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The War Power After 200 Years: Congress and the President at a Constitutional Impasse: Hearings before the Subcommittee on War Powers of the Committee on Foreign Relations, United States Senate, One Hundredth Congress, First Session

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Claiborne Pell, Larry Pressler, Paul Simon, Paul S. Sarbanes, Edwin B. Firmage, Michael J. Glennon, W. Taylor Reveley III, and Robert F. Turner
THE WAR POWER AFTER 200 YEARS:
CONGRESS AND THE PRESIDENT
AT A CONSTITUTIONAL IMPASSE

HEARINGS
BEFORE THE
SPECIAL SUBCOMMITTEE ON
WAR POWERS
OF THE
COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE
ONE HUNDREDTH CONGRESS
FIRST SESSION

JULY 13, 14, AUGUST 5, SEPTEMBER 7, 15, 16, 20, 23 AND 29, 1988

Printed for the use of the Committee on Foreign Relations
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THE WAR POWER AFTER 200 YEARS: CONGRESS AND THE PRESIDENT AT A CONSTITUTIONAL IMPASSE

WEDNESDAY, JULY 13, 1988

U.S. SENATE,
SPECIAL SUBCOMMITTEE ON WAR POWERS OF THE COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The subcommittee met at 9:30 a.m. in room SD-419, Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the committee) presiding.

Present: Senators Pell, Sarbanes, Kerry, Simon, Adams, Moynihan, Kassebaum, Boschwitz, Pressler, Murkowski, Trible, Evans, and McConnell.

The CHAIRMAN. The Committee on Foreign Relations will come to order.

Today our committee commences work on a project of real significance, an effort to evaluate and improve the War Powers Resolution of 1973. Congress passed this law 15 years ago in the hope of fostering constructive executive-legislative interaction in the decision to employ U.S. forces abroad.

Unfortunately, this intent has never been fulfilled. Indeed, from the moment of its enactment over President Nixon’s veto, the resolution itself has been an object of dispute rather than an instrumentality of cooperation.

This past year’s contentious debate over the Resolution’s applicability to the U.S. presence in the Persian Gulf has served to underscore the irony that now surrounds this crucial law. For the motive behind the War Powers Resolution was a determination to establish a procedure that would ensure national unity.

The aim was to devise a mechanism, consistent with the Constitution, through which Congress and the President would act together in the momentous decision to commit U.S. forces to hostilities.

Critics of the War Powers Resolution continue to characterize it as an idiosyncratic product of its time, an effort to prevent another Vietnam. But that involves a distortion.

The War Powers Resolution was not intended to prevent the necessary use of American military power, but rather to prevent the commitment of power unaccompanied by careful analysis and the commitment of national will.

The framers of the Constitution intended that Congress be an active participant in the decision to commence hostilities. While
the War Powers Resolution in its current form has failed, a way must be found to give modern meaning to constitutional intent.

Pursuant to this purpose, the committee last December authorized the establishment of a Special Subcommittee on War Powers. Today the subcommittee begins hearings that will provide for a full airing of the constitutional dimensions of the question, while considering practicalities as well as principles.

The chairman of the subcommittee is Senator Biden our colleague, who is completing recuperation from surgery and for whom I will sit in until he returns in a few weeks.

These hearings will extend through August and into September, and will involve former and present Government officials, including President Ford and a number of eminent constitutional scholars.

And now the subcommittee is pleased to be able to commence its hearings with testimony from four people who played a role in the genesis of the law we have set ourselves to evaluate.

Chairman Fascell and Congressman Broomfield have since assumed the leadership of the House Foreign Affairs Committee. Senators Eagleton and Mathias have retired and graduated to new careers. All four have records of distinguished service to our country, and the subcommittee is very pleased by their presence today.

I would ask Senator Pressler if he has an opening statement.

[The prepared statement of Senator Pell appears in the appendix.]

OPENING STATEMENT OF SENATOR PRESSLER

Senator PRESSLER. Thank you very much.

I am pleased to serve as the ranking member on the Republican side. This is the first, as you pointed out, in a lengthy series of hearings on the War Powers Resolution, often referred to as the War Powers Act. It has been a matter of major concern for the Congress over the past 15 years, and each time there is a new international crisis it is at the forefront. It may well be the subject of debate for the next 15 years.

The administration opposes this legislation on constitutional and practical grounds. I strongly support the administration's position.

Nevertheless, the reason we are meeting here this morning and listening to the testimony of these distinguished witnesses is the result of the continuing political controversy over that Resolution. It is a political statute, pure and simple.

We are inquiring not only into the nature and legality of the War Powers Resolution, but we are also examining the war power itself. Thus, we are exploring the issue of the constitutional separation of powers at the very time we are celebrating the bicentennial anniversary of the U.S. Constitution.

This is a curious way to celebrate a document that is not only the world's oldest written constitution, but also has made our system of Government the political wonder of the world.

I have long been a critic of the War Powers Resolution. It is unconstitutional in law and politically unwise in fact. It has seriously strained the relationship between the executive branch and the legislative branch at a time and under circumstances when coopera-
tion and not confrontation should be paramount for our own national interest.

I do not criticize, nor do I seek to undermine, the process of congressional oversight. The watchdog function of Congress with respect to the executive branch has been in place since the very first Congress.

The way the Constitution was written and the way it was originally intended was that each branch of Government keep an eye on the others. A cursory reading of the Federalist Papers, the best commentary ever written on the U.S. Constitution, reveals a serious concern by the framers over the potential abuse and misuse of power. James Madison warned specifically about that possibility in Federalist No. 48.

The founding fathers intentionally blurred the edges of the separation of powers doctrine, well realizing that complete separation might bring about stagnation and inflexibility. To quote the former Chief Justice of the United States, Warren Burger, in his majority opinion in the case of *Bowsher v. Synar*, 1986:

That system of division and separation of powers produces conflicts, confusion, and discordance at times. But it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.

The debate will be evident in the hearing that we are holding, but the current conflict between the legislative and the executive on who controls foreign policy is quite another matter.

The issue is well stated in the very first paragraph of the recommendations section of the Tower Commission Report of 1987:

Whereas the ultimate power to formulate domestic policy resides in the Congress, the primary responsibility for the formulation and implementation of national security policy falls on the President.

It then goes on to say:

It is the President who is the usual source of innovation and responsiveness in this field.

This means quite simply that in foreign policy the President leads. No one to my knowledge has maintained that the President absolutely controls. Congress has the explicit power under the Constitution to declare war. The President has the constitutional explicit power to defend the national security interests of the United States. I will have more to say about the Constitution’s intentions and obligations at our next hearing tomorrow afternoon.

Only 2 weeks ago, the Chief Justice of the United States, William Rehnquist, wrote in his majority opinion in *Morrison v. Olson* that:

Time and again we have reaffirmed the importance in our constitutional scheme of the separation of powers into the three coordinate branches.

This is why the Supreme Court has held the one-house veto to be unconstitutional in the *Bowsher* case and in *INS v. Chadha*, 1983. Indeed, several Justices in both cases have indicated that a two-house legislative veto is also of dubious constitutionality.

I believe without question that section 5(c) of the War Powers Resolution of 1973, providing for removal of U.S. forces from any theater of conflict, if Congress approves a concurrent resolution to that effect, is a clear violation of the presentment clause of the U.S. Constitution, found in article I, section 7, clause 3.
In conclusion, Mr. Chairman, I welcome these hearings as an opportunity to reacquaint ourselves with the Constitution and with constitutional theory in this bicentennial anniversary year of the ratification of that great document. It is particularly important, I believe, to get things straight in this Presidential election year. The great issues of war, peace, and national security should be debated in this Congress and in the public arena. That is what democracy is all about. When we do this, we demonstrate to the world the openness of our system and the strengths of the democratic process.

But debate is one thing. "Constitutional encroachment," as Madison warned, is quite another. I find myself in rare agreement, Mr. Chairman, with the distinguished speaker of the House when he wrote in another context:

What people really mean when they say "the system is not working" is simply that they are not getting their way.

The Congress is trying too hard to get its way.

Congressman John Marshall declared on the floor of the House of Representatives at the beginning of the last century that "The President is the sole organ of the Nation in its external relations."

The future Chief Justice of the United States spoke clearly then, and his words should be equally clear today. Congress has the power to declare war. It has the power to support, or to withdraw support, from the Armed Forces of the United States.

The President is Commander in Chief, as laid out by the Constitution, and he is charged with defending the national security interests of the United States.

The War Powers Resolution was a legacy of the political turmoil caused by the Vietnam war, a war in which I served and which I still remember. But that war ended almost 15 years ago. It is time to set the ship of state back on course, and to discard the War Powers Act as a faded relic of that contentious era.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Pressler.

Senator Simon.

OPENING STATEMENT OF SENATOR SIMON

Senator Simon. Thank you, Mr. Chairman. I am pleased these hearings are being held and I commend you for your leadership on this.

Just a couple of observations. One is the constitutional provision that we declare war is something that is probably never going to be used again. The formal declaration of war in the world in which we live is probably a thing of the past.

What can substitute for that in part is a genuine bipartisan foreign policy. Unfortunately, that has almost not existed in recent years. I think that has been one of the deficiencies of this administration.

The War Powers Act seems to me to be the sensible provision to provide restraint. But if the War Powers Act cannot be imposed, for example, in the Persian Gulf situation, I do not know where we will ever use the War Powers Act.
It clearly ought to be applicable to that situation. And so I hope out of these hearings we can find some mechanism that can pro-
vide the congressional restraint that was intended by those who wrote the Constitution.
And let me just add, Mr. Chairman, I welcome our first two wit-
nesses. I remember being on a trip with Senator Mathias. He was reading a biography of Boswell. How many times have you been on a trip where a Member of Congress has been reading a biography of Boswell? He is a Jeffersonian-type, and we welcome him.
And Senator Eagleton of course has contributed also in a variety of ways. I remember when we had the unfortunate duty to consider an impeachment of a judge, and the best analysis by far was the statement by Senator Eagleton summing up where we were.
He does lack, Mr. Chairman, a sense of humor. But other than that, he has been an outstanding member in this body.
Thank you, Mr. Chairman.
The CHAIRMAN. Senator Sarbanes.

OPENING STATEMENT OF SENATOR SARBANES

Senator SARBANES. Thank you very much, Mr. Chairman.
I will not speak to the substance of our hearings at this time, but I simply want to underscore my delight in having two of our former colleagues, Senator Eagleton and Senator Mathias, here today to lead off our set of hearings.
I cannot imagine two better qualified people for us to hear from. The Nation has benefited greatly by their very able and distin-
guished public service over the years, and in particular their inci-
sive work in this specific area. I look forward to hearing their testi-
mony.
The CHAIRMAN. Thank you very much.
I would add here that this legislation that will be coming before us is before our committee. For example, Senate Joint Resolution 323, which is the War Powers Resolution introduced by Senators Byrd, Nunn, Warner, and Mitchell, and probably there will be other thoughts that we will be considering as we move along.
I would like to apologize, incidentally, to our visitors because this is going to be a rather sporadic, interrupted morning. We have a vote at 10 o’clock and then we have a caucus for Governor Dukakis at 11:45. So, there will be some moving back and forth.
Congressman Broomfield has indicated he will not be able to be with us, but his testimony will be included in the record in full.
And I would also say how much I, speaking as an individual, have missed Senators Eagleton and Mathias, and how much less agreeable a place the Senate is since their departure. And I only wish they were still here.
Senator Eagleton, would you care to lead off?
Our first panel consists of Prof. Edwin B. Firmage, University of Utah, College of Law, in Salt Lake City, UT; Prof. Michael J. Glennon, University of California, Davis, Law School, Davis, CA; William Taylor Reveley III, Esquire, practicing attorney and author from Richmond, VA; and Prof. Robert F. Turner, Associate Director, Center for Law and National Security, University of Virginia Law School, Charlottesville, VA.

Gentlemen, welcome to you all.

Why don't we begin in the order that your names were called, unless you all have decided there is a more rational way to proceed.

Professor, welcome.

STATEMENT OF EDWIN B. FIRMAGE, COLLEGE OF LAW, UNIVERSITY OF UTAH, SALT LAKE CITY, UT

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

Let me simply summarize very quickly a much longer paper in six quick points.

Senator BIDEN. By the way, before we begin, I would like your entire paper placed in the record.

Mr. FIRMAGE. Of course. Thank you very much.

The war power of Congress is complete. The war power of the United States, in the sense of the decision for war or peace, is entirely in the Congress of the United States.

The sole exception to this is the power of the President to respond to sudden attack upon the United States.

The text makes this abundantly clear, the power to declare war and grant letters of marque and reprisal.

The first century of our history bore out this interpretation. There were exceptions, as Presidents exceeded the empowerment of statutes of Congress, but never until Korea and Vietnam did you have an effort to justify, under the Commander in Chief clause, a separate base of power to decide for war.

The Commander in Chief clause in the original understanding simply made the President Congress' general. These were the terms of Alexander Hamilton, a proponent of strong Presidential power. He, nevertheless, saw the paradigm shift from a European model of a monarchical power to decide for war to a congressional power to decide for war or peace.

Thomas Jefferson, though not present at the Philadelphia convention, where the Constitution was struck, rejoiced at this change, and he noted that they had gone a long way toward chaining the "dog of war."
The power over foreign relations, the matrix within which the
war power sits at the heart of congressional power, was clearly
meant to be collegially conducted and determined by the Congress
and the President. The treaty power, I think, as Louis Henkin dem-
strated a decade ago, gives us this insight.

Unlike the present time, in the 18th century, foreign relations
would have been conducted dominantly through the treaty power,
and there, with the Senate and the President joining together, we
see the original idea.

A relevant question, nevertheless, after any analysis of original
intent, is whether two centuries’ experience and radical changes in
technology make that original understanding insufficient.

I believe quite the contrary.
As one looks at ICBM technology and at the power of thermonu-
clear weapons, I see nothing so enticing in nuclear war as to en-
courage us to make war more easily accomplished, rather than
less.

I think, quite the contrary, that every restraint of law on Gov-
ernment and diplomacy should be placed upon the inclination to go
to war that possibly can be.
While one thinks, perhaps loosely without thinking it through,
that ICBM time of 15 minutes, or 20, or 25 minutes, might make a
quick decision absolutely necessary, when you stop and think about
the actual situations where nuclear weapons could possibly be
used, if, in fact, deterrence fails, what’s the hurry?
If you think through the scenarios of the likely use, or first use,
particularly, of nuclear weapons, I see no reason to drop restraints
of the Congress of the United States upon a decision for war or
peace, but enormous reasons to do just precisely the opposite.

Beyond the question of the use of nuclear weapons, I would like
to address two more issues.
I believe that covert war has come to be the type of war of our
time. I would hope that in some manner the War Powers Resolu-
tion can be strengthened to cover covert war.

Two factors, I believe, combined to make covert war the form of
international violence of our time. First, the enormous power of
nuclear weapons, paradoxically, limited the likelihood that they
would ever be used. Second, a Manichaean world view—seeing the
world in an absolutist vision of good and evil—grew understand-
ably out of our experience in World War II. In that war, far more
than in World War I, Vietnam, the Korean war, or the War of
1870, totalitarian dictatorships made war against nations at peace.
But it would be disastrous to adopt this black-and-white world view
as the paradigm rather than the exception. We emerged from
World War II, nevertheless, with the view that we were continuing
to fight against unadulterated evil, therefore excusing what ever
vicious means we chose to employ.

We have been so totally assured of our own righteousness and
yet deterred from all-out war in the model of World War II that we
have waged covert action, and done so, I think, with great harm to
others and to ourselves.
I think we have had short-term embarrassment and long-term
disaster consistently in our use of covert action and covert war.
Congress is responsible for this form of war not one whit less than for overt war. The term “grant letters of marque and reprisal” in the 18th century was a way of saying Congress has the total war power, announced, declared or undeclared, public or private, fought by the official forces of this country in uniform or by mercenaries, done by whatever means. If one wanted to make Francis Drake, pirate, who was preying upon Spanish shipping and who might be hanged as a criminal if caught, into Sir Francis Drake, confidant of the Queen, empowered and authorized by the state, one granted letters of marque and reprisal.

When we see mercenaries not authorized by the Congress of the United States fighting war or committing acts of war, we see abuse of the war power of Congress by the President.

Finally, how do we go about remedying these things?

I think the reality is that the view that the courts are the least dangerous branch is most surely true here. They are the least dangerous and the least helpful. They have the least power.

I have slight hope, really, that the central issues will be resolved there. The only other big guy on the block with the President of the United States is the U.S. Congress, where the war power was originally reposed and where it should remain.

I support the War Powers Resolution with great reluctance. I think it is simply the least worst way we have practically available now of going about things.

It assumes continued Presidential initiative in committing American troops into hostilities or situations where hostilities are likely, and it assumes congressional subservience in this process, both in reporting and consulting roles.

In the original understanding—and in my view, nothing has happened since then to change the wisdom of that understanding—we should be speaking of congressional authorization, not consultation and of censure or impeachment, not reporting, for Presidential violation of congressional power over the decision for peace or war.

I support strongly the War Powers Resolution but only because practically I do not see at this present time how to restore congressional virtue that was lost, I think tragically, in Korea and Vietnam.

Thank you.

[The prepared statement of Mr. Firmage appears in the appendix.]

Senator BIDEN. Thank you very much, Professor.

Professor Glennon.

STATEMENT OF MICHAEL J. GLENNON, PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, DAVIS, LAW SCHOOL, DAVIS, CA

Mr. GLENNON. Thank you, Mr. Chairman.

Let me begin by thanking the subcommittee for inviting me to be here today.

I wish to note at the outset that, although I serve as counsel to the congressional plaintiffs in Lowry v. Reagan, the views that I ex-
press here today do not necessarily represent those of my clients in that case.

My remarks will be directed to the constitutionality of the War Powers Resolution and also to the Use of Force Act set forth in Committee Print No. 1.

I understand that Committee Print No. 1 is intended not as a proposal but, rather, as a focal point for analysis. I believe that each of its provisions is constitutional; but I am less convinced that certain of those provisions are wise from a policy perspective. I would thus suggest that primary consideration be devoted to policy considerations in Committee Print No. 1.

In discussing issues of constitutionality, it seems appropriate to begin with a comment upon the September 14 testimony of the State Department Legal Adviser, Abraham Sofaer. In that testimony and in his answers to the chairman’s written questions, Mr. Sofaer launched a broad attack upon the congressional warmaking power, referring throughout to “independent” power conferred upon the President by the Constitution and reiterating the proposition, transposed in various forms, that independent Presidential power is not subject to statutory limitation.

The observation is, of course, true and, indeed, truistic: What his claim comes down to is that Congress cannot act unconstitutionally.

Yet, Mr. Sofaer repeatedly overlooks the fact that there is a second category of Presidential power that is subject to congressional regulation: concurrent power. This is constitutional power that may be exercised initially by the President in the face of congressional silence, but which Congress may, nonetheless, subsequently choose to restrict.

It is this class of power to which Justice Jackson referred in his famous concurring opinion in the 1952 Steel Seizure case.

In that case, in which the Supreme Court struck down the seizure of the steel mills during the Korean war by President Harry Truman, Jackson wrote: “Presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress.” He continued, “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers, minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.”

The Supreme Court formally adopted Justice Jackson’s mode of analysis in Dames & Moore v. Regan, in which Justice William Rehnquist applied Jackson’s approach to uphold President Jimmy Carter’s Iranian hostage settlement agreement as having been authorized by Congress. In so doing, Rehnquist wrote that Jackson’s opinion “brings together as much combination of analysis and commonsense as there is in this area.”

Rehnquist then quoted from Jackson a passage that, today, in this context, is as significant as it is timely. He said: “The example of such unlimited Executive power that must have most impressed the Forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads
me to doubt that they were creating their new Executive in his image.”

The War Powers Resolution, therefore, placed certain Presidential use of armed force in this third category of Justice Jackson’s analysis, where his power is at its lowest ebb. Under this analytical approach, the time limits of the War Powers Resolution, as well as the “prior restraints” set forth in the earlier Senate version, seem clearly constitutional. The scope of the President’s concurrent power is a function of the concurrence or nonconcurrence of the Congress; once Congress acts, its negative provides “the rule for the case.”

Mr. Sofaer ignores the learning of the Steel Seizure case, however, and can barely list the parade of horribles set to march by the time limits: They interfere with the “successful completion” of the President’s initiative; they “may signal a divided nation, giving adversaries a basis for hoping that the President may be forced to desist”; they provide “an undesirable occasion for interbranch or partisan rivalry.”

The curious thing about these arguments, Mr. Chairman, is that every one of them is an argument not against the War Powers Resolution but against constitutional limitations on Presidential war-making power. Every one of these arguments is an argument for untrammeled Presidential discretion to use the Armed Forces whenever, wherever, and for whatever purposes the President may choose.

Indeed, on close analysis, it becomes clear that this is precisely Mr. Sofaer’s view: “Explicit legislative approval for particular uses of force has never been necessary,” he candidly said.

The President thus could have used armed force in World War I, World War II, or Vietnam without any declaration of war or any other legislative approval.

This view of war-making power is, of course, not new. But it should suffice to say at this point in our history that the divine right of kings approach was ventilated and rejected in 1789, and I see no point in reopening that debate today.

The constitutional theory underpinning the War Powers Resolution is different from that underpinning the Use of Force Act. The War Powers Resolution confers no authority upon the President; as section 8 makes clear, it merely places limits upon the use of authority that otherwise might lay unregulated.

The Use of Force Act, on the other hand, affirmatively delegates power to the President to use armed force in certain specified instances. That distinction is critical. As early cases demonstrate, where Congress delegates authority, limits imposed incident to that delegation are constitutionally valid.

This important premise undergirds the approach of the Use of Force Act.

Mr. Chairman, a number of proposed modifications of the War Powers Resolution are before the subcommittee, ranging from the Byrd-Nunn proposals and Committee Print No. 1, to the De Fazio approach to simple repeal.

I would simply say, in concluding, that none of these modifications of the Resolution will, in themselves, to quote the War Powers Resolution, “ensure that the collective judgment of both
the Congress and the President will apply to the introduction of U.S. Armed Forces into hostilities."

Fifteen years after the War Powers Resolution’s enactment, it has become clear that the Resolution’s sponsors were naive to believe that any law could achieve that objective. The most that a statute can do, however artfully drawn, is to facilitate the efforts of individual Members of Congress to carry out their responsibilities under the Constitution.

To do that requires understanding and it also requires courage. It demands a insight into the delicacy with which our separated powers are balanced and the fortitude to stand up to those who would equate criticism with lack of patriotism.

For a Congress comprised of such Members, no War Powers Resolution would be necessary. For a Congress without them, no War Powers Resolution will be sufficient.

Thank you.

[The prepared statement of Mr. Glennon appears in the appendix.]

Senator Biden. Thank you.

Professor Turner.

STATEMENT OF ROBERT F. TURNER, ASSOCIATE DIRECTOR, CENTER FOR LAW AND NATIONAL SECURITY, UNIVERSITY OF VIRGINIA LAW SCHOOL, CHARLOTTESVILLE, VA

Mr. Turner. Thank you, Mr. Chairman.

It is a great pleasure to be back here. I spent 5 years sitting on the other side of your bench, in the back row, when I was working for a member of the committee. It is good to see the committee is still as active and as effective as it was in the old days.

Senator Biden. Which is easier?

Mr. Turner. Ask me that in 10 minutes.

Senator Biden. All right.

[General laughter.]

Mr. Turner. I have a rather lengthy statement that—

Senator Biden. Excuse me. Would you start the clock for this witness again.

Professor Glennon has been here so often and back here, too, that he didn’t even use his 10 minutes, which means he didn’t learn any of the lessons Senators taught him.

Mr. Turner. How long a warning is there?

Senator Biden. We always go over 10 minutes.

Mr. Turner. How long a warning do we have on the yellow light?

Senator Biden. I think it is 1 minute and then your seat is ejected.

[General laughter.]

Mr. Turner. I was wondering. I thought the device beneath the lights might be some sort of laser weapon.

I have a rather lengthy statement, Mr. Chairman, which I would like to submit for the record.

Senator Biden. The entire statement will be placed in the record.

Also, I ask unanimous consent that Professor Glennon’s statement be placed in the record.
Mr. TURNER. I would also like to emphasize that the views I express this morning are my own and not those of the University of Virginia, the Center for Law and National Security, the ABA or any other group with which I am associated.

This is a very important issue, and I am determined to be as candid and as honest as I can with the committee.

It is appropriate to note that we meet here today on the 50th anniversary of the opening of the 1938 Munich Conference; because, in my view, the War Powers Resolution stems from the same intellectual tradition which led Neville Chamberlain to think he could promote "peace for our time" by appeasing aggression, and which led Senator Nye and other isolationists during the same era to pass statute after statute, tying the President's hands, in an effort to legislate peace.

In the interest of time, I would like to focus primarily on the separation of powers issue. I want to help you "break the code" on how the Founding Fathers sought to separate powers between the President and the Congress.

Before doing that, I would like to make a few brief statements that are discussed at great length in my prepared testimony, which might provide the subject for discussion during the question-and-answer period.

First of all, as I testified last month at length in the House, the Congress was a full partner in getting the United States involved in Vietnam. The suggestion that it was not is not in my view unsupportable. I believe, in essence, the War Powers Resolution was a political fraud aimed at persuading the American people that Congress had had no role in that unpopular war.

Among the things which lead me to this conclusion are, first of all, the Senate, in 1955, consented to the ratification, with only one dissenting vote, of the SEATO Treaty. It created a legal obligation for the United States to go to the defense of certain countries in Southeast Asia that were victims of aggression, in response to their request, and, of course, acting pursuant to our constitutional process.

In carrying out those constitutional process in August 1964, by a vote of 416 to 0 in the House and 88 to 2 in the Senate, Congress enacted statutory authorization empowering the President to use armed force in Indochina.

Senator Javits said that this made Congress a full partner in the commitment. During the debate prior to passage, a colloquy took place between the chairman and ranking minority member of this committee, in which Senator John Sherman Cooper said that "Looking ahead, Mr. Chairman, if the President determined it were necessary to use such force as could lead into war, we will be giving that authority by this Resolution."

Chairman Fulbright responded, "That is the way I would interpret it."

Later, in 1970, Senator Sam Ervin, a very distinguished constitutional scholar, said that in his view, the Gulf of Tonkin Resolution represented "a declaration of war in a constitutional sense."

In 1967, when this committee issued its report on the national commitments resolution, it stressed that such resolutions as the Gulf of Tonkin Resolution were "a full alternative to a declaration
of war and were an appropriate means of Congress giving authority for hostilities.”

Section 2(c)(2) of the War Powers Resolution expressly recognizes the legality of the Commander in Chief using armed forces pursuant to “specific statutory authority.” That’s exactly the situation we had in Vietnam.

Before the public turned against the war, Congress, for several years, appropriated tens of billions of dollars for the war, often by 90 percent or greater majorities. During the month surrounding the Gulf of Tonkin Resolution, President Johnson’s popularity shot up not 30 percent, but 30 points—30 percentage points—an incredible increase, all attributed to the popularity of the Vietnam war in the early days.

My second conclusion is that Congress, in reacting to the implementation of the legislation, has been guided by political expedient rather than constitutional principle.

Let me illustrate by mentioning just three examples. When President Ford rescued the crew of the Mayaguez, he violated article 2(c)(C) and article 3 of the Resolution—not to mention the Cooper-Church amendment, which prohibited spending funds to send combat troops into that region. And yet, this committee passed a unanimous resolution praising his action and saying it was in full compliance with the War Powers Resolution.

In contrast, when President Carter tried to rescue endangered American citizens in Iran, under very similar circumstances—but in the absence of a statutory prohibition against sending troops into the area—the chairman and ranking minority member of this committee denounced his action as being in violation of the War Powers Resolution.

To me, the only clear distinction is that the public supported the successful Ford operation; they opposed the unsuccessful Carter operation.

Grenada is even a clearer example, because people like House Speaker Tip O’Neill stood up immediately and denounced the President upon learning of the operation. The House Foreign Affairs Committee called a hearing to investigate the legal aspects.

Later that afternoon, students landed at the airport, kissed the ground, and praised Ronald Reagan. The polls that came in overnight showed better than a 90-percent support for the operation, both within the United States and among the people of Grenada. House Speaker O’Neill announced that he had “reconsidered” the operation and had decided the President was fully justified. The House Foreign Affairs Committee decided to “postpone” their hearing on the legal issues, and those hearings still have not been rescheduled.

In essence, what Members of Congress have been doing is using the War Powers Resolution as cover. If there is a crisis, if there is a risk of the use of force, they shout “Fire” and run to the hills.

If the President, with the adversary knowing the country is divided, nevertheless succeeds, they come down from the hills, pick up a flag, and walk in the victory parade—saying that of course they supported the President from the beginning. If there is a failure, as occurred in Iran and Beirut, they solemnly come down from
the hills, charge that the President "broke the law," and then shoot the wounded.

These divisive congressional debates have done a great deal to increase the likelihood of war and to harm the cause of peace.

Today, the Nobel Prize Committee awarded the 1988 Nobel Peace Prize to U.N. peacekeeping forces. The United States, in 1982 and 1983, tried to participate in a very similar peacekeeping effort in Lebanon. By no strain of the imagination could it be said that sending American Marines to Beirut as part of an international peacekeeping force—at the request of all the governments in the area—constituted either an act of war or an infringement upon the power of the Congress to declare war. And yet, I think in large part because of the divisive debates in the Senate, President Assad of Syria concluded the Americans were "short of breath."

Right after the Senate debate, less than a week before the bombing of the Marines, the American press quoted intelligence accounts of intercepted Moslem militia messages that said, and I quote, "If we kill 15 Marines, the rest will leave."

A few days later, terrorists killed 241 Marines. I believe the U.S. Congress, and especially the Senate, deserves a great deal of responsibility for that tragedy.

In essence, by passing a War Powers Resolution that says any time a terrorist anywhere in the world takes a shot at an American soldier, that will start a clock and the President will have to withdraw all U.S. forces within 60 or 90 days, you have surrendered the initiative to the terrorist—and in the process you have placed a bounty on the lives of American servicemen.

Mr. Chairman, my final conclusion is suggested by the title of my paper, "Restoring the Rule of Law: Reflections on the War Powers Resolution at Fifteen."

Although some of you may not believe it, Congress can violate the law. Each of you took an oath of office to support the Constitution, and when you pass a law that seeks to take away from the President part of the Commander in Chief power vested in him by the American people through the Constitution—the essence of which is the control of the deployment of armed forces—you are violating the law.

Let me turn briefly to the question of "breaking the code" of separation of powers.

There is a theory today that perhaps the Founding Fathers didn't really think about separation of powers, or perhaps they couldn't decide how to divide them, so they decided to just leave the two parties to struggle. That is not in my view an accurate account of what happened.

To really understand what the Founding Fathers intended, first of all, you have to understand the views of John Locke, Montesquieu, and Blackstone—the primary theorists who influenced the constitutional Framers on separation of powers matters.

They all argued that legislative bodies were not competent to handle foreign affairs because battles would quickly change, princes would die, and it was necessary to be able to act with speed, dispatch, and secrecy—and for a variety of other reasons having to do with the inherent strengths and weaknesses of the two political branches.
Locke used the term "federative power" to refer to the power of controlling "leagues and alliances, war, peace, and all transactions with all persons and communities without the commonwealth." But he said the federative power required the same attributes for its execution as the power to execute the municipal laws passed by the legislative branch and, thus, both should be placed in the same hands.

Montesquieu distinguished between "the Executive in respect of things dependent upon the laws of nations" and "the Executive in regard to matters that depend upon civil law."

One you understand the 1787 meaning of "Executive power," you understand why, when the Founding Fathers in article 2, section 1, vested "the Executive power" in the President, as Quincy Wright said in his classic 1922 study, "The Control of American Foreign Relations," and I quote, "When the Constitutional Convention gave Executive power to the President, the foreign relations power was the essential element of the grant."

I would like to close with just two other quotations to show that both Jefferson and Hamilton, two arch rivals in the initial Government, strongly agreed on this subject.

Jefferson, in 1790, said, "The transaction of business with foreign nations is executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. The exceptions are to be construed strictly." The same theme of exceptions to Executive power being construed strictly was picked up by Madison.

If I might conclude with an almost identical statement 3 years later by Alexander Hamilton, he wrote in his first "Pacificus" letter, "It deserves to be remarked that, as the participation of the Senate in the making of treaties and the power of the Legislature to declare war are exceptions out of the general 'Executive Power' vested in the President, they are to be construed strictly and ought to be extended no further than is essential to their execution."

So, what I am suggesting is that the Founding Fathers vested in Congress a power of veto—a negative—over a decision by the President to launch a war, an offensive war, the kind of war for which a formal declaration would historically be associated. Short of that, the deployment of military forces, the entire question of what we do with our military and also how we fight wars either authorized by Congress or initiated by a foreign government, is left entirely to the discretion of the President under the Constitution.

The War Powers Resolution conflicts with this theory.

Senator BIDEN. Excuse me. I want you to keep going, but I want to make sure that I heard you correctly.

Did you say the Constitution vests in the Congress a veto power? Is that what you said?

Mr. TURNER. I used the term "veto," or "negative" which is exactly the term that Jefferson used.

Senator BIDEN. I understand. I just want to make sure that I heard what you said. It's a veto power.

Mr. TURNER. Yes, over a decision by the President to launch an offensive war.

The classic case of the proper congressional role occurred under Andrew Jackson, when the President decided he wanted to launch
a war against France because the French had not made good on their promise to repay certain debts owed to the United States from Napoleon's seizure of American merchant ships. Jackson went to the Congress and said in essence "I'm going to send the Navy over there and chastise the French and they will pay their debts." But Henry Clay, the chairman of this committee, said "No you're not," for a variety of reasons, and Congress blocked the President.

That was exactly the kind of adventuristic Executive initiative that the Founding Fathers were trying to guard against by the "declaration of war" clause.

It is a very important clause. But the critical point I am making is that that clause was not violated in Vietnam. The constitutional system was not broken. What happened in Vietnam was that Congress, after initially strongly supporting the war—and, indeed, many of the people who pushed the War Powers Resolution in 1973 had in the early 1960's denounced President Kennedy and President Johnson for not doing more, for not sending combat troops to Vietnam. A classic example was Representative Paul Findley.

At any rate, my bottomline is that the War Powers Resolution was a fraud. It exceeds the constitutional powers of the Congress. I strongly believe that it should be repealed.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Turner appears in the appendix.]

Senator BIDEN. Thank you very much. Mr. Reveley, please proceed.

STATEMENT OF W. TAYLOR REVELEY III, ESQUIRE, PRACTICING ATTORNEY AND AUTHOR, RICHMOND, VA

Mr. Reveley. I have a long statement that I would appreciate being included in the record.

Senator BIDEN. It will be.

Mr. Reveley. I will orally cover only the first 5 pages of it.

The theme of my remarks, Mr. Chairman, is let's be practical. In my judgment, the country does need war powers legislation. We need it to help solve the severe, debilitating war powers problem that afflicts us.

The problem is not that the President is deliberately, wickedly, usurping ancient congressional prerogatives over war and peace. Nor is the problem that Congress is deliberately, wickedly, invading hereditary powers of the President over the use of force.

The problem is that the country lacks a constitutional consensus about the process by which the President and Congress are to share authority over American decisions to use force.

We continue to bicker over which branch gets to decide what and when. This bickering occurs at profound cost to the country. Four sorts of harm come quickly to mind.

First, the bickering poisons relations between the President and Congress. To be accused of constitutional usurpation is simply no fun. It engenders anger, fear, defensiveness, countercharges.

Constitutional theologians from both sides, the President's and Congress', insist with passion of truly religious intensity that their
The view of the Constitution is the "only true view," that all others are heresy.

The fate of heretics in the hands of the righteous is well-known. Second, the bickering undermines public confidence in the rule of law and in the legitimacy of both the President and Congress. The political branches of Government cannot go on year after year accusing one another of illegality in one of the most sensitive areas of American life, war and peace, without seriously eroding the faith of the people in both of these branches of Government.

Third, the bickering prevents focused attention to policy; that is, focused inquiry into what the United States ought to do about particular foreign and military situations, what our realistic alternatives are for dealing with them, what the costs and benefits of these alternatives are, and which alternatives we ought to pursue to maximize our national interest.

Rather than focusing on these policy issues, the debate all too often focuses on process issues, on which branch is constitutionally entitled to decide what and when. Focused attention on whether the United States ought in the national interest to commit troops abroad is sacrificed to bickering over the precise way in which the President and Congress are to make whatever decision is ultimately to be made.

Fourth and finally, the bickering denies American war and peace decisions the wisdom and the staying power that can come only from having both the President and Congress meaningfully involved in our decisions to use force. It is unavoidable that the Constitution divides the war powers between the two branches. Thus, it is inescapable that for American foreign and military policy to work, the two branches must cooperate in the exercise of their overlapping prerogatives.

But wait, some people say, these sorts of harms occur not because we lack a constitutional consensus on process but simply because the country lacks a current consensus on policy. We had a policy consensus from the end of World War II to sometime in the mid-1960's, they say, but now we've lost it and that's the problem.

Well, of course, when people can easily agree on what policy to adopt—whether these people are spouses dealing with one another, parents and children, university faculties and administrators, corporate officers and directors, litigants, voters, or Presidents and Congresses—when consensus on policy does exist, then little attention is paid to the nature of the decisionmaking process.

But how often do people agree easily about difficult and important issues? History suggests not all that often, and the more difficult it is to get agreement on policy, the more important it becomes to have agreement on process.

There are two reasons. First, when people agree on how a decision should be made—that is, when they accept that a particular person or group is entitled to make a particular sort of decision—then they are far more likely to accept the decision that is ultimately made, even if they disagree with it as a matter of policy, than they are likely to accept such a decision if they believe it was made by people not authorized to decide.

Every day, in countless contexts, people accept and support decisions whether they like them or not because the decisions have
been made by a process that people thought was legitimate. In other words, agreement on process helps produce agreement on policy.

When we disagree over both process and policy—over who gets to decide as well as over what the decision ought to be—a two-front struggle results, with dismal effect for focused inquiry into what we ought to do in the national interest. Sound policy suffers.

In short, process matters. We badly need a constitutional consensus on how the President and Congress are to go about making war and peace decisions.

To reach at least minimal agreement on process, all the crucial constitutional threads must be drawn together. The President's constitutional theologians must stop ignoring the fact that the language of the Constitution and its Framers' and Ratifiers' purposes create an enduring role for Congress in American decisions to use force.

At the same time, Congress' constitutional theologians must stop ignoring 200 years of practice under the Constitution. From George Washington's administration to date, practice also has been central to this country's constitutional journey. War powers practice indicates that, when Congress has provided the necessary tools to the President—men, money, and materiel, for instance—and when Congress has not previously banned a particular use of force, then the President may begin it on his own initiative. Two hundred years of practice make that clear.

It is essential that we weave these threads together in war powers legislation.

We might just as well howl into the wind as try to put into place a process that ignores either the country's deep rooted constitutional expectation of congressional involvement on the one hand, or the country's equally deep rooted constitutional expectation of Presidential initiative on the other.

Both expectations must be met if we are to develop a war powers process that actually works.

For now, we should focus on the irreducible constitutional minimum, on the "nothing less" bedrock that must exist if Congress is to be involved consistently in decisions about the use of force and if the President is to retain the initiative that practice has given him and that he will exercise, in light of the hazard, pace, and complexity of foreign and military affairs and his greater capability than Congress, to deal quickly and quietly with these affairs.

What is the irreducible minimum? In my view, it is this:

First, means to encourage the President and Congress to consult meaningfully together before and during moments of truth;

Second, recognition that, informed by this consultation, the President may act alone if he thinks it in the national interest, for instance, because he believes speed or secrecy is crucial to U.S. success; and

Third, recognition that, when the President alone does initiate the use of force, it thereafter is for Congress to approve, disapprove, or limit the use if Congress chooses to act.

The irreducible minimum does not include time limits within which Congress must act either to approve, or be deemed to have disapproved, Presidential initiatives. It is far from clear that disap-
proval by inaction is constitutional; and it is quite clear that the President, all Presidents, will resist such a concept relentlessly and that Congress will rarely try to enforce it. Time limits won't work in the real world.

Is disapproval by concurrent resolution part of the irreducible constitutional minimum? In my opinion, it can go either way. After Chadha, Presidents will also probably resist relentlessly the concept that concurrent resolutions can constitutionally curb their initiatives.

But, as a practical matter, if the President commits troops who remain in the field a week, 2 weeks, 3 weeks, 2 months after their initial commitment, and Congress, by majority vote in both Houses, acts to limit or end the use of force, it is most unlikely that the President will simply disregard such an expression of congressional will. If he did, Congress has remedies, easy remedies—for instance, the power of the purse.

In sum, the War Powers Resolution, as passed in 1973, has not succeeded. It needs to be reduced to its most basic and workable elements. These elements, together, can lead the way to the constitutional consensus we so desperately lack. The consensus would involve less than either Presidential or congressional theologians insist is their branch's constitutional due. But the consensus would work.

One final note.

Some people say, if war powers legislation is to be so reduced, why bother to have it? Better to kill the 1973 resolution outright and thereby vindicate the Presidential view of the Constitution; or better to beef up the Resolution to require Congress' prior approval for any use of force, except for a few specified sorts, and, thereby, enshrine the congressional view of the Constitution. And, anyway, the irreducible minimum just described already exists. The President and Congress do not need a War Powers Resolution in order to consult one another. The President has been acting alone and reporting to Congress from time to time without such legislation, and Congress can already act before or during Presidential initiatives to block, limit, or end them in a variety of ways.

True, but simply because most of us could exercise daily, eat sparingly and otherwise see to our bodies does not mean that most of us do it. We are more likely to do it when pushed by an action-forcing regimen.

The War Powers Resolution is an action-forcing regimen for both the President and Congress. It hasn't worked well so far because it carries too much baggage, such as sections 2(c) and 5(b).

Stripped to its irreducible minimum, however, the Resolution just might bring the President and Congress to engage one another constructively on questions of war and peace—to consult, let the President act first if he feels so compelled, but then force the President to report and let Congress act second to approve or disapprove his initiative, if it feels so compelled.

To repeal the War Powers Resolution, leave it as it is, or amend it to impose more restraints on the President would do nothing for constitutional consensus. Repealed, the Resolution would greatly disappoint expectations that Congress must play a sustained, meaningful role in use of force decisions. Left as it is, the Resolution
would continue to work so fecklessly as to suggest that consistent collaboration between the two branches on the use of force is hopeless. Amended to try to restrain further the President, the Resolution would surely be ignored by just about everyone.

Cut to its irreducible minimum, however, the Resolution could lead us to constitutional consensus.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Reveley appears in the appendix.]

Senator Biden. Thank you very much.

We thank all of you for very concise and well-reasoned statements, close to within the time limit.

I have a number of questions. But let me begin in a slightly unorthodox way.

Would any of you like to raise questions about anything our colleagues have said?

Mr. Firmage. I have two points in regard to comments that have been made regarding Vietnam and foreign policy generally.

The point of Vietnam that was so disastrous is not that Congress didn't have an input into the decision, much to its regret, I believe. I think the Tonkin Gulf Resolution was, in effect, an unconstitutional attempt to delegate the warmaking power of Congress to the President.

I think that the Congress may well have been deliberately misled by the President in the Tonkin Gulf Resolution, too.

Nevertheless, I agree with my colleagues that Congress had an input in that decision to go to war. The problem that is even more disastrous than the disaster of the Tonkin Gulf Resolution itself is that Presidents made an argument that they didn't need it anyway, that, through the Commander in Chief clause, the President had the power to go to war and Congress could "go fish."

That argument, following the same argument from Korea, is, what I think, represents a vast difference from the past.

Of course we have had a checkered history. Of course Presidents have exceeded power given them. They have done things that perhaps they should not have done, and exigencies will arise when a President perhaps should cross a constitutional line, to be later, retrospectively, saved by Congress.

But what is very dangerous is an argument that the President has the power, under the Commander in Chief clause, to ignore any need of authorization from Congress and decide for war or peace. That does not have precedent in the past and it has no text to support it, either.

In regard to power over foreign relations, no doubt the transaction of foreign business is to be done by the President, as John Marshall noted before Congress. John Marshall speaking before the House of Representatives in defense of a controversial action taken by President John Adams, first described the President as "The sole organ of the Nation in its external relations, and its sole representative with foreign nations." What Mr. Marshall meant, of course, was that the President is our singular voice in the conduct of foreign relations—see Francis Wormuth and Edwin Firmage, "To Chain the Dog of War: The War Power of Congress in History and Law" 181, 1986. But the determination of that foreign policy
and the authorization of that policy, as well as the funding of that policy, is in the congressional bailiwick. There, I think, along with the general intent that we see from the treaty power, that foreign policy be conducted collegially, places Congress squarely in the role of determining the nature of, and then authorizing our foreign policy. This power collegially to help determine the content of our foreign policy is a separate empowerment of Congress, expressed in a multitude of constitutional texts, apart from the congressional power exclusively to decide for war or peace, absent a sudden attack upon this country.

Senator BIDEN. Would anyone else like to make a comment? Mr. TURNER. I could easily go on for 20 minutes, Mr. Chairman, but I will not. I will make just one point.

Professor Glennon, an old colleague from our years with the committee, made reference to the Steel Seizure case. It is very common for people analyzing the separation of powers issue to do that. I think it is an error, however, with respect to foreign affairs.

I would note that Prof. Louis Henkin, who testified here recently, I understand—though I have not seen his testimony—notes in his book, "Foreign Affairs and the Constitution," that the Steel Seizure case is not generally viewed as a foreign relations case. In the case of Goldwater v. Carter in 1979, four members of the Supreme Court, including the current and immediate past Chief Justices, distinguished that case from Steel Seizure, arguing that—unlike Goldwater and Curtiss-Wright—Steel Seizure was not a foreign affairs case. And, if you read both Justice Black's majority opinion and the famous Jackson concurring opinion in Youngstown—which, at the time, of course, was joined by not one other member—they both stressed that at issue in Steel Seizure was a President who, although he made reference to his Commander in Chief power, was trying to seize privately owned steel mills. Under the fifth amendment, the President is not empowered to seize privately owned property of U.S. citizens for any purpose without due process of law, and certainly the Commander in Chief power has to be exercised pursuant to all of the other constraints in the Constitution.

So, I would argue that relying upon the language in the Steel Seizure case is a serious error in trying to understand foreign affairs powers; because, in that case, the President was not exercising his Executive power of general control over foreign relations; but, rather, he was infringing upon the constitutional rights of U.S. citizens.

Senator BIDEN. I assume, Professor Glennon, that you would like to say something.

Mr. GLENNON. Mr. Chairman, I think that Mr. Turner's theory concerning the irrelevance of the Steel Seizure case is belied by the facts of the Steel Seizure case, the analysis of the Court in the Steel Seizure case, and the subsequent analysis of the Supreme Court in Dames & Moore v. Regan.

In the Steel Seizure case, President Truman argued that seizure of the steel mills was permitted under his independent power as Commander in Chief because of the indispensibility of steel as an element in the war effort to prosecute the war in Korea.
The Supreme Court held that that was not so; that his independent power as Commander in Chief did not support the seizure of the steel mills.

In 1981, the issue of the validity of the Iranian hostage settlement agreement confronted the Supreme Court, and the Court had to decide what analytical framework was to be applied to resolve that dispute. Justice Rehnquist wrote, in speaking for a majority of the Court, that the analysis of Jackson in the Steel Seizure case "brings together as much combination of analysis and common-sense as there is in this area." He proceeded to apply the analysis of the Steel Seizure case to resolve the validity of this international agreement.

Mr. Turner might be right, but I would be inclined to agree with Chief Justice Rehnquist.

Mr. Turner. This is very important, so let me try to be precise.

I think in both the Iran Claims case and in the Steel Seizure case the facts involved the property rights of individual American citizens. They were in that respect essentially domestic disputes. All powers of the Constitution have to be exercised consistent with all of the constraints of the Constitution.

If the President decided that he was angry at Canada, and wanted to send the Army up to launch an invasion of Canada over some economic or political grievance, before he could do that—and in this case, I might disagree with my dear friend, Taylor Reveley; what Taylor said was ambiguous—but if he meant to say that the President could essentially launch a war if he felt it were an emergency and then to go Congress, I would disagree.

I think the President can only launch a war, the kind of war with which declarations of war have historically been associated—which excludes a defensive war—after he has to come to Congress and obtained approval from both Houses.

But short of that, in Justice Jackson's opinion—

Senator Biden. Let me stop you there.

How about if the President of the United States concluded that he wished to send troops into Mexico because he believed that, absent doing so, the Communist Sandinistas would take control of Mexico City? Would he be able to do that without the consent of Congress?

Mr. Turner. I would argue that if the Government of Mexico asked him to come in, he might well be able to do it, but—

Senator Biden. Without Congress' approval?

Mr. Turner. Well, it depends upon the specific circumstances.

If he is going in for the purpose of engaging in war or in sustained hostilities, I would argue that he should, ideally, come to Congress first. But there are some cases where, for example, under a treaty, I can make an argument that the President—let's say if the Soviets invaded Germany tomorrow—I could make you a constitutional case that the President could respond to that immediately, even ignoring the fact that we've got tripwire troops there that he would also be permitted to protect.

But, my own judgment is, which is in part based on constitutional and in part political consideration, that he ought to get the approval of Congress as quickly as possible, if not in advance.
Senator BIDEN. Professor Turner, I think there is no one who would disagree that it would be better if the President and the Congress agreed. But the key question is, If the President concludes that he needs to project U.S. forces into an area where any reasonable person would expect that there would be a resistance to those forces being placed there, does he need congressional approval to do that.

Mr. TURNER. I would argue in general "No," but in some specific cases, he might.

The reality is that many decisions of how the military forces of the country are deployed during peacetime run the risk of another country getting angry and attacking or declaring war against us.

The question of whether the President may use the Navy to convoy merchant ships first came up in 1798, when Congress was passing a law in the House that had a provision "authorizing" the President to use the Navy to convoy ships. Speaker of the House John Dayton, the youngest man to sign the Constitution, said "We can't have this clause in here because the President already has the authority to use the Navy to convoy ships, and to put this language in the bill might someday be viewed as a precedent to argue that he did not get that power from the Constitution."

Now, what you are suggesting—deploying the Army into a foreign country against that Government's will—the only justification for that would be if the President could argue it were necessary for a real defensive purpose; for example, if that country had seized American civilians.

Senator BIDEN. Take Nicaragua.

Mr. TURNER. First let's take Iran and Mayaguez. I think the President had the right to send United States forces into Iran and into Cambodian territory to rescue endangered Americans without congressional authorization.

Nicaragua is a more difficult case. The Congress itself has found, by law, that Nicaragua is engaged in a flagrant violation of the rules of international law contained in article 2(4) of the U.N. Charter, article 18 of the OAS Charter, and other legal instruments. They have clearly been engaged in armed aggression against their neighbors, and the United States does have some treaty commitments to assist victims of armed aggression in the region.

My preference would be for the President to come to the Congress if he felt we should use armed force against Nicaragua.

Senator BIDEN. I understand your preference. But I am trying to establish clearly what the issue here is. I was here when we passed the War Powers Resolution, and we all have varying opinions on why we passed it. But rather than go back and argue why we did, our task now is to determine whether to keep it, throw it out, put in a new vehicle, or amend the existing vehicle.

So, let's not argue about Vietnam and what got us where we are today. We are revisiting this now in a different atmosphere.

The real issue up here is that many of us in Congress are concerned that any President, Democrat or Republican, will, under a stated authority, the Commander in Chief clause, decide to commit U.S. forces into a situation that establishes a substantially new foreign policy without any participation by the Congress. The concern
is that the President, essentially by the projection of forces, can make new policy. And, in the nuclear age and given the complexity of the world, those hostilities could quickly widen with potentially dire consequences.

We are not worried about 1898 or in 1798. The stakes were not as high then.

But if a President sends forces into a half dozen regions of the world, it has the potential to produce a showdown between the Soviet Union and the United States of America. Any showdown between the Soviet Union and the United States of America has the potential for nuclear annihilation.

So, that is one important and practical reason why everybody is either arguing the President should have the authority to act unilaterally or should not. But the issue also applies to situations where the scope of hostilities would in all probability remain limited but where there are fundamental issues of policy involved. For example absent the existence of an emergency which involves clearly visible U.S. interests relating to American military personnel or American citizenry abroad, does the President without consulting Congress have the constitutional authority to say tomorrow "Because I believe that the Sandinistas are a destabilizing threat to the Western Hemisphere, 75,000 American troops have invaded Nicaragua for the purpose of restoring democracy and stabilizing the hemisphere." Does the President have the authority to do that?

Mr. TURNER. The answer depends upon the specific factual circumstances, Senator, but the Nicaraguan case is obviously the one you have in mind. But let's look at it more broadly.

Senator BIDEN. No, no. Let's look at that one. If you don't have an answer to that one, let's pass.

Mr. TURNER. Let me have just a moment.

As Commander in Chief, the President has the power to deploy the military forces of the country anywhere he deems necessary short of engaging in war, and if that includes sending them where another country may be tempted to launch a war against us, that power has been conveyed to him.

Senator BIDEN. If, in fact, that country would resist, is that launching against us?

Mr. TURNER. I'm not talking about invading countries.

If he goes into a country at the request of the government, as in Beirut—many of you all complained, if you remember, that he was infringing the prerogatives—

Senator BIDEN. I understand all that. I'm trying to deal with your expertise here.

Mr. TURNER. The strongest legal case in which a President could order U.S. forces to invade another country would be if he could justify the action as defensive—for example, in response to armed aggression against this country, its citizens, or arguably an ally. For example, if Nicaragua continued its aggression against El Salvador—again, it is the kind of situation he ought to come to Congress on, but I am not prepared to say that under no circumstances could the President legally use force against Nicaragua.

On the other side, if I were talking to Abe Sofaer, I would strongly urge him before advising the President that it was legal to
commit American forces to invade Nicaragua, to advise that he go to Congress and get affirmative authorization.

I agree with Hamilton. In a case, the consequences of which could involve war, the President ought to exercise no doubtful authority. But, in particular, if you have a regional treaty, if you have a clear case of armed aggression by one party against others, certainly the President ought to be able to “rattle the saber” if you will, as a means of trying to deter aggression and restore peace. Whether or not he can go further than that, I think the best answer to that question is a political one, and that is he ought to come to Congress and get your approval—as occurred in Vietnam. I don’t want to say as a matter of law that he can’t do it.

Senator Biden. I have one last question for you and then I will let all of the panelists comment on both of these and I will let my colleague interject.

If we don’t satisfactorily negotiate a base agreement with the Philippines, can the President say—without the authority of Congress—“Mrs. Aquino, tough luck, we’re staying, we’re moving in, we’re going back to the old days”?

I’m serious. Can the President do that, because those are clearly the most important bases in the entire Pacific Basin and critical for American security interests. If the Filipinos say “Get out,” can the President say “No way, we’re staying, I don’t care what the Congress says, and, by the way, we’re moving into Manila”?

Mr. Turner. I would say “No.”

Senator Biden. OK.

Now, would you like to comment?

Senator Adams. I wanted to ask a question on this.

Senator Biden. As long as you don’t take them off this area.

Senator Adams. No. I want to stay on this question.

You mentioned that if we have a treaty or a series of treaty commitments and one of the parties to that feels threatened—the example used by the chairman. Are you stating that the President can invade another country that threatens one of the signatory countries to those treaties, and commit our Armed Forces to war without a declaration of war?

Can we do it? This is a practical question. Could we invade Nicaragua based on the fact that we felt that Nicaragua was invading El Salvador?

Mr. Turner. This is extremely important and I don’t want to mislead you. Let me give you a couple of examples.

Senator Adams. No. Could we first, Mr. Turner. Then give me examples.

Mr. Turner. But it is such a complex area——

Senator Adams. No, it’s not complex. It could happen tomorrow. I mean, we have the situation and we want to know what the power is of the President.

We have had people up here say that the President can do anything in committing troops. We have had some testify that no, if there is an offensive war and you go into somebody else’s territory, you’re sending troops, and that probably requires a declaration of war.

Mr. Turner. I agree it requires prior congressional authorization.
Senator ADAMS. I think I have heard you say that if there is some kind of treaty and we are indirectly threatened, the President can move troops in and can attack. The chairman used the example of 75,000 troops into Nicaragua if there were a Nicaraguan incursion or attack on El Salvador.

Can he do that without a declaration of war?

Mr. TURNER. I would want to look very carefully again at the Rio Treaty before making such an argument—but it is theoretically possible.

The basic argument would be that if the treaty makes an attack on a treaty partner an attack on the United States as a matter of law, since treaties are part of the supreme law of the land and the President is required by the Constitution to faithfully execute the law of the land, and the President, as Commander in Chief, is authorized to act defensively to an attack on the United States, he could in such circumstances act without further authority.

Senator ADAMS. Wait a minute. You also have a law of the land, which is ignored, in the War Powers Resolution. It says that the President should be doing certain things, and certainly most scholars have said that these cover offensive land actions. And those offensive land actions can be categorized that we will go ahead.

You forget, I think, one portion of the Gulf of Tonkin Resolution. I came to Congress just after it. I was here during the time of enactment of the War Powers Resolution. The War Powers Resolution was in part a result of the invasion of Cambodia by President Nixon which meant that it fit the definition that some of the scholars have given. Some scholars have said that the only time you declare war is when you are going to create a world war. I believe that is correct, is it not, Mr. Chairman?

Senator BIDEN. If the Senator would yield, he is forgetting that I still have the floor. I think this is a worthwhile area to go off on. Senator ADAMS. I don't want to go off on anything. I want to stay on the point.

Senator BIDEN. My point was, absent a war powers act, under the Constitution, does the President have the authority to deploy troops in the examples I have raised?

I pursue this because the Secretary of Defense, accompanied by the Chairman of the Joint Chiefs of Staff, and a number of other people have come up here and said there is no restriction on the President being able to do these things. In fairness, I don't think I mentioned the Philippines then—but there was no restriction, they said, on the ability of the President to do the kind of thing I have suggested.

So, it is not just idle discussion that is interesting at a cocktail party.

But I would like to let the others make comments here on the questions that I have just asked.

Mr. REVELEY. On the Philippines, Senator, I think probably there, by any reasonable definition, you would be into aggressive war. In my judgment, the President cannot, unilaterally, by himself, engage in an aggressive use of force. It is not even clear to me that the President and Congress together can.

Senator BIDEN. So, the key is not U.S. interests, but aggressive.
Mr. Reveley. Yes, but I don't think that is very helpful. As a practical matter, if the President does commit troops, he and his lawyers and his political aiders and abettors will argue that the use of force is defensive.

Senator Biden. Let's look at this as a practical matter, and I am a practical politician—with all due respect, I think the people sitting up here, including my friends on the Republican side of the committee, are probably more aware of what practically motivates politicians than you all who are sitting down there.

Mr. Reveley. You are right about that.

Senator Biden. One of the practical facts of life is that Presidents or Members of Congress or anyone else—and one of you mentioned this before—are reluctant to do things that have already been defined as out of bounds.

The issue that I am trying to narrow down is under what circumstances the President is able, under his own authority, to project American forces into a situation—whether it be the Philippines or Nicaragua—where any reasonable person would expect armed resistance.

Mr. Reveley. The Philippine example, Senator, is seems to me is clearly an aggressive use of force. Just because we want a base in somebody else's country and it's in our national interest to have a base there does not give us a right under international law to invade that country and take a base. We would like to have lots of Japanese yen, too. But we can't go and seize Japan to get the yen.

If most reasonable people agree that a particular use of force is "aggressive" under international law, then I don't think you are going to find many constitutional scholars saying that the President alone may commit troops.

But that is a rare situation. That is at an extreme end of the continuum.

The far more difficult questions are Cuban missile crises and Nicaraguas, and there you inescapably confront disagreement on the constitutional score. The language of the Constitution and its Framers' and Ratifiers' debates, strongly suggest that in the Cuban missile crises and Nicaraguas you need prior congressional approval for American use of force. Two hundred years of practice suggest the opposite.

Senator Biden. I would argue that we have taken care of the Nicaraguan situation, short of the use of American forces, through the Intelligence Committees and the Intelligence Act. We disagree. We fight about it. It does not always work. But we have reached a ground upon which we mediate, negotiate, and constrain, or promote Presidential action with regard to use of non-American forces; that is, forces other than American troops.

Professor Glennon, would you like to comment, and then Professor Firmage, and then I will yield the floor.

Mr. Glennon. Senator, I think the answer that the Senate gave to your question in 1973 is probably the best answer that has been formulated, and that is the definition of the President's exclusive powers set forth in the Senate version of the War Powers Resolution which, in addition to those situations set forth in section 2 of the current version of the War Powers Resolution, recognizes Presidential power to introduce the Armed Forces into hostilities to
forestall an imminent threat of attack on the United States, and also to rescue endangered U.S. citizens and nationals located abroad.

The whole theory of this approach is one of emergency power, which derives from the intent of the Framers, from constitutional custom since the earliest days of the Republic, and from the functional attributes of the two branches. The theory is that, where Congress has time to act and an underlying policy judgment has to be made about whether we should invade Japan to get more yen or the Philippines to get bases, that is a judgment for the elected representatives of the people.

It seems to me that to argue that in those circumstances that the President can use armed force without congressional consent would be to rob the congressional war power of any meaning.

Now, Senator Adams raised a separate question and that is whether under such circumstances the President might infer authority to use the Armed Forces in hostilities from any treaty. There are 7 mutual security treaties now in existence with 26 different countries. If one of those countries is attacked, can the President, relying on a treaty, respond to a real or purported request from one of those countries to introduce the Armed Forces into hostilities?

The answer is "Absolutely not."

None of those treaties in existence gives the President an iota of war power that he would not have had in the absence of those treaties. Every one of those treaties makes clear—and the legislative history is abundantly clear, established by this committee—that the allocation of constitutional power to make war between the President and the Senate that existed prior to the ratification of those treaties was not affected by the Act of ratification.

If the President needed to come back to Congress for authority prior to ratification, he still needs to after the Act of ratification.

I might point out to the committee that I have written an article for the Columbia Journal of International Law on precisely this subject, which I will make available to the committee, if it wishes.

Senator BIDEN. Yes, thank you.

[The information referred to appears in the appendix.]

Senator BIDEN. Professor Firmage.

Mr. FIRMAGE. I agree fully with what Professor Glennon has just said and would underline his last point particularly.

I think there is no base to hoist yourself up by treaty to have a war power that the President simply lacks. That is the power of the U.S. Congress. No treaty grants that. No treaty can constitutionally bind a Congress and an administration not then in existence to go to war at some time in the future. Reid v. Covert laid to rest the notion, inferentially suggested by Justice Holmes in Missouri v. Holland, that the treaty power was somehow beyond the bounds of the Constitution. Only the Congress of the United States possesses the war power. Only a sitting Congress can finally, absolutely commit us to war.

I would quickly tick off my response to your central questions.

The President, in my opinion, must have congressional authorization to place troops in any situation that would likely involve hostilities.
Second, no request of a host state changes that in the least. That has some relevance to the question of whether or not we are violating international law. It has no relevance that I can see to the question of the constitutional allocation of power between the Congress and the President.

Third, I do not think—I will go beyond your hypothetical situation—I do not think that the protection of U.S. citizens abroad gives any such right of intervention. I think that is highly suspect in international law and without any base in constitutional law. The protection of U.S. warships, U.S. forces, and other public forces provides a far different and stronger basis for claiming a Presidential responsive act of defense, analogous to a surprise attack upon our country.

U.S. citizens abroad place themselves there under the sovereignty of another state. They can never legitimately be used as the basis of Presidential war.

Your other point regarding base agreements: absent base agreements in the Philippines, the President of the United States possesses no right to maintain troops there. No amount of supposed U.S. interest creates that constitutional power, absent action by the Congress of the United States authorizing such a base agreement with subsequent acceptance by the Government of the Philippines.

Finally, regarding the hypothetical invasion of Nicaragua, no notion of preemptive action can be allowed to justify such an invasion or the idea of self-defense, which is rightly in the Constitution, simply eats up the rule of who has the war power, and that is the United States Congress, not the President of the United States.

Senator BIDEN. I thank you and I yield to my colleague from North Carolina, Senator Helms.

Senator HELMS. I will yield to Senator Pressler because he has another meeting.

Senator PRESSLER. Thank you.

I shall just ask one question and put the rest of my questions into the record.

I thank my colleague for yielding.

I might say that I have just been informed that the Discovery has been successfully launched and is going very, very well. I think that is good news.

I want to compliment this panel. I especially want to compliment Professor Turner for his "Restoring the Rule of Law." I am one who believes the War Powers Resolution should be repealed and I think this is an excellent study.

I also apologize for not hearing all of the testimony this morning. We have had a caucus, plus I have another committee meeting.

We cannot anticipate all of the circumstances that might arise. Also, it seems to me that we already have the appropriations process to help Congress in its relationship with the President.

I certainly agree we should have consensus and consultation. I think in some ways the war powers legislation actually causes more of a strained relationship between the two branches of Government.

In a speech at Oklahoma University recently, Supreme Court Justice Sandra Day O'Connor, in referring to the problems relating to the separation of powers said that each of the three branches of
Government has its hands in each other's pockets. I think our Framers did a pretty good job with that Constitution, and I see the War Powers Resolution as an infringement on that.

My suggestion is that we repeal the War Powers Resolution. Very frankly, that probably will not happen. But I hope that in amending it or whatever we do, we take very careful consideration of Justice O'Connor's speech.

I am intrigued with all of the other legislation in the mid-1970's that also struck at the President's powers. Why do you think—and I will address this to any panelist—why do you think it took until 1973 before Congress legislated on the war power?

Before that time and since that time, the Executive had used force abroad in one way or another approximately 200 times in the 200 years of the Republic. Surely practice has made precedent.

Why did it take until 1973 before Congress legislated on the war power, do you think? I might just ask each of you for your assessment.

Mr. FIRMAGE. I would contest your conclusion regarding 200 incidents. I think when you begin to analyze those 200 incidents, which I have done in each case, you find that they collect into different groups, in the main, with maybe a dozen exceptions, into very understandable, justifiable interventions where the Commander in Chief clause is not really at issue.

In 1967 the State Department compiled an official list of 137 instances where it asserted that the President, as the Commander in Chief of the Armed Forces, committed acts of war on his own authority beyond the borders of the United States. Careful scrutiny of the examples provided by the Government belies this assertion; 8 of the Acts involved enforcement of the law against piracy, for which no congressional authorization is required; 69 were landings to protect American citizens, many of which were statutorily authorized; 20 concerned invasions of foreign or disputed territories, which, although illegal, were not acts of war if the United States claimed the territory; 6 were minatory demonstrations without combat; another 6 involved protracted occupations of various Caribbean states, which occupations were authorized by treaty; and at least 1 was an act of naval self-defense, which is justified by both international and municipal law. Even in the one or two dozen instances when the President has acted without congressional authorization, he has done so by relying falsely on either a statute, a treaty, or international law, never on his power as the Commander in Chief or the Chief Executive. Clearly, neither the Constitution nor historical precedent empower the President to initiate a state of war or engage in an act of war on his own authority beyond the borders of the United States. The Presidential warmaking power is strictly limited to defending against sudden attack—see F. Womuth and E. Firmage, "To Chain the Dog of War: The War Power of Congress in History and Law, pages 133 to 149, 1986.

Presidential action aimed directly against the sovereignty of another state, whether or not done under the subterfuge of acting to protect U.S. citizens abroad, is a very different and far more dangerous and utterly aggressive action, with no conceivable justification or authorization in the U.S. Constitution.
Mr. Glennon. I think that Professor Firmage's analysis is absolutely correct. In fact, his excellent book, "To Chain the Dog of War," contains an analysis of those incidents. I believe the current number cited by the State Department is 132.

The point that he and Professor Wormuth make is that, if you analyze them closely, it turns out that most of them are relatively minor uses of force, involving chasing bandits across the border, clashing with pirates, et cetera—not sustained, large-scale involvement of U.S. Armed Forces in hostilities abroad, not instances in which the state of the Nation was changed from peace to war.

It really is a fairly recent phenomenon that Presidents have claimed authority to do that without congressional consent—beginning, really, as Professor Henkin has pointed out, with the Korean war. It was, as Professor Firmage said, the tragedy of Vietnam that crystallized congressional thinking on this subject.

So, I think that is the answer to Senator Pressler's question.

Mr. Turner. I would argue that the real distinction here is whether it is an operation that would historically require a declaration of war, or is it something like going after pirates or some similar use of force. In the old days, before the U.N. Charter outlawed aggressive war, Presidents often authorized force against such small states that there was really no likelihood of any kind of serious response. In most of those cases, Congress did not question such uses of force.

I agree that Korea was the first major exception. I personally think Truman was wrong in Korea. I think he should have gone to Congress.

I would note that Arthur Schlesinger, Jr., Henry Steele Commager, and others strongly defended Truman's use of force in Korea in those days. But I disagree with that view.

Your real question is why did they do it in 1973. I argued in my House testimony last month that Congress was a full partner in getting us into Vietnam and overwhelmingly supported the war until about 1967 or 1968, when the public turned against it.

Why they passed the Resolution in 1973 is, first of all, because public opinion did shift against the conflict, and they were trying to cover their tails, if you will. Second, it was because of Watergate. The veto override came right after the "Saturday Night Massacre," and I think there is a general consensus among people who have studied this that the Resolution's supporters would not have had the votes to override had it not been for the anger at President Nixon over Watergate.

Mr. Reveley. Three quick points, Senator.

First, I think you are absolutely correct that practice over 200 years—as well as the language of the Constitution and Framers' and Ratifiers' debates—has to be taken into account if we are to reach a constitutional consensus on the war powers. You can't ignore practice any more than you can ignore the Framers and Ratifiers or the text of the document.

Second, I think the War Powers Resolution was passed in 1973 for two reasons. The first was a reaction against a period of unusually vigorous Presidential assertion of war powers, assertion that had gone beyond the sorts of claims to use force that the President had made successfully in the 19th century and the early 20th.
Second, and far more important, the Resolution came up for a final vote in the context of Watergate. But for Watergate at white heat, I don’t think the Resolution ever would have passed.

Senator PRESSLER. I have some additional questions.

I ask unanimous consent to insert an article by John Silber, president of Boston University, which appeared in the New Republic on the War Powers Act.

I also ask unanimous consent to ask several questions for the record, and I apologize for my departure.

Senator BIDEN. Without objection.

[The information referred to appears in the appendix.]

Senator BIDEN. I have been told that Schlesinger, when he testified, and Commager, have since recanted their philosophy as “high-flying prerogative men.”

I guess we learn, or, hopefully, I will learn from them.

Senator ADAMS. Thank you, Mr. Chairman.

I want to thank the panel for their discussion. I want to go back to the particular point on consensus and whether or not something can be done when there is or is not a consensus. I am going to give you three examples, and these are not far-fetched. They are in the world that we have all lived in.

As the chairman stated earlier, we are not interested in just examining history but in trying to live in a world where we are now a superpower. We are confronting a superpower and maybe other growing superpowers in areas of smaller countries that can rapidly escalate. After all, World War I started in very small countries; World War II started in small countries.

I would say particularly let’s take, as a first example, Korea, which has been talked about.

As the chairman stated earlier, we are not interested in just examining history but in trying to live in a world where we are now a superpower. We are confronting a superpower and maybe other growing superpowers in areas of smaller countries that can rapidly escalate. After all, World War I started in very small countries; World War II started in small countries.

I would say particularly let’s take, as a first example, Korea, which has been talked about.

What if we had not had a president that pulled back the general that brought us to a point where the Chinese entered into that conflict? Would that not have required a declaration of war at some point, if we were engaged with the Republic of China in Korea, as opposed to what we are doing.

Professor Glennon.

Mr. GLENNON. Senator Adams, I think you have raised a point that answers the objections to the time limits in the War Powers Resolution, because it highlights the fact that what the critics of the time limits really object to is constitutional constraints on Presidential use of the Armed Forces. Forget about the War Powers Resolution: When the President puts the Armed Forces into hostilities abroad, at some point, as the magnitude of hostilities increases, the President constitutionally has to get congressional consent.

Senator ADAMS. Let me follow through with that. The other members of the panel can comment afterward.

That is the problem, and I am prepared to work with the chairman and others to make this act more workable. But in each of these cases, we have the beginning of a hostility, generally in a small country, and then an escalation that goes to what would ordinary be acts of war.

I mentioned Vietnam. We were moving then on Cambodia, another nation, which, as it turns out, we probably ended up causing
the destruction of that nation. That was beyond what was contemplated certainly in any Gulf of Tonkin Resolution.

Even though our debates up here were unsuccessful in triggering the Act in the Persian Gulf, we did prevent what many of us were concerned about, which was a land invasion of the Iranian area because of the Silkworm missiles and our ships being there, with no congressional policy, but just a Presidential policy.

It started first with some Kuwaiti tankers; then went to freedom of navigation; then all vessels; then an offensive action against the Iranian Navy, which was believed to be attacking. I am just thankful that we did not arrive at the point of the Silkworm missiles ashore.

So, the problem we are talking about up here is not theoretical. It is continual movement up, and at some point you cross the line.

Now, my question is if you don't have consensus in a democracy, you've got to have process. Process is the only means by which you divide a majority from a minority; then establish a majority position, so that the U.S. people, through their representatives, have said we are a majority committed to this military action.

That's the declaration of war power, and it is clear, through all the constitutional debates and down through the areas of these incidents, that it is a marshalling of major forces.

What did not happen in the Vietnam war was the Reserves were not called up, we did not go into a taxation program, and we never called it a "war." It was always an "incident."

But it marshalled U.S. powers. And those who could not be involved in that—the 18-year-olds and their families and the others—went to the streets because the consensus had not formed.

Now I don't know whether we want to call it a "declaration of war" or a "special authorization," but I would like to have any one of you tell me the process on the executive branch side and the congressional side that authorizes actions. Appropriations won't do it unless we put in a special provision in this law that says you can't have any money for any operation after so many days. You can operate on O&M a long time. I want the process that says we're in this, we're prepared to go to the next step, the minority has had its say, the majority has voted it, and the country is moving forward.

That is what we want.

You had your hand up first, Professor Turner, and then anybody else who wishes to respond, and I will ask no other questions.

Mr. TURNER. I think the process was established very well by the Founding Fathers, and that is the President, as Commander in Chief, can deploy whatever military force Congress gives him anywhere up to the point that he cannot launch a war. By that I mean that if you have a situation where a declaration of war would historically be necessary, the President must come to Congress.

Now, LBJ did that in Indochina after Congress pushed him into deeper involvement.

If you go back and look at the record of the 1950's, you find Senators like Hubert Humphrey, John Kennedy, and J. William Fulbright saying that the United States had to defend South Vietnam. First the Senate approves a treaty that covered both Cambodia and South Vietnam. Second, Congress passed a joint resolution—by a
vote of more than 500 to 2—saying the United States was prepared to resist aggression in this area, using such measures as the President determined, including the use of armed force; and it included in its parameters all of the SEATO countries and protocol states, which included Cambodia.

The Government of Cambodia, the Lon Nol Government, made a public plea in 1970 at the United Nations for help in defending itself against North Vietnamese aggression. We responded to that by sending in troops. The conflict was fully authorized by the SEATO Treaty, as implemented by the Southeast Asian joint resolution.

But, returning to the process itself, the key consideration for the Founding Fathers was the knowledge that you can't fight a war or even defend the country by antecedent laws—you can't have a law that says put the First Platoon on Hill 401 but keep Congress informed so it can pass another law in 30 days if the troops need to move, if the other side sends a larger force to the hill.

The command of military forces is a very important power. But by our Constitution we confine it in our Commander in Chief, who is elected by the people.

Now what you are saying is that times have changed. Today, there is a risk that if you even send a small unit out, the Soviets may decide to get involved—and it could get us into World War III.

What you are saying is that time has created a need for greater constraints, but even if you are right, you still can't amend the Constitution by law. You have to have a constitutional amendment to change that power.

Senator ADAMS. No, no, no. I am not saying that the time has changed to add greater constraints. I am stating that we already have the constraints and that there needs to be a process for using them so we don't declare war each time.

Mr. TURNER. Of what sort?

Senator ADAMS. Like in the War Powers Resolution, where you have the President say "I'm going to the Persian Gulf, I want the Kuwaiti tankers, here is what I want voted. Vote it or not."

Then, if there is a decision that we're going to invade Iran, that is a different kind of operation. It could be included in the first one if the President wanted to do it, or not.

But there must be a way of communicating with the Congress when you are in a major, sustained operation.

Professor, I'll state to you that we have been in the Persian Gulf for over a year and a half. The Joint Chiefs of Staff said to me that it was costing us $50 million a month, and this may well be supported by the Congress. But the Congress has never been involved in what is a sustained operation, which included offensive operations at certain points.

I think the Congress would have authorized those. I don't know whether they would have authorized an invasion of Iran.

That kind of use of the power to declare war and the powers which are connected in it—to take prizes and all of the other constitutional powers, which are carefully separated, so that we didn't have a king—from the Presidential power of Commander in Chief—why nobody in this Congress ever has tried to say to the President how many ships you fire and which fires where and
where they are located. But the policy of how big is this going to be, how many countries are we going to invade, how much money is it going to cost, that is what we are trying to get a system for establishing.

Professor Glennon.

Senator Helms. Excuse me, Senator Adams, but how long are we going to go beyond the red light?

Senator Adams [presiding]. I just got on with my questions, Senator Helms. The chairman has authorized us to finish our questioning. I thought you had passed on, but I would be happy to yield to you in just a moment.

Senator Helms. I had just passed on for one question from Mr. Pressler.

Senator Adams. I had been here and he had not given me an opportunity to question yet for about 2 hours. I was just trying to get the answer. Then I would be happy to yield to you.

Senator Helms. Very well.

Mr. Glennon. Senator Adams, the question that you raise is, what is the process by which we determine where the bright line is to be drawn? Of course, the War Powers Resolution was intended to be the authoritative, legislative answer to that question. Section 4(a)(1) purported to draw the line at the point when the Armed Forces are introduced into hostilities or situations in which imminent involvement in hostilities is clearly indicated by the circumstances.

The intent of the framers of the War Powers Resolution was that a report would be automatic and that the 60-day time period would be triggered when events specified in section 4(a)(1) occurred.

As you well know, it has not turned out that way for a variety of reasons. The War Powers Resolution in practice has not been self-executing.

Senator Adams. There has been no trigger, has there, Professor?

Mr. Glennon. That’s quite right. The trigger has been blurred by the fact that there is not one but three reporting requirements in section 4(a), and in the absence of a specification of the paragraph of subsection (a) under which a report is submitted, it is anybody’s guess as to whether the report is a 4(a)(1) report or a 4(a)(2) report or a 4(a)(3) report. And the 4(a)(2) and 4(a)(3) reports do not trigger the 60-day time period.

Now, as you well know, in the case of the Persian Gulf, Congress has received a number of communications from the President. None of them has been specified as a 4(a)(1) report. It seems to me that the clear intent of the framers of the War Powers Resolution was that this was the quintessential situation in which a triggering report would occur and that, after a 60-day period had expired, the President would be required to withdraw the Armed Forces from that situation unless Congress had authorized their use there or extended the time period.

Well, that has not happened.

It seems to me that the solution is, one, to make the bright line even brighter by defining what’s meant by “hostilities” and requiring that the subsection of the report be specified; or a variation of that, which is the approach set forth in Committee Print No. 1; and, second, and this is most important, statutorily facilitating an
effort by an individual Member of Congress, such as Mike Lowry, to go to court and get a declaratory judgment or injunctive relief from a court in the event a President declines to comply with the Act, as he has in the case of the Persian Gulf.

Senator Biden [presiding]. Thank you very much.

Senator Helms.

Senator Helms. Mr. Chairman, I thank you very much.

As I listen to various comments by various panels and various witnesses, on this question, I am reminded of the three blind men of Hindustan, who paraded loud and long, "Aween," about an elephant not one of them had seen.

Now, Professor Turner, I happen to agree with you and I sympathize that you are outnumbered three to one this morning. But one thing is inescapable in all of the discussion: The War Powers Resolution was passed in a highly charged political atmosphere. And it was highly charged because of the emotionalism that had been whipped up by politicians and by the liberal media of this country.

The Vietnam war was probably the first war ever fought on the television screens of America.

I have often said to the boredom of my colleagues that if Franklin Roosevelt had to fight, had to prosecute World War II under the same restrictions and conditions that prevailed, that war would have been lost. And probably the French people would be making their vichyssoise out of sauerkraut today.

But there is no question about this thing being the bastard child of politics. There is no question about that.

It's just the same as we hear today about the "Reagan deficits," and all of the spending. Well, it was the Congress of the United States that passed the Impoundment Act, prohibiting the President from saving any money. It also completely ignored the news media, saying that no President can spend a dime, that has not been authorized and appropriated by the Congress of the United States.

So, just like the War Powers Act, the Federal debt and the Federal deficits are the handiwork of Congress. The dead cat is lying on the doorstep of Congress.

Now, as for the Vietnam war, it was protracted through several administrations, through several Presidents, and the reason it became such a bitter, open sore is that we sent hundreds of thousands of men around the world to fight a war we would not let them win.

The American people got sick of it. The news media portrayed it in their own way. And we lost that war.

Here, again, it was the Congress of the United States.

Now, Mr. Turner, since you are outnumbered three to one, I am going to confine my one question to you because I looked over your text, and I noted that you urged there be consultation between the President and the Congress. That's the way it has always worked heretofore.

This hostility between the executive branch and the legislative branch never existed before.

At the same time, you appear to oppose quite vigorously—and I agree with you—that there should not be any formal requirements for consultation because that is a can of worms that will be opened up politically again.
Now, I would like for you to elaborate for just a minute or two on your view that such formal requirements would be an unconstitutional infringement on the Executive's prerogatives.

Mr. TURNER. Senator, I would be quite pleased to do that.

Essentially, what I am arguing is that the Founding Fathers created the two political branches as coequal representatives of the people.

Senator HELMS. Absolutely.

Mr. TURNER. As coequal representatives, they each have a great deal of autonomy.

I have argued that in all of these areas, it is very important that there be genuine consultation. During my service in the State Department, when people came to me and said to consult with Congress about a decision made a day earlier, I would say to them, "Look, if you'd come to me 2 weeks ago, I could have consulted; now you are telling me simply to 'inform' Congress of a decision already made"—and that's not the way the system ought to work.

I am a big believer in genuine consultation and not just notification. But what I'm saying is that when you put it into law and insist on law, that the President must consult when you tell him here, that is comparable to the President, as Commander in Chief, calling up General Gray and saying "Send a battalion of Marines over and bring the Speaker of the House to the White House, because I want to consult with him."

It is unseemly, it is improper, it is not the way that coequal branches of a sovereign government ought to deal with each other.

The principle behind setting up what I used to call a joint commission on national security—and the concept predates my entry into this field by many years—to engage in consultation, is a wonderful idea. But you don't put it in a law saying that whenever these key congressional leaders blow a whistle, the President must run over and salute, or sit down and consult. That is not the proper way for the two branches to deal with each other.

If I were the President's counsel and you tried it, I would advise him not to go lest it be understood from this that he was now the center of the Congress and not the great coequal representative of the American people.

Senator HELMS. I thank you.

Mr. Chairman, I have some questions that I wish to submit to each of these gentlemen in writing, so that they can respond in writing, and particularly to Professor Glennon.

I don't want to develop a subject in public that I want to be made a part of the record. So, I am going to provide you, sir, with some questions, which I would appreciate your answering.

With that, I think we ought to move to the second panel. But before you do that, Mr. Chairman, I don't know any of the second panel personally except Charlie Rice. I have known Charlie Rice for a long time, and his advice and counsel have meant a very great deal to me. He is a professor of law at Notre Dame.

I might ask Charlie if he likes Lou Holtz as the football coach now.

Mr. RICE. Very much.

Senator HELMS. Very much. Well, Lou is also a good friend of mine.
I welcome Charlie.
I’m going to have to leave, but I think it would perhaps be good to move on to the second panel. Thank you, gentlemen.

Senator Biden. Gentlemen, before you get up, I would like to note for my colleague from North Carolina that I really think it has been more two and one-half to one and one-half.

Mr. Reveley was, I think, somewhere between Glennon and Turner, leaning to Turner on two points, and somewhere between Firmage and Turner, leaning to Firmage on one point.

Gentlemen, all of your testimony was extremely helpful. You all made very concise, straightforward statements, and the disagreement is helpful to this committee, not harmful.

I sincerely appreciate your time and your efforts in being here.

Senator Helms. Mr. Chairman, I did not imply any derogation of anybody.

Senator Biden. Oh, not at all.

Senator Helms. Everybody has to be somewhere on every issue.

Senator Biden. I realize that, and I think Mr. Reveley is a little more conservative than you gave him credit for. I don’t know.

Mr. Reveley. It varies with the time and the moment.

Senator Biden. I want to thank you all again. Seriously, thank you all very much.

I will now call our next panel, and I understand that some of my colleagues will have to leave. I apologize that we have kept you all for so long. But, as you can see, this is an area of great interest to many of us.

We truly appreciate your testimony.
In my judgment, the country needs war powers legislation. We need it to help solve the severe, debilitating war powers problem that afflicts us.

The problem is not that the President is deliberately, wickedly usurping ancient congressional prerogatives over war and peace. Nor is the problem that Congress is deliberately, wickedly invading hereditary powers of the President over the use of force.

The problem is that the country lacks a constitutional consensus about the process by which the President and Congress are to share authority over American decisions to use force. We continue to bicker over which branch gets to decide what, when. This bickering occurs at profound cost to the country. Four sorts of harm come quickly to mind:

1. The bickering poisons relations between the President and Congress. To be accused of constitutional usurpation is no fun. It engenders anger, fear, defensiveness, countercharges. Constitutional theologians from both sides — the President's and Congress' — insist with passion of truly religious intensity that their view of the Constitution is the Only True View, that all others are heresy. The fate of heretics in the hands of the righteous is well known.

2. The bickering undermines public confidence in the rule of law and in the legitimacy of both the President and Congress. The political branches of government cannot go on year after year accusing one another of illegality in one of the most sensitive areas of American life — war and peace — without seriously eroding the faith of the people in both of these branches of government.

3. The bickering prevents focused attention to policy, that is, focused inquiry into what the United States
ought to do about particular foreign and military situations, what our realistic alternatives are for dealing with them, what the costs and benefits of these alternatives are, and which alternatives we ought to pursue to maximize our national interest. Rather than focusing on these policy issues, the debate all too often focuses on process issues, on which branch is constitutionally entitled to decide what, when. Focused attention on whether the United States ought in the national interest to commit troops abroad is sacrificed to bickering over the precise way in which the President and Congress are to make whatever decision is ultimately to be made.

The bickering denies American war and peace decisions, first, the wisdom and, second, the staying power that can come only from having both the President and Congress meaningfully involved in our decisions to use force. It is unavoidable that the Constitution divides the war powers between the two branches; thus it is inescapable that for American foreign and military policy to work, the two branches must cooperate in the exercise of their overlapping prerogatives.

But wait, some say, these sorts of harm occur not because we lack a constitutional consensus on process but simply because the country lacks a current consensus on policy. We had a policy consensus from the end of World War II to sometime in the 1960's, they say, but now we've lost it and that's the problem. Well, of course, when people can agree easily on what policy to adopt (whether these people are spouses dealing with one another, parents and children, university faculties and administrators, corporate officers and directors, litigants, voters, or Presidents and Congresses) — when consensus on policy does exist, then little attention is paid to the nature of the decision-making process. But how often do people agree easily about difficult and important issues? History suggests not all that often. And the more difficult it is to get agreement on policy the more important it becomes to have agreement on process. Why? Two reasons:
(1) When people agree on how decisions should be made, that is, when they accept that a particular person or group is entitled to make a particular sort of decision, then they are far more likely to accept the decision that is ultimately made, even if they disagree with it as a matter of policy, than they are likely to accept such a decision if they believe it was made by people not authorized to decide. Every day in countless contexts people accept and support decisions whether they like them or not because the decisions have been made by a process that people thought was legitimate. In other words, agreement on process helps produce agreement on policy.

(2) When we disagree over both process and policy — over who gets to decide as well as over what the decision ought to be — a two-front struggle results, with dismal effect for focused inquiry into what we ought to do in our best interest. Sound policy suffers.

In short, process matters. We badly need a constitutional consensus on how the President and Congress are to go about making war and peace decisions.

B.

To reach at least minimal agreement on process, all the crucial constitutional threads must be drawn together. The President's constitutional theologians must stop ignoring the fact that the language of the Constitution and its Framers' and Ratifiers' purposes create an enduring role for Congress in American decisions to use force. At the same time, Congress' constitutional theologians must stop ignoring 200 years of practice under the Constitution. From George Washington's administration to date, practice also has been central to this country's constitutional journey. War powers practice indicates that, when Congress has provided the necessary tools to the President — men, money and materiel — and when Congress has not previously banned a particular use of force, then the President may begin it on his own initiative. Two hundred years of practice make that clear.

It is essential that we weave these threads together in war powers legislation.
We might just as well howl into the wind as try to put in place a process that ignores either the country's deep-rooted constitutional expectation of congressional involvement, on the one hand, or the country's equally deep-rooted constitutional expectation of presidential initiative, on the other. Both expectations must be met if we are to develop a war powers process that actually works.

For now, we should focus on the irreducible constitutional minimum: on the "nothing less" bedrock that must exist if Congress is to be involved consistently in decisions about the use of force and if the President is to retain the initiative that practice has given him and that he will exercise in light of the hazard, pace and complexity of foreign and military affairs and his greater capability than Congress to deal quickly and quietly with these affairs.

What is the irreducible minimum? In my view, it is:

1. Means to encourage the President and Congress to consult meaningfully together before and during moments of truth;
2. Recognition that, informed by this consultation, the President may act alone if he thinks it in the national interest, for instance, because he believes speed or secrecy is crucial to U.S. success; and
3. Recognition that, when the President alone initiates the use of force, it thereafter is for Congress to approve, disapprove or limit the use if Congress chooses to act.

The irreducible minimum does not include time limits within which Congress must either act to approve, or be deemed to have disapproved, presidential initiatives. It is far from clear that disapproval by inaction is constitutional; it is quite clear that Presidents will resist such a concept relentlessly and that Congress will rarely try to enforce it. Time limits won't work in the real world.

Is disapproval by concurrent resolution part of the irreducible minimum? It can go either way. After Chadha, Presidents will also resist relentlessly the concept that
concurrent resolutions can constitutionally curb their initiatives. But as a practical matter, if the President commits troops who remain in the field a week, two weeks, three weeks, two months after the initial commitment, and Congress by majority vote in both Houses acts to limit or end the use of force, it is most unlikely that the President will simply disregard such an expression of congressional will. If he did, Congress has remedies, for instance, the power of the purse.

In sum, the War Powers Resolution as passed in 1973 has not succeeded. It needs to be reduced to its most basic and workable elements. These elements, together, can lead the way to the constitutional consensus we so desperately lack. The consensus would involve less than either presidential or congressional theologians insist is their branch's constitutional due. But the consensus would work.

One final note: Some people say, if war powers legislation is to be so reduced, why bother to have it? Better to kill the 1973 Resolution outright and thereby vindi-
cate the presidential view of the Constitution, or better to beef up the Resolution to require Congress' prior approval for any use of force, except for a few specified sorts, and thereby enshrine the congressional view of the Constitution. And, anyway, the irreducible minimum just described already exists. The President and Congress don't need a War Powers Resolution in order to consult one another. The President has been acting alone and reporting to Congress from time to time without such legislation, and Congress can already act before or during presidential initiatives to block, limit or end them in a variety of ways, such as cutting their funds.

True, but simply because most of us could exercise daily, eat sparingly and oth-
erwise see to our bodies doesn't mean that most of us do. We are more likely to do it when pushed by an action-forcing regimen. The War Powers Resolution is an action-forcing regimen. It hasn't worked well so far because it carries too much bag-
gage, such as §§ 2(c) and 5(b). Stripped to its irreducible minimum, however, the
Resolution just might bring the President and Congress to engage one another constructively on questions of war and peace — to consult, let the President act first if he feels so compelled, but then report and let Congress go second, to approve or disapprove his initiative if it feels so compelled.

To repeal the War Powers Resolution, leave it as it is, or amend it to impose more restraints on the President would do nothing for constitutional consensus. Repealed, the Resolution would greatly disappoint expectations that Congress must play a sustained, meaningful role in use of force decisions. Left as it is, the Resolution would continue to work so fecklessly as to suggest that consistent collaboration between the two branches on the use of force is hopeless. Amended to try to restrain further the President, the Resolution would surely be ignored by just about everyone. Cut to its irreducible minimum, however, the Resolution could lead us to constitutional consensus.

C.

The rest of my testimony is in two parts. The first puts flesh on the conclusions above about what the text of the Constitution, the Framers and Ratifiers’ purposes and two centuries of practice have to tell us. Part II is a detailed analysis of the War Powers Resolution that first appeared in my book War Powers of the President and Congress: Who Holds the Arrows and Olive Branch? Though completed in 1981, the analysis remains telling in most respects today.
OLD CONTROVERSIES OF NEW IMPORTANCE

For nearly two centuries the war powers have bedeviled a host of Presidents, Congressmen, and those few judges willing to deal with them in court. Through all, the nature of these powers has remained more unsettled perhaps than any other mainstream of American constitutional law.

The respective constitutional prerogatives of the President and Congress over war and peace were of consuming concern to Americans while Washington, John Adams and Madison held office. Nor have there been any administrations since in which the nature of these prerogatives has not been debated with some heat. Controversy has persisted in part because Americans have frequently had to decide whether to fight. Decisions to use armed force have been made well over a hundred times since 1789, and decisions against its use at least as often. Persistence also reflects the weighty nature of the subject. Profound consequences may accompany the use or non-use of armed force. Disputes of corresponding intensity have arisen over the extent to which each branch is entitled to set policy.

Passion and dogged adherence to positions aroused on this account have been given new edge precisely because the disputes have concerned separation of powers. Presidential and congressional zeal in defense of real or imagined prerogatives is traditionally acute. And argument over the allocation of war powers conjures up two of our most cherished political bugbears: the fear that American democracy will perish, choked by presidential tyranny, and the obverse dread that it will smother amid congressional indecision and parochialism. With stakes so high, partisans have been loath to leave the constitutional fray.
Persistence has resulted, too, from the accumulation of unresolved controversies. Constitutional uncertainties about the division of the war powers between the President and Congress have not been cured by formal amendment, and, unlike most other areas of constitutional confusion, there has been very little light shed here by judicial decisions. Moreover, post-1789 practice regarding the division is often inconsistent. Most plausible and many quaint allocations of the war powers between the two branches are supported by one bit of precedent or another. Contrary divisions of control have existed in fact, and contradictory statements have been made by different people about what sorts of allocations are required. With unsettling frequency the same luminaries (Madison, Hamilton and Fulbright, for example) have varied their constitutional conclusions with changing times.

Such flux has been encouraged by our general tendency to collapse the constitutional question of where decision-making control lies into the policy question of what we would like the President or Congress to do about a pending situation. This emphasis on immediate result rather than on long-term constitutional structure has been with us since 1789, but never so emphatically as when the Cold War went sour in Indochina, curdling the prevailing taste for presidential prerogative. Inevitably, then, recurrent disputes over the war powers of the two branches have fueled future controversy almost as often as they have resulted in case-by-case definition of how authority is to be split between them.

While the war powers present no novel constitutional issues, since the Second World War they have presented issues of wholly new dimensions. True, foreign relations were central to survival during the first generation under the Constitution. European Intervention in American affairs was an armed reality through the War of 1812. At times during the balance of the nineteenth century, the United States was internationally threatened, acutely during the Civil War. But through most of the 1800s, security
was an easy outgrowth of rising American strength, geographical isolation, modest military technology, and European balance of power. Security problems abroad centered on the protection of Americans from pirates, primitives, or weak states and on the consequences of manifest destiny in North America.

Times changed with the Spanish-American War. Militarily, politically, ideologically, economically, and legally the country has found itself increasingly threatened since 1900, and increasingly forced to react to developments more numerous, rapidly evolving, and complicated than before. The changed international environment has placed a new premium on informed, expert decisions made in accord with overall American objectives. It has valued rapid, flexible action and a willingness to make hard choices.

Especially during the last three decades, we have had a threefold change in circumstances: in our capacity and in our will to use force abroad and in the consequences of that use. The purely physical ability of postwar America to commit its military abroad in large or small numbers, swiftly or slowly, for days or years, vastly exceeds the country's conflict capacity before 1941. America's willingness to intervene abroad also stands in revolutionary contrast to a previous tradition of non-involvement except to trade, defend American citizens and property beset abroad, expand our boundaries, and police the Caribbean.

Ironically coupled with this new capacity and will to use force abroad are consequences of intervention that defy prediction and risk catastrophe more relentlessly than ever before. Since 1945 the pace, complexity, and hazard of foreign affairs have grown exponentially. A misstep invites troubles unimaginined when the United States was safe behind its ocean moats. Even the time when weak states might be "policed" with little risk of violating international law and political sensibilities has passed. No more with relative impunity may the American military punish backward peoples who
have attacked our citizens and property, or pursue criminals across the borders of weak states, or occupy and administer dissolute Caribbean countries. The war powers do indeed pose old controversies of new importance. More than at any time since 1789, we need to understand and order the process by which this country decides when and how to use its military abroad.

CONSTITUTIONAL DETERMINANTS

There have been four main influences on the division of authority over war and peace between the President and Congress: (1) the text of the Constitution's war-power provisions, (2) the purposes of those who wrote and ratified the text in 1787-88, (3) evolving beliefs since 1789 about what the Constitution requires, and — irrespective of text, purposes, and evolving beliefs — (4) the various allocations of control over the war powers that have existed in fact between the President and Congress during the past two centuries.

Determinants (1) and (2) are reasonably straightforward guides for constitutional interpretation. Determinants (3) and (4) are more convoluted. Together they make up what is generally termed "practice," or "usage." Practice has been shaped not only by the constitutional text and decades but also by factors of three other sorts: the hazard, pace, and complexity of America's international circumstances at any particular time; the respective institutional capabilities of the President and Congress to cope with these changing circumstances; and the shifting balance of political strength between the two branches, which has helped the President at times and Congress at others to greater control over war and peace. It is historical fact that all of these factors have contributed to the allocation of the war powers between the President and Congress. More important, they will all continue to contribute, barring a radical change in American habits.
The Text of the Constitution

If we could find a man in the state of nature and have him first scan the war-power provisions of the Constitution and then look at war-power practice since 1789, he would marvel at how much Presidents have spun out so little. On its face, the text tilts decisively toward Congress. Comparison of Articles I and IV with Article II shows that most of the specific grants of authority run to Congress. Reading them straight through provides an insight that nothing else can into how the Constitution itself divides the war powers. The sequence in which the text assigns authority to each branch, the location of certain provisions relative to others, and the simple weight of the words devoted to Congress as opposed to the President are as telling as is the precise language of the grants.

In addition, provision for suspending habeas corpus during military emergency is set out in the legislative, not the executive, article of the Constitution. And state war powers are placed with the congressional grants, rather than in Article IV with other state concerns.

Moreover, of the few specific grants of power given to the President, two of the most important (over treaties and major federal appointments) he shares with the Senate. Thus the text supports argument that, in those areas of foreign affairs where making policy and providing tools to implement it are not committed to the legislative process, they are held jointly by the President and the Senate (the executive element of Congress), except for certain ministerial functions most efficiently left to one person, for instance, military command and law enforcement, and, except for powers of limited war or peace importance, such as granting pardons and commissions.

Provisions giving Congress and the President weapons with which to coerce one another again run heavily toward the legislators. Under Articles I and II the Executive
can try to mold Congress through information and recommendations, by the veto, and through calling or not calling special sessions. He can attack the legislators in his public statements but lacks authority to remove them from office. The text, on the other hand, allows Congress to negate all of these executive spurs, and the President with them. Under its Article I legislative authority, Congress may supply its own information and recommendations and override presidential vetoes. It may also refuse to pass legislation dear to the Executive, and it can investigate other branches of government preparatory to lawmaking or while overseeing the execution of existing acts. Either or both houses may pass resolutions censuring the President, and together they can dispose of him "and all Civil Officers of the United States" through impeachment.

But more important in the real world than the congressional dominance suggested by the text has been the fact that the language does not unavoidably preclude broad presidential prerogative. Congressional control is not established beyond a reasonable doubt. There are three grounds for uncertainty about the text's meaning.

First, many words and phrases in the Constitution's provisions on war and peace are generality itself — for instance "declare war" and "commander in chief." They are neither self-defining nor susceptible to one meaning applicable in all circumstances. Each generality, accordingly, can be made concrete in many ways. And whether expansively or narrowly construed, each has a number of different meanings, reflecting the factual differences in the war-power contexts that it governs. Thus, whether an ample reading of the declaration-of-war clause is linked with a spare interpretation of the commander-in-chief proviso, or vice-versa, the meaning given both provisions will vary with the type of action in question, its purpose and costs, whether there is a need for speed or secrecy, the tools required to implement it, and so on. "A word is not a crystal, transparent and unchanged," Mr. Justice Holmes suggested. Rather, he said, "it is the skin of a living thought and may vary greatly in color and content according to
the circumstances and the time in which it is used." While this cannot fairly be said of all words, it certainly fits many of the crucial provisions in the war-power text.

Second, doubt also exists because the text gives certain powers to the President and others to Congress that can be read to cover the same areas in mutually exclusive fashions. These competing grants permit each branch to claim authority over many common aspects of the war powers. Edward S. Corwin spoke of "logical incompatibilities" and said that the "Constitution, considered only for its affirmative grants of powers capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy."

In fairness to the text, illogic and struggle do not have to characterize its affirmative grants. Struggle rises to fever pitch only when expansive readings are given to ill-defined Article II powers of the President, that is, when the clauses dealing with executive power, law enforcement, and military command are construed to involve the President in areas over which Article I has given Congress more explicit grants of authority. Competition is greatly lessened when congressional authority is read generously and presidential sparingly, for the Constitution provides the Executive with far fewer clearly defined responsibilities than it does Congress.

Third, in addition to ill-defined, frequently competitive provisions, there are also numerous gaps in the war-power provisions. Though the text deals directly with some of the issues, it conspicuously fails to speak to others. It says nothing, for instance, about which branch controls deploying ships on the high seas, stationing troops on foreign soil or declaring neutrality in other nations' struggles.

The Constitution does impose one iron demand on the President and Congress: that they cooperate if any sustained venture for war or peace is to succeed. Even if congressional authority is most broadly construed, Congress must work its will through the legislative process, and the President is very much part of that process. Under
Article II, Section 3, he determines when to call Congress into special session, should it not be sitting, on "extraordinary Occasions." Also under Section 3 he may provide Congress with information on the state of the Union and recommend such "Measures as he shall judge necessary and expedient." And under Article I, Section 7, he may veto any measure that the legislators wish to have become law of the land. Accordingly, the text limits congressional control by the President's discretion over special sessions, his right to importune the legislators, and his capacity to force them to raise a two-thirds vote in both houses to overcome his opposition. The constitutional role of the Executive in the legislative process has been sparingly construed at times, but its presence is textually assured. Too, he has at least an equal voice with the Senate over appointments and treaties. And even were the bulk of his remaining constitutional powers seen as those of a congressional agent, the indispensability of an agent grows with the ponderousness of his master and the scope of his assignments.

On the other hand, if executive authority is read to take maximum advantage of generality, competition among grants, and gaps, it still cannot give the President total control over American war and peace. There are many important matters — trade controls and money, to cite an important area of policy and a crucial tool — that require congressional consent under the unavoidable terms of the text. With less extreme readings of the Constitution, of course, the mutual dependence of the two branches becomes more pronounced.

**Purposes Revealed by Debates of the Framers and Ratifiers**

The Constitutional Fathers spent precious little time on what authority the President should have over foreign affairs, war and peace included. At issue in 1787-88 were far more basic questions about what sort of executive to carve out of existing congressional government — would it be single or plural, act with or without a council,
have veto power, how would it be chosen, for what term and with what possibility of reelection? These issues were rarely considered with an eye to the respective roles of the President and Congress in determining American foreign policy. To a large extent they were merely another manifestation of the conflict over the power of the central government, the federalists favoring a stronger Executive than the states rightsers.

That conflict was the transcendent problem for the Framers and Ratifiers. In 1787 it took eighteen days to move from Boston to Georgia. Economic and governmental divisions further separated the American people. Their constitutional necessities were, first, an allocation of authority between the national government and states that would create a viable union, and, second, a division of national authority between the representatives of the large and small states that would ensure ratification of the new plan of government.

Not surprisingly, when the Framers and Ratifiers felt they had to grapple with questions of war and peace, the emphasis was on the states, not on congressional and executive powers. Danger to the nation from state excesses in foreign affairs had provided important impetus to the Constitutional Convention. Since colonial days the states had been loath to subordinate their immediate individual interests to the common good. They were reluctant to bear their fair share of military burdens unless actually attacked, but prone themselves to incite Indians, European powers, and their sister states. Separate diplomatic activity by them and their violations of national treaties were frequent. Jefferson wrote Washington early in the Philadelphia Convention about the need "to make our states as one to all foreign concerns," and Madison concluded that "[1]f we are to be one nation in any respect, it clearly ought to be in respect to other nations."

By the same token the Constitutional Fathers found the supremacy of national treaties over state law far more troublesome than the manner in which the federal
government itself would make treaties. They were also vastly more concerned to define national authority over war and peace, already great in theory under the Confederation, than to split the war powers between the President and Congress. And they felt it necessary to grant emergency military powers explicitly to the states rather than to the President, probably on the assumption that state militia would bear the first brunt of repelling sudden attack.

The skimpy attention given congressional and executive war powers in 1787–88 was a byproduct as well of the relatively short shrift given foreign affairs as a whole. They were rarely mentioned in direct terms in either the Philadelphia or state debates. The only aspects that received real debate were war and treaty making. Emphasis went to treaties, though the two merged whenever the Constitutional Fathers turned to the termination of hostilities.

Predominant attention could go to treaties, because peace was expected to be the customary state of the new nation. America would avoid aggressive war abroad and enjoy in turn "an insulated situation" from the great powers of Europe. In Alexander Hamilton's words: "Europe is at great distance from us. Her colonies in our vicinity will be likely to continue too much disproportioned in strength to be able to give us any dangerous annoyance. Extensive military establishments cannot in this position be necessary to our security." This placid view of foreign relations precluded any explicit consideration of the use of American force abroad, except for defensive naval action to protect the Atlantic coast and American commerce. Only Hamilton suggested that it might be well to intervene in the Caribbean struggles of the Old World powers. Commercial relations were to characterize American relations abroad. Contacts of other sorts, not much desired, would be discouraged by hobbling treaty making. Gouverneur Morris opined that "[i]n general he was not solicitous to multiply & facilitate Treaties." The isolationist mood was perhaps a reaction to the trials of the Revolution.
It clearly fed on fear of great-power interference in the domestic politics of the fledgling state, especially through bribery of federal politicians. Whatever the cause, a notion of peaceful retreat did grip Americans in the late 1780s — John Adams going so far as to suggest disbanding the foreign service or reducing it from its already meager proportions.

Again, not surprisingly, it was the needs of domestic order, not foreign intervention, that provided the incentive for an executive who could lead the national army and navy. The demons arising out of that command for the Framers and Ratifiers were those of 1787-88, not ours. Their abiding fear was that the Executive would use the military for tyrannical purposes at home, possibly to make himself a hereditary prince, not that he would use it for ill-advised foreign adventures. Controversy centered on whether it was safe to allow executive command in the field, whether standing armies might be used by the President for domestic subversion, and whether he should be allowed to pardon traitors, since their crimes could stem from efforts to help him usurp power. For some of the Constitutional Fathers, the demons lurking in military matters were not executive but congressional: the legislators were said to hold both the purse and the sword, and thus feared as incipient military despots. For these Framers and Ratifiers the remedy would have been a national military thoroughly dependent on state militia, state officers, and state military appropriations.

In short, American problems and assumptions in 1787-88 did not anticipate all of ours. They were those of a small, divided people eager for national unity but fearful of federal tyranny. Domestic rebellion and foreign invasion were their "war" concerns. More important for them were safeguards against military usurpation at home than military preparedness during peace. Greatly more than we, they valued state authority over national, legislative power over executive. They preferred peace and political isolation to a world made safe for America. The institutional arrangements developed
in 1787-88 reflected these values and needs. A small, elite branch of Congress was planned as a plenary participant with the President in whatever American diplomacy might arise. State militias were to be the backbone of national defense; Congress the arbiter of military policy, by governing the existence of American armed forces and their commitment to conflict. The states and President would serve as interim defenders against sudden attack, pending opportunity for congressional decision; and the Executive would act as first general and admiral should the legislators choose to fight.

The Framers and Ratifiers did intend a more effective national executive than had previously existed in the Confederation Congress, influenced by their understanding of European practice and political theory, by prior legislative excesses in America, and by the dismal executive record of Revolutionary and Confederation legislatures. They wanted presidential aid in conducting negotiations, gathering intelligence, and in framing recommendations essential to policymaking. They hoped to obtain an executive check on foolish or venal legislators, and they sought presidential execution of national policy. But with rare exception the Framers and Ratifiers did not mean to surrender congressional control over setting American policy and providing tools for its implementation. Thus, they rejected executive hegemony over foreign and military affairs, as seen in European practice and political theory. Their model was Parliament's seventeenth-century steps to curb the British king, and throughout their debates ran a persistent fear of executive despotism.

Several caveats are overdue. A constant of human experience is that our conclusions about desirable allocations of power change with shifts in the basic facts on which those allocations are premised. The Framers and Ratifiers acted on the basis of many assumptions about reality that no longer hold, and they often seemed obsessed with ephemeral economic and security concerns. What the Constitutional Fathers would have thought given late twentieth-century realities often cannot be confidently
assumed from what they said amid the circumstances of the late 1780's. What if they had realized that peace and noninvolvement with the rest of the world would not be America's customary state; that the hazards, pace, and complexity of international affairs would burgeon, along with the country's capacity and need to work its will abroad; that treaties would hardly prove to be the guts of American foreign relations; that from the outset the Senate could not keep step with the President in diplomacy, and the militia could not replace federal forces; that the regular military would grow huge and stand during peace, little restrained by the need for Congress to raise and support it; and that the loyalty of naturalized citizens, the navigation of the Mississippi, and other compelling issues of the late eighteenth century would quickly fade?

There are, of course, aspects of the 1787-88 purposes not tainted by the passing assumptions and problems of those years. But any attempt to move from the specifics of the Framers' and Ratifiers' debates to resolve contemporary war-power issues must have its adequacy measured by reference to questions such as those above, and it must convincingly rebut the possibility that the extrapolation is too speculative to be meaningful.

Three other factors contribute to the hazards of extrapolating from 1787-88. First, records of the drafting and ratifying conventions come in fragments. The Framers did have an official secretary, William Jackson, but he restricted himself largely to recording motions and votes. Even these spotty notes were "carelessly kept." The Framers debated in secret, and Jackson's Journal remained undisclosed, first in the hands of George Washington and then in the Department of State, until it was published by an order of Congress in 1819, following the deaths of most of the Convention delegates. At that point, it was largely beyond verification or correction.

In subsequent years other accounts of the Framers' Philadelphia proceedings were published, most importantly the notes of James Madison in 1840. But Madison as
an old man had dubiously revised his account after the appearance of the Journal. His attempt to reconstruct events of more than thirty years before was necessarily clouded by the passage of time. Similarly, Charles Pinckney, attempting in 1819 to produce a copy of the plan that he had presented the Convention, could not remember which of four or five papers in his hands was the correct version.

Even when the available if checkered accounts of the Philadelphia proceedings are mustered, their overlapping discussion comes to very little for a convention that met steadily for almost four months. The standard compilation of the debates runs to less than 1,300 pages; the verbatim transcript of a proceeding of similar length could easily reach twenty times that volume. Records of most of the state ratifying conventions are even more modest than those of Philadelphia. When executive and congressional prerogatives clashed in the Steel Seizure Case, Mr. Justice Jackson lamented the "poverty of really useful and unambiguous authority applicable to concrete problems of executive power . . . . Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions," he said, "must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." The situation is not that grim, but available records are poor.

Second, though attendance varied, a total of fifty-five men participated in the four months of deliberation in Philadelphia, and many more took part in the state ratifying conventions. Divergent positions had to be compromised during the drafting of the Constitution. Compromise on one provision did not prevent efforts to reassert more extreme positions in later provisions. Interpretation of specific language varied among delegates. Because the Philadelphia Convention met in secret and its participants said little about its deliberations during ratification, delegates to the state conventions were largely unaware of the previously expressed views of the Framers. Even those Framers who were also Ratifiers and chose to tell their colleagues of the
Philadelphia debates did not always recall them with precision. Under the circumstances it is not likely that a majority, much less all, of those who voted in the federal and state conventions for the Constitution's war-power provisions held a finely drawn, common "intent" about their meaning.

Third, evidence of several sorts suggests that the Framers may have drafted with a measure of deliberate ambiguity. Any constitutional scheme that depends on separation of powers and on checks and balances necessarily allocates among the branches of government competing powers with vaguely defined frontiers of authority. Also apparent on the face of the Constitution is a drafting technique that eschewed detail for terse statement, leaving much to be assumed.

The Constitutional Fathers were practical men, and their laconic drafting technique may well have reflected awareness of the difficulty of laying down rules to govern situations whose dimensions are at best dimly grasped. James Madison in remarks to the Virginia ratifying convention was quite explicit about the need for experience, stating that "the organization of the general government of the United States was, in all its parts, very difficult. There was a peculiar difficulty in that of the executive. Everything incidental to it must have participated in that difficulty. That mode which was judged most expedient was adopted, till experience should point out one more eligible." As Washington noted, "Time and habit are necessary to fix the true character of governments." And though not a Framar, Thomas Jefferson suggested in 1816 what they "would say themselves" about the need for experience, "were they to rise from the dead."

Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in
government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead. 

. . . Let us . . . avail ourselves of our reason and experience, to correct the crude essays of our first and unexperienced, although wise, virtuous, and well-meaning counsellors.

Deliberate ambiguity may also have been a means of producing agreement among fractious delegates. Gouverneur Morris, very influential in drafting the final version of the document, explained that "it became necessary to select phrases which, expressing my own notions, would not alarm others . . . ." For men whose overriding objective was ratification of a Constitution promising a more viable union, the precise meaning to be given ambiguous but generally acceptable language could await resolution in practice.

It follows that all judgments about the Constitutional Fathers' purposes must be viewed with a cold and suspicious eye. Fragmentary evidence of the debates, the limited extent to which there is ever common purpose in any process as long, contentious, and complex as the drafting and ratifying of the Constitution, the chance that the text includes deliberately ambiguous language to be shaped by experience, the presence of gaps in intent caused by assumptions and problems peculiar to the late 1780's, and the dangers of extending what was said then about the war powers, in respect to concrete problems of that era, to unforeseen issues in unforeseen times — all these call for restraint about what the Framers and Ratifiers really had in mind.

With trepidation it can be said that there do seem to be certain long-term ends that the Constitutional Fathers sought by the way in which they divided authority over war and peace between the President and Congress. They were:

1. To ensure national defense
2. To hinder the use of the military for domestic tyranny
3. To hinder its use for aggression abroad
4. To create and maintain consensus behind American action for war and peace
5. To ensure democratic control over policy about these matters
6. To encourage rational war and peace decisions
7. To permit continuity in American policy when desirable and its revision as necessary
8. To permit emergency action for war or peace that has not yet been blessed by national consensus or democratic control
9. To ensure American capacity to move toward war and peace rapidly or secretly when necessary, and flexibly and proportionately always
10. To permit the efficient setting and executing of war and peace policy.

**Practice since 1789**

Ronald Reagan enjoys far more sweeping control over American war and peace than George Washington did, and Washington came to wield strikingly greater authority than had been expected for the President during the constitutional convention of 1787-88. The dominant trend in war-power practice has been presidential aggrandizement. True, the process has not been linear between administrations or even within them — compare Lincoln's war powers with those of Andrew Johnson or the prerogatives of the early Nixon presidency with those of his last year in the White House. But over the course of nearly two hundred years, presidential war powers have grown radically.

The growth of presidential authority over war and peace has stemmed largely from three factors: the evolving nature of those institutional characteristics of the presidency and Congress pertinent to the war powers; certain historical developments that have favored the Executive's characteristics over those of Congress; and, finally, the willingness of many Presidents, greater than that of Congress, to exercise their constitutional authority to the fullest and beyond.

During American retreat from Indochina, however, congressional influence over
war and peace came into flood tide after a period of unprecedented ebb. The legislators challenged the President's control over a range of action that seemed about to become permanently his by virtue of repeated congressional acquiescence. At the core of these matters was the commitment of American forces to undeclared combat on a large or small scale, openly or covertly. The constitutional text and debates account for much of this congressional resilience. They establish certain hard-core legislative powers and give rise to procongressional expectations which, in concert, create an enduring base from which the legislators can reassert their hold over war and peace from time to time.

In areas of hard-core congressional authority, Presidents have usually felt themselves able only to recommend action, sign or veto resulting legislation, and receive any delegation of authority that Congress offered. While these areas do not include most types of military action, they do cover most types of nonmilitary action with consequences for war or peace and most of the tools vital to implement policy of any sort.

Beyond these hard-core powers there has also been persistent popular feeling that the Constitution requires legislative approval of American use of force. Twentieth-century Presidents (unlike their predecessors) have rarely said that explicit congressional approval is needed for most military action, but the view has been pressed with vigor by others during this century. Even during the 1950s a remnant in Congress kept the faith, Senator Taft being their leading apostle.

The legislators' resilience also reflects the fact that congressional influence can be kept alive even though Congress as a whole declines to vote on the merits of a particular policy. The power of congressional committees to investigate and oversee provides a means of sparking national debate, molding opinion, and thereby influencing presidential action. Activity by individual Senators and Representatives can focus political pressure already existing outside Congress and bring it to bear on the Executive.
Legislators can work privately too, communicating quietly with the President to persuade him that his plans are ill-advised or subject to great potential opposition. Legislators can also work in tandem with rebellious elements in the bureaucracy to thwart presidential policy.

Finally, the door is kept further ajar for Congress by the restraints imposed on an Executive by his own capacity to persuade others to take steps he wishes taken. Other centers of power within the country — the bureaucracy, courts, and media in particular — lessen his freedom of maneuver. And the electorate stands ready to turn against him if his policies are perceived to be unresponsive to popular needs or, worse, illegitimate. Intensifying these restraints is fear of the President as a potential despot, a fear with us since 1787-88. In Arthur Schlesinger's terms: "The theory ... of the President as the great moloch generating its own divinity and about to swallow all power can be reproduced at every stage in our history, beginning with those who ... complained against the presidency of General Washington. Anti-Moloch pressures have as their by-product an opportunity for Congress to reassert its influence when in the mood."

To date, however, the legislators have proved unable to reassert themselves once and for all by establishing enduring channels for a congressional voice in decisions about war and peace. Like most of the rest of us, legislators tend to be result-oriented. Their concern with the particulars of policy often overshadows their concern with the institutional process by which it is made. Principal interest goes to what we should do (whether to intervene in Nicaragua) rather than to how we should go about deciding what to do (whether by executive fiat announced to congressional leaders shortly before the fact, by prior congressional approval, or by some intermediate method). Accordingly, most legislators become seriously solicitous of their prerogatives only when they disagree with executive policy. Then no oar is spared to set to rights presidential
“usurpation.” But once the tempest over policy has passed, concern with the institutional aspects of decision making fades also, to await the next tempest. The War Powers Resolution of 1973 may have signaled a change in congressional habits.
In the spring of 1965 the United States sent troops a short distance into the Dominican Republic. Although desiring to protect Americans threatened there by civil strife, President Johnson also feared that the Dominicans might be about to go the way of Castro’s Cubans. His prophylactic intervention in Dominican affairs provided the catalyst for recent struggles between the Executive and Congress over the war powers—Chairman J. William Fulbright of the Senate Foreign Relations Committee ended 1965 actively disillusioned with presidential direction of American foreign policy. The Indochina War massively spread his disillusionment. Spurred especially by the Fulbright Committee, many legislators began to reconsider Cold War assumptions about the proper roles of the President and Congress in controlling American use of force abroad. That reconsideration peaked only when President Nixon resigned.

Although attention focused on military action in Vietnam, Laos, and Cambodia, Congress was busy on related fronts as well. Legislators demanded that the President disclose all existing executive agreements with other states, and they moved to enlarge congressional control over future American commitments abroad, especially those with war and peace consequences. Efforts were made to cut foreign aid radically, including grants for military purposes, and to reduce spending by the Defense Department for weapons and overseas bases. Steps were taken to winnow the huge emergency authority delegated to the Executive by statutes passed and left standing
over the prior forty years (for instance, authority over the economy and the size of the armed forces). Legislators also tried to prevent the President from either impounding congressional appropriations, on the one hand, or spending monies not appropriated (particularly for military ends), on the other. Congress sought to pry information from the Executive branch on a timely and comprehensive basis, vigorously rejecting claims of executive privilege even as to matters said to involve national defense. There were attempts to ensure congressional oversight of covert actions, whether intelligence and military operations abroad or security measures at home. Senate confirmation was demanded for appointees to a number of newly crucial executive posts, and Senate review of nominees was taken as an opportunity to scrutinize and limit executive policy. Then, too, the legislators moved to lessen presidential influence by improving their own decision-making procedures, especially committee and budgetary practices.

All of this ferment was important to the division of the war powers between the two branches. Most telling were two of its aspects. First, Congress ended American involvement in the Indochina War by refusing to fund it any longer. The final in a series of fiscal restraints came in the Church-Case Amendment to the Continuing Appropriations Resolution of 1974, which banned outright the use of federal funds for any "military or paramilitary operations" "in, "over" or "off the shores of" the whole of Vietnam, Laos, and Cambodia. Never before had Congress used its appropriations power to withdraw the United States from a major conflict. Equally novel was the War Powers Resolution of 1973. Again, never before had Congress set out procedures for how the President and legislators are to go about deciding whether to fight. Together, these unprecedented developments offer Congress the best chance it has had since 1789 for an assured voice in war and peace decisions. Of the two, the appropriations ban suggests that the legislators will command the Executive's attention whenever they become restless, but the War Powers Resolution has the greater potential for long-term legislative influence. Cutting off funds is a drastic remedy not easily adopted even in extreme circum-
stances and one rarely conducive to thorough debate about policy. Systematic legislative influence is more likely to flow from procedures which cover mild as well as severe cases, which direct debate to the policy merits without fiscal distractions, and which provide unavoidable channels for communication between the Executive and Congress.

The Constitution’s necessary-and-proper clause permits Congress to adopt measures such as the War Powers Resolution, which reiterate constitutional requirements and define procedures for their implementation. Section 2(b) of the Resolution duly recites: “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 hereof.”

Congress’s authority to reiterate constitutional requirements, however, is far narrower than its power to define how they are to be implemented. No congressional discretion exists concerning the nature of the constitutional requirements (for example, under what circumstances the President may commit troops without prior legislative approval). So far as the necessary-and-proper clause is concerned, Congress’s only option is to reiterate the Constitution, elaborating perhaps but not changing it. Wide legislative discretion exists, on the other hand, over the choice of means: The President can be ordered to give up old methods of implementation (for instance, episodic, often untimely reporting of troop commitments) and adopt new ones (complete, prompt reporting).

As a practical matter, of course, the legislators do have some leeway with respect to the nature of the constitutional requirements. It comes from the same source as the President’s—uncertainty as to what the Constitution means. The greater the ambiguity, the greater the difficulty in separating a definition of constitutional requirements from the adoption of means to implement the Constitution. War-power legislation simply requiring the President to report his commitment of troops to combat seems to involve “means” alone. But such legislation
moves toward constitutional "definition" if it requires prior congressional approval for American use of force except on certain occasions defined in the statute; or if it puts a deadline on any use of force begun by the President alone unless Congress subsequently approves the venture; or if it permits Congress to end an executive use of force by concurrent resolution, that is, by a measure not subject to veto.

Once war-power legislation moves beyond means to definition, it has no more right to automatic acceptance by the President than his constitutional claims have to automatic acceptance by Congress. If the President signs the act, he concedes its claims, opening the way to consensus. If he vetoes it and is upheld, then no law formally exists, but prudence may lead the Executive to accept many of the measure's would-be requirements, and the legislators will have a concrete notion of the war powers that they think are constitutionally theirs. If the President's veto is overridden, he may still refuse to acknowledge the legislation, unless the courts tell him to do so. Prudence, however, will dictate even more strongly his acquiescence in the act's requirements, and Congress will be even more confident of its war-power role. Still, if the legislation strongly offends the President's understanding of his constitutional powers or of the national good, he may defy it. And he almost surely will obey only the narrow letter of the law. In other words, a war-power statute is most likely to foster a clear, enforceable division of authority between the two branches if it is signed by the President. Thus, if there are a few basics on which the two branches can agree, the legislation ought to stick to them, leaving other aspects of the division of authority to evolve from these basics.

It comes as no surprise, then, that the War Powers Resolution of 1973 and its proponents took care to stress that they were not engaged in constitutional definition. As Section 2(a) of the measure chastely states: "It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution . . . ." Or in the words of Senator Muskie:

The bill does not undertake to impose on the President a modification of his constitutional powers. It does not undertake to assert a restate-
The War Powers Resolution of 1973

ment of Congress’ view as to the President’s role with respect to the
warming power.

What it undertakes to do is to establish a procedure for comity as to
different views in the future, so that Congress can be brought in from
the periphery of the warming power to its center in order to exer­
cise its proper role.

The Executive disagreed. President Nixon felt that “the restric­
tions which this resolution would impose upon the authority of
the President are . . . unconstitutional,” adding that “[t]he only way in which the constitutional powers of a branch of the
Government can be altered is by amending the Constitution—
and any attempt to make such alterations by legislation alone
is clearly without force.”5 While it grates to hear a President
say that constitutional change may come only by formal
amendment in light of our Executives’ historic taste for amend­
ment by practice, it was seemly for Mr. Nixon to point out that
the War Powers Resolution does attempt a bit of constitutional
definition in Congress’s image. That fact has lessened the gen­
erosity with which the White House has implemented the
measure.

The steps leading to its enactment were complex and conten­
tious.6 They began with efforts by Senator Fulbright in the late
1960s to reduce presidential freedom in foreign affairs. On
June 25, 1969, the Senate by vote of 70 to 16 adopted the fol­
lowing proviso, a modified version of one that the Senator had
introduced almost two years earlier:

Resolved, That (1) a national commitment for the purpose of this
resolution means the use of the armed forces of the United States on
foreign territory, or a promise to assist a foreign country, government
or people by the use of the armed forces or financial resources of the
United States, either immediately or upon the happening of certain
events, and (2) it is the sense of the Senate that a national commitment
by the United States results only from affirmative action taken by the
executive and legislative branches of the United States Government
by means of a treaty, statute, or concurrent resolution of both Houses
of Congress specifically providing for such a commitment.

On November 16, 1970, by a vote of 289 to 39, the House of
Representatives took its initial step, passing a measure requir-
ing the President to report quickly to Congress, in writing, con­
cerning the legal basis, circumstances, and anticipated scope of
any commitment of American troops abroad, whether to en­
large forces already there, make new deployments, or fight.
Later House resolutions leading to ultimate agreement with the
Senate in the fall of 1973 became progressively more severe in
their limits on presidential freedom, but the Representatives
continued to hinge their scheme on after-the-fact reporting by
the Executive.

The Senate, to the contrary, was more interested in prevent­
ing the President from acting in the first place without prior
congressional approval, except in a few carefully defined cir­
cumstances. Thus Section 3 of the Senators’ 1973 bill provided
that

[1]n the absence of a declaration of war by the Congress, the Armed
Forces of the United States may be introduced in hostilities, or in
situations where imminent involvement in hostilities is clearly in­
dicated by the circumstances, only—

(1) to repel an armed attack upon the United States, its territories
and possessions; to take necessary and appropriate retaliatory actions
in the event of such an attack; and to forestall the direct and imminent
threat of such an attack;

(2) to repel an armed attack against the Armed Forces of the United
States located outside of the United States, its territories and posses­
sions, and to forestall the direct and imminent threat of such an attack;

(3) to protect while evacuating citizens and nationals of the United
States, as rapidly as possible, from (A) any situation on the high seas
involving a direct and imminent threat to the lives of such citizens and
nationals, or (B) any country in which such citizens and nationals are
present with the express or tacit consent of the government of such
country and are being subjected to a direct and imminent threat to
their lives, either sponsored by such government or beyond the
power of such government to control; but the President shall make
every effort to terminate such a threat without using the Armed
Forces of the United States, and shall, where possible, obtain the con­
sent of the government of such country before using the Armed
Forces of the United States to protect citizens and nationals of the
United States being evacuated from such country; or

(4) pursuant to specific statutory authorization . . . .
As majorities in the House and Senate struggled toward compromise, the dominant issue remained whether to try to define the occasions on which the President might use force without prior congressional approval, and if he might, whether the President had independent constitutional authority to act under those circumstances or merely delegated authority from Congress. Crucial also was the issue whether to impose time limits on any presidential action, and if so, what deadlines (30 days? 120?), measured from which tripwire (from the time of an executive order committing the troops? from the moment Congress receives the President's report? and if that, how long to submit the report after the order?). Also hotly debated was whether Congress should be able to end an executive initiative by inaction—by simply failing to vote one way or another on it, as opposed to explicitly voting no. Similarly contested was whether Congress might stop executive action by concurrent resolution or whether it should do so only by a vote subject to presidential veto. Finally, the nature of presidential consultation with Congress was the subject of much concern. While the House would not touch the Senate's definitional approach, it did warm to the notions of a deadline on presidential initiatives and their termination either by congressional inaction or concurrent resolution. The growing militancy of the House is epitomized by evolution in the consultation language included in the various House resolutions. The first urged the President to consult with Congress "when feasible." The fourth and last demanded that "the President in every possible instance shall consult with the leadership and appropriate committees of the Congress ...." On October 10, 1973, the Senate agreed by a vote of 75 to 20 to a compromise based on the House version. The Representatives concurred two days later, 238 to 123. On October 24 President Nixon vetoed the legislation, finding it "both unconstitutional and dangerous to the best interest of our Nation." On November 7 Congress overrode the veto. The text of the Resolution and veto appear in Appendix C. They are prime examples of conflicting congressional and executive claims regarding the war powers.
Congressional opinion was not monolithic. Though the War Powers Resolution as adopted did not include the constitutional definition that Senator Jacob Javits had championed, he nonetheless liked it: "The fact is that never in the history of this country has an effort been made to restrain the war powers in the hands of the President . . . . [I]t will make history in this country as has never been made before." But some other supporters of the Senate's definitional approach viewed the Resolution "as a historic surrender," not "a historic recapture." Thomas F. Eagleton and Gaylord Nelson, cosponsors of the Senate bill, bitterly opposed the final act. In Eagleton's terms:

If we are reluctant to deal with the constitutional issue of prior authority, then we will continue to be confronted in years to come with the prospect of desperately trying to stop misbegotten wars.

War powers legislation that is meaningful has to deal with the fundamental causes of the constitutional impasse that plagued the Nation for the past decade. It must . . . in the most precise legal language, carefully spell out those powers which adhere to the Executive by reason of his status as Commander in Chief and his obligation to act in emergencies to repel attacks upon the Nation, its forces, and its citizens abroad. For the rest, such legislation must make clear that all remaining decisions involved in taking the Nation to war are reserved to the elected representatives of the people—as the Constitution so says, the Congress. 

But others equally devoted to congressional prerogative feared precisely such a spelling out of presidential authority. Senator Fulbright had cautioned:

I am apprehensive that the very comprehensiveness and precision of the contingencies listed . . . 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.

And, of course, a significant number of legislators saw even the House approach, embodied in the adopted Resolution, as an
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unconstitutional or unwise restriction on presidential power. These people made up most of the 18 Senators and 135 Representatives who voted to sustain the President’s veto.

Why after almost two hundred years did Congress bring itself to institutional legislation on the war powers? A variety of factors were at work, some rooted in the Constitution and others in passing political exigencies—as is usually the case with great constitutional issues. Majorities in Congress felt a need to reassert themselves in decisions about war and peace. President Nixon’s 1970 Cambodian incursion, sprung as suddenly on Congress as on the North Vietnamese, his Christmas bombing of North Vietnam in 1972, carried out in the teeth of profound congressional disquiet, and his continued bombing of Cambodia in the summer of 1973, after Congress had forced an end to American fighting in Vietnam, all against a background of presidential sway during the Cold War, had created serious constitutional imbalance, so far as most Senators and Representatives were concerned.

Further, it was presidential prerogative’s bad luck that the gestation of the War Powers Resolution coincided with Watergate. The latter led most Congressmen to see constitutional imbalance in many aspects of executive power, not just those involving foreign affairs. Final action on the Resolution coalesced with the dismissal of Special Prosecutor Archibald Cox and the ensuing resignation of Attorney General Elliot Richardson, as well as with the mushrooming White House tapes controversy.

More mundane factors were also at work. Before the vote on Nixon’s veto of the Resolution, the House in 1973 had sustained five successive executive vetoes. Its Democratic majority was eager to override for the sake of the party. Similarly, the 1972 election had produced numerous new members of Congress, most of them Democrats eager to vote against anything Nixonian. There was also a successful lobbying effort to win for the override a number of Representatives who had voted against the Resolution on the ground that it was too weak. Five such votes were turned around; the override margin in the House was four votes. Finally, majority sentiment in both Congress
and the country had decisively rejected continued American involvement in Indochina, thereby removing the inhibitions on votes against a President and his policy that exist when the country is at war. Conditions were prime for Congress to stake an unparalleled claim to the war powers.

Constitutional Definition

In the War Powers Resolution, two-thirds of the Senate and House defined the Constitution as subjecting to legislative control all American involvement in imminent or actual combat, except perhaps for hostilities on American territory. Thus under Section 5(b) of the measure, the absence of congressional approval for such involvement compels its end after sixty days, unless Congress extends the deadline, is unable to meet in the wake of armed attack on America, or the President obtains an extra thirty days of grace by certifying in writing that our troops’ safety requires their continued use during the withdrawal process. And under Section 5(c), “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 declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.” In short, Congress claims that the President may not constitutionally commit our forces to foreign hostilities unless the legislators either explicitly authorize combat in advance or ratify it within a set time after its beginning. Further, Congress asserts that no veto is constitutionally permissible when the legislative process runs in reverse, that is, when the President commits troops without prior congressional authorization. In that event, Section 5(b) permits either the House or Senate to terminate the executive initiative simply by failing to ratify it before the statutory deadline, and Section 5(c) permits majorities in both houses to abrogate it at any time by concurrent resolution.

The principal parent of the Resolution, Representative Clement J. Zablocki, described its potential in these terms:

Our purpose . . . was to provide Congress with a two-barrel approach . . . to ending a commitment of troops ordered by the Presi-
dent. The first of that so-called two-barrel approach involves the 60-day period at the end of which the President would have to end the commitment of troops unless Congress, in effect, exercises its exclusive warmaking powers by endorsing or approving the action through a declaration of war or a specific authorization.

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

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

Having claimed legislative control over American involvement in combat, Congress went on in the Resolution to read the Constitution as requiring prior legislative approval for such involvement except on two occasions. Thus Section 2(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.” In the legislators’ view, the President on his own authority may constitutionally commit us to combat simply to repel an attack on American territory or on our troops abroad. Ironically, this reading of executive prerogative is narrower even than the definition in the Senate bill, quoted previously.

Congress nailed Section 2(c)’s constitutional position tighter in Section 8(d) (2): “Nothing in this joint resolution 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 an involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.” And the legislators apparently hoped to force the President either to accept their reading of the Constitution in Section 2(c), openly defy it, or to plead mea culpa, because Section 4(a) (B) demands that he explain to Congress “the constitutional . . . authority” for any commitment of troops to combat, should he do so without prior legislative approval.

How do the constitutional conclusions of the War Powers Resolution stand in relation to those reached in Chapters VIII and IX? The judgment that American involvement in combat is ultimately subject to congressional control seems sound for reasons developed there. Equally sound is the act’s provision that Congress may end presidential initiatives by concurrent resolution, again for reasons already noted.17

But the legislation’s apparent distinction between combat on American territory and abroad lacks merit. In both instances, as suggested previously, Congress should have authority to curb executive war making.18 Nor does the Resolution indicate with sufficient clarity that Congress may condition, as well as terminate, executive policy. The distinction between an absolute congressional ban on American involvement in combat and the imposition of congressional conditions on it has already been noted. Explicit recognition of the distinction is important to avoid presidential pretense that such conditions are the same as strategy or tactics and therefore wholly within executive control.

The act’s assumption that Congress must explicitly approve executive use of force, if the use is to be constitutional, does not seem ultimately sound. Defects in such a notion, especially one buttressed by a deadline for ratification, have already been detailed. Similarly, Section 2(c)’s severe limits on presidential discretion to commit troops have scant merit. Under this section’s constitutional definition, Presidents could never on their own authority direct American troops to confront those of another state in order to protect American civilians or property attacked abroad, to assist international peace keeping or
humanitarian rescue, to defend the territorial integrity of Mexico against foreign attack, and the like.

While the union of Sections 2(c), 4(a) (B), and 8(d) (2), described earlier, suggests that the legislators meant their niggardly reading of presidential war powers to govern American practice, other evidence exists that this was not really congressional intent. The October 4, 1973, "Joint Explanatory Statement of the Committee of Conference" hedged: "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 . . . ." Senator Eagleton dismissed the section as "the pious pronouncement of nothing." Senator Muskie attempted an explanation that seems as cogent as any, other than that the provision was included to placate backers of the Senate bill:

It is true . . . that this language is not operative language. Why was it put into the bill? It was put into the bill as an indication that, in enacting a bill, Congress did not intend to surrender any of its constitutional powers with respect to the making of war.

The remainder of the bill is a procedural bill, undertaken to insure consultation by the President with Congress and undertaking to put in the hands of Congress the procedure for terminating any hostilities into which the President may have plunged us, whether or not his action in so doing conformed with our view as to what his constitutional powers might be.

Presidents Ford and Carter ignored the limits of Section 2(c), and their successors are likely to ignore them. The State Department has concluded that the proviso "does not constitute a legally binding definition of the President's Constitutional power as Commander-in-Chief." And while modest as such definitions go, the June 1975 formulation of that power by the Department's Legal Adviser offered no comfort to the provision:
Besides the three situations listed in subsection 2(c) . . . , it appears that the President has the constitutional authority to use the Armed Forces to rescue American citizens abroad, to rescue foreign nationals where such action directly facilitates the rescue of U.S. citizens abroad, to protect U.S. Embassies and Legations abroad, to suppress civil insurrection, to implement and administer the terms of an armistice or cease-fire designed to terminate hostilities involving the United States, and to carry out the terms of security commitments contained in treaties. We do not, however, believe that any such list can be a complete one, just as we do not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander in Chief authority could be exercised. 28

To the extent that Section 2(c) does lack binding effect, its unduly restrictive view of presidential authority is softened. But, to precisely that same extent, the legislation takes on a quixotic air, detrimental to the rule of law. Clear, enforceable constitutional rules, as well as the war-power ends discussed earlier, would have been better served had Congress foregone the section.

**Implementing Procedures**

How does the War Powers Resolution implement the legislators' definition of the constitutional requirements? As just noted, it provides very few means to enforce Section 2(c). The legislation is far more thorough about obtaining information from, and consultation with, the President and about focused, expedited congressional action on the particulars of any use of force. President Nixon's veto message did not attack these aspects of the act. As the State and Defense Departments pointed out in June 1975, the message "indicated that portions of the War Powers Resolution, including sections 5(b) and 5(c), are unconstitutional. No such position was expressed as to section 4," concerning presidential reports to Congress. 27 In fact, one of the few provisions of the Resolution singled out for praise in the veto message was the third, or consultation, section:

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

Ironically, after the act went into effect, the most bitter congressional charges that “the executive branch proclivity is toward evasive and selective interpretation” of the Resolution have concerned consultation.28

Information
Legislative decisions about the use of force depend on the timely receipt by Congress of pertinent information, much of it from the President. Matters relevant to his reporting include what sorts of circumstances require a report, how rapidly it must be made, its content, whether it is to be periodically updated, and the mechanics for laying it before the various legislators. Sections 4 and 5(a) of the Resolution deal with these questions:

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... 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) ... [T]he 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.

Sec. 5(a) Each report submitted pursuant to section 4(a) (1) shall be transmitted to the Speaker . . . and to the President pro tempore . . . on the same calendar day. Each report so transmitted shall be referred to the Committee on [International Relations] 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 . . . and the President pro tempore . . . 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 . . .

Sections 4 and 5(a) are basically sound, with several reservations. There is no reason for Section 4(a) to dispense with a presidential report if Congress has declared war, while requiring one if Congress has previously authorized the use of force by legislation other than a formal declaration. Since Section 8(a) of the Resolution indicates that the President is to assume authority to use force only from the most explicit congressional statements to that effect, all prior legislative approvals should be regarded as the same, whether they are clothed in a declaration of war or some other form.

There is some ambiguity in the terms used by Section 4(a) (1) to (3) to describe what sorts of circumstances require a report. The first answer to this ambiguity must come in the Executive's appraisal of the facts of each case. In October 1974 Secretary of State Kissinger explained that
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several months ago the Office of the Secretary of Defense instituted an arrangement whereby the Legal Adviser to the Chairman of the Joint Chiefs of Staff informs the Department of Defense General Counsel of all troop deployment actions routed through the Chairman’s office which could raise a question as to whether a report to the Congress is required. In implementation of that arrangement a written instruction was promulgated establishing a War Powers Reporting System within the Operations Directorate of the JCS. Arrangements have been made for this Department’s Legal Adviser to receive the same information as is supplied to the DOD General Counsel. Consultations between the two departments’ legal counsels will be arranged as needed.30

Especially open to disagreement are the meaning of “hostilities” and “imminent involvement.” Legislative history of the Resolution indicates that Congress meant for these words to cast a broad net: “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.”31 The State and Defense Departments adopted more restrictive “working definitions” of these terms:

“[H]ostilities” . . . mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and “imminent hostilities” . . . mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.

Whether or not . . . rifle fire constitute[s] hostilities would seem to us to depend upon the nature of the source of this rifle fire—i.e., whether it came from a single individual or from a battalion of troops, the intensity of the fire, the proximity of hostile weapons and troops to the helicopter landing zone, and other evidence that might indicate an intent and ability to confront U.S. forces in armed combat.32

These interpretative issues matter, of course, because they
determine whether the President should report at all and, if so, whether under Section 4(a) (1), rather than under Section 4(a) (2) or (3). Recall that under Section 5 of the act, only Section 4(a) (1) circumstances give Congress the power to end an executive initiative by inaction or concurrent resolution.

This does not mean that a President can count on avoiding the Resolution by flatly refusing to report or by declining to report under Section 4(a) (1) even though hostilities are at hand. Senator Javits has felt "it . . . timely to remind the Executive Branch—as was made clear during the floor debate on the Conference Report—failure properly to label a report required . . . under Section 4, or even a failure to submit a required report, will in no way delay or frustrate the triggering of the 60-day clock and the provisions of Sections 4 through 7 of the law." In 1975 the Legal Adviser to the State Department did not quarrel with this view, though he noted that the Executive is just as entitled as Congress to interpret what the Resolution requires: "[I]t is perfectly within the power of Congress to decide even if we reported under 4(a) (2) that it was really 4(a) (1) and treat that as the beginning of the 60-day or 90-day period trigger. I don't agree that the competency is absolute. . . . [T]he Executive can have an interpretation just as the Congress can have an interpretation and in the last analysis it would arise on some sort of lawsuit which the courts would probably decide."34

Section 4(a) directs that the President report to Congress "within 48 hours" after "any case [listed in Sections 4(a) (1) to (3)] in which United States Armed Forces are introduced." It is not likely that the Executive can both manage a crisis and prepare a report in much less time. The Mayaguez report anticipated the deadline by four hours. It reached the offices of the Speaker and President pro tempore in the middle of the night, after the President "had to be awakened at 2 o'clock in the morning in order to read and sign his report . . . ." But it is also true that many American uses of forces will be over before a 48-hour report makes its way to the legislators. Thus, to the extent that the Resolution depends on congressional reaction to formal executive reports, it concedes control over short-term military crises to the President.
As regards Section 4(a) (A&C), a more particularized statement of content would be desirable (since Presidents will be prone to say as little as possible): for instance, requirements that the Executive set forth (1) the precise objectives of his action, (2) the American personnel, money, and other resources committed to it, (3) the geographical areas affected by the action, (4) the length of time that particular resources have been committed to particular areas, and (5) his projection of future developments regarding each of the above. If any of this information might aid the enemy, procedures could be developed to make reasonably likely its submission and receipt in confidence. Section 4(a) (B) poses other problems. As already suggested, its requirement that the President state the constitutional authority under which he acted seems designed either to force him to accept the stingy reading of his authority in Section 2(c), to defy it openly, or to admit guilt for having transgressed it. The Section 4(a) (B) requirement that he state the legislative authority under which he acted, if any, presumably refers to statutory approval other than declarations of war, since no report is required under the latter. This proviso renews the needless dichotomy between the two just mentioned. There would be merit, however, in requesting the President to justify his action under international law, including treaties. The degree to which the action is or is not legal under that law is an element Congress must weigh in determining whether the action’s costs to the country outweigh its benefits.

Section 4(b) is little more than hortatory, since it fails to deal with the extent to which the President in the exercise of his constitutional war powers is entitled to withhold information from the legislators. If the act means to suggest that the President has no such right, even as to strategic and tactical data, it strays. Section 4(c) has greater merit. Periodic reporting by the President during any ongoing use of force is essential to ensure that Congress remains capable of informed decision making and that it is presented with recurrent, unavoidable occasions to take a position. Whatever the content requirements for the initial presidential report, supplemental reports should update all pertinent categories. Section 5(a) provides apt means for laying the facts of American involvement in combat before those con-
gressional committees most competent to deal with them, as well as apt means for bringing the legislators as a whole together if they are out of session when crisis develops and the circumstances warrant their immediate consideration of the President’s action.

The Resolution does not deal with secret reporting, but its terms implicitly accommodate it. Nothing is said, for instance, about automatic disclosure of the President’s report in whole to all members of Congress, and certainly nothing is said about its automatic disclosure to the public. If the President is, in fact, to report meaningfully in all the circumstances covered by Section 4(a), he must have reasonable confidence that secrets told Congress will remain secret. On the other hand, the legislators must be assured that vital information is not withheld from them simply because it undercuts executive desires; and Congress cannot be bound to keep presidential secrets when it believes public awareness of them is crucial to the national interest. Most of these difficulties could be met by a constructive relationship between the Executive, on the one hand, and the Speaker, President pro tempore, and the Senate and House foreign affairs committees, on the other. It ought to be possible for these legislators to receive and keep information in confidence until the President agrees to its disclosure to the rest of Congress or until a majority of both committees so vote.38

Consultation

In addition to calling for formal presidential reports, the Resolution seeks to obtain a legislative voice in war and peace decisions by demanding that the President exchange views with the legislators and seek their advice about all American moves into or toward hostilities, except when circumstances utterly preclude consultation. Section 3 states: “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.” According to the
Resolution's legislative history, this "consultation" is to be a
meaty process:

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 emer-
gency circumstances—even when it is not possible to get formal con-
gressional approval in the form of a declaration of war or other
specific authorization.

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

The second element of section [3] relates to situations after a com-
mitment 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 hostili-
ties may be imminent."

A considerable amount of attention was given to the definition of
consultation. Rejected was the notion that the 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 informa-
tion relevant to the situation must be made available.39

Two defects in Section 3 are somewhat troublesome. First, it
does not require consultation in Section 4(a) (2) and (3) circum-
stances, only 4(a) (1). The Executive has carefully noted this
distinction, disclaiming any statutory duty to consult about new
deployments or substantial increases in old ones. But as the
State Department told a House subcommittee, "The President
has not made anything of that; he intends to consult irrespective
of which of these paragraphs an action may fall under."40 From
a "policy viewpoint" influential legislators have urged the
Executive to continue to make nothing of the distinction. Nonetheless, it is alive and well as a matter of law.

Second, Section 3 leaves the President significant discretion to choose which Senators and Representatives he will consult and when to talk with them. Obviously, the less often they meet during a crisis, and the less the chosen legislators know about foreign affairs, the more trivial the consultation is likely to be. Triviality is probable when the President inserts into a continuous process of executive decision making a few episodic gatherings with congressional leaders, chosen without regard to their foreign affairs expertise and responsibilities.

By way of remedy, one Representative has suggested that to have a really meaningful advise and counsel procedure involving legislative action, I would think that it would be almost essential that [the congressional consultees] drop everything else they are doing and stay with the NSC during this 24-hour period in this instance or any other unfolding crisis to be there to consider and evaluate the facts as they are perceived and as they may change during this period of time.

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

And one Senator has argued that consultation should draw on "the expertise of the members of the committee that are pertinent to the issue":

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

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

Recall the remedy proposed in Chapter X: more delegation of foreign-affairs authority by Congress to a few members who would be expected to work with the Executive throughout the course of a crisis.

Meaningful collaboration between the President and Congress, from the first through the eleventh hours, constitutes the war-power millennium. Section 3 of the Resolution seeks it. The section by itself, however, does little more than exhort, unless it is backed by a growing congressional capacity for coordinated, informed, timely decision making, by greater congressional will to take and assume responsibility for decisions about war and peace, and by heightened congressional zeal to cajole and coerce the President into consultation. As Senator Javits said, "If Congress sits back passively and merely awaits Executive fulfillment of the reporting requirements of the law, the key policy decisions will continue to be monopolized by the Executive Branch, as they were in the decades leading up to enactment of the War Powers Resolution."

**Improved Procedures for Congressional Action**

We have already seen how Section 5 ends a presidential initiative when (1) the House or Senate fails to ratify it within 60 days, subject to certain exceptions, or (2) Congress at any point votes it down by concurrent resolution. As is true of much of the other implementing detail in the act, there is nothing magic about the 60 days. They were born of the House’s preference for 120 and the Senate’s for 30, and many have disagreed about the likely effect of any particular time period. Devotees of congressional prerogative differ, for example, some finding 30 days essential lest the President have time to lock Congress into his policy by fait accompli, others fearing 30 days would allow the President to win rally-round-the-flag support. But whatever the time period, it does encourage focused, expedited congressional attention to the policy at hand.

The 60-day deadline, however, does more harm than good, for reasons already discussed. Indeed, the purpose of a series of
complex procedures in Section 6 of the Resolution seems to be to lessen the possibility that the deadline will arrive without the legislators’ having voted yea or nay. The provisions of Section 6 do not guarantee a definitive vote, nonetheless, because it can be blocked if either house “shall otherwise determine by the yeas and nays.” It is also well to be clear that the 60-day proviso is not the only means to focused, expedited congressional action. Section 5(c), coupled with the presidential reporting requirements just considered, unavoidably focuses the legislators on the pertinent executive action. And Section 7 deals with expediting procedures not tied to the 60-day deadline but related rather to congressional decision by concurrent resolution at any time.

The Section 7 provisions “against filibuster, or committees pigeon-holing,” are a significant step toward rationalizing Congress’s handling of war and peace issues. These provisions ensure prompt but not precipitate action in the respective foreign affairs committees, on the floor of each house, and in congressional conference deliberations, so long as majorities in each house believe that rapid action is desirable. When a majority in either house does not find it necessary, the pace slows. Thus, Section 7 is likely to achieve an element essential to a responsible role for Congress in war-peace decisions: an end to obstruction of legislative judgment on presidential initiatives.

Early Life

The War Powers Resolution did not get off to a brisk start. More than 17 months passed before the first presidential report was filed under it. During the interim there was at least one executive initiative that might well have been reported under Section 4(a) (2), if not 4(a) (1). While Greece and Turkey were struggling over Cyprus in 1974, the American Ambassador to that island requested on July 21 the evacuation of local Americans. President Nixon responded the next day by sending five naval vessels to the area and by permitting 22 helicopter sorties from the U.S.S. Inchon to a British base in Cyprus in order to remove roughly 400 Americans and 80 foreign nation-
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On July 23 a joint British-American effort rescued another 135 Americans and foreign nationals. In Senator Eagleton's view, the Executive's failure to report any of this activity violated the Resolution. The Senator was unable, however, to bring others in Congress to take a similar view of the matter—perhaps because no hostilities resulted. American armed forces did not land on any part of Cyprus where they were unwelcome, and the President traditionally has had a prerogative to rescue Americans threatened abroad. The fact remains that the Resolution could have been read to require a report on the operation. The President's refusal to do so, and Congress's disinclination to remonstrate with him, did nothing for a generous view of the legislation.

Content of sorts for it came during the last spasms of American military involvement in Indochina. President Ford sent three reports to Congress regarding the evacuation of Americans and foreign nationals. The first report on April 4, 1975, concerned the removal of thousands of refugees from Danang, Vietnam, to safer points south. The second on April 12 reported rescuing Americans and foreign nationals trapped in Phnom Penh, Cambodia. The third followed on April 30, about the evacuation from Saigon. No hostilities were involved in the Danang operation; limited enemy fire seems to have been received during the Cambodian venture, with no American response or casualties; some combat was involved at Saigon and there were American losses. The Saigon operation was the most taxing of the three. A naval task force participated offshore, 70 helicopters and assorted fighters flew numerous sorties, and 865 marines landed in an undertaking that lasted 19 hours. Approximately 1,400 Americans, 5,600 Vietnamese and 85 others were removed by helicopter while 30,000 Vietnamese were picked up at sea. There was a palpable possibility of heavy fighting with either communist forces or South Vietnamese troops desperate for rescue.

The reports submitted by President Ford to Congress concerning these operations were striking in several respects. First, none was expressly submitted pursuant to Section 4(a) (1). The Danang and Phnom Penh reports cited 4(a) (2), and the Saigon
report simply “section 4.” Thus the President did not come to Congress under the only provision in Section 4 that activates the deadline on executive action and creates the possibility that Congress may end the venture at any time by concurrent resolution.

Second, the President was careful to claim independent power to act. The first report was the most cautious, mixing constitutional prerogative with statutory authority: “This effort is being undertaken pursuant to the President’s constitutional authority as Commander-in-Chief and Chief Executive in the conduct of foreign relations and pursuant to the Foreign Assistance Act of 1961... which authorizes humanitarian assistance to refugees, civilian war casualties and other persons disadvantaged by hostilities... in South Vietnam.” The next two reports were more aggressive: “The operation was ordered and conducted pursuant to the President’s Constitutional executive power and authority as Commander-in-Chief of U.S. Armed Forces.” Third, the reports were exceptionally terse, involving little of the detail contemplated by the reporting provisions of the Resolution. Their texts appear in Appendix C. Fourth, by the time the President reported, each of the operations was over. The Resolution did receive its first substance in the April 1975 reports, but not much.

It is significant, however, that President Ford reported, despite the Nixon precedent on Cyprus and despite a long tradition of Executives’ rescuing Americans threatened abroad. Ford was encouraged to report because Congress had previously banned the use of federal funds for any military activities in Indochina. While it was not clear that the ban covered the evacuation of Americans and foreigners inextricably mixed with them, it could be read to do so (particularly if hostilities resulted), and the ban did seem clearly to cover foreigners not entwined with Americans. Certainly the evacuation operations involved decisions with “hostilities” implications—for instance, what nationalities were to be rescued, how many people should be brought out, by what means, over what period of time, to what extent reliance should be placed on diplomacy rather than military operations, and to what degree
combat would be accepted to achieve the predetermined objectives. With these considerations in mind, the President addressed the Senate and House in joint session on April 10, 1975: “And now I ask the Congress to clarify immediately its restrictions on the use of U.S. military forces in Southeast Asia for the limited purposes of protecting American lives by ensuring their evacuation if this should be necessary, and I also ask prompt revision of the law to cover those Vietnamese to whom we have a very special obligation, and whose lives may be in danger, should the worst come to pass.”

In response to the President’s request, both houses passed bills, each referring to the War Powers Resolution. On April 25 a conference committee reconciled the two bills as the Vietnam Humanitarian Assistance and Evacuation Act of 1975. The Senate promptly agreed to the conference report and sent it to the House, where it was to be considered on April 29. But before it reached the floor, the evacuation of Saigon was well underway. Calling from the White House, Speaker Carl Albert requested that the measure be withdrawn. It was considered by the House on May 1 and rejected. In short, the President sought explicit authority to use the military—authority which Congress might have provided and tied to the War Powers Resolution. When he had not received prior congressional approval nineteen days after asking for it, he acted nonetheless. And he acted despite a legislative ban on military operations in Indochina, which covered at least part of his initiative. The House then declined to take a position on the matter, forfeiting the opportunity at least to ratify what the President had done and to explicitly involve Congress in its authorization.

Some in the House had feared that the measure might authorize American reentry into Indochina. By May 1 others viewed the matter as moot or wished to avoid too close association with South Vietnamese refugees. There was strong sentiment among the foreign affairs leadership of the House and Senate, however, that the measure be adopted, whether before or after the fact, to associate Congress with the President in the use of military force under the War Powers Resolution. Senator
Eagleton’s postmortem was characteristically dismal, but more realistic than not:

Congress fumbled the ball. When the President was forced by events to order the evacuation from South Vietnam on April 29, the House of Representatives had not yet completed the final stage in enacting the necessary legislation. Two days later, when the House finally had the opportunity to express Congressional will and intent, the House voted overwhelmingly not to act.

This unfortunate decision raises grave questions about the willingness of Congress to fulfill its constitutional responsibilities. The President obviously had no authority to use the United States forces to rescue foreign nationals in Vietnam. Yet our forces evacuated thousands of Vietnamese. Asked to explain, President Ford tried to justify his action on “moral” rather than legal grounds. Yet Congress let the precedent stand. Future Presidents might now conclude that the Commander in Chief had an inherent right to do what Mr. Ford did. 50

And as the Milwaukee Journal said in a May 23 editorial:

In the spirit of partnership, Ford asked Congress to provide both money and clear authority to evacuate endangered Vietnamese along with Americans. While South Vietnam crumbled, Congress wrangled. Dozens of amendments filled the air. Many a lawmaker played general, trying to link certain kinds of aid to certain military maneuvers under certain conditions. Finally, Ford was forced to rely on inherent presidential power and order evacuation without companion action by Congress.

From all this, a pointed lesson emerges. On urgent foreign policy issues, the presidency is still the government’s decision making center—if only because it can move with a crisp singularity that a congressional multitude cannot hope to match. 51

There was some congressional feeling that the President failed to consult with the legislators during the April crises. 52 The emergencies began while Congress was in Easter recess. Nonetheless, the Executive tried to notify the congressional leadership about the Danang operation. The President spoke to Congress about the crisis that evolved into the Saigon evacuation. Four days after Mr. Ford’s message to the House and Senate, he, along with the Secretaries of State and Defense and
the Army Chief of Staff, met with the Senate Foreign Relations Committee to discuss the situation in Southeast Asia. Other high administration officials testified before several other congressional committees regarding the impending evacuation. While the full objectives of Section 3 of the Resolution may not have been met in April 1975, neither were they wholly ignored. Hardly had the Indochina evacuations ended when the new Cambodian regime seized an American merchant ship, the Mayaguez, on May 12, 1975. To recover the ship and its crew, protect the rescuers, and retaliate against the aggressors, President Ford sent American troops into Thailand, used that country as a staging area, and fought the Cambodians. Eight ships, 11 helicopters, 25 planes, and 300 marines were involved in the Cambodian hostilities, with the loss of 15 Americans dead, 3 missing, and 50 wounded. During the hostilities the United States dropped the largest bomb in its nonnuclear arsenal on the island of Koh Tang, to support marines in battle there. American forces bombed a military airfield and an oil storage depot in Cambodia, shortly after the crew of the Mayaguez had been released.

Since hostilities were clearly involved, the President reported to Congress on May 15 under Section 4(a) (1) of the Resolution. But the President chose not to report also under 4(a) (3), although his operations in Thailand were protested by its government. And as in April, he claimed an independent prerogative to use force. Like the Indochina reports, the Mayaguez account was terse, including, for instance, no explanation of the basis in international law for the operation. Its text is in Appendix C. And like the Indochina report, the Mayaguez account came after the fact. Finally, the President was not slowed by the statutory ban on military ventures in Indochina, apparently because he did not read it to preclude his armed rescue of Americans attacked abroad.

According to the State Department, “[A]lthough the Mayaguez incident was a rapidly unfolding emergency situation, four separate sets of communications took place between the executive branch and the congressional leadership.” These “communications” did not amount to much. Senator Javits
accurately complained that “[t]he consultation of the Congress prior to the Mayaguez incident resembled to me the old and discredited practice of informing selected Members of Congress a few hours in advance of the implementation of the decision already taken within the executive branch.” Still, on May 14 the Senate Foreign Relations Committee announced: “[W]e support the President in the exercise of his constitutional powers within the framework of the War Powers Resolution to secure the release of the ship and its men.” Congress as a whole acquiesced in the level of consultation offered it. So ended an eight-week period that has been by far the most important in the Resolution’s implementation to date.

Post Mayaguez

Several months after leaving the White House, former President Ford frontally attacked the Resolution on both legal and practical grounds. In an April 1977 speech he said that there had been six military crises during his presidency: the four discussed already and two June 1976 evacuations of American citizens from Lebanon’s civil war. No reports under the War Powers Resolution were submitted on the Lebanese ventures. Mr. Ford concluded that no reports were legally required either for them or for his initiatives in Indochina, although reports were in fact filed on the Indochina and Mayaguez rescues: “In none of those instances did I believe the War Powers Resolution applied, and many members of Congress also questioned its applicability in cases of protection and evacuation of American citizens. Furthermore, I did not concede that the Resolution itself was legally binding on the President on constitutional grounds.”

Mr. Ford assessed the act even more grimly from “a practical standpoint.” He focused first on the difficulties of consultation during the early stages of a crisis:

When the evacuation of DaNang was forced upon us during the Congress’s Easter recess, not one of the key bipartisan leaders of the Congress was in Washington.

... [H]ere is where we found the leaders of Congress: two were in Mexico, three were in Greece, one was in the Middle East, one was...
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in Europe, and two were in the People's Republic of China. The rest we found in twelve widely scattered states of the Union.

This, one might say, is an unfair example, since the Congress was in recess. But it must be remembered that critical world events, especially military operations, seldom wait for the Congress to meet. In fact, most of what goes on in the world happens in the middle of the night, Washington time.

On June 18, 1976, we began the first evacuation of American citizens from the civil war in Lebanon. The Congress was not in recess, but it had adjourned for the day.

As telephone calls were made, we discovered, among other things, that one member of Congress had an unlisted number which his press secretary refused to divulge. After trying and failing to reach another member of Congress, we were told by his assistant that the congressman did not need to be reached.

We tried so hard to reach a third member of Congress that our resourceful White House operators had the local police leave a note on the congressman's beach cottage door: "Please call the White House."60

The former President then went into "several reasons" why, "[w]hen a crisis breaks, it is impossible to draw the Congress into the decision-making process in an effective way . . . ." His reasons constitute a classic statement of executive distaste for measures such as the Resolution. Legislators are not suited for crisis management, in Mr. Ford's judgment, for a number of reasons:

First, they have so many other concerns: legislation in committee and on the floor, constituents to serve, and a thousand other things. It is impractical to ask them to be as well-versed in fast-breaking developments as the President, the National Security Council, the Joint Chiefs of Staff, and others who deal with foreign policy and national security situations every hour of every day.

Second, it is also impossible to wait for a consensus to form among those congressional leaders as to the proper course of action, especially when they are scattered literally around the world and when time is the one thing we cannot spare. Again, we should ask what the outcome would be if the leaders consulted do not agree among themselves or disagree collectively with the President on an action he considers essential.

Third, there is the risk of disclosure of sensitive information
through insecure means of communication, particularly by telephone. Members of Congress with a great many things on their minds might also confuse what they hear on the radio news in this day of instant communication with what they are told on a highly classified basis by the White House.

Fourth, the potential legal consequences of taking executive action before mandated congressional consultation can be completed may cause a costly delay. The consequences to the President, if he does not wait for Congress, could be as severe as impeachment. But the consequences to the nation, if he does wait, could be much worse.

Fifth, there is a question of how consultations with a handful of congressional leaders can bind the entire Congress to support a course of action—especially when younger members of Congress are becoming increasingly independent.

Sixth, the Congress has little to gain and much to lose politically by involving itself deeply in crisis management.

If the crisis is successfully resolved, it is the President who will get credit for the success. If his efforts are not successful, if the objectives are not met or if casualties are too high, the Congress will have seriously compromised its right to criticize the decisions and actions of the President.

Finally, there is absolutely no way American foreign policy can be conducted or military operations commanded by 535 members of Congress on Capitol Hill, even if they all happen to be on Capitol Hill when they are needed.

Domestic policy—for housing, health, education or energy—can and should be advanced in the calm deliberation and spirited debate I loved so much as a congressman.

The broad outlines and goals of foreign policy also benefit immensely from this kind of meticulous congressional consideration.

But in times of crisis, decisiveness is everything—and the Constitution plainly puts the responsibility for such decisions on the shoulders of the President of the United States.

There are institutional limitations on the Congress which cannot be legislated away.81

Mr. Ford’s assessment did not move Congress to repeal or otherwise limit the Resolution. To the contrary, in July 1977 the Senate Foreign Relations Committee considered amendments whose aggregate effect would have been to tighten the act’s
restraints on presidential use of force. Three days of hearings were held on these proposals as well as on other aspects of the Resolution’s “operation and effectiveness.” No amendments resulted.

Unlike Presidents Nixon and Ford, Jimmy Carter had kind words for the war-powers legislation. Early in his presidency he described it as an “appropriate reduction” in the sort of control enjoyed by some Executives before Indochina. Similarly, Secretary of State Vance indicated during his confirmation hearings that the Resolution was compatible with the President’s constitutional authority and that he anticipated no problems with its “good faith observance.” By the same token, during the Senate Foreign Relations Committee’s July 1977 hearings, just mentioned, the Legal Adviser to the State Department repeated anew: “We believe that conscientious observance of the procedures set forth in the Resolution, including effective consultation and timely reporting, will assure that both the Executive and Legislative Branches possess the means to exercise their full and proper constitutional responsibilities.”

A year later, in August 1978, the Legal Adviser assured the House International Relations Committee of Mr. Carter’s continued “strong support of the War Powers Resolution.”

Congress constrained Jimmy Carter in matters of war and peace less than it did Presidents Nixon and Ford when Indochina and Watergate coalesced, but more than has been customary in the twentieth century. Mr. Carter was required to provide significant secret information to Congress, especially its intelligence committees. These committees and others concerned with foreign affairs and the armed forces have been frequently informed and consulted, often heeded, by the Executive. Despite presidential objections, the legislators have insisted on the use of concurrent resolutions to disapprove major arms sales abroad. They have cut off or curbed both military and economic aid to certain countries that the President very much wished to help. Individual Congressmen have dealt directly with foreign representatives—members of the Senate Foreign Relations Committee conferring with Moshe Dayan in
a Washington hotel about proposed F-15 sales to Saudi Arabia and Egypt, for instance, and the House of Representatives threatening to cut off economic aid to South Korea unless its former ambassador to this country were returned to testify about South Korean influence buying in Congress. The Senate has coldly scrutinized the President's treaty initiatives, especially those involving the Panama Canal and SALT II, and many Congressmen reacted severely when the President alone terminated this country's Mutual Defense Treaty with the Republic of China.

Influenced by such constraints and by his own predilections, Mr. Carter used armed force very sparingly until late 1979, even when nothing more than deployment on the high seas was at stake. He had no need to report to Congress under the War Powers Resolution until spring 1980. Some legislators did feel that the administration's May 1978 activities in Zaire were reportable. At that time American, Belgian, and French citizens were threatened by Katangan forces in southern Zaire. Upon the request of Zaire, as well as Belgium and France, President Carter ordered U.S. transport aircraft to support rescue operations by Belgian and French troops. From May 19 to 23 the Air Force flew approximately thirty missions in Zaire, transporting matériel and some French troops to staging areas more than 100 miles from the site of the fighting. In June, after the Katangans had been repulsed, the Air Force flew the Belgians and French out while also transporting into Zaire elements of an African peace-keeping force. At one point during the June flights, as French legionnaires were loading a Peugeot onto a C-141, Zairian troops threatened to fire if the car departed with the French. The Peugeot was left on the runway without further incident. The American pilots and their support personnel took no weapons into Zaire. Nor did any American infantry or fighter aircraft accompany them.

Under the circumstances, most Congressmen who paid any attention to the matter concluded that American forces had not been introduced either into a situation "where imminent involvement in hostilities is clearly indicated by the circumstances" or "into the territory . . . of a foreign nation, while
equipped for combat." Thus, no presidential report to Congress was obligatory under Sections 4(a) (1) or 4(a) (2) of the Resolution. A few Congressmen emphatically disagreed. Their disquiet led to the August 1978 House hearings mentioned above.

Events in the Middle East proved to be more trying. Oil from that area became increasingly central to Western economies during the late 1970s. As the decade neared its end, Iran spun from being a force for tranquility in the area to a source of acute instability. In November 1979 the Iranians took American diplomats hostage. After the hostages had been captive for almost a year, Iraq invaded Iran, heightening the threat to Western oil. Meanwhile the Soviets invaded Afghanistan, putting Russian troops on Iran's border and within striking distance of the Persian Gulf.

In response, President Carter became more active militarily. He deployed powerful naval forces in the vicinity of Iran, sent radar command aircraft to Saudi Arabia as well as several hundred military personnel to operate and maintain equipment and train the Saudis, established an American military presence in Egypt, created a Rapid Deployment Force for the Middle East, and declared the United States would keep the oil flowing one way or another. Carter also suggested that armed action might be necessary to recover the hostages, and sent six C-130 transports, eight RH-53 helicopters, and roughly ninety combat troops into Iran on April 24, 1980, in an abortive effort to bring the captives out. American fighter aircraft from carriers off Iran were prepared to defend the rescuers against Iranian attack had that proved necessary.

Amid this activity, the President reported under the War Powers Resolution only once, on April 26, 1980. See Appendix C. He rejected claims that other reports were necessary when, for instance, the American military presence in Saudi Arabia and the Persian Gulf increased during the Iraqi-Iranian War; Senator Javits agreed with him, as Appendix C indicates.

The April 26, 1980, report was seriously flawed. It said little and made no mention of Sections 4(a) (1) and (2) of the Resolution, under which it should have been submitted. Terming
the rescue effort a "humanitarian mission," Jimmy Carter simply ignored the fact that the mission, while "humanitarian" in purpose, nonetheless "introduced" American armed forces into a situation "where imminent involvement in hostilities [was] clearly indicated by the circumstances." Combat with the Iranians was likely had the rescuers reached Tehran. Combat with others such as the Soviets was possible had the rescue degenerated into a prolonged struggle between American and Iranian forces. Moreover, the rescue effort obviously introduced U.S. forces "into the territory . . . of a foreign nation . . . while equipped for combat."

The April 26 report also claimed that Carter acted "pursuant to the President's powers under the Constitution as Chief Executive and as Commander-in-Chief of the United States Armed Forces, expressly recognized in Section 8(d) (1) of the War Powers Resolution," as well as pursuant to Article 51 of the United Nations Charter. The report was certainly free to argue that the President acted pursuant to his constitutional authority and international law, but it was wrong to suggest that he acted pursuant to Section 8(d) (1). In the context of the entire Resolution, especially Sections 2(c) and 4, it is clear that Section 8(d) (1) did not authorize the rescue attempt. Within the terms of the Resolution, the April 26 report was misleading and inadequate—at least as flawed as any report submitted by Gerald Ford. In practice, though not rhetoric, Jimmy Carter gave the Resolution's reporting requirements short shrift.

He also disregarded its consultation provisions. No one in Congress was informed, much less consulted, before the rescue effort began. Ironically, on the afternoon of April 24, Senators Church and Javits wrote Secretary of State Vance on behalf of the Senate Foreign Relations Committee, insisting under Section 3 of the Resolution that the President consult Congress before using force against Iran. "We write this letter to you in the context of the grave international crisis which has been developing for some months in the region of the Persian Gulf, precipitated by the seizure of the United States Embassy in Tehran and the holding of American hostages there, and by the brutal military occupation of Afghanistan by the Soviet Union,"
said Church and Javits. They noted that Carter had refused to exclude force as means of reclaiming the hostages from Iran and had threatened to fight if the Soviet Union moved into the Persian Gulf. They argued that the legislative history of the Resolution "makes it clear that the consultations called for do not necessarily signify at all that a decision has been made" to use force, but rather "the advance consultation provisions of the War Powers Resolution are intended to come into play before any such decision has been made, in order to ensure that any such decision, if made, is a national decision jointly entered into by the President and the Congress. . . . Accordingly, Mr. Secretary, we hereby request that you inform this Committee at an early date when consultations can begin . . . ." The Senators’ invocation of Section 3 was too little, too late. Subsequent congressional unhappiness with Carter’s failure to consult, however, did not lead to steps to strengthen Section 3.

Inertia

A prior page suggested that it is up to Congress to break the gravitational pull of executive hegemony over American war and peace. The War Powers Resolution provided the necessary initial thrust. But since the legislation has been on the books, Congress has done little to generate any sustained thrust. Most members of Congress remain very much result oriented. Their concern with the particulars of any specific policy still overshadows their concern with the institutional process by which that policy is made. So long as they and their constituents applaud an executive initiative, they do not seriously dispute their exclusion from its development.

Congress lost a singular opportunity to give the Resolution substance in the congressional mold when the legislators failed to participate in shaping the Saigon evacuation. Consultation under the Resolution has been minimal, largely because Congress has not insisted that the President meaningfully implement Section 3. Executives will rarely pay much attention to that section, especially during crises that arise suddenly, require constant, rapid, flexible response, and end quickly, unless
the legislators designate a small committee of Senators and Representatives, primed to share the command headquarters with the Executive and made acceptable to him by a capacity for informed, responsible advice and by a willingness to keep tactical secrets. Similarly, there is little reason to imagine that Presidents will accept Section 2(c)'s view of their authority to enter hostilities without prior congressional approval. As with many of their predecessors, Presidents in the future will very probably construe the Constitution to permit them to commit troops whenever they believe it essential to the national welfare.

Even so, the War Powers Resolution retains a potent bite. Following President Ford's example, his successors will doubtless report their military initiatives to Congress, usually having told congressional leaders about their plans and given them a moment to object. It is also probable that future Presidents will either accept an end to their military initiatives by the Section 5(b) deadlines or by the 5(c) concurrent resolutions, or ask the Supreme Court to rule on the constitutionality of these sections. Equally important, future legislators will have guaranteed opportunities to participate in deciding whether America fights, if the combat lasts more than forty-eight hours. While the Resolution may have slight impact on quick, surgical applications of armed force by the President, it should ensure legislative approval of any long-term commitment of the country to war.

Secretary of State Haig promised more for Congress during his January 1981 confirmation hearings. He committed the Reagan administration to compliance with both the letter and the spirit of the Resolution. Shortly thereafter several Senators charged the President with skirting the act while increasing the flow of American arms and advisers to El Salvador's civil strife. 

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2. The necessary-and-proper clause received little attention at the Constitutional Convention. See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION 344-45 (M. Farrand ed. 1911). Recall, however, that a prime federalist objection to Confederation government was the dichotomy between its formal
powers, reasonably ample, and its impoverished authority over means necessary to implement them. Antifederalists during the ratification struggle strongly attacked the necessary-and-proper language. According to Hamilton, it and the supremacy clause were "held up to the people in all the exaggerated colours of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated." Federalist Papers No. 33.

Madison in Federalist No. 44 examined the problem in some detail. He argued that even without the necessary and proper language, Congress would control means: "Had the constitution been silent on this head, there can be no doubt that all the particular powers, requisite as means of executing the general powers, would have resulted to the government, by unavoidable implication. No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included."

Madison argued, moreover, that it would have been impractical for the Constitution itself to attempt to deal more explicitly with means: "Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect; the attempt would have involved a complete digest of laws on every subject to which the constitution relates; accommodated too not only to the existing state of things, but to all the possible changes which futurity may produce: For in every new application of a general power: the particular powers, which are the means of attaining the object of the general power, must always necessarily vary with that object; and be often properly varied whilst the object remains the same."

Finally, Madison spoke to the possibility that Congress might attempt to usurp authority through necessary-and-proper legislation: "If it be asked, what is to be the consequence, in case the congress shall misconstrue this part of the constitution, and exercise powers not warranted by its true meaning? I answer the same as if they should misconstrue or enlarge any other power vested in them, as if the general power had been reduced to particulars, and any one of these were to be violated . . . . In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts; and in the last resort, a remedy must be obtained from the people, who can by the election of more faithful representatives, annul the acts of the usurpers."

Since 1789 congressional authority under the necessary-and-proper clause has been generously read in most instances. As Chief Justice Marshall said in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." See also, e.g., United States v. Oregon, 366 U.S. 643 (1961); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963). Note the suggestion that the necessary-and-proper clause is more sweeping in its grant of authority to Congress than are the enforcement provisions of the fourteenth and fifteenth amendments, in Cox, Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 99-108 (1966). Congressional power to prescribe means has been judicially restrained, as a rule, only when
it impaired civil liberties; e.g., Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 247 (1960). See generally L. Henkin, Foreign Affairs and the Constitution 78, 331-32 n.54 (1972).

Many have indicated that war-power legislation would be constitutional. See, e.g., Hearings on War Powers Legislation Before the Senate Comm. on Foreign Relations, 92d Cong., 1st Sess. (1971), at 7, 135 (Javits); 551, 554 (Bickel); 653-54 (William D. Rogers); 708 (Stennis); 774, 779 (Goldberg). But cf. William P. Rogers: "The question about whether a statute can change the President's constitutional powers or affect Congress'[ ] constitutional powers is a very doubtful proposition." Id. 517. But, as will be noted in the text, there is a distinction between congressional authority to define the nature of constitutional powers, on the one hand, and the means for their realization, on the other. Rogers's comments seem to assume that war-power legislation does only the former.


5. 9 Weekly Compilation of Presidential Documents 1285-86 (1973). The text of the veto message appears in Appendix C.


9. The House of Representatives almost adopted a requirement designed to preclude congressional inaction. It would have provided that, within 120 days after the beginning of a military initiative by the Executive, Congress "shall either approve, ratify, confirm, and authorize the continuation of the action taken by the President ... or ... disapprove such action in which case the President shall terminate [it] ... ." 119 Cong. Rec. 24,685 (1973) (Whalen amendment). But the most dyspeptic attack on the notion of ending an executive initiative by congressional inaction came in the Senate. Sam Ervin picked "invasion" to hammer home his point: "This measure is an absurdity. It says that when the United States is invaded, Armed Forces of the United States must get out of the fight against an invader at the end of 30 days if the Congress does not take affirmative action within that time to authorize the President to continue to employ the Armed Forces to resist the invasion. The bill is not only unconstitutional, but is also impractical of operation. In short,
it is an absurdity. Under it, the President must convert Old Glory into a white flag within 30 days if Congress does not expressly authorize him to perform the duty the Constitution imposes on him to protect the Nation against invasion.” 119 Cong. Rec. 25,093 (1973).

10. See Spong, supra note 1, at 828 n.41, 874.


12. 119 Cong. Rec. 36,189 (1973); see Spong, supra note 1, at 823.


16. Section 8(c) further narrows the meager § 2(c) discretion given the President by its broad definition of “introduction of United States Armed Forces” to include “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.”

17. See pages 197-98. Admittedly, there is controversy over whether Congress may “legislate” by concurrent resolution when the legislative process runs in reverse. The touchstone for those who think not is Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harv. L. Rev. 569 (1953). Executives especially have questioned legislation by concurrent resolution. It does deprive them of an opportunity to veto congressional limits on their initiatives. As a Congressman asked and the Legal Adviser to the State Department answered in 1975:

“MR. SOLARZ. . . . [I]s it your position that if the troops were sent in in the first place under the President’s inherent constitutional authority that the concurrent resolution ordering them to be withdrawn would itself be unconstitutional or do you believe that the President would be constitutionally obligated to act in accordance with the provisions of the War Powers Resolution and withdraw the troops?

“MR. LEIGH. . . . I think it would be unconstitutional on the simple logic that if the President had the power to put the men there in the first place that power could not be taken away by concurrent resolution because the power is constitutional in nature. There might, however, be all sorts of reasons as to why the political process would force him to wish to comply with that concurrent resolution.

“There is a further question as to whether a concurrent resolution in this situation would have the dignity of law under the Constitution. I think a very strong argument can be made that a concurrent resolution in this situation would be insufficient and that the Congress must resort to the usual process for a statute and submit it to the President. If he disapproves it, it must then be passed over his veto by a two-thirds vote in each House.” War Powers Hearings, supra note 15, at 91.

Precedent exists, however, for legislation by concurrent resolution. For in-
stance, there was provision for ending presidential action by this means in two prominent war-power measures: the 1941 Lend Lease Act and the 1964 Gulf of Tonkin Resolution. It is also a fact of life that, if Presidents wish to have their constitutional cake by committing troops without prior congressional approval, it is not likely that they will be allowed to eat it too by denying simple majorities in both houses the right to call a halt.

It can be argued that precedents such as those just cited are not applicable because they “created a concurrent resolution procedure to control the exercise of authority delegated [by Congress] to the President,” while the War Powers Resolution “does not delegate anything to the President .... It is ... a procedural scheme for arranging an interchange in what is ... a difficult area between the two branches ....” Accordingly, “to say that Congress would later by concurrent resolution take back what it had previously delegated overlooks the fact that nothing was delegated.” War Powers Hearings, supra note 15, at 96-97 (remarks of Mr. Leigh); cf. Rostow, Response, 61 VA. L. REV. 797, 800-01 (1975): “There are some instances of true delegation between Congress and the Presidency in the field of foreign affairs. The President’s discretion to change tariffs is a good example; only a statute could vest such authority in the President. However, in most cases a more accurate description is that a statute combines the overlapping powers of the Presidency and of Congress. In such instances, there is no delegation, but a pooling of the respective powers of the Presidency and of Congress. Thus in the Tonkin Gulf Resolution, the Formosa Resolution, and the Middle East Resolution, for example, language was carefully chosen to indicate that Congress and the President were making separate and also joint decisions, each exercising its own authority. No one attempted to draw a line marking the exact boundaries between the presidential zone and the congressional zone.”

It is more likely than not, however, that Congress did delegate some authority to the President in the War Powers Resolution. To wholly disclaim that possibility, it is necessary to assume that the Executive has a constitutional prerogative to commit troops whenever and wherever he pleases, subject only to later restraint by a two-thirds vote of the Senate and House, overriding his veto. If, as is more probable, Congress has a constitutional right to vote on at least some troop commitments before they are made, then the Resolution does delegate to the President congressional approval to act in these cases if he thinks it necessary, subject to the deadline and concurrent resolution restraints in §§ 5(b) and (c).

18. See pages 198-99. Some assume that the President has a constitutional prerogative to defend American soil, perhaps no matter what Congress thinks. Cf. Senator Ervin’s remarks in note 9 above and Legal Adviser Leigh’s testimony to a House Subcommittee in 1975: “I [am] not sure that the Congress by imposing a condition subsequent on an appropriation which has not yet been fully expended could limit the President’s power to carry out certain constitutional duties such as to defend the United States from hostile attack against its mainland territory. There is obviously no judicial decision on this but I would think that there would be a serious doubt as to the constitutionality of such a limitation if it were applied to prevent the President from defending the mainland territory of the United States from attack.” War Powers Hearings, supra note 15, at 89.
19. See also Senator Javits: "If this is a statute, every part means something, whether it is written in subsection 2(c) or in section 3, as in the Senate bill." 119 Cong. Rec. 33,557-58 (1973).
22. According to Representative Zablocki, the conference included § 2(c) "[i]n order to satisfy the Senate conferees"—"but it was intended as a statement of purpose and policy, a sort of sense of Congress." War Powers Hearings, supra note 15, at 32.
23. 119 Cong. Rec. 36,194 (1973). For further appraisal of § 2(c)'s mysteries, see Spong, supra note 1, at 837-41.
24. See pages 297-306 and note 25 below; cf. the Executive's rejection of the notion that the Resolution "delegates" any authority to him, note 17 above.
25. 119 Cong. Rec. 36,181 (1973); accord, the Legal Adviser to the State Department in 1975: "[W]e would not agree . . . that the specification of circumstances in which this power [the President's authority as commander in chief] might be used would be limited by section 2(c)." War Powers Hearings, supra note 15, at 11. See also note 26 below and accompanying text.
27. Id. 40.
28. Representative Zablocki's 1975 complaints are typical: "Clearly, it was not the intent of Congress to be merely informed of decisions already made. In the fullest meaning of partnership and shared responsibility in foreign affairs, it was the desire of Congress to have a participatory role in the process of decisionmaking."
29. This distinction does make sense on one score under the Resolution as presently written. Reports by the President pursuant to § 4(a)(1) permit Congress to end his initiatives by inaction or concurrent resolution. That is not justifiable if the President is acting with explicit congressional authorization (whether by declaration of war or some other form of approval). Accordingly, if the Resolution were amended to require presidential reports at the outset of any hostilities, it ought also to be amended to prevent the termination under §§ 5(b) or (c) of ventures previously approved by Congress.
32. War Powers Hearings, supra note 15, at 38-39. It does appear that the Resolution was not directed at "hostilities" involving foreign mobs, international criminals, or the like. See, e.g., the June 15, 1973, Committee on Foreign Affairs report on the House bill that underlay the ultimate Resolution: "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." 2 U.S. CODE CONG. & AD. NEWS 2348 (1973) (emphasis added). But so long as another nation is the adversary, Congress defined "hostilities" broadly, as indicated in the text.
33. War Powers Hearings, supra note 15, at 69. The Senator had previously elaborated:
“Now it is perfectly true, that [the Senate] bill which contained an authority test as well as a performance test was not the bill adopted in the sense that the House approach was adopted without the authority test. We did adopt the House approach, the methodology being that it is a performance test, it is not an authority test. That is, did he or didn’t he have constitutional authority?

“The minute he puts troops into hostilities or imminent danger of hostilities, the act begins to operate. And he does not have to tell us he is doing it, because the 60-day clock starts to tick if a report is required, and even if he fails to do a report, it still begins to operate and it is up to us to press the button so he loses all authority if we do not agree with his actions. Now this is the key to this whole legislation. If the President takes emergency action, his action is only good until Congress acts dispositively because we have the declaration of war authority.” Id. 63.

34. Id. 87.

35. According to the Resolution’s legislative history, “[A] commitment [or introduction] of armed forces commences when the President makes the final decision to act and issues orders putting that decision into effect.” 2 U.S. CODE CONG. & AD. NEWS 2351 (1973).


37. See the terse accounts submitted by President Ford, Appendix C. “They are brief to the point of being in minimal compliance with the content requirements set forth in the law.” War Powers Hearings, supra note 15, at 69 (remarks of Sen. Javits); cf. Thomas Ehrlich: “No one can expect preparation of a carefully reasoned, fully-developed brief within two days after a decision to use military force. But precisely for that reason, the requirement should have a useful impact. The need for justification to support a decision should be a strong incentive for a broader analysis of the impact of that decision than might otherwise be made. By requiring those in the Executive Branch to articulate the basis for an action, and to defend that basis, the Resolution will encourage them to think through their decisions more fully.” Response, 61 VA. L. REV. 785, 788 (1975).

38. The legislators cannot expect much tactical and strategic information from the President unless he is confident that it will not leak; e.g., Legal Adviser Leigh’s remarks to a House subcommittee about the Mayaguez hostilities:

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

When I was speaking about the President’s judgment of confidentiality, I was speaking in terms of an assumption on my part. I do not know what the President actually thought on this subject. I do know that he went to great pains to request the Members of Congress who came for the briefing in the Cabinet room that they maintain absolute security about this because breach of security might prejudice the carrying out of military operations.

“Section 3 of the War Powers Resolution has, in my view, been drafted so as
not to hamper the President's exercise of his constitutional authority. Thus, Section 3 leaves it to the President to determine precisely how consultation is to be carried out. In so doing the President may, I am sure, take into account the effect various possible modes of consultation may have upon the risk of a breach in security. Whether he could on security grounds alone dispense entirely with 'consultation' when exercising an independent constitutional power, presents a question of constitutional and legislative interpretation to which there is no easy answer. In my personal view, the resolution contemplates at least some consultation in every case irrespective of security considerations unless the President determines that such consultation is inconsistent with his constitutional obligation. In the latter event the President's decision could not as a practical matter be challenged but he would have to be prepared to accept the political consequences of such action, which might be heavy." War Powers Hearings, supra note 15, at 81, 100. See also Chapter VII, note 38 and accompanying text.

40. War Powers Hearings, supra note 15, at 85. But see id. 3.
41. E.g., id. 64, 73 (remarks of Sen. Javits).
42. Id. 57 (remarks of Rep. Findley).
43. Id. 62 (remarks of Sen. Javits); accord, his views at 67-70, 73.
44. Id. 67.
45. Id. 63 (remarks of Sen. Javits).
46. Congressional umbrage at the missing references to § 4(a) (1) was met by Legal Adviser Leigh with various palliatives: "There was nothing ulterior about this in any sense. We were not trying to mislead anyone. I think the factual situation was different as between the first case, the Danang sealift, and the other two. In the Danang sealift we were confident that we were not going to be involved in a section 4(a) (1) situation of hostilities, and in fact the President's orders required that the force avoid any kind of hostilities. We felt certain that that was going to fall under 4(a) (2) so we specified it in that case.

"Now the other distinction is that we didn't know at the time we were required to make the report, which has to be within 48 hours, when we would complete the task of picking up refugees, and as it turned out it went on longer than either of the other two.

"Now with respect to both the Cambodian and the Saigon evacuations, by the time the President made his report the last Americans and the last armed forces had already been taken out so that as lawyers we did not see that the specification of which of the three subparagraphs of 4(a) was involved, was crucial to the operation of the mechanism which is established in section 5 of the War Powers Resolution because there would be no occasion for the 60-day period to even begin running.

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

"Thus, although the events as known at that time indicated that hostilities may have existed between U.S. and communist forces, U.S. forces 'equipped
for combat' were also introduced in the 'territory, airspace or waters' of South Vietnam—the situation apparently provided for in section 4(a)(2).

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

"[T]he first three war powers reports contain the phrase 'taking note of . . . .' You inquire whether this suggests anything other than a full binding legal responsibility upon the President. This phrase connotes an acknowledgement that the report is being filed in accordance with section 4 of the War Powers Resolution. No constitutional challenge to the appropriateness of the report called for by section 4 was intended." War Powers Hearings, supra note 15, at 9, 39, 40.

47. The evacuations sparked a brouhaha over what was statutorily permitted and over the broader question of the President's constitutional right to order armed rescues. Compare, e.g., the views of Glennon, supra note 1, with those of Emerson, The War Powers Resolution Tested: The President's Independent Defense Power, 51 Notre Dame Lawyer 187 (1975). See also, e.g., War Powers Hearings, supra note 15, at 28-32.

48. 121 CONG. REC. 10,006 (1975). In making this request, the President did not concede any constitutional necessity to do so. The Legal Adviser to the State Department suggested that Mr. Ford "wanted the political support of the Congress in what he saw was going to be necessary, and the fact that he asked for it should not, in my view, be interpreted as an indication of his belief that in the absence of congressional action he could not have done the things that he did. On the other hand, he obviously wished to have congressional support and there remains the question of the financing of this evacuation." War Powers Hearings, supra note 15, at 18; cf. Woodrow Wilson's requests for prior congressional approval of his Vera Cruz and merchantmen ventures, pages 158-59 above.

49. The Executive disliked restrictions in the bill as it ultimately emerged, e.g., its severe limits on rescuing non-Americans. See the description of the measure in Glennon, supra note 1, at 17-19, and Spong, supra note 1, at 852-53. See also Legal Adviser Leigh's objections, e.g., War Powers Hearings, supra note 15, at 19-20, 34-35.

50. Eagleton, Congress's "Inaction" on War, N.Y. Times, May 6, 1975, at 39, col. 2. See also Glennon, supra note 1, at 19-20 n.66.


52. E.g., id. 82 (remarks of Rep. Zablocki); Spong, supra note 1, at 855 n.180.

53. See Emerson, supra note 47, at 193.

54. On May 15, 1975, the legal adviser and legislative assistant to the Chairman of the Joint Chiefs of Staff explained the bombing to a House committee:

"In conducting an operation of this nature, there is only one mission involved . . .: To achieve the return of the crew, the vessel. Thereafter you must execute the safe extraction of the forces that were put in in order to accomplish the two primary missions.

"The potential enemy had the capability of reinforcing from the places on
the mainland that were struck. To strike those places . . . in the judgment of almost every military man involved in the situation—and I say almost everyone because I have not talked to everybody, everybody I have talked to shares this view—was essential to save the marines on that island.

"Now, you are forced . . . to make a judgment between using adequate force and failing to use sufficient force to protect the men on the ground. That judgment is a very close one . . . in almost every instance, whether it is a platoon operation under a sergeant, a division operation under a general, or an operation of this nature under the direct command of the Commander in Chief. That is a tactical decision that is easy sometimes to Monday-morning quarterback. The question has to be what would you do if you were responsible for the men on the ground at the time the decision was made . . . .

"We recognized that of all the manifestations of power, restraint is one that is greatly recognized. That fact was constantly a consideration in the minds of the military planners involved in this operation. Restraint was a goal, but protecting American lives . . . was the first goal.

"Mr. Wilson. I would like to comment that as far as the air strikes on the mainland were concerned, the military judgment was made apparently that it was necessary, but I think that the strikes on the mainland, and I would like to hear the Colonel's response, probably in addition to their military significance served to let the Khmer Rouge know we were serious about this.

"Mr. Zablocki. It would serve as a deterrent to any further intentions of any country, including Cambodia.

"Colonel Finkelstein. We certainly hope it will have that effect." *Hearings on the Seizure of the Mayaguez Before the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. 33-34, 34-35 (1975).

It seems likely that the bombing was meant both to protect American troops and demonstrate that America "cannot allow U.S. vessels to be seized with impunity" (remarks of Secretary of Defense Schlesinger in a May 21 interview). *Id.* 130. See also *id.* 42-43, 49.

According to May 14 testimony of the Deputy Assistant Secretary of State for East Asian and Pacific Affairs: "The Thai Prime Minister has called in our Chargé in Bangkok . . . and has in effect given us an aide memoire asking that our marines leave Thailand immediately." *Mayaguez Hearings*, supra note 54, at 16. The President had sent approximately 1,200 marines from Okinawa into Thailand when the crisis broke. Two hundred of them had then moved from there to the Cambodian theater. *Id.* 16, 43, 58.

56. *War Powers Hearings*, supra note 15, at 78. *But cf.* note 38 above, and Mr. Leigh's recognition that "the congressional leadership under the circumstances of the emergency action had been given an opportunity to express dissent or contrary views before the [President's] orders were executed [not before they were given]." *Id.* 61 (emphasis added).

57. *Id.* 61.

58. *Id.* 51; N.Y. Times, May 15, 1975, at 18, col. 7.

60. Id. 328.
61. Id. 328-30.
62. See id. 338-48. Perhaps most important among numerous proposed changes was the amendment that would have given operative effect to § 2(c)'s presently inoperative view that *prior* congressional approval is required for American use of force except in very limited circumstances. The impact of this amendment would have been softened only slightly by its expansion of the existing § 2(c) occasions in which the President may act alone to include (1) protecting Americans endangered abroad and (2) forestalling direct, imminent threats of attack on this country.

63. See id. 187, 322.
64. Id. 190. See also 126 Cong. Rec. S4114 (daily ed. April 23, 1980).
66. See *Zaire Hearings*, supra note 65, at 2-4, 16, 32.
68. The State Department's Assistant Secretary for Congressional Relations, however, did write soothingly to the Chairman of the Senate Foreign Relations Committee. The Assistant Secretary said in part:

"As you know, your letter was received after the commencement of the rescue mission in Iran on which the President reported to the Congress on April 26. For that reason, the letter has in a sense already been overtaken by events.

"The President did not find it possible to consult with the Congress before commencing this rescue mission, in view of its extraordinary nature which depended upon absolute secrecy. Nevertheless, let me assure you that this Administration remains fully committed to the effective implementation of the consultation provisions of the War Powers Resolution to which you refer, and to the maximum possible cooperation between the Executive and Legislative branches in decisions which might involve the United States in hostilities."
Letter from J. Brian Atwood to Frank Church, May 6, 1980.

"Congress adopted the War Powers Resolution to remind Presidents of their accountability for the use of troops. It created a formal procedure for consultation and an as yet untested requirement that Congress consent to hostilities lasting longer than 90 days.

"But for all its bark, Congress has always been reluctant to bite. Successive Presidents have committed forces to emergency operations on eight occasions without real consultation with key committee chairmen. President Ford reported after the fact on the military airlift of Americans out of Southeast Asia and on the rescue of the crew of the Mayaguez. But he did not report on the evacuation of civilians from Cyprus and Lebanon, nor did Mr. Carter report on airlifts into Zaire during an insurgency in 1977."
"The war powers debate actually flared up before the rescue mission, in response to Mr. Carter's threats of a blockade against Iran. That is scarcely a minor matter; it could involve a direct challenge to a warship, including a Soviet ship. As Senators Church and Javits of the Foreign Relations Committee asked even before the rescue raid, the military options the President keeps threatening clearly should be discussed with leading members of Congress. That view will have a sympathetic advocate in Senator Muskie, Mr. Carter's nominee for Secretary of State.

"The legal scholar Edward Corwin once observed that the Constitution is 'an invitation to struggle for the privilege of directing American foreign policy.' In that struggle, Congress too often confines itself to tactical details, ignoring strategic design. If the will is there, Congress can now insist on a larger role and give real meaning to its War Powers Resolution."

70. Eugene V. Rostow has been among the most compelling critics of war-power legislation, the 1973 Resolution included. Such measures treat an "imaginary disease," in his view, one that resulted when congressional result-orientation was misdiagnosed as "presidential usurpation":

"That popular thesis [that the rules of constitutional balance were somehow violated in Indochina] is a myth. There was no presidential usurpation of Congress' war power in either Vietnam or Korea. . . .

"In the Korean War, and to a much greater extent during the war in Vietnam, we experienced naked political irresponsibility. First, the President and Congress, acting together in a constitutional mode that goes back to the time of Washington, made a series of decisions involving us in the wars. Later, when the wars became unpopular, many of the congressmen who had voted and voted and voted for them suddenly began to say that they were all the President's fault. They claimed that the President had involved the country in war through stealth and concealment. They argued that the difficulties were the result not of human mistakes in carrying out policies duly authorized and pursued, but rather of some structural imbalance in the Constitution. These representatives told their constituents, 'The President has stolen our clothes while we were swimming; we have never really authorized this Presidential war.' Then, having created the myth of presidential usurpation, Congress passed the War Powers Resolution to cure the imaginary disease.

"These events have had a significant effect on the spirit of cooperation between the Executive and Congress. When the Executive Branch deals with congressmen and senators who continue to vote for a war and then say, 'There's no one here but us chickens' after the war becomes unpopular, a mood of suspicion develops which is rather hard to allay. I personally have dealt with congressmen and senators about Vietnam, often reminding them that the Administration had long been trying to achieve goals which they had recommended in political speeches—reconvening the Geneva Conference, for example. Typically, their response was, 'I know that, but you must remember that I have to be reelected in my district. The President has to do what must be done. I must take care of my reelection.' In short, a great many men slithered off the deck when the going got rough. This is simply a fact, not a reproach, something that happens in life.

"It is the ultimate reason why the War Powers Resolution and other structural remedies we have been considering are so unrealistic and unreal. President Johnson was very conscious of President Truman's experience in
Korea and of the political fact that Korea became ‘Truman's War.’ President Truman did not seek the support of a formal congressional resolution. President Johnson had the advantage of the SEATO Treaty, . . . the Tonkin Gulf Resolution, and a number of other congressional actions expressly designed to approve the decisions of four Presidents under the Treaty. This experience is what President Johnson had in mind when he observed, ‘I knew that if I wanted Congress with me at the crash landing, they had to be with me at the take-off. But I forgot about the availability of parachutes.’” Response, 61 Va. L. Rev. 797, 801-03 (1975).

71. But cf. the executive views in note 17 above. It is quite conceivable that the Supreme Court would agree to decide such a case if asked, and it is probable that the President would obey a decision against him. See pages 206-17 above.