WAR POWERS ACT

The Senate continued with the consideration of the bill (S. 440) to make rules governing the use of the Armed Forces of the United States in the absence of a declaration of war by Congress.

Mr. FULBRIGHT. Mr. President, I ask unanimous consent that I may be permitted to yield to the Senator from North Carolina (Mr. Ervin) for 5 minutes, without the time being charged to either side. The PRESIDING OFFICER. Without object, so ordered.

Mr. ERVIN. Mr. President, despite the normalcy of the so-called war powers bill, I cannot in good conscience support it. The reasons for my opposition are extremely simple. The Constitution clearly makes a distinction between two kinds of wars.

The 11th clause of section 8 of the first article gives Congress the power to declare war. That clearly refers to any offensive war initiated by the United States. It may engage. This is made manifest by section 4 of article IV which says:

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; . . .

Now the question occurs, By what official is that power to be exercised? It is clearly to be exercised by the President, because section 2 of article II of the Constitution says:

The President shall be Commander in Chief of the Army and the Navy of the United States . . .

This bill provides in section 5 that the President, as the Commander in Chief of the Army and Navy of the United States, cannot exercise his constitutional duty, to protect this country against invasion for more than 30 days without the consent of the Congress.

We hear much nowadays about the separation of powers. Here is a power and no one is exercising it. The Constitution clearly imposes upon the President of the United States, to use the Armed Forces to protect this country against invasion. And here is a bill which says expressly that the President of the United States cannot perform his constitutional duty and cannot exercise his constitutional power to protect this country against invasion for more than 30 days without the affirmative consent of Congress.

The President, those are the reasons for my opposition to the bill. And I thank my good friend, the Senator from Arkansas, for his great generosity in yielding me 5 minutes in which to speak at this hour.

Mr. FULBRIGHT. Mr. President, will the Senator yield for a brief elaboration of his point?

Mr. ERVIN. I yield.

Mr. FULBRIGHT. Mr. President, is it not true that if this bill passes, the President will have powers under the Constitution for 30 days, that it is a little bit unusual and indeed impractical to suggest that we can limit his constitutional power by simple statute and limit it arbitrarily to 30 days?

Mr. ERVIN. The Senator is correct. In my opinion, in spite of the good purposes of the bill and the lofty motives of those who support it, I think the bill is an absurdity as a practical matter.

We used to have a lot of fighting in my old hometown in the court square. We had an ex-sheriff by the name of Alex Duckworth, who drove by there in his buggy one day when two men were in a fight.

The ex-sheriff asked, "Whose fight is this?"

One of the fighting men said, "Anybody's."

The other one said, "I am in it."

One of the other men gave him a hefty punch to the jaw and knocked him down. The ex-sheriff jumped up and said, "I am out of it."

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 repel the attack. Only if Congress declares the bill 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.

Mr. GRIFFIN. Mr. President, as a Senator on this side of the aisle, I want to thank a proponent of the bill for yielding time to an opponent of the bill.

Mr. FULBRIGHT. Mr. President, I did not yield the floor.

The Senator asked me if as a matter of courtesy, I would yield to him. I asked that the Senator be given 5 minutes without it being charged to either side. I had the right to the floor under the previous agreement.

Mr. GRIFFIN. Of course.

Mr. FULBRIGHT. Mr. President, I do not want to mislead the Senator, but I do not happen to agree with the Senator from North Carolina. He has fallen prey to the same illusions as many other people in the country, that the only person who is interested in the security of the United States is the President of the United States.

I remember the first time that Secretary of Defense Laird came up to testify before the Foreign Relations Committee. I remember that now that he had left the Congress and gone over to the Office of Secretary of Defense, he had a very special responsibility for the security of the United States that overlapped everything else and that he was the only man qualified to say what was at the interest and security of the United States.

I am afraid, I must say, with all due deference to a man rendering such important service to our country today, that I think his statement was a statement to the effect that the Congress had no interest in the security of the United States or in protecting the Nation's institutions.

I do not believe that. I think that the President can be misled more easily than Congress as to what is in the security of the United States and as to what is a proper way to protect the independence of Arkansas or North Carolina.

I do not accept the basic assumption that all wisdom resides in the White House, no matter who the occupant is. Mr. ERVIN. Mr. President, will the Senator yield?

Mr. FULBRIGHT. Mr. President, I yield for a question.

Mr. ERVIN. Mr. President, I want to say that the Senator from North Carolina does not adhere to the assumption that the Senator from Arkansas insinuates he does on this occasion.

The Senator from North Carolina thinks that the Founding Fathers were acting in great wisdom when they separated the powers of Government by establishing an executive branch in the President of the United States, the Commander in Chief of the Army and Navy of the United States, rather than 100 Senators and 435 Representatives.

I thank the Senator from Arkansas for his great generosity in yielding me 5 minutes.

Mr. HUMPHREY. Mr. President, the Senate's consideration of the war powers bill comes at a critical juncture in our history.

If the Senate adopts the legislation as introduced by my distinguished colleague from New York, it will mark the end of one era and the beginning of another.

For more than a quarter of a century, we have experienced a cold war, regional hot wars, and intermittent and prolonged conflicts with varying levels of American involvement.

At the moment that we are at the threshold of at last halting American involvement in regional conflicts, the President appears ready to redefine its own war powers and those belonging to the President.

It is clear that since the end of the Second World War fast changing military technology and new codes of international political and military behavior have combined with growing Presidential power in spheres of both domestic and foreign policy. The result has been the accumulation of warming power in the hands of the chief executive— the President of the United States.

This state of affairs was known well by the men who wrote our Constitution.

They had lived under the rule of a British king. They knew all too well that the absolute warming authority of a sovereign ruler was oppressive to his subjects. For this reason, the Framers declared in the "national interest" by a monarch.

Determined to avoid the oppression of royal wars, the framers of our Constitution granted the Congress the authority to declare war and the President was vested with the power of Commander in Chief.
In 1789 Jefferson wrote to Madison and commented on this vital separation of authority:

> We have already given in example one effectual check to the Dog war. On the Washington-Townsend controversy, bringing him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.

The power to initiate war was firmly lodged in the hands of the Congress. As Madison stated, speaking of this principle:

> That the executive has no right, in any case, to decide the question, whether there is or is not cause for declaring war . . .

Congressional possession of warmaking authority is firmly planted in our Constitution. It has been held in due course by our Presidents and by great constitutional experts.

Yet today—even as we speak—the Armed Forces of the United States are deployed in a war without the approval of the Congress. They are deployed, because the President believes it in the national interest to bomb Cambodia—to make war by skirting article I, section 8 of the Constitution. This, of course, is not the first instance of a dangerous abdication of authority; that is simply called "Presidential war." We have seen it before in this and other administrations.

When a President initiates war, he is taking a power away from the Congress. His act is unconstitutional. His act is wrong.

The legislation we are considering today will, in fact, make more remote the possibility that we will again be involved in a presidentially initiated war. It will do so not by reshaping or altering the constitutional structure but by requiring in a presidentially initiated war:

> (1) to respond to any act or situation that endangers the United States, its territories or its possessions, when the necessity to respond to such act or situation in his judgment constitutes a national emergency; and
> (2) to respond to any act that may reasonably be construed to be an attack on the Armed Forces or any American citizens abroad.

The first problem lies with section 3. This section relates not to the objective of the legislation, but to some of the provisions that go to the means or, as the President has phrased it, the "infusion of the entire power into the hands of the President to be ineffective, or indeed irrelevant; as a congressional check on the President's constitutional authority. Under the Constitution strictly construed, besides a "sudden attack" on U.S. territory, the only other circumstances warranting unauthorized Presidential use of the Armed Forces are an attack on the Armed Forces of the United States stationed outside of the country and an imminent threat to the lives of American citizens abroad, the latter of which would justify only a brief military operation for purposes of evacuation.

The bill introduced by Senator Javits is precise in its definition of circumstances and conditions when American Armed Forces can be introduced into hostilities. Section 1 authorizes the use of Armed Forces to respond to any act or situation that endangers the United States or its territories or possessions, when the necessity to respond to such act or situation in the President's judgment constitutes a national emergency; and to respond to any act which may reasonably be construed to be an attack on the Armed Forces or any American citizens abroad.

The central focus of the bill is declared wars. It governs the use of Armed Forces in the absence of a formal declaration of war. It is true that in today's world, formal declaration of war may be impractical. Nonetheless, we believe that the authority of the Congress to authorize the initiation of war is certainly not obsolete.

Critics of the war powers bill have stated that it is not needed—that historical precedents are sufficient to provide adequate safeguards in the absence of a formal declaration of war.

I do not believe this to be the case.

The steady accretion of Presidential warmaking authority must be halted and limited by new statutory definitions of what constitutes war.

The bill introduced by Senator Javits is precise in its definition of circumstances and conditions when American Armed Forces can be introduced into hostilities. Section 1 authorizes the use of Armed Forces in the event of an emergency and to respond to any act or situation that endangers the United States or its territories or possessions, when the necessity to respond to such act or situation in the President's judgment constitutes a national emergency; and to respond to any act which may reasonably be construed to be an attack on the Armed Forces or any American citizens abroad.

It is important to note that this measure is not designed to tie a President's hands or slow our response to attack. The War Powers Act recognizes the need for quick response to attack. But it does not provide for the prolonged commitment of American forces without the approval of Congress.

In reversing a severe constitutional imbalance, the Congress is in a sense also stating publicly that it is ready to share the terrible burden of committing a nation to war.

This power has gone unshared for too many years. The result has been the prolongation of a tragic and costly war. The result has been the embitterment of a generation, and severe strains on our constitutional system of democratic government.

The war powers bill offers the Congress an opportunity to restore the doctrine of shared power between coequal branches of Government.

The war powers bill offers the Congress an opportunity to prevent future American involvement in never-ending wars.

And, finally, the war powers bill offers the Congress an opportunity to stop the serious erosion of its own authority in a field vital to the health and security of our Nation.

Mr. FULBRIGHT. Mr. President, I call up amendment No. 387.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

> On page 3, line 1, strike out through line 6 on page 4 and insert in lieu thereof the following:
> 
> "Sec. 3. In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be employed by the President only—
> 
> (1) to respond to any act or situation that endangers the United States, its territories or its possessions, when the necessity to respond to such act or situation in his judgment constitutes a national emergency; and
> 
> (2) to respond to any act which may reasonably be construed to be an attack on the Armed Forces or any American citizens abroad."

Mr. FULBRIGHT. Mr. President, before I make these remarks, I certainly want to reiterate my admiration and respect for the sponsors of this legislation. We have heard excellent hearings, and they have produced some very useful information on one of the most important aspects of our Government. And the differences of view, as I have already stated, are related not to the objective of the legislation, but to some of the provisions that go to the means or, as the Senator from New York likes to call it, the methodology of this effort to bring a greater responsibility on the part of the Congress to the warmaking activities of our country.

Obviously we all know that grows out of the extreme tragedy and the extreme injury, the enormous injury, that has occurred to this country as a result of the happenings during the last 10 years. Mr. President, although the intent of the bill is unquestionable, it seems to me that the bill could be improved in several respects.

Mr. President, I must say that we discussed this and I offered a similar amendment in the House and Senate. So, it is not a new attitude on my part.

The first problem lies with section 3, which catalogs the various conditions under which the President would be permitted to make emergency use of the Armed Forces. These conditions, in my view, go too far in the direction of Executive prerogative, especially in allowing the President to take action not only to "repel an armed attack"—with which we all agree, I think—but also to "forestall the threat or even the imposition of such an attack" on the United States or its Armed Forces abroad. The danger here is that these provisions could be construed as sanctioning a preemptive, or first strike, attack solely on the President's discretion.

The emergency powers of the President specified in section 3 of the bill would give the President a simple abbreviated provision allowing emergency use of the Armed Forces because it is not a new attitude on my part. The amendment in the committee.

Mr. President, although the intent of the bill is unquestionable and the substance of the legislation is not a new attitude on my part. The amendment in the committee.

The amendment will be stated.
Representatives on July 18 by a vote of 244 to 170. In practice, it is exceedingly difficult to draw up a list of emergency conditions for Presidential use of the Armed Forces that will be both long and extensive a catalog as to constitute a de facto grant of expanded Presidential authority. The list of conditions spelled out in section 3 of the committee bill, is, in my opinion, about as precise and as thoroughly thought out as can be devised, and its purpose, I fully recognize, is not to expand Presidential power, but to restrict it to the categories listed. Nevertheless, I am apprehensive that the very comprehensiveness of the precisions with which the contingencies listed in section 3 may be drawn upon by future Presidents to explain or justify military initiatives which would otherwise be difficult to explain or justify. A future President might, for instance, cite "secret" or "classified" data to justify almost any conceivable foreign military initiative as essential to "forestall the direct and imminent threat of an attack on the United States or its Armed Forces abroad.

For these reasons I am much inclined either to say nothing about the President's emergency powers as in the House bill, or to include a simple substitute for paragraphs (1), (2), and (3) of section 3 of the committee bill, in which it would simply be recognized that the President, under certain emergency conditions, may find it absolutely essential to use the Armed Forces without or prior to congresional authorization. This approach too has its dangers as it would of irresponsible or extravagant interpretation, but at least it would place the burden of accountability squarely upon the President, where it belongs, and it would also of course be restricted by the 30-day limitation specified in sections 5 and 6 of the bill.

Mr. President, I wish to emphasize this paragraph by putting but one thing, saying that the matter is one of judgment on the psychology of a reasonable person. If we undertake in advance to specify the conditions under which the President can act, he can rationalize whatever the circumstances are that would arise under these conditions. He will then feel free to proceed as he sees fit and feel authorized in doing it. Without that, I think he would do one of two things: He would be extremely cautious, if that is at all doubtful, or he would consult Congress.

It is the collective judgment of the Congress and the President working together which I think our system regards as of fundamental importance, and it is that judgment which I think this and other efforts we have engaged in seek to emphasize, that is, that it be a collective judgment. It is my own judgment of the psychology of the situation that the President, having these specific in hand, would say, "Well, we have this one condition that exists and proceed out of hand, either without reflecting fully himself upon the conditions, or without consulting Congress to any degree at all.

Under the language of paragraphs (1), (2), and (3) of section 3 of the bill the Executive could cite fairly specific authority for the widest possible range of military initiatives. Under the simpler, more general approach I propose, the President would remain free to act, but without the prop of specific authorization that he could defend to the Congress. He would remain accountable to Congress for his action to a greater extent than he would if he had specific authorizing language to fall back upon. Congress, for its part, would have in its supervisory right to pass judgment upon any military initiative taken without its advance approval.

This reminds me very much of the use that President Johnson made of the Tonkin Gulf resolution. He used to pull it out whenever anyone raised any question about it, and point to the language. He never did point out that he obtained that language by misrepresenting the facts in the case of Tonkin Gulf.

Considered in the light of the need to explain and win approval for any use of the Armed Forces on the specific merits of the case at hand, a wise President would think carefully before acting; he might even be discouraged from deposing Members of Congress as well as with his personal advisers before committing the Armed Forces to emergency action. For these reasons, it appears to me that a general, unspecified authority for making emergency use of the Armed Forces, though superficially a broad grant of power, would in practice be more restrictive and inhibiting than the specific grants of emergency power spelled out in paragraphs (1), (2), and (3) of section 3 of the committee bill. Alternatively—perhaps preferably—the same objective could be achieved by simply leaving out any attempt to codify the President's emergency powers, which is the approach of the House bill.

To deal with these difficulties I recommend the substitution of the following for the introductory clause and first three paragraphs of section 3 of the committee bill-page 3, line 1, through page 4, line 6:

SEC. 3. In the absence of a declaration of war by the Congress, the Armed Forces of the United States may be employed by the President only—

(1) to respond to any act or situation that endangers the United States, its territories or possessions, or its citizens or nationals in such a manner and degree of such act or situation in his judgment constitutes a national emergency of such a nature as does not require congressional authorization to employ such forces.

Another, related problem arises in connection with section 5 of the committee bill which specifies a 30-day limitation for emergency use of the Armed Forces by the President. Under the committee bill, the President could continue military action within the 30-day emergency period only by act or joint resolution, of which course would be subject to veto by the President.

In addition, section 6 of the committee bill, like section 5, makes a complete exception to the congressional termination power in any case where the President judges that "unavoidable military necessity" requires their continued use in the 30-day emergency period only by act or joint resolution, of which course would be subject to veto by the President.

Although I prefer the 30-day emergency period of the Senate Foreign Relations Committee's bill to the 120-day emergency period of the House bill, the latter, nonetheless, provides more effective control by Congress over the termination of military action within the 30-day emergency period only by act or joint resolution, of which course would be subject to veto by the President.
In any case, this bothers me very much. I was certainly hesitant to realize that this should be found to have re-moved from Congress one of the existing powers while we think we are trying to restrict the power of the President. It would certainly, indeed, be ironic if, instead of restricting the power of the President, we restricted the power of Congress to terminate hostilities once they had begun.

Mr. President, I yield the floor.

Mr. JAVITS. Mr. President, I yield myself, in position, as much time as I may require.

Mr. President, the distinguished chairman of the Committee on Foreign Relations made the same effort in 1972 when the bill was last considered, with one exception. At that time, he also had included in the same amendment some special provision respecting the use of nuclear weapons.

This consideration which we are asked to delineate and fight for its own power, specify the parameters of its power in order to specify the parameters of the President’s power? Or shall it not? The drafters of the bill came down on the President’s power? Or shall it not?

Moreover, as a matter of effective drafting, it seems to me impossible to state with any precision that is reserved to Congress without stating first what is reserved to the President. The distinction of lines, of separating one thing from another, and in doing so one must state it on both sides of the line.

This, it seems to me, is very authoritative. I see no reason for the President to have taken.

Mr. President, the 30-day period, which ties into this specification of what constitutional powers the President practically has, takes cognizance of the living fact that an incident can become a war. There we are in a situation in which the incident may perhaps cease and not become a war, in which case there would be no ground for congressional action. Where the incident is or is about to become a war, the War Powers Act becomes effective.

Second, we delineate the powers of the President for the purpose of making more clear the powers of Congress; and here they are to intermesh. You cannot delineate a part unless you delineate the other parts to encompass the whole. I think this is fundamental to this bill. We in Congress cannot assume that we are going to get off scot-free.

We must respect the President’s powers, while we use this opportunity to re-establish our own, and they are not a bit inconsistent. This is really what this bill is all about.

I regard the specification of the authority of the President to be a critically important element of the bill. Specificity is the very thing we have all been looking for. That is why we have been complaining that the “President’s men,” so-called, claim the moon and the stars. We have heard extraordinary quotations. I will not delay the Senate with reading long quotations, but we have some truly long quotations of what the so-called President’s men—to wit, the people who speak of the “strong” President—have been claiming on the part of the President. They have many unmitigable, self-defined authority, especially respecting war and “national security.”

Let me read just a few of them, so that the Senate may have an idea of the effort to bring into realistic focus the powers of the President. For example,
President Johnson said, in speaking of the Gulf of Tonkin resolution on August 18, 1967:

"We stated then, and we repeat now, we did not think the resolution was necessary to do what the President and what he was doing. We thought it was desirable and we thought if we were going to ask them [Congress] to stay the whole route and if we expected them to be there if we asked them to be there on the takeoff.

The legal officer of the State Department, testifying in 1966, spoke as follows:

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

One final statement. Secretary Acheson really threw down the gauntlet to Congress when he testified in respect to President Truman's plan to station six divisions of U.S. troops in Europe. He said:

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

Mr. President, in view of these very broad claims of Presidential authority to commit us to war and to wage war, if we do not specify statutorily the President will make his own specifications for the forces to be used in this situation at the moment. This is just what has become intolerable.

I believe one thing is critically important. If we adopt this amendment, we are defying, it seems to me, the very purpose and intent of our reason for considering the war powers bill, and that is that there is no such thing as independent, absolute, discretionary authority in the President of the United States when it comes to war.

He has to join with Congress. We understand the exigencies and we provide for them, but essentially it provides he does not have a free-wheeling mandate, limited only by time; for the effect of the Fulbright amendment would be to give him absolute, free-wheeling, self-defined authority.

I have heard some words of the Senator from Arkansas (Mr. Fulbright) which deeply disturbed me when I heard them, which carry out this philosophy, which says to the President, "You have 30 days to do what you want." The Constitution does not give that to him and neither does this bill. He has 30 days to defend the United States and its people in an emergency without statutory indication, without authorization. He does not have 30 days to do anything. That is not in the Constitution and it should not be the law.

I feel that the specificity we give him does have the effect of solution as conceived and written, with certain pragmatism in terms of the security of the country and at the same time there is a rationalization of power given the President with regard to war.

Finally, this will be a very important issue in the conference with the other
ize that there are certain differences of view as to this approach. He likes the word "methodology." It is a difference of opinion. None of us know for sure.

The Senator from New York gives his view of what prompt disengagement means, and said he has been opposed to the war in Vietnam. It has been approximately 4 years. It is not really ended yet, although the major: part has ended.

Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. All time has been yielded back. The question is on agreeing to the amendment of the Senator from Arkansas (putting the question).

The amendment was rejected.

The PRESIDING OFFICER. The bill is open to further amendments.

Mr. GRIFFIN. Mr. President, I call up my Amendment No. 368.

The PRESIDING OFFICER. The clerk will now state the amendment.

The legislative clerk proceeded to state the amendment.

Mr. GRIFFIN. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment reads as follows:

Beginning with line 1 on page 2, strike out through the end of the bill and insert in lieu thereof the following:

CONSULTATION

Sec. 2. It is the sense of the Congress that the President should seek appropriate consultation with the Congress before invoking the Armed Forces of the United States in armed conflict, and should continue such consultation periodically during such armed conflict.

REPORT TO CONGRESS

Sec. 3. In any case in which the President, without a declaration of war by the Congress—

(1) commits United States Armed Forces to hostilities outside the territory of the United States, its possessions and territories; or

(2) commits United States Armed Forces equipped for combat to the territory, airspace, or waters of a foreign nation, except for deployments which relate solely to supply, replacement, repair, or training of United States Armed Forces; or

(3) substantially enlarges United States Armed Forces for combat already located in a foreign nation;

the President shall submit promptly to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth:

(a) the circumstances necessitating his action;

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

(c) the estimated scope of activities;

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

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

CONGRESSIONAL RESPONSIBILITY

Sec. 4. (a) Each report submitted pursuant to section 3 shall be transmitted to the Speaker of the House and to the President pro tempore of the Senate on the same day. Each such report shall be referred to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives.

(b) If Congress is not in session when the report is transmitted, the Speaker of the House and the President pro tempore of the Senate shall forward the respective Senate and House of Congress to consider any such report of the President.

(c) No later than five days after receiving any such report, the majority of such committee shall report out a bill or joint resolution approving the actions taken by the President, or disapproving those actions and prohibiting the expenditure of any funds, from such date as it considers appropriate, shall be reported with respect to such commitment or enlargement of forces.

(d) (1) A bill or joint resolution reported under subsection (c) of this section shall be high priority legislation, to be considered by Congress in order at any time after the third day following the day on which such a bill or joint resolution is reported to move to proceed to its consideration and make a previous order on the motion to the same effect has been disagreed to. Such a motion to proceed to its consideration shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(2) Debate on such bill or joint resolution, and all amendments thereto, shall not exceed fifteen hours.

(e) If, prior to the passage of such a bill or joint resolution, a motion to the effect that the President shall submit a report to Congress shall be divided equally between those favoring and those opposing the bill or joint resolution. Once debate on such bill or joint resolution shall be concluded, no other measure or matters of constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.

SAFETY OF UNITED STATES ARMED FORCES

Sec. 5. The commitment of United States Armed Forces or the enlargement of those Forces requires the continued use of such Armed Forces for the purpose of bringing peace to such foreign nation and to the United States Armed Forces; or

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

such a bill or joint resolution of the second House shall be reported to the Senate or the House of Representatives, as the case may be, to the Committee on Appropriations and the Committee on Foreign Relations, respectively, of the second House shall be reported to the Committee on Foreign Relations of the Senate and the Committee on Appropriations of the House of Representatives, and each such report shall be printed as a document for each House.

Subsections (b)–(f) of this section are enacted by the Congress to the extent to which they specifically apply; and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and such rules shall apply to the entire rulemaking power of the Congress without regard to the jurisdiction of such committees. In enacting such rules the Congress deems appropriate, shall be referred to such committees.

The decision to vote "no" on final passage shall be applicable with respect to the particular, item or items, vote upon the same total amount of outlays of the United States Government with respect to such fiscal year without the convening of committees of conference by the President or the Congress, and conferences of committee of conference shall meet immediately to resolve their differences. The provisions of subsection (d) shall not be construed to require the consideration of any report of a committee of conference on any bill or joint resolution.

The Senator from New York gives his support for the amendment. He has serious reservations about its constitutionality, and he expects that the amendment will be rejected.

The amendment was rejected.

Earlier this year I did not object when the Committee on Foreign Relations reported this measure for debate by the Senate. Despite my reservations and concerns, as a member of the Foreign Relations Committee, I believed then that this important measure— which is the product of long study and hard work by the distinguished Senator from New York (Mr. Javits) —and other Senators—deserves and is entitled to the consideration and debate which is being accorded it now by this body.

The decision to vote "no" on final passage shall be applicable with respect to the particular item or items, vote upon which the amendment was rejected. The amendment was rejected.

I reluctantly voted for a measure which was similar in many respects to the one before us now. I indicated then that I had serious reservations about its constitutionality, and I expected that the amendment would not become law this year over the veto of the President— and that veto is certain.
without tying the President's hands in advance.

The amendment I am suggesting now is put forth for educational purposes—and for future consideration—rather than for immediate action.

I want to demonstrate that there are other ways to go—constitutional ways. At the same time, I should seriously suggest that this alternative is complex that it has been developed at a late date and that it should be the subject of hearings.

During the last few days, as printed copies of this amendment have been circulating among my colleagues, I have received a number of constructive suggestions which indicate that, while the thrust of the amendment is appropriate and correct—some details still need to be worked out.

Accordingly, I shall not press for a vote on this amendment today. But its very existence as an alternative for future consideration helps, I hope, to put my reasons for opposition to the pending bill in proper perspective.

Unfortunately, S. 440, before us now, would raise up serious doubts about the authority of the President in times of crisis. It would encourage unfortunate miscalculations on the part of potential enemies; it would seriously impair the conduct of our foreign relations, it would weaken our national defense and thereby it is likely to increase—not lessen—the dangers of war.

I wish to spell out some of the reasons for my doubts about the constitutionality of S. 440, and then I shall briefly explain the alternative route which I suggest. I am convinced that my amendment would accomplish the desired rejuvenation of constitutional responsibilities of the President as Commander in Chief.

The report of the Committee on Foreign Relations with respect to S. 440, filed July 14, 1973, includes the following statement:

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

Last year, the committee's report in connection with the original bill, S. 2956, filed February 29, 1972, made this statement:

The purpose of the war powers bill, as set forth in its statement of "purpose and policy," is to provide, alter, amend, or adjust—the intent of the framers of the United States Constitution in order to insure that the collective judgment of both the Congress and the President will be brought to bear in decisions involving the introduction of the Armed Forces of the United States in hostilities or situations where imminent involvement in hostilities is indicated by circumstances.

The earlier report at another point declared:

The bill is in no way intended to encroach upon, or be derived from the constitutional power of the President.

But despite these praiseworthy declarations, I am deeply concerned that the language and effect of S. 440 is to do exactly what the reports say it would not do: It seeks to alter the constitutional powers of the President. Leaving aside questions about the wisdom of such changes, the cold fact is that changes in constitutional powers cannot be accomplished except by amending the Constitution.

Section 5 of S. 440 declares that without prior approval of Congress the Armed Forces of the United States cannot be introduced by the President for more than 30 days, in hostilities, or, in any situation where "imminent involvement in hostilities" is indicated except in the four situations described in section 3.

Clearly, by this provision the proponents of this bill acknowledge that there are situations and times when the President is justified, and empowered under the Constitution, to commit U.S. Armed Forces to hostilities without prior congressional approval. Once that President is acknowledged, I am led to conclude that understanding how Congress by statute could constitutionally impose an arbitrary 30-day limitation on such Presidential authority.

Certainly, no arbitrary time limit is expressly set in or can be inferred from the Constitution itself. The committee report admits that such a limitation is arbitrary. At page 28 of the 1973 report are found these words:

The choice of thirty days, in a sense, is arbitrary.

Of course, Congress can set limitations and procedures with respect to its own actions, which my substitute amendment would do. But that is a totally different thing than seeking to fix by statute as limitation admitted to be arbitrary upon powers of the President which are derived from the Constitution.

The 1972 report, at page 6, declared:

The intended effect of Section 5 is to impose a prior and unalterable restriction on the emergency use of the armed forces by the President.

It is clear, I think, that S. 440 seeks to impose: "A prior and unalterable restriction" on the President's constitutional powers.

In addition, I believe the specification in section 5 of only four situations in which Congress can use the Armed Forces without prior approval is also an arbitrary restriction on his constitutional powers. How can we be so sure that there are not other situations, not now contemplated, when the President could correctly argue that a failure to deploy troops. If there are such other situations, the Congress cannot limit or deny that constitutional power by a simple statute.

It cannot be emphasized too strongly that the bill has been drafted to fulfill—not a proposed constitutional amendment. Some may believe the language embodied in the bill is wise; some may believe it unwise. But the fundamental issue is whether such legislation is consistent with the Constitution.

Because S. 440 would be unconstitutional, and because in any event, it will not become law over a certain Presidential veto, I believe a practical, constitutional alternative to S. 440 is needed and should be considered. It is for those reasons that I have developed my amendment.

S. 440 provides that the President, for a period of up to 30 days, can introduce U.S. Armed Forces in hostilities, or, in situations where imminent involvement is indicated except in response to an armed attack on U.S. territory or against U.S. forces abroad, or to a direct and imminent threat thereof or in the case of assisting Americans in clear and present danger.

This means that a President would be prohibited in the absence of prior approval by Congress from employing U.S. forces in situations where:

First, there is no armed attack on the territory or U.S. forces, or direct and imminent threat thereof, and

Second, the situation is such that imminent involvement in hostilities could be clearly indicated by the circumstances.

The feature of the bill could have dangerous implications for American foreign policy, or for the safety of the United States, and for the prospects of peace in the world.

The modernization and expansion of Soviet military strength in Europe and the Mediterranean, together with increased Soviet deployment around the world, is a fact which cannot be ignored or avoided.

The United States cannot escape the fact that, too, must have the ability to deploy forces in support of its foreign policy. The authority of the President to act in some situations not recognized by this bill can be absolutely essential to the maintenance of peace and to the prevention of war.

Let me be more specific.

If S. 440 had been the law in 1962, President Kennedy could not have deployed the U.S. fleet and imposed a quarantine, as he did at the time of the critical missile crisis. It will be recalled that at that time, there was no armed attack on the United States or its Armed Forces, nor any imminent threat thereof. But the act of deposing a pro-Soviet regime in Lebanon did raise a risk of "imminent involvement in hostilities." If S. 440 had been in effect, President Kennedy's hands would have been tied. Those who say he could have gone to Congress and asked for authority are unrealistic. By the time Congress could have been called back into session to consider such a proposal, the international ball game would have been over.

Similarly, the reinforcement of our Dec. 20, 1967, at various critical times was not a response to armed attack or the imminent threat thereof. But actions taken by several Presidents with respect to Berlin have exposed our forces to the risk of "imminent involvement" in hostilities.

President Eisenhower sent troops to Lebanon at a critical point in time. His action was in the interest of peace—not war. There are times and situations when a requirement of prior approval by Congress would be self-defeating and impractical.

The ability of our President to act in
the interest of peace should not be placed under the shadow of doubt and uncertainly. I speak specifically of the S. 440.

President Johnson's strategic deployment in the Middle East of 6th Fleet vessels at the time of the Six Day War, coupled with his diplomatic contact with the Soviet Union to avert a war, was designed to prevent effective action taken not in the interest of war but in the interest of peace. His action was not in response to an attack upon the United States or our Armed Forces. But that move could expose our Armed Forces to the risk of "imminent involvement in hostilities" and, therefore, would have been prohibited under S. 440.

Some have argued that a Middle East resolution would confer Presidential authority to take such actions with respect to the Middle East. But it is my understanding that that resolution applies only if there is "armed aggression from any country controlled by international communism." Obviously, this provision does not cover some of the situations that could arise in the Middle East.

My point in reciting these examples is to underscore the fact that S. 440 is not a step toward reducing the chances of war. Indeed, Presidential authority to take such actions in very critical situations, this legislation could actually have the effect of increasing the likelihood of war—not peace.

I realize that the bill is well intentioned. But, unfortunately, it would raise up ambiguities and doubts in situations where the President's power to act should be clear and unqualified.

S. 440 is not only unconstitutional but it is unnecessary to a restoration of the appropriate congressional role.

It is not necessary to attempt to limit the Constitutional powers of the President—"to impose a prior unalterable restriction on emergency use of the Armed Forces by the President"—in order to insure that the Congress can speedily and promptly cut off funds for ventures which do not have the support of Congress.

All that is necessary—as was demonstrated when funds for bombing in Cambodia were cut off—is for Congress to act.

No time limit of 30 days need be imposed on the President's Constitutional powers. Aside from the fact that such a limitation would be unconstitutional, the period could be much too long in some situations—and too short in others.

The amendment I have suggested calls for consultation between the President and the Congress before troops are involved abroad. To this extent, it calls for prompt notification to the Congress if and when the President commits or substantially enlarges U.S. troops abroad. I believe that taking action to support the concept of consultation in time of crisis is an appropriate step—a step that would implement the intentions of the Founding Fathers, that would enable Congress to take action on the basis of up-to-date information.

My amendment then establishes an expedited procedure for Congress to consider the action of the President and to exercise its power of the purse with respect to the continued use of the Armed Forces in hostilities. Finally, provision is made in the amendment so that any cessation of funding of operations would not imperil the safety of the Armed Forces.

My amendment would not tie the hands of the President in advance. It would make the President and make more effective the power which Congress already possesses under the Constitution.

In contrast to the pending bill, my amendment does not attempt to prejudge the circumstances in which our Armed Forces should be employed at some time in the future.

That question is left to the President and the Congress of the future to decide under the circumstances that then prevail. I believe that through this approach wiser decisions can be made than would have been the case if we attempt, as S. 440 does, to foresee and anticipate future events now.

The approach of my amendment draws upon the recent experience of Congress where the President was not cut out. It seems to me that if that experience proved anything it demonstrated that Congress has the power to act—but sometimes it lacks the will to act.

Such an attitude, it seems to me, calls for legislation—not to restrict the President—but to approve the procedures under which Congress can act, and particularly the Senate where filibusters are a serious obstacle to prompt action.

I shall not press my amendment, Mr. President, but I suggest and urge that the approach embodied in this amendment be seriously studied once it is made clear that S. 440 cannot become law.

Mr. President, I withdraw the amendment.

The PRESIDING OFFICER. The amendment is withdrawn. The bill is open to further amendment.

Mr. JAVITS. Mr. President, does the Senator from Minnesota wish to speak now?

Mr. HUMPHREY. Yes, if someone will yield me time.

The PRESIDING OFFICER. Who yields time?

Mr. MUSKIE. Mr. President, I yield 5 minutes to the Senator from Minnesota.

Mr. HUMPHREY. On the bill?

Mr. MUSKIE. On the bill.

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. HUMPHREY. I yield.

Mr. JAVITS. Let me say that I shall reply to the statement of the distinguished assistant minority leader at a later point, and I shall ask unanimous consent that my remarks may be printed in the Record at this point.

Mr. HUMPHREY. Mr. President, I think it would be appropriate that the Senator from New York reply now, and I shall yield to him.

Mr. JAVITS. Mr. President, if I may have 5 minutes, I shall not take very long.

Mr. President, I reply, first, because the merits demand a reply, and second, because my remarks are for large. From Michigan (Mr. Griffin), who, if memory serves me correctly, was one of the co-sponsors of our bill.

Mr. GRIFFIN. No.

Mr. JAVITS. No, I guess not. In any event, I think the President is right. He probably bespeaks a good deal of what the administration is thinking. So I should like to reply.

One cannot expect that the bill we propose is palatable to the President. It would be for President Nixon that President Any President would be found to oppose it, to try to give himself all the powers he possibly can hang on to.

It may be remembered that President Nixon, in regard to the Cambodian situation, was precise on that score. He echoed the words of Winston Churchill when he said he was not there to be President in any way to reduce the powers of the President. That is what Churchill said about the British Empire. But, Mr. President, I believe that by doing what we are doing, we are avoiding the baffle for President Nixon's idea, which is equivalent to what overtook the British Empire, and overtook it are trying to do is, at long last, to bring about an end to the guerrilla warfare between Congress and the President, in which Congress has been constantly bated, with such tremendous tragic cost to our country. Here is legislation which has been developed as to really sweep away Presidential authority.

Mr. JOHNSTON. Mr. President, will the Senator from New York yield?

Mr. JAVITS. Mr. President, would the Senator from New York explain to me, it seems to me that the purpose of the bill is to prevent the kind of situation we had in Vietnam, yet the language of the bill speaks of involving our troops into hostilities. As I recall the situation in Vietnam, our troops were originally sent there to guard an Air Force base. We were there to guard that base. They in turn were attacked, as perhaps could have been predicted. That in turn would cause us to consider other sections of the law which would allow the President, then, to use the troops to repel an attack on those troops.

Is it not true that this would or would not prevent the kind of Vietnam situation which we have had?

Mr. JAVITS. It would prevent a Vietnam situation because the troops who went there to defend that Air Force base—even assuming that those facts are correct—but let us assume that, for the sake of the answer, although I think there is more to it than that—because President Johnson had decided on—the Senate majority and the Administration meetings he held with the President of Vietnam, I think it was either at Manila or Hawaii, in which it was decided that the Vietnamese forces would undertake essentially garrison duties and U.S. forces would fulfill the Presidential.

But even if the Senator is right—and it is a hypothetical question—if we sent troops into hostilities, and there were hostilities in Vietnam, then this act would immediately apply. Certainly no President, even if there were an actual case to pass for such a case, that there was imminent danger of hostilities which, according to this, would apply.

So it is an a priori situation—to wit,
troops were there at all, whether to guard an Air Force base, which made this applicable, and not the exemption contemplated in the section regarding Presidential powers.

Mr. JOHNSTON. Then the term "introducing hostilities" means introducing troops into the country if hostilities are taking place.

Mr. JAVITS. That is exactly right.

Mr. JOHNSTON. And where they are not employed initially for hostilities?

Mr. JAVITS. That is precisely right.

I am obliged to the Senator for sharpening up my thinking. Now, Mr. President, to continue, I should like to deal with the various items the Senator from Michigan (Mr. GRAFFIN) has in his amendment which he has now withdrawn, because it gives us the opportunity to show precisely how this applies.

I said a minute ago that no one will get off scot-free. We are confirming the President in constitutional authority, which is something that has never happened in the history of this country. That is good for him. We are also confirming ourselves in our authority. It is not one-sided at all. I hope that the President, who has been rather quick about this, will now ask for the time lag and the danger was that he may not get another chance, nor may any other President. We may have a constitutional crisis, if the country gets sick and tired of a "President's war," even as Senator Byrd noted a few years ago in his constitutional amendment. We have passed that bill. We may again. We will have a Presidency which is truly emasculated and I do not want to see that, either.

The PRESIDING OFFICER (Mr. HELMS). The time of the Senator from New York has expired.

Mr. MUSKIE. Mr. President, I yield the Senator from New York as much time as he requires.

The PRESIDING OFFICER. The Senator from New York may proceed.

Mr. JAVITS. Mr. President, that is the framework, because this is very important.

Let us take the various instances. First, deployment regarding the Cuban missile crisis. The fact is that missiles were stationed in Cuba by the Soviet Union, essentially, and that, therefore, the President who would propose to stop their ships at sea would know he was in imminent danger of hostilities. So this bill would apply. And why should it not? In fact, the Soviet ships were not stopped by us. They stopped themselves. It is important to note that McGeorge Bundy, who is the closest living person to President Kennedy respecting this matter, has testified that the War Powers Act would not have hamstrung President Kennedy's successful diplomatic moves to resolve the Cuban missile crisis.

Now, the President came to Congress and said, "I need authority to stop those ships," we would have stopped those ships. That was risky business for hundred of millions of people around the world, with nuclear war in the offing; to leave it to one man in the White House, and to decide yes or may. Fortunately we got out of it through diplomacy.

Mr. GRIFFIN. Mr. President, will the Senator from New York yield?

Mr. JAVITS. I yield.

Mr. GRIFFIN. Mr. President, I am glad, does concede that the effect of the bill would be to have had it impossible for President Kennedy to have acted in the Cuban missile crisis without getting prior approval of Congress.

Did the Senator aware that Congress was not in session at that time?

Mr. JAVITS. This Senator is very well aware of that. Also, that Congress can be called into session in 10 hours. In addition, I quote from Michigan of some history, that crisis was brewing for several weeks. I was on television about it, as were many others, before the President made the decision as to what he would do, that is, that he did not have time to deal. I repeat, he might have—in good faith, invoked that provision of this bill which said that if U.S. territory was in imminent danger of attack; that bill, too. I would hope that the President would not do that, but, nonetheless, he perhaps could have, if it came to that.

Mr. GRIFFIN. I am interested in having this debate fully reflect the various points of view, so let me say that, as I recall it, President Kennedy made that decision rather late, after it was ascertained, I think by aerial observation, that the missiles were actually on the ships. Certainly we would not criticize him for not making the decision earlier. Once he made that decision, and the ships were on their way, it was too late to call back Congress or to get Congress to consider and pass some kind of resolution of approval before the missiles would have been launched.

Now, to say that because the missiles were in Cuba would have authorized us, under the resolution, is to say that missiles anywhere in the world, or ICBM's for that matter, which are much larger than those in Cuba, and which can reach the United States, would allow the same thing. I do not think that the Senator from New York would really mean that. So I point out that I think the effect of the bill would have been impractical and unrealistic in the Cuban missile crisis. President Kennedy's hands would have been tied and he would not have been able to act in the interests of peace, as he did.

Mr. JAVITS. I could not disagree more with the Senator from Michigan.

Mr. MUSKIE. Mr. President, will the Senator from New York yield for a moment?

Mr. JAVITS. I yield.

Mr. MUSKIE. The Senator, of course, is the author of the bill and the careful architect of its provisions. He understands what he intended by this legislation better than anyone else. But in discussing the Senator's amendment, if he will let me make the point first—the historical point—that the President at that point did assemble the congressional leaders.

Mr. JAVITS. Of course he did.

Mr. MUSKIE. At the time he considered the decision. Second, the declaration of war at the time of Pearl Harbor was made within 2 days of the attack on Pearl Harbor. So Congress is capable of acting quickly, but this Senate, so far as I emphasize a point the Senator from New York made a moment ago. The language of subsection (1) of section 3, which confirms the emergency authority of the Commander in Chief.

Mr. JAVITS. The Senator is not correct. The 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 foretell the direct and imminent threat of such an attack.

I remind both Senators that the implication from the pictures taken by our aircraft was to the effect that the installation of the missiles posed an imminent threat to the United States.

Mr. JAVITS. The Senator, himself, said that. We New York has said, I would hope that, given time, a President would still consult Congress. But one certainly could not challenge his good faith if he were to use that language in those circumstances to invoke the authority of Congress.

Mr. JAVITS. The Senator has answered the question exactly as I would, and I wish to add one other point.

No one denies for a minute that you still need to go to a great extent upon the Presidency, as far as all the loose talk about credibility, and so forth, we all can appreciate and understand that, but you cannot run a country that way. You cannot operate; you cannot pass laws on that theory.

We must assume that, having written it out, the President will obey the law in reasonable good faith. In any case, we will have something to repair to.

I believe that the answer to the Cuban missile crisis is for the President to do what he always does, if he has the assurance of the United States, that he would not have seen his clear duty under this bill to come to us. What gives him the prescience and patriotism that is denied to us? I do not understand it. He is a mortal, he is human and mortal, as we are. If you had any doubt about it yesterday, you should not have it today. What is the basis for the assumption that he is infallible and cannot make a mistake and that only we are capable of mistakes?

So much for the Cuban missile crisis.

As to the relief of the Berlin garrison, there was no imminent threat of war. The Senator, himself, said that. We just defeated an amendment by the Senator from Arkansas (Mr. FULBRIGHT) which would have inhibited the deployment of our forces. So the President is perfectly free to deploy the forces of the United States. That covers the Berlin garrison problem.

As to the situation of the troops to Lebanon, there, again, the President should have come to us; and, in fact, he did. He got a resolution which in the terms of that time was valid: if they are attacked by Communist forces or Communists backed forces.

That was his cover for asking for the resolution, on the ground that the revolt
In Lebanon was fomented by the Soviet Union or forces acting at the dictates of their international Communist apparatus. But primarily this was not an attack, and I apply and apply in that kind of situation. That could have led to an enormous conflagration in the Middle East exactly like that in Vietnam. We are mighty lucky that we got away with it. Certainly, we want this to apply to that kind of situation, and it should.

Finally, as to the deployment of the 6th Fleet in the 6-day war, the answer is precisely the same as that respecting the deployment in respect of the Berlin garrison. The President moved our ships forward in a situation which represented the normal deployment for naval forces of the United States. There was no imminent danger.

Nobody was threatening to attack. They were not involved in hostilities. And the President had complete authority to do that. Had he moved them within the war zone, that is a design of war, that is part of a policy of the other of the parties, then he would be subject to this law, and I maintain that he should be. That is why we are doing it.

I understand the views of the Senator from New York, that these are appropriate questions to raise and to be debated. But I really feel that the plan of the bill meets the appropriate exigencies. Where we ought to have power, we are given power; and where the President ought to have power, he is given power.

I thought these views should be juxtaposed to those of the Senator from Michigan, and I thank the Senator from Maine.

Mr. MUSKIE. Mr. President, I yield 5 minutes to the distinguished Senator from Minnesota.

Mr. HUMPHREY. Mr. President, earlier today I made a statement and placed in the Record a statement in full support of the important, historic piece of legislation.

I particularly wish to compliment the Senator from New York for his initiative in this area of constitutional law—that is what this is. And the distinguished Senator from Maine for bringing this bill on the floor of the Senate and for his intimate knowledge of its details.

The report of June 14, 1973, which has been published on the War Powers Act, as it is known, is possibly one of the most powerful and informative documents relating to the relationships between the President and Congress, as pertains to waging powers and the authority that each branch of Government has, that has ever been published. We are indebted to the Senate Foreign Relations Committee, the sponsors of this bill, and the staff of that committee for a truly remarkable report. The report contains these words:

It is legislation essential to our security and safety. It is legislation in the interest of the President as well as the Congress. . . . We live in an age of undeclared war, which has meant Presidential war. Protracted engagement in undeclared, Presidential war has created a most dangerous im-balance in our Constitutional system of checks and balances. . . . [The bill] is rooted in the words and the spirit of the Constitution. It is underlined in Section 8 to restore the balance which has been upset by the historical disenfranchisement of that power over which the framers of the Constitution were the most troubled. The whole Article of Congressional power—the exclusive authority of Congress to "declare war"; the power to change the nation from the state of peace to a state of war; the power to make treaties and to negotiate peace—all of these votes the occasion time and again of warmaking powers and the authority over war which the framers of the Constitution regarded as the most sacred and fundamental. Congress on the issue of life or death, peace or war, nothing could be more fundamental.

Whether on this bill is what it ought to be or not, it is a beginning. It represents an intelligent, instructive effort on the part of Congress to work out the relationships between the Presidency and Congress on the entire subject of national security, particularly as it relates to the use of the armed forces of the United States, and under what terms and conditions.

So I would hope, as the Senator from New York has said, that the President would not be too hastily in proclaiming that it will be vetoed. I would urge upon the President that he study the background of this legislation as the testimony before the Foreign Relations Committee was given. I would urge upon the President and his advisers that they read the report on this bill, as filed by the Committee on Foreign Relations. I urge upon the President that we learn the lessons of the second half of the 20th century—namely, that power begets power, that action begets action, and that Presidential power exercised is building precedent upon precedent, and there comes a time when you have to take a look once again and attempt to restore the balance upon which this constitutional system is based.

Mr. MUSKIE. Mr. President, one of the best ways to prevent a war is to have communication between the respective nation-states. I am today submitting a resolution which will place the Senate on record as favoring a return to normal relations between the United States and an old historic friend—namely, Sweden—and the means to do this would be the normal exchange of ambassadors.

Since August 1972, almost a full year, we have had no diplomatic relationship with Sweden, a friendly nation, a nation of democratic principles and democratic institutions, a nation of people who have a great and fierce sense of patriotism and liberty. Yet the President of the United States has seen fit to break off diplomatic relations and inform the Swedish Government that an ambassador from Sweden would not be welcome here and, of course, not to send an American ambassador there. Why? Because the present Prime Minister of Sweden made some derogatory remarks about our country in 1972 when the bombing was taking place over Vietnam. But he did not say anything that had not been said by members of the People's Party, or distinguished citizens of this country who disagreed with the President's action.

What the Swedish Prime Minister said was not unlike what had been said from Peking or Moscow. They had articulated a diatribe against this country for years. Yet we reach out to Moscow and Peking and we call them long lost brothers. It is the new diplomacy.

Sweden was entitled to express their points of view, but if the reason we broke relations with Sweden is because we did not like what their Prime Minister said in 1972, I want to know what we are doing in our new rhetoric and spirit of understanding with the Peoples Republic of China and the Soviet Union. The situation does not make sense.

All I am doing here is to ask the President of the United States to restore the relationship with Sweden that is a bridge between the North Atlantic Pact on the one hand and the Soviet Union on the other hand, a country that is a friendly country, which has its sons and daughters by the millions in this country, that is a country that believes in civil liberty. I am asking that the President of the United States "get with it" and send an ambassador there and say to the Prime Minister of Sweden that we are prepared to act like mature people; that we are done with this infantile petulance, and it is time we cut it out.

We do not have an ambassador in Moscow. It might not be a bad idea to have one there. I urge on the President of the United States that in the name of diplomacy for peace, for which I commend him, and repeatedly praise him, that he take the steps now to heal some of these wounds in the case of Sweden and he use of the process of normalizing relations with the Soviet Union, that an ambassador be sent there.

Mr. President, this is one of the ways to preserve peace and this fits within the context of this debate.

Mr. President, the resolution would place the Senate on record as favoring a return to normal relations between the United States and Sweden. The means to do this would be a normal exchange of ambassadors.

At present, there is no American ambassador in Stockholm. Our Ambassador left his post in August of 1972. The administration has not nominated another ambassador for this post, leaving it vacant, as we are here.

The Swedish ambassador left Washington in January 1973. I understand that the administration has made it known to the Swedish Government that it will not welcome his successor. The President of the United States is the one who made the Swedish ambassador to Washington has been given another post by his government.

Mr. President, what appears to be a childish rift between two allies has serious implications for U.S. foreign policy.

It is a matter of great concern to me.
and others who feel that the United States has absolutely no right to penalize a nation in this fashion, because its national leadership expresses views which may not be in accord with our own.

The Nixon administration, I believe, has chosen to attempt to embarrass the Swedish Government by not sending an ambassador to Stockholm. We have also rebuffed any attempts made by the Swedes to normalize relations.

The principle was the guiding force in the 1930's when Franklin Roosevelt recognized the Soviet Union. And this sentiment certainly was in evidence when Mr. Nixon and Mr. Kissinger arranged for a mutual exchange of diplomats with the People's Republic of China.

It is interesting that we choose to penalize the Swedish Government for expressing views critical of our involvement in Indochina and doing no more than bat an eyelash when far more critical and more numerous statements are made by the Soviet Union and the Peoples Republic of China. Of course, I do not believe we should diplomatically penalize any country for statements it makes which faithfully reflect the views of large numbers of its people.

We cannot avoid the fact that our policies in Indochina have deeply disturbed large numbers of Scandinavians and Europeans. When Prime Minister Palme was critical of the American bombing of Hanoi in December 1972 his remarks were not aimed personally at the President or any other Americans. While they may have been exaggerated and personally take exception to them, however, the essence of his frustration, outrage, and disagreement with our policies was shared by many Americans.

Mr. Palme, like all Americans, has a right to be heard in Indochina and doing no more than to experience retribution of any sort.

I have no doubt that Swedish-American relations strengthened by bonds of friendship and kinship will long outlive the present infantile petulance.

However, the principle involved here is how the United States relates to the smaller democratic nations of the world.

Why have we paid so little attention to the ugly tirades of great socialist powers and react so unfairly to criticism of our policies by a small democracy who does not punish diplomatically and embarrass a country which has been our friend for so many years?

During the month of April in a letter, I called upon the President to give this matter his personal attention and remedy this deplorable situation. There has been no response from the White House or from the Department of State.

Apparently, the exchange of views that we so cherish with the People's Republic of China and the Soviet Union is not desired in the case of Sweden.

All Americans—and especially those of Swedish descent—must realize how unfair and untenable our position is.

It is my hope that the Senate Resolution I introduce today will bring to the attention of the President and the State Department the fact that the United States is treating with all due haste an ambassador to Sweden.

The time has come to normalize our relations with Sweden and let not the past interfere with the necessary exchange of views so badly needed for future settlement.

Mr. TOWER. Mr. President, I call up my amendment No. 386 and ask that it be stated. It is my understanding that the amendment is out of order, but I was under the impression that the point of order could not be raised until after the time on the amendment had expired or had been yielded back.

Mr. MUSKIE. I am happy to yield time to the Senator.

The PRESIDING OFFICER. The Chair is advised that the amendment is out of order.

Mr. TOWER. Mr. President, I withdraw the amendment for the moment.

Mr. MUSKIE. I am happy to yield to the Senator from Texas on the bill.

Mr. TOWER. Will the Senator yield to me for 15 minutes?

Mr. MUSKIE. I yield 15 minutes to the Senator from Texas on the bill.

The PRESIDING OFFICER. The Senator from Texas has the floor.

Mr. TOWER. Mr. President, the amendment in question is out of order because it is an amendment to the title of the bill and, therefore, cannot be called up until after the bill is passed.

I will read the amendment. It states:

"Amend the title so as to read: 'A bill to make rules governing the use of the Armed Forces of the United States in war by the President or his veto is overridden."

I know on the face of it that it appears to be a frivolous and facetious amendment, but I offer it not in levity because to me it really says what we are trying to do without doing what I conceive to be the impact of this legislation if it is passed and if it is signed by the President or his veto is overridden.

Mr. President, what is proposed in § 440 is to reduce the United States to a state of impotence in this negotiation with the large superpowers of this world because it imposes a paralysis of military action on the President of the United States.

Anyone knows that to negotiate successfully with a superpower, the United States must not only be in possession of great military power, but also you must have the flexibility and the willingness to use it, if necessary.

What this bill does is to prescribe the Chief Executive in this country in a way that would leave his head of state in a large country in the world. They must be laughing themselves silly in the Kremlin over our consideration of this legislation.

Much has been made of the research and constitutional prerogatives of the Presidency of the United States. It seems to me we are trying to do it not only at the expense of the constitutional prerogatives of the President, but also at the expense of the continuance of a tradition in our governmental system, a tradition which has allowed the President freedom of movement in the conduct of diplomacy.

Mr. President, I do not think a better case could be stated against the adoption of the war powers bill than was stated by Mr. Justice Sutherland in the case of United States v. Curtiss-Wright Export Corporation, 299 U.S. 304, 1936.

He said:

"It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government and those in respect of domestic or internal affairs. That there was differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal vast external power, with its important exceptions, except those specifically enumerated in the Constitution, and such implied powers as necessity and the mutual advantage may confer in the enumerated powers, is categorically true only in respect of our internal affairs. . . . The powers to declare war and wage war, to conclude treaties and negotiate diplomatic relations with other sovereign states, if they had never been mentioned in the Constitution, would have vested in the federal government as matters of national and international concern. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our citizens (see American Banana Co. v. United Fruit Co., 213 U.S. 347, 356); and operations of the nation in such territory were necessarily restricted by international understandings and compacts, and the principles of international law. . . .

Not only, as we have shown, as the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In many cases, it is true, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. In practice, treaties are the advanced consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, nor can Congress do anything to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Annals, 6th Cong., col. 613.

That was a man speaking within the same time frame that the Constitution was conceived, framed, and adopted. If we want to talk about the intent of the framers, we should look at those who were present in that era and who were commenting on the Constitution at that time.

Justice Sutherland further said:

"It is quite true that if, as the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our foreign policy is to be achieved, then, that is something which is to be made effective through negotiation and inquiry within the international field must often account to the President a degree of discretion and from him from statutory restriction which would not be admissible were domestic affairs alone involved. . . . [B]oth upon principle and in practice it can be concluded there is sufficient warrant for the broad discretion vested in the President to determine
whether the enforcement of the statute will have a beneficial effect upon the re-establishment of peace in the affected area.

The opinion goes on to matters that are not necessarily relevant to this debate.

Mr. President, it occurs to me that what we are doing here flies in the teeth of tradition, custom, and usage. In a horse-and-buggy era, even legislation conceivably could have had its place, but not today, not at a time when we have the Middle East crisis, the Lebanese crisis, the Dominican crisis, the Cuban crisis. This is no time for us to fly into the arena of tradition and constitutional uses.

I have no thought that this bill will be rejected, but I think that those of us who can see the inherent evil in this measure would have been remiss had we not talked about it. Should this bill become law, the United States from this point will be disregarded as a great power with influence over the course of world events.

The PRESIDING OFFICER. Who yields time?

Mr. MUSKIE. Mr. President, I yield to the Senator from South Carolina 10 minutes.

Mr. THURMOND. Mr. President, I rise in opposition to the pending bill, S. 440, on the grounds that it is unnecessarily restrictive on the President and may well lead to new problems rather than correct present problems.

Under this bill the President of the United States could take emergency military action—in the absence of a congressional declaration of war—in only four cases:

First. To repel an attack on the United States or an attack in which U.S. Armed Forces are directly and immediately threatened.

Second. To repel or forestall an attack on U.S. Armed Forces stationed outside the United States;

Third. To protect U.S. citizens and nationals in foreign countries;

Fourth. Pursuant to some specific statutory authorization short of declaration of war.

The bill further provides that when the President does take emergency action, such action must cease within 30 days unless Congress authorizes continuation of use of the Armed Forces.

Mr. President, in my view this measure fails to meet the objectives of re-establishing the President's emergency power to act in emergencies. The legislation conceivably could have had its place, but not today, not at a time when we have the Middle East crisis, the Lebanese crisis, the Dominican crisis, the Cuban crisis. This is no time for us to fly into the arena of tradition and constitutional uses.

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CONGRESSIONAL RECORD - SENATE

July 20, 1973

THE SENATE

Mr. JAVITS. Mr. President, the amendment of the Senator from Missouri, Mr. STENNIS, and I are willing to accept the amendment of the Senator from New York (Mr. MUSKIE), and I do not believe I shall take the full 5 minutes. As Senators know, I came off a campaign recently. I was in a campaign at the height of the Vietnamese war, and during my campaign for this office last fall, I told my fellow New Mexicans that I pledged myself to support these measures which would insure an end to this country's involvement in Vietnam. I have, I believe, lived up to that commitment. I also said that I supported Senator McGovern's War Powers Act. I am doing that today.

The Vietnam war divided our country. Families were divided; friendships were strained over differences in opinion. The war was not an "American war" because a real way Congress had not declared it such as they did at the time of the First and Second World Wars.

Mr. President, I feel that this measure, despite its imperfections, comes closest to supporting the philosophy shared by Congress and its founders. It would have the feeling that the decision to declare war was so awesome that the President needed the advice of the people's representatives. They learned this lesson studying the causes and effects of "older" Government's past decisions.

I agree with their philosophy. The judgment and responsibility for the decision to wage war have to be shared by the people through their elected representatives. We have learned a lesson by our involvement in Vietnam. God forbid that we should ever have another war of aggression, but if ever such should occur, it should not be "Kennedy's war" or "Johnson's war" or "Nixon's war" but rather an "American involvement."

We have learned the hard way that when the American people through their elected Representatives do not share in a decision to go to war, they do not share their support and sense of personal obligation. The spirit of patriotism is absent. The principle established by the war powers bill is that this country should not be committed to war without the sanction of the American people through their elected representation.

This bill is constitutionally sound. It would leave the President ample room for emergency military action should the country's security be threatened. I urge support for a limiting bill in that regard. The emergency provisions incorporated in the measure permit the President to take a wide variety of actions in defense of the Nation or its citizens and forces stationed abroad. Thirty days
If war should ever come again—God forbid that it should—at least we will go into it knowing that it will have been a decision that is in the national interests of the country, that there has been a national debate, and that there is a chance to be heard, under the republican form of government that has been set up.

For these reasons, I look forward to casting my vote in favor of the bill, and I look forward with great hope that this great bill will become law this year.

Mr. JAVITS. Mr. President, I take this occasion to reaffirm my support for S. 440, the War Powers Act of 1973. I have been a strong supporter of war powers legislation since my first year in the Senate in 1917 when I cosponsored a precedent-setting bill. I am pleased that the essential features of that version, which owed so much to the initiative and wisdom of Senator STENNIS, have been incorporated in S. 440. I also want to commend the senior Senator from Florida, the junior Senator from Missouri who have played major roles in shaping this bill.

It is important to have a clear understanding of just what the war powers bill would or would not do. It provides a determining role for Congress in any decision to go to war, but it does not detract—or as a statute, can it detract—in any way from the constitutional authority of the President as the Commander in Chief of our Armed Forces.

I believe it is clear that the Founding Fathers intended that Congress should have a role in making any decision to go to war when they provided in the Constitution that Congress has the power to declare war. We have learned from our most recent experience with war, however, that there are situations where U.S. participation in a major conflict can result from a series of incremental decisions, none of them in itself seeming to justify a full declaration of war. In such a case, the respective roles of Congress and the President are unclear and can be the subject of bitter controversy especially at a time of national unity at the time it is most needed. Americans most probably will not have to be used. Unfortunately, war powers legislation cannot in itself make the world any safer a place for America. There are other ways we try to do that—by the skillful exercise of diplomacy and facilitating greater people-to-people contacts with both our friends and our enemies. I think the President deserves great credit for his many efforts in these respects.

We cannot, by legislation, change the interests or intentions of any other government in the world. We can, however, ensure that our own governmental processes for handling danger conform to our democratic principles and concepts of checks and balances and shared responsibility between Congress and the Executive.

Mr. TAFT. Mr. President, the question of the balance to be struck between the executive and legislative branches is at the very heart of our constitutional form of government. Historically, the initiative in foreign policy lies with the President, and I believe practically every Member of this body would agree that the executive branch must perform many important functions in developing and carrying out U.S. policy throughout the world. To be sure, the President is advised by the President and the executive branch, however, must not be arbitrary and unrestrained. The Constitution specifically provides, in article 1, section 8, that the Congress shall "declar[e] war" and "raise and support armies" with the President under article 2, section 2, provided with the responsibility as Commander in Chief to conduct war, after receiving congressional approval.

Despite this constitutional mandate, however, there have been at least 165 instances of the executive branch acting without the advice and consent of the Congress when American Armed Forces have been committed abroad. On only five oc-
cession has war been declared by the United States; and as to one of those, the Mexican war, the declaration occurred after two battles had been fought with the Congress in 1846 adopting a resolution stating that the war was commenced unnecessarily and unconstitutionally.

Apart from declared wars, the Congress has on several occasions, when American troops have been committed in other nations, adopted measures relating to the propriety of the President's action. These were legislation which we are considering today would be in keeping with this tradition of legislative approval and input and by no means inconsistent with the intent of the framers of our Constitution.

Abraham Lincoln focused upon this issue some time ago and I believe that his thoughts are very pertinent today. In a letter to Herndon, President Lincoln stated as follows:

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

During my service in the House while on the Foreign Affairs Committee I introduced war powers legislation, and in January of 1971, when I began my service in the Senate, I introduced similar legislation on this issue. Last session I testified before the Senate Foreign Relations Committee, stating my concern for action in this area and cosponsored the legislation reported by the Foreign Relations Committee, S. 2956. Unfortunately, the House did not act on this matter. This year I am cosponsoring S. 440, and I am hopeful that the Senate will again approve this legislation. I believe it is essential that we adopt a constitutional viewpoint also from a practical position that citizens in this country, and their representatives have a voice in formulation of U.S. foreign policy.

Mr. TUNNEY. Mr. President, this body votes again today on the War Powers Act, one of the most important pieces of legislation to come before the Congress in a generation. Last year, the Senate overwhelmingly adopted this act. The vote underlines the concern felt by the membership about the deterioration of the constitutional mandate to vest the war-making power in the Congress. The events of the past year, which saw the President pursue undeclared wars in Laos and in China, even after the removal of our troops and prisoners of war, indicate that the need for this legislation has not diminished at all. I am confident that it will be adopted once more by the Senate, and both the House and Senate this year the War Powers Act will become law.

In the 1950's and 1960's Americans found that our Armed Forces were involved in repeated actions: in Korea, in Lebanon, in Vietnam, and in the Dominican Republic. More than 100,000 Americans lost their lives in these actions, and in no case was there a formal declaration of war by the Congress. This generation saw peace at home, but suffered from repeated war in remote lands far from home.

The Constitution vests the power to make war in the Congress. Both the language of the Constitution and the historical records of the Constitutional Convention show the conclusion of the framers of the Constitution that the Congress—not the President—was granted the authority to engage our Nation in war.

The Constitution recognizes, however, that while the Congress holds the power to make war, the President has the power to execute it. The President, as Commander in Chief of the Armed Services, has the authority to respond to sudden attacks, conduct a war once it had started, and to command the Forces once they are committed to action.

In an era of nuclear weapons, there is little likelihood that we will even see the relatively massive armed conflicts which I mentioned. Instead, there will be more insurmountable civil wars, and localized flare-ups which have marked our most recent history. Such situations may not be conducive to a formal declaration of war—in some cases the powers involved are not even sovereign states. But this does not mean that the constitutional balance on war-making, created almost 200 years ago, is irrelevant. Indeed, the history of our tragic involvement in Indochina shows just how dependent the abandonment of the constitutional mandate can be. The Congress and the President must move to share again the decisionmaking power in this vital area of war and peace. New arrangements can and must be made to take account of both modern technology and communications and our historical and constitutional heritage.

In the past 25 years, there has grown a severe imbalance in the relative voice of the Congress and the President on the war-making function. Despite the Constitution, despite the consistent traditional separation of war-making power, affirmed by the courts, the executive branch, and the precedent of a century and a half of our history, the past generation has witnessed the dramatic expansion of the role of the Executive in the power to make war.

It has mattered not whether the President was a Democrat or a Republican. In Korea, in Vietnam, in the Dominican Republic, in Cambodia, and in Laos—a startling variety of locations and activities—the President of the United States has committed a large number of American troops—without congressional approval. Once the Congress was included in the process, it was faced with inadequate information, it was brought into the decisionmaking process well after the inception of major operations, and it was often it was confronted with a fait accompli.

This is not to deny that many situations might require an American military presence. It is to stress that the methods selected by recent American Presidents for introducing and maintaining American troops in hostilities indicate that defects exist in the process by which war-making decisions are made. In response to the increasing preponderance of the Executive in this and related areas, it is essential for the Congress to be involved and to be aware of the Executive's activities in these areas.

The War Powers Act should help Congress in this effort. It should restore to the Congress its proper role in the war-making process. Our foreign policy can be based upon an authoritative role for the members of Congress recognize that they have the responsibility, on an ongoing basis, for evaluating properly the foreign as well as the domestic policies in which our Nation is involved.

The War Powers Act not only restores the proper role of the Congress in the war-making process. It also reaffirms the proper role of the Executive. It neither denies nor limits his authority, Section 3 of the bill defines the emergency conditions under which the United States may be introduced into hostilities in the absence of the declaration of war of Congress. The President can respond to any of these emergencies for a period of 30 days, after which he must request the Congress to declare war or withdraw United States forces.

Beyond these relatively limited and specific categories, the act provides a final, considerably broader category which allows the President to introduce the Armed Forces in hostilities in the absence of a declaration of war for any reason—but pursuant to specific statutory authorization.

Mr. President, this legislation is urgently needed. It is more important than ever that the people of America, through their elected representatives, should be closely involved in the crucial decisions of war and peace which affect their lives and well-being. This act will do this, and expose these vital decisions to open discussion and consideration, as they should be. Secret, executive war-making has led to the participation in large numbers of what is now called "gung ho" warfare. It has contributed more than anything else to the dissonance and bitterness which have unnecessarily and tragically plagued our country in the last decade. The passage of this bill will not only restore the Congress to its rightful place in the constitutional scheme of decision-making, but it will also help restore the confidence of the American people in their government, and help to heal the wounds opened by our most recent extremely unpopular war.

Mr. HUNDESTON. Mr. President, I am pleased to cosponsor and support S. 440, the War Powers Act.

Now that our Nation has disengaged itself from undeclared war, in the absence of an understood war, we have a special opportunity to learn from the mistakes of the past, to build on a somewhat unfortunate experience and to design for a more secure future.

Many developments offer encouragement for success: the opening of doors to China, the visit of Mr. Brezhnev to our country, the promise of continued progress at the SALT talks, the conven-
First of all, that the framers drew a distinction between offensive and defensive actions. Alexander Hamilton, for one, wrote that the Constitution provided that—

"The Congress shall have power to declare war; it is the peculiar and exclusive province of Congress, when the nation is at peace, to change that state into a state of war, whether from calculations of force or from provocations or injuries received; in other words, it belongs to Congress only, to go to war. But when a foreign nation, declared or openly and manifestly making war upon the United States, they are then by the very fact already at war, and ... declaration on the part of Congress is nugatory; it is at least unnecessary.

Second, the power of the President in the utilization of forces abroad is not unlimited. Thomas Jefferson, noted that—

We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the legislative body, from those who are to spend to those who are to pay.

And. Dr. Henry Steele Commager, in testimony before the Senate Foreign Relations Committee, suggested—

The power here is lodged very clearly in the legislative branch, and the power to fight a war, to make the war, is lodged in the Executive.

Third, there are constitutional and legal bases for congressional authority to set regulations and prerequisites for the use of U.S. troops abroad. One of these is the latter part of the necessary and proper clause, which empowers Congress to enact laws necessary and proper for carrying out the powers vested by the Constitution in the Government of the United States, or in any Department or officer thereof—in other words, to set procedures for the Executive and executive departments, such as Defense or State, or other national authorities. Another, as Prof. Richard B. Morris pointed out in 1971 hearings before the Senate Foreign Relations Committee, is that since—

Congress was given, under the Constitution, the right to declare war, it has the right to pass enabling legislation to indicate just what war is.

Finally, there are a few—a scant few, to be sure, and mainly from the early years of our Nation—but a few court cases, such as the Eliza, the Flying Fish and the President, are to the argument that there must be a congressional basis for the exercise of war powers.

I believe, therefore, that there is a very adequate constitutional basis for the war powers legislation before us, and that, as Prof. Alexander Bickel recommended in the 1971 hearings, the way for Congress to reassume the constitutional powers it does have, is to reassert them. Intrinsically, the war powers bill is an attempt to redress the imbalance which, by practice and legislative inaction, grew up between the Executive and legislature and to replace it with an equilibrium based upon shared constitutional authorities and upon the preservation of a balance of powers and a separation of powers.

Beyond this, however, there are two practical bases for the legislation before us. The first, of course, is that we must seek to avoid those involvements which, are likely to come to be considered as contrary to our Nation’s interest and lacking of our people’s support. I would have to admit that that is not an easy task. The future does not reside in a crystal ball, revealing events and allowing us the luxury of time to examine and analyze policy options and their implications. And, even if it did, there would be no defense against fallacies of our own judgments.

But, not attempting to anticipate situations and not preparing for possible alternatives breeds its own ill results. A divisive war contributes little to a nation’s moral strength. And, there is perhaps nothing less conscience than asking the young men of a nation to fight in a war with obscure and unnamed objectives and without home support. As Senator John F. Kennedy, the chairman of the Armed Services Committee so eloquently stated:

The overriding issue is that we must insure that this country never again goes to war without the moral sanction of the American people. This is important both in principle and as practical politics. Vietnam has shown us that by trying to fight a war without the clear-cut prior support of the American people, we not only lose effectiveness but we also strain, and can shatter, the very structure of the Republic.

At a time when our Nation continues to have a multitude of commitments throughout the world, as outlined in such documents as the Mutual Security Agreements and Commitments Abroad, we must continue to seek ways to avoid unwanted entanglements.

Beyond that, however, we must as I noted in the opening paragraphs of these remarks use this time to seek the creation of new procedures and structures to insure a more secure world for ourselves, our children and all Americans to come.

To do that, we must build at home and abroad. I have already referred to a number of the developments that have created the very significant area of warming.

The war powers legislation represents one method by which we can strengthen our collective national will to act as a means of bringing the collective judgment of the Congress and the executive branch to bear on the use of our Nation’s Armed Forces. It represents one means by which we may, hopefully, have better decisions based on the many years of our history. It is one of the very significant area of warming.

It represents one means by which we might not only restore a constitutional balance, but a balance among the views, opinions, and options of those who have been selected—and the millions more they represent.

Mr. President, this legislation is the responsible way for Congress to discharge its obligations—not only to provide for the available defenses, but to supply—all those defenses—but also to promote peace and security. I urge its adoption by the Senate.

Mr. TALMADGE. Mr. President, the single most important decision we as a nation can make is the decision to go to war.

In our Nation’s relatively short history of 197 years, the Armed Forces of the
United States have been committed abroad on 174 separate occasions. Yet, the Congress has formally declared war only five times.

This is significant that for every war declared by the Congress, we have been involved militarily on over 30 other occasions solely at the direction of the President.

Our Nation has been at war for 16 of the last 23 years, and in the last 10 years alone, Presidents have launched major military interventions in seven different nations.

In short, Mr. President, since World War II, our Nation has become greatly overextended worldwide, militarily, politically, and economically, without any expressed congressional mandate.

The expansion of Presidential authority and the erosion of Congress’ role in foreign affairs generally and in war policy specifically has precipitated a constitutional imbalance of grave proportions.

The purpose of S. 440, the so-called War Powers Act, is to restore that constitutional balance of responsibilities between the coequal branches without hamstringing the President in the performance of his duties as Commander in Chief.

How does this legislation go about accomplishing its goal? Stated simply, it defines the circumstances in which the President, without prior congressional authorization, can unilaterally commit the Armed Forces of our Nation, and the circumstances in which prior congressional authorization is required before the President can act militarily.

The starting point, and rightly so, is the Constitution itself. The bill recognizes that the Constitution vests in the President the power, even in the absence of a declaration of war, to use American forces to repel sudden attacks on U.S. territory or U.S. forces outside this country, and to protect U.S. nationals whose lives are endangered abroad.

The bill goes to great lengths to preserve and protect these constitutional prerogatives of the President. Recognizing that ours is a troublesome and perilous world, it further empowers him to use the Armed Forces to forestall the threat of a direct and imminent attack on this country or this country’s forces abroad.

However, the bill clearly and unequivocally states that any other use of the Armed Forces by the President for any other purpose in any other circumstance is prohibited, unless specifically authorized by Congress in law advance.

Perhaps most importantly, Mr. President, the bill prescribes procedures by which the Congress may oversee the President’s exercise of his emergency war powers.

Any commitment of U.S. forces initiated by the President under the emergency conditions outlined in the bill is limited to 30 days, unless Congress by specific legislation authorizes their continued use.

Moreover, if it disapproves of the President’s action, Congress may pass legislation terminating the use of our forces before the 30-day period has expired.

In my judgment, these provisions are the essence of the bill. The President, any President, would stand forewarned against any emergency use of the Armed Forces without the law and that would not command the support of the Congress and the American people.

We want no more of this calling of American troops into action because of a vague threat, or a tentative commitment or executive agreement.

Let us have no more of this implying or inferring after-the-fact approval of a Presidential war because of congressional passage of an appropriations bill providing for such a deployment. To do so in war is in violation of the law and that definition would not command the support of the Congress and the American people.

The decision is too great for one man to make alone.

Mr. President, I am most fearful that for every war declared by the Congress, we have been involved militarily on over 30 other occasions solely at the direction of the President.

The Constitution’s meaning regarding deployment of our Armed Forces abroad is well defined in these past 185 years. This is not achieved through the explicit language of the Constitution, but also through usage in literally scores of instances.

Mr. President, I rise in opposition to the bill S. 440 “to make rules limiting the use of Armed Forces of the United States in the absence of a declaration of war by the Congress.”

This is a bill which seeks to legislate in a field of constitutional consideration; to try to effect a change in powers granted to the President by the Constitution.

To the extent it does so, it will be totally ineffective, and without force or effect, except perhaps to confuse, delude, and even render affirmatively harm.

It is quite clear that wide sympathy for the bill is based upon a desire to do something about future Vietnams. This is understandable because memories of the unhappy episode are still strong and bitter. While such an objective to do something about future episodes is laudable, the bill would be highly counter-productive in this regard. The greater likelihood is that the next war is in engineer Vietnamese-type situations in the future, rather than preventing them.

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Such development and usage have served our Republic well. Even if a statute could change them, it would not be wise to do so.

But it is respectfully submitted that the pending measure cannot alter that which the Constitution confers. It is to the President’s authority to act in the self-interest of national security.

Under the Constitution the power to declare war, to raise and support the military, and related powers, are vested in the Congress. The power to command and to deploy the Armed Forces is vested in the President as Commander in Chief.

Mr. President, I am most fearful that for every war declared by the Congress, we have been involved militarily on over 30 other occasions solely at the direction of the President.

The single most important decision to go to war. I strongly feel that the decision is too great for one man to make alone.

The War Powers Act, S. 440, is a step in the right direction toward restoring this authority and this responsibility to the people and creating a better and more effective partnership between the Congress and the executive branch in foreign affairs.

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STATEMENT OF WILLIAM H. REHNQUIST

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The constitutional division of power between the branches is set forth in Article I, Section 8 of the Constitution which directs the Legislative Branch to make all laws which shall be necessary for carrying into execution the powers vested in the President. James Madison and Elbridge Gerry then jointly moved to substitute the word "make" for "enact" in the Constitution. If a word is not included in the Constitution, such bills like S. 440 can legally be utilized to do this.

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There had been no prior authorization by Congress for the sending of the American ships to the Nueces. Justice Grier, in his opinion in The Prize cases, commented on this fact, stating: "The battles of Palo Alto and Resaca de la Palma had been fought; therefore the action of the Congress of May 13, 1846, which recognized 'a state of war as existing by the act of the Republic of Mexico,' 2 Black 654. The Joint Resolution of July 17, 1864, which declared the action of the naval officer who bombarded Greytown, Nicaragua in retaliation against a rebel vessel, was not designed to make reparations for damage and violence to United States citizens. This action was upheld by Justice Samuel Nelson, a Justice of the Supreme Court of the United States, sitting as a Circuit Justice in Durand v. Holtis, 4 Blatch. 451 (1800). In his opinion in that case, Justice Nelson wrote:

"The question whether it was the duty of the President to interpose for the protection of the citizens of Greytown against an irrepressible and marauding community that had established itself there, was a public political question, in which the government, as well as the citizens whose interests were involved, was interested; and it was not for the Executive to determine; and his decision is final and conclusive, and justified the defendant in the execution of his orders as secondary to the law by which he was directed.

"In April, 1861, President Lincoln called for 75,000 volunteers by the southern states, and proclaimed a blockade of the Confederacy. These actions were taken prior to their later ratification by Congress in July, 1861. The Supreme Court upheld the validity of the President's action in proclaiming a blockade in the Prize Cases.

"In 1900, President McKinley sent an expedition of 5000 United States troops as a component of an international force during the Boxer Rebellion. Congress recognized the existence of the conflict by providing for combat pay, it neither declared war nor formally ratified the President's action."

Similar incidents in Central America took place under the administrations of Presidents Theodore Roosevelt, Taft and Wilson. Naval or armed forces were sent to Panama, Nicaragua, and twice to Mexico in the first two decades of the Twentieth Century. On none of these occasions was there prior congressional authorization.

Prior to the Vietnam conflict, the most recent example of Presidential combat action of American forces, the international decision of war was President Truman's intervention in the Korean Conflict. In many senses, this is undoubtedly the high water mark of Executive exercise of the power of Commander-in-Chief to commit American Armed Forces to hostilities. Following the invasion of South Korea by the North Koreans in June, 1950, and a request for aid by the United Nations Security Council, President Truman ordered air and sea forces to aid in the defense of South Korea and support and ordered the Seventh Fleet to guard Formosa. Ultimately 250,000 troops were engaged in the Korean War which lasted for more than three years.

President Truman relied upon the United Nations Charter as a basis for his action, as well as his power as Commander-in-Chief. This reliance was criticized by the United Nations Charter, however, does not reduce the value of the incident as a precedent for Executive action in committing United States Forces to alleviate hostilities without a formal declaration of war by Congress. The United Nations Charter was ratified by the Senate and has the status of international law. Despite the fact override any constitutional provision, the precedent now pending before the Committee.

The enactment of legislation which would tidy down specific guidelines as to the respectability of Executive action without formal congressional declaration now pending before the Committee, Mr. ROBERT C. BYRD. Mr. President, I rise in support of S. 440, the war powers bill, of which I am a cosponsor. No legislation, in my judgment, is more necessary than is this bill. The series of reports of the Congress of the United States to restore a proper balance between the
executive and legislative branches of government.

The significance of this bill, however, goes beyond that immediate and desirable objective. It is important to all citizens well, treatment of this life, every citizen of this Republic can be affected by the far-reaching decisions which may be made with respect to the questions of war and peace.

This is our ground. It seeks instead, to reaffirm and to reestablish the original intent of the framers of the Constitution. Its aim, in the simplest terms, is to set forth guidelines for the use of the Armed Forces of the United States in so-called "undeclared wars," so that in the future the best judgment of both the Congress and the Chief Executive may jointly be brought to bear upon the problem at hand.

Not only the events of recent years, but also, those in the considered hostilities by Presidents in years past, make this legislation necessary. Passage of this bill is especially important at this point in our history when the United States is moving toward a recognition of the likelihood of its future status as a world power. The approval of this bill is needed so that in the future there may be no mistake and no misunderstanding about the circumstances in which our Armed Forces may be used without a declaration of war by the Congress.

The authority of the President of the United States to act appropriately in an emergency is not impaired by this bill. Section 2(a) is especially designed to detail the conditions or circumstances under which the President, as Commander in Chief, can act to repel or forestall sudden attacks, or to protect U.S. citizens whose lives might be endangered abroad. Subsections (1), (2), and (3) codify the implied power of the President to act in emergency situations. Subsection (4) of section 3 deals with the delegation by Congress of additional authority to the President through statutory action and establishes a means by which the President and the Congress, working together, could act to deal with any contingency which might arise.

It is this provision of the bill which would be brought into play in any future situation such as that from which we are only now extricating ourselves in Indochina. The language here would require that the Congress participate with the President in any decision to authorize the use of the Armed Forces in any situation other than the three emergency categories of sudden attack upon the United States, attack upon its Armed Forces, or the protection of its nationals abroad.

Section 6 of the bill provides the 30-day limitation upon emergency action by the President, and seems to me to be as satisfactory a solution as may be devised to the problem of reconciling the necessity for swift retaliatory action in the light of attack with the constitutional requirement that Congress make the ultimate judgment upon the question of waging war.

It is not my purpose in these brief remarks to go into more detailed aspects of S. 440. Sufficient to say, I think, that this is a bill whose time has come. Presidential warmaking must be brought under control. The Congress must reassert itself in this vital area in which the Constitution makes so unmistakably clear that the legislative branch bears the ultimate responsibility. The disclosures this week of the hundreds of secret U.S. bombing raids carried out over Cambodia and Laos only add a tragic falsification of reports concerning the inability or underestimates the necessity for action.

If war is too important a matter to be left to the generals, it is also too important a matter to be left to the Commander in Chief and to the President. Until such time that the Congress is infallible in its wisdom. But in times when national commitments may require action, or in times of national peril, the collective best judgment of the Nation's elected leaders, legislative and executive together, is the Nation's best hope of following the right course of action.

Mr. DOLE. Mr. President, the War Powers Act before the Senate today is a proposal of substantial importance to the legislative branch of the United States government, a proposal that is so unmistakably clear that the legislative branch bears the ultimate responsibility. The disclosures this week of the hundreds of secret U.S. bombing raids carried out over Cambodia and Laos only add a tragic falsification of reports concerning the inability or underestimates the necessity for action.

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limited use of this Nation's Armed Forces against those of France. The third Congress, 1 Statute 578.

In the Eliza, a case arising out of this "undeclared war," the Supreme Court described differences between war and other armed conflicts as being differences between "solemn war" and "imperfect war":

If it be declared in form, it is called solemn war, by the postscript kind: because one whole nation declaring war are authorized to commit hostilities against all the members of another, in every place and under every circumstance. In such a war, all the members act under a general authority, and all the rights and consequences of war are theirs.

But hostilitys may subsist between two nations, more confined in its nature and extent, war with France in 1788-1800. In such a condition, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities are fewer in number, and are not the whole parties.

While the Court termed both forms of military action "war," the distinction which it drew likewise separates the declared wars of the 20th century, such as the two World Wars, and the undeclared armed conflicts such as have more recently occurred in the two instances, and in central and eastern Asia. In both of the two World Wars, the declarations of war were viewed by the executive branch to authorize complete subjugation of the enemy, and some form of "unconditional surrender." In such a condition, the questions arose in interpretation of two statutes as to what they were entitled to. To answer that question, the Court had to decide whether we were at war with France.

As has been pointed out many times, the United States throughout its history has been involved in armed conflicts short of declared war, from the undeclared war with France in 1788-1800 to Vietnam. I will discuss the more significant of these involvements later.

THE PRESIDENT AS COMMANDER IN CHIEF

Because of the nature of the President's power as Commander in Chief and because of the fact that it is frequently exercised in the absence of declared war, there are judicial precedents dealing with the subject. Such judicial learning as there is on the subject, however, makes it reasonably clear that the designation of the President as Commander in Chief of the Armies and Navies of the United States, as provided by the Constitution, has not been interpreted as transferring to him all the authority that was transferred to the President in the Eliza case.

Justice Grier, speaking for the Supreme Court in its famous decision in the Prize cases, likewise viewed the President's power as limited. On 177 and 178, the President was styled as a substantive source of authority on which he might rely in putting down rebellion:

The President in fulfilling his duties, as Commander in Chief, in suppressing an insurrection, has met with armed hostile resistance, and a civil war of such alarming proportions as will compel the exercise of authority, as to armed belligerents, in a question to be decided by him, and this court must be governed by the decisions and acts of the political department of the Government to what this power was entrusted. He must determine what degree of forces the crisis demands. 2 Black 625, 670.

More recently, Justice Jackson, concurring in Youngstown Sheet & Tube Co. v. Sawyer, said:

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. 343 U.S. 579, at 645.

The limits of the President's power as Commander in Chief are nowhere defined by the Constitution, and it has been said more than once that nothing less than a constitutional amendment would establish a constitutional precedent in the field.

The questions of how far the Chief Executive may go without congressional authorization in committing American military forces to armed conflict, or in deploying them outside of the United States and in conducting armed conflict already authorized by Congress, have arisen repeatedly through the Nation's history. The President has asserted and exercised at least three different variatns of authority under the power as Commander in Chief.

First, authority to commit military forces of the United States to armed conflict, at least in response to enemy attack or to protect the lives of American citizens in the field, the character of whom the force.

I might add that this is precisely the type of authority we talked about with reference to the Church-Cooper resolution.

Second, authority to deploy U.S. troops throughout the world, both to fulfill U.S. treaty obligations and to protect American lives and property.

Third, authority to conduct, or carry on armed conflict once it is instituted, by making and carrying out the necessary strategic and tactical decisions in connection with such conflict.

Congress has on some of these occasions questioned in the President's action without formal ratification; on others, it has ratified the President's action; and on still others, it has taken no action at all. On several occasions, Members of Congress have protested President's use of Armed Forces. At the close of the Mexican War, the House of Representatives went so far as to pass an amendment to a pending resolution, labeling the war as undeclared and requiring that no funds be appropriated for its support.

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President Jefferson in 1801 sent a small squadron of American war vessels into the Mediterranean to protect U.S. commerce against threatened attack by the Barbary pirates of Tripoli. In his message to Congress discussing his action, Jefferson took the view that it was consistent with the constitutional authority in conduct or carry on armed conflict without congressional authorization.
In April 1861 President Lincoln called for 75,000 volunteers to suppress the rebellion by the Southern States, and proclaimed a blockade of the Confederacy. The Supreme Court in the prize cases, 2 Black 655—1863—upheld the action taken by President Lincoln prior to their later ratification by Congress in July, 1861, saying:

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for either special legislative authority, 2 Black at 668.

In 1900 President McKinley sent an expedition of 5,000 U.S. troops as a component of an international force during the Boxer Rebellion in China. While Congress recognized the existence of the conflict by providing for combat pay, 31 Statute 903, it neither declared war nor formally ratified the President's action. A Federal court, however, reiterated the early recognition of limited or undeclared war.

In the present case, at no time was there any formal declaration of war by the political department of this Government against either the Government of China or the "Boxer" element. A formal declaration of war, however, is unnecessary to constitute a condition of war. Hamilton v. McCaskey, 136 F. 445, 449 (Ct. C.D. Kan. 1905).

Presidents Theodore Roosevelt, Taft, and Wilson on more than one occasion committed American troops abroad to protect American interests. In November, 1903, President Roosevelt ordered the U.S. Navy to guard the Panama area and prevent Colombian troops from being landed to suppress the Panamanian insurrection against Colombia. In this annual report to Congress in 1912, President Taft reported sending some 2,000 marines to Nicaragua—at the request of the President of Nicaragua—and the use of warships and troops in Cuba. He merely advised Congress of these actions without requesting any statutory authorization.

President Wilson on two separate occasions committed American Armed Forces to hostile actions in Mexican territory. In April 1914, he directed a force of sailors and marines to occupy the city of Vera Cruz during the revolution in that country. The city was seized and occupied for 7 months without congressional authorization. In 1916, Wilson ordered General Pershing and more than 10,000 troops from Fort Bliss, Tex., to Nicaragua to follow the latter's raid on Columbus, N. Mex.

The most recent example of Presidential combat use of American Armed Forces was the Mexican intervention in the Korean conflict. Following invasion of South Korea by North Koreans on June 23, 1950, and the President's decision that the conflict lasted more than 3 years. President Truman's action without congressional authorization precipitated the "Great Debate" in Congress which raged from January to April 1952.

While President Truman relied upon the U.N. Charter, as well as his power as Commander in Chief, his action stands as a precedent for presidential action in committing U.S. armed forces to other foreign wars without formal declaration of war by Congress.

The U.N. Charter, as a result of its ratification by the Senate, has the status of a treaty, but it does not by virtue of this fact override any provisions of the Constitution. Though treaties made in pursuance of the Constitution may under the supremacy clause override specific constitutional limitations. Geofoy v. Riggs, 133 U.S. 238; Reid v. Covert, 351 U.S. 1, it might not justify under the Constitution a condition of war would be required in other circumstances to commit U.S. forces to hostilities similar in extent and nature to those undertaken in Korea, the ratification of the U.N. Charter would not effectively change the nature of the Korean conflict. While the issue of presidential power which was the subject of the great debate in Congress was never authoritatively resolved, it is clear that President Truman's intervention in Korea. See Rees, "The Limited War"—1964; Pusey, "The Way We Go To War"—1969.

DEPLOYMENT OF U.S. TROOPS THROUGHOUT THE WORLD

In February 1917, President Wilson requested congressional authority to arm American merchant vessels. When that authority failed of passage in Congress as a result of filibuster or extended debate, Wilson proceeded to arm them without the advice and consent of Congress. Determining that he was relying on his authority as Commander in Chief.

Near the close of the First World War, President Wilson announced a decision to send American military forces to Siberia. The troops sent remained for over a year, their withdrawal beginning in January 1920. There was no congressional authorization of such disposition of troops, and the United States had not declared war on Russia.

In 1941, prior to Pearl Harbor, President Roosevelt utilized his power as Commander in Chief to undertake a series of actions short of war, designed to aid the Allied Forces in the South Pacific. On April 9, 1941, he made an agreement with the Danish Minister for the occupation of Greenland by American forces. In May 1941, Roosevelt issued a proclamation declaring unlimited national emergency, and he ordered American naval craft to sink on sight foreign submarines found in the defensive waters of the United States.

In July 1941, the President announced that U.S. Forces would occupy Iceland in order to relieve British forces there, and that the Navy would perform convoy duty for supplies being sent to Great Britain under lend-lease. In September 1941, Roosevelt stated that he had given orders to the U.S. Army and Navy to be ready for action at any time, and that American vessels would be on station more than 3 years. President Truman's action without congressional authorization has never been doubted that the President's power as Commander in Chief authorizes him, and him alone, to commit U.S. armed forces to the prosecution of conflict.

AUTHORITY TO CONDUCT OR CARRY ON ARMED CONFLICT ONCE IT HAS BEEN LAWFULLY INSTITUTED

It has never been doubted that the President's power as Commander in Chief authorizes him, and him alone, to commit U.S. armed forces to the prosecution of conflict. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns. That power extends beyond the President as Commander in Chief.

In the First World War, it was necessary to decide whether U.S. troops in France would fight as a separate command under General Pershing, or whether U.S. divisions should be incorporated in existing groups or armies commanded by French or British generals. President Wilson and his military advisors decided that U.S. forces would fight as a separate command.

In the Second World War, not only similar rapid actions on a global scale were required, but also decisions that parceled as much of political strategy as they did of military strategy. Should the United States concentrate its military and material resources in the defense of either the Atlantic or Pacific fronts to the exclusion of the other, or should it pursue the war on both fronts simultaneously? Where should the reconquest of Allied territories in Europe and Africa, which had been captured by the Axis powers begin? What should be the goal of the Allied powers? Those who lived through the Second World War will recall without difficulty, and without the need of any reference to the records of history that this sort of decision was reached by the allied commanders in chief, and chief executive officers of the allied nations, without—the on the part of the United States—any formal congressional participation in the series of conferences attended by President Roosevelt around the world—at Quebec, Cairo, Casablanca, Tehran, Yalta, and by President Truman at Potsdam, ultimately established the Allied goals in the Second World War. Including the demand for uncon-
ditional surrender on the part of the Axis nations.

What must be regarded as the high-water mark of Executive action without express congressional approval is, of course, the Korean War. Although Congress declared that war in 1950, it expressly sanctioned the President's action in committing U.S. forces by the hundreds of thousands to the Korean conflict, it repeatedly voted authorizations and appropriations to arm and equip the American troops. This continuous flow of authorizations are invariably the equivalent of express congressional approval; the decision as to whether limited hostilities, commenced by the Executive, should be sanctioned by Congress may be one quite different from the decision as to whether American troops already committed and engaged in such hostilities shall be equipped and supplied.

CONGRESSIONAL POWER TO RESTRICT THE PRESIDENT

While the President may commit Armed Forces of the United States to hostile conflict without congressional authorization under his constitutional power as Commander in Chief, his authority exercised in conformity with congressional authorization or ratification of such conduct by Congress is far different than if it stood alone. By the same token, Congress undoubtedly has the power in certain situations to restrict the President's power as Commander in Chief to a narrower scope than it would have had in the absence of legislation. Chief Justice Marshall strongly intimates in his opinion in *Little v. Barrone*, 2 Cranch. 790 (1804), that the Executive action directing the seizure of a ship on the high seas would have been valid had not Congress enacted legislation restricting the circumstances under which such a seizure was authorized. Congress, exercising its constitutional authority to "make rules concerning captures on land and water," would have the power to direct the manner of proceeding with such captures.

Congress has similarly sought to restrict the authority of the President in the exercise of its power to "raise and support armies." In the Selective Service Act of 1940, it was provided that:

*Persons inducted into the land forces of the United States under this act shall not be employed beyond the territory of the Western Hemisphere except in the territories and possessions of the United States, including the Philippine Islands,* 54 Stat. 885.

The duration of the Vietnam conflict and its requirements in terms of both men and matériel would have raised the most serious sort of constitutional question, had there been no congressional sanction of that conflict. However, as is well known, the President, in April 1964, had followed an attack on U.S. naval forces in the Gulf of Tonkin in August 1964. At that time, President Johnson took direct air action against the North Vietnamese, and he also requested Congress "to join in affirming the national determination that all such attacks will be met" and asked for "a resolution expressing that support of the Congress for all necessary action to protect our Armed Forces and the Free Peoples of the Southeast Asia covered by the SEATO Treaty."

On August 10, 1964, Congress passed the so-called Gulf of Tonkin resolution. I ask unanimous consent that the text of that resolution be printed in the Record at page 76 Stat. 697.

The notion that such advance authorization by Congress for military operations constitutes some sort of an invalid delegation of congressional war power simply will not stand analysis. A declaration of war by Congress, is, in effect, a blank check to the Executive to conduct military operations to bring about subjugation of the nation against whom war has been declared. The idea that while Congress may do this, it may not delegate a lesser amount of authority to conduct military operations, as was done in the Selective Service Act of 1940, is utterly illogical and unsupported by precedent. While cases such as *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), hold that Congress in delegating powers to deal with domestic affairs must establish standards by which an administrator is to act, no such principle obtains in the field of foreign affairs. The Supreme Court in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, made this distinction clear.

This is not to say, however, that every conceivable condition or restriction which Congress may by legislation seek to impose on the use of American military forces would be free of constitutional doubt. Even in the area of domestic affairs where the relationship between Congress and the President is balanced differently than it is in the field of external affairs, virtually every President since Wilson has had occasion to object to certain conditions in authorization legislation as being violative of the separation of powers between the executive and the legislative branch. The problem from that standpoint would then be the Congress's attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander in Chief of the Armed Forces. Surely this is the thrust of Chief Justice Chase's concurring opinion in *ex parte Milligan*, quoted earlier.

*Congressional Power* necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such measures as would encroach upon the power and duty belonging to the President as Commander in Chief. *4 Wall. at 159.*

SOUTHEAST ASIA RESOLUTION

WHEREAS naval units of the Communist regime in Vietnam, in violation of the principles of the Charter of the United Nations and of international law, have deliberately and systematically attacked and escorted ships lawfully present in international waters, and have thereby created a serious threat to international peace; and

WHEREAS the United Nations is assisting the people of South Vietnam in the defense of their freedom and has no territorial, military or political ambitions in that area, but desires only that these peoples should be left in
peace to work out their own destinies in their own way: Now, therefore, be it
Resolved by the Senate and House of Rep­resentatives of the United States of America in Congress assembled, That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the United Nations Charter, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom. Sec. 2. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action taken under this resolution, except that it may be terminated earlier by concurrent resolution of the Congress.

Mr. DOLE. In connection with this res­olution, Congress noted that whatever the limits of the President's authority with respect to the Gulf of Tonkin resolution, the House and the President act together, "there can be no doubt" of the constitu­tional authority.

Since that time, Congress repeatedly adopted and enacted statutes recognizing the war in Southeast Asia, providing the funds to carry out U.S. commitments there, and providing special benefits for troops stationed there. By virtue of these acts, and the Gulf of Tonkin resolution, there was longstanding congressional recognition of a continuing U.S. com­mitment in Southeast Asia. This recognition and ratification of the President's policies continued even after the Ton­kin Gulf resolution was repealed in 1971.

While seeking a negotiated peace and furthering "Vietnamization," President Nixon continued to maintain U.S. troops in the field in South Vietnam. The legality of this troop presence, although not widely challenged in South Vietnam, and their use to render assistance to the South Vietnam­ese troops in repelling aggression from the Vietcong and the North Vietnam­ese, would have been subject to doubt only if congressional sanction of hostili­ties commenced on the initiative of the President could be manifested solely by a formal declaration of war. But the numerous historical precedents previ­ously cited militate against such reason­ing.

A requirement that congressional ap­proval of Presidential action in this field can come only through a declaration of war is not only contrary to historic con­stitutional usage, but as a practical matter would curtail effective congressional participation in the exercise of the shared war power. If Congress may sanction armed engagement of U.S. forces only by declaring war, the possi­bility of its retaining a larger degree of control through a more limited approval

is foreclosed. While in terms of men and materiel the Vietnam conflict was of large scale, the objectives for which the conflict was carried on were by no means as clear as the authority as would have resulted from a declaration of war by Congress.

Conversely, however, there was not the slightest doubt from an examination of the background of the Gulf of Tonkin resolution that Congress expressly au­thorized extensive military involvement by the United States. To reason that if the caption "Declaration of War" had appeared at the top of the resolution, that, having been possibly im­possible, but that the identical language without such a caption did not give effective congressional sanction, would be to treat this most nebulous and ill­defined of all areas of the law as if it were a problem in common law pleading. Mr. Justice Grier, more than a century ago, in the prize cases said:

"This greatest of civil wars was not gradu­ally developed by popular con­viction, tumbling together of families or local unorganized insurrections. However long may have been its previous conception, it nevertheless arrived as a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Con­gress to baptise it with a name; and no name given to it by him or them could change the fact."

If substance prevailed over form in establishing the right of the Federal Government to fight the Civil War in 1861, substance should equally prevail in establishing the need for congressional sanction for the Vietnam conflict by the Gulf of Tonkin resolution, even though it was not in name or by its terms a formal declaration of war.

SEPARATE AND SHARED AUTHORITY

Mr. President, I believe the foregoing discussion of the war powers legislation of the Congress has grown up surrounding the war powers of this country. It shows that the President is charged with real responsi­bilities in matters of foreign and he­reditary war, of mass death and chaos. It also shows that the Congress, too, has a proper, legitimate role to play with its own unique and separate authority. There are some clear lines of demarca­tion and firm divisions of authority.

Of course, the Congress cannot and should not become involved in the tactics and strategy required to carry out na­tion­al defense policy. And at the same time the President cannot and should not seek to determine that national defense policy solely on his own initiative.

But between these firm and clear areas there is room and a real need for shared decisiomaking and joint leadership. And in my view the War Powers Act before the Senate today is a responsible and necessary attempt to serve the national interest by harmonizing the roles of the legislative and executive branches in the exercise of the war power.

PREVIOUS SUPPORT FOR WAR POWERS ACT

When this measure was first intro­duced in the 91st Congress in 1970, I joined in sponsoring it. At that time I felt it was a proper and useful attempt by Congress to cast some light in a murky and misunderstood constitutional area. It was reintroduced in the 92nd Con­gress in 1971; however, at that time, we were in the midst of the Vietnamization program, efforts were continuing to reach a negotiated settlement to the Vietnam conflict, and an attempt to se­cure information about or the return of our prisoners of war and missing in ac­tion.

CONCERN FOR MISCONSTRUCTION OF CONGRESSIONAL ACTION

At that time I felt a genuine concern that an entirely appropriate and useful exercise of the Congress' responsibility in at­tempting to define the lines of constit­utional authority might be misconstrued by the opposite side at the Paris negoti­ations, and thus endanger the prospects for achieving a negotiated peace and the eventual possible end to the war in Southeast Asia. Therefore, I did not re­join my colleagues in sponsoring this legislation at that time.

Happily, the Vietnam war is now be­hind us. American forces have been with­drawn. Our prisoners are home. The Paris agreements establish our rights to information on the missing, and there is a real prospect that the Vietnamese parties will be able to arrive at a peaceful determination of their future course. On August 15, barring further congressional authorization, the bombing in Cambodia will stop.

CONCLUSION

This is a unique moment in our his­tory, and it is the appropriate interval for Congress to assert its authority in a proper, constructive, and worthwhile manner.

The War Powers Act will establish a partnership between the Congress and the President, recognizing the awesome responsibility of employing this Nation's military might. It should serve to stimulate broader communication be­tween the legislative and executive branches, and to serve as a strong unifying influence in a national which in recent years has too frequently been strained by forces of division, discord, and mistrust between the branches of Government, between groups and among individuals.

I am pleased to support this legisla­tion and believe its passage will mark a proud and hopeful day in the constitu­tional history of the United States.

WAR POWERS: NOW IS THE TIME

Mr. MONDALE. Mr. President, I sup­port the war powers bill, § 440. I wish to commend Senators JAVITS, EAGLETON and STENNIS for their thoughtful judgment, scholarly precision, and constitutional expertise in producing such a landmark piece of legislation. Years of conscien­tious effort, countless public and private hearings, and lengthy congressional de­bate on the subject of war powers are evident in this bill, and I am pleased to be a cosponsor.

The bill comes to the floor once again with wide support and cosponsorship. It
is a bipartisan, nonideological attempt to restore the constitutional balance of power between Congress and the President, not to alter it. It is appropriate that the war powers bill has such consensus, for war-making decisions involve both political parties in the most profound kind of decision-making.

Both the Senate and the House have previously debated—and passed—the War Powers Act, but were unable to reach agreement in conference. The House passed a similar bill which I hope will now finally pass Congress. I believe the bill can finally agree to a piece of legislation.

But simply by debating this legislation, much has already been accomplished in recognizing a more precise and more demanding standard of judgment for Congress and the Executive to apply to the use of our Armed Forces. This debate signals congressional intent to take up its delegated responsibility to control the commitment of U.S. military forces. It indicates the importance of a balance of power, resulting from the unilateral expansion of Presidential power in the war-making field over the past 25 years will last be corrected.

During this debate, there is one theme which has been repeatedly mentioned—that there is something very wrong with the way Presidents have committed American military forces over the past 25 years. Presidents have usurped congressional power, but only because Congress has placed too much confidence in the Executive. Congress has acquiesced and accepted various Presidential rationalizations and, therefore, must share part of the blame for our involvement in the Dominican Republic, Vietnam, Cambodia, and Laos. But the lack of prior consultation with the Congress in all of these commitments, as well as the recently revealed series of secret military activity in Cambodia cloaked in the name of "national security," makes it imperative that Congress assert its legitimate constitutional authority. For there is no longer any doubt that a constitutional crisis over war-making powers now exists. If we fail to pass this legislation now, in the aftermath of the most graphic evidence of Presidential wars by reestablishing the balance outlined in the Constitution so that Congress will decide

whether and when this Nation goes to war.

In a telegram yesterday to Minority Leader Gerald R. Ford, the President threatened to veto the proposed legislation because it would restrict the President's authority as Commander in Chief to repel attacks upon the United States or its Armed Forces, while it assures that Congress maintains its war-making authority over the unchecked, unilateral decisions of the President. As the Committee on Foreign Relations stated in the report on the war powers bill,

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

Section 3 of the bill defines the emergency and military presence criteria by which, in the absence of a congressional declaration of war, the Armed Forces of the United States "may be introduced in hostilities, or in situations where imminent involvement in hostilities is clear and present. The decision committing the armed forces in hostilities, he must immediately make a full report of the circumstances, authority for, and expected scope and duration of the military action. If the President is unable to obtain the concurrence to extend his authority, he must terminate his action at the end of 30 days. This will prevent Presidents from under-taking military adventures contrary to the wishes of the American people.

At the Constitutional Convention, the Founding Fathers, sensitive to the war-making powers of the British kings, were especially concerned that the President to declare war and to raise armies be left to the legislature, with the President acting as Commander in Chief after the onset of hostilities. They intended that no single man, no matter how benevolent, could take this Nation to war. As Jefferson stated in his famous letter to Madison in 1789:

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

In the early years of the Republic, Presidents acknowledged and carefully respected the war-making power of Congress. President Madison said that the question of "opposing force to force" was one of "which the Constitution wisely confided to the legislative department of the Government."

Daniel Webster, while serving as Secretary of State, said:

The war-making power in this Government rests entirely in Congress, . . . the President . . . an authorizing belligerent operations only in

the cases expressly provided for in the Constitution and the laws.

Abraham Lincoln expressed his viewpoint on the matter in his protest over the Mexican War while he was a Member of Congress:

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

The deception, secrecy, ambiguity of the Indochina experience have made the American people determined that there will be no future undeclared wars initiated by Presidents and prosecuted without clear-cut national support.

During hearings on the war powers in 1971, Prof. Henry Steele Commager made the following statement:

No afterthought, no repentance, and, almost routine, invasions by the Executive of the war-making powers assigned by the Constitution to Congress, we can see today as the final dissipation of the Constitutional principle of the separation of powers. At stake is the fate of the age-long effort of men to fix effective limits on government; at stake is the reconciliation of the claims of freedom and of security; at stake is the fateful issue of peace or war, an issue fatal not for the American people alone, nor alone for the stricken peoples of Southeast Asia, but for the whole of mankind.

Mr. President, this bill will do much to restore the faith of the American people in both the Congress and the Executive that war policies are not being conducted in clandestine remoterms initiated by Presidents and prosecuted without clear-cut national support.

Mr. RANDOLPH. Mr. President—

Our people want authentic information. They know not what to believe.

These words are certainly relevant in the context of today's discussion of S. 440 and in light of the fact that administration officials in 1971 and 1973 falsified reports to the Senate Armed Services Committee of bombing operations in Cambodia.

I initially made that statement on February 28, 1942, in the House of Representatives during debate on House Joint Resolution 89 of the 76th Congress. This measure, sponsored by Representative Ludlow and Senator Capper, gave Congress the initial decision-making to take the power of declaring war "to the people of the United States," except in a case of an invasion of our country or territorial possessions by a military expedition.

I cosponsored this war referendum bill in 1939 and 34 years later I urge passage of S. 440, the War Powers Act of 1973. I quote Senator Javits:

And when the President's authority is so defined, as it will be if the War Powers
Act becomes law, then the issue of authority is determined in an authoritative way, and, I have always held, will be settled out to the best of his ability in good faith by any American President.

I strongly support this historic and necessary legislation. Mr. President, I ask unanimous consent that my remarks and colloquy with other members, on the War Powers Act of 1942, be printed in the Record.

There being no objection, the excerpt from the Congressional Record was ordered to be printed in the Record as follows:

Mr. Randolph. I yield to the gentleman from California.

Mr. VOORHIS of California. Mr. Chairman, will the gentleman yield?

Mr. RANDOLPH. I yield to the gentleman from California.

Mr. VOORHIS of California. What concerns me about this matter is the people of our section.

Mr. RANDOLPH. Certainly, they are in the dark.

Mr. VOORHIS of California. They were pretty much that way when they went into the world they want a simple statement upon which they feel they can absolutely rely. I am confident they are going to get that, and I think it is very important that they do get it.

Mr. RANDOLPH. I thank the gentleman, and I join in the hope that a common ground on which we can stand can be soon found. The American people, if told the actual happenings, will always respond to the truth. They are not children. They are sober and understanding men and women.

Mr. HINSHAW. Mr. Chairman, will the gentleman yield?

Mr. RANDOLPH. I yield to the gentleman from California.

Mr. HINSHAW. In connection with the statement by the Secretary of War, may I say that the Secretary of War gave three different sources in the War Department, not by the Secretary, that they did not believe it was the same plane that came over the Los Angeles area. Then the Secretary of War came out and refuted the statements made by representatives of his own Department.

Mr. RANDOLPH. I am sorry these divergent and misleading statements have been made. If they were correct, I would not discuss them, but I have checked and have found that they were given to the press by the Secretary of the Navy and the Secretary of War. I call on our Commander in Chief to stop this unwarranted situation.

Mr. PELL. Mr. President, the power of waging war is the power of life and death over every man, woman and child in this country. It is a power, therefore, that the U.S. Congress can only exercise by a greater solemnity and care. It is for this reason that the framers of the Constitution desired to insure that the collective judgment of both the Congress and the President should be brought to bear in decisions to engage U.S. forces in hostilities or situations leading to them. Any use of force by one country against another is war, regardless of its size, or whether it is declared or undeclared. And in an age of nuclear weapons, a small war can escalate to nuclear annihilation.

In recent decades, this collective judgment called for by the Constitution has been increasingly imbalanced, with the Presidential input far outweighing that of the Congress, a judgment that has frustrated the intent of the drafters of the Constitution and embrace the Nation in the longest, most divisive and agonizing war in our history.

At an earlier stage, a statutory remedy might have been unnecessary, but we have passed that stage. Congressional action is now overdue. I have long advocated such action in past legislation. I have decried congressional failure to take this action. Therefore, I now urge, more vigorously than ever, that this action be promptly taken by the passage of S. 440.
Mr. GRIFFIN. I yield back the re­
mainder of my time.

The PRESIDING OFFICER. All re­
main­ ing time has been yielded back. The bill having been read the third time, the question is, Shall it pass? The yeas and nays have been ordered, and the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. ROBERT C. BYRD. I announce that the Senator from Arkansas (Mr. STEVENS), the Senator from South Dakota (Mr. McGovern) are necessarily absent.

I also announce that the Senator from Mississippi (Mr. STEVENS) and the Senator from South Dakota (Mr. McGovern) would each vote "yea."

Mr. GRIFFIN. I announce that the Senator from New Hampshire (Mr. COTTON) and the Senator from Arizona (Mr. GOLDWATER) are absent because of illness in their respective families.

The Senator from Illinois (Mr. STEVENS) is absent by leave of the Senate on account of illness in his family.

The Senator from New York (Mr. BUCKLEY), the Senator from Colorado (Mr. DOMINICK), and the Senator from Illinois (Mr. PENCE) are necessarily absent.

The Senator from Virginia (Mr. SCOTT) is absent on official business.

On this vote, the Senator from Illinois (Mr. PENCE) is paired with the Senator from Colorado (Mr. DOMINICK). If present and voting, the Senator from Illinois would vote "yea" and the Senator from Colorado would vote "nay."

The result was announced—yeas 72, nays 18, as follows:

No. 312 Leg.)

YEAS—72

Aiken—Hart—Nelson
Allen—Hicks—Nigel
Bayh—Haskell—Packwood
Beall—Hefield—Pastore
Bentsen—Hatch—Filo
Bible—Hollings—Pell
Biden—Huddleston—Proxmire
Brooke—Hughes—Randolph
Brooke—Humphrey—Ribicoff
Buradick—Incquie—Both
Byrd—Kassemeier—Saxbey
Harry F., Jr.—Jacobs—Schweiker
Bryan—Kennedy—Sparkman
Case—Lott—Stafford
Chiles—Magnuson—Stevenson
Church—Manefield—Symington
Clarke—Mathias—Taft
Coke—Meehl—Trible
Cranston—McIntyre—Tunney
Dake—McHatton—Welcker
Domenici—Mondale—Williams
Eagleton—Montoya—Young
Fosd—McNamar—Woodward
Fulbright—Muskie—NAYS—18

NAYS—18

Abourezk—Baeker—Hansen
Abercrombie—Baker—Huntsman
Bellmon—Gravel—McCleure
Bennett—Gorton—Thurmond
Curtis—Gurney—Tower

NOT VOTING—10

Buckley—McClellan—Stevens
Cotton—McGovern—Stevens
Dole—Goldwater—Scott, Va.
The motion to lay on the table was agreed to.

Mr. MUSKIE. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 330, House Joint Resolution 542, The PENDING OFFICER. Without objection, it is so ordered.

The Senate proceeded to consider the joint resolution (H.J. Res. 542) concerning the war powers of Congress and the President, which was agreed to.

Mr. MUSKIE. Mr. President, I move to strike all after the resolving clause of House Joint Resolution 542 and substitute therefor the text of S. 440, as amended, and passed.

>THE PRESIDENT. The question is on agreeing to the motion of the Senator from Maine.

The motion was agreed to.

Mr. JAVITS. Mr. President, I move to reconsider the vote by which the joint resolution was passed.

Mr. MUSKIE. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. MUSKIE. Mr. President, I should like to take a moment to congratulate the distinguished Senator from New York (Mr. JAVITS) for one of the most masterful pieces of legislative craftsmanship that it has been my pleasure and my privilege to be associated with. He has done an outstanding job in the service of the Senate and the country, and I congratulate him.

Mr. JAVITS. Mr. President, if the Senate will allow me, I greatly appreciate the job Senator MUSKIE undertook. It required him to absorb literally months of work and study, which I have done and others have done, including some very complicated legal questions and conditions. I greatly appreciate the assistance which has been given me with the skill and grasp he showed in connection with this bill. I am very grateful to him. The Senate has every reason to be grateful to him. He has done the Foreign Relations Committee proud.

Mr. MUSKIE. I thank the Senator.

Mr. JAVITS. Mr. President, I wish to express my appreciation to a number of assistants of my own and of the Foreign Relations Committee, who rendered extraordinary help in respect to the bill. I would like to thank Peter Lakeland of my own staff, a former Foreign Service officer and a very gifted foreign policy analyst, who helped with the research, and the draft of the monumental job, which any professional would consider a life's work, in the preparation for this debate, the drafting of the committee report, and the research, all of which went with it.

I should like to acknowledge one of the assistants to Senator Fulbright, who had a big hand in drafting the committee report, which I thought was a magnificent document; and Mr. Tillman worked under the direction of Carl Marcy, the very honored and very much respected chief of staff of our committee, to whom I also wish to give every credit for bringing the matter to the floor and for the preparation on it.

THE USE OF RECORDING DEVICES

Mr. CURTIS. Mr. President, I wish to speak concerning the use of recording devices. This was brought to the attention of the Nation during the summer, by the testimony given by a Senate committee concerning records made by the White House in the last couple of years. There may be arguments pro or con concerning the wisdom of such recordings but it is important that first we clear up a few essential points.

It is lawful for an individual to wire-tap his own telephone without notifying the other person on the line and without the use of a beeper. The statements made about the records in the White House revealed a practice which is not in violation of present law. It was not undertaken by the Nixon administration unless the other party was told. I agree that the idea of following a telephone conversation which is in progress is a violation of the law and a violation of the Constitution.

The second point I would like to establish is that similar recordings have been made in the White House under previous administrations. It is not a new practice at all. It has been widely used in the past and I will have something to say about that later. Much can be said in favor of recording conferences, conversations, and discussions. It makes for an accurate record. It prevents error taking the place of what was said, but it is certainly contrary to the Constitution.

I can recall a visit that I made to the White House early in the Nixon administration concerning rural development. There were one or two staff members in the room and they were very busy taking notes of everything that President Nixon or I said. I was delighted that they were not recording any conversations, but it seems to me that the discussion is reflected in the rural development program that is now in operation. Important matters were talked about and the fact that a record was kept by the making of notes made it possible for the President's wishes to be carried out. A record preserved by a recording would have saved time and may have been more accurate.

I wanted to satisfy myself as to the practices by previous administrations concerning the recording of conversations, conferences, and telephone calls. I had understood that the White House had collected evidence on this in the form of affidavits. I asked to see those affidavits. I did see them and I read them.

One affidavit that I saw stated that the individual in 1965 was ordered to install a microphone in a small room located behind the President's office, and the President and the office of Mr. Marvin Watson. The room, I understand, was used as a Presidential sitting room and used frequently by President Johnson for private meetings. The affidavit went on to say that a listening device had been installed in the south wall of the room at the baseboard level. A tape recorder was installed in the wall.