The original documents are located in Box 65, folder "War Powers Resolution Korean Incident" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

DEPARTMENT OF STATE

Washington, D.C. 20520

August 27, 1976.

Subject: War Powers and Korean Deployments

[Note: The following are the relevant, substantive portions of a memorandum sent to the Secretary by the Acting Legal Adviser on August 21, 1976, explaining why it was not recommended that the Secretary propose to the President a War Powers Report in connection with events in Korea and the augmentation of United States armed forces there.]

The War Powers Resolution requires that "the President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances..." Given what I know of the situation in Korea, I would not interpret this requirement as applicable to the strengthening of our armed forces there, even when accompanied by a hightened alert status. More difficult is the question whether the sending of reinforced patrols into the DMZ would qualify, but, so long as they are engaging merely in acts which we are entitled to take under the Armistice Agreement and which we have consistently taken, then I do not think the prospect of increased North Korean aggressiveness triggers the consultation requirement. In any event, consultation is only required where "possible;" and, to the extent that it is possible, it is clearly desirable in any case.

The Resolution requires reporting within 48 hours in three circumstances. The possibly relevant one with respect to the presently planned deployment

is Sec. 4(a)(3) - "numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation." Whether the proposed additions are substantial enlargements depends upon an anlysis of what is already there and what is being added.

I believe it would be an undesirable precedent to construe the Resolution as requiring a report in a situation where a relative handful of people have been added to an existing force of some 41,000 men. Although in terms of tactical aircraft the increment is significant, I believe we should interpret 4(a)(3) as concerned primarily, if not entirely, with numbers of military personnel, rather than with items of equipment. Certainly the text speaks of "numbers," and the examples given in the legislative debates referred only to numbers of personnel. I am satisfied that this interpretation is reasonable and fully defensible and that a contrary interpretation would create a precedent that would haunt us in many future cases.

NOT TO BE RELEASED BEFORE
2PM WEDNESDAY, SEPT. 1, 1976

"PANMUNJOM INCIDENT"

Statement by Ambassador Arthur W. Hummel, Jr., Assistant Secretary, Bureau of East Asian and Pacific Affairs, Department of State, Before the Subcommittees on International Organizations and International Political and Military Affairs of the Committee on International Relations of the House of Representatives

September 1, 1976

Mr. Chairman, Distinguished Members of the Subcommittees:

I appreciate the opportunity to appear before these subcommittees and to testify on the August 18 incident at Panmunjom and its aftermath.

As members of the subcommittees are fully aware, the Korean peninsula has been in an armed truce since 1953, with the political problems that caused the Korean hostilities still unresolved and two heavily armed forces facing each other across a four-kilometer wide Demilitarized Zone. Over the past 23 years of the Armistice the consistent goal of the U.S. has been to prevent the outbreak of new hostilities and contribute to stability in an area where the interests of four great powers, ourselves, Japan, the USSR and the People's Republic of China, all intersect. The security of Korea remains vital to peace in Northeast Asia, and is closely linked to the security of Japan, a major ally.

Throughout the long period since the end of the Korean war, North Korea has not given up its goal of reunifying the peninsula on its own terms, and views the use of force as one measure of achieving this

goal. The North has remained intransigent on all the political issues which divide North and South and has posed a constant military threat. The Demilitarized Zone has thus been an area of major tension since the Armistice Agreement, with frequent military clashes which, over the years, have taken 49 American and over one thousand Korean lives.

The United States, which was of course a major participant in the Korean hostilities, is firmly committed to the security of Korea through its important interests in the peninsula and the Mutual Defense Treaty of 1954 with the Republic of Korea. We continue to maintain forces in the Republic of Korea under this treaty to preserve the peace by deterring renewed aggression from the North.

You will recall that after the fall of Viet Nam there was a period of time during which there was the possibility that the North Koreans might miscalculate our commitment to peace and stability on the Korean peninsula and our commitment under the Mutual Defense Treaty of 1954 to the security of the Republic of Korea. This commitment was strongly restated by the President, Secretary Kissinger and other high level United States Government officials.

We believe that this commitment, together with the state of readiness of the U.S. and the Republic of Korea forces continues to deter any renewed major aggression by North Korea. We believe that neither the People's Republic of China nor the U.S.S.R. wish to see North Korea make any move that would destabilize the situation on the Korean peninsula.

At present there is on the peninsula a rough military balance between the forces of South Korea and the United States on the one hand and those of the North on the other. It has been a major goal of the North Koreans to destroy this balance by securing the withdrawal of United States forces from the Republic of Korea. North Korea has repeatedly called for such a withdrawal, trying to win international support for this goal by depicting the United States presence as a source of tension in the area.

Immediately prior to the August 18 incident, Pyongyang embarked upon a major intensification of this long-standing campaign. On August 5 they issued a strongly worded government statement attacking the United States and the Republic of Korea. The statement was accompanied by a supporting memorandum purporting to document the statement's allegations that the United States was about to make war on North Korea.

The statement said the United States had completed war preparations and was entering into a "phase of directly triggering war from a phase of directly preparing for war." It demanded that the United States must withdraw all its military equipment from the Republic of Korea, abandon what it called a "two Koreas" policy, disband the United Nations Command, withdraw all foreign troops under the United Nations flag, and replace the Armistice Agrement with a peace agreement.

From earlier North Korean statements we know that the phase "foreign troops under the United Nations flag" also means all United States forces in Korea under bilateral United States-Republic of Korea arrangements. The statement claimed that the reunification of Korea could then be achieved by the Korean people through a national congress. There was no recognition of the Government of the Republic of Korea. The statement also appealed to other nations to condemn alleged United States attempts to trigger a war in Korea.

This statement was also the culmination of anti-U.S. efforts among the non-aligned nations which were about to hold their Non-Aligned Summit Meeting in Colombo. At the Non-Aligned Meeting, which took place

in mid-August, we believe the North Koreans hoped for endorsement of very harsh anti-United States and anti-Republic of Korea language which they could subsequently utilize in lobbying for a resolution submitted by their supporters at the United Nations General Assembly. As you may recall, the United Nations General Assembly last year approved two contradictory resolutions on Korea -- one submitted by supporters of North Korea, and one submitted by ourselves and other supporters of the Republic of Korea. We believe that at this year's United Nations General Assembly the North Koreans hope to score a diplomatic victory which would contribute to isolation of the Republic of Korea and its supporters by securing approval of its own propagandistic resolution and the defeat of the friendly resolution. I shall return to the United Nations General Assembly situation later.

The August 18 incident came in the context of this heightened propaganda campaign. Before I describe this incident, let me make some comments on the Joint Security Area. This is a small, roughly circular area of the Demilitarized Zone some 800 yards in diameter in which the Military Armistice Commission meetings

are held. It is a neutral area, maintained and patrolled by both sides. Each side is permitted to have 35 armed guards in the area at any given time. Larger groups of unarmed work personnel are permitted. Specific maintenance and grounds-keeping tasks, such as the pruning of trees, have been carried out by each side without prior consultation with the other. The North Koreans have frequently caused incidents in the Joint Security Area, harassing United Nations Command personally, engaging in verbal threats and on occasion in physical assaults. In 1975 a United Nations Command officer was knocked to the ground and severely injured with a kick to the throat.

With respect to the tree involved in the August 18 incident, it was found that the foliage on this tree was obstructing the line of sight between two United Nations Command guardposts. One of these guardposts was near the North Korean side of the Military Demarcation Line near the Bridge of No Return. It was felt that if this guardpost were not fully visible from the other, the chances for its being subject to harassment or attack by North Korean personnel was increased. It was decided, therefore, to remove the obstruction.

On August 5 a work party went to the tree, which is located in the United Nations Command side of the Military Demarcation Line, for the purpose of felling it. North Koreans guards told them to leave the tree alone, although they did not lodge a formal protest over the matter. Subsequently, it was determined that guard-post visibility could be improved by trimming the tree rather than cutting it down.

On Wednesday, August 18, 1976, at approximately 10:30 local time, a United Nations Command work crew of five Koreans laborers accompanied by three United Nations Command officers (two U.S. and one Republic of Korea) and a seven man security force arrived in the Joint Security Area at Panmunjom. Their purpose was routine and non-threatening; namely, to prune the tree.

Shortly after the party began its work, two North Korean Army officers and about nine enlisted men arrived in a truck. They inquired about the work in progress. After being told that the tree was to be trimmed, not cut down, one North Korean Army officer stated that this was "good." Work continued for 10-15 minutes during which some North Korean Army personnel tried to direct the United Nations Command workers on

how to prune the tree. At about 10:50, some 20 minutes after work began, one North Korean Army officer told the United Nations Command officer to halt work. After a short discussion, the North Korean Army officer threatened the United Nations Command personnel. The United Nations Command officer told his men to keep working. The North Korean Army officer then ordered the Korean laborers to stop working. The United Nations Command officer indicated that work would continue at which point the North Korean Army officer sent a guard across the bridge, apparently to summon reinforcements. Several minutes thereafter the number of North Korean Army guards on the scene had increased to approximately 30.

At this point, one North Korean Army officer put his watch, which he had wrapped in a handkerchief, into his pocket. Another rolled up his sleeves. One officer yelled "kill" and then struck Captain Bonifas, knocking him to the ground. Five other North Korean Army guards jumped on Bonifas and continued to beat him. Other North Korean Army guards attacked the other United Nations Command guards, beating them with axe handles and clubs. United Nations Command witnesses reported that North Korean

Army guards picked up the axes used by the three pruners. Captain Bonifas was beaten with the blunt head of the axes while he was on the ground. All United Nations Command personnel received repeated beatings even though they tried to break contact and leave the area.

Casualties from this incident -- which lasted less than five minutes -- were two United States Army officers killed, four U.S. Army enlisted personnel wounded, and four enlisted Korean augmentees to the U.S. Army wounded.

We believe that the August 18 incident may have been an attempt by North Korea to underscore the theme of its propaganda campaign: that tensions were high in Korea as a result of the United States presence. The number of North Korean personnel involved in the incident, the ferocity of their attack, and their readiness to spill blood in the Joint Security Area, an area in which there had been no deaths during the 23 years of the Armistice, all indicate that this was meant to be a major provocation. As a result, we believe that the North Koreans may have been seeking an incident which could be used

extensively in their propaganda efforts to depict us as seeking war on the peninsula.

We also believe the incident was intended to test whether in the midst of a national election campaign we would firmly maintain our security commitment to the Republic of Korea. It threatened our goal of maintaining peace and stability on the peninsula.

We believe our response was sobering to the North Koreans. Our reactions were measured and calculated. Our military moves -- the deployment of the F-4s from Okinawa, and the F-111s from Idaho to Korea, the despatching of the Midway task force to the area, the raising of our defense alert status to DefCon 3, and daily B-52 flights from Guam to Korea -- were swift and coordinated. They demonstrated to Pyongyang that we were willing and able to move decisively to counter any threat in this area.

In the context of this military response, the tree-cutting operation itself made it clear to Pyongyang

that we would not tolerate intereference with our rights in the Joint Security Area under the Armistice Agreement, and that we were determined to protect United Nations Command personnel in the area in order to maintain the viability of the Armistice Agreement.

Let me make a few further points with regard to the tree-cutting. We are aware of critical comments to the effect that we took massive and expensive military moves simply to cut down a tree. This is not the case. The military augmentations were precautionary deployments designed to make it clear to Pyongyang that we were determined to meet any larger military threat which they might pose. The tree operation, as I have indicated, was meant to uphold the rights of the United Nations Command in the Joint Security Area and to help ensure the future safety of the United Nations Command personnel.

Pyongyang was clearly taken aback by both our military response and the tree cutting operation. It put its own forces on a so-called "war footing" and took certain defensive measures, but gave no indication that it was contemplating any military reaction to our moves. In the Joint Security Area, North Korean guards watched the tree cutting operation without attempting to interfere. A few hours later,

North Korean President Kim Il-sung took the unprecedented step of conveying a message through the Military Armistice Commission to the Commander-in-Chief of the United Nations Command, General Stilwell, expressing regret that the August 18 incident had occurred, and urging that further incidents in the area be avoided. Kim's conciliatory message has been widely viewed as an implicit acceptance of responsibility for the incident, particularly when contrasted with Pyongyang's usual rhetoric.

At subsequent Military Armistice Commission meetings, the North Koreans have been uncharacteristically subdued and business-like and have reiterated Kim Il-sung's expression of regret. They have also suggested a proposal for new security arrangements at Panmunjom to avoid incidents in the Joint Security Area.

The United Nations Command is now considering the proposal -- which it put forth itself in 1970 and which the North has now picked up. One important element of this plan will be the removal of four guardposts which the North Koreans now have on the United Nations Command side of the Military Demarcation Line. The United Nations Command has no guardposts on the North Korean side of the line.

We think the North Koreans have been chastened by the incident. It is not certain that the lesson will stick; however, it is evident tht Pyongyang now has a clearer picture of our readiness to maintain the security of the Korean peninsula and to uphold the Armistice Agreement. We believe the North Koreans may also fear that our response to any future incidents of the kind that occurred on August 18 could well be costly to them.

World reaction to the August 18 incident and its aftermath has, of course, varied according to the predisposition of the countries involved, but there has been widespread support for our position on the incident and for our subsequent moves.

Most significantly, both the Soviet and Chinese media were very restrained in their handling of the issue. They gave it only limited attention and confined themselves to quotes from the North Korean press, avoiding any editorial comment of their own. This clearly indicated a lack of enthusiasm for the North Korean provocation and a reluctance to be sharply critical of our response.

It is not clear to what extent the August 18 incident affected the language adopted on Korea at the Non-Aligned Conference, which was in its final sessions at the time the incident occurred. The North Koreans were successful in ramming through the hard-line language they wanted, largely because the drafting committee was composed of Pyongyang's supporters. However, many countries recognized the one-sided nature of this language and, for the first time on any question in the Non-Aligned meetings, specific reservations to the language of the political declaration and resolution on Korea were entered. We do not yet have a full list of countries which did so, since reservations are still being submitted, but the total may reach 20 to 25. It well may be that the brutal murders in the Joint Security Area were seen as evidence of North Korean belligerence and not aggressiveness on the part of the United States.

It is also unclear at this point how the incident and its aftermath will affect the United Nations General Assembly's vote on the two resolutions which have been submitted on the Korean question. We had made it clear this year that we, the Republic of Korea and many other countries hoped to avoid another sterile Korean debate, although we were prepared to meet the

challenge if one was mounted by North Korea and its supporters.

North Korean supporters, however, submitted a harsh and inflexible resolution even before the Non-Aligned had finished their debate on a Korean position, thus demonstrating that North Korea was more interested in maintaining its inflexible position than in obtaining a true non-aligned consensus on Korea.

This resolution, which draws heavily on the August 5 govenment statement, calls for the withdrawal of all foreign forces under the United Nations flag. North Korea made clear last year that this also means the withdrawal of all United States forces in Korea under the bilateral arrangements with the Republic of Korea. There are now only about 300 personnel in Korea under the United Nations flag, of which about 250 are Americans. It "demands" the withdrawal of "new" types of military equipment from the Republic of Korea, and an end to alleged acts aggravating tensions and increasing the danger of war. The resolution also calls for the unconditional dissolution of the United Nations Command. North Korea has said that if the

Command is dissolved the Armistice Agreement, the only legal document binding the parties to keep the peace, would cease to exist. It also calls for the replacement of the Armistice Agreement with a peace agreement. The latter means an agreement with the United States, and is an attempt to negotiate future security arrangements on the peninsula without the participation of the Government of the Republic of Korea, which represents two-thirds of the peninsula's population. The resolution further "hopes" for re-unification through a "great national congress." The Government of the Republic of Korea is not mentioned; this provision is an attempt to obfuscate North Korea's refusal to accept the necessity of South-North discussions, and its failure to respond to repeated offers by the Republic of Korea to resume without preconditions the South-North discussions which both sides agreed to in 1972 and which were broken off by North Korea in 1973. Through this resolution the North is attempting to isolate our ally, the Republic of Korea, to precipitate American troop withdrawal, and dissolve existing legal arrangements without substituting suitable arrangements to maintain peace and stability. We will not accept such proposals. We will not negotiate on future security arrangements

on the Korean peninsula without the participation of the Republic of Korea.

To meet this challenge, the United States and 18 other countries introduced on August 20 a non-contentious resolution on Korea which calls for the resumption of the South-North dialogue to achieve by negotiation the resolution of the outstanding problems between them. It calls on both sides to exercise restraint so as to create an atmosphere conducive to peace and dialogue. It also urges that South and North Korea and the other parties directly concerned, ourselves and the People's Republic of China, enter into early negotiations permitting the dissolution of the United Nations Command by adapting the Armistice Agreement, or replacing it with more permanent arrangements to maintain the peace.

This provision refers to a major United Nations General Assembly initiative which we and the Republic of Korea undertook last year. On September 22, 1975, Secretary Kissinger proposed that we and the Republic of Korea meet with the other parties directly concerned, the People's Republic of China and North Korea, to discuss ways of preserving the Armistice Agreement and of reducing tensions in Korea. We said that in

such a meeting we would be ready to explore possibilities for a larger conference to negotiate more fundamental arrangements to keep the peace. This invitation was not accepted then, and was dismissed by North Korea in its statement August 5, 1976 after the Secretary restated the proposal in a speech July 22, 1976.

Our position in Korea is clear:

-- We urge the resumption of serious South-North discussions which both sides agreed to in 1972 and which North Korea has broken off.

-- If North Korea's allies are prepared to improve their relations with South Korea we are prepared to take reciprocal steps toward North Korea.

-- We continue to support proposals that the United Nations give full membership to both South and North Korea, without prejudice to eventual reunification.

-- And, we are prepared to negotiate a new basis for the armistice or replace it with more permanent arrangements in any form acceptable to all the parties concerned.

As a result of North Korea's intransigence, we thus again face a tough and time-consuming confrontation

in the United Nations General Assembly on Korea which is likely to be both contentious and unproductive. The effect of the August 18 incident on what will follow in the United Nations General Assembly confrontation, as I have said, is difficult to judge. We believe few countries take seriously the charge that the United States is about to make war on North Korea. The pattern of North Korean propaganda, together with the brutality of the North Korean assault, the measured response from our side, and the subsequent backing down on Pyongyang's part may serve to convince some non-aligned countries that continued support of the North's inflexible position is not productive, and may well increase tensions. We also believe many non-aligned countries recognize that there cannot be progress on the Korean question until South and North resume direct discussions, and that the North's refusal to talk with the Government of the Republic of Korea is an unrealistic and self-defeating posture. The reservations on the Korea language at the Non-Aligned Meeting that I mentioned earlier are a sign of this view.

We believe that our firm and judicious response to the August 18 incident has shown the North that we are prepared to resist aggression,

We do not view the August 18 incident as having a major effect on decisions regarding United States force levels in Korea. As then Assistant Secretary Habib said before the subcommittee on Foreign Assistance and Economic Policy of the Senate Foreign Relations Committee April 8, "The specific level of our forces in Korea is not immutable. It is a function of the North Korean threat, the ability of the Republic of Korea forces to meet that threat and the prevailing international situation." Mr. Habib went on to say that we intended to honor commitments and maintain our presence in the area, and, in this context, we had no present plans for significant force reduction in Korea. Our response to the incident of August 18 has demonstrated that we will meet our commitments.

We would hope that the firmness we demonstrated in the aftermath of this incident,

will eventually cause the North to reassess its inflexible position of seeking to reunify the peninsula on its own terms. Meanwhile we and the Republic of Korea are prepared to seek the easing of tensions and more permanent security arrangements on the peninsula through negotiation rather than confrontation.

THE WHITE HOUSE

WASHINGTON

August 19, 1976

MEMORANDUM FOR: EDWARD SCHMULTS

FROM: PHIL BUCHEN P.

SUBJECT: Additional Squadrons of Fighter Bombers in South Korea

Attached is a rough draft of a memo on the above subject which draws the conclusion that the introduction of additional fighter bombers into South Korea with the very limited number of flyers involved does not come under Section 4(a) of the War Powers Resolution.

I think the start of the memo requires better elaboration of the facts than appears. You may get called upon to complete this memo during my absence.

Attachment

THE WHITE HOUSE

WASHINGTON

M E M O R A N D U M

As part of a general military "alert" arising from the recent incident in South Korea, some 36 U.S. fighter-bombers and customary supporting personnel have been transferred to the territory of South Korea to augment a U.S. air force of some 70 fighter-bombers and supporting personnel normally stationed there. This memorandum treats the question of whether such action by itself triggers the consultative or reportorial requirements of the War Powers Resolution (Pub. L. 93-148).* Not dealt with directly here are fundamental objections to the Resolution which are of constitutional dimension and question the necessity of any Executive action in conformity with the Resolution.

CONSULTATION

Section 3 of the War Powers Resolution provides as follows:

* * *

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

* * *

*Nothing in the War Powers Resolution or its legislative history purports to challenge the authority of the Executive to effect the transfer of forces noted herein. See Sec. 2(c) of the Resolution which, in situations involving "hostilities" or "situations where imminent involvement in hostilities is clearly indicated by the circumstances," interprets the Constitution to the effect that Executive action is dependent upon (1) a declaration of war, (2) specific statutory authorization, or (3) national emergency created by attack upon the U.S. Clearly, this is not the nature of the situation under discussion here.

This provision derived from the House bill (H.J. Res. 542). The House report accompanying the bill notes:

* * *

> "In addition to a situation in which fighting actually has begun, 'hostilities' also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. 'Imminent hostilities' denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict." (Report of the Foreign Affairs Committee, No. 93-287, June 15, 1973, at p. 6)

* * *

It would appear that the transfer of air forces to South Korea in the current climate would not raise the type of "clear and present danger" or "clear potential" for actual armed conflict referred to in the legislative history of the Resolution. Thus, I see no necessity for the President to consult with Congress on the matter.

REPORTING

The War Powers Resolution also includes a requirement that the President report to Congress on the status of military action within the purview of Section 4 (a) of the Resolution. This reportorial requirement is triggered by the introduction of U.S. Armed Forces --

> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation while equipped for combat except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation.

Subsection (1) of Section 4 (a) does not describe the type of situation under discussion here. Subsection (2) is irrelevant since it has been interpreted to cover only the initial deployment of troops /See House Report at p. 7/*. However, the legislative history of Section 4 (a) would indicate that subsection (3) may be triggered by the movement of supplemental air forces to South Korea.

Section 4 (a) derives from the House bill (H.J. Res. 542). In discussing Subsection (3) of Section 4 (a), the House Report notes:

* * *

> "(3) Reporting is required when the President 'substantially enlarges United States Armed Forces equipped for combat already located in a foreign nation.' While the word 'substantially' designates a flexible criterion, it is possible to arrive at a common-sense understanding of the numbers involved. A 100-percent increase in numbers of Marine guards at an embassy - say from 5 to 10 - clearly would not be an occasion for a report. A thousand additional men sent to Europe under present circumstances does not significantly enlarge the total U.S. troop strength of about 300,000 already there. However, the dispatch of 1,000 men to Guantanamo Bay, Cuba, which now has a complement of 4,000 would mean an increase of 25 percent, which is substantial. Under this circumstance, President Kennedy would have been required to report to Congress in 1962 when he raised the number of U.S. military advisers in Vietnam from 700 to 16,000." House Report No. 93-287, at p. 7).

* * *

A review of the Senate and House debates on subsection (3) provides no further guidance as to the nature of a "substantial" increase in Armed Forces.

*". . . While subsection (1) refers to the commitment of U.S. troops to an area where armed conflict actually is in progress, subsection (2) covers the initial commitment of troops in situations in which there is no actual fighting but some risk, however small of the forces being involved in hostilities." (emphasis supplied.)

RECOMMENDATION

As a matter of law, it seems clear that there is no necessity to "consult" with the Congress on this matter. However, it might be advantageous to do so voluntarily. Either way, attention might be focused on the absence on any necessity to consult in these circumstances as a method of tempering any sensational reaction to formal of informal reports on the increase in air forces -- i.e., "consultation" is not required since armed forces are not being introduced ".....into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."

The question of the necessity for a formal report to the Speaker of the House and President pro tem of the Senate is not at all clear in these circumstances. The issue turns on whether there has occurred a "substantial" increase in our Armed Forces in South Korea. Two operating principles should be followed. First, the substantiality requirement should be viewed as relating solely to manpower, rather than equipment or firepower. Secondly, both relative and absolute hurdles of substantiality should be cleared.

By these standards, we ~~might argue~~ may conclude that the addition of several hundred men to a force of thousands is insubstantial. ~~However, since we normally "report"~~ these matters only with reference to the President's constitutional powers (~~rather~~ than any requirement under the Resolution), ~~it would~~ probably be more discreet and also ~~consistent~~ with the general spirit of the ~~Resolution to report~~ to Congress in these circumstances.

WAR POWERS RESOLUTION

P.L. 93–148, see page 614

House Report (Foreign Affairs Committee) No. 93–287, June 15, 1973 [To accompany H.J.Res. 542]

Senate Report (Foreign Relations Committee) No. 93–220, June 14, 1973 [To accompany S. 440]

House Conference Report No. 93–547, Oct. 4, 1973 [To accompany H.J.Res. 542]

Cong. Record Vol. 119 (1973)

DATES OF CONSIDERATION AND PASSAGE

House July 18, October 12, 1973

Senate July 20, October 10, 1973

The House bill was passed in lieu of the Senate bill. The House Report and the House Conference Report are set out.

HOUSE REPORT NO. 93–287

THE Committee on Foreign Affairs, to whom was referred the joint resolution (House Joint Resolution 542) concerning the war powers of Congress and the President, having considered the same, report favorably thereon with amendments and recommend that the joint resolution as amended do pass.

APPLICABILITY TO CERTAIN EXISTING COMMITMENTS

SEC. 9. All commitments of United States Armed Forces to hostilities existing on the date of the enactment of this Act shall be subject to the provisions hereof, and the President shall file the report required by section 3 within seventy-two hours after the enactment of this Act.

BACKGROUND

On three occasions in the past two sessions of Congress, the House of Representatives has passed war powers legislation. In the 91st Congress a joint resolution reported by unanimous vote from the Committee on Foreign Affairs was adopted under suspension of the rules in the House by a vote of 288 to 39. The House-passed measure was sent to the Senate where, because of that body's failure to act, it died with the end of the 91st Congress.

In the 92d Congress, the Committee on Foreign Affairs, again unanimously, reported House Joint Resolution 1 to the House. It was

passed unanimously in the House by a voice vote under a suspension of the rules. The Senate, however, passed its own version of a war powers measure, and because of a parliamentary snarl which developed, it became necessary for the House to act once again. The Senate bill was amended with the language of House Joint Resolution 1 in the House—by a vote of 344 to 13—and sent to conference. The conferees met once near the end of the 92d Congress but could come to no agreement and the war powers resolution died once again.

ACTION IN THE 93D CONGRESS

Upon the opening of the 93d Congress the chairman of the Subcommittee on National Security Policy and Scientific Developments, and 11 cosponsors, introduced a new war powers resolution (House Joint Resolution 2), somewhat modified from those of prior years.

Six days of hearings were held by the subcommittee on that resolution, and other war powers measures which had been referred to the Committee on Foreign Affairs. Among those proposals were:

Concerning the war powers of the Congress and the President.
- H.J. Res. 96—Pepper
- H.R. 2053—Matsunaga
- H.R. 4378—Gude
- H.J. Res. 498—du Pont

Governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress.
- H.R. 317—Bingham
- H.R. 4038—Nix
- H.R. 5669—Bingham
- H.R. 6424—Bingham et al.

Relating to the power of Congress to declare war.
- H.J. Res. 315—Leggett

Relating to the war power of the Congress.
- H.J. Res. 21—Danielson
- H.J. Res. 71—Chappell et al.
- H.J. Res. 72—Chappell et al.
- H.J. Res. 89—Matsunaga
- H.J. Res. 250—Dickinson
- H.J. Res. 271—Fuqua
- H.J. Res. 409—Chappell et al.
- H.J. Res. 448—Cronin

Relative to the commitment of U.S. Armed Forces.
- H. Res. 112—Rarick

To define the authority of the President of the United States to intervene abroad or to make war without the express consent of Congress.
- H.R. 3722—Sisk
- H.R. 4834—Nix

To make rules respecting military hostilities in the absense of a declaration of war.
- H.R. 926—Quie
- H.R. 2616—Railsback
- H.R. 2740—Tiernan

To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress.
- H.R. 454—Dellenback
- H.R. 1454—Ullman
- H.R. 3139—Harrington
- H.R. 3333—Charles H. Wilson of Calif.
- H.R. 3408—Fish
- H.R. 3832—Mazzoli
- H.R. 4725—Sandman
- H.R. 4858—Ruppe
- H.R. 4966—Meeds
- H.R. 5455—Zwach
- H.R. 5594—Esch

To make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress of the United States or of a military attack upon the United States.
H.R. 3046—Dennis et al.
H.R. 4295—Rousselot
H.R. 6318—Dennis et al.

Testifying were seven Members of the House, two Senators, a spokesman for the Department of State, and five private experts. Four markup sessions followed at which new language was drafted. A revised war powers resolution was ordered reported to the full committee by a vote of 9 to 1 on May 2. The following day the measure, House Joint Resolution 542, was introduced by the subcommittee chairman with 14 cosponsors, including Mr. Fountain, Mr. Fraser, Mr. Bingham, Mr. Fascell, Mr. Davis of Georgia, Mr. Charles Wilson of Texas, Mr. Findley, Mr. du Pont, Mr. Biester, Mr. Nix, Mr. Broomfield, Mr. Pepper, Mr. Hays, and Mr. Holifield. The committee considered the bill in markup on May 22, May 31, and June 7. The resolution was reported with amendments on the latter date by a vote of 31 to 4, with one member answering "present."

CONSTITUTIONAL CONTEXT

The Cambodian incursion of May 1970 provided the initial impetus for a number of bills and resolutions on the war powers. Many Members of Congress, including those who supported the action, were disturbed by the lack of prior consultation with Congress and the near crisis in relations between the executive and legislative branches which the incident occasioned.

The issue concerns the "twilight zone" of concurrent authority which the Founding Fathers gave the Congress and the President over the war powers of the National Government.

The term "war powers" may be taken to mean the authority inherent in national sovereignties to declare, conduct, and conclude armed hostilities with other states. In the U.S. Constitution the war powers which are expressly reserved to the Congress are found in article 1, section 8, of the Constitution:

1. The Congress shall have power * * *

* * * * * * *

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than 2 years;

13. To provide and maintain a Navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;

16. To provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States;

* * * * * * *

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

The war powers of the President are expressed in article II, section 2:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States * * *.

The interpretation and application of these constitutional grants have varied widely through our Nation's history. Testimony received during hearings held in the 91st , 92d, and 93d Congresses confirmed the view of many Members of Congress and outside observers that the constitutional "balance" of authority over warmaking has swung heavily to the President in modern times. To restore the balance provided for and mandated in the Constitution, Congress must now reassert its own prerogatives and responsibilities.

In shaping legislation to that purpose, the intention was not to reflect criticism on activities of Presidents, past or present, or to take punitive action. Rather, the focus of concern was the appropriate scope and substance of congressional and Presidential authority in the exercise of the power of war in order that the Congress might fulfill its responsibilities under the Constitution while permitting the President to exercise his responsibilities.

The objective, throughout the consideration of war powers legislation, was to outline arrangements which would allow the President and Congress to work together in mutual respect and maximum harmony toward their ultimate, shared goal of maintaining the peace and security of the Nation.

THE INTENT AND EFFECT OF HOUSE JOINT RESOLUTION 542

The issue of the war powers is a complex and challenging one. The committee's objective was to reaffirm the constitutionally given authority of Congress to declare war. At the same time, the committee was sensitive to and cognizant of the President's right to defend the Nation against attack, without prior congressional authorization, in extreme circumstances such as a nuclear missile attack or direct invasion. On the basis of the deepened understanding generated over recent years, however, it became increasingly evident that the problem did not center on such extraordinary circumstances. Rather, the main difficulty involved the commitment of U.S. military forces exclusively by the President (purportedly under his authority as Commander in Chief) without congressional approval or adequate consultation with the Congress.

As a result of extensive hearings and the contributions made by many members of the House who have given thought to, and sponsored legislation on, war powers, it was possible to arrive at a consensus as to what legislation in this important area should encompass. House Joint Resolution 542 embodies that consensus. Briefly, the legislation does the following:

1. Directs the President in every possible instance to consult with the leadership and appropriate committees of Congress before, and regularly during, the commitment of United States Armed Forces to hostilities or situations where hostilities may be imminent;

2. Requires that the President make a formal report to Congress whenever, without a declaration of war or other prior specific congressional authorization, he takes significant action committing U.S. Armed Forces to hostilities abroad or the risk thereof, or places or substantially increases U.S. combat forces on foreign territory;

3. Provides for a specific procedure of consideration by Congress when a Presidential report is submitted;

4. Denies to the President the authority to commit U.S. Armed Forces for more than 120 days without specific congressional approval, while also allowing the Congress to order the President to disengage from combat operations at any time before the 120-day period ends through passage of a concurrent resolution.

5. Stipulates a specific congressional priority procedure for consideration of any relevant bill or resolution which may be introduced—in other words, an antifilibuster provision; and

6. Specifies that the measure is in no way intended to alter the constitutional authority of the Congress or the President, or the provisions of existing treaties.

COST ESTIMATE

Pursuant to clause 7, Rule XIII, of the House Rules, the committee believes that the adoption and implementation of this war powers resolution will result in little or no additional cost to the Government of the United States. If adopted, however, application of the legislation could result in substantial future savings to the Nation, both in blood and treasure, by preventing U.S. military combat involvements abroad which are found by Congress to be not in the national interest.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title and introductory clause

The introductory clause simply reads: "Concerning the war powers of Congress and the President." Sec. 1, the "Short Title," reads: "This measure may be cited as the 'War Powers Resolution of 1973'."

The word "concerning" was chosen because the resolution is merely intended to elaborate upon the application of the warmaking powers of the Congress and the President mentioned in the Constitution. By contrast with other war powers proposals, House Joint Resolution 542 does not attempt any itemized definition of the war powers.

Section 2. Consultation

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

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

At the same time, through use of the word "possible" it recognizes that a situation may be so dire, e.g. hostile missile attack under-

way, and require such instantaneous action that no prior consultation will be possible. It is therefore simultaneously *firm* in its expression of Congressional authority yet *flexible* in recognizing the possible need for swift action by the President which would not allow him time to consult first with Congress.

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

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

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

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

Section 3. Reporting

This section contains a reporting requirement obligating the President to submit a written report to Congress when "*without a prior declaration of war by Congress*", he takes certain actions committing U.S. Armed Forces. The section stipulates the circumstances requiring such a report, prescribes its form, specifies the nature of its contents, and states the timing of its submission. A central purpose of the reporting requirement is to cause the President, in the process of decisionmaking, to take into account the legal and constitutional foundation for his actions, as well as the constitutional role of the Congress in warmaking.

Three sets of circumstances which would require a report are enumerated in the resolution as follows:

(1) When the President "*commits United States Armed Forces to hostilities outside the territory of the United States, its possessions and territories.*" This includes all commitments of U.S. Armed Forces abroad to situations in which hostilities already have begun and where there is reasonable expectation that American military personnel will be subject to hostile fire.

The language makes clear that the subsection applies to hostilities *outside* the territory of the United States, as opposed to at-

tacks directly upon, or *within*, the territory of the United States. This language implicitly recognizes the President's right to protect the United States against attacks by all enemies, foreign and domestic. There is no implication whatsoever that the resolution is intended to impair the President's authority to provide such defense.

(2) Reporting is required when the President "*commits United States Armed Forces equipped for combat to the territory, airspace or waters of a foreign nation, except for deployments which relate solely to supply, replacement, repair or training of United States Armed Forces*". While subsection (1) refers to the commitment of U.S. troops to an area where armed conflict actually is in progress, subsection (2) covers the initial commitment of troops in situations in which there is no actual fighting but some risk, however small, of the forces being involved in hostilities. A report would be required any time combat military forces were sent to another nation to alter or preserve the existing political status quo or to make the U.S. presence felt. Thus, for example, the dispatch of Marines to Thailand in 1962 and the quarantine of Cuba in the same year would have required Presidential reports. Reports would not be required for routine port supply calls, emergency aid measures, normal training exercises, and other noncombat military activities.

(3) Reporting is required when the President "*substantially enlarges United States Armed Forces equipped for combat already located in a foreign nation.*" While the word "substantially" designates a flexible criterion, it is possible to arrive at a commonsense understanding of the numbers involved. A 100-percent increase in numbers of Marine guards at an embassy—say from 5 to 10—clearly would not be an occasion for a report. A thousand additional men sent to Europe under present circumstances does not significantly enlarge the total U.S. troop strength of about 300,000 already there. However, the dispatch of 1,000 men to Guantanamo Bay, Cuba, which now has a complement of 4,000 would mean an increase of 25 percent, which is substantial. Under this circumstance, President Kennedy would have been required to report to Congress in 1962 when he raised the number of U.S. military advisers in Vietnam from 700 to 16,000.

The latter half of section 3 deals with the timing, form, and scope of the report submitted by the President.

(1) *Timing.*—Although prior war powers legislation had used the word "promptly" in designating the time period in which a Presidential report had to be submitted following an action specified under the resolution, the committee saw the need for more precision and adopted 72 hours as the time limit. This period is assumed to be sufficient for the President to assemble all the pertinent information necessary to make a full report to the Congress.

(2) *Form.*—The report by the President is stipulated to be in writing. Moreover, to the maximum extent possible, it is to be unclassified. If the President desires to make classified information available to the Congress as additional justification for his actions, he is free to do so. The procedure of submitting the report to the Speaker of the House and the President pro tempore of the Senate is a normal one for receiving such reports on behalf of Congress.

(3) *Scope.*—Five stipulations are made on the contents of the report. By prescriptive language in the resolution, the President is to include:

(*A*) *the circumstances necessitating his action;*

(*B*) *the constitutional and legislative provisions under the authority of which he took such action;*

(*C*) *the estimated scope of activities;*

(*D*) *the estimated financial cost of such commitment or such enlargement of forces; and*

(*E*) *such other information as the President may deem useful to the Congress in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.*

It is the belief of the committee that a report which fulfills the criteria set forth above will provide the Congress with adequate information on which to base its deliberations and possible action concerning the commitment of U.S. Armed Forces by the President.

Section 4. Congressional action

Section 4 has four basic purposes: first, to provide for a specific procedure of consideration by Congress when a report is submitted pursuant to section 3; second, to provide for the receiving of a report when Congress is not in session; third, to deny the President the authority to commit U.S. Armed Forces for more than 120 days without further specific congressional approval; fourth, to authorize both Houses of Congress to order the President to disengage any forces from hostilities outside the United States at any time during or after the 120-day period through passage of a concurrent resolution.

Subsection (*a*) of section 4 provides that each report submitted by the President pursuant to section 3 shall be transmitted to the Speaker of the House and President pro tempore of the Senate on the same day.

It further provides that if such a report is received when Congress is not in session the Speaker and President pro tempore, *if they deem it advisable, shall jointly* request the President to convene Congress to *provide for consideration* of it and allow the Congress to take *appropriate action* pursuant to this section. There are *three reasons* for this language:

By use of the phrase "* * * *if they deem it advisable* * * *" it is intended that the good judgment of these two officials would determine whether the report covered a situation of sufficient urgency, importance and severity to warrant the extraordinary measure of ordering the reconvening of Congress. There may be instances when a report is filed on a relatively minor action.

The language "* * * *shall jointly request*" makes clear that both the Speaker and President pro tempore would have to concur in the importance of and urgency of the situation covered in the report and in the desirability of asking the President to reconvene Congress. Yet, through use of the word "*shall*" the committee intended to convey its strong belief that reports dealing with situations of urgency and importance would obligate these two officials to request the President to reconvene Congress. In this connection the committee recognizes that the Constitution states clearly that only the President "may" reconvene Congress.

The language "* * * *that it may consider the report and take appropriate action* * * *" refers to the congressional action and procedures

outlined in section 4 (b) and (c) as well as sections 5 and 6, "Congressional Priority Procedure."

The resolution further stipulates that following receipt of the report the Speaker and President pro tempore shall refer "*it to the Committee on Foreign Affairs of the House of Representatives and to the Senate Foreign Relations Committee.* * * *" The purpose of this language was to make clear that these two committees have proper jurisdiction over declarations of war and with foreign affairs generally. Further, in order to make the report available to all members of Congress the resolution stipulates that it "*be printed as a document for each House.*"

Subsection (*b*) of the resolution is one of its major provisions. In brief, it stipulates that "*within one hundred and twenty calendar days after a report is submitted or is required to be submitted* * * *" the President would be required to terminate the commitment referred to in the report and "*remove any enlargement of U.S. Armed Forces*" unless the Congress enacts a declaration of war or a specific authorization for the use of U.S. Armed Forces. Considerations which entered into this provision are as follows:

The language "* * * * *within one hundred and twenty calendar days* * * *" was used as a means of providing an adequate but fixed limitation on the period of the Presidential action. The Congress recognizes that the President has, from time to time, assumed a power to act from provision of treaties, laws, and resolutions as well as from the Constitution itself which do not constitute an explicit or specific authorization. This provision enables Congress to consider the necessity or wisdom of a President's action and to require the President to abandon such action if Congress is not persuaded that the action is in the interest of the United States, or to endorse the action if Congress believes it to be in the national interest. As is made clear in section 8 of the resolution, this provision is not to be construed as a grant of authority to the President to act for 120 days. Rather, it should be considered a specific time limitation upon any power to act assumed by the President from sources other than a specific authorization by Congress.

Nor should this limitation and the power contained in subsection (c) be interpreted as limiting the means now available to Congress and citizens to challenge the authority of the President to act.

The language "* * * *or is required to be submitted* * * *" takes into account a situation in which the President for whatever reason may decide not to submit a report. In that case, the 120-day period would begin after the 72-hour period referred to in section 3.

The language "* * * *the President shall terminate any commitment* * * *" obligates the President explicitly to stop the commitment or enlargement and remove U.S. Armed Forces to which the report refers.

The phrase "* * * *unless the Congress enacts a declaration of war or a specific authorization for the use of United States Armed Forces*" spells out either of the two specific *affirmative actions* which the Congress would have to take in order for the President to continue his action, namely, a declaration of war *or* a specific authorization in the form of a joint resolution.

Subsection (*c*) is another of the resolution's major provisions. It provides for the termination of the President's action covered in the report through passage of a concurrent resolution by both Houses, before the end of the 120-day period referred to in section 4(b) and notwithstanding section 4(b). It is, in other words, an option of congressional action. Considerations which entered into the legislative language here are as follows:

> The phrase "*shall be disengaged*" has as its antecedent the President's action of committing U.S. Armed Forces. The intent of the committee was simply that the President shall stop the action to which he has committed the forces by releasing the forces from the order which committed them, and removing them from the situation.
>
> The language "* * * *if the Congress so directs by concurrent resolution*" is the heart of subsection (c). It authorizes the use of a concurrent resolution to "veto" or disapprove an action of the President committing United States Armed Forces to hostilities. In effect, the joint resolution "endows" this concurrent resolution with the binding force of statute. Since the language applies to a situation where there is no congressional authorization for the President's action it thereby avoids the possibility of a Presidential veto—and resulting impasse—which would be possible on a bill or a joint resolution. A discussion of the use of a concurrent resolution for this purpose may be found on pages 13–14.

Sections 5 and 6. Congressional priority procedure

Sections 5 and 6 stipulate a specific congressional priority procedure for consideration of a relevant bill or joint resolution which may be introduced pursuant to section 4(b) or a concurrent resolution introduced pursuant to section 4(c). Sections 5 and 6 are, in other words, the "antifilibuster" provisions of the resolution. While it was recognized that filibusters are primarily a problem of the Senate, it was felt that these provisions would protect the interests of the House. It would achieve that objective, for example, by allowing the House enough time to deal with any relevant bill or resolution sent by the Senate. Section 5 relates to section 4(b) and section 6 relates to section 4(c). In both cases, the language provides for referral to relevant bills or resolutions to the House Committee on Foreign Affairs and the Senate Foreign Relations Committee in accord with the traditional jurisdiction of those committees.

The intent of the committee in including sections 5 and 6 is to establish the status of relevant legislation as "privileged motions," approximate to the procedure followed when a discharge petition is filed for the consideration of a resolution.

TIMING OF SECTION 5

As prescribed in section 5 which relates to section 4(b), the timing of congressional procedures would be as follows:

> *Forty-five days before end of 120-day period.*—Bill or joint resolution must be introduced to be guaranteed protection of committee consideration.
>
> *Thirty days before end of 120-day period.*—One such resolution or bill must be reported out by committee.

Within 3 legislative days of being reported by committee.—Legislation becomes pending business of either House and shall be voted on and sent to the other body.

Fifteen days before end of 120-day period.—Legislation acted upon by one body and sent to the other body and referred to appropriate committee shall be reported out.

Within 3 legislative days of being reported by committee in other body.—Legislation so reported shall become pending business and shall be voted on unless such body shall otherwise determine by yeas and nays.

End of 120-day period.—Presidential action must stop unless previously sanctioned by Congress.

TIMING OF SECTION 6

The timing for congressional consideration under section 6, which relates to section 4(c) is as follows:

Within 15 calendar days of introduction of concurrent resolution.—One such resolution shall be reported out by committee with recommendations and shall become pending business.

Within 3 legislative days of being reported out.—Shall be voted on unless otherwise determined by yeas and nays.

Within 15 calendar days of concurrent resolution passed by one House and referred to other body's appropriate committee.—Shall be reported out by committee and become pending business.

Within 3 legislative days of being reported out by committee.—Shall be voted on unless otherwise determined by yeas and nays.

Section 7. Termination of Congress

Section 7 deals with a situation in which a Congress terminates during the 120-day period specified in subsection 4(b) without having taken final action to approve or disapprove a commitment of armed forces.

The committee did not wish to force the President to cease a military action abroad simply because Congress was not in session at the expiration of 120 days and it had not been possible to take final action before adjournment.

Thus, section 7 provides that in such a case the 120-day period shall not expire *sooner than* 48 days after the convening of the next succeeding Congress, providing that a resolution or bill is introduced pursuant to subsection 4(b) within 3 days of the convening of the next succeeding Congress. This language is meant to insure that in any case in which the 120-day period is interrupted by statutory termination of Congress without congressional action, there would be an extension of the period. It also would allow the antifilibuster provisions to come into effect.

Section 8. Interpretation of act

Section 8 deals with the construction, intent, and effect of the resolution.

The intent of subsection (a) is to disclaim any intention of altering the constitutional grants of war powers to the legislative and executive branches. It thereby helps insure the constitutionality of the resolution by making it clear that nothing in it can be interpreted as changing in any way the powers delegated to each branch of govern-

ment by the Constitution. In addition, it reassures U.S. allies that passage of the resolution will not affect U.S. obligations under mutual defense agreements and other treaties to which the United States is a party.

The intent of subsection (b) is to state explicitly that nothing in the resolution "*shall be construed to represent congressional acceptance of the proposition that Executive action alone can satisfy the constitutional process requirement contained in the provisions of mutual security treaties to which the United States is a party.*"

This statement is aimed at rejecting those interpretations of the treaty obligations of the United States which hold that mutual security treaties such as NATO, SEATO, and ANZUS are "self-executing" and do not require congressional sanction of any kind for Presidential actions taken in pursuit of such obligations, including actions which involve the deployment of U.S. Armed Forces into hostilities.

The intent of subsection (c) is to emphasize that this resolution does not grant the President any new authority and, in connection with the 120-day period referred to in section 4(b), that the President would not have any freedom of action during the 120-day period which he does not already have.

Section 9. Applicability to certain existing commitments

This section provides that the resolution would apply to those commitments of U.S. Armed Forces to hostilities which are *in progress* on the date of its enactment into law. The section further provides that upon enactment of the resolution the President should proceed to file the report as required by section 3 and that the 120-day period called for by subsection 4(b) would begin on the date of the filing of the report.

Section 10. Effective date

This section states that the resolution, except to the extent otherwise provided in section 9, shall take effect on the date of its enactment.

USE OF A CONCURRENT RESOLUTION

Section 4(c) provides that an action by the President committing U.S. troops to hostilities or into areas or situations where hostilities are imminent could be terminated by both Houses of Congress acting through a concurrent resolution. Some question has been raised about the constitutionality of the use of a concurrent resolution for this purpose. After careful study of the issues involved the committee believes that there is ample precedent for the use of the concurrent resolution to "veto" or disapprove a future action of the President, which action was previously authorized by a joint resolution or bill.

There are many examples of legislative actions which have the effect of law without a Presidential signature. Perhaps the most notable is the ability of Congress to veto executive branch reorganization plans under the Executive Reorganization Act. Other examples are amendments to the Constitution of the United States and orders to spend money appropriated to the use of the Congress.

Further, most of the important legislation enacted for the prosecution of World War II provided that the powers granted to the Pres-

ident would come to an end upon adoption of concurrent resolutions to that purpose. Among those acts were:

The Lend-Lease Act;
First War Powers Act;
Emergency Price Control Act;
Stabilization Act of 1942;
War Labor Disputes Act.

In more recent times both the Middle East Resolution and the Gulf of Tonkin Resolution provided for their repeal by concurrent resolution.

This use of a concurrent resolution has been accepted by various authorities as a constitutionally valid practice. It might be noted that Senator Sam J. Ervin, a noted constitutional scholar, has authored a bill which would permit international executive agreements to be "vetoed" by the Congress through passage of a concurrent resolution. This proposal has been endorsed by many constitutional experts and a former Supreme Court justice.

The constitutional validity of such usage of a concurrent resolution is based on the capacity of Congress to limit or to terminate the authority it delegates to the Executive. In the case of the war powers, the Constitution is clear that the power to declare war, as well as the power to raise and maintain an army and a navy, belong to Congress. Under the Constitution, the President is designated as the Commander in Chief to prosecute wars authorized by Congress.

When the President commits U.S. Armed Forces to hostilities abroad on his own responsibility, he has, in effect, assumed congressional authority. Under this war powers resolution the Congress can rescind that authority as it sees fit by a concurrent resolution and thereby avoid the problem of a Presidential veto. The authority for the Congress to establish a legislative process for rescinding an assumed power to act on the part of the President can be found in Article 1, Section 8, of the Constitution through the "necessary and proper" clause.

This authority of Congress was recognized as legitimate when Congress passed legislation permitting the President to prosecute World War II. This authority of Congress was recognized as legitimate in the passage of the Middle East Resolution and the Gulf of Tonkin Resolution. It is no less legitimate and constitutional today as embodied in this war powers resolution.

Supplemental Views of Representatives Mailliard, Broomfield, Mathias, Guyer, and Vander Jagt

We voted in committee to report this resolution because we strongly support the reporting and consulting provisions of the legislation, although we have equally strong reservations over the operating provisions. In our opinion the House should have the opportunity to debate the resolution.

It is our hope that as the House works its will, the Members will carefully scrutinize section 4 (b) and (c). In our opinion, section 4(b) is dangerous and perhaps unconstitutional. It would unwisely put into law a provision whereby the failure of the Congress to act could force Presidential action with major national and international implications. Specifically, section 4(b) requires that within 120 calendar days

after a report is submitted or required to be submitted pursuant to section 3, the President shall terminate any commitment and remove any enlargement of U.S. Armed Forces with respect to which such report was submitted, unless the Congress enacts a declaration of war or a specific authorization for the use of U.S. Armed Forces. In our opinion, the Congress ought to exercise its powers in a positive way and not have major consequences ensue from the inaction of the Congress.

There are several objections to terminating the President's authority in this manner. Recognizing that the war powers are shared by the President and the Congress, the President—to cite one example—obviously has the authority to commit U.S. Armed Forces stationed overseas to hostilities in order that they might protect themselves from attack or threat of imminent attack. We doubt that the Congress can constitutionally terminate the President's authority to protect the Armed Forces. We further doubt that the Congress can constitutionally terminate the President's authority by a failure to act, as provided for by section 4(b).

This section appears to be as unwise as it may be unconstitutional. Section 4(b) could require the disengagement of our Armed Forces even in the face of a continuing attack. It could destroy an adversary's incentive to reach an early settlement of a dispute, since he surely would hope that the Congress—by failure to act or otherwise—would compel the President to disengage U.S. Armed Forces.

We should also consider the constitutionality of section 4(c), which would permit the Congress by a concurrent resolution to require the President to disengage U.S. Armed Forces from hostilities. We have no problem with the policy envisioned in section 4(c); namely that in exercising a shared constitutional power a majority of both Houses of Congress should have the power to require the disengagement of Armed Forces committed to hostilities by the President without congressional approval.

We would, however, call attention to the constitutional question of whether a concurrent resolution, not requiring the approval of the President, would be binding upon the President.

WILLIAM S. MAILLIARD,
WILLIAM S. BROOMFIELD,
ROBERT B. (BOB) MATHIAS,
TENNYSON GUYER,
GUY VANDER JAGT.

SUPPLEMENTAL VIEWS OF REPRESENTATIVES BUCHANAN AND WHALEN

We concur that there is great need for war powers legislation. Congress must possess the means by which it can act on the question of placing U.S. Armed Forces in combat. House Joint Resolution 542 goes a long way toward providing such a mechanism.

Nevertheless, the language in section 4(b) troubles us. It permits the exercise of congressional will through inaction. It is our opinion that in order to fulfill its constitutional responsibility, Congress must act, whether it be in a positive or negative manner.

Therefore, during the committee's markup of the resolution, we supported replacing the committee's language in section 4(b) with an amendment similar to the following:

> Not later than one hundred twenty days after the receipt of the report of the President provided for in section 3 of this Act, the Congress, by a declaration of war or by the enactment within such period of a bill or resolution appropriate to the purpose, shall either approve, ratify, confirm, and authorize the continuation of the action taken by the President and reported to the Congress, or shall disapprove, in which case the President shall terminate any commitment and remove any enlargements of the United States Armed Forces with respect to which such report was submitted.

We shall offer this amendment during floor debate on House Joint Resolution 542. On an issue which may involve the death of thousands of Americans, we cannot delude ourselves that no action at all is an appropriate response. Rather, each Member of Congress should declare his views—through a "yes" or "no" vote—when the President commits our Armed Forces to combat or substantially enlarges our military presence abroad. Passage of our amendment will afford this opportunity.

JOHN BUCHANAN,
CHARLES W. WHALEN, Jr.

MINORITY VIEWS OF REPRESENTATIVES FRELINGHUYSEN, DERWINSKI, THOMPSON, AND BURKE

We are opposed to the enactment of House Joint Resolution 542. Its most important provisions are probably unconstitutional and certainly are unwise. We strongly doubt the wisdom of attempting to draw rigid lines between the President and Congress in the area of warmaking powers. Ironically, enactment of this resolution in some respects would expand considerably the constitutional authority of the President, and in other respects would severely restrict his authority. In our opinion, the only appropriate way to make such far-reaching changes would be by an amendment to the Constitution.

While we are in accord with the understandable desire of Members to assure Congress its proper role in national decisions of war and peace, we consider the severe restrictions which this resolution seeks to impose on the authority of the President to be dangerous. Should they become effective, they could affect adversely important national security interests of the United States.

Flexibility—not the exact delimitation of powers—is a basic characteristic of the Constitution. The framers of the Constitution clearly had that aim in mind when they refrained from closely defining the responsibilities of the executive and legislative branches in the areas of warmaking powers. Moreover, throughout our history, Presidents have employed the power which that flexibility has allowed them to encourage peaceful resolutions of potentially dangerous situations.

What is most ironic is that this joint resolution, constructed as it is with an eye to our unfortunate experiences during the mid-1960's, would not have prevented our steadily deepening involvement in Vietnam, had it been on the books 10 years ago. For example, there is no reason to believe that Congress after the Gulf of Tonkin incident

would have refused to approve Presidential action through the mechanism provided in this measure. Congress at the time would have declared war, had that been requested, or we would have specifically authorized the use of our Armed Forces.

House Joint Resolution 542 cannot give Congress foresight or wisdom, and will not force an uncooperative Executive to be more forthcoming. In fact, it may achieve just the opposite effect. A President faced with a possible congressional veto of his actions might be tempted to circumvent Congress. He might, for example, appeal directly to the American people in order to force Congress to support him. If that were to happen, Congress could be virtually excluded from the decisionmaking process. Moreover, House Joint Resolution 542, which seeks to provide a "trip wire," invoking restrictions on Executive action, might well encourage a President to be less than candid when setting forth the circumstances and justifications for his actions.

Following are our views in more detail with respect to each section of the resolution.

Section 2, and most of section 3, seek to insure reasonable consultation with Congress, by requiring submission of reports to Congress by the President whenever he commits the U.S. forces to hostilities or potentially hostile situations, or when he enlarges our combat forces already located in foreign nations. Essentially the same provisions have been enacted previously by the House of Representatives in two preceding Congresses. Section 4(a), which seeks to insure prompt action by Congress on such reports, also is the same language as that already twice approved by the House. We consider these requirements to be entirely appropriate.

We have reservations, however, about the wisdom of the inclusion of section 3(d), language which was not contained in the resolutions previously approved by the House. Section 3(d) requires that the President communicate to Congress the estimated financial cost of any commitment of U.S. forces outside the United States. What point would there be in requiring the President to announce at the outset of a national security emergency his judgment as to the cost of committing of our forces? It may be argued that Congress needs a specific estimate of costs in order to help us make up our minds about whether or not to support the President. In our opinion, that information would be of no particular value to Congress but might be extremely revealing to an enemy. We believe that Congress would receive adequate information under the requirements of the other subsections of section 3, and that the advantages to be gained by hostile powers through the required financial disclosure would far outweigh any incremental benefit to Congress.

Section 4 (b) and (c) are at the heart of our objections to the resolutions. Section 4(b) provides that the President at the end of 120 days, without regard even to the immediate safety of our armed forces, must terminate any involvement of U.S. forces in hostilites outside the United States, and withdraw newly dispatched combat forces from the area of any foreign country (except for supply, replacement, repair or training deployments), unless the Congress by that time has enacted a declaration of war or "specifically" authorized the use of our Armed Forces.

This effort to limit the President's power—by the failure of Congress to take affirmative action—strikes us as highly dangerous. For

example, suppose the President were to commit troops in Europe in order to defend our own country? That he has such power as Commander in Chief is not challenged, but the 120-day limitation might make it necessary for him to withdraw troops already fully committed to combat. At best, the limitation could only be construed as an effort to circumscribe sharply his ability to continue to exercise his power. To avoid such a reversal of national policy, a President might hurriedly escalate hostilities, to force Congress to support him, or in an effort to win the conflict within 120 days—or an enemy might seek to avoid negotiating a settlement in the belief that the President would soon be forced to withdraw our troops. Thus the 120-day provision might actually promote, rather than deter, our involvement in hostilities.

Proponents may argue that in such a situation Congress would recognize the necessity of declaring war, or of specifically authorizing the use of troops. As a practical matter, however, Congress does not always move quickly and a legislative deadlock might develop. Moreover, in our opinion it is highly undesirable for Congress, through its own inaction, to be able to determine whether a course of Presidential action should be continued.

The manifold constitutional and national security problems created by the 120-day provision of section 4(b) are compounded by section 4(c). This section provides that hostilities and deployments may be terminated by Congress alone at any time within the 120-day period, by means of a concurrent resolution having no force of law.

If the Commander in Chief, acting within his constitutional authority, orders our forces to deploy or to engage in hostilities, Congress may affect such action if it wishes, but necessarily must do so through use of its constitutionally granted powers. By seeking to provide that a concurrent resolution shall have the force of law, we are embarking on an extremely dangerous, and probably unconstitutional course of action.

There may be cases in which Congress has specifically authorized hostilities or deployments by constitutional means other than a declaration of war. Under Article I, Section 7 of the Constitution, authority granted by any bill, order or resolution may be repealed or amended only through the same process; once Congress has given its consent to legislation it may not be withdrawn unilaterally by the Congress with less than a two-thirds vote.

Section 5 is another example of the difficulty of trying to establish rigid procedures where, in fact, flexibility is required. During committee consideration it was clear that the practical effects of the time requirements were not adequately explored. For example, the question was raised, if the beginning of the last 45 days of the 120-day period coincided with the end of a Congress, would be the 15 days for committee consideration be binding upon the next Congress? A related question was whether Congress would be able to organize quickly enough to meet the deadline. These questions, in our opinion, were not answered satisfactorily.

While sections 7 and 8 are generally helpful, given their context, we strongly oppose the requirement of section 9 that this resolution be applied retroactively to cover hostilities existing on the day of its enactment which were previously authorized and initiated.

The proper and most useful role for Congress to play, in decisions of war and peace, cannot be developed through confrontation with the Executive. To function effectively, particularly in times of national crisis, our system of government must exhibit a maximum amount of cooperation between the two branches—executive and legislative. In the past such cooperation has been the means by which we have achieved successful policy decisions. It is to this end that we should be striving. House Joint Resolution 542 will not help—indeed, we believe it will seriously impede—the achievement of this objective.

PETER H. B. FRELINGHUYSEN,
EDWARD J. DERWINSKI,
VERNON W. THOMSON,
J. HERBERT BURKE.

CONFERENCE REPORT NO. 93-547

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the joint resolution (H.J. Res. 542) concerning the war powers of Congress and the President, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment to the joint resolution struck out all after the resolving clause and inserted a new text. Under the conference agreement the House recedes with an amendment which substitutes a new text explained below except for clerical corrections, incidental changes made necessary by reason of agreements reached by the conferees, and minor drafting and clarifying changes.

SHORT TITLE

Section 1 of the Senate amendment substituted "War Powers Act" as a short title in lieu of the short title "War Powers Resolution of 1973" in the House joint resolution. Section 1 of the conference substitute provides a short title of "War Powers Resolution".

PURPOSE AND POLICY

The Senate amendment contained a section entitled "Purpose and Policy" (section 2) and a section entitled "Emergency Use of the Armed Forces" (section 3) which defined the emergency powers of the President to introduce United States Armed Forces into hostilities or situations of imminent hostilities.

The House joint resolution did not contain similar provisions.

The conference report contains a section entitled "Purpose and Policy". The new section states that:

(*a*) the purpose of the joint resolution is to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will

apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations;

(*b*) Article I, section 8 of the Constitution provides the basis for congressional action in this area; and

(*c*) the constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Section 2(c) is a statement of the authority of the Commander-in-Chief respecting the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. Subsequent sections of the joint resolution are not dependent upon the language of this subsection, as was the case with a similar provision of the Senate bill (section 3).

CONSULTATION

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

REPORTING

Section 4 of the conference report concerns reporting both the House joint resolution and the Senate amendment contained similar reporting provisions requiring the President to report to the Congress on specified actions. In the case of the House joint resolution, the reporting provisions triggered the subsequent congressional action provisions. In the Senate version, congressional action provisions were not triggered by the reporting provision, but were otherwise brought into play. Section 4 of the conference report draws on both the Senate and House versions. It requires that the President provide such other information as the Congress may request following his initial report on the introduction of United States Armed Forces, and further requires supplementary reports at least every six months so long as those forces are engaged. The initial presidential report is required to be submitted within 48 hours. The objective is to ensure that the Congress by right and as a matter of law will be provided with all the information it requires to carry out its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

CONGRESSIONAL ACTION

Both the House joint resolution and the Senate amendment provided for termination within a specified time of presidential use of

United States Armed Forces without a declaration of war or specific prior statutory authorization. The termination period in the House joint resolution was 120 days; in the Senate amendment, 30 days.

The conferees agreed on a 60 day period following the forty-eight hour period in which the President is required to report under section 4. The 60-day period can be extended for up to 30 additional days if the President determines and certifies in writing to the Congress that unavoidable military necessity respecting the safety of the troops requires their continued use in bringing about a prompt disengagement from hostilities.

In section 5(a) the conferees accepted the provisions of the House joint resolution relating to the transmittal of the presidential report to Congress, with amendments which (1) provide for the possibility of reconvening of Congress in case of adjournment in order to consider such report, and (2) provide that 30 percent of the membership of the respective Houses may petition for such reconvening.

The House joint resolution provided that use of United States Armed Forces by the President without a declaration of war or specific statutory authorization could be terminated by Congress through the use of a concurrent resolution. The Senate amendment provided for such termination by a bill or joint resolution. The conference report contains the concurrent resolution provision.

The House joint resolution provided for termination of certain peacetime deployments of United States Armed Forces through the elapsing of a time period in which Congress failed to approve such deployments. The Senate amendment did not include such deployments in its congressional action provisions. The conference report requires presidential reporting on such deployments but section 5(b) does not require their termination.

CONGRESSIONAL PRIORITY PROCEDURES

Both the House joint resolution and the Senate amendment contained congressional priority procedures. They differed primarily in that the House language specifically stipulated resort to a procedure of committee consideration while in the Senate version any pertinent bill or joint resolution was to be considered as reported directly to the floor of the House in question unless otherwise decided by the yeas and nays. The language agreed to by the conference in sections 6 and 7 corresponds to the House version including separately stipulated priority procedures for consideration of concurrent resolutions requiring removal of forces. The following changes, however, were made:

(1) language was added at the end of sections 6(a) and 7(a) allowing each House to change the procedures by the yeas and nays;

(2) the various time frames in section 6 for full cycle consideration of a joint resolution or bill were shortened to conform to the change in section 5(b) from 120 days to 60 days;

(3) following the reporting of a joint resolution or bill or concurrent resolution by the appropriate committee it was stipulated that the time for debate in the Senate shall be equally divided between the proponents and the opponents; and

(4) section 6(d) and section 7(d) provide for expedited conference committee procedures in the consideration of pertinent legislation passed by both houses.

TERMINATION OF CONGRESS

Section 7 of the House joint resolution provided a mechanism to insure that the time period provided for under section 4 of the joint resolution would not expire while Congress was in adjournment. The Senate amendment had no similar provision. The conference report does not contain the House provision on the grounds that the language of section 5 of the conference report had obviated the need of this section.

INTERPRETATION OF JOINT RESOLUTION

The Senate amendment contained definitions of certain terms. The House joint resolution, while incorporating some broad interpretations of the meaning of the joint resolution, did not contain such definitive language. The conferees agreed to combine both definitions and interpretations in a single section 8 with changes including:

(1) adoption of modified Senate language defining specific statutory authorization, and defining the phrase "introduction of United States Armed Forces" as used in the joint resolution;

(2) elimination of House language concerning the constitutional process requirement contained in mutual security treaties; and

(3) addition of Senate language which makes clear that the resolution does not prevent members of the United States Armed Forces from participating in certain joint military exercises with allied or friendly organizations or countries. The "high-level military commands" referred to in this section are understood to be those of NATO, the North American Air Defense command (NORAD) and the United Nations command in Korea (UNC).

SEPARABILITY CLAUSE

The Senate amendment contained a separability clause stipulating that, if any of its provisions or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to any other person or circumstance would not be affected. The House version did not contain a corresponding provision. The conferees accepted the language of the Senate amendment, with certain technical modifications.

EFFECTIVE DATE

Both the House joint resolution and the Senate amendment contained language providing that the legislation would take effect on the date of its enactment. This provision was not in disagreement.

CLEMENT J. ZABLOCKI,
THOMAS E. MORGAN,
WAYNE L. HAYS,
DONALD FRASER,
DANTE B. FASCELL,
PAUL FINDLEY,
WM. BROOMFIELD,
Managers on the Part of the House.

MISUSE OF NAMES—FEDERAL AGENCIES

For Legislative History of Act, see p. 2344

PUBLIC LAW 93-147; 87 STAT. 554

[H. R. 689]

An Act to amend section 712 of title 18 of the United States Code, to prohibit persons attempting to collect their own debts from misusing names in order to convey the false impression that any agency of the Federal Government is involved in such collection.

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

(a) Section 712 of title 18 of the United States Code [57] is amended to read as follows:

"§ 712. Misuse of names, words, emblems, or insignia

"Whoever, in the course of collecting or aiding in the collection of private debts or obligations, or being engaged in furnishing private police, investigation, or other private detective services, uses or employs in any communication, correspondence, notice, advertisement, or circular the words 'national', 'Federal', or 'United States', the initials 'U.S.', or any emblem, insignia, or name, for the purpose of conveying and in a manner reasonably calculated to convey the false impression that such communication is from a department, agency, bureau, or instrumentality of the United States or in any manner represents the United States, shall be fined not more than $1,000 or imprisoned not more than one year, or both.".

(b) The table of sections for chapter 33 of title 18 of the United States Code is amended by striking out of the item designated

"712. Misuse of names by collecting agencies to indicate Federal agency."

and inserting in lieu thereof

"712. Misuse of names, words, emblems, or insignia.".

Approved Nov. 3, 1973.

WAR POWERS RESOLUTION

For Legislative History of Act, see p. 2346

PUBLIC LAW 93-148; 87 STAT. 555

[H. J. Res. 542]

Joint Resolution concerning the war powers of Congress and the President.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

SHORT TITLE

Section 1. This joint resolution may be cited as the "War Powers Resolution".

57. 18 U.S.C.A. § 712.

PURPOSE AND POLICY

Sec. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

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

REPORTING

Sec. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

Sec. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a decla-

ration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

Sec. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

Sec. 7. (a) Any concurrent resolution introduced pursuant to section 5(c) shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent

resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the head-

quarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

SEPARABILITY CLAUSE

Sec. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

Sec. 10. This joint resolution shall take effect on the date of its enactment.

Passed over Presidential veto Nov. 7, 1973.

Calendar No. 209

93D CONGRESS
1st Session

SENATE

REPORT
No. 220

WAR POWERS

JUNE 14, 1973—Ordered to be printed

Mr. FULBRIGHT, from the Committee on Foreign Relations, submitted the following

REPORT

together with

SUPPLEMENTAL VIEWS

[To accompany S. 440]

The Committee on Foreign Relations, to which was referred the bill (S. 440), to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by the Congress, having considered the same, reports favorably thereon and recommends that the bill do pass.

PREVIOUS SENATE ACTION

The bill, S. 440, is identical in text to S. 2956 which was passed by the Senate on Arpil 13, 1972 by a vote of 68 to 16. No agreement having been reached in conference in the 92nd Congress, S. 2596 was reintroduced as S. 440 on January 18, 1973 by Senator Javits and 57 cosponsors. S. 440 has a total of 61 cosponsors as it goes to the Senate floor.

PURPOSES OF THE BILL

A detailed explanation of all the bill's provisions is given at the end of the Committee Report, beginning on page 21.

The purpose of the war powers bill, as set forth in its statement of "purpose and policy," is to fulfill—not to alter, amend, or adjust—the intent of the framers of the United States Constitution in order to insure that the collective judgment of both the Congress and the President will be brought to bear in decisions involving the introduc-

tion of the Armed Forces of the United States in hostilities or in situations where imminent involvement in hostilities is indicated by circumstances. The constitutional basis for this bill is found in Article 1, Section 8, of the Constitution, which enumerates the war powers of Congress, including the power to declare war and to make rules for the Government and regulation of the Armed Forces, and further specifies that Congress shall have the power "to make all laws necessary and proper for carrying into execution" not only its own powers but also "all other powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof."

The essential purpose of the bill, therefore, is to reconfirm and to define with precision the constitutional authority of Congress to exercise its constitutional war powers with respect to "undeclared" wars and the way in which this authority relates to the constitutional responsibilities of the President as Commander-in-Chief.

Section 3 of the bill defines the emergency conditions in which, in the absence of a declaration of war by Congress, the Armed Forces of the United States may be introduced in hostilities, or in situations where imminent involvement in hostilities is indicated by circumstances.

The designation of conditions for the emergency use of the armed forces spelled out in Section 3 is the result of a concerted effort on the part of the Committee and the principal sponsors of the "War Powers Act" to make provision for the exigencies of modern warfare and international politics but to do so in such a way as to fulfill the intent of the Constitution, particularly with reference to war powers of Congress.

Senator Javits, the initial sponsor of war powers legislation, in testimony before the Committee in 1971 explained the rationale for the proposed legislation as follows:

> My cosponsors and I regard this bill as basic national legislation. It is legislation essential to our security and well being. It is legislation in the interest of the President as well as the Congress. . . . We live in an age of undeclared war, which has meant Presidential war. Prolonged engagement in undeclared, Presidential war has created a most dangerous imbalance in our Constitutional system of checks and balances. . . . [The bill] is rooted in the words and the spirit of the Constitution. It uses the clause of Article I, Section 8 to restore the balance which has been upset by the historical disenthronement of that power over war which the framers of the Constitution regarded as the keystone of the whole Article of Congressional power—the exclusive authority of Congress to "declare war"; the power to change the nation from a state of peace to a state of war.

In testimony before the Committee in 1971, Senator Stennis, Chairman of the Armed Services Committee, stated: ". . . I believe that all of the bills and resolutions so far introduced are important chiefly because they attempt to delineate between those circumstances in which the President can first act unilaterally and those in which prior authority by Congress is required before armed forces can be used."

Section 3 of the bill makes these crucial delineations. Subsections (1), (2) and (3) are codifications of the President's authority to "repel

sudden attacks" and protect U.S. nationals whose lives are endangered abroad—powers based on established precedent and the intention of the Constitutional Convention, as evidenced by Madison's notation about "leaving to the Executive the power to repel sudden attacks." Subsection (4) of Section 3 of the bill is a crucial provision of the legislation, requiring that all other use of the Armed Forces in hostilities, or situations where hostilities are clearly imminent, must be "pursuant to specific statutory authorization."

In allowing of emergency action to forestall the direct and imminent threat of an attack the majority of the Committee accepted the view expressed in testimony before the Committee by Alexander M. Bickel, Professor of Law, Yale University, that the authority involved is "a reactive not a self-starting affirmative power. . . ." As Professor Bickel put it in 1971:

> The "sudden attack" concept of the framers of the Constitution denotes a power to act in emergencies in order to guard against the threat of attack, as well as against the attack itself, when the threat arises, for example, in such circumstances as those of the Cuban missile crisis of 1962. So long as it is understood that this is a reactive, not a self-starting affirmative power, I have no trouble agreeing that it is vested in the President by the Constitution, that it provides flexibility, and that Congress cannot take it away.[1]

Again, in testimony before the Committee in 1973, Professor Bickel expressed his belief that:

> The actual draft of Section 3 of S. 440 is precise and is, on any fair reading, not only a full implementation of the constitutional grant to the President, but also more restrictive than many a claim of power that has in past years been made by Presidents, and indeed acted upon. Moreover, as a matter of effective drafting, it seems to me impossible to state with any clarity what is reserved to Congress without stating first what belongs to the President. The task is one of line-drawing, of separating one thing from another, and in doing so one must state what is on both sides of the line.[2]

With respect to the provisions of subsection (4) of section 3, Professor Bickel made the following point:

> The Constitution does not say that the President shall declare war subject to Congressional veto by failure to appropriate. It says that Congress shall declare war, and that must mean that Congress, whether by formal declaration or other legislation, must expressly authorize the initiation of hostilities, save only in the limited conditions in which the President may act on his own independent authority, and in which, indeed, his authority may be exclusive. To appropriate money in support of a war the President is already waging, it seems to me, is no more to ratify his action in responsible fashion than to appropriate for the payment of his salary.[3]

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[1] "War Powers Legislation." *Hearings Before the Committee on Foreign Relations*, U.S. Senate, 92d Congress, 1st Session. (Washington: U.S. Govt. Printing Office, 1972), p. 553.
[2] "War Powers Legislation," *Hearings Before the Committee on Foreign Relations*, U.S. Senate, 93rd Congress, 1st Session. (Washington: U.S. Govt. Printing Office, 1973), p. 21.
[3] "War Powers Legislation," (1973), p. 23.

In his testimony before the Committee in 1971, Senator Eagleton made the point forcefully concerning the need for reporting:

> For Congress to pay more than pious lip service to its war making role, it must not only pass a strong war powers bill, but also must be willing to demand, receive and act upon relevant information it needs to exercise the most solemn of its constitutional responsibilities—making the final decision that takes this country to war.

Section 5, which with Section 3 is the heart and core of the bill, provides that the use of the armed forces under any of the emergency conditions spelled out in Section 3 shall not be sustained for a period beyond thirty days unless Congress adopts legislation specifically authorizing the continued use of the armed forces. The intended effect of Section 5 is to impose a prior restriction on the emergency use of the armed forces by the President. Emergency use of the armed forces by the President—under Section 3—would be undertaken with full knowledge on his part that the operation could be continued beyond a thirty-day period only with the specific authorization of Congress. The President would thereby stand forewarned against any emergency use of the armed forces that did not conform with the law and that he did not feel confident would command the support of majorities of both Houses of Congress.

BACKGROUND AND COMMITTEE ACTION

On June 15, 1970, Senator Javits introduced the first war powers bill (S. 3964) with the cosponsorship of Senator Dole; and on February 10, 1971, he reintroduced a revised version as S. 731 with the cosponsorship of Senators Mathias, Pell and Spong. War powers bills were subsequently introduced on January 27, 1971 by Senator Taft; on March 1, 1971 by Senator Eagleton; on May 11, 1971 by Senator Stennis; and on May 15, 1971, by Senator Bentsen. All of these bills, except that introduced by Senator Taft, contained the requirement of advance Congressional authorization for the commitment of the armed forces to hostilities by the President, except in certain designated emergencies, in the event of which the President would be authorized to commit the armed forces to combat for a period not to exceed thirty days unless explicitly authorized by Congress.

The immediate legislative history of the war powers bill can be dated to the controversial Gulf of Tonkin Resolution of 1964 and the subsequent conduct of hostilities in Vietnam, Laos and Cambodia without valid Congressional authorization. In 1969, by a vote of 70 to 16, the Senate adopted the National Commitments Resolution, which expressed the sense of the Senate that "a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government...." This enactment has been ignored by the executive. Recent Presidents have relied upon dubious historical precedents and expansive interpretations of the President's authority as Commander-in-Chief to justify both the initiation and perpetuation of foreign military activities without the consent—in some instances without even the knowledge—of Congress. As Presi-

dent Johnson put it in a press conference, "We stated then, and we repeat now, we did not think the [Tonkin Gulf] resolution was necessary to do what we did and what we are doing.[4]

The purpose of the National Commitments Resolution, as the Committee commented in its Report of April 16, 1969, was "not to alter the Constitution but to restore it." The resolution was understood by the Committee as essentially ". . . an invitation to the executive to reconsider its excesses, and to the legislature to reconsider its omissions, in the making of foreign policy, and, in the light of such reconsideration, to bring their foreign policy practices back into compliance with that division of responsibilities envisoned by the Constitution and sanctioned by over a century of usage." The Committee also held the view at that time that no further legislative enactment was required, that, indeed, ". . . all that is required is the restoration of constitutional procedures which have been permitted to atrophy." Much to the Committee's disappointment, the executive has chosen not to accept the "invitation" conveyed in the National Commitments Resolution. The executive—not just the present Administration but its recent predecessors as well—has chosen to ignore Congressional expressions of constitutional principle which do not carry the force of law.

Following upon the adoption of the National Commitments Resolution it was hoped that the then newly installed Nixon Administration would take a view different from that of its predecessor. That hope has not been realized. The commitment of American military forces to Cambodia in 1970, and to Laos in 1971, without the consent or even the knowledge of Congress, showed that, like its predecessor, the present Administration believes the President may initiate foreign military actions without reference to the authority of the Congress.

Following upon extensive hearings before the Committee in 1971, Senators Javits, Stennis, Eagleton, and Spong joined in introducing a joint bill, S. 2956, on December 6, 1971 and were joined by Senators Taft and Bentsen. It was this bill, representing a synthesis of separate bills offered by the co-sponsors, which the Committee favorably reported and which the Senate subsequently adopted 68–16 on April 13, 1972, with three perfecting amendments, offered by the bill's sponsors, which were adopted unanimously.

Between March 8, 1971 and October 6, 1971, and again on April 11 and 12, 1973, the Foreign Relations Committee conducted public hearings on the war powers bills. The hearings began with testimony from a number of leading scholars and academic authorities on the formation of the Constitution and the early period of our nation's history. These early hearings, combined with the later testimony of eminent contemporary legal scholars, were important in establishing the constitutionality of the war powers legislation before the Committee. Several close advisors of the previous two Presidents testified as to the desirability and workability of the proposed legislation viewed from the perspective of their own experience as Presidential advisors. In this regard, the Committee takes particular note of the testimony in favor of S. 440 offered by Nicholas deB. Katzenbach, who as Under

[4] "Foreign Relations Committee on the National Commitments Resolution." *Reproduced in Documents Relating to the War Power of the Congress, the President's Authority as Commander-in-Chief, and the War in Indochina*, 91st Congress, 2nd Session, compiled by the Senate Foreign Relations Committee (Washington: Government Printing Office, 1970), p. 24.

Secretary of State in the Johnson Administration had testified forcefully against the National Commitments Resolution. In his testimony of April 11, 1973 Mr. Katzenbach expressed a new viewpoint: "I conclude that this legislation is constitutional and, if enacted, binding upon the President." With respect to the impact of the bill's provisions on crisis diplomacy, McGeorge Bundy, who served as President Kennedy's National Security Assistant during the Cuba missile crisis, while testifying in support of the legislation, stated: "I think the essential processes of the Cuban missile crisis would not have been sharply affected by this resolution or this bill or this kind of procedure."

In two years the Committee has heard testimony in public session by a total of 28 witnesses, including the Secretary of State speaking for the Administration, 10 Senators, 2 Congressmen, and a number of distinguished historians and legal scholars. Significant additional material and opinion were inserted in the record.

Speaking in favor either of specific bills or the general concept of war powers legislation were the following:

(1) Henry Steele Commager, Professor of History, Amherst College.
(2) Richard B. Morris, Professor of History, Columbia University.
(3) Alfred H. Kelly, Professor of History, Wayne State University.
(4) Claiborne Pell, U.S. Senator from Rhode Island.
(5) Jacob K. Javits, U.S. Senator from New York.
(6) Thomas F. Eagleton, U.S. Senator from Missouri.
(7) Alpheus T. Mason, Professor of Political Science, Princeton University.
(8) Robert Taft, Jr., U.S. Senator from Ohio.
(9) Charles McC. Mathias, U.S. Senator from Maryland.
(10) Paul Findley, U.S. Congressman from Ohio.
(11) Frank Horton, U.S. Congressman from New York.
(12) McGeorge Bundy, President, Ford Foundation.
(13) George Reedy, former Press Secretary to President Johnson.
(14) Alexander M. Bickel, Professor of Law, Yale University.
(15) Lloyd M. Bentsen, U.S. Senator from Texas.
(16) William D. Rogers, Arnold & Porter, Washington, D.C.
(17) William B. Spong, Jr., U.S. Senator from Virginia.
(18) John Stennis, U.S. Senator from Mississippi.
(19) Lawton Chiles, U.S. Senator from Florida.
(20) Arthur J. Goldberg, Esq., former U.S. Ambassador to the United Nations.
(21) Raoul Berger, Charles Warren Senior Fellow in American Legal History, Harvard Law School.
(22) Nicholas B. Katzenbach, Vice President and General Counsel, IBM Corporation.

Speaking in opposition to the war powers legislation were the following in chronological order:

(1) Barry Goldwater, U.S. Senator from Arizona.
(2) John Norton Moore, Professor of Law, University of Virginia.
(3) William P. Rogers, Secretary of State.
(4) George Ball, Lehman Bros. International, New York.
(5) Charles N. Brower, Acting Legal Adviser, Department of State.

(6) David F. Maxwell, member, Advisory Panel on International Law (Department of State).

Those supporting war powers legislation emphasized the intent of the framers of the Constitution and the importance of the Congressional war power for a system of government based on the separation of powers and checks and balances. Those testifying against the war powers legislation cited historical instances in which the President has used the armed forces without the consent of Congress and the necessity of rapid action under the conditions of the nuclear age. Meeting in executive session, the Committee marked up the War Powers Act December 7, 1971, adopting clarifying and perfecting amendments. On the same day, by unanimous vote, the Committee ordered the bill reported favorably to the Senate.

The bill was debated in the Senate from March 28 to April 13, 1972, on which date it was adopted by a vote of 68 to 16.

The war powers act of 1972 failed of enactment into law owing to the inability of the two houses to agree in conference. In 1972 the Senate and House bills were markedly different in content and scope, and the Senate-House conference, able to convene only once late at the end of the session, was unable to reconcile the two bills.

Following its reintroduction on January 10, 1973, the Committee again considered the war powers bill in executive session. During the Committee mark-up, Senator Fulbright proposed substitute language for section 3 of the bill. This proposed amendment was identical to the one offered by Senator Fulbright during the 1972 floor debate, which was defeated on April 12, 1972 by a vote of 10–68. Following extensive discussion, the Committee rejected the proposed substitute by a vote of 4–10. The Committee on May 16, 1973 then voted 15–0 (with one member voting "present") to report the war powers bill favorably to the Senate.

COMMITTEE COMMENTS

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.[5]

Justice Harlan observed:

> "We are accustomed to speak of the Bill of Rights and the Fourteenth Amendment as the principal guarantees of personal liberty. Yet it would surely be shallow not to recognize that the structure of our political system accounts no less for the free society we have. The Founding Fathers," said Justice Harlan, "staked their faith that liberty would prosper in the new nation not primarily upon declarations of individual rights but upon the kind of government the Union was to have." "No view of the Bill of Rights or interpretation of any of its provisions," the Justice warned, "which fails to take due account of [federalism and separation of powers] can be considered constitutionally sound." [6]

[5] Justice Hugo Black in Reid v. Covert, 354 U.S. 5–6 (1957).
[6] Excerpts from remarks to the American Bar Center, Chicago, Illinois, August 13, 1913. In 49 A.B.A.J. 943 (1963).

The Committee concurs in the view expressed by Justice Harlan: when checks and balances are disrupted in one area of our public policy, all others are affected, and so also are the basic rights of the citizen. As Professor Alpheus Thomas Mason said in his testimony before the Committee, "Separation of powers in war making, constitutionally shared by Congress and the President, has all but vanished. The President is in complete, unqualified control." [7] In the Committee's view, as in the view of the framers of our Constitution, "complete, unqualified control" in one area poses the danger, if not indeed the inevitability, of "complete, unqualified control" over all other areas of our national life.

Advocates of Presidential power point out that the President is a responsible, elected official, the only official indeed who is elected by all the people. The President's accountability cannot be gainsaid, but of and by itself is dangerously insufficient. As Madison wrote in *Federalist 51*, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." [8]

Despite instances of executive "usurpation" of power, more often unintentional than deliberate, and an even greater number of instances of failure on the part of the Congress to defend and exercise its prerogatives, the major cause of the unhinging of the checks and balances of our political system as to war making has been the impact of three decades of almost uninterrupted crisis in foreign policy. In time of emergency there is a natural, powerful tendency to fall in line behind the leadership of the President. When the nation is thought to be in danger, it seems to most people irresponsible, capricious, or even unpatriotic to question the President's word as to the need for action of one kind or another. Secretary of State Acheson summed up this state of mind cogently when he advised the Senate in 1951 that it ought not to quibble over President Truman's claim of authority to station American troops primarily in Europe. Acheson said, "We are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour." [9]

Experience has shown that counsel of this nature is not meant to be taken quite literally: it is not meant to suggest that it does not matter where the power of decision lies, but rather that the power should be left with the President exclusively and Congress ought not to interfere. Similarly, executive branch lawyers have fallen into the habit of telling us that the Constitution is vague about the division of foreign policy and war powers and that questions as to "who has the power to do this, that, or the other thing" are best left to be resolved according to the requirements of the moment—according, as Under Secretary Katzenbach put it, to "the instinct of the nation and its leaders for political responsibility. . . ." [10] Or, as Mr. Justice Rehnquist put it when he was Assistant Attorney General,

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[7] "War Powers," Hearings, p. 254.
[8] *The Federalist*, Henry Cabot Lodge, editor (New York and London: C. P. Putnam Sons, 1908), p. 323.
[9] Assignment of Ground Forces of the United States to Duty in the European Area," *Hearing by Committees on Foreign Relations and Armed Services*, U.S. Senate, 82d Congress, 1st Session, on S. Con. Res. 8, Feb. 1–28, 1951 (Washington: U.S. Govt. Printing Office, 1951), pp. 92–93.
[10] "National Commitments" Hearings, pp. 72–73.

> The Framers here, as elsewhere in the Constitution, painted with a broad brush, and it has been left to nearly two hundred years of interpretation by each of the three coordinate branches of the National Government to define with somewhat more precision the line separating that which the President may do alone from that which he may do only with the assent of Congress.[11]

In practice, the advocates of the "broad brush" have something more precise in mind: they want the President to be left unencumbered to use the armed forces and contract foreign obligations essentially as he sees fit, drawing Congress into the decision-making process insofar as he finds it useful and convenient.

The Committee does not contest the need of "flexibility," nor of adaptability, in our political process in order to accommodate to modern conditions. The Committee does, however, contest the view which holds that the price of adaptability is the repudiation of constitutional precept. The notion of a "living" Constitution ceases to make sense when it is taken as license for nullifying the Constitution's intent—or at least some part of it. The real issue, in the Committee's view, to which the war powers bill purports to address itself, is whether our constitutional process can be reconciled with the requirements of the nuclear age. The Committee believes that it can, that indeed, even as written in 1787, the Constitution made adequate provision for response to a genuine emergency with whatever speed might be required. No responsible citizen questions the right—or even the duty—of the President to take immediate action against a sudden attack, or imminent threat of an attack, upon the United States or its armed forces. What the Committee does contest is that expansive view of Executive prerogative which holds that the President may use the armed forces at will, even in conditions falling short of a genuine national emergency, and that he may sustain that use for as long as he, and he alone, sees fit. Such unrestricted Presidential control of the armed forces is neither necessary or wise in our nuclear age, reconcilable with the Constitution, nor tolerable in a free society.

Far from having been made obsolete by the necessity for dealing with fast-moving events in the nuclear age, the checks and balances of our Constitution have become, in the Committee's view, more essential than ever. Disposing as he does of a vast arsenal of nuclear weapons, ballistic missiles and an enormous number and variety of lesser weapons, the President of the United States has acquired something close to absolute power over the life and death of hundreds of millions of people all over the world. As Alexander Hamilton, even though an advocate of strong executive authority, warned in *Federalist 75:*

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate created and circumstanced as would be the President of the United States.[12]

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[11] Statement by William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, on the "President's Constitutional Authority to Order the Attack on the Cambodian Sanctuaries." *Documents Relating to the War Power of Congress,* p. 176.

[12] The Federalist, pp. 467–468.

A. THE INTENT OF THE FRAMERS

Whatever else they may have painted with a "broad brush," the framers of the American Constitution were neither uncertain nor ambiguous about where they wished to vest the authority to initiate war. In his testimony before the Foreign Relations Committee, Professor Raoul Berger expressed astonishment that anyone should consider the matter of the division of war powers between Congress and the President as "murky": "The power to wage war, it may be categorically asserted, was vested by the Constitution in Congress, not the President. If this be so," said Professor Berger with reference to the current legislation, "your bill merely seeks to restore the original design. It cannot be unconstitutional to go back to the Constitution." [13] The Founding Fathers had been much dismayed by the power of the British Crown to commit Great Britain—and its American colonies—to war. They were also fearful of the danger of large standing armies and of the possible defiance of civilian authority by military leaders. In order to alleviate the threat of militarism and of the possible resurgence of monarchical tendencies in the new Republic, the Article I, Section 8 the framers vested the authority to initiate war in the legislature, and in the legislature alone, and established the framework for tight Congressional control over the military establishment.

The absence of extended debate over the war powers in the Constitutional Convention attests to the near unanimity of the Founding Fathers as to where that authority was meant to be placed. There was some discussion as to whether the war power should be vested in the Congress as a whole or only the Senate, but only one delegate, Pierce Butler of South Carolina, favored vesting the war power in the President.

The Constitutional Convention at first proposed to give Congress the power to "make" war but changed this to "declare" war, not, however, because it was desired to enlarge Presidential power but in order to permit the President to take action to repel sudden attacks. Madison's notes on the proceedings of the Convention report the change of wording as follows: "Mr. Madison and Mr. Gerry *moved* to insert 'declare,' striking out '*make*' war; leaving to the executive the power to repel sudden attacks." [14] It is noteworthy that the delegates who spoke on this change of wording all expressed concern with the possible enlargement of Presidential power. Elbridge Gerry, for example, declared that he "never expected to hear in a republic a motion to empower the Executive talons to declare war." George Mason firmly expressed himself as "against giving the power of war to the executive," on the ground that he was "not to be trusted with it."

A closely related concern of the framers was to make it more difficult to start a war than to stop one. It was essentially for this reason that the power to authorize hostilities was vested in the Congress rather than in the President as successor to the British Crown. It was also for this reason that the war power was vested in the two Houses of the Congress rather than in the Senate alone. As Oliver Ellsworth told his fellow delegates, it "should be more easy to get out of war,

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[13] "War Powers" (1973) p. 14.
[14] *The Records of the Federal Convention of 1787*, 4 volumes (Max Farrand, editor, New Haven and London: Yale University Press, 1966), vol. 2, p. 318.

than into it"; and as George Mason said, he was "for clogging rather than facilitating war; but for facilitating peace." [15]

The division of authority intended by the framers was explicit: the Congress was to "declare"—that is, to authorize the initiation of—war. The President, as Commander-in-Chief, was to respond to sudden attacks and to conduct a war once it had started and command the armed forces once they were committed to action. The powers of the President as Commander-in-Chief were explained by Alexander Hamilton in *Federalist 69*:

> The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Conferderacy, while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.[16]

Or as Jefferson put it in a letter to Madison in 1789:

> We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.[17]

The Supreme Court has also declared that the power to initiate war is one which rests solely with the Congress. In the "Prize Cases" of 1862 the Supreme Court said:

> By the Constitution, Congress alone has the power to declare a national or foreign war . . . The Constitution confers on the President the whole Executive power. . . . He is Commander-in-Chief of the Army and Navy of the United States. . . . He has no power to initiate or declare a war either against a foreign nation or a domestic state.[18]

In the early years of the Republic, Presidents acknowledged and carefully respected the war power of Congress. President Madison, for example, who had been one of the principal framers of the Constitution and one of its principal interpreters through his writings in the *Federalist Papers*, sent a message to Congress on June 1, 1812, in which, after recounting the depredations of British ships on American commerce on the Atlantic, he referred the matter to Congress in these words:

> Whether the United States shall continue passive under these progressive usurpations and these accumulating wrongs, or opposing force to force in defense of their national rights, shall commit a just cause into the hands of the Almighty disposer of events, avoiding all connections

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[15] Summarized by Richard B. Morris, Gouverneur Morris Professor of History, Columbia University, in a statement before the Foreign Relations Committee, March 9, 1971.
[16] "War Powers" Hearings, p. 80.
[17] *The Papers of Thomas Jefferson*, 17 volumes (Julian P. Boyd, ed., Princeton: Princeton University Press, 1955), vol. 15, p 397.
[18] 67 USC 635 (1962).

which might entangle it in the contests or views of other powers, and preserving a constant readiness to concur in an honorable reestablishment of peace and friendship, is a solemn question which the Constitution wisely confides to the legislative department of the Government.[19]

Madison summarized the issue in these unequivocal terms: "Every just view that can be taken of this subject, admonishes the public of the necessity of a rigid adherence to the simple, the received, the fundamental doctrine of the Constitution, that the power to declare war, including the power of judging the causes of war, is fully and exclusively vested in the legislature; that the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war; that the right of convening and informing Congress, whenever such a question seems to call for a decision, is all the right which the Constitution has deemed requisite and proper." [20]

The Monroe Doctrine has been erroneously cited as an early precedent for use of the armed forces by the President acting on his own authority. In keeping with the intent of the framers of the Constitution, President Monroe made the appropriate distinction between a statement of policy and the authority to carry it out. When in 1824 the Government of Colombia inquired as to what action the United States might take under the Monroe Doctrine to repel certain European intervention in the Latin American Republics, Secretary of State John Quincy Adams replied,

> With respect to the question, "in what manner the Government of the United States intends to resist on its part any interference of the Holy Alliance for the purpose of subjugating the new republics or interfering in their political forms" you understand that by the Constitution of the United States, the ultimate decision of this question belongs to the Legislative Department of the Government.[21]

President Buchanan, to cite another example, acknowledged the war power of Congress quite explicitly in his message to Congress of December 6, 1858:

> The Executive government of this country in its intercourse with foreign nations is limited to the employment of diplomacy alone. When this fails it can proceed no further. It cannot legitimately resort to force without the direct authority of Congress, except in resisting and repelling hostile attacks.[22]

Daniel Webster, who served as Secretary of State during the early 1850's, was also a distinguished constitutional lawyer. On July 14, 1851, during his tenure as Secretary of State, he wrote as follows:

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[19] *A compilation of the Messages and Papers of the Presidents*, 10 volumes (James Richardson, ed., Washington: Govt. Printing Office, 1917), vol. 2, pp. 489–490.

[20] Quoted by Raoul Berger in "War-Making by the President," 121 University of Pennsylvania Law Review (1972), p. 48.

[21] John Quincy Adams to Don Jose Maria Salazar, August 6, 1824, quoted in *The Record of American Diplomacy*, third edition (Ruhl J. Bartlett, ed., New York: Alfred A. Knopf, 1954), p. 185.

[22] *A Compilation of the Messages and Papers of The Presidents* (New York: Bureau of National Literature, Inc., 1917), vol. 7, p. 3047.

> In the first place, I have to say that the war-making power in this Government rests entirely in Congress; and that the President can authorize belligerent operations only in the cases expressly provided for the Constitution and the laws.[23]

During the course of the nineteenth century it became accepted practice, if not strict constitutional doctrine, for Presidents acting on their own authority to use the armed forces for such limited purposes as the suppression of piracy and the slave trade, for "hot pursuit" of criminals across borders, and for the protection of American lives and property in places abroad where local government was not functioning effectively. An informal, operative distinction came to be accepted between the use of the armed forces for limited, minor or essentially non-political purposes and the use of the armed forces for "acts of war" in the sense of large-scale military operations against sovereign states. In the former category, custom and usage developed to give a certain informal sanction to unauthorized Presidential action; in the latter, involving full-scale warfare against a foreign power, no President was to claim the right to act without Congressional authorization until the twentieth century.

Nor indeed was it contended by any President until recent years that, because *declarations* of war might be obsolete, so also was the authority of Congress to authorize—or refuse to authorize—the initiation of war. Even if it be granted, as perhaps it must, that the former declaration of war is no longer a useful instrument in international politics, this is to say no more than that a particular form in which the Congress exercised its constitutional authority in the past is no longer appropriate. As Richard B. Morris, Gouveneur Morris Professor of History at Columbia University, said in his testimony before the Committee—after citing the provisions of the Constitution relating to Congress's power to declare war and "raise and support armies", the authority of the President as Commander-in-Chief, and the limitation of appropriations of money for the support of armies to a maximum of two years——

> * * * it is a fair inference from the debate on ratification and from the learned analysis offered by the *Federalist* papers that the war-making power of the President was little more than the power to defend against imminent invasion when Congress was not in session.[24]

It is also of great importance to note that the residual legislative authority over the entire domain of foreign policy—not just the war power—was placed in Congress by the Constitution. Members of Congress have themselves perhaps understimated the authority vested in them by the "necessary and proper" clause of Article I, Section 8, of the Constiution. That clause entrusts the Congress to make all laws "necessary and proper for carrying into execution" not only its own powers but "all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Strictly interpreted, the "necessary and proper" clause entrusts the Congress not only to "carry into execution" its own constitutional war

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[23] A letter from Daniel Webster to Mr. Severance, July 4, 1851, in *The Writings and Papers of Daniel Webster*, vol. 14, p. 440.
[24] "War Powers" Hearings, p. 81.

power, but also, should it be thought necessary, to define and codify the powers of the government as a whole, including those of the President as it principal officer.

B. THE GROWTH OF PRESIDENTIAL POWER

Prior to the Second World War Presidential use of the armed forces without Congressional authorization was confined for the most part to the Western Hemisphere, primarily to Mexico and the Caribbean. President McKinley's participation, in the Boxer expedition in China in 1900 was a noteworthy exception. Only since the Second World War have American Presidents claimed, and exercised, the power to commit the armed forces to full-scale and extend warfare overseas. The kind of foreign military intervention we have witnessed in the last quarter century is, in the words of Henry Steel Commager, Professor Emeritus of History. Almost College, "if not wholly unprecedented, clearly a departure from a long and deeply-rooted tradition." [25]

Professor Alexander Bickel of the Yale Law School made the same point in his testimony before the Committee:

> * * * the decisions discussed as early as 1964, made in the first half of 1965, and executed thereafter, to commit the moral and material resources of this Nation to full-scale war in Vietnam seem to me the mark the farthest, and really an unprecedented, extension of Presidential power. Certainly the power of the President in matters of war and peace has grown steadily for over a century. The decisions of 1965 may have differed only in degree from earlier stages in this process of growth. But there comes a point when a difference of degree achieves the magnitude of a difference in kind. The decisions of 1965 amounted to an all but explicit transfer of the power to declare war from Congress, where the Constitution lodged it, to the President, on whom the framers explicitly refused to confer it.[26]

The transfer from Congress to the executive of the actual power—as distinguished from the constitutional authority—to initiate war has been one of the most remarkable developments in the constitutional history of the United Sates. For this change Congress as well as the Executive bears a heavy burden of responsibility.

When President Truman committed the armed forces to Korea in 1950 without Congressional authorization, scarcely a voice of dissent was raised in Congress. Senator Watkins of Utah challenged the President's authority to commit the country to war without consulting the Congress, even in compliance with a resolution of the United Nations Security Council, and said that, if he were President, he ". . . would have sent a message to the Congress of the United States setting forth the situation and asking for authority to go ahead and do whatever was necessary to protect the situation." [27] Senator Taft also challenged President Truman's action but not until January 1951. "The President," he said, "simply usurped authority, in violation of the laws and

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[25] "War Powers" Hearings, p. 8.
[26] *Ibid.*, pp. 551–552.
[27] *Congressional Record*, 81st Congress, second session, vol. 96, pt. 7, Senate, June 27, 1950, pp. 9229–9233.

the Constitution, when he sent troops to Korea to carry out the resolution of the United Nations in an undeclared war." [28]

The isolated voices of Watkins and Taft were ineffectual against the accelerating tide of growing executive power. Secretary of State Acheson virtually threw down the gauntlet to Congress—although few at that time were disposed to pick it up—when he testified before the Committee on Foreign Relations and Armed Services Committee in 1951 in support of President Truman's plan to station six divisions of American soldiers in Europe. He said on that occasion:

> Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interefered with by the Congress in the exercise of powers which it has under the Constitution.[29]

In the course of the Vietnam war, the Johnson Administration reconfirmed the executive's claim to unilateral authority in the use of the armed forces. In his now famous testimony of August 1967, Under Secretary of State Katzenbach contended that the Gulf of Tonkin Resolution was "as broad an authorization for the use of armed forces for a purpose as any declaration of war so-called could be in terms of our internal constitutional process." [30] In fact, the Johnson Administration went farther.

Where as Mr. Katzenbach at least claimed the existence of legislative authority, the President himself contended that no such authority was required. Speaking of the Gulf of Tonkin Resolution in his news conference of August 18, 1967, President Johnson said,

> We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we're doing. But we thought it was desirable and we thought if we were going to ask them [Congress] to stay the whole route and if we expected them to be there on the landing we ought to ask them to be there on the takeoff.[31]

Making the same claim in more formal language, the Legal Advisor to the Department of State had written in March 1966,

> There can be no question in present circumstances of the President's authority to commit U.S. forces to the defense of South Vietnam. The grant of authority to the President in Article II of the Constitution extends to the actions of the United States currently undertaken in Vietnam.[32]

The attitude of the present Administration will be explored in greater detail in Subsection C below. It suffices here to point out that the Nixon Administration has shown that its conception of the war power differs in no important respect from that of its predecessor. It could hardly be otherwise, one suspects, if only because the accumulation of precedents of unauthorized Presidential use of the armed

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[28] *Congressional Record*, 82d Congress, first session, vol. 97, pt. 1, Senate, January 5, 1951, p. 37.
[29] "Assignment of Ground Forces of the United States to Duty in the European Areas," pp. 92–93.
[30] "National Commitments." Hearings, p. 24.
[31] *New York Times*, August 19, 1967, p. 10.
[32] Leonard C. Meeker, "The Legality of U.S. Participation in the Defense of Vietnam," *The Department of State Bulletin*, March 28, 1966, p. 484.

forces seems to have had a spurious self-legitimizing effect. A President can hardly be blamed if, coming into office, he supposes himself to be properly vested with all of the powers exercised by his predecessor, however improperly exercised. A President can hardly be blamed if, under such circumstances, he regards an effort by Congress to reassert powers which it has long neglected to exercise as an attempt to infringe upon his own powers.

All of which is by way of making the point that it is far more difficult to reassert a power which has been permitted to atrophy than to defend one which has been habitually used. The Congress accordingly bears a heavy responsibility for its passive acquiescence in the unwarranted expansion of Presidential power. As the late Justice Robert H. Jackson pointed out in his concurring opinion in *Youngstown* v. *Sawyer*, there is a "zone of twilight" between the discrete areas of Presidential and Congressional power. Politics, like nature, abhors a vacuum. When Congress created a vacuum by failing to defend and exercise its powers, the President inevitably hastened to fill it. As Justice Jackson commented, "Congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent Presidential responsibility...." [33]

To assert power is not, however, to legitimize it. As a Supreme Court Justice of the last century commented: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." [34] The same principle must apply to action by the executive.

In the pithy phrase of Professor Berger, "Illegality is not legitimated by repetition." [35]

C. THE EXECUTIVE VIEW

The Nixon Administration has shown that it shares the expansive view of the President's power as Commander-in-Chief held by preceding Administrations. The commitment of American military forces to Cambodia in 1970, and to Laos in 1971, demonstrated the present Administration's determination to initiate new foreign military actions solely on its own authority.

In its public statements as well as in its foreign military operations the Nixon Administration has indicated its belief that the President is at liberty to commit the armed forces substantially as he sees fit. In its comments of March 10, 1969, on the then-pending National Commitments Resolution, the Department of State made the following assertion:

> As Commander-in-Chief, the President has the sole authority to command our Armed Forces, whether they are within or outside the United States. And, although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific congressional approval.[36]

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[33] Justice Robert H. Jackson concurring in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).
[34] Justice Field in *Norton* v. *Shelby County*, 118 U.S. 425 (1886).
[35] Berger, "War-Making by the President," p. 60.
[36] "National Commitments" Hearings, p. 25.

The same assumptions of executive war-making authority were expressed in the Department of State's comments of March 12, 1970, regarding the proposal then before the Foreign Relations Committee for repeal of the Formosa, Cuba, Middle East, and Tonkin resolutions. Declining either to advocate or to oppose such action, the State Department took the position that ". . . the Administration is not depending on any of these resolutions as legal or constitutional authority for its present conduct of foreign relations, or its contingency plans." More specifically, as to the war in Indochina, the State Department asserted that ". . . this Administration has not relied on or referred to the Tonkin Gulf resolution of August 10, 1964, as support for its Vietnam policy."

On January 12, 1971, President Nixon signed into law a bill which, among other things, repealed the Gulf of Tonkin Resolution. The repeal of that Resolution quite naturally raised the question as to the authority the Administration believed it was acting under in its continued prosecution of the war in Indochina. The Administration, so far as is known to the Committee, has never addressed itself to that question except to assert that it was protecting the lives of American troops. Even this contention, however, ceased to be available as an explanation for the bombing of Cambodia after the signing of the Paris peace agreement of January 1973 and the subsequent withdrawal of American forces from Indochina.

President Nixon himself has said little on the subject. Asked in a press conference on April 29, 1971, for his opinion of the pending war powers bills, the President replied, ". . . I believe that limiting the President's war powers, whoever is President of the United States, would be a very great mistake." The President went on to say: "We live in times when situations can change so fast internationally that to wait until the Senate acts before a President can act might be that we acted too late." [37]

In Mr. Nixon's perspective there seems to be an association between the war power and the grandeur of the Presidential office itself. Speaking in Texas on April 30, 1972, President Nixon said:

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

In its official comments on the war powers bills the Administration placed primary emphasis on historical precedents and the need for speedy action as the basis of its opposition to the bills. As with the previous Administration, emphasis was also placed on what the Executive regards as the imprecision of the Constitution, the need of Presidential flexibility, and the desirability, as expressed in Assistant Secretary Abshire's letter of May 1971, of some sort of undefined "common perspective" between the two branches of Government.

In his definitive presentation of the Administration's views on war powers legislation, presented to the Committee on May 14, 1971, Sec-

[37] *New York Times*, April 30, 1971, p. 18.

retary of State Rogers gave evidence of holding the impression that the war powers bills purported to alter the Constitution. "Any attempt to change it," he said, "should be subjected to long and full consideration of all aspects of the problem." [38]

This viewpoint was reiterated on April 12, 1973, by the State Department's Acting Legal Adviser, who averred that the war powers bill would "alter" the "fundamental constitutional scheme." [39] The notion that Congress was somehow undertaking to change the Constitution by asserting its own war powers is one also offered by the Johnson Administration. Now, as on previous occasions, the Committee reconfirms its own conviction that, far from purporting to alter the Constitution in any way, the bill herewith reported is designed to restore constitutional practices which have been permitted to atrophy and, as a matter of necessity and propriety under Article 1 of Section 8, "to carry into execution" both the war powers of Congress and those of the President in his capacity as an Officer of the Government of the United States. Professor Bickel commented: "Nothing in the Constitution does or can empower Congress to do something unconstitutional, but much in the Constitution needs to be clarified or implemented, and except in the limited number of instances where exclusive power is specifically vested elsewhere, the necessary and proper clause authorizes Congress to do so, with respect to its own functions as well as those of the other branches of the federal government." [40]

In his statement before the Committee, Secretary Rogers said he opposed war powers legislation because, in his view, it would attempt to fix in detail, or "freeze," the allocation of power between the President and Congress, and because such legislation would "narrow the power given the President by the Constitution." The exercise of the war powers, the Secretary emphasized, was consigned to the "political process" in a constitutional system "founded on the assumption of cooperation rather than conflict." [41]

The Committee is obliged to contest the Secretary's argument in all its major specifications. First of all, far from attempting to "freeze" the allocation of war powers between the President and Congress, the bill, through the emergency procedures spelled out in Section 3, allows of action by the President under almost any conceivable genuine national emergency, so much so, in fact, that some members of the Committee have expressed apprehension that Section 3 may go too far in the President's direction.

Second, as already noted, the bill would in no respect, "narrow the power given the President by the Constitution;" it does indeed purport to delineate Presidential power, but only because that power in recent practice has extended far beyond the confines of the Constitution.

Third, the Committee reiterates its view that the Constitution is not at all imprecise in allocating the war powers; on the contrary, the Constitution is quite specific—as the framers intended it to be—in giving Congress the authority to decide on going to war and in giving the President the authority, as Commander-in-Chief, to respond to an emergency and to command the armed forces once a conflict is under-

[38] "War Powers" (1972), p. 486.
[39] "War Powers Legislation" (1973), p. 52.
[40] "War Powers Legislation" (1973), p. 20.
[41] "War Powers," (1972), p. 498.

way. In brief, the Constitution gave Congress the authority to take the nation into war, whether by formal declaration of war or by other legislative means, and the President the authority to conduct it.

There has grown up in recent decades a conception of what is required for a "strong Presidency" which the Committee finds disturbing. According to this school of thought, a "strong President" is not one who strengthens and upholds our constitutional system as a whole but one who accumulates and retains as much power as possible in the Presidential office itself. This outlook appears to have been an important factor in influencing recent Presidents to claim authority as Commander-in-Chief far exceeding the specifications and intent of the Constitution. It appears too to have been a factor in encouraging executive branch officials to invoke dubious past instances of foreign military operations undertaken by the President without Congressional approval—as if one act of usurpation legitimized another. A leading American historian, Thomas A. Bailey, has written:

> The bare fact that a President was a strong one, or a domineering one, does not necessarily mean that he was a great one or even a good one. The crucial questions arise: Was he strong in the right direction? Was he a dignified, fair, constitutional ruler, serving the ends of democracy in a democratic and ethical manner? [42]

CONCLUSION

In the perspective of American history since World War II, the war powers bill must be perceived as necessary legislation which should not have been necessary. It would not have been necessary if Congress had defended and exercised its responsibility in matters of war and peace and so prevented the Executive from expanding its power in that "zone of twilight" of which Justice Jackson spoke.

The framers of the Constitution vested the war power in the Congress not primarily because they felt confident that the legislature would necessarily exercise it more wisely but because they expected the legislature to exercise it more *sparingly* than it had been exercised by the Crown, or would be likely to be exercised by the President as successor to the Crown. The framers, it would appear, were concerned with the way in which war would be initiated in making certain that it would not be initiated easily, capriciously, or often.

In this regard, Abraham Lincoln once wrote:

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

Whether and to what degree we might have avoided the war in Indochina is an issue outside of the scope of this Report. It is men-

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[42] Thomas A. Bailey, *Presidential Greatness* (New York: Appleton-Century, 1966), p. 227.

tioned here only in connection with the Committee's general belief that, in the long run, even the best conceived legislation for the reassertion of Congressional prerogative will not in and of itself prove sufficient to the maintenance of constitutional democracy in America. As Professor Kelly observed, war and peace in the American constitutional system and in the American value system are separate and distinct; and as Tocqueville observed, war breeds dictatorship. Strongly though it endorses the bill herewith reported, the Committee does not deceive itself that this bill, if enacted, will of itself restore checks and balances in matters of the war power. If the country is to be continually at war, or in crisis, or on the verge of war, or in small-scale, partial or surrogate war, the force of events must lead inevitably toward executive domination despite any legislative roadblocks that may be placed in the executive's way. During the Constitutional Convention, James Madison, often regarded as "father of the Constitution," at one point moved to authorize two-thirds of the Senate to make treaties of peace without the concurrence of the President. Although his motion was withdrawn, his argument for introducing it is instructive. "The President," he said, "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace."

Congress, in the Committee's view, can take no more useful and needed step toward the restoration of constitutional balance than to enact legislation to confirm and codify the intent of the framers of the Constitution with respect to the war power. The President, as Professor Bickel and as Mr. George Reedy, formerly of the White House staff, pointed out in their testimony before the Committee in 1971, is in many respects a remote and almost royal figure, shielded from direct personal participation in the adversary politics of democracy. "Under the American system," as one political scientist points out, "the executive is virtually *prevented* from engaging in public debate on policy by the institutional setting of his office; under the British system he is expected and, in fact, *compelled* to engage continually in it."[48] The processes through which the President reaches decisions are largely personal and private, beyond the reach of direct institutional accountability.

Congress, on the other hand, makes its decisions almost entirely in the open and under public scrutiny. The President is subject to quadrennial plebiscite, but Congress provides the American people with points of access through which they can hold their Government to day-to-day account and thereby participate in it. Inefficient and short-sighted though it sometimes is, Congress provides the only feasible means under the American constitutional system of drawing the President, at least indirectly, into the adversary processes of democracy. The executive branch is endowed with organizational discipline and legions of experts, but Congressmen and Senators have a unique asset when it comes to playing an effective, democratic role in the making of foreign policy: the power to speak and act freely from an independent political base.

The point the Committee wishes to stress is not that the President—the one now in office or any other—is an untrustworthy person but that all men wielding power must, in the interest of freedom, be treated

[48] Alexander J. Groth, "Britain and America: Some Requisites of Executive Leadership Compared," *Political Science Quarterly*, June 1970, p. 218.

with a certain mistrust. "Confidence," said Jefferson, "is everywhere the parent of despotism—free government is founded in jealousy; . . . it is jealously and not confidence which prescribes limited constitutions to bind down those we are obliged to trust with power . . . In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution. . . ."[44]

The Committee believes that the adoption of the war powers bill would help to restore the confidence of the American people in the processes of their government, particularly as they relate to the questions of war and peace. As Senator Stennis, a principal cosponsor of the bill, said in his testimony: ". . . I believe the overriding issue is that we must insure that this country never again go to war without the moral sanction of the American people. This is important both in principle and as practical politics. Vietnam has shown us that in trying to fight a war without the clear-cut prior support of the American people we not only risk military ineffectiveness but we also strain the very structure of the Republic.

EXPLANATION OF THE BILL

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

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

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

Section 3 consists of four clauses which define the conditions or circumstances under which, in the absence of a Congressional declaration of war, the armed forces of the United States "may be introduced in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances."

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

The authority of Congress to make this statutory delineation is contained in the enumerated war powers of Congress in article I, section 8 of the Constitution, and especially in the final clause of article I, section 8, granting to Congress the authority:

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

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[44] Quoted in A. T. Mason, *Free Government in the Making*. (New York: Oxford University Press, 1965), p. 371.

REPELLING ARMED ATTACK ON THE UNITED STATES

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

It should be noted that this subsection authorizes the President not only to repel an attack upon the United States and to retaliate but also "to forestall the direct and imminent threat of such an attack." The inclusion of these words grants a crucial element of judgment and discretion to the President. While it was thought by some that the power to "forestall" was inherent in the power to "repel," it was decided expressly to include the forestalling power to avoid any ambiguity domestically or in the eyes of any potential aggressor.[45]

While the President clearly must apply his discretion and judgment to the implementation of this authority, it is by no means a "blank check." For the President to take forestalling action, the threat of attack must be "direct and imminent." Moreover, he must justify his judgment on this point under the mandatory reporting provisions contained in section 4.

REPELLING ATTACK ON U.S. ARMED FORCES

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

The authority contained in this subsection recognizes the right, and duty, of the Commander-in-Chief to protect armed forces deployed outside the United States. Just as the President would not have to wait until the bombs actually started landing on our soil to act against an attack upon the United States, similarly our forces would not have to wait until enemy bullets and mortars hit them before they could react.

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

The wording of this provision is meant to retain safeguards against wider embroilment resulting from incidental attacks upon U.S. forces, or attacks resulting from questionable actions by local U.S. commanders. Thus, for instance, an attack upon a Marine Guard at an Embassy would not trigger an authority to retaliate by seizing the country. Likewise, for instance, a sneak attack on security guards at one of our airbases would not trigger an authority to retaliate by launching search and destroy missions.

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[45] In *Martin* v. *Mott* (12 Wheat.) 18, 29 (1827), Justice Story speaking for the Supreme Court affirmed the constitutional authority of Congress to "provide for cases of imminent danger of invasion." He stated further: "In our opinion, there is no ground for a doubt on this point, . . . for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object."

PROTECTING U.S. CITIZENS ABROAD

Subsection (3) codifies the authority of the President to rescue United States citizens and nationals abroad and on the high seas. By defining the circumstances and procedures to be followed, this subsection is a conscious movement away from some of the excesses of nineteenth century gunboat diplomacy.

The tightly worded language of this provision grants the President the authority only to rescue endangered American citizens. He may not use the circumstance of their endangered position to pursue a policy objective beyond safe and expedient evacuation. Even before the President can take action under subsection (3) he must ascertain that the government of the country in question is either incapable of protecting Americans or is itself presenting a threat to them.

NATIONAL COMMITMENTS

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

The key phrase in this subsection is contained in its initial five words: "pursuant to specific statutory authorization." The rest of the subsection is an explanation, elaboration and definition of the meaning (for the purposes of the bill) of the words "pursuant to specific statutory authorization." In an important sense, this subsection gives legislative effect to S. Res. 85, the National Commitments Resolution adopted by the Senate on June 25, 1969 by a vote of 70 to 16 which states: "that a national commitment by the United States to a foreign power necessarily and exclusively results from affirmative action taken by the executive and legislative branches of the United States Government through means of a treaty, convention, or other legislative instrumentality specifically intended to give effect to such a commitment."

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

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

There is a clear precedent for the action anticipated in subsection (4)—the "area resolution." Over the past two decades, the Congress and the President have had considerable experience with area reso-

lutions—some of it good and some quite unsatisfactory. In its mark-up of the war powers bill, the Foreign Relations Committee considered this experience carefully in approving the language of subsection (4). The wording of the final clause of subsection (4) holds the validity of three area resolutions currently on the statute books. These are: the "Formosa Resolution" (H.J. Res. 159 of January 29, 1955); the "Middle East Resolution" (H.J. Res. 117 of March 9, 1957, as amended); and the "Cuban Resolution" (S.J. Res. 230 of October 3, 1962).

The question may be asked: What is to guard against the passage of another resolution of the Tonkin Gulf type? The answer is that any future area resolutions, to qualify under this bill as a grant of authority to introduce the armed forces in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, must meet certain carefully drawn criteria—as spelled out in the language of subsection (4). The pertinent language is:

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

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

Following the passage of this bill, Congress would have to review closely the three area resolutions which are left standing by the provision of subsection (4), and the Administration should review the world situation carefully and take the initiative in coming to the Congress with recommendations respecting the existing area resolutions—as well as recommendations for any new ones which the President might feel are neded for our national securty.

Requests for new authority pursuant to subsection (4) do *not* qualify for the "Congressional Priority Provisions" contained in section 7. However, it is contemplated that Congressional consideration of new subsection (4) grants of authority can geenrally be undertaken in the absence of an imminent threat or emergency in a deliberative way, including Committee hearings. The point here is to obviate a repetition of the unfortunate experience of the Congress with the Tonkin Gulf Resolution, which it was later realized went through the Congress without enough inquiry in the respective Committees and in the related floor debate.

RENEWING CLOSE CONSULTATION

Last minute "crunches" can be avoided by a renewal of the earlier practice of continuing close consultation between the Executive branch and the relevant committees of Congress. The Executive would be obliged to make the Congress, again, its partner in shaping the broad,

basic national security and foreign policy of the Nation well in advance of the exercise of the war power.

CONGRESSIONAL AUTHORITY AND PRESIDENTIAL FLEXIBILITY

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

However, the President would not be compelled or obliged to use the armed forces just because the Congress granted him the authority to do so. Moreover, this legislation would not inhibit the President's capacity to deploy the armed forces, i.e., to move elements of the fleet in international waters. To give a specific example, there is nothing in the bill which would have affected the President's decision to move elements of the Sixth Fleet into the eastern Mediterrean during the 1970 Jordanian crisis. The right of United States naval forces to operate freely anywhere in international waters would not be abridged by this bill.

An important provision of subsection (4) is contained in its first qualifying clause (A). The purpose of this clause is to counteract the opinion in the *Orlando* v. *Laird* decision of the Second Circuit Court holding that passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war.[46]

TREATIES

One of the most far-reaching aspects of subsection (4) is its provisions respecting treaties. Throughout the past two decades there has been continuing confusion respecting a crucial phrase that is standard in our nation's collective and bilateral security treaties; to wit, that implementation of such treaties, as to involvement of U.S. forces in hostilities, will be in accordance with the "constitutional processes" of the signatories.[47]

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[46] Judicial opinion has shifted on this point. In *Mitchell* v. *Laird* (D.C. Cir. No. 71–1510 March 20, 1973) Judge Wyzanski speaking for the Court of Appeals stated: "This court cannot be unmindful of what every schoolboy knows: than in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. An honorable recent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture. We should not construe votes cast in pity and piety as though they were votes freely given to express consent. Hence Chief Judge Bazelon and I believe that none of the legislation drawn to the court's attention may serve as a valid assent to the Vietnam war.

[47] In its Report on 1949 to the Senate recommending approval of the North Atlantic Treaty, the Foreign Relations Committee stated: "The committee wishes to emphasize the fact that the protective clause 'in accordance with their respective constitutional processes' was placed in article 11 in order to leave no doubt that it applies not only to article 5, for example, but to every provision in the treaty. The safeguard is thus all-inclusive.

"The treaty in no way affects the basic division of authority between the President and the Congress as defined in the Constitution. In no way does it alter the constitutional relationship between them. In particular, it does not increase, decrease, or change the power of the President as Commander-in-Chief of the armed forces or impair the full authority of Congress to declare war." (Senate Executive Report No. 8, 81st Congress, 1st Session, p. 18)

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

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

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

Additionally, the subsection states that authorization for introducing the armed forces in hostilities shall not be inferred.

> . . . from any treaty hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of the Armed Forces of the United States in hostilities or in such situation and specifically exempting the introduction of such Armed Forces from compliance with the provisions of this Act.

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

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

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

Second, the provisions with respect to treaties are important so as to remove the possibility of future contention such as arose with respect to the SEATO Treaty and the Vietnam war.

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

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

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

The purpose of this provision is to prevent secret, unauthorized military support activities and to prevent a repetition of many of the most controversial and regrettable actions in Indochina. The ever deepening ground combat involvement of the United States in South Vietnam began with the assignment of U.S. "advisers" to accompany South Vietnamese units on combat patrols; and in Laos, secretly and without Congressional authorization, U.S. "advisers" were deeply engaged in the war in northern Laos.

REPORTING REQUIREMENT

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

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

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

What is intended is a full and accurate report of events, combined with an authoritative statement by the President of his judgment about the direction in which the situation is likely to develop. The Congress can act intelligently and responsibly only when it has the necessary information at hand.

The reporting requirements of the bill apply independently of the provisions of sections 5, 6, and 7. The President's mandatory report is not to be considered a request for an extension of authority as might be granted subsequently under section 5. Such a request can only be introduced by a member of Congress.

Moreover, it is entirely possible that even a majority of the actions taken under the President's direction pursuant to section 3 full will be short-lived, one-shot actions completed well within the thirty-day time period, and thus requiring no extension in time of the authority spelled out in section 3.

30-DAY AUTHORIZATION PERIOD

Section 5 (along with section 3) is the heart and core of the bill. It is the crucial embodiment of Congressional authority in the war powers field, based on the mandate of Congress enumerated so comprehensively in article I, section 8 of the Constitution. Section 5 rests squarely and securely on the words, meaning and intent of the Constitution and thus represents, in an historic sense, a restoration of the constitution balance which has been distorted by practice in our history and, climatically, in recent decades.

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

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

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

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

The issue has been raised quite properly, as to what would happen if our forces were still engaged in hot combat at the end of the thirtieth day—and there had been no Congressional extension of the thirty-day time limit. The answer is that, as specified by clause (1), the

President would not be required or expected to order the troops to lay down their arms.

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

The wording of Section 5(1) is very specific and tightly drawn. It is to be emphasized that Section 5(1) is in no sense to be construed as a loophole giving the President discretionary authority with respect to the thirty-day disengagement requirement. It is addressed exclusively to the narrow issue of the security of our forces in the process of prompt disengagement. The criterion involved is the security of forces under fire and it does not extend to withdrawal in conformity with some broader strategy or policy objective. No expansion of the thirty-day time frame is conveyed other than a brief period which might be required for the most expeditious disengagement consistent with security of the personnnel engaged. Moreover, it requires the President's certification in writing that any such contingency had arisen from "unavoidable military necessity."

Section 5(2) provides for suspension of the thirty-day disengagement requirement in the event "Congress is physically unable to meet as a result of an armed attack upon the United States."

The question has been raised whether there can or should be any time limitation on the President's emergency authority to repel an attack upon the United States and take the related measures specified in Section 3(1). The bill rejects the hypothesis that the Congress, if it were physically able to meet, might not support fully all necessary measures to repel an attack upon the nation. Refusal to act affirmatively by the Congress within the specified time period respecting emergency action to repel an attack could only indicate the most serious questions about the bona fides of the allleged attack or imminent threat of an attack. In this context, the admonition articulated in 1848 by Abraham Lincoln is most pertinent.

> Allow the President to invade a neighboring nation, whenever he shall deem it necessary to repel an invasion, and you will allow him to do so, whenever he may choose to say he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix any limit to his power in this respect . . . If, today, he should choose to say he thinks it necessary to invade Canada, to prevent the British from invading us, how could you stop him? You may say to him, I see no probability of the British invading us but he will say to you be silent; I see it, if you don't.

Section 5(3) provides for: "the continued use [beyond thirty days] of such armed forces in such hostilities or in such situation [provided it] has been authorized in specific legislation enacted for that purpose by the Congress and pursuant to the provisions thereof." It is to be noted that authorization to continue using the Armed Forces is to come in the form of specific statutory action for this purpose. This is to avoid any ambiguities such as possible efforts to construe general appropriations or other such measures as constituting the necessary authorization for "continued use." Moreover, just as the Congress

under the Constitution is not intended to be under any obligation to declare war against its own better judgment, so under Section 5(3) of the war powers bill there is no presumption, or obligation, upon the Congress to enact legislation for the continued use of the armed forces, as covered by the bill, except as it is persuaded by the merits of the case presented to it, and consequent to appropriate reflection and due deliberation.

It is further to be noted that any "continued use" which might be authorized by the Congress must be "pursuant to the provisions" of such authorization. The Congress is not faced with an all or nothing situation in considering authorization for "continued use." It can establish new time limits, provisions for further review by the Congress, as well as other limits and stipulations within the ambit of the constitutional powers of the Congress.

TERMINATION PRIOR TO 30 DAYS

Section 6 provides that the Congress can, through statutory action, foreshorten the thirty-day provisions of Section 5. In such instances, the President is protected by his veto power regarding the basic thirty-day emergency period specified to him with respect to the authorities contained in section 3. Clearly, effective Congressional action under section 6 would be likely in extraordinary circumstances wherein two-thirds of both Houses of Congress were convinced that the President had acted against the national interest or with great improvidence. Just as the burden of proof lies with the President to persuade that his use of the armed forces under section 3 merits prolongation in the national interest beyond thirty days, the burden of proof, in effect, lies with the Congress to foreshorten the thirty-day period.

PRIORITY CONSIDERATION

Section 7 establishes procedures to assure priority action in Congress to consider legislation to extend under section 5, or to foreshorten under section 6, the thirty-day time limit. The provisions of section 7 are, thus, a safeguard against the possibility that Congressional action with respect to such measures could be obstructed or relayed through a filibuster or committee pigeonholing. Section 7 also provides that the respective Houses of Congress can modify the priority consideration provisions by majority vote. In this way, provision is made for a majority of either House to determine by yeas and nays an alternative procedure—for instance, directing a committee to hold hearings and report back by a certain date. Section 7 is shaped so as to assure that control of the consideration of legislation to extend or foreshorten the thirty-day period is in the hands of the majority and that a minority cannot obstruct the will of the majority in this respect through procedural means. It should be noted that requests for statutory authorization under section 3(4) do not qualify for the priority consideration provisions of section 7 as explained above.

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SEPARABILITY CLAUSE

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

NOT EX POST FACTO

Section 9 has two parts. The first part makes clear that the bill is not ex post facto legislation respecting the Vietnam war. The second part makes clear that the provision of section 3(4) would not require, for instance, the withdrawal of U.S. military personnel from NATO command headquarters in the event that forces of other NATO nations became engaged in hostilities unrelated to NATO, or in hostilities in which the introduction of U.S. forces were not authorized under section 3(1), 3(2), or 3(3) of this Act or by other specific statutory action of the Congress. However, in the absence of specific statutory authorization members of the U.S. armed forces pursuant to section 3(4) could not by reason of the NATO Treaty "command, coordinate, participate in the movement of, or accompany" the regular or irregular forces of a NATO country engaged in hostilities.

The "high-level military commands" referred to in this section are understood to be those of NATO, the North American Air Defense command (NORAD) and the United Nations command in Korea (UNC).

The overall purposes of the War Powers Act are to codify the "emergency" powers of the Commander-in-Chief, in the absence of a declaration of war, to introduce the armed forces of the United States in hostilities, or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and, very importantly, to establish a methodology to assure that Congress is not foreclosed by the practice of undeclared war from exercising its constitutional responsibilities respecting the awesome decision of putting the nation at war.

SUPPLEMENTAL VIEWS OF J. W. FULBRIGHT

Although the intent of the bill herewith reported is unexceptionable, it seems to me that the bill could be improved in several respects.

The first problem lies with Section 3, which catalogues the various conditions under which the President would be permitted to make emergency use of the armed forces. These conditions, in my view, go too far in the direction of executive prerogative, especially in allowing the President to take action not only to "repel an armed attack" but also to "forestall the direct and imminent threat of such an attack" on the United States or its armed forces abroad. The danger here is that these provisions could be construed as sanctioning a pre-emptive, or first strike, attack solely on the President's own judgment. Should the President initiate such a pre-emptive attack, the thirty-day limitation provided for in Sections 5 and 6 of the bill might prove to be ineffective, or indeed irrelevant, as a Congressional check on the President—all the more for the fact, which will be elaborated later that the 30-day limit on Presidential discretion is by no means absolute. The provisions authorizing the President to "forestall the direct and imminent threat" of an attack could also be used to justify actions such as the Cambodian intervention of 1970 and the Laos intervention of 1971, both of which were explained as being necessary to forestall attacks on American forces.

In their memorandum on war powers legislation the Lawyers Committee on American Policy Toward Vietnam reminded the Foreign Relations Committee that the classical language used to describe the basic power of the Commander-in-Chief to engage in hostilities in the absence of Congressional authorization is as follows: "to repel a sudden attack against the United States, its territories and possessions." This language is much more restrictive than that contained in paragraphs 1 and 2 of Section 3 of the Committee bill, which, in their extensiveness, may have the unintended effect of giving away more power than they withhold. In the view of the Lawyers Committee, the extension of the President's power to use the armed forces to "forestall" an attack before it takes place may well go beyond the President's constitutional authority. Besides a "sudden attack" on United States territory, the only other circumstances identified by the Lawyers Committee as warranting unauthorized Presidential use of the Armed Forces are an attack on the armed forces of the United States stationed outside of the country and an imminent threat to the lives of American citizens abroad, the latter of which would justify only a brief military operation for purposes of evacuation.

The bill appears to me to deal satisfactorily in paragraph (3) of Section 3 with the matter of protecting the lives of Americans abroad; it goes too far in paragraphs (1) and (2), however, in allowing of discretionary Presidential action to "forestall the direct and imminent threat" of an attack on the territory or armed forces of the United States.

Rather than spell out what amounts to Presidential discretion to mount a pre-emptive attack, I am inclined toward a simple abbreviated provision allowing of emergency use of the armed forces by the President. Alternately, there may be merit in simply abstaining from the attempt to codify the President's emergency powers, which is the approach of Congressman Zablocki's bill, H.J. Res. 542, favorably reported by the House Foreign Affairs Committee on June 7. In practice, it is exceedingly difficult, as the Committee has found, to draw up a list of emergency conditions for Presidential use of the armed forces which does not become so long and extensive a catalogue as to constitute a *de facto* grant of expanded Presidential authority. The list of conditions spelled out in Section 3 of the bill is, in my opinion, about as precise and comprehensive a list as can be devised, and its purpose, I fully recognize, is not to expand Presidential power but to restrict it to the categories listed. Nevertheless, I am apprehensive that the very comprehensiveness and precision of the contingencies listed in Section 3 may be drawn upon by future Presidents to explain or justify military initiatives which would otherwise be difficult to explain or justify. A future President might, for instance, cite "secret" or "classified" data to justify almost any conceivable foreign military initiative as essential to "forestall the direct and imminent threat" of an attack on the United States or its armed forces abroad.

For these reasons I am much inclined either to say nothing about the President's emergency powers as in the Zablocki bill, or to include a simple substitute for paragraphs (1), (2) and (3) of Section 3 of the Committee bill, in which it would simply be recognized that the President, under certain emergency conditions, may find it absolutely essential to use the armed forces without or prior to Congressional authorization. This approach too has its dangers, allowing as it would of irresponsible or extravagant interpretation, but at least it would place the burden of accountability squarely upon the President, where it belongs, and it would also of course be restricted by the thirty-day limitation specified in Sections 5 and 6 of the bill.

Under the language of paragraphs (1), (2) and (3) of Section 3 of the bill the executive could cite fairly specific authority for the widest possible range of military initiatives. Under the simpler, more general approach I propose, the President would remain free to act but without the prop of specific authorization; he would have to act entirely on his own responsibility, with no advance assurance of Congressional support. A prudent and conscientious President, under these circumstances, would hesitate to take action that he did not feel confident he could defend to the Congress. He would remain accountable to Congress for his action to a greater extent than he would if he had specific authorizing language to fall back upon. Congress, for its part, would retain its uncompromised right to pass judgment upon any military initiative taken without its advance approval. Confronted with the need to explain and win approval for any use of the armed forces on the specific merits of the case at hand, a wise President would think carefully before acting; he might even go so far as to consult with members of Congress as well as with his personal advisers before committing the armed forces to emergency action. For these reasons, it appears to me that a general, unspecified authority for making emergency use of the armed forces, though superficially a broad grant

of power, would in practice be more restrictive and inhibiting than the specific grants of emergency power spelled out in paragraphs (1), (2) and (3) of Section 3 of the bill. Alternately, the same objective could be achieved by simply leaving out any attempt to codify the President's emergency powers, which is the approach of the House Committee bill.

A related consideration, called to the attention of the Committee by the Federation of American Scientists, is the danger of a President, on his own authority, escalating conventional hostilities into a nuclear war. The United States has not, like the People's Republic of China, announced that it will never make first use of nuclear weapons. Accordingly, the Federation of American Scientists proposes that Congress require the President to secure its consent before using nuclear weapons except in response to their use or irrevocable launch by an adversary. So enormous is the significance of nuclear war that the conversion of any conventional conflict into a nuclear conflict cannot realistically be considered a mere change of tactics in a continuing conflict. In effect, the introduction of nuclear weapons would constitute the beginning of a whole new war. This being the case, I concur wholly with the Federation of American Scientists that Congress must retain control over the conventional or nuclear character of a war.

Paragraph 4 of Section 3 of the Committee bill, spelling out the conditions for use of the Armed Forces "pursuant to specific statutory authorization," seems to me to be well and carefully drafted in its present form. I recommend its retention in Section 3 revised along one or the other of the lines suggested above. One feasible approach is that of the Zablocki bill, although that will not take account of the matter of first use of nuclear weapons. Another possible approach is the substitution of the following for the introductory clause and first three paragraphs of Section 3 of the Committee bill (page 2, line 22, through page 4, line 3):

> Section 3. In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be employed by the President only—
>
> (1) to respond to any act or situation that endangers the United States, its territories or possessions, or its citizens or nationals when the necessity to respond to such act or situation in his judgment constitutes a national emergency of such a nature as does not permit advance congressional authorization to employ such forces; but, except in response to a nuclear attack or to an irrevocable launch of nuclear weapons, the President may not use nuclear weapons without the prior, explicit authorization of the Congress; or.

A most serious problem arises in connection with Section 5, which specifies a 30-day limitation for emergency use of the armed forces by the President. Under the Committee bill, this limitation allows of an exception which might in practice prove to be a loophole so gaping as to nullify the 30-day limitation entirely. The Committee bill states that the emergency use of the armed forces by the President may be sustained beyond the 30-day period, with or without Congressional authorization, if the President determines that "unavoidable military necessity respecting the safety of the armed forces" requires their con-

tinued use for purposes of "bringing about a prompt disengagement" from hostilities. In this connection, it will be recalled that President Nixon prolonged the Vietnam war for four years under the excuse of "unavoidable military necessity respecting the safety of the armed forces." This escape clause could reduce to meaninglessness the entire provision limiting the President's emergency power to 30 days. The approach taken by the House bill is in this respect much superior inasmuch as it allows of no such escape clause. Section 4 (b) of the bill approved by the House Foreign Affairs Committee states simply that, within the 120-day emergency period specified in the House bill, "the President shall terminate any commitment and remove any enlargement of United States armed forces . . . unless the Congress enacts a declaration of war or a specific authorization for the use of United States armed forces." Although I greatly prefer the 30-day emergency period of the Senate Foreign Relation Committee's bill to the 120 day emergency period of the House bill, the latter nonetheless provides more effectively for Congressional authority to decide whether or not any given military action may be continued beyond the emergency period.

Another, similar problem arises in connection with Section 6 of the Committee bill, under which Congress could require the termination of military action within the 30-day emergency period only by act or joint resolution, which of course would be subject to veto by the President. In addition, Section 6 of the Committee bill, like Section 5, makes a complete exception to the Congressional termination power in any case where the President judges that "unavoidable military necessity respecting the safety of the armed forces" requires their continued use in the course of bringing about a "prompt disengagement" from hostilities. The requirement of Presidential signature for an act of termination, combined with the exception of "unavoidable military necessity," reduce to meaninglessness the ostensible power to Congress to terminate hostilities within the 30-day emergency period. The approach taken by the Zablocki bill in this respect, as in the case of military action beyond the initial emergency period, seems much superior. Section 4(c) of Zablocki bill would authorize Congress to require the President to terminate military action within the emergency period simply by concurrent resolution. Since a concurrent resolution does not require the signature of the President, this approach would eliminate the possibility of Presidential veto of a Congressional act of termination. Furthermore, in the matter of terminating military action within the emergency period as well as allowing it to continue beyond the emergency period, the Zablocki bill contains no such gaping escape hole as the "unavoidable military necessity" spelled out in Section 5 and 6 of the Senate Committee bill. The Zablocki bill, therefore, provides not only for Congressional authority to decide whether military action will be sustained beyond the emergency period; it also provides more effectively for Congressional authority to terminate military action within the emergency period.

Still another problem arises with respect to Section 9 of the Senate Committee bill, which states that the bill would "not apply to hostilities in which the armed forces of the United States are involved on the effective date of this Act." The effect of this provision would be the exemptions of the lingering war in Indochina from the application

of the bill. As formulated, Section 9 of the Committee bill can even be read as giving negative or implicit sanction to the continuation of the war in Indochina. My own view is that the current bombing of Cambodia is unconstitutional as well as unwise, and this view seems now to represent a consensus in Congress, which may soon result in a legislative cutoff of the bombing. I would not wish, however, even by indirection, to have it suggested in a major piece of legislation that this war warrants exemption from rules of legality which would be applied to future wars. As the Committee Report correctly points out, the war powers bill is not an attempt to alter the Constitution but a reassertion and codification of the war powers provisions of the Constitution. To exempt any war from the bill's provisions is, in effect, to exempt it from the Constitution. In order to deal with this problem I recommend that the language exempting the Indochina conflict—this act "shall not apply to hostilities in which the armed forces of the United States are involved on the effective date of this Act"—be deleted from Section 9 of the Committee bill, making the Senate bill equivalent to the Zablocki bill, which states simply that the legislation "shall take effect on the date of its enactment." In addition, I recommend, most strongly, the inclusion in the bill of a provision equivalent to Section 9 of the bill reported by the House Foreign Affairs Committee, which states that "All commitments of United States armed forces to hostilities existing on the date of the enactment of this act shall be subject to the provisions hereof. . . ." The inclusion of such language would remove all doubt of the applicability of Congress's war power to the current hostilities in Indochina as well as to future possible wars.

A most important problem, closely related to the war powers, is the question of authority to deploy the armed forces outside of the United States in the absence of hostilities or the imminent threat of hostilities. In the section above entitled "Explanation of the bill" it is stated that "this legislation would not inhibit the President's capacity to deploy the armed forces, i.e., to move elements of the fleet in international waters." Professor Raoul Berger commented in his testimony before the Foreign Relations Committee on war powers: "Unless Congress establishes control over deployment by statute requiring Congressional authorization, the President will in the future as in the past station the armed forces in hot spots that invite attack, for example, the destroyer Maddox in the Tonkin Gulf. Once such an attack occurs, retaliation becomes almost impossible to resist."[1] I am reminded in this connection of a memorandum written in 1968 by General Wheeler, then Chairman of the Joint Chiefs of Staff, regarding the deployment of American forces in Spain in the absence of a security treaty: "By the presence of the United States forces in Spain the United States gives Spain a far more visible and credible security guarantee than any written document." Both experience and logic show that, to the extent the President controls deployment of the armed forces, he also has the *de facto* power of initiating war.

Either in connection with the war powers bill, or through separate legislation, it would seem appropriate, indeed urgent, to affirm by law the authority of Congress to regulate the deployment of the armed

[1] "War Powers Legislation," *Hearings Before the Committee on Foreign Relations*, U.S. Senate, 93rd Congress, 1st Session. (Washington: U.S. Govt. Printing Office, 1973), p. 17.

forces in the absence of hostilities or their imminent threat. Such authority derives directly from the Constitution, which specifies Congress's power to "make rules for the government and regulation of the land and naval forces." In addition, the general power of appropriation necessarily carries with it the power to specify how appropriated moneys shall and shall not be spent. Moreover, the authority of Congress to regulate the deployment of the armed forces in peacetime is scarcely separable from the war power itself, inasmuch as the power to deploy the armed forces is also the power to precipate hostilities or—to take the language of the war powers bill—to create "situations where imminent involvement in hostilities is clearly indicated. . . ." In the words of a Congressional Research Service memorandum on the subject, dated May 24, 1973, "Almost every substantive aspect of the armed forces is an appropriate subject for regulation by the Congress; and, since the President is entirely dependent on the Congress for the forces he commands, it follows that Congress can control, directly or indirectly, the objectives for which these forces are used, at least during times of peace."

J. W. FULBRIGHT.

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NATIONAL SECURITY COUNCIL

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Phil ——

Per our conversation.

Les

THE WHITE HOUSE
WASHINGTON

September 10, 1976

TO: Phil Buchen

FROM: Ed Schmults

Nothing came up on this while you were gone, and it didn't move at all.

Is there any need for the memorandum at this point?