, but as I understand what you are saying it is that if the President has inherent or—not implied constitutional authority to take action such as in the Mayaguez situation, that Congress cannot contravene that, which is—I mean that is simple, first page constitutional law.

**TIME LIMITATION IN ACT PLAYS IMPORTANT ROLE**

Mr. Solarz. Let's say the President sent in the troops to rescue American citizens and Vietnamese nationals in Saigon. Let's say an effort was made to obstruct that evacuation and let's say the President was determined to carry it out so it goes on for a period of several weeks and then it continues to the end of the 90 days. At the end of the 90 days the Congress which decides in its wisdom that it wants to bring this operation to an end because it does not want American troops getting shot at trying to rescue Vietnamese or American citizens fails to give a specific authorization. At that point, if I understand Mr. Leigh's interpretation, the President would say since the troops are there protecting against a continuing attack on American troops that are already there, the fact that the Congress didn't pass specific authorization pursuant to the War Powers Resolution does not mean anything and I can continue to keep them there. The President would say that because of any implied constitutional authority. I thought the whole point of this act was at the end of the 90 days the President would have power to respond to emergencies but after 3 months if the Congress felt they would not have to be there they could be yanked out.

Mr. Lagomarsino. Would the gentleman yield?

The chairman can speak to the purpose of the act better than any of the rest of us, but even if that was the purpose of the act that does not mean that the purpose can be fulfilled by the act. I think this is an old question. I think Mr. Leigh is saying that if the President has the constitutional authority to do anything, whether it is this or something else, that by its statute Congress cannot contravene that. It is that simple. I don't think he is taking the position that that is what the President would do or even that that is what he thinks he should do, it is just a simple statement of the constitutional law. It is simple, not a very complicated one.

**INTENT OF WAR POWERS RESOLUTION**

Mr. Zablocki. If I may just attempt to very briefly explain what was the intent of the War Powers Resolution. It certainly was not intended to prevent the President from fulfilling his duties as Commander in Chief but at the same time, as a result of the various developments—and call them brush fires or police actions or whatever—there was the intent that when the President commits U.S. Armed Forces to hostilities abroad on his own responsibility he has in effect assumed congressional authority. That is the reason we felt that a concurrent resolution approach was necessary. However, we are not now speaking about his authority as Commander in Chief where he is defending the United States or defending the U.S. property; rather, we are talking about a situation of a President sending troops to a foreign land